Constitutional History Cases
For LAW GAT

Constitution

1) Constitutional History of Pakistan (Cases)
   i. Maulvi Tamiz-ud-Din Khan vs. Governor General of Pakistan (PLD 1955 F.C. 240).
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Constitutional History of Pakistan (Cases)

i.	Maulvi Tamiz-ud-Din Khan vs, Govemor Governor General of Pakistan (PLD 1955 FC 240) (The Maulvi Tamizuddin case)
ii.	The State vs, Dosso and Other (PLD 1958 SC 533) (The Dosso case)
iii.	Miss Asma Jilani vs Government of Pakistan (PLD 1972 SC 139) (The Asma Jillani case)
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vi.	Al-Jehad Trust vs Federation (PLD 1996 SC 324) (The Judges case)
vii.	Zafar Ali Shah and others vs. General Pervez Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869) (The Musharraf Takeover Validation case)
viii.	Khan Asfandyar Wali and others vs, Federation of Pakistan (PLD 2001 SC 607) (The NAB Ordinance Vires case)

Case 1

Maulvi Tamizuddin case

P L D 1955 FEDERAL COURT 240

(Appellate Jurisdiction)

Present : Muhammad Munir, C. J., A. S. M. Akram, A. R. Cornelius, Muhammad Sharif and S. A. Rahman, JJ

(1) FEDERATION OF PAKISTAN,

(2) MUHAMMAD ALI,

(3) CHAUDHRI MUHAMMAD ALI,

(4) MAJOR* GENERAL ISKANDER MIRZA,

(5) M. A. H. ISPAHANI,

(6) DR. A. M. MALIK,

(7) DR. KHAN SAHIB

(8) GENERAL MUHAMMAD AYUB KHAN,

(9) GHYAS-UD*-DIN PAIHAN AND

(l0) MIR GHULAM ALI TALPUR

Appellants

versus

Moulvi TAMIZUDDIN KHAN-Respondents Constitutional Civil Appeal No. 1 of 1955, decided in Pakistan v, April 1955.

(On appeal from the judgment and order of the Chief Khan Court of Sind at Karachi, dated the 9th February 1955, in -- Writ Petition No. 43 of 195--- P L D 1955 Sind 96). Indian Independence Act, 1947, Ss. 5. 6 (3), 8 (I), 223-A*, C J Assent of Governor-General necessary to all legislations of Constituent Assembly, including those making provision as to the

Constitution of the Dominion under S. 8 (I)-Constituent Assembly acting under S. 8 (I) acts as the "Legislature of the Dominion"-S. 223-A, Government of India Act, 1935, invalid for want of .such assent-Rule 62, Rules of Procedure of Consti*tuent Assembly-Dominion Status-Independent Dominion* History fsand background-Governor-General part of Legisla*ture-King's Prerogative-Constituent Assembly, whether sovereign-Contemporanea Expositio and argument ab incon* venienti-Assent need not be in writing.

The Constituent Assembly of Pakistan was dissolved by the Governor-General by a Proclamation dated the 24th of October, 1954 and a re-constituted Council of Ministers was set up. The President of the Constituent Assembly, Moulvi Tamizuddin Khan (respondent) thereupon put in a Writ Petition (under section 223-A, Government of India Act, 1935) in the Chief Court of Sind against the Federa*tion of Pakistan and the members of the re-constituted Council of Ministers (appellants) praying that a writ in the nature of mandamus be issued against the appellants restrain*ing them from implementing the Proclamation of the 24th October, 1954 and from interfering with the exercise of res*pondent's functions as President of the Constituent Assembly, and another writ in the nature of quo warranto with a view to determining the validity of appellants' appointment as members of the Council of Minister.

The appellant's reply inter alia was that the dissolution of the Assembly was valid and that the Chief Court has no jurisdiction to issue the writs, because section 223-A was not validly enacted for want of assent of the Governor General to the enactment (Government of India (Amendment) Act, 1954), inserting that section in the Government of India Act, 1935.

The Chief Court issued the writs prayed for, holding that the Acts of the Constituent Assembly, when it did not function as the Federal Legislature did not require the Governor-General's assent.

The Federation of Pakistan and the re-constituted Council of Ministers appealed to the Federal Court.

Held, (Per Muhammad Munir, - C. J., A. S. M. Akram, Muhammad Sharif and S. A. Rahman, JJ. agreeing ; Cornelius, J., contra).-The Constituent Assembly when it functions under subsection (I) of section 8 of the Indian Independence Act, 1947, acts as the Legislature of the Dominion within the meaning of section 6 of that Act, and under sub*section (3) of the latter section the assent of the Governor *General is necessary to all legislations by the Legislature of the Dominion. Since section 223-A of the Government of India Act under which the Chief Court of Sind assumed jurisdiction to issue the writs did not receive such assent, it was not yet law, and

that therefore that Court had no jurisdic*tion to issue the writs.

In view of this conclusion, the Court did not go into the other issues in the case.

The main conclusions supporting the above opinion were :

The position of the Constituent Assembly is that it is the Legislature of the Dominion when it makes laws for the constitution of the Dominion and the Federal Legislature when it functions under the limitations imposed upon it by the Government of India Act, 1935.

The Crown is a constituent part of Parliament in the United Kingdom and of all Dominion Legislatures either because it is expressly so stated in the constitutional statutes or because the Crown appoints the Governor-General who is empowered to give or withhold assent to the legislation of the Dominion. The same was the position, under the Government of India Act, 1935, i. e. the Governor-General, was a part of the Federal Legislature. It is this common restriction that exists on the Dominion legislation which subsection (3) of section 6, Indian Independence Act, 1947 intended to enact when it provided that the Governor-General of the Dominion shall have full power to assent in His Majesty's name (including the power to withhold assent) to the laws of the Legislature of the Dominion.

The restrictions are illustrative of the constitutional position that assent to the Dominion legislation by the Crown or its representative is indispensable and has in no instance ever been dispensed with by the Crown. [ibid]C

The provisions in Constitutions of other Dominions relating to assent do not create in tile Crown or to its representative a new right, but confirm an existing right and merely provide the manner in which that right is to be exercised. Thus if the right to withhold assent to Dominion legislation is inherent in the . Crown .and the statute that legislates on that right merely says that a bill after it has been passed by the popularly elected House or Houses shall be presented for - assent to the Governor-General, , who will give assent to that bill or withhold it there from, the statute does not create the right to withhold assent but merely describes the manner in which that right is to be exercised. Similarly the provisions in the Government of India Act which give to the Governor-General the right to withhold assent from legislation do not confer on, or create a new right in, the Crown ; on the contrary, they implicitly recognise such right and regulate the manner in which it is to be exercised. 1t is for this reason that fiction. of making the Crown a consti*tuent of the legislature is resorted to, because neither the King nor his representative, the Governor-General, is a member of the legislature like other members: The King or the Governor-General is a part of the Legislature only in the sense that all bills passed by the

Legislature are presented to him, so that he may exercise his right of giving or withholding assent. Thus subsection (3) of section 6 produces the same result by giving to the Governor-General full power to assent in His Majesty's name to any law of the Legislature of the Dominion. It makes the Governor-General a constituent part of the legislature inasmuch as the right, to give assent necessarily includes in it the right to withhold assent. Every bill must therefore be presented to him to provide him an occasion to exercise that right, and unless a bill is so presented a constituent part of the Legislature does not function and the proposed legislation does not become law. There is, therefore, no distinction between those constitutions where the Crown is a constituent part of the Legislature and the Legislature of the Dominion of Pakistan whose functions are being exercised by the Constituent Assembly and to whose legislation assent is enacted by subsection (3) 'of section 6 as a necessary condition.

"The powers of the Legislature of the Dominion" in subsection (1) of section 8 ' refer back to the powers of the Legislature of the Dominion defined in section 6, which the Constituent Assembly was to exercise in its capacity of Legislature of the Dominion.

The provisions of section 6 are applicable to the powers given to the Constituent Assembly by subsection (1) of section 8 and the restriction as to the Governor-General's assent to legislation by the Legislature of the Dominion, whatever may be the character of that legislation, is applicable when the Constituent Assembly exercised the powers of the Legislature of the Dominion under subsection (1) of section 8. That subsection does not say that the constitution of the Dominion shall be made by the Constituent Assembly. It assumes that the powers of the Legislature of the Dominion include the power to make provision as to the constitution of the Dominion, declares that those powers shall be exercis*able in the first instance by the Constituent Assembly and directs that references in the Act to the Legislature of the Dominion shall be taken as references to the Constituent Assembly. The plain words of subsection (1) of section 8 that "reference in this Act to ' the Legislature of the Dominion shall be construed accordingly" have the effect of substituting the 'Constituent Assembly for the. words "the Legislature of each of the new Dominion" in subsections (1) and (3) of section 6. That being the position, there can be no escape from the conclusion that the Governor-General's assent to the laws made by the, Constituent Assembly is an necessary as his assent to any future Legislature of the Dominion brought into existence by the Constituent Assembly to replace itself.

Legislation is the exercise of a high prerogative power and even where it is delegated by statute or charter to a legislature, in theory it is always subject to assent whether that assent be given by -the King or by a person nominated by the King. In the British system there is not a single instance to the contrary. That necessity was enjoined in the case of Pakistan so long as it continued to be a Dominion, though it was open to that Dominion, if the Governor-General gave assent to a bill of secession to repudiate its Dominion status. The force of the words `full power to assent' would be realised if a situation arose where a bill of secession came up before :the

Governor-General for assent. So far as His Majesty was concerned he had given full powers to his Governor-General to assent to any legislation of the Dominion ; but the Governor-General, though he was a representative of the King, was also the representative of the Dominion in the sense that he was a person in whom the majority party of the Assembly had confidence. He would, therefore, have no hesitation, and would also have the requisite authority to give assent. If, however, he withheld assent, his' immediate recall by His Majesty would have been successfully insisted upon by the Assembly and the assent could then have been obtained from his successor.

The word `law' in subsection (3) of section 6 has been used in a general sense, namely, any proposed legislation which has not as yet received the assent of the Governor *General.

The legislation of the, Constituent Assembly under sub*section (1) of section, 8 is a part of the government of the Dominion within the meaning of section 5 arid 'the whole scheme of the Government of India Act proceeds on the assumption that the Governor-General represents the . Crown when he assents in Her Majesty's name to the laws, of the Federal Legislature. Therefore it seems to me to be an im*possible proposition to assert that the .making of laws is not a part of the government of the Dominion, and that being so no reason whatsoever has been suggested why the making of constitutional laws should not be a part of the Government of the Dominion. If the Governor-General represents the Crown for the purposes of the government of the Dominion when he gives assent to the laws passed by the Federal Legislature, it must a fortiori follow that he represents the Crown for the same purpose when he assents to constitutional laws, because in a State like ours it is impossible to conceive of a Government without there being a constitution.

Rule 62 of the Rules of Procedure of the Constituent Assembly, which provides that when a bill is passed by - the ,Assembly a copy thereof shall be signed by the President and it shall become law on being published in the official Gazette of Pakistan under the authority of the President, is a mere rule of procedure which cannot amend the Constitution Act.

The rule of Contemporanea expositio and argument as inconvenient does not apply to the present case inasmuch as there is no doubt as to the true meaning of sections 6 and 8 as a whole, and there is no estoppel.

As for the question whether the Constituent Assembly is a sovereign body it is a mistake to suppose that sovereignty in its larger sense was conferred upon the Constituent Assembly, or that

it could function outside the limits of the Indian Independence Act. The only power given to that Assembly was the, power to make laws, constitutional or federal. In the former case, it exercised the power to make provision as to the constitution of the Dominion which had been included in the generality of the powers conferred by section 6 on the Legislature of the Dominion, and in the later. it acted as the Federal Legislature with all the limitations to which that Legislature was subject. Apart from these powers, it had no other power and it lived in a fool's paradise if it was ever seized with the notion that it was the sovereign body in the State. It had, of course, legislative sovereignty as the Legislature of the Dominion but then the Governor-General was a constituent part of the Legislature. Every. Act passed by it required the Governor* General's assent, consistently with the position that prevails throughout the Dominions,. the Colonies. and the Possessions, settled or ceded or conquered, where the Crown still retains to itself or has delegated to its representative the high preroga*tive right of assenting to bills.

Any attempt to construe the Governor-General's power to withhold assent, as a veto on legislation proceeds on a misapprehension and cannot be made a ground for the inference that that power is an infringement of the legislative sovereignty of the Legislature of the Dominion and - thus of the Constituent Assembly.

We are not concerned with the consequences, however beneficial or disastrous they may be, if the undoubted legal position was that all legislation by the Legislature of the Dominion under subsection (3) of section 8 needed the assent of the Governor-General. If the result is disaster, it will merely be another instance of how thoughtlessly the Constituent Assembly proceeded with its business and by assuming for itself the position of an irremovable legislature to what straits it has brought the country.

The Governor-General is appointed by the King or Queen and represents, him or her for the purposes of the government of the Dominion (section 5 of the Indian Independence Act). The authority of the representative of the King extends to the exercise of the royal prerogative in so far as it is applicable to the internal affairs of the Member, State or Province, even without express delegation, subject to any contrary statutory or constitutional provisions.

History and background of Dominion Status discussed from pp. 258to 267.

Incidents of an Independent Dominion indicated from pp. 306 to 313.

Assent need not be in writing.

M. A: Khuhro v. The Federation of Pakistan P L D 1950 Sind 49, dissented from.

Khan Iftikhar Hussain Khan of Mamdot v. The Crown (1951) F C R 24-P L D 1930 F C 15, not applicable.

Stockdale v. Hansard 1839-9-A ' & E 1, Ndlwana v. Hofmeyer 1937 A D 229 and Campbell v. Hall XX How-St. Tr. 239 ref.

Per A. S. M. Akram, J.-Reading section 6 (3) and the 1st part of section 8 (1) together the conclusion which I am able to draw is that the Governor-General has full power to give assent to any kind of law proposed by the Legislature of the Dominion and that the Constituent Assembly which in the first instance is to make provision -for the constitution of the Dominion is to exercise the power of the Legislature of the Dominion for that purpose. As a result, the assent of the Governor-General ' becomes necessary for the validity of even constitutional laws. In my opinion the words "full power to assent" in the context carry with them full liberty to refuse -assent as power' conferred does. not mean liability imposed or, obligation. created.

In the interpretation of laws and statutes plain words, should, as a rule, be given their plain meaning and a laboured construction should not be put ; upon them to bring into prominence some kind of a remote signification.

The effect of conferring Dominion Status was that certain rights and liabilities as between the Dominion and the United Kingdom came into existence, for instance, if the Dominion by its legislation negated allegiance to the Crown or severed' connection with it, such a legislation perhaps could not be considered as legally valid or justified. The expression, "Independent Dominion" has, therefore, been purposely used in the Independence Act in order to give to the Dominion a freedom of choice either to remain or to refuse to remain within the British Commonwealth of Nations.

I am of the view that in the absence of any express or implied provision in any enactment to the contrary, the assent of the Governor-General is necessary before any constitutional measure framed under section 8 (1) of the Independence Act, 1947; can pass into law.

Per Cornelius, J. (Contra).-The Indian Independence ,Act, 1947, possessed in several respects the same character as the Statute of Westminster, 1931, but with one major difference . . . . the extent of freedom accorded to the countries which, as Dominions, were to replace the Indian Empire, was in very material degree greater than that which the older Dominions had gained in 1931. That, in my view, is the circumstance which justifies the application of the special description "Independent Dominions" to the two new States which were brought into existence by means of this highly effective instrument.

The Governor-General owes nothing to the British Sovereign except his warrant of appointment, issued upon the recommendation of the Government of Pakistan. No duty of any kind is prescribed which he owes to Her Majesty, except that of being "faithful", appearing in the oath which Her Majesty is pleased to accept. The appointment, by its terms affirms and emphasises that the Governor-General's duty, or as it might be termed "allegiance", is to the Constitu*tion, as in existence from time to time.

The Constituent Assembly was, as a body, not a creation of the British Parliament. It is, in my opinion, to be regarded as a body created by a supra-legal power to discharge the supra-legal function of preparing a Constitution for Pakistan. Its powers in this respect belonged to itself inherently, by virtue of its being a body representative of the will of the people in relation to their future mode of Government. In relation to constitutional provisions, it (Constituent Assembly) exercised the powers of the British Parliament, which were in that respect, untrammelled by any laws.

With respect to the necessity of assent by the Governor. General to laws of a constitutional nature passed by the Constituent Assembly, this doubt arose at a very early stage. The Court is indebted to the learned Advocate-General of Pakistan for the assertion, made on more than one occasion, that the Late Ministry of -the Government of Pakistan (by which was meant the body of permanent officials constituting the staff of the Ministry under the Law Minister) had consistently advised the Minister that -such assent was sine` qua non. On the other hand, the Constituent Assembly had throughout maintained the view that assent was not necessary, and acting on that view had made and promulgated a rule, No. 62 in the Rules of the Constituent Assembly, to give formal expression to that view.

The major limb (Constituent Assembly) of the three great limbs of the autonomous State of Pakistan had clearly expressed in 1948 its view on this question, which has now assumed so high an importance. I place the Constituent Assembly above the Governor-General, the Chief

Executive of the State, for two reasons, firstly that the Constituent Assembly, was a sovereign body, and secondly because the Statutes under and in accordance with which the Governor- -General was required to function, were within the competence of the Constituent Assembly to' amend.

The second great limb of the State, namely the Executive 'Government of the Federation, has never, until after the event of the 24th October 1954, shown any sign, of doubt on this point.

The Government of Pakistan, composed of the Governor *General and his Ministers, , have, throughout the relevant period, been aware that the Constituent Assembly had formally declared that its constitutional laws became law under its own Rule 62, without the need of the Governor-General's assent.

In illustration of the view of the third great limb of the State, His Lordship referred to the three cases : M. A. Khuhro v. The Federation of Pakistan 1950-51 F C R 24= P L D 1950 F C 15. Khan Iftikhar Hussain Khan of Mamdot v. The Crown, P L D 1950 Sind 49, ex-Major-General Akbar Khan and Faiz Ahmad Faiz v. The Crown P L D 1954 F C 87 and observed

For the first seven years of Pakistan's existence, the three great limbs of this new "autonomous community" exhibited complete harmony of view in regard to the point this Court is now. called upon to decide.

The Constituent Assembly . . . . . was a supra-legal body, not acting in its constitution-making capacity within the Constitution. It was not to be presumed that,' in this capacity, its proceedings and decision were subject to the qualified negative of the Governor-General, who was a statu*tory authority, owing existence - to the interim Constitution.

With reference to the argument ab inconvenienti His Lord*ship observed : -

The present is not a case where a mere "departmental construction", or even a judicial or legislative construction is put forward, as a caution against lightly disturbing .that which has been accepted and acted upon as settled law for a period, leading to development of vested

rights. The rule of stare decisis is altogether too small in its content to fit the case. Here, the greatest organs and agencies of the State have been consciously and unanimously holding a certain belief, and have been acting upon it, in numerous respects affecting the most fundamental rights of the entire people, It is difficult to imagine a law which affects so large a pro*portion of the public as does a law designed to grant adult suffrage, and to determine the composition of Provincial Legislatures on that basis. The Delimitation of Constituencies (Adult Franchise) _Act, 1951, was procured by the Federal Government, was passed by 'the Constituent Assembly, was put into operation by the combined labours of the Federal and Provincial Governments, and has borne fruit in the shape of new Legislative Assemblies, which have been, busy ever since passim; .new laws and in other ways; regulating the lives of the people. It is beyond conception to tabulate all the vested . rights and interests which have been developed in conseclimice of this law. And there are many other laws which have produced 'extensive effects, which cannot possibly be ascertained with exactness. These circumstances should; in my opinion, furnish an argument of almost insuper*able character, in favour of. upholdihg what has been the practice hitherto in regard to assent to constitutional laws,

The effect of section 6 (3) read with section 8 (1) and section 5 of the Indian Independence Act, 1947 was stated thus by His Lordship The Constituent Assembly being designed to be a sovereign body and to exercise sovereign power, including power to alter the Constitution subject to which the Governor-General was intended to act, it would clearly be inconsistent with that design and purpose if the "qualified negative" of assent by the Governor-General were imposed upon its constitutional laws. Secondly, it being within the complete power of thg Constituent Assembly to determine the constitution of the "Legislature of the ~ Dominion", or Union Legislature, and to determine the scope of its legisla*tive competency as well as the mode in which its laws should be enacted, the British Parliament could' not affect to prescribe the requirement of assent, as an essential formality, in respect of the laws made by such a Legislature. This would be to usurp the functions of the Constituent Assembly. To impose such a requirement upon laws of a constitutional nature made by the Constituent Assembly would be a direct affornt to the position and authority of that body. Hence the careful use of expressions in section 8,- Indian Independence Act, to indicate that the necessary powers of legislation should be exercisable by the Constituent Assembly. The words signify the courtesy owed by one sovereign body to another. There was no direct imposition of obligations, but the need being indicated, it was indicated also that the Con*stituent Assembly, as previously agreed upon by the pleni*potentiaries in the negotiations between' the United Kingdom Government and the representatives of the Indian people, might fulfil the need.

Section 5, Indian Independence Act, cannot operate to confer any right to grant assent beyond that conveyed by the relevant words in section 6 (3). Therefore, to draw the right of assent from section 5 seems to me to be impossible.

In the context, (of section 6 (3) "any law" must mean "any law requiring assent for it to become operative", i.e., any Bill passed by the "Legislature of the Dominion", which under any provision of law required to be presented to the Governor-General for his assent, and to receive assent before it could become operative.

The term "Legislature of the Dominion", cannot be, and was not intended to be, regarded as equivalent, at any time, to the Constituent Assembly.

Neither the British Sovereign nor the Governor-General, as such, was a part of the Constituent Assembly.

His Lordship arrived at the conclusion

There is nothing in section 6 (3), Indian Independence Act, or in the status of Pakistan as a Dominion which creates the obligation that all laws made by the Constituent Assembly, of a constitutional nature, require the assent of the Governor-General, for their validity and operation.

Per S. A. Rahman, 'J,. (agreeing with the. leading judg*ment).-After a comparison of 'sections 6 and 8 the infer*ence seems to be irresistible that during the interregnum prior to the promulgation of a fresh' constitution, . the Constituent Assembly in fact functions as the Legisla*ture of the Dominion. It is only thus that full meaning can be given to the words 'of subsection (1) of section 8 "references in this Act to the Legislature of the Dominion shall be construed accordingly" and to the provision contained in subsection (3) of section 8. The plenary law-making powers of the Legislature of the Dominion mentioned in section 6 had to be divided into two compartments for transitional period, in order to keep the legislative machinery of the Government of India Act, 1935, in working order, with all its limitations, side by side with the enactment of a new Constitution. For the purpose of functioning as the Federal Legislature under the Government of India Act, 1935, the Constituent Assembly as the Legislature of the Dominion, should be deemed to have placed the incident limitations on itself, under the provisions of subsection (6) of section 6 read with subsection (3) of section 8. I confess I am unable to follow the process of reasoning which seeks to give a different meaning to "Legislature of the Dominion" occurring in subsection (3) from that possessed by the expression in other subsections of section 6. The attempt seems to be directed towards investing the Constituent Assembly with all the powers under section 6, without attracting the restric*tion (if restriction it really be) regarding assent, provided for in the same section. The two submissions made that subsection (3) is confined to the Federal Legislature functioning under the Government of India Act, 1935, and that the sub* section would also be applicable to laws passed by the future Legislature of the Dominion, appear to me to be mutually contradictory. The word `law' or

`laws' - used in subsec*tion (3) obviously includes laws of a constitutional character as a reading of the whole of section 6 shows and must clearly mean enactments passed by the Legislature and awaiting assent of competent authority.

The words "full power" (in section 6 (3)) amply connote discretion to give or withhold assent, beside indicating freedom from extraneous control, in full measure. The pre*sumption is implicit in the subsection that all such laws shall be submitted to the Governor-General for his assent.

A reading of sections 5 and 6 together, would lead to the inference that henceforth the prerogative of the Crown as respects assent, would, in the case of each new Dominion, be exercised by the Governor-General as representing His Majesty.

Op the doctrine of "Departmental Construction" as applied to the interpretation of statutes His Lordship observed A practice in contravention of a constitutional provision'

contained in a statute, can never ; abrogate or repeal a rule of strict law, with which alone the Courts are concerned.

Faiyaz Ali, Advocate-General of Pakistan and Kenneth Diplock, Q. C. Abdul Haq, Advocate, Federal Court, with them) instructed by Iftikhar-ud Din, Attorney for Appellants.

L I. Chundrigar and Nazir Ahmad Khan (Mahmud Ali, Sharifuddin Pirzada and Manzar-e-Alam with them) instructed by M. Siddiq, Attorney for Respondents.

Dates of hearing: March 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, and 21, 1955.

JUDGMENT

MUHAMMAD MUNIR, C. J.--This is a constitutional appeal from the judgment of the Chief Court of Sind, dated the 9th February, 1955, directing writs of mandamus and quo warranto to

issue against the appellants, the Federation of Pakistan and certain Ministers of the Central Government, on the application of the respondent Mr. Tamizuddin Khan. The application was heard by a Full Bench of five Judges of whom Mr. Justice Hassanally Agha retired during the hearing and, therefore, gave no opinion. The remaining four Judges were unanimous in their findings. The leading judgment was written by Constantine, C. J., with which Muhammad Bachal, J., agreed, while Vellani and Muhammad Bakhsh A. Memon, JJ., delivered separate judgments.

Pakistan came into existence as an independent Dominion and a member of the British Commonwealth of Nations on the 15th August, 1947, with a provisional constitution of the Federal pattern, under the Indian Independence Act, 1947 (10 & 11 Geo. VI, Ch. 30) hereinafter also referred to as the Act of 1947. Under that Act, until a new Constitution was framed., the Government of Pakistan was to be carried on under the Government of India Act, 1935 (26 Geo. V, Ch. 2), here*inafter referred to wherever necessary as the Act of 1935, subject to such adaptations and modifications as were con*sequential on her attaining the status of an independent Dominion. A Governor-General was to represent His Majesty for the purposes of the government of the Dominion. The functions of the Legislature of the Dominion, including the making of a constitution, were to be performed by a Con*stituent Assembly which had also to function as the Federal Legislature under the adapted Act of 1935. At the relevant time the respondent wad the President of that Assembly. The Assembly had not made any constitution when on 24th October, 1954, it was dissolved by the following proclamation of His Excellency the Governor-General :-

"The Governor-General having considered the political crisis with which the country is faced, has with deep regret come to the conclusion that the constitutional machinery has broken down. He, therefore, has decided to declare a state of emergency throughout Pakistan. The Constituent Assembly as at present constituted has lost the confidence of the people and can no longer, function.

The ultimate authority vests in the people who will decide all issues including constitutional issues through their representatives to be elected afresh. Elections will be held as early as possible.

Until such time as elections are held, the administration of the country will be carried on by a reconstituted Cabinet. He has called upon the Prime Minister to reform the Cabinet with a view to giving the country a vigorous and stable administration. The invitation has been accepted.

The security and stability of the country are of paramount importance. All personal, sectional and provincial interests must be subordinated to the supreme national interests."

The reconstituted Council, of Ministers which was an*nounced in an extraordinary issue of the Gazette of Pakistan, on the 26th October, 1954, consisted of :-

(1) Mr. Muhammad Ali,

(2) Ch. Muhammad Ali,

(3) Major-General Iskander Mirza,

. (4) Mr. A. H. Espahani, ,

(5) Dr. A. M. Malik,

(6) General Muhammad Ayyub Khan,

(7) Mr. Chyasuddin Pathan, and

(8) Mir Ghulam Ali Talpur.

Dr. Khan Sahib was included in the Council a few days later.

On the 7th November, 1954, the respondent put in an application, Writ Petition No. 43 of 1954, on the Extraordinary Special Jurisdiction Side of the Chief Court of Sind. The respondents to this petition were the present appellants, namely, the Federation of Pakistan, the aforesaid members of the Council of Ministers, and the Estate Officer of the Govern*ment of Pakistan. After stating the facts leading to the setting up of the Constituent Assembly and the coming into force of the Act of 1947, the application alleged that the 4th appellant, Major-General Iskander Mirza, had informed the respondent on the 26th October, 1954, that the Constituent Assembly had been dissolved ; that the respondent and members of the Constituent .Assembly had been forcibly prevented from entering the premises of the Constituent Assembly Building in Karachi on the 27th October, 1954 ; that on the 30th October, 1954, the Estate Officer of the Govern*ment of Pakistan has addressed a letter to the respondent intimating to him that as he had ceased to be the President of the Constituent Assembly the allotment in his name of Bungalow No. 3, Bath Islands, had been cancelled with effect from the 8th November, 1954, and requesting him to vacate the said premises by 8th November, 1954 -,. that the appellants were contending that in pursuance of the alleged proclamation the Constituent Assembly had been dissolved and were inter*fering with the duties of the ,respondent as the President of the Assembly and preventing him from exercising his functions ; that for the reasons stated in the application the alleged pro*clamation and the appointment of appellants 2 to 16 as members of the Council of Ministers were unconstitutional, illegal, ultra vires, without jurisdiction, inoperative and void ; that in any case the inclusion of appellants 4, 5, 7, 8 and 10 in the Council was contrary to the provisions of the Act of 1935 inasmuch as they were not the members of the Federal Legis*lature ; and that there resided in the respondent a legal right to the performance of legal duties 13y the appellants which was of a public nature. The application concluded with the prayer that a writ in the nature of mandamus be issued against the appellants, their agents, servants and all persons claiming and acting through or under them restraining them from imple*menting or otherwise giving effect to the proclamation of the 24th October, 1954, and. from interfering, directly or indirectly, with the exercise of the respondent's functions and duties. as the President of the Constituent Assembly ; and ,that another writ in the nature of quo warranto be issued against appellants 4, 5, 7, 8 and 10 with a view to determining the validity of their appointment as members of the Council of Ministers. A joint reply to this application was filed by the Advocate *General of Pakistan on behalf of appellants, raising some preliminary objections and opposing the application on the merits. The reply alleged that the Sind Chief Court had no jurisdiction to issue either of the writs ; that the dissolution of the Assembly was valid ; that the writs prayed for could not, in any case should not, issue'; and that the grounds men*tioned in the proclamation for the dissolution of the Assembly were true, and if any proof was needed the appellants were prepared to show that the constitutional machinery had broken down, that the Constituent Assembly had lost the confidence of the people, and that it could no longer function in accordance with the provision of the -Act of 1947. In the arguments before the Chief Court several questions which the application and the reply gave rise to were debated, but the main points which received the attention of that Court and which were argued before us on behalf of the appellants were :-

(1) that since the Government of India (Amendment) Act, 1954, by which on 16th July, 1954, section 223-A, which empowered the High Courts to issue writs to mandamus and of quo

warranto, was inserted in the Act of 1935, had not received the assent of the Governor-General, it was not law, and that therefore .the Sind Chief Court had no jurisdiction to issue the writs ;

(2) that the prayer for a writ of quo warranto must also fail on the ground that section 10-A of the Act of 1935, which imposed on members of the Council of Ministers the qualification of being members of 'the Federal Legislature, and which was inserted in that Act by the Government of India (Fifth Amendment) Act, 1954, was not law because that Amendment Act also had not received the assent of the Governor-General ;

(3) that the Governor-General was competent to dissolve the Constituent Assembly and in the circumstances had rightly dissolved it ; and

(4) that the direction to issue either of the writs should not be exercised in favour of the respondent.

The Chief Court held' that the Acts of the Constituent Assembly, when it did not function as the Federal Legislature, did not require the Governor-General's assent and that the dissolution of the Assembly was illegal. It, therefore, issued the writs prayed for.

In order to appreciate the nature of the issues raised and the implications flowing from their determination one way or the other it is necessary to preface this judgment with some observations of a general character before stating the precise constitutional position that the Act of 1947 brought about and deciding the main issue, the determination of which is in my opinion sufficient to dispose of the appeal. The words demo*cracy, democratic institutions, sovereignty, political sovereign*ty, legislative sovereignty, independent dominion etc., have been freely used in the arguments before us. I, therefore propose-to give a general idea of these terms but only to the extent that it, is necessary for the purpose of this judgment.

DEMOCRACY AND ENGLISH POLITICAL INSTITUTIONS

The word `Democracy' is now used at least in three different senses. It is the name given to a philosophy of life, to the means requisite to live up to that philosophy and lastly to the principles which determine those means. In the first sense democracy is a subjective attitude. by which the members of the community secure to every one his rights, look upon all fellow citizens without

distinction of colour or race .as brethren in a common enterprise and give spontaneous support to projects which enhance the-civic excellence and promote the general welfare. It is thus a way of life; based contrary to the ancient Greek, conception, upon -the fundamental assump*tion of equality of" all .individuals and of their equal rights of life, liberty of action, thought and expression and pursuit of happiness. It is. essentially an attitude towards life, and a definite conception of man's place in society, and of the ends of life. As a mode of government, democracy involves a study of the basic principles on which political institutions ought to be founded as well as of the actual mechanism to be employed in particular conditions. The basic idea on which such form of government rests is that of self-rule of the people of freely elected representative institutions and of an executive responsible to the people. The fundamental in*stitution in modern democracy is the constitution, whether this be a written or an unwritten one. The constitution performs three functions : it expresses the consent by which the people actually establish the state itself : it sets up a definite form of government ; and it grants and at the same time limits the power which that Government possesses. It is the people who give the constitution and the appointed ruling agency is held in its administration within the rigid limits of its letter, subject to the right of the people at any time by appropriate means to enlarge or constrict the power it had granted. Since democracy is that form of government which represents the common will, political institutions under that form of government, whatever may be the form of the constitution, must be based on principles without which democratic ends cannot be realized. In no modern state can the people now like the City States of ancient Greece, directly assume legislative functions, the number of population ahd size of the country making it impossible for them to meet in an assembly for purposes of legislation. Therefore in a nation of any size it is necessary to find some means by which people could rule without taking part in every immediate step of the process of authority. Thus the principle has now been firmly established of choosing a certain number of agents or representatives, who are numerous enough to speak for the whole people and few enough to meet at one place. The first essential of democratic constitution therefore is that the entire people must be represented in the Legislature by their nominees to be elected periodically by them. The object being that the popular will should be reflected in the Legislature, the only means known to _modern democracy of achieving this result is election of the people's representatives who on being elected constitute the popular assembly, whether it be called by the name of Parliament, the House of Commons, House of Representatives, the House of People or by any other name.

The second and by far the most important requirement of a democratic constitution is the need for periodic account*ability of the representatives to their electors. In modern times within a few years political events of great and un*anticipated importance may happen in a country and the mental horizon of the whole people may change by a sudden international or domestic event, the importance and implica*tions of which may not have been present to the minds of the people when elections were hold. It is, therefore, necessary that old representatives should seek re-election either because of their having ceased to reflect in the Legislature the progres*sive or changing outlook of the people or because of their having ceased to represent the views of the people on a particular issue. The principle, therefore, is fundamental that in every democratic constitution there must . exist a provision for holding elections after. a few years, so that the House may continue to be representative of the varying aspirations and needs of the people. It is

unnecessary to discuss here the position of a representative after he has been elected, whether he is an agent or trustee of the people or a mere messenger. . The basic principle is that no -representative body can continue indefinitely and that its composition must admit of change from time to time by means of an appeal to the people. An irremovable Legislature is the very antihesis of democracy and no democratic constitution is known in the world where elections are for, life or for an indefinitely long time.

It may incidentally be mentioned here that in the Act of 194 7 there was no express provision for the dissolution of the Constituent Assembly, and it was alleged before us by Mr. Chundrigar on behalf of the respondent that the only way to get rid of the Assembly if it did not dissolve itself, may force or revolution, thus admitting that extra legal acts like revolution, coup d'etat and other unconstitutional acts become legal concepts where the people, deprived of political sov*ereignty which in a democracy is their birthright, seek to assert that right against an indissoluble Assembly. .

This is what Sir William Blackstone said in 1765 about a perpetual Legislature

"Lastly, a Parliament may be dissolved or expire by length of time. For if either the legislative body were perpetual ; or might last for the life of the Prince who convened, them, as formerly ; and were so to be supplied, by occasionally filling the vacancies with new representatives ; in these cases, if it were once corrupted, the evil would be past all remedy ; but when different bodies succeed each other, if the people show cause to disapprove of the present, they may rectify its faults in the next." (Commentaries on the Laws of England, Book I, Chapter 2, p. 189.)"

The requirement of periodic accountability of a representa*tive Assembly to the electors is so basic that in the United Kingdom the Crown, which since long has ceased to exercise its discretion in opposition to the advice of the Ministry, will be considered to be justified in exercising its reserve powers of withholding assent or .directing dissolution if Parliament ever attempted to prolong its own life indefinitely. The reason for it is that in a democratic constitution the ultimate or political sovereignty resides in the people, while the popular assembly, where the constitution does not impose any limita*tion on its powers, exercises legislatives sovereignty only during its term. Since sovereignty as applied to States imports the supreme, absolute, uncontrollable power by which a State . is governed, and democracy recognises all ultimate power as resting in the people, it is obvious that in the case of a conflict between the ultimate and legal sovereign, the latter must yield. An irremovable Legislature,

therefore, is not only a negation of democracy but is the worst calamity that can befall a nation because it tends to perpetuate an oligarchic rule which, while it has none of the advantages, has all the disadvantages of a dictatorial rule. An oligarchy, while it lacks the determination, the singleness of purpose and the clarity of vision of a dictator, is subject to all the temptations to which a dictator may be exposed. - If, therefore, the Constituent Assembly was an irremovable Legislature, it was a form of oligarchy and not a body of representatives subject to periodic accountability. The reason for it may be' that the framers of the Act of 1947 expected that constitution would be framed within a reasonable time and that the Consti*tuent Assembly would thus dissolve itself. They may not have imagined that the Assembly to which they were confiding all legislative powers would not complete the constitution even for seven years and, on the contrary, would assume the role of an irremovable and irresponsible Legislature.

As Government is the responsibility of the executive in a constitution, it- is an indisputable corollary of the democratic principle that the executive must be responsible to the Legislature for its acts. The executive discharges its duty of day to day administration without the popular Assembly enquiring into it but there may come an occasion, and this sometimes does happen, when on some important issue, executive or legislatve, ` there ensues a conflict between the executive and the Assembly. In such a case, if the Assembly does not support the executive, the Government must take it to mean that it has ceased to be the representative of the House, and on the principle of responsible Government must make way ,for those who have the support of the Assembly. The same is the effect of a general vote of no confidence, which is intended to declare to the Government that it no longer enjoys the confidence of the House. In that case, too, the Government, if it wishes to stay on, has one means of asserting its will against the will of the Assembly. , If it is sure that the Assembly itself has ceased to be representative of the people and that in fact the Government has the popular support on that issue, it may ask for a dissolution of the House however recently the House might have been elected, though this course will constitutionally not be adopted where elections were held on the specific issue on which the Government insists to, take a particular stand. To meet such a situation and to enable the popular will to be reflected in the Assembly it is necessary that, apart from the provisions relating to periodic dissolution; there should exist in the constitution some power competent to dissolve the Assembly, if, before the expiry of a normal life, it adopts on a particular issue an attitude which is not the attitude of the electors. Every democratic constitution, therefore, written or unwritten, gives to the Head of the State the power to dissolve the Assembly in the contingency just mentioned.

The next basic fact in a democracy of the British pattern, which has a constitutional monarch at the head; is that of ministerial responsibility. This doctrine proceeds on the assumption that the sovereign himself belongs to no party, that he does nothing on his own individual responsibility, and that every act, of his is backed by ministerial advice. If there be no clash between the Government and the Assembly, and a measure be brought up by Government which the

sovereign feels would be resented or disliked by the people, he is entitled to dismiss the Ministry, to form a Ministry from amongst the members of the opposition, and then on the advice of the new Ministry, to order dissolution. This power undoubtedly rests in the British Monarch, though it has not been exercised since the time of William IV, the established convention now being that by dismissing a Ministry, which represents the House of Commons whose life has not yet expired, the Monarch must be deemed to have taken active interest in party politics, and thus foregone his claim to the respect and affection which every one in the realm owes to him because of his aloof and lofty' position. It will have been noticed that the principles mentioned above can operate in full force only where there are organised parties in the country and at least two parties in the Legislature, namely, the Treasury Benches and the Opposition, so that in case the existing Government be dismissed the Opposition may be called upon to form a new Government.

Another means possessed by the British Monarch of appealing to the electorate against the House of Commons and the Government which enjoys the confidence of that House is that of withholding his assent to a bill. This power was last exercised in the time of Queen Anne and is now stated to be as dead as the dodo. But as late as the reign of King George V. there were suggestions, when the House of Commons twice passed the Irish Home Rule Bill, that the Sovereign could withhold his assent from the bill and appeal to the country. The King was himself inclined to accept this view and Sir William Harcourt had to tell him in a personal interview that, if he dissolved the House of Commons, in the ensuing elections Sir William would not mention the issue of Home Rule but that elections would be fought on the issue

"Is the country governed by the King or by the people?" and that every Minister would then attack the King personally.

Thus the necessary mechanism in a normally functioning democratic constitution of the British principle consists of :-

(1) a free and independent electorate, willing to give, when necessary, what is called an

"electoral mandate";

(2) a popularly elected Legislature ;

(3) an executive responsible to the Legislature ;

(4) the Head of the State, with a legal right not only to dissolve the legislature but also to withhold assent to bills The question in what circumstances these powers of the King are to be exercised is an entirely different question and has nothing to do with the legal powers of the King, though clearly defined conventions have come to be recognised which the King can, ignore only if he wishes to take the responsibility of ceasing to be a constitutional monarch. But these conven*tions 'cannot be enforced by the Courts, though they will undoubtedly be taken cognizance of in the interpretation of written constitutions. The only issue that the Court is required to determine in such cases is whether the legal power existed or not, and not whether it was properly and rightly exercised, which is a purely political issue.

POSITION OF ME DOMINIONS

As the principal argument which is to be found in the judgment of the learned Judges of the. Chief Court of Sind and which has been reiterated before-us is founded on the conception of an `independent dominion' and the alleged sovereignty of the Constituent Assembly, it becomes necessary to ascertain the meaning of the words `independent dominion' and to have a clear comprehension -of the powers that the Governor-General of a ,Dominion exercised in 1947, when the Indian Independence Act was passed. For that purpose we shall have to go far back in history and to trace the origin and subsequent development of the British Empire itself.

Up to the date. of the passing. of 'the Statute of Westminster in 1931 there was no distinction between a Colony and a Dominion. Section 18 of the Interpretation Act, 1898, had a colony - as "Any part of His Majesty's Dominions exclusive. of the British Islands and of British' India, and where parts of such Dominions are both under a Central and a local Legislature, all parts under the Central Legislature shall, for the purposes, of this definition, be deemed to be one colony."

By section 11 of the Statute of Westminster the definition of a colony was not to include in any Act of the Parliament of the United Kingdom passed after the commencement of the Statute, a dominion or any province or state, forming part of a "dominion" which was defined by section 1 of the Statute as meaning the Dominion of Canada, the Common* wealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free state and Newfoundland.

Colonies in America and other parts. of the globe were obtained in three ways :-

(1) by treaty of cession ;

(2) by conquest ; and

(3) by taking possession and peopling them where they were found uninhabited.

On the well-recognised doctrine of. Constitutional Law that all acquisitions of sovereignty by a subject are on' behalf of the Crown, all ceded or conquered colonies were under the Common Law of England held of the Crown. The relationship between such colonies and countries which, the King did not hold in right of his British Crown, as for instance, the German territories, was of a fundamentally different character because those territories during the union of the two Crowns had no connection with England or its laws.

Where a colony was acquired by treaty, the King could not legally disregard or violate the articles on which .the country was ceded and such articles were sacred and inviolable according to their true intent and meaning. Subject to this qualification, there -was hardly any distinction between a colony acquired by treaty or by conquest. Thus in the case of a territory, whether acquired by conquest or treaty, the King, subject to the terms of the treaty, possessed an exclusive prerogative power over it and could entirely change or new*model, the whole or part of its laws and political form of government and govern it by Letters Patent or orders-in* Council. But because a country acquired by British arms became a dominion of the King in right of his Crown, it was necessarily subject to the Legislature of Great Britain and consequently the King's legislative powers over it, as conqueror, were subordinate to his own authority in Parlia*ment, so that the King could not make any new change contrary to fundamental principles or exempt the inhabitants from the power of Parliament. The King could preclude himself from the exercise of his prerogative legislative authority in the first instance over a conquered or ceded territory by promising to vest it in an , elected Assembly of the inhabitants and the Governor or by any other measure of a similar nature by which the King did 'not claim or - reserve to himself that important prerogative. But the grant of representative institutions, without the reservation of a power of concurrent legislation, precluded the exercise of the prerogative only while the legislative institutions continued to exist.

If an inhabited country was discovered and peopled by English subjects, they were supposed to possess themselves of it for the benefit of their Sovereign and such of the English laws then in force as were applicable and necessary to their situation were immediately enforced on the principle that wherever an Englishman goes he carries. with him as much of English law and liberty as . the nature of the situation will allow. In the case of such colonies the Crown never had the prerogative of legislation. The distinction, between ceded or conquered territories and settled colonies was clearly brought out by the Privy Council in Sammut v. Strickland, (1938 A C 678) where Lord Maugham L. C. delivering the judgment of the Board said

"The line of distinction here has always been based on the circumstance that English settlers wherever they went carried with them the principles of English Law, and that English common law necessarily applied in so far as such laws were applicable to the conditions of the new colony. The Crown clearly had no prerogative right to legislate in such a case. Where, however, the territory was acquired by cession or conquest, more particularly where there was an existing system of law, it. has always been considered that there was an absolute power in the Crown, so far as was consistent with the terms of cession (if it was a case of that kind), to alter the existing system of law, though until such interference the laws remained as they were before the territory was acquired by the Crown.".

But it was a common characteristic of all colonies, ceded, conquered or settled, ,that they were subject to the legislative sovereignty of Parliament. .

I have already observed that the King cannot vary from any treaty which he has entered into on the Acquisition of a country and may preclude himself from the exercise of his prerogative powers of legislation in the first instance over an acquired or ceded territory by vesting it in an elected Assembly of the inhabitants and a Governor. It is, therefore the most important principle that though the King may keep in his own hands the power of regulating or governing inhabitants, he cannot infringe or depart from the provisions of the Charter by which he has, though voluntarily, granted them any liberties or privileges. Thus in every question which arises between the King and his colonies respebting the prerogative, the first consideration is the Charter granted to the inhabitants. If that be silent on the subject, it cannot be doubted that the King's prerogatives in the colony are precisely those prerogatives which he may exercise in the mother country. Where the Colonial Charter affords no criterion or rule of construction, the Common Law of England with respect to the rule or prerogative is the, common law of the territory. Rut whether a, colony was ceded or conquered territory to which representative legislative institutions were granted by Letters Patent or Order-in-Council or a settled colony governing itself under a constitution granted to it by Parliament, the King in no instance delivered himself or was divested of the prerogative to withhold assent to colonial legislation.

And this prerogative has always been considered to be so material to the existence of the King's real or formal sovereignty, that there can scarcely be imagined a case in which such power could not be exercised. True, the King did not exercise this power himself, but only through his agent or representative, but that the power was exercised by the Governor or the Governor-General on the King's behalf has always remained undoubted: In every sense of the term the Governor-General has remained a constituent part of the, local Legislature.

STATUTE OF, WESTMINSTER DOMINIONS

In exercise of its right to legislate for the colonies *settled, ceded or conquered-the British Parliament provided a constitution for the Dominion of Canada in 1867, for the Commonwealth of Australia in 1900, for South Africa in 1909, for New Zealand in 1852; and for Newfoundland in 1809. In the case of Ireland the Constitution framed by Dail Eireann, sitting as a Constituent Assembly, was recognised by 'the Irish Free State Agreement to which statutory effect was given by the Irish Free State Constitution Act, 1922. These constitutions defined the Legislative powers of the Legislatures in these Dominions and worked under a Governor or a Governor-General who represented the King and exercised on behalf of the King the power of giving assent to or withholding assent from bills or of reserving them for the signification of His Majesty's pleasure. The Governor-General or the Governor had also the power to prorogue, adjourn or dissolve the Legislature of which he himself as representative of- the King was a necessary constituent. Though originally these Dominions were subjected to British control through the Governor-General, and the British Parliament had the authority to legislate for them, the development of the system of responsible Government in them was so steady and consistent that they began to claim for themselves complete autonomy and an equal status with Great Britain. Accordingly, an Imperial Conference was held in London on the 25th October, 1926, in order to investigate some of - the questions affecting interimperial relations. This Conference was attended by the representatives of Great Britain, Canada, Australia, New Zealand, Union of South Africa, Newfoundland, the Irish Free State and India. Among the resolutions passed at the Conference was one which defined the mutual position and relation of Great Britain and the Dominions. It stated "They (Dominions) are autonomous communities within the British Empire, equal in status, is no way subordinate one to another in any respect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Common*wealth of Nations."

It was recognised at the Conference that every self-governing member of the Empire was the master of its own destiny and that in fact, if not always in form, it was subject to no com*pulsion whatever. Regarding the position of the Governor *General it was declared :-

"In our opinion it 'is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representatives of the Crown holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government."

The attention of the Conference was also called to various points in connection with the operation of the Dominion Legislation which, it was-suggested, required clarification, the particular points involved being

(a) the practice under which Acts of the Dominion Parliaments were sent each year to London, and it was intimated, through the Secretary of State for Dominiori Affairs, that "His Majesty will not be advised to exercise his powers of disallowance" with regard to them ;

(b) the reservation of Dominion legislation, in certain circumstances, for the signification of His Majesty's pleasure which was signified on a advice tendered by His Majesty's Government in Great Britain ;

(c) the difference between the legislative competence of the Parliament at Westminster and of the Dominion Parlia*ment in the Acts passed by the latter operated, as a general rule, only within the territorial area of the Dominion con*cerned and ;

(d) the operation of legislation passed by the Parliament at Westminster in relation to the Dominions. In this connection special attention was called to such statutes as the Colonial Laws Validity Act. It was suggested that in future uniformity of legislation as between Great Britain and the Dominions could best be secured , by the enactment of reciprocal statutes based upon consultation and agreement.

The Conference gave .to these matters the best consider*ation possible but came to the conclusion that the issues involved were so complex that there would be grave danger in attempting any immediate pronouncement other than a state*ment of certain principles which

underlay the whole question of the operation of the Dominion Legislation. It felt that for the rest it would be necessary to obtain expert guidance as preliminary to- further consideration by the Governments in Great Britain and the Dominions. With regard to the dis*allowance and reservation of Dominion Legislation the Con*ference placed on record that, apart from the provisions embodied in the Constitutions or in specific statutes expressly providing for reservation, it is recognised that-it was the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Secondly, that it would not be in accordance with constitutional practice that any advice should be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of the Dominion against the view of the Government of that Dominion:

On the question raised with regard to the legislative com*petence of members of the British Common wealth of Nations other than Great Britain and in particular to the disability of those members to legislate with extra-territorial operation; the Conference thought that it should similarly be placed on record that the constitutional practice was that . legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned. The Conference recommended that steps should be taken by Great Britain and the Dominions to set up a committee to enquire into, report upon, and make recommendations con*cerning :-

(1) the statutory provisions requiring reservation of Dominion Legislation for the assent of His Majesty or authorising the disallowance of such legislation ;

(2) (a) the position as to the competence of Dominion Parliaments to give their legislation extra-territorial opera*tion ;

(b) the practicability and most convenient method of giving effect. to the principle that each Dominion Parlia*ment should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order and good government of the Dominion ;

(3) the principles embodied in or .underlying the Colonial Laws Validity Act, 1869, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of the relations between the various members of the British Commonwealth of Nations, At

the Imperial Conference of 1930 the report of the Con*ference of 1929 on the operation of the Dominion Legislation was considered and it was recommended that a statute be passed by the Parliament at Westminster embodying certain specific provisions. Accordingly in 1931 there was passed by the Parliament of the. United Kingdom a statute called the Statute of Westminster which gave effect to the resolutions of the Imperial Conference of 1930. This statute referred to the declarations and resolutions set forth in the report of the Imperial Conferences held in 1926 and 1930, and attended by the delegates of the .Government in the United Kingdom, the Dominion , of Canada, the, Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, and considered it to be meet and proper to set out by way of Preamble that the. Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and that as they were united by a common allegiance to the Crown it would be in accordance with established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the succession to the throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom, and .enacted the resolutions of the Imperial Conferences in 12 sections. Section ,2 of that Act declared that the Colonial Laws. Validity Act, 1865,, was, not to apply to any law made after the commencement' of the Act by the. Parlia*ment of a Dominion, that no law and no provision of any law made after the commencement of the Act by the Parlia*ment of a Dominion shall be void or inoperative on the . ground that it was repugnant to the law of England or to provisions of any existing or future Act of the Parliament of the United Kingdom or to any order, rule or regulation made under any such Act and that the powers of the Parliament of a Dominion shall include. the power to repeal or amend any such Act, _ order, rule or regulation in so far as the same was a part of the law of the Dominion. The Colonial Laws Validity Act which was declared by the Act not to be applicable to any law made by the Parliament of a Dominion had declared in section 2 .that any Colonial Law which was or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colonies to which such law may relate or repugnant to any order or regulation made under the authority of such Act of Parlia*ment, or having in the Colony the force or effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be. and remain absolutely, void and ineffective. Section 3 of the Statute gave to the Parliament of a Dominion full powers to make laws having extra-territorial operation. Section 4 declared that no Act of Parliament of the United Kingdom passed after the commencement of the Act shall extend, or be deemed td extend, to a Dominion as part of the law of that Dominion unless it was expressly declared in that Act that that Dominion had requested, and consented to, the enactment thereof. Section 5 dealt with the powers of the Dominion Parliaments in relation to merchant shipping and 'section 6 with their powers in relation to Courts of Admiralty. Sections 7 and 8 enacted that nothing in the Act was to be deemed to apply to the repeal, amendment or alteration of the Constitutions of the Dominion- of Canada, the Commonwealth of Australia and New Zealand or the distribution of legislative powers between the Parliament of Canada and the Legislatures of the Provinces of . that Dominion.

Some important constitutional practices which had been firmly established between the Dominions and the United Kingdom before the passing of the Statute of Westminster have to be

fully understood with a view to appreciating the constitutional position existing at the time of the passing of that Statute. The first of these relates to the position of the Governor-General. Originally under the Constitution Acts of the Dominion the Governor-General had substantial powers of interference in the administration of the Dominion. He was not a representative of the Dominion but a person appointed by the British Government who was responsible to that Government. Under the Constitution he exercised his powers of control by withholding his assent from and reserva*tion of bills or by dissolving the Legislature, powers which were expressly vested in him. These powers could be exer*cised by him even in opposition to the advice of the Ministry, But by 1926, when the Imperial Conference met in London, his position had become that of a constitutional Governor* General; he had ceased to be an agent of the British Govern*ment and become a representative of the King, exercising in relation to the affairs of the Dominion the same powers as were exercised by the King in the United Kingdom. In other words, the principle of ministerial' responsibility hack been firmly established in the Dominions. This constitutional position was affirmed by the ruling of 3rd December, 1915, in the New South Wales constitutional crisis of 1926 when in reply to a request for instructions regarding some appoint*ments to the Legislative Council, Mr. Amery, the Secretary of State, informed the Governor that , established constitu*tional principles require that the question should be settled between the Governor and the Ministry. Consequently I do not feel able to give you (i. e. the Governor) any instruction". He re-affirmed this attitude in the House of Commons on March 15th, 1926, and said

"Since there seems to be some misconception as to the position of the Secretary of State in relation to matters of this kind, I should like to take this opportunity of making it clear that; in my view, it would not be proper for the Secretary of State to issue instructions to the Governor with regard to the exercise of his constitutional duties."

Stating his final conclusion on the issue, which was conveyed by his letter, dated the 14th July, 1926, to the Attorney-General, he said that if Ministers at home purported to intervene in the internal affairs of New South Wales, that would be wholly incompatible with the status of New South Wales within the Empire, and that the matter in dispute as to the Legislative Council appointments was essentially one to be settled in New South Wales, and not in London. (pp. 127 and 128 of Evatt's `The King And His Dominion Governors', 1936 Edition).

After the post-Statute-of-Westminster controversy between Sir Philip Game and the Lang Ministry of New South Wales in 1932, Sir Alexender. Hore-Ruthven, Sir Philip Game's successor, announced on his arrival that "The Governor can advise his advisers. He can suggest. He can warn. But as long as Ministers are chosen representatives of the people, he must defer to their advise and assist them to the best of his ability in their deliberations, no matter what may be his private view or personal conviction." (Evatt, The `King And His Dominion Governors', p. 152). These are only two of the several incidents in the history of Dominion Government which

confirm the principle that the, position of 'a Governor*General or a Governor qua ' a Dominion Government is precisely the same as that of the British Monarch qua the Government in London.

A much more important constitutional incident of the office of the Governor-General is that his appointment and dismissal actually rest with the Dominion Government and not with the home Government, and that if he ever comes in conflict with the Government of the Dominion, that Govern*ment can successfully insist on his recall by the King. Speaking generally, he has ceased to possess the right of exercising the reserve powers of the King against the wishes of the Dominion Government. Stating the position as it exists after the Imperial Conferences of 1926 and 19'30, Evatt at pp. 192 and 193 of his book "The King And His Dominion Governors" says "Other aspects of these decisive declarations are of supreme importance, but, for present purposes, it has to be noted that the decisions of the two Conferences assert the general principle that the King proceeds upon the advice of responsible Ministers. Moreover, the general doctrine of Ministerial responsibility in its application to the affairs of a Dominion does not except from its operation, but definitely includes, the appointment of the King's representative therein. Such matter thus becomes a Dominion affair, and a very important and vital one The declarations of 1926 and 1930, despite their great significance in the other respects, do not contain any final solution of the various problems of the reserve. power, although it is recognised that the general principle of Ministerial responsibility (illustrated by the Harcourt decision in the Tasmanian case of 1914) governs the actions of the King and Governor-General alike ; and also that in the appointment of the latter the relevant Ministers are those of the Dominion concerned".

And Jenks states at p. 21 of the Cambridge Law Journal (1927) Vol. 3, "Who then is to advise the King upon the appointment of the Governor* General, say, of Canada, Australia, or New Zealand ? The answer (I may be wrong) seems as a matter of principle to me to be reasonably plain, namely, that, just as the King in matters affecting the United Kingdom takes the advice of his Prime Minister, in London, , so in matters affecting Canada he will take the advice of his Prime Minister in the Dominion, and in the case of Australia that of his Prime Minister in the Commonwealth of Australia, and so forth. And I see .no difficulty in applying the principle in that way". Resuming the discussion at p. 196 of his book Evatt again says : "For paragraph VI of the Report of the 1930 Conference certainly secures to the Dominion Ministers direct access to the King himself for the purpose of the King's. acting on their advice in relation to the appointment of the Governor-General, His Majesty's Government in Great Britain being neither inter*ested nor concerned in such appointments. And the new method of appointing the Governor-General, exclusively upon the advice of Dominion Ministers, has been adopted in appoint*ments since 1930".

The Strickland-Holman controversy of 1916 which resulted in the recall of Sir-Gerald.

Strickland, : the Governor of New South Wales, in something like disgrace is a very apt illustration of the power of the Dominion Government to insist on the recall of a Governor who does 'not act according to the advice of the Ministry. The implications of the Imperial Conference Resolutions and Declarations are thus stated by Evatt :-

"Now Jenks logical inference from the 1926 Report, that the appointment of a Governor-General is . exclusively a matter of Dominion concern, seems to justify the further inference-equally logical-that the termination of the appoint*ment of a Governor-General is also a matter exclusively of local or Dominion concern. So far as the position of strict law is concerned, it is well-established that, in the absence of a controlling statute, a person _ holding such a position as that of Governor or Governor-General holds it at the pleasure of the Crown. It would seem, therefore, that Dominion Ministers must possess sufficient constitu*tional authority to approach His Majesty directly, i.e., without any intervention by Ministers in Britain, for the purpose of advising the King that the appointment of the Governor-General should be terminated. This course was apparently the procedure adopted when the De Valera Government of the Irish Free State secured the termination of Mr. McNeill's appointment as Governor-General in the year 1932".' (The King And His Dominion Governors.

Under the Constitutions of the Dominions the Governor *General had the power of withholding his assent from bills or reserving them . for the signification of His Majesty's pleasure. But before the Imperial Conference of 1926 he had ceased to exercise these powers in opposition to the wishes of the Dominion Government, unless under some Act of the British Parliament he was bound to reserve a particular bill for the signification of His Majesty's pleasure. This was is consonance with the principle of ministerial responsibility, according to which his discretionary powers in all matters were to be exercised in accord*ance with the advice of the Dominion Ministry. His position had, therefore, become precisely that of a consti*tutional monarch in the United Kingdom, and this was recognized by the representatives of the United Kingdom who took part in the deliberations of the Imperial Con*ferences in 1926 and 1930. The resolutions of those Conferences relating to the position of the Dominions and the powers of the . Governor-General were therefore a factual statement of the constitutional position. In fact, the position was so clearly understood by all concerned that the Statute of Westminster said nothing about it and took for granted the well-recognized convention that the Governor-General was not in a position effectively to interfere with the administration of a Dominion contrary to the wishes of that Dominion. Thus, at the time the Statute of Westminster was passed there were only a few legal restrictions on the legislative sovereignty of the Dominion Parliaments. They could not pass laws having extra-territorial operations ; any Dominion laws which were repugnant to the law of England were invalid ; and the United Kingdom Parliament could still legislate for, those Dominions. All these restrictions were removed by -the Statute of Westminster.

PRE-INDEPENDENCE INDIA

Nowhere else is the common law principle that the acquisition of political power in a_ foreign land accrues for the benefit , of the Crown better illustrated than by the history of the Government of India. By the Charter of 1600 A. D. granted to it by Queen Elizabeth, the East India Company was authorised to make reasonable laws, constitutions, orders and ordinances, not repugnant to English Law, for the good government of the Company and the management of its affairs. But when consequent on the grant of the `Diwani' to the Company by the help*less Moghal Emperor, Shah Alam, on 12th August 1765, presistent scandals relating to -the conduct of the officers of the Company began to reach England, the British Parliameit stepped in and claiming the right to interfere with the exercise of political powers by the Company passed the Regulating Act of 1773. The subsequent Acts,, namely, the Amending Act of 1781, Pitt's India Act of 1784, the Act of 1793, the Charter Acts of 1830 and 1833 and the Act of 1854, were all based on the claim that the Company held the Indian territories in trust for the Crown. By the Charter Act of 1858, the British Crown formally assumed responsibility for the- Government of India and Lord Canning came to India as the first Viceroy and Governor-General Eighteen. years later . Queen Victoria assumed the title of "Empress of India" by the Royal Titles Act of 1876. This addition to the Royal Titles was indicative of the sovereignty of the Crown in India. The controversy between the Viceroy, Lord Northbrook, and the Secretary of State, Lord Salisbury, during Disraeli's Ministry resulted in an emphatic pronounce*ment by the latter that it was "not open to question that Her Majesty's Government are as much responsible to the Parliament for the Government of India as, they are for any of the, Crown Colonies of the Empire", and section 33 of the Government of India Act, 1915, imposed upon the Governor-General in Council a constitutional obligation of paying true obedience to all such orders as he received from. the Secretary of State, thus 'securing the supervision of British Parliament over Indian affairs.

The element of responsible government in the Government of India was first introduced by the Act of 1919, which was passed on the recommendations contained in the Montague Chelmsford Report. This Act introduced in the sphere of Provincial Government the system of diarchy , which was based on the principle that Ministers, without being answerable for the Reserved Departments or for the policy on the reserved side, were jointly responsible to the popularly elected Legis*lature in respect of the Transferred Departments. The system was extended by the Act, -of 1935, so as to cover, with some important exceptions, the whole field of Govern*ment. But though the element of responsibility had been considerably enlarged, the basic constitutional position still was that the ultimate responsibility . for the administration of Indian affairs still vested in the United Kingdom Govern*ment. As the Indian Independence Act 1947, brought about a complete change in the government and transferred all responsibility for the government of the Indo-Pakistan sub-continent to the two new Dominions, it is necessary, to have a thorough grasp of the main principle which underlay the Act of 1935 in order to be able to appreciate the fundamental change that wag effected by the Act of 1947.

GOVERNMENT , OF INDIA ACT, 1935

Section 2 of the Act of 1935 asserted that all rights, authority and jurisdiction heretofore belonging to His Majesty the King, Emperor of India, which appertained and were incidental to the government of the territories in India for the time being vested in him, and all rights, authority and jurisdiction exerciseable - by him in or in relation to any other territories in India, were exercisable by His Majesty, except , in so far as it was otherwise' provided by or under the Act, or as it was otherwise directed by His Majesty, provided that any powers connected with the exercise of the functions of the, Crown in its relation with the Indian States was, if not exercised by His Majesty, to be exercised only by, or, by persons acting under the authority. of, His' Majesty's representative for -the exercise of those functions of the Crown. The said rights, authority and jurisdiction were to include any rights, authority or jurisdiction hereto*fore exercisable in, or in relation to, any territories in India by the Secretary of State, the Secretary of State-in* Council, the Governor-General, the Governor-General-in* Council, any Governor or any local Government, whether by any delegation from His Majesty or otherwise. Sections 5 and 6 of the Act contained provisions for the establishment of a Federation and .the accession of the Indian States to that Federation. Section 8 defined the extent of the execu*tive authority of the Federation and section 9 provided for the administration of the Federal affairs. The Council of Ministers to be set up under subsection (1) of sec*tion 9 was to aid and advise the Governor-General in the exercise of his functions, except in so far as he was required by the Act to exercise those functions or any of them in his discretion and the proviso to the subsection stated that nothing in that subsection was to be construed as preventing the Governor=General from exercising his individual judgment in any case whereby or under the Act he was required so to do. Subsection (3) of that section declared that if any question arose whether any matter was or was not a matter as respects which the Governor-General was under the Act required to act in his discretion or to exercise his individual judgment, the decision of the Governor* General in his discretion would - be final and that the validity of anything done - by the Governor-General was not to be called in question on the ground that he ought or ought not to have acted in his discretion or exercised his indi*vidual judgment. Under section 10 the Ministers were to be chosen or dismissed, by the Governor-General in his discretion. Section 11 enumerated some of the functions of the Governor-General which were. to be exercised by him in his discretion, while section 12 defined his special responsibilities in the discharge of which he was to exercise his individual judgment. Under section 13 the Secretary of State was, with the approval of the Parliament, to issue an instrument of instructions to the Governor-General but the validity of anything done by the Governor-General was not to be called in question on the ground that it was done otherwise than in accordance with that instru*ment. Where the Governor-General acted in his discretion or in exercise of his individual judgment, he was placed by section 14 udder the general control of the Secretary of State. Chapter III made provision for a Federal Legis*lature. The Governor-General had the power to summon, prorogue and dissolve the House of Assembly, one of the three constituents of the Federal Legislature. When a bill was passed by the chambers (the Council of State and the House of Assembly) it had to be presented to the Governor* General who . was in his discretion to declare either that he assented in His Majesty's

name to the bill or that he withheld assent there from or that he reserved the bill for the signification of His Majesty's pleasure, and a bill was not to become an Act unless and until within 12 months from the date on which it was presented to the Governor *General, he made known by public notification that His Majesty had assented thereto. An Act assented to by the Governor-General could be disallowed by His Majesty within 12 months from the date of the Governor-General's assent.

Under sections 42 and 43 the .Governor-General had the power to promulgate ordinances during the recess of the Legislature, and with respect to certain subjects at any time. In any such" case he acted either in his discretion or in exercise of his individual judgment. He could also enact Acts in relation to matters in which he was required to act in his discretion or in exercise of his individual judgment. By section 45 he had the power to assume to himself all or any of the powers vested in or exercisable by. any Federal body or authority if he was satisfied that a situation had arisen in which the government of the Federation could' not be carried on in accordance with the provisions of the Act, and in this matter he was to act in his discretion.

The position in the Provinces was similar to that at the Centre. The Governor was appointed, like the Gover*nor-General, by His Majesty by a Commission under the Royal Sign Manual. He was also to have a Council of Ministers and in certain specified matters was required to act in his discretion or in exercise of his individual judgment, and when so. acting he was subject to the general control of the Governor-General. He had the power to summon, prorogue or dissolve the Assembly. He could withhold assent to bills of the Provincial Legislature or, reserve them for the consideration of the Governor-General, who could either assent to the bill or withhold his assent therefrom or reserve it for the signification of His Majesty's pleasure thereon. Apart from this, His Majesty had the power to disallow Acts passed by the. Provincial Legislature. The Governor could either in his discretion or in exercise of his individual judgment promulgate ordinances during the recess of the Legislature, and with respect to certain sub*jects at any time. He could also enact Acts concerning matters, which were within his discretion or his individual judgment. If at any time he was satisfied that a situation had arisen in which the government of the Province could not be carried on in accordance with the provisions of the Act, he could by proclamation assume to himself all or any of the powers vested in or exercisable by any Provincial body or authority.

As the scheme underlying the Government of India Act was that of a federal pattern of government the Act had defined in List . I matters with respect to which the Federal Legislature could make laws, in List II matters with respect to which the Provincial Legislature could, make laws and in List III matters in "which the Federation and the Provinces, subject to certain restrictions, were both competent to make Laws. Residual powers were to be assigned by the Governor-General to the Federal Legislature or to the Provincial Legislature by, public 'notification. In the cases specified in section 99, the Federal Legislature could make laws having

extra-territorial operation.

Under section 108, unless the Governor-General in his discretion thought fit to give his previous sanction, no bill or amendment could be introduced into or -moved in either Chamber of the Federal Legislature which inter alia : (a) repealed, amended or was repugnant to any provision of any Act of Parliament extending to British India ; (b) repealed, amended or was repugnant to any Governor* General's or Governor's Act or any ordinance promulgated in his discretion by the Governor-General or a Governor ; and (c) affected matters as respects which the Governor- F General was required by the Act to act in his discretion. , °There were similar restrictions on the chambers of the Provincial Legislature.

Section 110 enacted that nothing in the Act was to be taken to affect the power of Parliament to legislate for any part of British India ; or to empower the Federal Legislature or any Provincial Legislature to make any law affecting the Sovereign or the Royal family or the sovereignty, dominion or - suzerainty of the Crown in any part of India or the law of British nationality ; or to make any law amending any provision of the Act.

Under section. 91 His Majesty could at any time by Order-in-.Council direct that a specified area .shall be an excluded area or, partially excluded area and on such direc*tion no Act of the Federal Legislature or the Provincial, Legislature was td apply to it unless the Governor by public notification so directed in his discretion.

To summarize, the position under the Act of 1935 was that though in matters in which the Governor-General .was not empowered to act in his discretion or in exercise of his individual judgment,. the Ministers could take action, which as a matter of. convention was not to be questioned by the Governor-General, there still remained a large sphere of action in which either the Governor-General did not consult the Ministers or he was not bound by their advice. In matters lying within that sphere he was responsible solely to the British, Government through the Secretary of State. Though he was appointed by the King, he was a nominee of the British Government and subject to the control of the Secretary of State who was one of the members of the British Cabinet, which was ultimately responsible to Parliament for the Government of India. The Indian Legislature was not a sovereign Legislature and limitations on its powers were not only imposed by the Act but the Governor-General could withhold assent to its legislation. It was wholly . incompetent to legislate on certain matters, and ` the United Kingdom Parliament had not only full authority specifically to legislate for British India but the laws made by that Parliament could extend to British India.

It was in fact in exercise' of this legislative sovereignty that the Indian Independence Act was passed. These restric*tions on legislation and the .external control on government had, therefore, to be removed if India was to become independent.

Now for a country to be independent it is necessary-

(1) that it should have a Legislature with' authority to legislate on all matters without any restriction, including matters relating to the making of a constitution ;

(2) no law made by it should be invalid by reason of its being repugnant to the law of any other country ;

(3) no other country should have any authority to legislate for it and no law made by any other country should extend to it ;

(4) its government should be responsible only to its own people or to itself and not to any outside authority ;

(5) if independence is to be granted by the law of `a dominant country, that law must provide 'for the freed country a provisional constitution including ' a sovereign Legislature and a government so that the withdrawal of control may not be followed by chaos and confusion, and if the constitution with which the freed country starts its independence is .a Federal Constitution, the Legislature of the country must accept limitations on its powers if it has also to function as the Federal Legislature..

Limitations on the sovereignty of a Legislature can be imposed by itself as well as by yin external authority if it is the creation of such authority. Thus the dominant country, which grants the constitution of an independent country to a dominated country, can by that constitution impose limita*tions on the powers of the Legislature of the independent country, provided it also leaves powers to that Legislature to remove those limitations. Limitations on the powers of a Legislature may also be imposed by itself, as for instance, where it has defined fundamental

rights or has converted itself into a Federal Legislature with defined powers. Even in the case of a country with a unitary constitution, its Legislature may impose future limitations on its power if it precludes itself from legislating on defined subjects or from making certain laws.

INDIAN INDEPENDENCE ACT

It is in the light of these principles that the Indian Independence Act has to be examined when it came into force on the midnight of the 14th August ' 1947. The principles mentioned above underline the whole scheme of that Act whose true scope and significance can be understood and appreciated- only if those principles are borne in mind. The scheme of that Act for our present purposes will be apparent from the following sections of the Act :-

The Governor-General of the New Dominions-

5. For each of the, new Dominions, there shall be a Governor-General who shall be appointed by His Majesty and shall represent His Majesty for the purposes of the govern*ment of the Dominion :-

Legislation for the new Dominions-

6. (1) The Legislature of each of the new Dominions shall have full power to make laws. for that Dominion, including laws having extra-territorial operation.

(2) No law and -no provision of any law made by the Legislature of either of the new Dominions shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of this or any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act, and the powers of the Legislature of each Dominion include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the Dominion.

(3) The Governor-General of each of the new Dominions shall. have full power to assent to any

law of the Legislature of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon of the suspension of the operation of laws until the significa*tion of His Majesty's pleasure thereon shall not apply to laws of the Legislature of either of the new Dominions.

(4) No Act of Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to either of the new Dominions as part of the. law off' that Dominion unless it is extended thereto by a law' of the Legislature of the Dominion.

(5) No Order-in-Council made on or after the appointed day under any Act passed before the appointed day, and no order, rule or other instrument made on or after the appointed day under any such Act by any United Kingdom Minister or other authority, shall extend, or be deemed to extend, to either of the new Dominions as part of the law of that Dominion.

(6) The power referred to in subsection (1) of this section extends to the making of laws limiting for the future the powers of the Legislature of the Dominion.

Consequences of the setting up of the new Dominions-

7. (1) As from the appointed day-

(a) His Majesty's Government in the United Kingdom have no responsibility as respects the

government of any of the territories which, immediately before that day, were included in British India ;

(b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable, by His Majesty at that date with respect to, Indian States, all obli*gations of His Majesty existing at that date towards Indian States or the rulers thereof, and, all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty,, grant, usage, suffer*ance or otherwise; and

(c) there lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obliga*tions of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date by His Majesty in or in relation to the tribal areas by treaty, grant, usage, sufferance or otherwise

Provided that, notwithstanding anything in paragraph 1(b) or paragraph (c) of this subsection, effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as is therein referred' to which relate to customs, -transit, and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are super*seded by subsequent agreements.

(2) The assent of the Parliament of the United Kingdom is hereby . given to the omission from the ' Royal Style and Titles of the words `Indiae Imperator' and the words `Emperor of India, and to the issue by His Majesty for that purpose of His Royal Proclamation under the Great Seal of the Realm.

Temporary Provision as to government of each . of the new Dominions-

8. (1) In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall; for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion, and reference in this Act to the Legislature of the Dominion shall be construed accordingly.

(2) Except in so -far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under subsection (1) of this section, each of the new Dominions and all Provinces and other , parts Thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935 ; and the provisions of that Act, and of the Orders-in-Council, rules and other instruments made thereunder, shall, so far as applicable, and

subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General, under the next succeeding section, have effect accordingly Provided that-

(a) the said provisions shall apply separately in relation to each of the new Dominions and nothing in this sub*section shall be construed as continuing on for after the appointed day any Central Government or Legislature common to both the new Dominions

(b) nothing in this subsection shall be construed as con*tinuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new -Dominions or of . any Province or other part thereof ;

(c) so much of the said provisions as requires the Governor-General or any Governor to act in his discretion or exercise his individual judgment as respects any matter shall cease to have effect as from the appointed day ;

(d) as from the appointed day, no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure, and no Provincial Act shall be disallowed by His Majesty thereunder ; and

(e) the powers of the Federal Legislature or Indian Legislature under that Act, as in force in relation to each Dominion, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion in addition to the powers exercisable by that Assembly under subsection (1) of this section.

(3) Any provision of the Government of India Act, 1935, which, as applied to either of the new Dominions by sub* section (2) of this section 'and the orders therein referred 'to, operates to limit the power of the Legislature of the, Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of sub* section (1) of this section, have the like effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature. ' „

Orders for bringing this Act into force-

9. (1) The Governor-General shall by order make such provision as appears to him to be necessary or expedient-

(c) for making omissions from, additions to, and adaptations and modifications of the Government of India Act, 1935, and the Orders-in-Council, rules and other ins*truments made there under in their application to the' separate new Dominions.

Interpretation, etc.-

19. (3) References in this Act to the Constituent Assembly of a Dominion shall be construed as references-

(b) in relation to Pakistan, to the Assembly set up or about to be set up at the date of the passing of this Act under the authority of the Governor-General as the Constituent Assembly for Pakistan.

Provided that nothing in this subsection shall be construed as affecting the extent to which representatives of the Indian States take part in either of the said Assemblies, or as preventing-the filling of casual vacancies in the said Assemblies, or as preventing the participation in either of the said Assemblies in accordance with such arrangements as may be made in that behalf, of representatives of the tribal areas on the borders of the Dominion for which that Assembly sits, and the powers of the said Assemblies shall extend, and be deemed always to have extended, to the making of provision for the matters specified in this proviso.

Thus by section 1 Pakistan became an Independent Dominion. Because it became a Dominion, it had to be connected by a legal link' with the United Kingdom and the other Dominions. Section 5, therefore, provided that there shall be for the Dominion a Governor-General, who shall be appointed by His Majesty and who shall represent His Majesty for the purposes of the government of the Dominion.

And because the status of Pakistan was that of an Independent Dominion, its Legislature' should possess .full power to make laws for that Dominion, including laws having extra*territorial

operation, laws limiting for the future the powers of the Legislature of the Dominion, and laws making provision for its constitution. None of its laws should, be void on the ground that it is repugnant to the past or future laws of another country ; and it should have full power to alter any provision of the -provisional constitution with which it started. There must also exist in that Dominion an authority competent to give assent to its laws and no law of the dominant . country relating to disallowance, suspension or reservation of laws should be applicable to, it. Nor should any law of the dominant country passed after the attainment of independence be applicable to it. These propositions were all recognised by section 6 of the Indian Independence Act which followed closely the scheme of the Statute of Westminster; subsection (1) of the former corresponding to section 3 of the latter, subsection (2) to subsection (2) of section 2, sub*section (3) to sections 5 and 6, subsection (4) to section 4 and subsection (6) to sections 7 and 8. Thus section 6 ' of the Act of 1947 practically, adopted every important provision of the Statute of Westminster. This section is the most important section in the Act because it gives to the Legislature of the Dominion full power to make any law that it likes, including laws making provision for the constitution, because laws- having extra-territorial operation which this section mentions as being .within the competence of the Legislature of the Dominion are often constitutional laws while laws repugnant to or repealing or amending the Government of India Act, 1935, or the Indian Independence Act itself, which are -mentioned in subsection (2) and laws limiting for the future the powers of the Legislature of the Dominion are necessarily constitutional laws. The words of the first subsection `the Legislature of each of the new Domi*nions shall have full power to make laws for that Dominion are thus wide enough to include .laws of every description. The exact meaning of the words `Legislature of the Dominion' that occur in this section in several places has been the subject* matter of some discussion before us, counsel for the respondent contending that these words are used in the Act- in several different senses. Any such possibility would, in " my opinion, entirely take away the artistic ,value and destroy the under*lying scheme of the Act, leaving it a jumble of confused ideas and full of inconsistencies and contradictions. Thus Mr. Chundrigar's contention that the words "Legislature of that Dominion" and "Legislature of either pf the new, Dominions" that occur in subsection (3) refer only to Federal Legislature and not to the Legislature of the Dominion which is mentioned in subsection (1) is entirely devoid of substance because, as I have pointed- out, the laws which .the Legislature. of the Dominion may make include in three places expressly and in the whole , of the section by necessary implication what are essentially constitutional laws. There can be no difficulty in understanding this section if it be borne in mind that the words `Legislature of the Dominion' are used in this section to indicate the future Legislature which was to make all laws. for the ,Dominion. When the Act. was passed, the Legislature of the Dominion was an abstract conception which was to be applicable to the future sovereign Legislature of the Dominion, including the Legislature that came into existence on the 15th August, 1947, without any limitations on its power. ' The section is a power-giving section and must be read as such to be intelligible in all its implications. The power to make all laws. was given to the Legislature of the Dominion while the power to give assent to those laws was given to the Governor* General, who thus became a constituent part of the Legislature and was to occupy the same position as the Sovereign in the United Kingdom in respect of the prerogative of giving or withholding assent.

The next important provision in the Act is section 8 which make's temporary provision as to the government of each of the new Dominions. The first subsection of that section provides that in the case of each of the new Dominions the powers of the Legislature of the Dominions shall, for the purpose of making provision as to the constitution of the Dominion, be exercisable, in the first instance, by the Constituent Assembly of that Dominion and that references in the Act to the Legislature of the Dominion shall be construed accordingly. The important point to remember about this subsection is that it refers to the powers of the Legislature of the Dominion which had been defined in section 6 and which included the power to make constitutional laws. The sub*section, however, provides that so far as the powers for the purpose of making provision as to the Constitution of the Dominion are concerned, they shall be exercisable in the first . instance by the Constituent Assembly which for the purposes of the Act shall be construed to be the first Legislature of the Dominion. The subsection is a machinery provision as the words in the marginal note to the section "temporary provision as to government of each of the new Dominions" show and not a power-giving .provision except in so far as it states that immediately on coming into force of the Act the Constituent Assembly shall, in the first instance, exercise the ~ powers of the Legislature of the Dominion. Another important point not to be overlooked in construing subsection (1) of section 8 is that the Constituent ,Assembly can make a provision as to the constitution of the Dominion only by "law". This is clear from the second subsection which says that the Dominion shall be governed in accordance with the ,,Government of India Act, 1935 "except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of ,the Dominion under subsection (1) of this section."

The second subsection to section 8 also provides a provisional constitution for' the new Dominions and that constitution is the Government of India Act, 1935, as adapted in exercise of the authority given to the Governor-General by section 9 of the Indian Independence Act. The subsection has five provisos, of which proviso (c) declares that Any provision of Government of India Act which requires the Governor-General or any Governor to act in his discretion or exercise his individual judgment shall cease to have effect ; and proviso (d) states that no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure nor any Provincial Act disallowed by His Majesty there under. Both these provisos were necessary deductions from the main provision enacted in section 7, that from the appointed day His Majesty's Govern*ment in the United Kingdom shall have no responsibility as respects the government of any of the territories which immediately before that day were included in British India and from proviso (b) to subsection (2) of section 8, that nothing in subsection (2) shall be construed as continuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new Dominions or of any Province or other part there*of. The principle that His Majesty's Government in the United Kingdom had no responsibility for and had relinquished all control over the government of the Dominion made necessary the enactment of section 7 which declares that from the appointed day the suzerainty of His Majesty over the Indian States lapses, as well as all treaties and agreements in force between His Majesty and any person having authority in the Tribal areas, and that words `Indiae Imperator' and `Emperor of India' which represented the sovereignty of the King over Indian territories shall be omitted from the Royal Style and Titles.

Under the temporary constitution provided by section 8 a Federal Legislature had to come into existence and some one from the appointed day had to - exercise its functions under that constitution. Proviso (c) to subsection (2) of section 8 therefore declares that the powers of the Federal Legislature or the Indian Legislature under the Government of India Act, 1935; as in force in relation to each of the Dominions, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion in addition to the powers exercisable by that Assembly under subsection (1) of that section. Thus the Con*stituent Assembly became on the 15th August 1947, not only the Legislature of the Dominion for the purposes of section 6, fully competent to make provision as to the constitution of the Dominion but also the first Federal Legislature under the scheme outlined in the Government of India Act, 1935, which with necessary adaptation came into force on the same date. Accordingly the position of the Constitutent Assembly is that it is the Legislature of the Dominion when it makes laws for the constitution of the Dominion and the Federal Legislature when it functions under the limitations imposed upon it by the Government of India Act, 1-,35. This position may be explained in the form of a mathematical proposition and that is this :-

(1) Constituent Assembly minus the fetters to which it is subject as a Federal Legislature is equal to the Legislature o1 the Dominion ; and

(2) Constituent Assembly plus the fetters to which it is subject under the Government of India Act, 1935,- is equal to the Federal Legislature.

This situation is, clearly brought out in subsection (3) of section 8 which says that any provision of the Government of India Act, 1935, which, as applied to either of the new ` Dominions by subsection (2), operates to limit the powers of ; the Legislature of that Dominion shall, unless and until other 5 provisions made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of subsection (1) of the section, have the like effect , as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature. Thus subsection (3) recognises the principle I have mentioned earlier that the Legislature of a Dominion may impose limitations on it for the future. The Constituent Assembly had under subsection (1) of section 8 the authority to exercise all the powers given to the Legislature of the Dominion by section 6 but because that Assembly had also to function as the Federal Legislature, the provisions of the Government of India Act which operated to limit the powers of the Legislature of the Dominion were to have the same effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legis*lature. In other words, the Constituent Assembly by functioning, as the Federal Legislature had by law imposed future limits on its power, but under section 6 it had full authority to remove those fetters from itself at any time after the midnight of ' 14th August, 1947, and this position was recognised

expressly both by subsection (2) and subsection' (3) of section 8, to indicate which the former uses the words "excepting in so far as other provision is made by or in accor*dance with a law made by the Constituent Assembly of the Dominion", and the latter the words "unless and until other provision is made by or in accordance with a lave made by the Constituent Assembly of the Dominion in accordance with the provisions or subsection (1) of this section". Thus Pakistan became independent because (I) in law, on the midnight of the 14th August, 1947, if the Constituent Assembly made a law and the Governor-*General assented to it, it could secede from the Common*wealth and become a completely independent State, its citizens owing no allegiance to the Crown and not being British subjects ; and ,

(2) it was not subject, as Canada and Australia were, to any disability to change its constitution. It could have any constitution or form of government she liked, having no connection with the Commonwealth or the Crown or the Governor-General as the representative of the Crown.

But so long as it did not secede from the Commonwealth, it was a Dominion because

(a) it was linked with the Commonwealth by allegiance to a common Crown ;

(b) its citizens were internationally British subjects ;

(c) its laws needed the assent of His Majesty or his repre*sentative, the Governor-General ;

(d) the King's prerogative existed here except to the extent that it was utilized by parliament in the Indian Inde*pendence Act because the King had placed .his ' prerogatives and interests at the disposal of Parliament only "so far - as concerned the matters dealt with by the bill"; and

(3) it could make any law it liked, constitutional or other*wise, and no law of the dominant ,country was to extend to it.

LACUNA

There is, however, one obvious lacuna in the Indian Inde*pendence Act which is otherwise a masterpiece of draftsman*ship-it contains no express provision as to what was to happen if the Constituent Assembly did not or was unable to make a constitution,. or resigned en bloc, or converted itself into a perpetual Legislature. It may be that any such contingency was beyond the imagination of the authors of the Act, but the more probable reason seems to be that they thought that any such contingency had .ceased to be their headache. and was purely a concern of the "independent" Dominion. So long, as the responsibility for the government of the country was that of the Government in London, a provision to meet such a situation appeared in the constitution, but that responsibility having been disclaimed by the Indian Independence Act, the necessity for relating any such provision also disappeared from the constitution. If a breakdown came, it seems to have been thought, it was for the Dominion itself to reset the tumbled down machinery. A third explanation has been suggested by the learned , counsel for the appellants and that is that section 5, in view of its wide terms, was supposed to contain a solution of the difficulty .by the exercise by the Governor-General of his prerogative powers as representative of the. King.

ROYAL ASSENT

We are now in a position to approach the , question whether the Sind Chief Court had the jurisdiction to issue the writs in question. The point sought to be made on behalf of the appellants is, that section 223-A of the Government of India Act, 1935, which gives to a High Court the power to issue writs in the nature of habeas corpus,- mandamus, prohibition, quo warranto and certiorari and which was inserted in that .Act by the Government of India (Amendment) Act, 1954, is not a part of the law because the amending Act did not receive the assent of the Governor-General as required by subsection (3) of section 6 of the Indian Independence Act. The answer to the question raised depends upon the true construction of .that subsection but before I come to that it is necessary briefly to refer to the English Constitutional Law and the law in force , in the Dominions on the Subject.

ASSENT IN BRITISH AND DOMINION LEGISLATION .

The necessity of the King's assent to all legislation in England has its origin in a remote period in British history. Not only was Kingship the great central institution around which the English constitution grew, but monarchy has always been the most deeply rooted and enduring part of that constitution and the whole course of English constitutional history is a story of the ever varying concept of King , the Crown, the Sovereign and His or Her Majesty. Though these words often represent-a political abstraction and are not necessarily significant- of any judgment or discretion to be exercised by the person who for the time being happens to occupy the throne, nevertheless they hide in themselves a .political doctrine of profound practical importance which must be thoroughly understood in order to comprehend the essential characteris*tics , of democractic institution of the British pattern. Kingship was not imported in Britain from the forests of Germany but is an essentially indigenous institution which first came into importance by the domination of the Heptarchy by Wessex. The emergence of a single kingship and his `Council of wise men' called the `Witenagernot' lies at the root of present political institutions and the theory of the Royal prerogative. The King issued his orders with the advice of the `witen'; his acts were limited by the customs of the people ; and though he was the supreme judge, the `witen' sat with him when he held his supreme court of justice.

Though the British people were jealous of the power of the King, and they even beheaded one, except for a few brief periods they never ceased to associate his name with legisla*tion, however strong and independent the Parliament became. He was always an integral part of Parliament and even now the enacting part of every Act begins with the words "Be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same." The power to give assent to bills or withhold it therefrom continued to remain for a long time one of the personal prerogatives of the King which he could use to veto bills passed by Parliament, and though the last exercise of this power was in the time of Queen Anne, several eminent constitutional. writers referred to this reserve power of the King to control legislation as recently as 1913 in the contro*versy that arose over the passing of the Irish Home Rule Bill, Professor Dicey, the celebrated constitutional writer, writing to `The Times' in the course of that controversy declined to enter on the academic enquiry whether during that political crisis the King could rightly or wisely refuse assent to the Home Rule Bill after it should for a third time have been passed by the House of Commons and rejected by the House of Lords but he agreed with the following words of Burke :-

"The King's negative to bills is one of the most undisputed of the royal prerogatives, and it extends to all cases whatso*ever. I am far from certain that if several laws which I know had fallen under the stroke of that sceptre the public would had had a very heavy loss, but it is not the propriety of the exercise which is in question. It repose may be the preservation of its existence

and its existence might be the means of saving the constitution itself on an occasion worthy of bringing it forth.

Mr. Disraeli in 1852 expressed the view that the Crown's right to refuse assent 'to legislation was still outstanding and was not an empty form. "It is not difficult", he said, "to con*ceive an occasion when, supported by the sympathies of a loyal people, its exercise might defeat an unconstitutional ministry and a corrupt parliament." Frederic Austin Ogg in his `English Government and Politics' asserts that the royal assent, though given indirectly and perfunctorily, is indispens*able to legislation and then reproduces the following graphic account of the ceremony from Sir Courtenay Ilbert's book 'Parliament':-

"The assent is given periodically to batches of bills, as they are passed, the largest batch being usually at the end of the session. The ceremonial observed datos from Plantagenet times, and takes place in the House of Lords. The King is represented by Lord Commissioners who sit in front of the throne on a row of armed chairs arrayed in scarlet robes and little cocked hats . . . . . .At the- .bar of the House stands the Speaker of the House of Commons who has. been sum*moned from that House. Behind him stand such members of the House of Commons as have followed him through the lobbies. The Clerk of the House of Lords reads out in sonorous voice the commission which authorises the assent to be given. The Clerk of the Crown at one side of the table reads out the title of each bill. The Clerk of the Parliament on the other side making profound obeisance’s, pronounces the Norman French formula by which the King's assent is signified : The Little Peddington Electricity Supply Act. (Le Roy le Veult.)

Between the two voices six centuries lie."

Mr. Chundrigar in all seriousness raised what appeared to me to be a novel contention that royal assent is not indispens*able even in the United Kingdom legislation, and in this connection he drew our attention to some episodes in English history when the country had to carry on the business of legislation without a King, and referred to the following passage from Anson's "Law and Custom of the Constitution", Fifth Edition, p. 333

"3. We have still to consider the action of the Crown as a party to legislation, and looking back at the history of this matter, and noting, as we have had to do, the large, share of legislative power which the Crown once possessed, we are apt to forget that laws have been passed to which no royal assent was given ; we are apt to forget the .episode of the Commonwealth ; the restoration of Charles 11 ; . the resolu*tion of the Lords and Commons that the Crown, should be offered, on the abdication of James II, to William and Mary ; the strange conclusion at Which Lord Chancellor Thurlow arrived during the insanity of George III, in 1788, that he could put the great

seal to a Royal Commission, empowering him to give the royal assent to Acts of Parliament."

He, however, omitted to read the very next passage at page 334 of the book which contains the following explanation of this anomalous position :-

"We may leave out of consideration the make-shifts to which constitutional lawyers may be reduced when the throne is vacant or its occupant insane. All that can be done under such circumstances is to supply, as soon as may be, the deficiency in the constitution. Apart from catastro*phies which need to be dealt with as may best suit the circumstances of each case, we may safely join with the second Parliament of Charles II in holding that there is no truth in the `opinion that both Houses of Parliament, or either of them, have a legislative power without the King', an opinion the expression of which rendered its holder liable, by the same statute, to the penalties of a praemunire."

As far therefore as English law is concerned, there has never been, and cannot be any doubt that a bill cannot become a law in the absence of the royal assent, and the House of Lords case in Stockdale v. Hansard (11839-9-A & E 1) expressly rules that no Resolution of the House of Commons is a law unless it is passed by the other House and receives the royal assent. There is a South African case, Ndlwana v. Hofmeyer (1937 A D 229) com*menting upon which at page Iii of his Introduction to Dicey's `Law of the Constitution' Wade says :-

"The Court refused to regard the procedure of Section 152 as binding and held that the legislature could pass any measure by joint or separate sessions at their option provided that the bill received the royal assent, it was binding on the Courts who would accept the King's Printer's copy as conclusive evidence."

In that case Stratford A. C. J. had thus stated the point --

"This is not a case where one of the constituent elements of Parliament has not functioned. The contrary is clearly to be inferred from the royal assent and promulgation. A resolution of one of the Houses of Parliament, in an example of such a case : it is not an Act of Parliament, and a court of law would not enforce it." '

The assent of the King is also necessary to all Dominion legislation, and before their independent status was recognised by the convention of non-interference, the Governors-General of the Dominions utilized their reserve powers to withhold assent if as representatives of the British Government they thought that the legislation in question was contrary to imperial interests. A similar power rested with the Governors of Colonies and Possessions. But before the Imperial Con*ference of 1926 the Governor-General's power to veto Dominion legislation had practically fallen into disuse and its removal was not therefore insisted upon at that conference. Thus the Statute of Westminster, 1931,, which recognised the independent status of certain Dominions, did not, except in relation to Merchant Shipping and Colonial Admiralty . Courts, contain any provision for the removal of this legal restriction ; but this was not because these restrictions were not in law limitations on their sovereignty but because they had not since long been used and it was mutually understood that they shall not in future be used. Of course under sub*section (2) of section 2 of that Statute these limitations could be removed by the Dominion concerned because under that subsection no law and no provision of any law made after the commencement of the Statute by the Parliament of a Dominion could be void or inoperative on the ground that it was repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act, and the power of the Parliament of a Dominion were to include the power to repeal or amend any such Act, order, rule or regula*tion in so far as the same was a part of the law of the Dominion ; and the reason that they 'have not yet been so removed is that in practice they had become inoperative and no Governor-General who is appointed and' is liable to dis*missal at the instance of the Dominion concerned call now possibly think of bridging them into use, whatever his 'personal view or inclination may be.

Mr. Mahmood Ali was obviously labouring under some misapprehension when he attempted to apply to the present case the principle that the- right to withhold assent exists only where there is a power to legislate and that where the latter does not exist the former cannot. Stated as an abstract pro*position, the principle is correct but I do not see how it is applicable here, Mr. Mahmood Ali read long passages from Lord Mansfield's judgment in Campbell v. Hall (XX How-St. Tr. 239) which lays down no more than that where the King has surrendered his prerogative of legislation to a popular Assembly in a conquered country, he himself cannot legislate. That case is considered by constitutional lawyers as an authority for the deduction that freedom once granted cannot be taken back. But how can that principle be applied to the present case ? The Indian Independence Act does not take away anything which had been previously granted.. On the contrary, it confers full freedom on the Dominion and gives to the legislature-of the Dominion powers which under the Act of 1935 it was incom*petent to exercise. If Mr. Mahmud Ali assumes that the Crown had parted with the power to withhold its assent to legislation in India, he is clearly mistaken because under the Act of 19:5 the Governor-General and the Governors were entitled not only to give assent to bills in His Majesty's name but also to withhold assent therefrom in their discretion. It is, therefore, wholly incorrect to . suppose that the right to control legislation by withholding assent did not exist before the Indian Independence Act came into force and that that Act, if it-retains the Governor-General's power to withhold assent, has the effect of taking away something which had previously been granted. The Crown

is a constituent part of a Parlia*ment in the United Kingdom, and of all. Dominion Legislatures: either -because it is expressly so stated in the constitutional statutes or because the Crown appoints the Governor General who is empowered to give or withhold assent to the legislation of the Dominion. The same was the position under the Act of 1935, where the King's representative, i.e., the Governor-General, was a part of the Federal Legislature. It is this common restriction that exists on the Dominion legis*lation which subsection (3) of section 6 intended to enact when it provided that the Governor-General of the Dominion shall have full power to assent in His Majesty's name (includ*ing the power to withhold assent) to the laws of the Legis*lature of the Dominion.

On this part of the case Mr. Chundrigar's argument was that the right to withhold assent to bills was retained in the adapted Act of 1935 because it had existed in the original Act and that it was not a necessary deduction from the provisions of subsection (3) of the Act of 1947 ; but in adopting this position he contradicted his other proposition, vehemently urged, that the right to withhold assent to bills is an arbitrary control on legislation and therefore a restriction on the legislative sovereignty of ' the Constituent Assembly. If the power to withhold assent derogates from the legislative supremacy of the Legislature of the Dominion, i.e., the Constituent Assembly, it is obvious that sections 32, 75 and 76 of the adapted Act of 1935 which still retain for the Governor-General the right to withhold assent are incompatible with the otherwise limited legislative sovereignty of the Federal Legislature whose power also are exercised by that Assembly, and that such restrictions being inconsistent with the conception of full freedom could only be retained or inserted if they were authorises and followed from the provisions of subsection (3). The restrictions are, therefore, illustrative of the constitutional position that assent to the Dominion legislation by the Crown or its representative is indispensable and has in no instance ever been dispensed with by the Crown. Elsewhere in this judgment I have pointed out that Mr. Chundrigar' contention that the right to withhold assent is an effective restriction on the legislative activity, of a Dominion Parliament is wholly unfounded. and that no Governor-General o Governor of a Dominion can continue to occupy his office he does not act on the advice of the Ministry to assent to an important legislation: This is certainly the position under the adapted Government of India Act because the appointment and dismissal of the Governor-General being a matte on which the advice of the Dominion Government would invariably be accepted by the Crown, it is impossible for the Governor-General to withhold assent from a bill to which the Ministry advises him to assent. Mr. Chundrigar urges the in the case of the Constituent Assembly the , position .: different because the Assembly has no Cabinet and no Prim Minister, but he forgets the basic position that the Constituent Assembly as also the Federal Legislature and virtually choose a Cabinet and a Prime Minister and that in case of a difference between the Governor-General and the Constituent Assembly the Assembly as the Federal Legislature can always have the Governor-General recalled.

Equally incorrect is the contention of Mr. Chundrigar that the requirement as to assent in the other constitutions is the creation of the statutes granting those constitutions. The true position is that the provisions of those statute relating to assent do not create in the Crown or in its

represen*tative a new right, but confirm an existing right and merely provide the manner in which that right is to be exercised. Thus if the right to withhold assent to Dominion ., legislation is inherent in the Crown and the statute that legislates o that right merely says that a bill after it has been passed by the popularly elected House or Houses shall be presented for assent to .the Governor-General, who will give assent to that bill or withhold it there from, the statute does not create the right to withhold assent but merely describes the manner in which that right is to be exercised. Similarly the provision in the Government of India Act which give to the Governor General the right to withhold assent from legislation do no confer on, or create a new right in, the Crown ; on the con*trary, they implicitly recognise such right and regulate the manner in which it is to be exercised. It is for this reason that the fiction of making the Crown a constituent of the Legislature is resorted to, because neither the King nor hi representative, the Governor-General, is a member of the Legislature like other members. The King or the Governor* General is a part of the Legislature only in the sense that all bills passed by the Legislature are presented .to him, so that he may exercise his right of giving or withholding assent. Thus subsection (3) of section 6 produces the same result by giving to the Governor-General full power to assent in His Majesty' name to any law of .the Legislature of the Dominion. It makes the Governor-General a constituent part of 'the legis*lature inasmuch as the right to. give assent necessarily includes in it the right to withhold assent. Every bill must therefore be presented to him to provide him an occasion to exercise that right, and unless a bill is so presented a constituent par of the legislature does not function and the proposed legisla*tion does not become law. There is, therefore, no distinction between those constitutions where the Crown is a constituent part of the legislature and the Legislature of the Dominion o Pakistan whose 'functions are being exercised by -the Constituent Assembly and to whose legislation assent is enacted by subsection (3) of section 6 as a necessary condition.

Let us now revert to subsection (3) of section 6, the true question on which the decision of the case depends being whether the first part of that subsection which says that the Governor-General of each of ' the new Dominions - shall have full power to assent in His Majesty's name to any, law of the legislature of that Dominion has the effect of enacting the necessity of assent of the Governor-General to all laws made by the Legislature of that Dominion and whether the Constitu*ent Assembly when acting under subsection (1) of section 8 is a Legislature of the Dominion within the meaning of subsec*tion (3) of section 6. It should be noticed that the marginal note to section 6 is . `Legislation for the New Dominions', which means that the provisions relating to the assent of the Governor-General relate to legislation by the Legislature of the Dominion. If the power to assent includes in it the legal right to withhold assent, which it does as held by Muhammad Bakhsh, J., then the subsection must be held to mean that the Governor-General has the right to withhold' assent to any law of the Legislature of the Dominion. The plain meaning of this provision is that, as representative of His or Her Majesty, the Governor-General has full power of himself giving assent to laws which otherwise, on the common law doctrine that a law made by the legislature of a Dominion is not law unless it receives the royal assent, would require the royal assent. If the law gives to a person the power to do a thing, the necessary implication is that; he heed not exercise that power. and that he has the right of refusing to exercise such power A power is not a duty or an obligation and it is only if the words "shall have full power to assent" are read to mean "shall be under an obligation to

assent", that the discretion to withhold assent can disappear, though even then the legal necessity of a formal assent would remain. Mr. Chundrigar has referred to section 32 of the Interpretation Act, 1889, but that section in no way supports him because it not only draws the distinction between a power and a duty but also declares that where a power is given to a person to do a certain thing, that power may be exercised . from time to time. In the debates on the Indian Independence Act in the House of Commons, Mr. Molson speaking on clause (d) of the Proviso to subsection (2) of section 8 suggested that under that clause instead of His Majesty disallowing legislation on the advice of the Secretary of State for India, it would under the Act be done by the Governor-General. In replying to this, the Attorney-General said:

"The second point raised by the Honourable Member was in regard to the provision in clause 8 (2) (d) as to reserva*tion. That corresponds in the case of the Provincial Legis*lature with the provisions under clause 6 (3) with regard to the reservation of laws passed by the Central legislature. That was dealing with reservation until His Majesty's pleasure was known and that was a form of reservation which enabled the Governor-General to withhold assent to a Bill until His Majesty could be advised by the Government of the United Kingdom about the matter. That provision would have been a wholly inappropriate one to retain and obviously would have involved a derogation from the sovereignty we are now giving to the Dominion. No doubt, the Governor-General will provide immediately, as the eventual Constitution will have to provide that there will be some sort of power of that kind vested in the Governor-General or provided for in the provisions of the new Constitution, but that will be a matter for the new Constituent Assembly." (440 H. C. Deb., 5th Series 1946*47, column 122).

It is quite clear from these observations of the Attorney-General that in place of the provisions which did away with reservation and disallowance by the insertion of clause (d) some sort, of control on the Provincial Legislature was con*templated to be given to the Governor-General in the provisional constitution. Such. control was actually given by providing in section 75 of the adapted Act of 1935 that the Governor shall declare either that he assents to a bill or that he withholds assent therefrom or that he reserves the bill for the consideration of the Governor-General, as well as by providing in section 76 that -when a bill is reserved by a Governor for :he consideration of the Governor-General, the Governor-General shall declare that he assents in His Majesty's name to the bill or that he withholds his assent therefrom. In the same way section 32 of the . adapted Government of India Act gives to the Governor-General the power to with*hold assent from a bill. This power to withhold assent could, however, be given only if it was implied in the provision in subsection (3) of section 6 that the Governor-General of each of the new Dominions shall have full power to assent in His Majesty's name to any law of the; Legislature of that Dominion. The position, therefore, is that the words of the provision in question give to the Governor-General the power to with*hold assent ; the sponsors of the Indian Independence Bill thought that this power was implied in this provision ; and the experts who adapted the Government of India Act, 1935, took this provision to mean that the power to withhold assent is implied in the power to give assent. If the power to withhold assent had not been included in this provision, its insertion in sections 32, 75 and 76 of the adapted Government

of India Act would have been entirely without authority.

I have already pointed out that the words "the powers of the Legislature of the Dominion", in subsection (1) of section 8 refer back to the powers of the Legislature of the Dominion defined in. section 6, which the Constitutent Assembly was to exercise in its capacity of Legislature of the Dominion pertinent reference to section 6 is to be found in the Attorney-General's speech in column 118 of 440 H. C. Deb. 5th Series, 1946-47 ; where referring to section 8 he said that that section was to provide for a temporary constitution and that subsection (1) of section 8 gave the necessary legislative power to a Constituent Assembly and attracted the provisions of clause 6. This .could only mean that section 6 was the power-giving section while subsection (1) of section 8 made those powers exercisable by the Constituent Assembly. If this relation of the two provisions was correctly stated by the. Attorney-General, as I think it was, it could only mean that the provision of section 6 were applicable to the powers given to the Constituent Assembly by sub*section (l) of section 8 and that the restriction as to the; Governor-General's assent to legislation by the Legislature of the Dominion, whatever may be the character of that legislation was applicable when the Constituent Assembly exercised the powers of the Legislature of the Dominion! under subsection (1) of section S. That subsection does not say that the constitution of the Dominion shall be made by then Constituent Assembly. It assumes that the powers of the Legislature of the Dominion include the power to make provision as to the constitution of the Dominion, declares that those powers shall be exercisable in the first instance by the Constituent Assembly and directs that references in the Act to the Legislature of the Dominion shall be taken as references to the Constituent Assembly. It was contended both byl Mr. Chundrigar and Mr. Mahmud Ali that the Constituent Assembly, though it exercises the powers of the Legislature of the Dominion, is not itself the Legislature of the Dominion. This to my mind is tantamount to a refusal to read sub*section (1) of section 8, the only purport of which can be that the Constituent Assembly shall be the first Legislature of the Dominion, competent to exercise all the powers give to that Legislature by section 6 including the power to make laws as to the constitution of the Dominion. Learned counsel for the appellants therefore rightly contended that the plain words of subsection (1) of section 8 that "reference in this Act to the Legislature of the Dominion shall be construed accordingly" have the effect of substituting the Constituent Assembly for the words "the Legislature of each of the new Dominions" in subsections (1) and (3) of section 6. That being the position, there can be no escape from the conclusion that the Governor-General's assent to the laws made by the Constituent Assembly is as necessary as his assent to any future Legislature of the Dominion brought into existence by the Constituent Assembly to replace itself. It was conceded before us that if the Constituent Assembly dissolved itself after creating another Legislature of the Dominion and everything else remained as it is today, the provisions of section 6 would be applicable to such Legislature, including the provision in subsection (3) relating to the assent of the Governor-General, and if that be so, I do not see why the provisions of that subsection should not have been applicable to the Constituent Assembly itself when under the express words of subsection (1) of section, 8 it became the Legislature of the Dominion on the coming into force of the, Indian Independence Act.

The necessity of the Governor-General's assent to legislation-is, as I have already said, based on a well-understood principle which is known to every constitutional lawyer conversant with constitutional practice in the United Kingdom and the Dominions. Legislation is the exercise of a high prerogative power and even where it is delegated by statute or charter to a Legislature, in theory it is always subject tai assent whether that assent be given by the King or by a person nominated by, the King. In the British system there; is not a single instance to the contrary. That necessity was, enjoined in the case of Pakistan so long as it continued to be, a Dominion, though it was open to that Dominion, if the Governor-General gave assent to a bill of secession to repudiate its Dominion status. The force of the words `full power to assent' would be realised if a situation arose where; a bill of secession came up before the Governor-General for assent. So far as His Majesty was concerned he had given full powers to his Governor-General to assent to any legisla*tion of the Dominion ; but the Governor-General; though he was a respresentative of the King, was also the representative of the Dominion in the sense that he was a ,person in whom the majority patty of the Assembly had confidence. He, would, therefore, have no hesitation, and would also have the requisite authority to give assent. If, however, he withheld assent, his immediate recall by His Majesty would have been successfully insisted upon by the Assembly and the assent could then have been obtained from his successor.

Confused and clearly contradictory, though they. are said to be alternative, arguments have been addressed to us as to the construction of this subsection which consists of two distinct parts, the first declaring that the Governor-General of the Dominion shall have full power to assent in His Majesty's name to any law of the Legislature of the Dominion and the second saying. that so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of .laws until the signification of His Majesty's pleasure thereon shall not apply to the laws of the Legislature of the Dominion. I have already shown that if the power to assent includes, as in my opinion it does, the power to withhold assent, then the true import of the first part ,trust be that the . Governor-General, since he has the power to withhold assent, is a necessary part of the Legislature in precisely the -same sense as under the old Government of India Act he was a constituent part of the Federal Legislature because no bill could become law unless he gave his assent thereto. The argument of Mr. Chundrigar and Mr. Mahmud Ali is that the word `law' as it first occurs in the subsection means a bill to which the assent of .the Governor-General has been given and which has thus become a law. In this connec*tion the language of the subsection is compared with clause (d) of the proviso to subsection (2) which speaks of bills and .not laws. No inference. from this comparison can, however, be drawn because clause' (d) uses the language of the Govern*ment of India Act when it refers to the reservation of the Provincial bills for the signification of ' His Majesty's pleasure, or when it refers to an assented bill as a `Provincial Act'. The word `law' in the subsection has been used in a general sense, namely, any proposed legislation which has not as ye t~ received the assent of the Governor-General ; otherwise the subsection would lead to this absurd result that a legislative proposal which has already received the assent of the Governor-General would need a second assent. The assent of the Governor-General in respect of a proposed legislation, which by the Government of India Act is described as a bill, is needed only once and it is ridiculous to say that the Governor-General of the 'new Dominion shall have full power to assent to any bill to which assent has already been given by

him..

The second contention of Mr. Chundrigar is that when this subsection says that the Governor-General of the Dominion shall have full Dower to assent in His Majesty's name to any law of the Legislature of the Dominion, it empowers the Governor=General to give assent only in cases, which are mentioned in the second part of the subsection, namely, where a law may be disallowed by His Majesty or reserved for the signification of His Majesty's pleasure or suspended until the signification of such pleasure. This con*tention has to be rejected for ,several ,reasons. Firstly, on that construction the first part of the subsection becomes wholly superfluous, because it is undoubtedly within the competence of the Legislature of the Dominion to say under subsection (t) of section 6 that to a particular' law the provisions of any Act of the Parliament of the United Kingdom relating to disallowance, reservation or suspension shall not apply ; secondly, the plain terms of the first part of the sub*section do not limit its application to the cases specified in the second part ; and thirdly, the words `reservation of laws' cannot possibly relate to laws which have already received the . assent of the Governor-General. When asked to paraphrase the first part of the subsection in order to give to it the meaning contended for, Mr. Chundrigar attempted the following substitution for it : the powers of the Governor* General to assent in His Majesty's name to any law of the Federal Legislature, which previously were not full, shall hereafter be full in the. sense that , the, Governor-General shall be competent to give his assent in His Majesty's name in cases where a law could be disallowed by His Majesty or reserved for the signification of His Majesty',s pleasure or suspended until the signification of such pleasure. Comment on this strained paraphrase is superfluous. There is no warrant for substituting `Federal Legislature' for `Legislature of the Dominion' ; nor for limiting the operation of the first part only to cases contemplated in the 'second part ; and the words used are clearly inapplicable to `reservation' of laws.

Our attention was drawn to some Acts which provide for disallowance, reservation or suspension, but none of these Acts contemplates reservation after the proposed legislation has been assented to by the Governor-General or the Governor of a Dominion or a Colony. I have already pointed out that the second part of the subsection corresponds to sections 5 and 6 of the Statute of Westminster which specifically refer to the Merchant Shipping Act and the Colonial Courts of Admiralty Act. Section 735 of the Merchant Shipping Act, 1894, enacts :-

"The Legislature of any British Possession may by any Act or Ordinance, confirmed by Her Majesty in Council, repeal wholly or in part, any provision of this Act relating to ships registered in that Possession ; but any such Act or Ordinance shall not take effect until the approval of Her Majesty has been proclaimed in the Possession or until such time thereafter as may be fixed by the Act or Ordinance for the purpose."

It is obvious that the intention of this section is that even where an Act or Ordinance of any British Possession has received the assent of the Governor-General or the Governor, it shall not be law until it has been confirmed by . Her Majesty in Council and Her Majesty's approval of that Act or Ordinance has been proclaimed in the Possession. Similarly, section 736 of that Act says :-

"The Legislature of a British Possession may, by any Act or Ordinance, regulate the coasting trade of that British Possession, subject inter alia to the condition that the Act or Ordinance shall contain a suspending clause providing that the Act or Ordinance shall not come into operation until Her Majesty's; pleasure thereon has been publicly signified in the British Possession in which it has been passed."

Though the language used in' this section is different from that of section 735, the principle underlying both of them is the same, inasmuch as section 736 instead of requiring confirmation and its proclamation enjoins on the Legislature concerned that the Act or Ordinance itself shall contain a suspending clause providing that it shall not come into force until Her. Majesty's pleasure thereon has been publicly signified. Thus though subsection (3) of section (6) may apply to section 736, it does not in terms apply to confirmation, or approval mentioned in section, 735.

Section 4 of the Colonial Courts of Admiralty Act, 1890, relates to reservation of Colonial laws for Her Majesty's assent. It provides that certain Colonial laws shall, unless previously approved by Her Majesty through a Secretary of State, either be reserved for the signification of Her Majesty's pleasure thereon,- or contain a suspending clause providing that such law shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British Possession in which it has been passed. Here again the section relates . to approval, reservation and suspension, and though the second part of subsection (3) may be applicable to suspension, it does not . apply to approval and is clearly inapplicable to reservation in the sense which Mr: Chundrigar and Mr. Mahmud Ali attach to it, because the section clearly enjoins the assenting authority not to assent to it but to reserve it for the signification of Her Majesty's pleasure. Similarly. the reference to section 1 of- the Colonial Evidence Act, 1843, is beside the point because what that section enacts is

"No law or ordinance made or to be made by the Legislature of any British colony for the admission of the evidence of any such persons as . aforesaid in any Court or before any magistrate within any such colony shall be or be deemed to have been null and void or invalid by reason of any repugnancy or supposed repugnancy "of any such enactment to the law of

England, but every law or ordinance made or to be made by any such Legislature as aforesaid, for the admission before any such Court or magistrate of the evidence of any such .persons as aforesaid on any con*ditions thereby imposed, shall have such and the same effect, and shall be subject to the confirmation or disallowance of Her Majesty is such and the same manner, as any other law or ordinance enacted for any other purpose by any such colonial Legislature",

but subsection (3) of section 6 contains no reference to con*firmation.

It will be apparent from what I have said above that it is a contradiction in terms to speak of the Governor-General as giving assent to a proposed legislation which has already received his assent, and unless this impossible position be accepted, the construction of this subsection put forward for the respondent, namely, that the word `law' where it first occurs in subsection (3) refers to cases where the assent of the ' Governor-General has already been given, cannot be accepted. Again, the- word `law' has to be distinguished from the word `Act' because while the first part of the subsection says that the Governor-General shall have the power to assent to any law, the second part speaks of an Act relating to disallowance, reservation or suspension. This clearly means that the second part of the subsection applies to Acts relating to disallowance, reservation or suspension and that the word `Act' there is used in a sense different from that in which the word "law' has been used in the first part, namely, in the sense of a bill or legislative proposal which has been passed by the Legislature but which has not received the assent of the Governor-General. Faced with this difficulty Mr. Mahmud Ali shifted his position and asserted that the word `law' in the first 'part of the subsection means an Act or Ordinance. But any such construction would lead to the absurd result that an Ordinance or Act which has been passed by, or received the assent, of the Governor-General would need a second assent by him. Thus none of the various constructions suggested on behalf of the respondent fits in with the plain language of the subsection, which shows that the word "law" in the first part of the subsection is used in a general sense and not in the sense of a bill which has already received the assent of the Governor-General. Evidently the words "so much of any Act" used in the second part of the subsection were intended to refer not. only to those provisions of the Act of 1935 which had required the Governor-General to reserve . bills for the signification of His Majesty's pleasure or enabled His Majesty to disallow Acts, but also to those provisions of the other Acts of Parliament of the United Kingdom which related to reservation, disallowance or suspension of laws in the Dominions, Colonies or Possessions. The power to withhold assent has not been specifically mentioned in subsection (3) and the subsection, as it stands, cannot be taken as enacting that the Governor-General shall not have the power . to with*hold assent to legislation. The power to withhold assent appeared in the Act of 1935, and has also been retained in the adapted Act. Unless, therefore, the power to assent neces*sarily included in it the power to withhold assent, and this result followed from subsection (3), it could not have found place in the adapted Act either in regard to Federal' legislation or in regard to Provincial legislation. Mr. Chundrigar's argu*ment that it has been retained in the adapted Act because it appeared in the original Act .being based, as already pointed out, on an obvious fallacy.

The argument seriously advanced on behalf of the respon*dent and which was readily accepted in the Chief Court that the words "Legislature of the Dominion" in subsection (3) refer only to the Federal Legislature must be rejected on the short ground that; as already pointed out, the laws which the Legislature of the Dominion is empowered by section 6 to make may be constitutional laws which are not within the competence of the Federal Legislature as, for .instance, laws repealing or amending the . Indian Independence Act, or the adapted Government of India Act, and laws limiting for the future the powers of the Legislature of the Dominion. If the reference in section 6 had been only to the Federal Legis*lature, one would have expected for the present phraseology of subsection (3) some provision similar to proviso (d) to sub= section (2) of section 8.

The next point taken by Mr. Chundrigar was that sub*section (3) of section 6 must be read with section 5 which says that the Governor-General represents the Crown only for the purposes of the government of the Dominion, the inference sought to be drawn being that because the Governor*-General represents the Crown only for the purposes of the government of the Dominion he can have no say in constitu*tional legislation by the Constituent Assembly. This argument appeared to be unanswerable to one of the learned Judges of the Sind Chief Court who thought that. the words `govern*ment of the Dominion' only meant government under the adapted Government of India Act as provided by sub*section (2) of section 8. When questioned whether government also includes the administration of constitutional laws Mr. Chundrigar replied in the affirmative, but he asserted that so far as the making of constitutional laws is concerned it is not a part of the government of the Dominion and the Governor General does not come in there. I do not understand how if the administration of constitutional laws is a part of the government of a Dominion, their making is not. The marginal note to section 8 "temporary provision as to the government of each of the new Dominions" shows that the legislation of the Constituent Assembly under subsection (1) of section 8 is a part of the government of the Dominion and the whole scheme of the Government of India Act proceeds on the assumption that the Governor-General represents the Crown when he assents in Her Majesty's name to the laws of the Federal Legislature. Therefore it seems to me to be an impossible proposition to ,assert the making of laws is not a part of the government of the Dominion, and that being so no reason whatsoever has been suggested why the making of constitutional laws should not be a part of the government of the Dominion. If the Governor-General represents the Crown for the purposes of the government of. the Dominion when he! gives assent to -the laws passed by the Federal Legislature, it must a fortiori follow that he represents the Crown for the same purpose when he assents to constitutional laws, because in a State like ours it is impossible to conceive of a govern*ment without there being a constitution.

It is next contended on behalf of the respondent that rule 62 of the "Rules of Procedure of the Constituent Assembly,. which provides that when a bill is passed by the Assembly copy thereof shall be signed by the President and it shad, become law on being published . in the official

Gazette Pakistan under the authority of the President, has the effect Q fi validly dispensing with the Governor-General's assent. This rule has a history which should be mentioned. In its original form the Rule, when passed on the 24th February, 1948, in meeting presided over by the Quad-i-Azam who was thin the President of the Constituent Assembly, was as follows :-

"When a bill is passed by the Assembly a copy there shall be signed by the President."

In the meeting of the 22nd May 1948, under the presidentship of the respondent, Sardar Abdur Rab. Khan Nishtar moved the following amendment :-

"That for rule 62 of the Constituent Assembly Rules, tie following be substituted, namely :-

"Assent to Bills.-When, a bill has been passed by the Assembly, it shall be presented to the President for his assent'."

Khan Sardar Bahadur Khan, however, moved the following amendment for that moved by Sardar Abdur Rab Khan Nishtar :-

"That for rule 62 of the Constituent . Assembly Rules, the following be substituted When a bill is passed by the Assembly, a copy thereof shall be signed by the President and it shall become law on being published in the official Gazette of Pakistan under the authority of the President."

This amendment was accepted by Sardar Abdur Rab Khan Nishtar and was adopted without discussion. The confusion as to the scope and nature of the rule is apparent from the amendments. Sardar Abdur Rab Khan Nishtar's amendment related to assent to bills while that of Sardar Bahadur .Khan related to their authentication. The former aimed at substituting the assent of the President for that of the Governor* General without an amendment of section 6 of the Indian Independence Act while the latter said nothing about assent and sought to provide for authentication. of the bills and as to when they became law. The latter amendment suc*ceeded and is now Rule 62 of the Rules of Procedure.

There is no specific provision in the Act of 1947 empower*ing the Constituent Assembly to

make its own Rules of Pro*cedure but that does not mean that it was incompetent to . flake such Rules. Such power is inherent to a Constituent Assembly and must be presumed to vest in it. The question, however whether Rule 62 is a mere rule of procedure or law in the Sense that it overrides the provision in the constitution that tense bill of the Legislature of the Dominion requires the Governor General's assent. It will be noticed that the Rule says nothing about assent and relates only to authentication. It is, there*fore, not inconsistent with the constitutional provision that a bill in order to become law must be assented to- by the Governor *General, and is quite capable of the construction that it assumes a bill to have been assented to by the Governor-General before it is signed by the President and published in the Gazette. In the second place, it cannot. be said to be a law governing the decision of the present question. It may be that if a legal right can be founded on a Rule of Procedure, the breach of that rule may provide to the person in whom that right vests a cause of action. to come in Court, but no such rule can become law so long as the constitutional provision which conflicts with it is not repealed. Under the Assembly's own rules, all amendments to the Constitution have to follow the procedure of bills which is' prescribed by Rules 43 to 62 and it is admitted that the amendment which gives its present form to the Rule did not comply with that procedure. This shows that even the Constituent Assembly did not consi*der the Rule to be a constitutional provision, much less a pro*vision overriding or repealing a specific constitutional provision. If the Assembly intended to change the law relating to assent, it was necessary for it to amend section 6 of the Indian Inde*pendence Act in such a manner as to dispense with the necessity of the Governor-General's assent. A mere Rule of Procedure cannot amend the Constitution Act any more than a Resolution by the Assembly that a person named shall be stoned to death for an act that is not an offence under the substantive law of crimes and without his being tried in accordance with the law relating to criminal procedure. Lastly, even if this Rule be assumed to be a constitutional provision, it itself required the Governor-General's assent and, in the absence of such assent, is wholly invalid.

Contemporanea Expositio and argument ab inconvenient

I may notice here Mr. Chundrigar's argument that because for several years no assent to an Act of the Constituent Assembly, while sitting as a constitution-making body under subsection (1) of section 8, was ever obtained, and that some important Acts passed by the Assembly were treated as law by every one concerned, though they had not received the assent of the Governor-General, subsection (3) bf section 6 must be so interpreted as not to be applicable to the legisla*tion passed by the Constituent Assembly . under sub*section (1) of section 8. In this connection, he read to us some passages from pages 399-401 of Crawford's "Statutory Construction", 1940 Edition, and pages 144, 146, 147, 148 and 150 from Cooley's First Volume of "Constitutional Limita*tions", Eighth Edition. The rule enunciated in these passages is the principle of Contemporanea Expositio which also applies to the construction of documents. The principle as applied to documents may be stated to be as follows in order to explain, but not to contradict, ancient (documents whose meaning is doubtful, the acts of the parties, even before the execution of the instrument, or the mode in which property has since been held and enjoyed thereunder, as

well as constant modern user may be given in evidence. Such. evidence, however, seems now admissible not only in the case of ancient, but also of modern documents, and whether the ambiguity be a curable patent ambiguity or a latent ambiguity. On the other hand, where the meaning of the words is not ambiguous, the subsequent acts of the parties are not admissible to construe it, whether the document be ancient or modern (Sue Phipson's Evidence, 7th Ed., 605 and Taylor, Evidence Sections 1204=1205.).

In its application to constitutional statutes, the rule is thus stated by Cooley at page 144 of his book :-

"Contemporaneous interpretation may indicate merely the understanding with which the people received it at the time, or it may be accompanied by acts done in putting the instrument in operation, and which necessarily assume that it is to be construed in a particular way: In the first case it can have very little force, because the evidences of the public understanding, when nothing has been done under the provision in question, must always of. necessity be vague and indecisive. But where there has been a practical construction, which has been 'acquiesced in for a consider*able period, considerations in favour of adhering to this construction 'sometimes present themselves to the Courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been, generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention."

In all the cases where observations of this kind have been made, the true intention of the particular provision in the constitution was ambiguous or doubtful, and I know of no instance where the words of the constitution being clear and consistent with a reasonable interpretation, any Court ever went to the extent of misconstruing its true purpose merely because somebody else had, taken a mistaken view of it. There is no question of estoppel in such cases, the correct description of 'the reasoning employed being argument ab . inconvenienta. This mode of construction of written constitu*tions is, therefore; - subject to an overriding consideration which has thus been stated by . Cooley himself at pages 149-150:-

"Contemporary construction . . . . . can never abrogate the text ; it can never fritter away its obvious sense ; it can never narrow down its true limitations ; it can never enlarge its natural boundaries. While we conceive this to be the true. and only safe rule, we shall be obliged to confess that some of the cases. appear, on first reading, not to have observed these limitations . . . . . .

"It is believed, however-, that in each of these cases an examination of the Constitution left in the minds of the Judges sufficient doubt upon the question of its violation to warrant their looking' elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it' is claimed,, and it may be exercised for a long period, in violation of the constitu*tional prohibition, without the mischief which the Constitu*tion was designed to guard against appearing or without anyone being sufficiently interested in the subject to raise the question ; but these circumstances cannot he allowed to sanction an infraction of the Constitution. We think we allow to contemporary . and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favour the doubts which arise on reading the instrument to be construed."

Therefore to apply the principle of contemporaneous and practical exposition to the present case, we shall first have to say that there is a doubt in our mind as to the true meaning of sections 6 and 8 as a whole, and particularly as to the meaning of subsection (3) of section 6 and subsection (1) of section' 8.

I think we should be mutilating the-Act and misunderstanding in its true purpose and scheme if we were to hold that the words of subsection (1) of section 8 "for the purpose of making provision as to the constitution of the Dominion" do not refer to the power which section 6 gives to the Legislature of the Dominion, including the power to alter, repeal, or amend the two Constitution Acts themselves or that the power to give assent to which the third subsection of section 6 . refers does not include the power to withhold assent. In my opinion, it is a mistake to suppose that sovereignty in its larger sense was conferred upon the Constituent Assembly, or that it could function outside Vie limits of the Indian Indepen*dence Act. The only power given to that Assembly was the power to make laws, constitutional or federal. In the former case, it exercised the power to make provision as to the constitution of the Dominion which had been included in the generality of the powers conferred - by section 6 on the Legislature of the Dominion, and in the latter it acted as the Federal Legislature with all the limitations to which that Legislature was subject. Apart from these powers, it had no other power and it lived in a fool's paradise if it was ever seized with the notion that it was the sovereign body in the State. It had, of course,

Legislative so , as the Legis*lature of the Dominion but then the Governor-General was a constituent part of legislature. Every Act passed by it required the Governor-or-General's went, consistently with the position that prevails throughout the Dominions, the Colonies and the

Possessions, settled or ceded or conquered, where the Crown still retains to itself or has delegated to its representative the high prerogative right of assenting to bills. If this basic position was misunderstood or misconstrued, there is neither any estoppel nor is the argument ab inconvenienti applicable. On its interpretation of the Indian Independence Act, the Constituent Assembly attempted to function outside the Constitution, and it was the right not only of the Governor-General to object to such, unconstitutional activity, but the right of every citizen in the State to demand that the Assembly .must function within its constitutional limits. The members of the Assembly before they undertake the duties of their office take the oath of allegiance to the constitution of Pakistan, and they are subject to all the limitations of that Constitution. Having taken that oath, they cannot subsequently forswear themselves and assert that they are the only sovereign body in, the State and that their will is the law whether the Governor-General endorses or do no endorse that will.

DISASTER

It has bean suggested by the learned Judges of the Sind Chief Court and has also been vehemently urged before us that if the view that I take on the question of assent be correct, the result would be disastrous because the entire legislation passed by the Constituent Assembly, and the acts done and orders passed under it will in that case have to be held to be void. On this part of the case I do not wish to say anything more than that the sole question before us is whether the Governor-General's assent was obtained to the Government of India (Amendment) Act of 1954, which, inserted section 223-A to the Government of India Act, and nothing said here should be deemed to be applicable to any other Act. In England the assent is given by the King to a bill in person or by commission. It is ceremonial act and has to be formally recorded. Mr. Chundrigar is, however, right in the contention that in Pakistan no particular form for assent is prescribed, .and- that it need not be in writing. It may be that where the Governor-General has taken some action as, for example, where he has issued some rules in exercise of the authority given to him by the Act or taken some other step, his assent to the proposed legislation may by inferred. . That question is not before us and I do not decide it. We are concerned in the present case only with the validity of the Government of India (Amendment) Act of 1954, and so far as that Act is concerned, it is common ground that it was not presented to the Governor-General for assent, and that he has not done anything under this Act which might be taken as~ indicatives of his having assented to 'it. I am quite clear in my mind that we are not concerned with the consequences, however beneficial or disastrous they may be, if the undoubted legal position was that all legislation by the Legislature of the Dominion under subsection (3) of section 3 needed the assent of the Governor-General. If the result is disaster, it will merely be another instance of how thoughtlessly the Constituent 'Assembly proceeded with its business and by assuming for itself the position of an- irremovable Legislature to what straits it has brought the country. Unless any rule of estoppel require its to pronounce merely, purported legislation as complete and valid legislation, we have no option but to pronounce it to be void and to leave it to the relevant authori*ties under the Constitution or to the country to set right the position in any way it may be open to 'them. The question raised involves the rights of every citizen in Pakistan, and neither any rule of construction nor any rule estoppel stands in the way of a clear pronouncement.

Consistently with the practice that has grown up since his sad demise, of citing Quaid-i-Azam's alleged oral sayings as authority for a particular proposition, it has been alleged before us that the practice of not obtaining the assent of the Governor-General to acts of the Constituent Assembly had, come into existence during the Quaid's time and had his support. We have no record of any ruling having been given by him on this point, nor any legal opinion obtained by the Assembly from anyone has been produced before us: Reference has been made to two Acts which during the Quaid's Presidentship of the Assembly were published in the Gazette "under the authority of the President of the Consti*tuent Assembly" and it is alleged that they were never placed before the Quaid for purposes of assent: But during those days the Quaid was not only the President of the Assembly but also the Governor-General and it is quite possible that he might have thought that since the bills were passed under his own Presidentship it was unnecessary again to place them for his assent as Governor-General. Be this as it may, the conduct of one Governor-General in a matter like this does not relieve his successor of * the duty of demanding compliance with the Constitution. Wheare, while discussing the efficacy of non-legal rules as - a medium of constitutional change, says at page 18 of the Fifth Edition of his book "The Statute of Westminster and Dominion Status": "In the first place, they (non-legal rules) cannot always nullify or modify a rule of strict law. In the second place, though they may nullify, a rule of strict law, . they do not and cannot, abolish it. They may paralyse a limb of the law but they cannot amputate it." Can practices and conventions override an express statutory provision merely because nobody attempted or cared to under*stand it and its implication ?

I now proceed to examine the case on which. Mr. Chundrigar relied. The first of these is the Sind . case, M. A. Khuhro v. The Federation of Pakistan (P L D 1950 Sind 49) in which Hassanally Agha J. held that the meaning of subsection (3) of section 6 of the Indian Independence Act is that the assent of the Governor-General is required only where the assent of His Majesty is necessary under the Constitution. These, however, are not the words of the subsection which speaks of the "Legislature of the Dominion" in which expression subsection (1) of section 8 expressly includes the Constituent Assembly, and says that the Governor-General of the Dominion shall have full power to assent in His Majesty's name to the laws of the Legislature of the Dominion, which power necessarily implies the power to withhold assent. In Khan Iftikhar Hussain Khan of Mamdot v. The Crown ((1951).FCR24-PLD195UFC15) the Crown was intervener, but there the sole question to be determined, was whether the Public and Representative Offices (Disqualification) Act, 1949, fell within the powers of the Constituent Assembly as the Federal Legislature or within. the powers of the Legislature of the Dominion competent to make constitutional provisions, it being assumed by every one concerned that the assent of the *Governor-General was necessary only where the Con*stituent Assembly functioned as the Federal Legislature. The question whether when the Constituent Assembly acts under subsection (1) of section 8 and exercises the powers of making provision as to the constitution of the Dominion, the assent of the Governor-General under subsection (3) of section 6 is necessary for its Legislation, was neither raised,. nor discussed, nor decided. That case therefore is no authority for the proposition that the Governor-General's assent is. not necessary under subsection (3) of section 6 to legislation by the Constituent Assembly when it functions as the Legislature of the Dominion..

In the Irish case Ryon v. Lennon (1935 1 R 170.) extracts from which are reproduced at pages 377 to 383 of Sir Ivor Jennings' book "Constitutional Laws of the Commonwealth"., 2nd Edition, the question involved was entirely different, namely, whether the amendment by the Oireachtas to the constitution set up by the Third Dail, sitting as Constituent Assembly, was ultra vires, though .there are some observations there in the arguments of counsel, Mr. Gavan Duffy, that the constitution was proclaimed in the name of the people' by Dail Eireann (Third Dail) as an act of supreme authority and that it did not require any -assent. The all-important fact which must not be forgotten about the Irish instance is that the Constitu*tion of the Irish Free State , (Saorstat Eireann) Act, 1922, made by the Third Dail (Dail Eireann) was recognised by the Irish Free State (Constitution) Act. 1922, passed by the Parliament of the United Kingdom just as the Constitution of India made by the Constituent Assembly which, if the information supplied to us by Mr. Chundrigar is correct; had not received the assent of the Governor-General, was recognised by the Parliament by the India (Consequential Provision) Act, 1949 (11, 13 and 14 Geo. 5 c. 92)

Sovereignty of Constituent Assembly

Mr. Chundrigar's next contention was that this interpre*tation of subsection (3) should be rejected on the principle of reductio and absurdem inasmuch as it affects the sovereignty of the Constituent Assembly by recognising outside that Assembly an authority which has the power to veto all legisla*tion by it. He also relies on the omission of the words `in his discretion' in the adapted Government., of India Act by virtue of clause (c) to the Proviso to subsection (2) of section 8 and the disappearance of the practice of , issuing instructions to the Governor-General, as factors, in favour of a contrary construction. Illustrating the point, he argues that on this construction of the subsection the Crown may appoint any one it likes as the Governor-General of the Dominion and the person so appointed may be hostile to Pakistan, as for instance, a retired officer of the old Civil Service with Congress sympathies and anti-Pakistan views who may not only refuse assent to all material legislation but also withhold assent from any legislation removing the office of the Governor-General himself or declaring Pakistan as an independent country. No construction of this subsection, he says, should be accepted which would be completely incom*patible with the independence of Pakistan as a Dominion and introduee into the legislation of the Dominion effective control by the Crown or by the . Crown's representative. The argument proceeds on an obvious fallacy and a clearly mis*taken assumption. In the first place, the Indian Independence Act nowhere says that .the Constituent Assembly shall be the sovereign of the new Dominion. It gives to it only the power of the Legislature of the Dominion and' nothing more. The expression sovereignty of Constituent Assembly was repeated before us ad nauseam but as has been observed elsewhere when we pointedly asked Mr. Chundrigar whether apart from legislative functions it had any other powers, under the Indian Independence Act, the hesitating reply was, and rightly, in the negative. Now if it be held as a matter of construction that the Governor-General _ is assigned a necessary part in the legislation of the Dominion, the legal sovereignty of the Constituent Assembly is reduced to a myth, because on that construction the Assembly cannot effectively function alone. But that does not mean that its

legislative sovereignty cannot be converted into an actuality in exactly the same way as in the other constitutions, namely, by having a Governor-General who is acceptable to the Assembly, who will not resist legisla*tion by the Assembly, and who can be recalled if he goes against the advice of the Ministry. The rule has worked well for a long time in all self-governing Dominions. 1f, therefore, a similar provision has not in any way affected the indepen*dence of the other Dominions where well-established conventions have been responsible for a smooth working of the con*stitution, there is no reason why. the Pakistan Constitution could not have been and should not have been worked in that manner. To illustrate the point, suppose that the Constituent Assembly. 'decides . to secede from the Commonwealth and to declare Pakistan as an independent republic. On my interpretation of subsection (3), the Governor-General's assent to such legislation would be necessary. But there cannot be the slightest difficulty in obtaining his assent. If the Governor*General refuses assent a request for his recall addressed by the Prime Minister to the Secretary of Her Majesty would be sufficient for the purpose because the matter would not go to Her Majesty's Government in the United Kingdom, that Government having relinquished all responsibility for the government of this country, and Her Majesty xhe Queen in such matters normally acts on the advice of the Ministry of the. Dorhinion provided that the ministry represents the people of the .Dominion as ministries in other Dominions do. She herself takes no more part in the politics of a Dominion as she does in the United Kingdom and it is wholly erroneous to suppose that contrary to her attitude in home politics she would assume the . role of a partisan in the internal politics of any of her Dominion. On having the Governor-General recall*ed, the Constituent Assembly can recommend for appointment another person who would be willing to give his assent to the bill of secession.

I have already pointed out that the necessity of the assent of the King to legislation by the House of Commons and the House of Lords was at one time one of the most important reserve powers and was actually used in Britain by the Crown in and before the reign of Queen Anne to veto objectionable legislation and in the Dominions by the Governor-General to defeat legislation which appeared to him adversely to affect the Imperial interests .or to be otherwise unpopular. Now the generally accepted position in this respect, however, is that this power can be exercised. in the United Kingdom only on the advice of Ministry and in the Dominions oar the advice of the Ministry of the Dominion. The issue has not actually arisen in recent times because the throwing out of an important Government bill by the House of Commons in England or by the Legislature in a Dominion amounts to a vote of no , confidence in the Ministry and is thus a valid constitutional ground for the Ministry to resign or to ask for a dissolution and not for advising the King or the Governor* General to withhold assent. But whatever may be the position, it cannot possibly be said in the case of Dominions including Pakistan' that the Governor-General is in a position to exercise this power in opposition to the wishes of a Ministry which represents the people of the Dominion, Though the Governor-General is supposed to be a representa*tive of the king, in fact he is a representative of the Dominion concerned, because his appointment and dismissal depend on the advice of the Ministry of the Dominion which on the convention of non-intervention is always accepted by the Crown. If, . therefore, the Governor-General withholds his assent to any legislative measure to which he is required to give his assent by the Ministry of the Dominion, the Ministry is generally in a position to have .him immediately recalled oar removed. He cannot, therefore, exercise the power of with*' holding assent contrary,

to the wishes of the Ministry or in order to veto legislation against the advice of the Ministry. It follows from this that the provisions empowering him to give his assent are in no sense a fetter on the sovereignty or the independence of the Dominion, and' in Pakistan they certainly do not amount to an encroachment on the legislative sovereignty of the Legislature of the Dominion. Even in the case of Federal legislation the Governor-General has the power to give or withhold assent, but he cannot, if the Constitution is functioning in normal times and in its true spirit, withhold assent contrary t0 the wishes of the Ministry And this is so, not because the words `in his discretion' which occurred is the Act of 1935 have been omitted from the adapted relevant provisions but because the withholding of assent to such legislation, when the Ministry requires him to give his assent, can raise -a constitutional issue which can only end in the recalling or removal of the Governor-General. Any attempt therefore to construe the Governor-General's power to withhold assent as a veto on legislation proceeds on a mis*apprehension and cannot be made a ground for the inference' that that power is an infringement of the legislative sovereign*ty of the Legislature of the Dominion and thus of the Constituent Assembly. ,

NODDING AUTOMATON OR AUTOCRAT?

From the fact that the Governor-General is the head of the State, it must not tie inferred that in matters of legislation his position is either that of a nodding automation or that of an autocrat. He is appointed by the King and represents the King for the purposes of the Government of the. Dominion, .but that does not mean that he is an unrestrained autocrat, and purporting to act on behalf of the King, can in normal times take an active part in the actual administration of the country: Since the Imperial Conference of 192.) he has generally been a man of the Dominion and a representative of that Dominion just as the Prime Minister is. As a constitutional functionary, it is his duty to give his assent to all reasonable and necessary legislation by the Legislature. But there may be occasions, however remote their conception may be, where the Governor-*General would be entitled to withhold his assent from a particular legislation. In the United Kingdom, if the House of Commons passes a law -which strikes at the very .foundations of the constitution, as for instance, where Parliament indefi*nitely prolongs its life or trifles with the right of the electors to vote, the Sovereign may, and perhaps would, whe*ther the Ministry advise it or. not, exercise his reserve powers of withholding assent or dissolution. The same is the position of the Governor-General in the Dominions Leslie Stephen, while illustrating the omnipotence of the Legislature, says at page 143 of the 1882 edition of his Science of Ethics: "If a Legislature decided that blue-eyed babies should be murdered, the preservation of blue-eyed., babies would be illegal; but legislators must go mad 'before they pass such a law and subjects be idiotic before they submit to it." If a similar law were passed by the Constituent Assembly, and this of course is an extreme case which is being mentioned merely to explain the point, I have no doubt that it would be the duty of the Governor-General to. withhold his assent from such legislation not because he has any instructions in the matter from the King, but because he represents the Dominion and in such matters he is supposed to be able rightly to gauge the public feelings and sentiments. Similarly, if the Con*stituent Assembly decided to make a law - that all adults; shaven or unshaven as it chose to say, shall be deprived of the rights of citizenship in Pakistan, the Governor-General will undoubtedly withhold assent from such legislation. Or take

the instances mentioned by Mr. Faiyaz Ali before the learned Judges of the Chief Court to illustrate his theory of checks and balances. "I have given your Lordships," said Mr. Faiyaz Ali,- "one, example of a possible misuse of these powers, namely, that the Constituent Assembly could, if absolutely uncontrolled, legislate that everyone of its members was to get a -salary of one lac of rupees per month, enjoyable for life and heritable from generation to generation. What was there to prevent it 'from doing so ? But let us take a more probable and less extravagant instance. Suppose the Constituent . Assembly. in the exercise of its absolute powers decided to impose a Soviet Constitution on Pakistan. Suppose they said.: ' It is our will that there shall henceforth be no God. in Pakistan and no Religion. Let Religion and God both be ejected from Pakistan and. a Constitution based on the purely economic doctrine of Karl Marx be framed ' and suppose they did all this against the will of the people and in open defiance of. their views and sentiments. What would have happened in such a case ? The - Assembly, if it had absolute and uncon*trolled powers, could very w 11 impose such a Constitution on Pakistan. What could the people do ? What could be their remedy ?" And surprisingly enough the reply to it 'by one of the learned Judges was "If the majority of the members are for it that means the people are for it." Comment on this reply is unnecessary beyond saying that it overlooks the doctrine, which is a fundamental doctrine in democracy, that the mere fact that the majority of the members of a Legislature are in favour of a measure does not necessarily mean that the .people are for such measure. The second instance cited by Mr. Faiyaz Ali was precisely the instance where if the question arose in the United Kingdom the King' would exercise his reserve powers of dissolution or of withholding assent. In the circum*stances supposed, the Governor-General here will act in precisely the same way,. namely, he will withhold his assent from such legislation, not because he represents the King but because he represents, the people of the Dominion and in such matters acts on their behalf in the belief that his action will have their approval. '

An instance may also be cited from the history of the Constituent Assembly itself. It is alleged before us in an affidavit put in by the attorney of the appellants that at the time the Constituent Assembly decided to repeal the Public and Representative Offices (Disqualification) Act, 1 949, proceedings under that Act were contemplated against ten members of the Constituent Assembly itself. The law repealing the Act which is said to have been passed in undue haste could have been attributed by the Governor-General to a desire on the part of the Constituent Assembly to screen its own members from prosecution, and few people could have objected if he had withheld his assent from the repealing bill. It will, therefore, be seen that in this respect tha Governor-General occupies a very important constitutional position. By withholding assent to an unpopular measure he cari create a constitutional crisis of the first magnitude, and though eventually he himself may have to go, he can in appropriate cases rivet the attention of the country to the caprice, cupidity or folly of the Legislature.

In the course of arguments before us, a question arose, similar to the one mooted before this, Court in Khan Iflikhar Husain Khan of Mandot v. The Crown (1950-51 F C R 24=P L D 1950 F C 15), namely, whether if the Constituent Assembly passed a law, which was within its competence as the Federal Legislature, it could be held to be ultra vires on the ground that it did

not receive the assent of the Governor-General. The point was not decided in that case, but Mr. Chundrigar appeared to suggest before us that is such a case because the Constituent Assembly is a sovereign body, the Court could . not inquire into the ultra vires of, any law purporting to have been passed by it under subsection (1) of section 8 of the Act of 1947. If Mr. Chundrigar's claim is valid, does it not follow from it that the Constituent Assembly ,can dispense with the necessity of all assent even in regard to laws which fall within the Federal List merely by purporting to pass such laws in exercise of the powers conferred on it by subsection (1) of section 8? The question whether a law falls within the Federal List or relates to the constitution of the Dominion being one for the Constituent Assembly .to deter*mine and not for the Courts to decide, the Assembly could at its will do away with the. necessity of assent to all Federal legislation merely by not placing a bill before the Governor General for his assent.

For the foregoing reasons I hold that so long as the provision in subsection (3) of section 6, giving full powers to the Governor-General to assent to any law of the Legislature of the Dominion stands, every bill passed by the Legislature of the Dominion which has the effect of amending the existing constitution as contained in the Government of India Act and the Indian Independence Act must be presented for the assent of the Governor-General, and this assent is as necessary to the validity of legislation as the law which requires a document to be under seal 'or registered. It is a formality which cannot be dispensed with except by a proper amendment of the Constitution. In view of this it is wholly unnecessary to go into the other issues, and nothing said in this judgment is to be taken as an expression of opinion on anyone of them.

INDEPENDENT DOMINION

I now proceed to notice some of the incidents of an independent dominion which were referred to in the arguments before us by the parties. These incidents are connected with allegiance, Royal Style and Titles, nationality, assent to legislation and Prerogatives.

INDEPENDENT

The words `independent dominion' first received statutory recognition in the Act of 1947. The speakers in the House of Commons who took part in the debates on the bill had different conceptions of an independent dominion. There were also proposals that these words be

substituted by some more expressive words. Thus Mr. Godfrey Nicholson sug*gested the amendment "two independent States within the British Commonwealth of nations, hereinafter to be known for the purposes of' this Act as the new Dominions", because he thought the word "Dominion" was subject to several misconceptions. Mr. Wilson Harris supported Mr. Nicholson and said

"I think that we need the word `Dominion' here and that it was a stroke of genius on the part of Lord Mountbatten to apply the possibility of Dominion Status to the two halves of India. I cannot help thinking, however, that the term `Independent Dominion' involves a certain contradiction. Dominions as between themselves are interdependent and not independent. I would very much prefer the use of the words `autonomous Dominions'. In the famous language of 1926, the Dominions are not subordinate one to another in any internal or external affairs, but they are not entirely independent. They do not stand completely apart from one another, indeed they have the right to secede from the. Com*monwealth in which case they would, achieve complete independence. It seems to me the word `independent' ought to be used for that status. It would be more desirable to speak of autonomy in this case and to use the words `autonomous Dominions' rather than `independent Dominions'.

Replying to this criticism,. the Prime Minister, Mr. Atlee, said :-

"With regard to the term `independent Dominions', I think you need the word Dominions here. We .do under*stand what Dominion Status means under the Statute of Westminster. .Whatever alteration there may be in the future in the Statute of Westminster, that statute today does define this position. It does mean complete autonomy. With regard to the word `independence', that again one may quarrel over, but one has to consider both history and psychology in this matter and it is a fact that it is not generally realised throughout the world, that although it is quite properly said that there is interdependence there is complete independence in the Dominions from any control, whether from Whitehall .or from Parliament. That is the important point that needs to be stressed. It is not perhaps quite the same as if this were being formed from some' country adjoining, which had never been in the position of being under this Parliament and under Whitehall. I think that is what the- Indians really want to have emphasised. I think they quite accept the position and they know the advantages of being in the Dominions. People, who have long been under the tutelage of Whitehall and under the control of this Parliament, feel that now, at last, they are independent of that control."

The essential characteristics of an independent Dominion were rightly brought out by Mr. Atlee when he said that the independence of a Dominion implied freedom from all control by the Government in London and the British. Parliament. If the Government of the United Kingdom

has no right to inter*fere in the affairs of a Dominion and the Legislature of that Dominion can pass any law that it likes, including the law relating to its own future constitution, and the authority of the Parliament of the United Kingdom to legislate for it comes to an end, we have a true conception of the independence that was intended to be conferred on the Dominions of India and Pakistan. In this sense the Dominions. of Canada, Australia and New Zealand cannot be said to be independent because under the Statute of Westminster, their Legislatures are in*competent to amend their Constitution Acts. India and Pakistan, however, could frame their own constitutions as independent countries and -entirely secede from the Common*wealth.

DOMINION

ALLEGIANCE TO THE CROWN

But though independent in the .sense just explained, Pakistan, is a Dominion and therefore certain incidents attach to it by reason of that status. The first feature that is common to the Dominions which are members of the British Common*wealth 'of Nations is common allegiance to the Crown. This common feature, as pointed out by Wade and Phillips at page 443 of 4th Edition of their Constitutional Law is the one legal link which joins members of the Commonwealth (except India) and Empire, though it is no longer regarded as indis*pensible for membership of the former. In the Commonwealth Declaration of April 1949 made by the Prime Ministers of the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon and the Canadian Secretary of State for External Affairs, it was declared that their countries were united as members of the British Common*wealth of Nations and owed a common allegiance to the Crown which - was also a symbol of their free association. The Declaration was made on the occasion of receiving India as a member of the Commonwealth view of the new Republican Constitution she was about to adopt. In the resolutions of the Imperial Conference of 1926, common allegiance to the Crown was stated to be one of the. bonds that united the participating Dominions: This position received a recognition by the Statute of Westminster, 1930, the preamble of which states that the Crown is the symbol of the free association of the members of the British Commonwealth of Nations and that they are all united by, a common allegiance to the Crown. Halsbury describes common allegiance to, the Crown as a common law doctrine (Laws of England, 3rd Edition, Volume V, paragraph 1024). It is for this reason that the Statute of Westminster requires that any alteration in the law touching the succession to the Throne or the Royal Style and Titles must have the assent of the Parliaments of the Dominions as well as the Parliament of the United Kingdom.

So important is the connection of a common Crown and common allegiance that in the case of Canada, Australia and New Zealand, it cannot be broken by local legislation, and General Smuts consistently maintained that even the King himself could not with due regard to his duty assent to a measure of a Dominion Parliament purporting to destroy the connection with the Crown.

Writing .in 1932, Keith in his

Constitutional Law of the British Dominions (page 61) thought that to effect a separation there would in law be necessary an Imperial as well as a Dominion measure .and that under the principle enunciated by the Statute of Westminster the concurrence of the other Dominions would also be re*quisite. This relation is very different from the mere personal union between the United Kingdom and Hanover where the connection could be, and was broken as a result of the different laws of descent of the Crowns of the two territories when Queen Victoria succeeded to the throne in 1837. He says at page 62 of the book :-

"Closely connected with the question of the common Crown is that ' of a common alligiance. The issue might rest, of course, on the old decision in Calvin's case, after the union of the Crowns of England and Scotland in the person of James I, that person born in Scotland after the union were natural born in English subjects, despite the absolutely distinct character of the two kingdoms. The same doctrine was applied during the period of the union of the Crown of England with the Electorate '.of Hanover, Even were each of the Dominions to be regarded as an absolutely distinct kingdom, the subjects of the King therein would on . that doctrine be subjects in the United Kingdom".

These observations were of course not applicable to the two Dominions created by the Indian Independence Act because each of them was declared to be fully competent to secede. But so long ast either of them remains a Dominion; assent to its legislation is necessary both under the common law doctrine and the statutory provision in subsection (3) of section 6. So strict is this rule that even if a dominion in*tended to secede from the Commonwealth and repudiate allegiance to the Crown, it could do so only by an extra-legal act. But if it intended -to - proceed constitutionally such secession would itself require the assent of the Queen or her representative, or legislation by the Parliament of the United Kingdom. Such. assent was given when Burma became inde*pendent under the Burma .. Independence Act, 1947. And though in the case of India no such assent seems to have been requested or given, the . . connection between India and the United Kingdom had to be . recognised by a statute of the British Parliament, India (Consequential Provision) Act, 1949, to retain India as a member of the Commonwealth.

ROYAL STYLE AND TITLES

Though by subsection (2) of section 7 of the Act of 1947 the words `Indiae Imperator' and the words `Emperor of India' were omitted from the Royal Style and. Titles by a Royal Proclamation under the Great Seal of the Realm, the words "of Great Britian, Ireland and British Dominions beyond the Seas, Queen" continued to be used. In December, 1952, after consultation between the Governments of members of the Commonwealth it was agreed that ' in place of the existing Titles which had ceased to be, fully appropriate each member should adopt for its own purpose a form of Title suitable to its particular circumstances but including a substantial common element. A separate Title has accordingly been adopted for use in the United Kingdom (including the territories for whose foreign relations the United Kingdom Government is respon*sible). This Title, which was adopted in pursuance of section 1 of the Royal Titles Act, 1953 (1 and 2 Eliz. 2

c. 9), is "Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories, Queen, Head of the Common*wealth, Defender of the Faith". In Canada, Australia and New Zealand, the Title adopted, in each case by a local enact*ment, is . "Elizabeth the Second, by the Grace of God of the United Kingdom (Canada or Australia of New Zealand) and Held other Realms and Territories, Head of the Common*wealth". In South Africa the Title adopted by the Royal Style and Titles Act, 1953 (local) is "Elizabeth the .Second, Queen of South Africa and Her other Realms and Territories, Head of the Commonwealth". In Ceylon the Title is the same as for South Africa with substitution of `Ceylon' for `South Africa'. A few days before her Coronation, the Queen re*ceived the Prime Ministers of the United Kingdom, Canada, Australia, New Zealand and Ceylon who submitted for her signature the proclamations relating to the Royal Style and Titles for their countries. In Pakistan, the Title signed by the Governor-General, and published simultaneously in the Commonwealth capitals on the 29th May, 1953, was "Elizabeth the Second, Queen of the United Kingdom and of Her. other Realms and Territories, Head of the Commonwealth". It should be noted that under subsection (4) of section 6 of the Act of 1947 no Act. of the' United Kingdom passed on or after the appointed day -was, to extend or be deemed to extend to the Dominion of Pakistan as a part of the law of the Dominion unless it was extended thereto by a law of the Legislature of the Dominion. No such law adopting the Royal Title was passed by the Legislature of the Dominion and the Title was published by a proclamation signed by the Governor-General. The words `Her other Realms -and Territories' in the Title were evidently considered to embrace Pakistan because on the occasion of the 'Coronation of Her Majesty on the 2nd June, 1953, the oath that was administered to her by the Archbishop. of Canterbury was

"Will you solemnly promise and swear to govern the peoples of the United Kingdom of Great Britian and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon and of your possessions and the other Territories to any of them belong*ing or pertaining, according to their respective laws and customs ?"

The commission that was issued by His Majesty's command appointing the Governor-General of Pakistan described His Majesty'as "George VI, by the Grace of God of Great Britian and the British Dominions beyond the Seas, King, Defender of the Faith", and the oath that the Governor-General takes is :-

"I do solemnly affirm true faith and allegiance to the Constitution of Pakistan as by Law established and I will be faithful to His Majesty (or Her Majesty), his heirs and successors in the Office of the Governor-General of Pakistan. "

The point sought to be made by Mr. Chundrigar is that in this oath the allegiance that is sworn is to the Constitution of Pakistan and not to the Crown ; but if allegiance to the Crown is a necessary incident of the Constitution of Pakistan, the allegiance to that Constitution obviously implies allegiance to the Crown. Further it - does not make the slightest difference whether the Queen is described as the Queen of Pakistan or the Head of the Commonwealth of which Pakistan is a member. ,

NATIONALITY

From the common law doctrine of common allegiance it must follow that those who owe allegiance to the same Crown or common subjects. In United Kingdom law, citizens of the United Kingdom and the Colonies and citizens of other Commonwealth countries, including Pakistan, are British subjects and Commonwealth citizens, and by section 2 of the Pakistan Citizenship Act, 1951, read with section 1 of the British Nationality Act, 1948, a Commonwealth citizen, as for instance a citizen of Pakistan, is a British subject. Thus the second incident of Pakistan being a Dominion is that her citizens are for international purposes British subjects. Under section 262, subsection (4) of the adapted Government of India Act, no person who is not a British subject is eligible to hold any office under the Crown in Pakistan, and under subsection (1) of section 298 of that Act no subject of His Majesty domiciled in Pakistan shall, on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in Pakistan. '

PREROGATIVE

The Governor-General of Pakistan is appointed by the King or Queen and. represents him or her for-the purposes of the Government of the Dominion (section 5 of the Indian Independence Act). The authority of the representative of the King extends to the exercise of the royal prerogative' in so far as it is applicable to the internal affairs of the Member, State or Province, even without express delegation, subject to any contrary statutory or constitutional provisions. In Canada and the Union of South Africa the full external prerogatives are exercisable by the Governor-General, who, is invariably invested with the duties of Commander-in-Chief of the armed forces, is authorised to appoint Judges, Minis*ters and other Crown servants, to summon, prorogue and dissolve Parliament, assent to legislation, and grant pardons oil ministerial advice. Mr. Mahmud Ali's contention that in Pakistan the Governor-General does not exercise any of the prerogatives of the King is clearly wrong because here, even under the adapted Act of 1935, the Governor-General appoints -the Governors of . Provinces, the Commanders-in-*Chief of the Pakistan Army, Royal Pakistan Navy and the Royal Pakistan Air Force, and Judges of the Federal Court and the High Courts. Ambassadors to foreign countries are accredited and ambassadors from foreign countries are received by, the Governor-General. The defence and civil services in Pakistan are services of the Crown and appointments to them are made by. the

Governor-General while in the Pro*vinces the appointments to the services of the - Province are made by the Governors. In defence services 'the Governor *General has the power to grant commissions. Every person who is a member of the Civil Service of the Crown in Pakistan or holds any post under the. Crown holds office during His Majesty's pleasure. And assent to - all legislation under the adapted Act of 1935 is given in His Majesty's name, in the case of bills of the Federal. Legislature by the Governor *General, and in the case of Provincial bills by the Governor: Criminal prosecutions are initiated and conducted in the name of the Crown. In the face of these constitutional provisions I do ,not see how Mr. Mahmud Ali finds it possible to assert that in Pakistan the Royal Prerogative is not exercised by the Governor-General.

I am conscious that in thus interpreting the Constitution of Pakistan and emphasising the, incidents that attach to it as a Dominion I am going against a layman's idea of an "inde*pendent dominion", the implications of which were not fully understood even by the wise and experienced members of the Constituent Assembly, though some of them were pro*minent members of the legal profession. But- I am quite clear in my conscience what the duty of a Judge in such cases is. That duty is rightly to. expound the law in complete indiffer*ence to any popular reaction. The status .of which I have described the main incidents was accepted by our leaders under a gentlemen's agreement which received statutory re*cognition in the Act of 1947. If they had been so minded, they need not have accepted that status and like Burma could have complete independence. And if the legal incidents of association with the Commonwealth under a common head hurt their pride or were offensive to thier susceptibilities, and the Constituent Assembly, shared that feeling, it could have done away with all these so-called indicia of inferiority within a day. It is not that the Constituent Assembly was unaware of these incidents. I had drawn their attention to them by my judgment in the Full Bench case of Sarfraz Khan v. The Crown (1950 P .L R (Lah.) 658=P L D 1950 Lah. 384) as far back as May 1950. But the only action taken by the Assembly on that judgment was to delete the words "in His Majesty's name" from subsection (3) of section 6 of the Act of 1947 and those provisions of the adapted Act of 1935 where these words occurred in respect of the Governor-General's assent to bills. This tinkering with the provisional constitution merely showed that the Con*stituent Assembly was unwilling to take big decisions, and they can hardly have any grievance if, on the present occasion, that position is restated to them. In this connection it will be interesting to mention here the history of an incident from a High Court file. In 1951 some one appears to have sent to the Prime Minister of Pakistan a High Court Notice which began with the words "George VI, by the Grace of God of Great Britain and Northern Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith". The Prime Minister. appears to have been surprised at the heading of this Notice and the Cabinet Secretariat, through the Secretary to the Governor, Punjab, drew the attention of the High Court to this Notice by a letter in which the view was expressed that while the inclusion of the name and Titles of the King in the Notice was constitutionally and legally correct, it did not appear to be legally necessary and was liable to misinterpretation. The letter also com*municated the Prime Minister's desire to omit these words from the Court Notices if there was no objection. The matter was discussed in a meeting of the Judges of the Lahore High Court when I was the Chief Justice of that Court. In reply, the High Court pointed out that the Letters Patent Seal of the Court also contained the Royal Arms and suggested that the Seal of the Court be changed. That reply went from the High Court on the

19th March, 1952, but since. an amendment of the Letters Patent, however simple it might appear to be, involves some study and thought, the matter is still under consideration, and the High Court writs, though they no longer run in the name of "Elizabeth the Second, Queen of the United Kingdom and of her other Realms and Territories, Head of the Commonwealth", continue to issue under a seal containing the Royal Coat of Arms.

JUDGMENT OF THE SIND CHIEF COURT

All that remains to notice now is the judgment of the Sind Chief Court. That judgment which was delivered after 19 days of argument and 25 days of deliberation, is a dis*appointing document. In the lengthy arguments before us, extending over three weeks, hardly any reference was made to it by either party. On the vital point in the case, repeatedly urged by Mr. Faiyaz Ali before the learned Judges, namely that the power of making provision as to the constitution of the Dominion which the Constituent Assembly was to exercise in the first instance under subsection (1) of section 8 was included in the powers conferred by section 6 on the Legislature of the Dominion, there is not one word in the judgment. Nor is there in any of the opinions delivered even a remote reference to the basic question, which .I am not deciding because the respondent was not called upon to reply to it, but. which must undoubtedly have stated the learned Judges in the face, namely, whether it is a wise exercise of discretion for the judiciary to re-install in power a deposed government by issuing enforceable writs against a de facto government. .

On the question on which we are disposing of this appeal Constantine, C. J. merely followed the opinion of Hassanally Agha, J. in a previous case and thought that the provision requiring the Governor-General's assent to legislation by the Legislature of the Dominion was inconsistent with indepen*dence. He overlooked-the obvious fact that if the Governor *General is a man from the Dominion and is appointed and dismissed on the advice of the Dominion Government, the legislative sovereignty of the)Legislature is not at all affected by the provision relating to assent. Nor, in the absence of a finding that some sort of estoppel operated or that there was an ambiguity in the Act, was he entitled to let his judgment be swayed by the consideration that the Law Officers of the Crown on previous occasions did not considers assent necessary, and that the objection was novel and, if accepted, would upset a consistent course of practice and understanding. I should incidentally mention here that it was stated before us by Mr. Faiyaz Ali, Advocate-General of Pakistan, -that on the point now raised the Law Ministry has consistently been taking the view that assent to constitu*tional legislation by the' Constituent Assembly is necessary, As regards the point that assent is needed only with respect to legislation by the Federal. Legislature and that there is no corresponding provision in the Act of 1947 in respect of legislation by the Constituent Assembly as Legislature of the Dominion; it is sufficient to say that the argument begs the whole question because the essential question that has to be determined is whether subsection (3) of section 6 does or does not have the effect of requiring assent to all legislation by the Constituent Assembly when it functions as the Legis*lature of the

Dominion under subsection (I) of section 8 to exercise the powers given to it by section 6. The ground on which Mr. Justice Vellani's judgment proceeds is somewhat more remarkable inasmuch as that learned Judge merely contents himself by asserting that the Constituent Assembly was- a' supreme body, subject to no agency or instrument to give its laws validity, and that the provision requiring the Governor *General's assent to its legislation would make the Governor-*General truly a Viceroy. He should have seen that other Dominions are independent, though similar provisions relating to assent exist in their constitutions, that the Governor* General, though a representative of the King, is a leading public man from the Dominion and certainly not the agent of the Government of the United Kingdom, and that the provision as to assent is not in the nature of a veto, because if the Constitution is properly worked as the Constitutions of the other Dominions are, the Governor-General is not in a position to veto any legislation by the Legislature of the Dominion unless he withholds his assent from some outrageous legislation, in which case, whatever may be the legal position, the final law would be the will of the people and not the will of the 'Constituent Assembly. The finding of Mr. Justice Muhammad Bakhsh Memori that the word `law' occurring in subsection (3) of section 6 of the Act of 1917 refers to laws made by the Federal. Legislature amounts to a plain misread*ing of that: provision and his view that the action of the Privy Council in transferring certain appeals to the Federal Court under the Privy Council (Abolition of Jurisdiction Act, 1950, and their receipt by the Federal Court amounts to "law declared" within the meaning of section 212 of the Act of 1935, amounts to misunderstanding of how law is declared. He was not concerned with the consequences, if on a true construction of the Act, he had come to the conclusion that assent was necessary. The validity or otherwise of other Acts was not before him, the only question that he was called upon to decide being whether the impugned amend*ment to the Government of India Act was valid. He also begs the question when he finds that Rule 62 of the Constituent Assembly Rules is law, and whether that Rule did or did not receive the assent of the Governor-General, it can override the express provisions of subsection (3) of section 6.

CONCLUSION

For the reasons given, I hold that the Constituent Assembly when it functions under subsection (1) of section 8 of the Indian Independence Act, 1947, acts as the Legislature of the Dominion within the meaning of section 6 of that Act, that under subsection (3) of the latter section 'the assent of the Governor-General is necessary to all legislations by the Legislature of the Dominion, that since section 223-A of the Government of India Act under which the Chief Court of Sind assumed jurisdiction to issue the writs did not receive such assent, it is not yet law, and that therefore, that Court had no jurisdiction to issue the Writs. In view of this conclusion we cannot go into the other issues in the case whatever their general importance may be.

I would, therefore, accept the appeal, set aside the Judg*ment of the Chief Court of Sind, and recall both the writs. Parties will bear their own costs throughout.

Before concluding I should like to express our apprecia*tion of the assistance rendered by counsel in the decision of this case, of Mr. Faiyaz Ali's vigorous all round argument, Mr. Diplock's masterly analysis of the Acts of 1935 and 1947 and Mr. Chundrigar's brave fight in defence of the sovereignty of the Coustituent Assembly.

AKRAM J.-I agree in the order allowing the, appeal. I, however, desire to say a few words of my own in support of the order. The facts of; the case are set out in detail in the judgment of my Lord the Chief Justice and need not be repeated. As regards the preliminary question : "Whether the assent of the Governor-General is necessary before any constitutional legislation by the . Constituent Assembly under section 8 (1) of the Independce Act, 1947, can pass into law?", the answer to it seems to me to' depend upon a true construction of the relevant provisions of the Independence Act itself. Section 6 (3) and the Ist part of section 8 (1) of the Act are as follows :-

"6 (3)-The Governor-General of each of the new Dominions shall have full power to assent to any law of the Legisla*ture of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon shall no apply to laws of - the Legislature of either of the new Dominions. -

8 (1) (1st part)-In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall for the purpose of making provision as to the constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion, and references u this Act to the Legislature of the Dominion shall be construed accordingly."

Reading section 6 (3) and the 1st part of section 8 (1; together the conclusion which I am able to draw, is that the Governor-General has full power to give assent to any kind of law proposed by the Legislature of the Dominion and that the Constituent Assembly which in the first instance is to make provision for the constitution of the Dominion is to exercise the power of the Legislature of the Dominion for that purpose. As a result, the assent of the Governor-General become necessary for the validity of even constitutional laws. In my opinion the words "full power to assent" in the context carry with them full liberty to refuse assent as power conferred does not mean liability imposed or obligation created. I am unable to construe section 6 (3) in the manner suggested by counsel for the respondent and to hold that the assent of the Governor* General is not necessary so far as constitutional laws are concerned. I have carefully considered the arguments which he has advanced- in its support,. namely :-

(a) That in case the assent of the Governor-General is regarded as essential to the validity of constitutional laws, then the result will be that the form of the Constitution will depend on the views of the Governor-General rather than those of the Constituent Assembly in contravention of section 8 (1) of the Independence Act-

(b) That under section 5 of the same Act, the Governor* General is to represent His Majesty for the purposes of the government of the Dominion, but this cannot confer on the Governor-General authority to nullify constitutional legisla*tion by withholding assent.

(c) That all along, the Government itself, the - people and the Courts, proceeded on the same view as is now pressed for by the respondent, namely, that the assent of the Governor-General is not necessary for constitutional legisla*tion under section 8 (1) of the Independence Act.

(d) That in section 6 (3) reference to ' the Dominion Legislature is only notional as no Dominion Legislature exists or existed before ; that in reality the reference is to the Federal Legislature functioning under section 8 .(2) - of the Independence Act ; that "law" in the subsection (3) is used in a broad and comprehensive sense in order to cover not only proposed legislative bills but also enactments which require confirmation by His Majesty under section 736 of the Merchant Shipping Act and section 4 of the Colonial Courts of Admiralty Act ; that the expression "full power to assent" has been used because the power of disallowance, reservation or suspension which existed under section 32 of the old Government of India Act, 1935, is done away with ; that the two parts of subsection (3) are to be read in close conjunction with each other in order to bring out the real meaning of the subsection; that "full power to assent" can*not be interpreted as full option to refuse assent.

(e) That section 8 (1) is not to be read with section 6 (3); there is no connection between the two.

(f) That there is no provision anywhere for the presenta*tion of a constitutional legislation by the Constituent Assembly to the Governor-General for his assent.

But these arguments, though ingenious and interesting, do not seem to me to be so cogent and convincing as to prevail over the clear meaning of section 6 (3) read with section 8 (1) of the Independence Act. In the interpretation of laws and statutes plain words should, as a rule, be given their plain meaning and a laboured construction should not be put upon them to bring into

prominence some kind of a remote significa*tion. I see no justification for any embroidery upon the plain and simple language of the subsections. Certain decisions in support of the respondent's contention were also cited but they do not appear to me to be precisely in point- and need not be referred to. But apart from the reasons given by me, while interpreting sections .6 (3) and 8 (1) of the Independence Act, if we look to the statement of His Majesty's Government, dated the 3rd June 1947; para. 20 and take into 'consideration the conditions and the circumstances existing at the time of the passing of the Independence Act, the plan and the purpose which the Legislature had' in view will not, perhaps, be far to seek. Paragraph 20 of the statement aforesaid runs as follows:

"Accordingly, as the most expeditious, and indeed the only practicable way of meeting this desire,-'His Majesty's Government propose to introduce legislation during the current session for the transfer of power this year . on a Dominion Status basis to one or two successor authorities according to the decisions taken as a result of this announce*ment. This will be without prejudice to the right of the Indian Constituent Assemblies to decide in 'due course whether or not the part of India, in respect of which they have authority, will remain within the British Common*wealth."

"Dominion Status", it appears, had already acquired a techni*cal meaning ; it implied, according to the declaration of the Imperial Conference held in London in 1926, "autonomous communities within the British Empire, equal in status; in no way subordinate one to another in any respect of their domestic or external affairs, though united by a common allegi*ance to the Crown and freely associated as members of the British Commonwealth of Nations". Indeed, the Dominions were virtually distinct kingdoms united by a common King and a common allegiance and their inter-Imperial relations were in no sense regarded as international.

Thus the effect of conferring 'a Dominion Status was that certain rights and liabilities as between the. Dominion and the United Kingdom came into existence, for instance, if the Dominion by its legislation negated allegiance to the Crown or severed connection with it, such a legislation perhaps could not be considered as legally valid or justified. The expression, "Independent Dominion" has, therefore, been' purposely used in the Independence Act in order, to give to the Dominion freedom of choice either to remind or to refuse to remain) within the British Commonwealth of Nations as envisaged in para. 20 of the statement of His Majesty's Government quoted above. It is clear that by the Independence Act the intention was to give a constitutional form of Government modelled on the pattern of the British Government pending the setting up of a final constitution by the Dominion itself. According to English Constitutional theories, the Sovereign, who is the Executive Head of the State; is always a constituent part of the supreme legislative power and as such has the legal right not only of giving assent but also of refusing assent in case he considers a' provision to be inexpedient or injurious. The power to give or to refuse assent is one of a great variety of royal prerogatives and cannot be abrogated or

curtailed without clear statutory provision to that effect made with the royal concurrence. See (a) Blackstone on the Laws of England, Volume I, Fourth Edition, Chapter VII, page 221 :-

He, (the Sovereign) may reject what bills may make what treaties, may create what peers, may pardon what offences he pleases : unless where the constitution has expressly, or by evident consequence, laid down some excep*tion or boundary: declaring; that thus far the prerogative shall go, and no further."

(b) Keith's' Constitutional Law, Seventh Edition (1946 Reprint), page 201 :-

"The prerogative of the King is the privilege of his subjects; that is the King must exercise his -prerogative not for his own benefit but for the protection of his subject in accordance with the advice of his constitutional legal advisers. The King in Council is the Executive; the King in Parliament is the Legislature ; the King in his Courts administers justice; and thus the Crown binds together every department of the State."

(c) Constitutional law by Wade and Phillips, Third Edi*tion, page 95-.-

"Parliament cannot legislate without the concurrence of all its parts, and therefore the assent of the King is required. The King not only summons Parliament and can dissolve Parliament, but must give his consent before any legislation can take effect."

(d) Stephen's Commentaries on the Laws of England, Eighteenth Edition (By Edward Jenks), Volume I, page 176;-

"In legal theory, the King is .capable of refusing-to give his ,assent to a Bill; and, if he did so refuse, 'the Bill, although it had passed both Commons and Lords, could not become law. But . for over two centuries, no monarch has placed himself in opposition to the wishes of the people as expressed through their representatives. The Spirit of the Constitu*tion is, that the Government is carried do by the Houses of Parliament (since 1911 one may say by one House only), and that the King's functions in legislation are purely formal. The last occasion when the royal assent was refused was when Queen Anne rejected the Scotch Militia Bill in, 1707; and it is unlikely that the words `le roys' avisera' will ever be spoken in the House of Lords again."

Such being the English constitutional theories, it would be a strange supposition to make that the British Parliament, while framing an interim Constitutional Act for Pakistan, acted in a manner contrary to its own principles and traditions and deprived the Executive Head of the Dominion of power to give or to withhold assent as respects constitutional laws. For the reasons stated, I am of the view that in the absence of any express or implied provision in any enactment to the contrary, the assent of the Governor-General is , necessary before any constitutional measure framed under section 8 (1) of the Independence Act, 1947, can pass into law.

CORNELIUS, J.-It is proper that, realising the grave issues which are involved in this case, I could commence with an expression of -my sincere regret at being unable to agree with the view on one part of the case, which has commended itself to my Lord the Cheif Justice and my learned brothers, in consequence of which the appeal has been allowed. It will be the principle concern in this judgment .to indicate with such clarity and brevity as may be possible to me, the reasons which have compelled me to come to a different conclusion. The resolution of a question affecting the interpretation of important provisions of the interim constitu*tion of Pakistan in relation to the very high matters which are involved, entails a responsibility going directly to the oath of office which the constitution requires of a Judge, namely, to bear true faith and allegiance to the Constitution of Pakistan as by law established and faithfully to perform the duties of the office to the best of the incumbent's ability, knowledge and judgment. The reasons I am about to set out have the effect of determining my humble judgment in one way and one way only, namely, that in the given circumstances, there is nothing in the law which makes the grant of assent bar the Governor-General to Acts of the Constituent Assembly, which make provision as to the Constitution of the country, a sine qua non, so that the absence of assent has the effect of invalidating all laws which have been passed in that mode, i.e., without the Governor-General's assent. Since the questions to be dealt with relate in essence to the period immediately prior to the 24th October 1954 when the Proclamation was made by His Excellency the Governor-General, as a consequence of which the Constituent Assembly was deemed to have been dissolved, the argument will of necessity proceed upon. the assumption that the Constituent Assembly is still in being. The assumption cannot of course affect the factual position.

A brief recital of the facts is necessary, and may appro*priately commence with the enactment by the Constituent Assembly of two Acts in the year 1954, amending the Government of India Act, 1935. The first of these Acts is described as the, . Government of India (Amendment) Act, 1954, and purported to insert a new section ' 223-A in the Government of India Act, which reads as follows :-

"223-A. Every High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any Government within those territories, writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them.

The second Act was described as the Government of India (Fifth Amendment) Act, 1954, which inter alia inseited a new section 10 to replace the existing sections 10, 10-A and 10-B. The relevant provision in the new section 10, for the purpose of the present case, is contained in subsection (1) which reads as follows :-

"10. (1)-The Governor-General shall appoint a Member of the Federal Legislature who commands the confidence of the majority of the Members of the Federal Legislature as Prime Minister. The other Ministers shall be appointed by the Governor-General, from amongst the Members of the Federal Legislature in accordance with the advice of the Prime Minister."

The previous provision on this subject was that "the Governor-General's Ministers were chosen and summoned by him, and that a Minister who for any period of ten conse*cutive months was not a member of the Federal Legislature, should at the expiration of that, period, cease to be a Minister.

Both these Acts were passed by the Constituent Assembly and were signed by the President, by way of authentication and in the belief, based upon rule 62 of the Rules of Procedure of the Constituent Assembly of Pakistan which I reproduce below' that by such authentication and subsequent publication these Acts became law without the necessity of the Governor* General's assent. Rule 62 reads as below

"When a Bill is passed by the Assembly, a copy thereof shall be- signed by the President and it shall become law on being published in the official Gazette of Pakistan under authority of the President."

Shortly after the making of the Proclamation, Maulvi Tamiz-ud-Din Khan; who was President of the Constituent Assembly, filed a' writ petition in' the Chief Court of Sind, citing as respondent the Federation .of Pakistan and nine Ministers who had been sworn in as Ministers of the Federal Government. The reliefs claimed were inter alia, .a writ of mandamus against all the respondents, their agents, etc., to prevent them from giving effect to the Proclamation and from interfering with the exercise by Maulvi Tamiz-ud-Din Khan of his functions and duties as President of the Constituent Assembly, and a separate writ of quo warranto against each of the respondents who were Ministers in the newly-constituted Government to determine the validity of their appointments. The respondents contested the petition raising preliminary objections as well as objections on the merits. The first preliminary objection was that section 223-A (which has been reproduced above) had not yet become law in Pakistan by reason of absence of the Governor-General's assent which was sine qua non for the purpose. The other preliminary

objections were to the effect that, even if section 223-A was held to be valid, in the existing 'circumstances, no writ as claimed could issue. The objections on the merits related to the dissolution of the Constituent Assembly and set out that in view of the fact that Pakistan is expressly constituted as " one of the dominions of the Crown of the United Kingdom, a power to dissolve the Legislature was furnished by the common law and also lay in the prerogative which the Governor*General could exercise". After lengthy arguments, a Bench of four Judges of the Sind Chief Court held unanimously that the conditions requisite for the issue of the writs claimed were shown to exist, and accordingly they directed that the writs should issue. Three of the learned judges wrote separate judgments, the fourth learned judge expressing agreement with the judgment written by the learned Chief Judge. It is not necessary to state in detail all the findings recorded by the learned .Judges or the reasons which they have furnished in support of each finding, for the reason that in this Court the decision has been confined to the single question of necessity for the Governor-General's assent iii relation to laws made by the Constituent Assembly containing provisions as to the Constitution of Pakistan. On the latter point, the reasons which guided the learned judges of the Court below may be shortly stated as under :-

(1) The key to the Indian Independence Act, 1947, is the independence of Pakistan, and the purpose of section 6 of that Act is to efface the supremacy of the British Parlia*ment.

(2) Subsection (3) of section 6, which provides that "the Governor-General shall have full power to assent to any law of the Legislature of the Dominion" does not impose the requirement of assent for all laws made by the "Legisla*ture of the Dominion", but merely provides that if assent were necessary, the Governor-General should have full power in that respect. Express provision was retained in the Government of India Act, 1935, for the necessity of assent to Acts of the Federal Legislature only, and therefore section-6 (3) applies only to such Acts.

(3) The Crown is not named in the relevant Constitu*tional Instruments. viz., the Indian Independence Act and the Government of India Act, 1935, as sharing in the power of legislation and the clear implication was that the Crown was excluded from such power.

(4) On the Constitution-making side the Constituent Assembly had sovereign power, equal to that of the King, and therefore, no assent of the King was necessary.

(5) That the Constituent Assembly could have repealed section 6 (3) and even the whole of the Independence Act; it was impossible to think that such a law would require the assent of the Governor-General.

(6) That all authorities in Pakistan, executive, legislative and judicial, had for many years past interpreted the Constitution in this way, i.e., that constitutional enactments by the Constituent Assembly became law without the assent of the Governor-General.

Accordingly, the learned judges held that section 223-A by which they were empowered to issue writs was good law, and proceeded thereafter to consider the question whether the Governor-General had the power to dissolve the Constituent Assembly, and whether in the given circum*stances, the writs claimed could properly issue. They answered the first question in the negative and the second in the affirmative as against the Federation and five of the Ministers. The reasons for these findings have been given at great length, but do not require mention for the purpose of this judgment.

The respondents appealed in this Court against this decision under section 205 of the Government of India Act, on a certificate issued by the Court below as required by that section. In support of the appeal, the Court heard addresses from the Advocate-General of Pakistan who was followed by Mr. Kenneth Diplock Q. C. of the English Bar. On the question of assent, the argument of the learned Advocate *General was confined to showing that such a requirement could be construed out of the provisions of section 6, subsection (3) of the Indian Independence Act, and that rule 62 made by the Constituent Assembly had no validity in law, though not having been made in the proper form viz., by presentation as a Bill and consequential proceedings, and also though its lacking the assent of the Governor-General.

The learned Advocate-General urged that in order to produce the result which rule 62 was designed to achieve, the Constituent Assembly should have amended section 6 (3) of the Indian Independence Act, which they had full power to do, subject to the assent of the Governor-General. The argument presented by Mr. Kenneth Diplock was lengthy and elaborate. The resume which I proceed to attempt may, therefore, be incomplete in some respects. He started with the proposition that although when the King has once transferred legislative powers to representative institutions in one of his realms or territories, he cannot thereafter take back that power, yet, in every such realm ®r territory, at every stage of its development, the King remains an integral part of the law-making machinery. In this connection, he referred to the decision of the Privy Council in the case of The Liquidator of the Maritime Bank of Canada v. The Receiver-General - of new Brunswick (1892 A C 437). The question there raised was that the British Sovereign had no direct connection with a Province of the Dominion of Canada after the passing of the British North America Act, 1867. The Privy Council overruled the contention, having found that the Lieutenant-Governor of a Province was appointed by the Executive Government of the Dominion which was expressly vested in the Queen, that all public properties

and revenues in the Province were also vested in the Queen, and that the Queen was part of the Legislature. The relevant observations, which relate to the last-mentioned finding, may be reproduced verbatim :-

"It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the Provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share."

Next, Mr. Diplock urged that the key to the Indian Independence Act was not the independence of Pakistan, as had been concluded by the learned Chief Judge of the Sind Chief Court, but the formation of an independent Dominion of Pakistan, and he argued that in all essential respects, Pakistan was on the same footing as any of the other Dominions. Dominion Status was virtually undistinguishable from independence, for it was recognized that the Dominions were Sovereign States in the eye of international law, since they enjoyed independent treaty-making powers. the right of separate representation in the United Nations, and the right to appoint their own ambassadors in foreign. countries. Such was the degree of independence they enjoyed, that even a declaration of war against a foreign country by His Majesty's Government in the United Kingdom did not operate in relation to any Dominion of its own force. The Dominions were free to accept the British Sovereign in relation to themselves, with such royal titles as they might them*selves determine. Yet, as is stated in the Preamble to the Statute of Westminster, 1931, "the Crown is the symbol of the free association of the members of the British Common*wealth of Nations and . . . . . they are united by a common allegiance to the Crown." Both as a symbol of such free association and as recognition of the allegiance owed to the British Sovereign, it was the invariable practice in all Dominion countries to seek the assent of the Sovereign from his representative in the Dominion, namely, the Governor* General, in relation to Dominion laws. This was an inherent feature of Dominion Status, and could not be avoided unless by express words or necessary intendment. The right of assent was a prerogative right of the Sovereign and although it could be taken away either by the British Parliament, where it retained the capacity to legislate or by the "Legislature of the Dominion" itself, following the rule applicable to prerogatives of the Crown, it could not be taken away except by express words or necessary intendment.

On this foundation it was argued that subsection (3) of section 6 of the Indian Independence Act, so far from excluding the royal prerogative, was founded upon the assumption that the prerogative of assent was to apply in relation to all laws of the "Legislature of the Dominion". although the. "Legislature of the Dominion. " was not constituted by any provision in the Indian Independence Act, and the intention was that its constitution and powers should be settled by the Constitution to be drawn up by the Constituent Assembly, yet the provisions of the Indian Independence Act when read together could lead to only one conclusion, namely, that, pending the promulgation of a new Constitution, the Constituent Assembly was, to all legal intents and

purposes, the "Legislature of the Dominion". Therefore, until such time as the country ceased to be a Dominion, or a new Constitution came into force which avoided the requirement, assent on behalf of the British Sovereign was a necessary requisite to validity of all laws made by the Constituent Assembly including laws of a constitutional nature. The latter conclusion was unavoidable in view of the provision in subsection (6) of section 6, Indian Independence Act, that the "Legislature of the Dominion " should have power to make laws limiting its own powers for the future, and such laws were undeniably constitutional in their nature.

Mr. Diplock also argued at length that a power of dissolution of the Constituent Assembly could be found in favour of the Governor-General from the words of section 5 of the Indian Independence Act which provide that "the Governor-General shall represent His Majesty for the purposes of the government of the Dominion", coupled with the proposition, firstly, that a power of dissolution vests in the Crown in the United Kingdom by virtue of the preroga*tive, and secondly, that after the grant of legislative institutions to an overseas possession, the Crown acting through its Governor-General, stands in the same relation to the Legislature of that possession as it does to the British Parlia*ment. The force of this argument was materially impeded by two powerful considerations,-viz., that in the case of every other Dominion and possession, the power of dissolution was vested in the Governor or. Governor-General by express provision in the Constitution, and secondly, by the circumstance that a power of dissolution of the Federal Legislature which was contained in section 32, Government of India Act, 1935, had been deliberately taken away in the course of adapting the Government of India Act to the conditions which were to obtain after the creation of the independent Dominions. By section 8 (2), proviso (e) of the Indian Independence Act, it was enacted that the powers of the Federal Legislature or the Indian Legislature, as set out in the Government of India Act, should be exercisable in the first instance by the Constituent Assembly, and it is all too plain that to allow the Governor-General to dissolve the Federal Legislature, would in effect be to allow him to dissolve the Constituent Assembly. The second part of Mr. Diplock's argument on this point was, to my mind, the more attractive, namely, that the Governor-General of Pakistan is the virtual head of the State and under the maxim salus populi est suprema lex, he has not only the power but also the duty to act, in face of any great national disaster; threatening the country, in such a way-as to avert that disaster. His action, when purporting to be taken in exercise of this power anti duty, would be above the law, and, consequently, not justiciable. I found it impossible, however, to accede to Mr. Diplock's further claim that if, in such a threatening situation, the Governor-General should fail to act, the British Sovereign, by virtue of the relationship of allegiance, would have power to intervene and to take action for the safety and security of the country in accordance with the express wishes of the people of the country. Such a possibility has never so far as I am aware been present to the minds of any persons in Pakistan who have ever had occasion to examine the incidents of Dominion Status, and it is easy to imagine that any such action by the British Sovereign, as distinguished from the Government of the United Kingdom, would be beset by practical difficulties in relation to a country such as Pakistan, some of which would appear at first sight to be insuperable.

The main reply to these arguments on behalf of the petitioner was made by - Mr. Chundrigar. He stressed that the point for consideration was the validity of the practice of a Sovereign Constitution-making body. while engaged in making provision as to the Constitution. Both as to the practice as well as in relation to its validity, the right of decision vested in the Constitution-making body alone. In that view of the matter the expressed will of the Constituent Assembly as declared in rule 62 of the Rules of Procedure must be regarded as final. The rule in its original shape merely provided for authentication of the Bill by the President. It was made at a meeting of the Constituent .Assembly held on the 24th February 1948, which was presided over by the late Quaid-i-Azam, who combined in himself the offices of first Governor-General of Pakistan and first President of the Constituent Assembly of Pakistan. The rule was amended and brought to its present shape at a meeting of the Constituent Assembly held on the 22nd May 1948, under the Chairmanship of Mr. Tamiz-ud-Din Khan, then Deputy President of the Constituent Assembly of Pakistan, deputizing for the Quaid-i-Azam in his absence. It must be assumed that the rule was made in its final shape to the knowledge of the then Governor-General.

On the point of assent, as a requisite derivable 'from the considerations (a) that the country possessed Dominion Status and (b) that it owed allegiance to the King, Mr. Chundrigar argued that Pakistan and India were constituted not as mere Dominions, but as "Independent Dominions" and the differ*ence was very strong and very material. Each of these new Dominions was provided, at its very birth, with an apparatus, namely, the Constituent Assembly composed of elected representatives of the people for equipping itself with a Constitution of its own choice, even one which could take it out of the oversight of the British Sovereign altogether. No other case of the same kind was known in the history of development of the British Commonwealth. It was, he urged, in consequence of this enormous difference that a great change was brought about in the oath which the Governors* General of Pakistan are required to take upon assuming office. The previous oath was one to be faithful, and bear true allegiance to His Majesty the King etc.". but from the very inception of Pakistan the oath has been to bear true allegiance to the Constitution of Pakistan, and to be faithful to His Majesty the King, etc. Allegiance to a Constitution which, although effective to create a Dominion, could have been changed by the Constituent Assembly at any time, could not be construed as acceptance by the Governor-General of the King as liege lord, or to constitute the Governor-General as liege-man of the King. Between allegiance and faithfulness, as forms of human relationship, there was a vast difference. The position is further emphasised by the fact that, upon the accession of the present British Sovereign, Her Majesty Queen Elizabeth II, the title relevant to Pakistan which was accepted by Pakistan was not that of Queen of Pakistan but only that of "Head of the Commonwealth". The materiality of the difference appears from the fact that the other Indepen*dent Dominion created in 1947, namely, India, became by virtue of a Constitution passed by the Constituent Assembly of that country, which was set up in precisely the same circumstances, a Republic. That Constitution did not receive the assent of the then Governor-General, and in India also the practice throughout was that constitutional Acts of tile Constituent Assembly were sufficiently passed into law by authentication of the President, and assent of the Governor* General was never obtained. India also, after becoming a Republic, has accepted the British Sovereign only in the capacity of "Head of the Commonwealth". Therefore,

in the existing conditions, no bond of allegiance could be deemed to exist between the Governor-General of Pakistan as head of this State on the one side and the British Sovereign on the other. (It was emphasised that even the acceptance of the title "Head of the Commonwealth" had been effected not by an expression of the will of the country's Legislature but only by a proclamation made by the Governor-General, whose status under section 5 of the Indian Independence Act is that of representative of the British Sovereign.)

Mr. Chundrigar then pointed out that the Constitutional Instruments relevant to Pakistan are devoid of any expression such as might have the effect of making tile British Sovereign a part of any Legislature in Pakistan. ' This has been achieved by gradual steps. The provision in the Act: that the Federal Legislature of India should consist of the British Sovereign represented by the Governor-General and two Chambers was radically altered in the cause of adaptation to the new conditions which were expected to develop from the date of establishment of the new Dominions. The new section merely set out in different words the provisions of section 5, sub*section (2), proviso (e) of the Indian Independence Act, viz., that the powers of the Federal or Indian Legislature should be exercisable by the Constituent Assembly. The Constituent Assembly had thereafter been at pains, by amendment of the Indian Independence Act and the Government of India Act to remove references to the grant of assent to legislation by the Governor. General and by. Governors of Provinces in Ibis Majesty's name,, thereby emphasising the actual, independence of the Governor-General and the Governors in respect of the grant of the assent. Where the interim Constitu*tion provided that the head of the Government should be a part of the legislative machinery, it said so explicitly, e.g., in section 60 of the Government of India Act which declares that "there shall for every Province be a Provincial Legislature, which shall consist of the Governor, and one Chamber". This was in 'accordance with the practice in every other Dominion, and, therefore, since the Government of India Act and the Indian Independence Act are wholly devoid of any words which could make the Governor-General a part of the Constituent Assembly, either in the capacity of Federal Legislature or in its higher Constitution-making capacity, the conclusion must be that the Governor-General as such was not a part of the law-making machinery of the Dominion.

Next, Mr. Chundrigar put forward the argument that assent is a form of control over legislation, and referred to the history of the grant of independence to the sub*continent of India for the purpose of showing that in relation to the preparation of new Constitutions for the two countries, it was impossible to suppose that any control was intended to be imposed. The constitutional documents relevant to the grant of independence showed a clear intention on the part of His Majesty's Government in the United Kingdom to fulfill the wish of the Indian people to attain freedom, and to assist the Indian people to achieve freedom in a form which they should freely decide for them*selves, by helping to establish the necessary machinery. Although the hope was expressed that the new countries would remain within the Commonwealth, and emphasis was laid upon the advantages of such a position, contrasted with the perils of isolation in the modern world, it was nevertheless repeatedly stated that the Constitution would be settled by Indians for Indians. It was said that His Majesty's Government had "no intention of attempting to frame any

ultimate Cons*titution for India; this is a matter for the Indians themselves". The argument for the appellants had been that the power of assent included necessarily the power to withhold assent and the implication was that insistence upon assent by the appellants was tantamount to insistence upon the acceptance of a control. The conditions which His Majesty's Govern*ment in the United Kingdom created in India and in Pakistan before they themselves relinquished all responsibility for the Government of these territories, clearly militated against the presence of any such control.

With reference to section 6 (3), Indian Independence Act, the contention was that its terms did not render assent to constitutional laws necessary, but, on the other hand, if the express terms imposing the necessity of assent which are contained in the Constitution of every other Dominion existing in 1947, be compared with this provision, the necessary con*clusion must be that no provision requiring assent to constitu*tional law made by the Constituent Assembly, had been made by the British Parliament. The necessity for assent to Federal legislation arose out of the statutory provision under section 32, Government of India Act, 1935. The Constituent Assembly which in the interim period exercised the powers of the Federal Legislature could have amended section 32 to remove the requirement of assent, which was in the nature of a control, but it chose of its own free will not to do so. The added powers of legislation which were to vest in the Dominions through the relinquishment of such power by the British Parliament were conveyed by the Indian Independence Act, and if it was the intention of Parliament, which was fully aware that such vested powers were being conveyed away, to impose upon the exercise of such powers, the control implicit in assent, they would certainly have done so in explicit terms. That had been done by the same Parliament in the case of every other Dominion, and its omission from the Indian Independence Act could only lead to the conclusion that Parliament intentionally avoided making such a provision, and that it did so in view of the plenary powers which were being allowed in favour of the Constituent Assemblies of the Dominions, to prepare a wholly new Constitution for each Dominion. If there was to be any such control imposed upon the Constituent Assembly's power, that control must be left to the Constituent Assembly itself to impose ; having declared the Constituent Assembly to be fully unfettered in this particular respect. the British Parliament could not thereafter have concerned itself with the imposition of control of any kind, whether exercisable from the United Kingdom or from within the new Dominion of Pakistan.

Consequently, section 6 (3), Indian Independence Act, was to be construed as a provision which broke down with one stroke all pre-existing restraints imposed from the United Kingdom, whether by virtue of His Majesty's prerogative, or by Act of the British Parliament, upon the Governor-General's power to grant assent to laws which might for the future be made so as to have effect throughout the new Dominion, sup*posing that it remained a Dominion. It had been made clear that this would depend upon the free choice of the Constituent Assembly, and therefore to suppose that section 6 (3) had the effect of making assent sine qua non was impossible, since that would be to fetter the powers of the Constituent Assembly.

It was next urged that the Indian Independence Act did not purport to set up a Legislature for either of the two independent Dominions that were to be formed. Here also, the Indian Independence Act furnishes a sharp contrast with every other law of the British Parliament, creating Dominions. No body of persons was specified which would constitute the "Legislature of the Dominion". The expression was indeed used in a completely abstract sense, as is clear from the fact that the only aid furnished by the Act to the formation of any idea as to the nature and quality of the "Legislature of the Domi*nion" was by references to things which the "Legislatures of the Dominions" might do, which were mentioned in a number of sections in the Act, notably subsection (1) of section 8, which refers to "the powers of the Legislature of the Dominion for the purpose of making provision as to the constitution of the Dominion". On the other hand, the Constituent Assembly was 'referred to throughout as a specific body, and indeed on the appointed day, the Constituent Assembly of Pakistan was already in being. In section 8, Indian Independence Act, which has reference to the exercise of legislative powers of the Dominion, the Constituent Assembly is mentioned three times and each time as a distinct body, differentiated from the "Legislature of the Dominion". if the intention of the British Parliament had been that as from the appointed day, viz., 14th August 1947, the Constituent Assembly of Pakistan should be the "Legislature of the Dominion", nothing could have been easier than to have said so expressly, and-if that had been done, a considerable number of provisions, which were made neces*sary only because the conception of the "Legislature of the Dominion" was to be kept distinct from the actuality of -the Constituent Assembly, would have been rendered unnecessary, and the Act might have been greatly shortened and 'simplified. In fact, the Constituent Assembly could not conceivably be identified with the "Legislature of the Dominion" for the simple reason that the Constituent Assembly was to be the parent and creator of the "Legislature of the Dominion", whose shape and form the British Parliament could not presume to set, having once declared that this function was to be perfor*med by the Constituent Assembly of Pakistan free of all control. It might have been that in the result the Constituent Assembly may have decided upon a Legislature to exercise the legislative powers of the Dominion, in which the Governor *General might have been an integral part, and in that case, that provision, in section 6 (3), Indian Independence Act, would immediately come into play. But until that happened, the correct position was that the Constituent Assembly was not the "Legislature of the Dominion", whether it was exercising Constitution-making powers or the powers of the Federal Legislature.

Lastly, Mr. Chundrigar referred to the great number of constitutional laws which had been made. by the Constituent Assembly in the same mode as the laws which were now being impugned, and emphasised that the addition of section 223A to the Government'- of India Act had been made by the Con*stituent Assembly upon motion of the then Law Minister, Mr. A. K. Brohi. Being a provision relating to a highly important subject of great public interest, namely, the jurisdiction of the High Courts, it must be presumed to have been put forward after due consideration by the Federal Government. It did not lie in the mouth of that Government now to repudiate this provision, which it itself moved to obtain, presumably with the intention that it should be effective. M. Chundrigar also referred to a number of judgments of superior Courts in

Pakistan where either directly or by implication, effect had been given to the view that a law of the Constituent Assembly making provision or containing a provision as to the Constitu*tion of Pakistan did not require the assent of the Governor General. These cases are firstly, M. A. Khuhro v. The Federa tion of Pakistan, (P L D 1950 Sind 49) the Mamdot case (P-L D 1950 F C 15=1950-51 F C R 24) and ex-Major General Akbar Khan's case (PLD 1954 FC87). In the first case, a single Judge of the 'Sind Chief Court, in the year 1950 expressly accepted a contention advanced on behalf of the Federation of Pakistan, in respect of a law which the opponent was seeking to avoid, that that law, being a law making provision of a Constitutional nature, was validly passed without the assent of the Governor-*General. In the other two cases, which were subsequently decided in 1950 and 1954 respectively, in both of which the Federation of Pakistan was represented, the validity of the law in question in each case was challenged on the ground that it . was not a law relating to the Constitution; and therefore, required assent. In each case, this argument was negatived, but the absence of assent was the central and crucial fact in each of these cases and it .was of the utmost significance that the eminent counsel who appeared did not challenge the validity of the legislation, even as constitutional legislation, on this ground. Nor did the learned Judges of the Federal Court themselves take notice of the matter, indicating clearly that the judicial view expressed in the Sind case was accepted as correct in this regard. .

The issue between the parties on the point of necessity of assent may be stated somewhat as follows. For the Federation of Pakistan and the Ministers whose legal status has been held by the Sind Chief Court to be unsound, the contention is that the necessity of assent by the Governor-General, as a condition of the validity of all laws passed by any Legislature which has the capacity to make laws for the whole Dominion, including laws making provision as to the Constitution, is derivable from (a) the fact that Pakistan is a Dominion included in the British Commonwealth of Nations and (b) the following words contained in section ; 6 (3) of the Indian Independence Act, viz., "The Governor-General of each of the new Dominions shall have full power to assent to any lave of the Legislature of that Dominion". On behalf of the petitioner, the contention is that no such condition or obligation can be construed out of Pakistan's membership of the British Commonwealth of nations, even as a Dominion, in view. of the present-day conception of that membership, of the deliberate avoidance by .Pakistan of acceptance of alle*giance to the British Crown, and the equally deliberate accept*ance of the British Sovereign, not as Queen of Pakistan,-, but only as Head of the Commonwealth. The Construction placed upon section 6 (3) of the Indian Independence Act is characterized as entirely incorrect, and it is contended that the words are only of enabling effect and cannot carry any connotation of a duty. I shall examine first the question whether the necessity of assent by the Governor-General can be founded upon any consideration arising out of Pakistan's membership of the British Commonwealth of Nations.

As far back as 1926,, following the Imperial Conference of that year (the British Empire being then a. living reality), it was declared that the United Kingdom and the Dominions were "autonomous communities within the British Empire, equal in status, in, no way one subordinate to another in any aspect of their domestic or external affairs, though united by q common

allegiance to the ' Crown, and freely associated as members of the British' Commonwealth - of Nations". It was still possible at that time to describe the British Parliament as "the Imperial Legislature", a term employed by the Privy Council in the Maritime Bank of Canada case which I have already cited. In 1931, "the Imperial Legislature" passed what may be described, I hope without disrespect, as a self-denying enactment, viz,, the Statute of Westminster, whose long title however was-

"Act of the Imperial Parliament to give Effect to, certain Resolutions passed by Imperial Conferences held in the years 1926 and 1930."

The lengthy preamble to this Act is in six separate para*graphs of which the second contains an attempt at a definition of the' position of members of the Commonwealth, couched in the following words:- . .

"It is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the = free association of the members of the British Common wealth of Nations; and as they are united by a common allegiance to the Crown."

It may be noted that the freedom was confined to the association of the countries among themselves; as against the Crown however there was not' freedom but allegiance. It is, I think, entirely justifiable to give to the word "allegiance", when used in respect of a high and mighty Prince, its full connotation, namely, that bond of servitued which a liege-man owes to his liege-lord. A liege-man is, in the feudal. concept, from which it is not safe to depart when assessing at its full weight the power and authority. of royalty, a sworn vassal, bound by an oath of fealty to his liege-lord, namely, a feudal superior or sovereign entitled to receive feudal service. It may be that by convention and also as a result of the devolution of power involved in the . grant of representative institutions, the strict obligations, which words such as "feudal sovereign", "feudal service" import become. inapplicable in course of time. In the case of the sub-continent of India, which was known as the Indian Empire in which the British Sovereign as will appear from section 2 of the Government of India -Act, 1935, enjoyed and possessed every kind of royal power and authority, being also sovereign - of all the territories thereof, it would be possible, in my view, to place a meaning upon the word "allegiance" not far removed from that which might be thought to convey the maximum obligations arising out of the relation*ship. At that time, however, i.e., in the year 1931, India was not a Dominion.

As a -result of the Statute of Westminster, the conception of an "Imperial Parliament" was swept

away in relation to the Dominions of Canada, Australia, New Zealand, South Africa, the Irish Free State and Newfoundland. Yet, -allegiance to the British Crown was retained on the one side, and while it was declared that no future Act of the British Parliament would extend to any of these Dominions (subject to acceptance of this provision by Australia, New Zealand and Newfoundland) and that the Parliaments of these Dominions should be free to make any law they pleased, even a law repugnant, to arty United Kingdom law having effect in the Dominion so that the power to repeal any such law of England was included, yet the Parliaments of Canada, Australia and New Zealand were expressly debarred by sections 7 and 8 from amending or repealing their respective constitutional Acts, being Acts of the erstwhile "Imperial Parliament". In the case of Australia, a further limitation upon the fullness of the legislative power of the Dominion was provided by section 9, namely, that the British Parliament retained power to make laws "with respect to any matter within the authority of the States of Australia, not being a matter within the.-. authority of the Parliament or Government of the Commonwealth of Australia", where the making of such a law without the concurrence of the Parliament of the Dominion was in accordance with the previous constitutional practice. These provisions are still substantially in operation as law, and, in my opinion, they detract very greatly from the nature of the- sovereignty which was received by these Dominions in consequence of the Statute of West*minster. It was argued for the appellants that by convention the stringency of these powerful controls was susceptible of relaxation, but at this point, it is useful, in my opinion, to repeat one of the basic propositions which Mr. Kenneth Diplock advanced as the foundation .. of his argument, viz., that in construing any constitutional enactment the Courts are concerned only with legal powers.. In my opinion, the existence of these restraints clearly, and forcefully, stands in the way of acceptance of Mr. Diplock's assertion that all the *Dominions were independent Dominions in exactly the same) sense as India and Pakistan became independent Dominions in August 1947. It is true that Mr. Diplock. did not rely to the greatest extent for this assertion on the case, of India, Australia and New Zealand. His strongest card as the South Africa Act, 1909, which by section -t52, gave power to the Parliament of the Dominion to repeal or alter any of the provisions of that Act. Yet that Act imposed specific jurisdic*tions of a very real kind which exist to this day, as is evident from section 9 providing that the Governor-General shall be appointed by the King and section 64 which lays down that a Bill passed by the two Houses should be presented to the Governor-General for the King's assent, and the Governor *General shall declare "according to his discretion, has subject to the provisions of this Act, and to such instruction as may from time to time be given in that behalf by the King, that he assents in the King's name, or that he withholds assent". The power of this strong legal provision was sought to be minimised in argument by reference to conventions, but again I repeat that the Court is not concerned with conventions but only with legal provisions.

The conclusions which I reach on the basis of this brief examination regarding the effect of the Statute of Westminster are as follows. In respect of the specified Dominions, for the future, the British Parliament altogether, lost the status of "Imperial Legislature". ' In the case of each Dominion, the duty of allegiance to the British Crown was asserted, and in the case of three of them, the power to alter their own Constitutions, which had been conferred upon them by Act of the "Imperial Legislature" was expressly withheld. The idea of independence is certainly not the first or the strongest, impression conveyed by these stipulations. In only one respect was a word

of liberation employed, viz., these countries, enjoying a mitigated form of legislative power,. Approximating to but distinctly different from legal sovereignty, were describ*ed as being "freely associated" with each other; as well as with His Majesty's Government- in the United Kingdom.

After the year 1931, a number of rapid developments took place, particularly in relation to the Irish Free State, which are of great importance to a proper understanding of the position occupied by Pakistan and the obligations arising out of that position, when it was admitted to the community of the 'Dominions in 1947. The history of the developments affecting the Irish Free State may be conveniently extracted from a foot-note to paragraph 1022 on page 458 of Volume V. of Halsbury's Laws of England. Third Edition, which reads as follows, the unnecessary matter being excised :-

"The Irish Free State was one of the Dominions specified in the Statute of Westminster, 1931. In 1933 she abolished the oath of allegiance ; in 1935 she purported to exclude her citizens from the definition of British subjects, in 1936 she abolished the office of Governor-General ; in 1937 she adopted what was in effect a republican Constitution, in which the only reference to the Crown related to the Executive Authority (External Relations) Act, 1936, which provided that so long as the -Free State was associated with the Commonwealth the King could act on her behalf and on the advice of her Government for the appointment of diplo*matic and consular representatives. The adoption of the 1936 Constitution was not accepted by the United Kingdom as effecting a fundamental change in Eire's relations with the Commonwealth, and an argument that the adoption of the 1937 Constitution was an act of secession was rejected in Murray v. Parkes 1942 2 K B 123."

The final steps were however not taken until 1949, and these may be conveniently set out in the words of paragraph 1022 mentioned above :-

"In 1949 Eire, which, regarding herself as being externally associated within the Commonwealth, had for long oc*cupied an equivocal and anomalous constitutional position, seceded from the Commonwealth by her own action. By an Act of the Oireachtas her remaining formal links with the Crown were severed and she was declared to - be the Re*public of Ireland ; this measure was accompanied by an announcement by. the Government of Eire of intention to terminate the association with the Commonwealth. The United Kingdom Parliament by statute recognized and declared that Eire had ceased as from 18th April 1949 (the date fixed by Eire) to be part of His Majesty's dominions". From foot-note (o) at page 459, however, it appears quite clearly that even these acts are not construed in the United Kingdom as determining finally the traditional relationship between Eire and the United Kingdom.

Accordingly it would appear to .be perfectly clear that in August 1947, when India and Pakistan. entered the community of the Dominions, there was in existence one Dominion accepted As such by- His Majesty, and by His Majesty's Government in the United Kingdom as well as by the other 'Dominions, which did not owe allegiance to the British Crown, which by law had declared that her citizens were not British subjects, and had by law abolished the office of Governor-General hitherto within the power of the British sovereign to fill, replacing him by an elected President. These several acts, which might be thought to be unequivocal acts of dissociation and severance .from the purview of the British Sovereign, were not ' regarded by any of the other parties interested to maintain the position of Eire as a country within the community of: the British Commonwealth of Nations, to have the effect of excluding Eire from that com*munity. The same view was -apparently taken by Eire herself, for she delayed her final act of severance from the Common*wealth for another twelve years. Nothing can indicate more clearly the interest which the United Kingdom displayed in retaining Ireland within the Commonwealth, despite its denial of every kind of obligation which might be thought to stem from a common allegiance to the Crown" than the fact that even after 1949, it continued to be assumed in the United Kingdom that citizens of Eire and Eire herself are not yet wholly free of the character which they had earlier possessed.

It is, therefore, not surprising to find the learned author of the monograph on "Commonwealth and Dependencies" in the latest edition of Halsbury's Laws declaring at page 431 of the volume already cited that :-

"Having regard to the variant conceptions of the Com*monwealth association held by different members; no attempt has been made or is likely to be made to prescribe a uniform terminology to designate the association."

By the year 1947, the clear-cut conception of "a common allegiance to the Crown" as a necessary incident of member*ship of the Commonwealth had, as a result of the studied defection therefrom of a valued and apparently still-cherished member,, become obscured to vanishing point. Consequently, any new entrants into the Commonwealth might reasonably consider that they were under no obligation accept any ties or bounds in excess of the minimum which the- existing members being, of course, freely associated with each other, were content to regard as sufficient in relation to any one of their number. The point .is of crucial importance for deter*mining the obligations of India and Pakistan when they entered the Commonwealth in 1947, that Ireland had completely renounced all allegiance to the British Crown at that time, and was being governed under .a republican constitution, F according to which the head of the State was an elected President, whose powers of ail kinds were derived from the Constitution of the

country and not in any way from or through the British Sovereign. When it is borne in mind, as a matter of public general knowledge of which judicial notice may properly be taken, that the Indian Independence Act was passed by the British Parliament as a result of an insistent public demand throughout the sub-continent of India - for independence from what used to be described as the "British yoke" a fair idea may be formed of the sense in which entry into the Commonwealth was regarded by those to whom, on their departure. from the -sub-continent, the British transferred power of every kind. The temper of the people may be gauged with a high degree of accuracy from the last of the popular political slogans which preceded the transfer of power. It was contained in two words, namely, "Quit India". Further proof of that temper, if proof be needed, is provided by the rapidity with which the Indian people proceeded to frame a new Constitution for themselves and proclaimed a Republic under an elected President in January 1950. It, is true that this did not lead to dissociation of India from Common*wealth, any more than a similar declaration some thirteen years earlier by Eire had been thought either by Eire or by the United Kingdom or by any of the .other then existing Dominions to have caused such a . severance. But allegiance to the British Crown of necessity- `disappeared and India accepted the British Sovereign only as Head of the Common wealth.

Again, as a matter of public general knowledge, judicial notice may be taken of the fact that in material respects, the attitude in Pakistan was no different from that - displayed in the other "Independent Dominion" towards the British connection. By way of evidence, one may cite the several occasions upon which the Constituent Assembly has acted to remove from the Instruments which formed the interim Con*stitution 'of the country, namely, the Indian Independence Act, 1947, and the Government of India Act, 1935 (as adapted to come into effect on the 14th August 1947) various . residual references to the British Sovereign which were taken as imposing restraints upon legislative freedom. - Another indication of the same intention is to be found in the official declaration by Pakistan that the country is to be under its new Constitution, an Islamic Republic. I am not aware that any later declaration has been made on this subject by any competent authority.

There are, however, two very precise acts of the Pakistan Governor-General which' cannot be interpreted otherwise than as acts of denial of allegiance to the - British Sovereign. The first such act was performed by the first Governor*-General of Pakistan, the late Quaid-e-Azam Muhammad Ali Jinnah. When the time came for him to take the oath upon assuming office as Governor-General of Pakistan, he .refused to accept the earlier form which required the Governor-General to bear "true faith and allegiance to His. Majesty"

and thereupon, by agreement with the British Sovereign, the oath which he took and which, his successors after him have taken requires that he should bear true allegiance ' to the Constitution and be faithful to His Majesty. Nothing can indicate more clearly that appointment at the hands of the British Sovereign to the office of the Governor-General of Pakistan is accepted by .the

Governor-General of this country in a form vastly different from that which the Governors* General of the other Dominions are required to accept.. In the case of these latter Governor-General, they swear "true faith and allegiance to the British Sovereign." That imports of necessity a disparity of position . and acceptance of servitude. The Governor-General of Pakistan,' when he swears to 'be faithful to the British Sovereign cannot be thought to accept any inferiority of position, much less of servitude in the feudal sense appropriate to the conception of royalty. At the highest it is an undertaking of loyalty on equal terms, and entirely appropriate to acceptance of the British Sovereign not as a Queen, .but as a symbolic Head of the, Commonwealth.

The second such act was performed by the present Governor-General, His Excellency _Mr. Ghulam Muhammad. By the preamble to the Statute of Westminster, it is set out that through the Crown being the symbol of free association within the Commonwealth, and as the members are united by the common allegiance to the Crown, constitutional practice require that the royal styles and titles should, after the Act, require the assent "as well of the Parliaments of the Domin*ions as of the Parliament of the United Kingdom." Such a question arose upon the accession of the present occupant of the British Throne, Her Majesty Queen Elizabeth 11. Although the Constituent Assembly met on numerous occasions after June 1953, when Her Majesty was crowned, it does not appear that the matter of acceptance or otherwise of the royal styles and titles appropriate to Her Majesty, in relation to Pakistan, was ever brought before the Constituent Assembly. On the other hand, and perhaps by way of sub*stitution; a proclamation was made by the Governor-General accepting Her Majesty Queen Elizabeth II as "Head of the Commonwealth," which expression, so far as I can gather, includes every Dominion and may also include other realms and territories. It seems to me quite clear from this Tingle act that the position which has been accepted by Pakistan, as being- occupied by Her Majesty in relation to this country is in no way different from that which has been accepted by the neighbouring Republic of India. Despite the apparently, constant activity of well-informed persons, in unravelling the legal incidents of the various terms employed in British Con*stitutional Law with reference to the Commonwealth, no authority has yet chosen to derive from the description "Head of the Commonwealth" anything importing the exercise either directly or by . a delegate of royal prerogatives of powers. A passage from a notable judgment by my Lord the Chief Justice, delivered as Chief Justice of the Lahore High Court in the case of Sarfraz Khan v. The Crown (P L R 1950 Lah. 658 : P L D 1950 Lah. 348) may assist materially in 'elucidating the position. That judgment was delivered at a time when the declaration of the Governor-General in relation to the status of Her Majesty Queen Elizabeth II qua Pakistan had not yet been made. The passage reads as follows :-

"The assent to the bills, however, is still given by the Governor-General and the Governors in the name of His Majesty but that is because the Crown is the symbol of the free association of the members ;of the British Common*wealth of Nations and not because His Majesty exercises any control over it in the form of revoking the assent or the authority of the Governor-General or disallowing the Act. The Governor-General is the head of the Government of the Dominion, and he is there by reason of the will of that Government and not by the will of the British Government or that of His Majesty, His Majesty in such matters having no will at all.

True he represents His Majesty for the purposes of the Government of the Dominion but that does not mean that he is an agent of His Majesty in the sense that His Majesty has delegated any authority to him- which His Majesty can revoke at will."

Having regard to the change brought about by the Governor-General's proclamation in respect of the present occupant of the British Throne qua Pakistan, the view expressed in this passage gains enormous emphasis from the circumstance that, as Head of the Commonwealth, Her' Majesty is indeed a `mere symbol, although as Queen of Pakistan a more substantial position might perhaps have been claimed.

The next question to which I propose to address myself is what was the nature of the freedom which the Indian Independence Act, 1947, was intended to convey ? I .use the expression "freedom" advisedly, for, it is sufficiently clear from the foregoing that in the description "free association of free peoples", so often applied to the Dominions, the words "free peoples" must necessarily be understood in a qualified sense. I conceive that they are meant in the sense of peoples enjoying- the advantage of representative institutions according to the British pattern, and that fullness of legislative compe*tence does not necessarily follow from the application of these words. In order to confirm this view, I propose at this stage to. reproduce verbatim from the Constitutions of the three principal Dominions, namely, Canada, Australia and South Africa, provisions relating to the powers still reserved in His Majesty to control legislation in these Dominions.

In Canada, by section 17 of the British North America Act, 1867, it is provided that :-

“There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled ‘the Senate', and the House of Commons."

By section 9 of the same Act, it is provided that*" The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen."

Provision under section 11 is made for the Governor *General who is to be aided and advised by

a Council composed of members to be chosen and summoned by him, this Council being described as "The Queen's Privy Council for Canada". Section 55 of the Act relating to Royal assent is of the utmost significance. I reproduce it below along with sections 56 and 57, ~as these form a self-contained legal code, which visibly and expressly reserves power in the Queen to veto legislation by the Parliament of Canada :-

"55. Where a bill passed by the Houses of the Parliament is presented to the ' Governor-General for the Queen's assent he shall declare, according to his discretion, but subject' to the provisions of this Act and to Hey Majesty's instructions, either that' he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure.

56. Where the Governor-General assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within 2 years after receipt thereof by the' Secretary of State thinks fit to disallow the Act, such disallowance- (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor* General, by speech or message to each of the Houses of the Parliament or, by proclamation, shall annul the Act from and after the day of such signification.

57. A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until, within 2 fears from the day on which it was , presented to the. Governor-General for the Queen's assent, the Governor *General signifies, by speech or message to each of the Houses of the Parliament or by proclamation, that it. has received the assent of the Queen in Council."

In a judgment of this character it may, I think, be presumed that whore a Governor-General reserves a bill for the signification of the Royal pleasure, he does so in accordance with general. instructions received in that behalf from the British Sovereign. In each of the three sections which are reproduced above the assent of the British Sovereign in person therefore appears with absolute clearness, as a final controlling force applicable to legislation of the Canadian Parliament.

The .corresponding provisions in the Australian Constitu*tion are as follows. In the Commonwealth of Australia Constitution Act, 1900, it it is provided by section 1 of Chapter I as follows :-

"The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, `and which is hereinafter called `the Parliament', or `the Parliament of the Commonwealth."

By section 2 provision- is made for appointment . by the British Sovereign of a Governor-General to be the Sovereign's representative in the Commonwealth. Sections 58, 59 and 60 give effect to the control provided by the requirement of Royal assent and are in the following terms :-

"58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his' discretion, but subject to this constitution, that he assents in the Queen's name, or that he withholds assent!. or that he reserves the law for the Queen's pleasure.

The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and ,the Houses may deal with the recommendation.

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor: General by speech or .message to each of ' the Houses of the Parliament, or by proclamation,' shall annul the .law from the day when the disallowance is so made known.

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within 2 years from the day on which it was presented to the .Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of . the Houses of the Parlia*ment, or by proclamation, that it has received the Queen's assent."

The same observations as have been made above with reference to the Canadian Constitution are fully applicable to the restraints so specifically imposed upon the legislative power of "the Parliament of the Commonwealth."

In the South Africa Act, 1909, section 19 by which the Parliament of the Union was constituted; reads as under

"The, legislative powers of the Union shall be vested in the Parliament of the Union, hereinafter

called `Parliament', which shall consist of the King, a Senate and a House of Assembly".

By section 9 it is provided that the Governor-General shall be appointed by the King. Section 64 to which reference has already been made may here be reproduced in full with advantage :-

"64. When a 'bill is presented to the Governor-General for the King's assent, he shall declare according to his discretion, but subject to the provisions of this Act, and to such instructions as may from time to time be given in that behalf by the King, that he assents in the King's name or that he withholds assent. The Governor-General may return to the House in which it originated any bill so presented to him, and may transmit therewith any amendments which he may recommend, and the House may deal with the recommenda*tion."

In the face of these provisions it is obvious, that these great countries can hardly be called "Independent Dominions",

Their. principal Legislatures work under controls imposed- from without, by force of law.

The Indian Empire, as it was till the grant of independence in 1947, did not enjoy Dominion Status, but it had been provided by the British Parliament with a series of constitu*tions, progressively liberal in character, under which the Government of the country with its vast population and extremely complex administrative problems, had been success*fully carried on for a great many years. The last of these constitutions was that contained in the Government of India Act, 1935, and it falls to be observed that in many essential respects, it provided a degree of freedom not far removed from that enjoyed by the recognised Dominions. True, by section 2 of the Government of India Act, it was stated, in words of high import that :-

"All rights, authority and, jurisdiction heretofore belonging to His Majesty the King, Emperor of India, which appertain or are incidental to the Government of the territories in India for the time being vested in him, and all rights, authority and jurisdiction exercisable by him in or in relation to any other territories in India, are exercisable by His Majesty, except in so far as may be otherwise provided by or under this Act, or as may be otherwise directed by his Majesty."

The words, perhaps by design, convey a vast sense of majesty and authority, which despite the generous distribution effected by the Act could yet be exercised by the Sovereign, free of all control. Nevertheless, in their effect, they are scarcely to be distinguished from the simpler words of section 9 of the British North America Act, 1867, relating to Canada. Indeed, if distinction be sought, in relation to imposition of legal limitations upon the exercise of royal power, that distinction would appear to lie clearly in favour of the then Indian Empire. But Canada as a country within the purview of the Statute of Westminster, 1931, enjoyed one advantage, namely, that the British Parliament could no longer legislate for Canada, except with the consent of the Dominion. The condition in India - was entirely different. Although very wide legislative powers had been expressly conveyed to the Indian people by, numerous provisions in the Government of India Act and intricate provisions were made for exercise of these powers in a harmonious manner by the Centre and the Provinces among whom those. powers had been distributed, yet, by section 110, the following over-riding provision was made, viz :-

"Nothing in this Act shall be taken to affect the power of Parliament to legislate for British India, or any part thereof."

There were other limitations also contained in this section, but these are of minor importance compared with that appearing from the words reproduced above. Restrictions oil the exercise of legislative powers were spread all. over the Government of India Act; in several different forms, but as regards reservation and disallowance, the main provisions relating to the Central Legislature were contained in a single section, viz., section 32, which is reproduced below:-

"32. (1) When a Bill has been passed by the Chambers, it shall' be presented to the Governor-General, and the Governor-General shall in his discretion declare either that he assents in His Majesty's name to the Bill, or that he withholds assent therefrom, or that he reseves the Bill for the signification of His Majesty's pleasure:

Provided that the Governor-General may in hr's discretion return the Bill to the Chambers with a message requesting that they will reconsider the Bill or any specified provisions thereof arid, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and the Chambers shall reconsider the Bill accordingly.

(2) A Bill reserved for the signification of His Majesty's pleasure shall not become an Act of the Federal Legislature unless and until, within twelve months from the day on which it was presented to the Governor-General, the Governor-General makes known by public notification

that His Majesty has assented thereto.

(3) Any Act assented to by the Governor-General may be disallowed by His Majesty within twelve months from the day of the Governor-General's assent; and where any Act 'is so disallowed the Governor-General shall forthwith make the disallowance known by public notification, and as from the date of the notification the Act shall become void."

The terms of this section do not vary materially from those which are still in operation in the senior Dominions of Canada and Australia. 1n the case of laws made by the Provincial Legislatures, which had their own independent powers of legislation, it was laid down that the assent of the Governor should be necessary and the Governor should either accord assent, or reserve the bill for the consideration of the Governor-General, who might in his discretion either grant or withhold 'the assent or reserve the bill for the signification of His Majesty's pleasure. A time limit was fixed within which a reserved bill could become law by proclamation of. His Majesty's assent, as in the case of Federal laws. Finally, there was a specific provision enabling His Majesty to disallow Provincial Acts within twelve months of the giving of the assent by the Governor or the Governor-General.

Here again, it seems evident that the position in the Indian Empire was not materially different from that which the great self-governing Dominions were enjoying. The Governor-General and the Governors were required to observe Instruments of Instructions issued to them after approval by the British Parliament in the name of His Majesty, and these contained, inter alia, very precise directions regard*ing the kind of legislation which must be submitted for signification of His Majesty's pleasure. (These Instruments of Instructions were declared by subsection (4) of section 18, Indian Independence Act to 'lapse as from the appointed day").

A distinction might perhaps appear at this point, in favour of the -older Dominions, viz., that His Majesty, when exercis*ing, the power of granting or' withholding .Royal assent, or disallowing Acts, would not be advised by His Majesty's Government in the United Kingdom, as was the case in relation to the Indian Empire. In this respect the position of the Indian Empire approximated to that of a British Colony or Possession, for the Government of which the British Parlia*ment was directly responsible.

' It will be of advantage, if at this stage, two sections from the Government of India Act, 1935, relating to the constitution of Legislatures under the Act are reproduced, viz., section 18 relating to the Federal Legislature and section 60 relating to Provincial Legislatures:-

"18. (I) There shall be a Federal Legislature which shall consist of His Majesty, represented by the Governor *General; and two Chambers, to be known respectively as the Council of State and the House o#' Assembly (in this Act referred to as "the Federal Assembly").

(2) The Council of State shall consist of one hundred and fifty-six representatives of British India. and not more than one hundred and four representatives of the Indian States, and the Federal Assembly shall consist , of two hundred and fifty representatives of British India and not more than one hundred and twenty-five representatives of the Indian States.

(3) The said representatives shall be chosen in accordance with the provisions- in that behalf contained in the First Schedule to this Act.

(4) The Council of State shall be a permanent body not subject to dissolution, but as near. as may be one-third of the members thereof shall retire in every third year in accordance with the provisions in that behalf contained in the said First Schedule.

(5) Every Federal Assembly, unless sooner .. dissolved, shall continue for five years from the date appointed for their first meeting and no longer, and the expiration of the said period of five years shall operate as a dissolution of the Assembly."

"60. (1) There shall for every Province be a Provincial Legislature which shall consist of His Majesty, represented

by the Governor, and

(a) -in the Provinces of Madras, Bombay, Bengal, the United Provinces, Bihar and Assam, two Chambers;

(b) in other Provinces one Chamber.

(2) Where there are two Chambers of a. Provincial Legislature, they shall be known respectively as the Legisla*tive Council and the Legislative. Assembly, and where there is only one Chamber, the Chamber shall be known as the Legislative Assembly."

It is particularly to be noted that as in . the case of each of the Dominions, the sections expressly , declared His Majesty represented by the Governor-General or the Governor to be a part of the relevant Legislature.

I now proceed to consider the impact of the' Indian Independence Act in relation to the matters appearing from the Government of India Act fo which I have referred above, all of which were materially altered in the course of adaptation by the Governor-General of the Indian Empire in the exercise, of the powers conferred upon him by section 9 of the Indian Independence Act.. It should be fairly clear from the preced*ing discussion that . the Indian Independence Act, 1947, possessed in several respects the same character as the Statute of Westminster, 1931, but with one major difference. It will, I think, be clear from the analysis I am about to attempt, that the extent of freedom accorded to the countries which, a§ Dominions, were to replace the Indian Empire, was in A very material degree greater than that which the older Dominions had gained in 1931. That, in my view, is the circumstance which justifies the application of the special description "Independent Dominions" to the two new States which were brought into existence by means of this highly effective instrument.

Firstly, I take up the provisions for appointment of the Governor-General and the provincial Governors. The original Government of India Act provision relating to the Governor*-General read as follows :-

"3. (1) The Governor-General of India is appointed by His Majesty, by a Commission under the Royal Sign Manual and has-.

(a) all such powers and duties as are conferred or imposed on him by or under this Act ; and-

(b) such other powers of His Majesty, • not being powers connected with the exercise of the functions of the Crown in its relations with Indian States, as His Majesty may be pleased to assign :to him."

In the adapted Government of India Act, 1935, which was in force when Pakistan came into existence, section 3 reads simply as follows :-

"The Governor-General of Pakistan is appointed by His Majesty. by a Commission under the Royal Sign Manual."

This, however, is not to be regarded as divesting him of all power, for by section 5 of the Indian Independence Act, 1947, it was provided that-

"For each of the new Dominions, there shall be a Governor- General who shall be appointed by His Majesty and- shall represent His Majesty for the purposes of the government of the Dominion "

The Royal Commission which issues under His Majesty's in signature contains the following significant provisions. Firstly, the appointment is "during our pleasure". Secondly, the in Governor-General is to have "all the powers, rights, privileges and advantages to the said official belonging or appertaining"

and it would appear that neither the British Sovereign nor the British Parliament possess any longer the authority to vary these powers, rights, privileges and advantages. On the date of the creation of Pakistan, and at least until just before the 24th October, 1954, such a power could be regarded as belonging to no person or body, other than this Constituent Assembly of Pakistan. Next, the Governor-General is authorised, empowered find commanded to perform the powers and duties conferred and imposed upon him by and under the Indian Independence Act, 1946. These powers and duties are also no longer subject to regulation by either the British Sovereign or the British Parliament. Only one of the Royal prerogatives is specifically conveyed to the Governor-General, namely, that of pardon, and is conferred in the following terms :*

"We-do hereby authorise and empower you in our name and on our behalf to grant to any offender convicted in the exercise of its criminal jurisdiction by any Court of Justice within our territories in Pakistan a pardon, either free or subject to such lawful conditions as you may deem fit." There are no instructions or authorizations in relation to legislation, e.g., with respect to grant or assent, and even the prerogative of summoning, proroguing and dissolving the Legislature is not conveyed.

The contrast with the case of Governor-General of the older Dominions is almost startling. In South Africa which Mr. Diplock urged was as "independent" as Pakistan, the following authorizations are found in the Letters Patent, viz., (a) to fulfil his duties "according to our instructions"; (b) to keep and use the Great Seal ; (c) to summon, prorogue and dissolve the Union Parliament ; (d) to appoint deputies to himself ; and (e) to exercise the prerogative of mercy. In Canada and Australia, the Governor-General is authorised to appoint Judges, commissioners, justices of the peace, Ministers, and other officers "in our name and on our behalf", and also to suspend and remove such persons, under instructions given by, or under the authority of, the King. In each case, the Governor-General is forbidden to quit the Dominion on any pretence whatsoever, except under the Sign Manual of the King, on the ground, expressed in the Canada Royal Instruc*tions, 1931, that "great prejudice may happen to our service and to the security of our said Dominion" otherwise.

One cannot fail to observe that the formal order made by the British Sovereign, in relation to the Pakistan Governor* General contains no instructions or prohibition at all. He is merely enjoyed to perform his duties under the interim Constitution, which itself provides for the grant of the Royal prerogative of mercy in section 295, Government of India Act, 1935. It could hardly appear more clearly that the Governor-General owes nothing to the British Sovereign except his warrant of appointment, issued upon the recommendation of the Government of Pakistan. No duty of any kind is prescribed which he owes to Her Majesty, except that o g being "faithful ', appearing in the oath. which Her Majesty is pleased to accept. The appointment, by_ its terms affirms and emphasises that the Governor-General's duty or as it might be termed "allegiance", is to the Constitution, as in existence from time to time.

With respect to Governors, the earlier position was that each Governor was appointed by His Majesty by a Commission under the Royal Sign Manual, but under the adapted Government of India Act, 1935, the new provision reads as follows :-

"48. The Governor of a Province holding office as from the date of the establishment of the Federation is, appointed by His Majesty by a Commission under the Royal sign Manual but any person appointed thereafter to be the Governor of a Province shall be appointed by the Governor *General and shall hold office at the Governor-General's pleasures." ,

A provision similar to the latter part of the section cited above was also included in the British North America Act, 1867, but as has been seen in the Maritime Bank case cited above, such a provision was not regarded as sufficient for holding that the Lieutenant-Governor of a' province

in *Canada was not a representative of His Majesty, because the same Act expressly vested the Executive Government of Canada in the Queen. The corresponding provision in section 2 of the Government of India Act, 1935 (cited above, was entirely omitted, in advance of the creation of Pakistan in the course of adaptation and, consequently; it would appear difficult to suppose, under. the existing provisions, that Governors of Provinces other than those who were holding office at the time when Pakistan came into being, are appointees of or owe their position in any respect . to, the British Sovereign.

The impression is thus clearly gained that the effective presence of the British Sovereign in the new State of Pakistan was confined to the connection still retained by virtue of the power of appointment of the Governor-General being by law vested in Her ,Majesty. That furnishes, in my opinion, a precise indication of the measure of freedom which Pakistan possessed, at its creation, by virtue of the legislative and other actions taken by the King and the British Parliament.

In all but name, the Governor-General was free of all connec*tion with the British Sovereign ; and in point of control, he was altogether free.

At this stage it will be convenient for me to state my opinion. regarding an argument raised by Mr. Diplock con*cerning the use to be made of adaptations of the Government of India Act effected by the then Governor-General, in advance of the creation of the new Dominions, under the powers given by section 9 of the Indian Independence Act. I am unable to agree with Mr. Diplock that these are acts of a subordinate or delegated character and therefore .cannot be called in aid for the purpose of interpreting the meaning of words contained in the Indian Independence Act and the intention underlying those words. This is a proposition which may be appropriate to many types of legislation, but it cannot, in my view, be sustained in relation to an organic document such as the Indian Independence Act. By section 9 of that Act, the Governor-General was given power equivalent to that of the British Parliament to make all changes in the Government of India Act which were necessary for the purpose of carrying out the intentions underlying the specific provisions of that Act. The Governor-General of that time, namely, Lord Mountbatten, was not a mere statutory authority working within the four corners of the Government of India Act, 1935, as a number of his predecessors had been. He acted, for instance, as a plenipotentiary of His Majesty's Government in the United Kingdom, for the purpose of carrying out the design of that Government to provide the peoples of the Indian Empire with machinery appropriate for the purpose of enabling them to draw up a new Constitution for themselves, and to decide at the same time whether or not they would remain within the British Empire. Similarly, under section 9 of the Indian Independence Act, the power which the Governor-General exercised was not exercised by him as merely an instructed agent, for it is a matter of public general knowledge that Lord Mountbatten had been most intimately associated with both the peoples of the Indian Empire as well as- the members of His Majesty's Government in the United Kingdom, in settling details of the great com*promise which was

eventually. found acceptable to both parties. Any action. taken by a person in that position, which in its nature, is susceptible of only one explanation in point of intention must, in my view, be regarded as furnishing a very powerful indication of the intention underlying the provision in the Indian Independence Act, which was thereby carried into effect. Exactly the same holds good in the case of the first Governor-General, of Pakistan, the late Quaid-e-Azam Muhammad Ali Jinnah, for he too had been associated in the closest manner with the negotiations of 1946-47 which preceded the elimination of the British power in the sub*continent of India, and having been designated as the first Governor-General of Pakistan well in advance of that event, may be assumed to have been directly concerned in the decisions relevant to the adaptations which were necessary in the case of Pakistan. .

The important changes in the Government of India Act relating to the exercise of the 'legislative power in respect of the future Dominion as a whole may now be considered. The Government of India Act provided, as has already been stated, a very precise distribution of legislative powers between the Centre and the Provinces, and as section 8, subsection (2) of the Indian Independence Act clearly shows, it had been agreed that each of the Dominions should continue, during the interim period, to be governed in all respects according to that Act as adapted, and subject to any alterations therein which might be subsequently effected by the Constituent Assembly. The wording of this provision is important and it is accordingly reproduced below in full

"8 (2). Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under subsection (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935 ; and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly provided that-

(a) the said provisions shall apply , separately in relation to each of the new Dominions and nothing in this subsection shall be construed as continuing on or after the appointed day any Central Government or Legislature common to both the new Dominions ;

(b) nothing in this subsection shall be construed as con*tinuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new Dominions or of any Province or other part thereof ;

(c) so much of the said provisions as requires the Governor-General or any Governor to act in his discretion or exercise his individual judgment as respects any matter shall cease to have effect as from the appointed day ;

(d) as from the appointed day, no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure and no Provincial Act shall be disallowed by His Majesty thereunder.; and

(e) the powers of the Federal Legislature or Indian Legislature under that Act, as in force in relation to each Dominion, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion, in addition to the powers exercisable by that Assembly under subsection (1) of this section."

At this stage I invite particular reference to provisos (b), (c) and (d) in this subsection. By these provisos, the power of His Majesty's Government in the United Kingdom over the affairs of Pakistan and its Provinces was .completely eliminated. The pre-existing requirement that the Governor-*General and the Governors should in certain respects act in their discretion (i.e., independently of the elected Ministers) or in their individual judgments (i.e. according to their own judgment although after consultation with the elected Ministers) were -also- removed and .the removal is- significant powers given by section 9 of the Indian Independence Act. I am unable to agree with Mr. Diplock that these are acts of a subordinate or delegated character and therefore .cannot be called in aid for the purpose of interpreting the meaning of words contained in the Indian Independence Act and the intention underlying those words. This is a proposition which may be appropriate to many types of legislation, but it cannot, in my view, be sustained in relation to an organic document such as the Indian Independence Act. By section 9 of that Act, the Governor-General was given power equivalent to that of the British Parliament to make all changes in the Government of India Act which were necessary for the purpose of carrying out the intentions underlying the specific provisions of that Act. The Governor-General of that time, namely, Lord Mountbatten, was not a mere statutory authority working within the four corners of the Government of India Act, 1935, as a number of his predecessors had been. He acted, for instance, as a plenipotentiary of His Majesty's Government in the United Kingdom, for the purpose of carrying out the design of that Government to provide the peoples of the Indian Empire with machinery appropriate for the purpose of enabling them to draw up a new Constitution for themselves, and to decide at the same time whether or not they would remain within the British Empire. Similarly, under section 9 of the Indian Independence Act, the power which the Governor-General exercised was not exercised by him as merely an instructed agent, for it is a matter of public general knowledge that Lord Mountbatten had becn most intimately associated with both the peoples of the Indian Empire as well as- the members of His Majesty's

Government in the United Kingdom, in settling details of the great com*promise which was eventually. found acceptable to both parties. Any action. taken by a person in that position, which in its nature, is susceptible of only one explanation in point of intention must, in my view, be regarded as furnishing a very powerful indication of the intention underlying the provision in the Indian Independence Act, which was thereby carried into effect. Exactly the same holds good in the case of the first Governor-General, of Pakistan, the late Quaid-e-Azam Muhammad Ali Jinnah, for he too had been associated in the closest manner with the negotiations of 1946-47 which preceded the elimination of the British power in the sub*continent of India, and having been designated as the first Governor-General of Pakistan well in advance of that event, may be assumed to have been directly concerned in the decisions relevant to the adaptations which were necessary in the case of Pakistan. .

The important changes in the Government of India Act relating to the exercise of the 'legislative power in respect of the future Dominion as a whole may now be considered. The Government of India Act provided, as has already been stated, a very precise distribution of legislative powers between the Centre and the Provinces, and as section 8, subsection (2) of the Indian Independence Act clearly shows, it had been agreed that each of the Dominions should continue, during the

interim period, to be governed in all respects according to that Act as adapted, and subject to any alterations therein which might be subsequently effected by the Constituent Assembly. The wording of this provision is important and it is accordingly reproduced below in full

"8 (2). Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under subsection (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935 ; and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such omissions, additions, adaptations and modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly

provided that-

(a) the said provisions shall apply , separately in relation to each of the new Dominions and nothing in this subsection shall be construed as continuing on or after the appointed day any Central Government or Legislature common to both the new Dominions ;

(b) nothing in this subsection shall be construed as con*tinuing in force on or after the appointed day any form of control by His Majesty's Government in the United Kingdom over the affairs of the new Dominions or of any Province or other part thereof ;

(c) so much of the said provisions as requires the Governor-General or any Governor to act in his discretion or exercise his individual judgment as respects any matter shall cease to have effect as

from the appointed day ;

(d) as from the appointed day, no Provincial Bill shall be reserved under the Government of India Act, 1935, for the signification of His Majesty's pleasure and no Provincial Act shall be disallowed by His Majesty thereunder.; and

(e) the powers of the Federal Legislature or Indian Legislature under that Act, as in force in relation to each Dominion, shall, in the first instance, be exercisable by the Constituent Assembly of the Dominion, in addition to the powers exercisable by that Assembly under subsection (1) of this section."

At this stage I invite particular reference to provisos (b), (c) and (d) in this subsection. By these provisos, the power of His Majesty's Government in the United Kingdom over the affairs of Pakistan and its Provinces was .completely eliminated. The pre-existing requirement that the Governor *General and the Governors should in certain respects act in their discretion (i.e., independently of the elected Ministers) or in their individual judgments (i.e. according to their own judgment although after consultation with the elected Ministers) were -also- removed and .the removal is- significant in this respect that by specific provisions in the Government of India Act and the instructions issued to the Govern General and the Governors, these powers were to be exercise in consultation with the Secretary of State for India London, who was in the last resort to be the deciding authority. Thirdly, there was an express prohibition against reservation of Provincial laws for signification of His Majesty's pleasure and equally express withdrawal : of His Majesty's power disallow such laws, both to take effect upon, a. . date in t future, which in the case of Pakistan was fixed as the 14th August, 1947. .

The terms of the last-mentioned provision are, in n opinion, of high significance. In respect of the laws applicable in the whole of the Dominions, the -corresponding provision was in subsection (3) of section 6, and is contained in the following words :-

"so much of any Act as relates to the disallowance law by His Majesty or the reservation of laws for the signification of His Majesty's pleasure thereon or the suspension of the operation of laws until the signification of His Majesty's pleasure thereon shall net apply to laws . c the Legislature of either of the new Dominions."

As has been seen, provisions for disallowance and reservation of Central laws were contained in the Government of India Act, 1935, and it appears that such provisions might also be found in other Acts of the British Parliament. As regard suspension, the only example brought to the notice -of the Court was a provision contained in the Colonial Courts o Admiralty Act, 1890, which did apply to the Indian Empire The point which emerges, and which is, to my mind, of the greatest importance, is that whereas the wording in relation to Provincial laws is in absolute and peremptory terms of immediate application on the appointed date the provision relating to the "Legislature of the Dominions" is expressed in terms of simple futurity. This is relevant, anal in

my opinion appreciably so, to the contention raised on behalf of the petitioner in the present case that the British Parlia*ment in the Indian Independence Act having indicated some forms of legislative activity appropriate to a Legislature whose Acts were to have force throughout the Dominion, designedly refrained from constituting such a Legislature. Since it was concerned only to make provision for an interim period to precede the establishment of the new Constitution which was to be drawn up by the Constituent Assembly, the British Parliament was content to provide for exercise of those legislative powers only,-vide section 8, subsection (1) and proviso (e) to subsection (2), Indian Independence Act: Therefore, the "Legislature of the Dominion" being intended to assume concrete from at a date in the future, under and in accordance with the decision of the Constituent Assembly it was deemed sufficient to provide that the laws of such a Legislature, assuming that the country still remained a Dominion, would not be subject to the' restrictions and controls which were part of the heritage of .the other Dominions and had also by statute been imposed upon the pre-existing Indian Empire. As for laws of the Constituent Assembly made in the interim period, that Assembly being a sovereign body, it was unnecessary and might have been thought derogatory to its position, for a Legislature not superior in status, to provide that such laws should be not subject to controls exercisable by the British Sovereign. But as for the Provincial Legislature, they were either in being, or were to be consti*tuted for newly-created Provinces by the Governor-General under section 9 (1) (i), Indian Independence Act, and -they were to act under the terms of the adapted Government of India Act, 1935, as from the appointed day. Their existence and powers being actual on the appointed day, the words used to free those powers from all control by His Majesty needed to -be absolute and peremptory in their effect.

In my opinion, the language in which the relevant controls were sought to be eliminated in relation to laws of "the Legislature of the Dominion" furnishes a strong clue to the time when the words were to take effect, and the nature of that effect. Putting the matter in a single sentence, I would say that these words constituted a promise that, should the count remain a Dominion, and should e, as course could a more confidently expected, a Union Legislature, then unlike the great self-governing Dominions of - Canada, Australia and South Africa, Pakistan would be wholly free of any control of an kind exercisable- over the laws of the Union legislature by His Majesty., But the difference of language also include me to think that section 6 (3) of the, Indian Independence Act was - not drafted on the assump*tion that on the appointed date, there would be a "Legislature of the Dominion" in existence in Pakistan.

Section 6 of the Indian Independence Act contains provisions of the highest significance, couched in language of subtle and comprehensive nature, whose interpretation is a task, as the lengthy arguments in the present case clearly show, of no mean magnitude. Subsection (2) of section 6 is in almost precisely the same terms as subsection (2) of section 2 of the Statute of Westminster. Taken by itself, this provision would necessarily be understood .a instituting the people of Pakistan a "free people" in a sense no higher than that which, as has already been -seen, must be accepted in relation to the “free peoples” of Canada, Australia and Newzealand subsection (4) of section 6 of Independence Act corres*ponds to section 4 of the

Statute of Westminster. It provides that Acts of the British Parliament passed after the transfer of power should not extend or be deemed to extend to Pakistan, unless extended to Pakistan "by a law of the Legis*lature of the Dominion". (In the Statute of Westminster, the condition is differently expressed as follows, viz., "unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof".) Subsection (5) provides similar immunity from the operation of Orders-in-Council, and other orders, rules and instru*ments made under Acts of the British Parliament, passed after the transfer of power. Subsection (1) of section 6 is/ in the following terms:-

"The Legislature of each of the new Dominions shall have full power to make laws for that Dominion, including laws having extra-territoral operation."

This may be compared with section 3 of the Statute of Westminster which reads as follows:*

"It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra* territorial operation."

This provision was interpreted in The British Columbia Electric Co., Ltd. v. The King ((1946) 4 Dominion Law Reports, p. 81,) in the following terms:*

"The specific investment of extra-territorial power by section 3 of . the Statute of 1931 was designed no doubt to remove the generally accepted limitation of colonial legisla*tive jurisdiction, a limitation which the Courts of the colony itself were bound to recognise."

It may be pointed out that in the original Government of India Act by section 99 (2), extra-territorial operation had been allowed within specified limits to laws . of the Federal Legislature of India. The effect of the relevant clause in section 6 of the Indian Independence Act, would naturally be to remove these limitations, and accordingly it is found that section 99 was adapted,. before the transfer of power, so as to eliminate the subsection making this provision.

It yet remains to consider why it was thought necessary by the British Parliament to declare, in the clear language of futurity, that "the Legislature of the Dominion" should have "full power to make laws for that Dominion". Having equipped the Dominion at its very birth with a

Constituent Assembly whose function would be to make provision for exercise of legislative powers including the legislative power which was to vest in the Union or Federation, it might have been thought sufficient for the British Parliament to remove by express words, all the controls of any kind which had previously operated on such laws, through operation of laws of the British Parliament or through the exercise of the Royal prerogative.

The Government of India Act, 1935, as originally enacted contained a number of scattered. provisions operating in restraint of the power of the Federal Legislature to pass laws within the sphere allotted to it in the distribution of the powers effected by that Act. Thus, under section 116, which has been referred to already, there are words which clearly debar the Federal Legislature or any Provincial Legislature from making laws, inter alia, affecting the British Sovereign or the Royal Family, Succession to the Crown, the sovereignty of the Crown in any part of India, the law of British nation*ality, the Army Act, the Air Force Act, the Naval Discipline Act, or the law of Prize or Prize Courts; it was forbidden also for these Legislatures to make any laws amending any provision of the Government of India Act, 1935, or any subordinate legislation thereunder, except to the extent per*mitted expressly by the Act; and finally subject to the same condition, they were forbidden to legislate so as to take away the prerogative right of His Majesty to grant special leave - - -*appeal from any Court .(i.e., to the Privy Council). Another of mode of restraint appears in section 108 which contains a lengthy list of subjects in regard to which the introduction of any bill in the Federal Legislature would require the previous sanction of the Governor-General in his discretion, i.e., acting within that sphere of his executive power which was controlled by His Majesty's Government in the' United Kingdom.

It should be remembered that the Indian independence Act was passed in advance of the adaptations which were made in the stage immediately prior to the transfer of power. Two of these adaptations were the entire elimination of section 108 and section 110 and it may safely, be said that all other provisions of a similarly restraining nature were also removed in the same process. The conclusion would appear to be plain that the complete removal of these powerful restraints was a necessary consequence of the employment by the British Parliament, whose intention was being carried out in course of the adaptations, of the expression "full power to make laws". The word "full" in that aspect would perhaps be completely translated as "unrestrained". .

It was stated from time to time in the course of arguments' that the Constituent Assembly derives power to make laws for the Dominion from section 6 (1), ,but with great respect, it seems to me that the interpretation overlooks the, fact that the Constituent Assembly' was, as a body, not a creation of the British Parliament. It is, in my opinion, to be regarded as a body created by a supra-legal power on Constitution for the supra-legal function of preparing a Pakistan. Its powers in respect belonged to itself inherently, by virtue of its being a body representative of the will of

the people in relation to their future mode of Government. The will of the people had, up to that time, been denied expression in this respect, through the presence, by virtue of conquest and cession, of the undisputed and plenary executive power in India of the British Sovereign, which was being withdrawn by unilateral act. That power did not owe its existence to any law, though its exercise ma have time to time progressively been reduced to regulation b laws of the British Parliament and of the Indian Empire.

I draw a sharp distinction between the function of providing for the government of the Indian Empire and the function of governing the Indian Empire. The latter function was to be carried out by the Governor-General, of, India and his subordinates acting in accordance with instructions received from His Majesty's Government in the United Kingdom in certain respects, and in other respects in accordance with the provisions of the statutory instrument then in force, viz., the Government of India Act, 1935. That Act, however, must not itself be included in the complex which may be described as the "Government of India". It was set apart from and above that complex, the whole of which was conducted in accordance with the strict terms of that Act. The making of that Act, and the replacement and amendment of that Act, on the other hand, belong to the sphere of making provision for the government of the Indian Empire, and that was until the 14th August, 1947, a function exclusively to be discharged by the British Parliament of which the British Sovereign is an integral part. For the purpose of making such provision, the British' Sovereign has invariably made the Royal prerogatives available to the British Parliament so that their operation might be provided for, so far as necessary, in the constitutional instrument to be enacted. It is quite clear that the Latter function which is obviously the higher of the two functions, was entrusted to the Constituent Assembly of Pakistan. .

The nature of the freedom from external control of the Governor-General having already been considered, . and found to be absolute so long as he remained faithful to His Majesty", it is now possible to answer - the question posed at the commencement of this discussion. That answer may be considered under three heads:-

(i) What was the nature of the autonomy, in the legis*lative sphere, which - the British Parliament intended to convey by means of the Indian Independence Act, 1947, and the adapted Government of India Act, 1935?

(ii) Did the autonomy include power to interpret and apply the provisions in these constitutional instruments as the successor authorities thought best?

(iii) How did these successor authorities interpret and apply the provisions, in respect of the matter now in dispute, and what weight is to be allowed to the interpreta*tions as they appear

from the actions of these persons or bodies?

It should be quite clear from the foregoing discussion . that, in a legal sense, the older Dominions to which in 1926 the description "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs", had been applied, were in respect of legislation at least, not so blessed as was Pakistan when it emerged as an "Independent Domi*nion". In the case of Pakistan, the statute which created the new State, was prepared with meticulous attention to the elimination in detail of every provision of law which had hitherto operated to impose controls upon the executive government and Legislatures in the territory. Existing laws were retained, whether they operated as part of the law of the territory, or as part of the law of the United Kingdom, but there was provided, a Constituent Assembly which being empowered to furnish if it : so chose, a completely new Constituent assembly which being empowered to furnish, if it so chose, a completely new Constituent for the country, was not to be regarded bound by any law in existence, unless it choose to be so bound. In relation to constitutional provisions, it exercised exercises the powers of the British Parliament, which were in that respect, untramelled by any laws. By way of a practical expedient, it was declared in section 8, Indian Independence Act, that

(a) "the powers of the Legislature of the Dominion shall for the purpose of making provision as to the Constitu*tion of the Dominion, be exercisable in the first instance by the Constituent Assembly" and (b) "the, powers 'of the Federal Legislature or Indian Legislature under , (the Government of India) ' Act, as in force - in relation to each Dominion, shall in the first instant, be exercisable by the Constituent Assembly."

It will be necessary, .in connection? with an argument to be dealt with later, to decide whether these provisions have

the effect contended for by the appellants of (i) prescribing the powers of the "`Legislature of the Dominion" as being the aggregate of "powers for the purpose of making provision for the Constitution of the Dominion" and "powers of the Federal, or Indian Legislature under the Government of India Act" and (ii) making the Constituent Assembly, since these powers were exercisable by it, identical with the "Legislature of the Dominion" as so composed. It may save discussion at a later stage, if I utilise this occasion to say that proposition (i) involves usurpation by the British Parliament of a very essential part of the power which had expressly been delivered over to the Constituent Assembly, namely to provide a Cons*titution for Pakistan, in which there might or might not be a "Legislature of the Dominion," and if there were such a Legislature, to prescribe its powers and functions. To my mind, such an inference is obnoxious to the entire plan which His Majesty's Government in the United Kingdom. implemented through the enactment by the British Parliament of the Indian Indepen*dence Act. And it seems to me that to identify an existing body of persons such as the. Constituent Assembly clothed with sovereign power to provide a new Constitution for the country, with an entirely different and as yet notional body, whose constitution and. powers were yet to be shaped by the Constituent Assembly, involves an operation in thought of extreme difficulty. It stands out most prominently, in this context, that the Indian Independence Act uses no words to relate "the vow of the Federal

Legislature or the Indian Legislature under the Government of India Act" with any future power of the "Legislature o t e Dominion".

The reason seems obvious, namely, that it was for the Con*stituent Assembly to say, what should be the powers of the "Union Legislature", and they were in no way bound to follow the pattern provided by the Government of India Act, 1935. In marked contrast with the Constitutions of other Dominions, all of which have been enacted by the same British Parliament, the Indian Independence Act refrains from cons*tituting any "Legislature of the Dominion". The references to it are confined to mentioning, in scattered sections, , certain powers which it could exercise, and certain matters with which it might deal. There are only eleven such provisions, and putting all these together, they cannot,, in the remotest degree, be thought to meet the enormous complexities involv*ed in a distribution of legislative powers between the Centre (or Dominion) and the Provinces. Therefore, to refer to the expression "full power to make laws for the Dominion" as conferring plenitude of power is not helpful, and the delibe*rate avoidance of any words to suggest that, on the appointed day, the "Federal Legislature or the Indian Legislature" was to be replaced by the "Legislature of the Dominion" makes it clear beyond doubt, that no definition of the "Legislature of the Dominion" by reference to the powers which it was to exercise was attempted in the Indian Indepen*dence Act. For that, the- plain reason is that it was for the Constituent Assembly to provide for (a) the Constitution and (b) the powers of tl?e Union Legislature, or the "Legisla*ture of the Dominion".

But to return to the question of the legislative autonomy which can be construed out of the Indian Independence Act, I think I can safely predicate on the basis of what I have already said, that it was intended to be absolute, the existing laws as adapted being retained only for the purpose of conti*nuing the Government of the country on a stable and uniform basis, pending the preparation and promulgation of a new Constitution. The British Parliament was so meticulous in this regard that it was even at pains to include in the Indian Independence Act, two provisions designed to produce the effect that the limitations upon legislative powers which were contained in the Government of India Act, 1935, should be deemed to be of Dominion origin. By subsection (6) of section 6, the following provision was made -.-

"The power referred to in subsection (1) of this section (i.e., full power to make laws for the Dominion) extends to the making of laws limiting for the future the powers of the Legislature of the Dominion."

Learned counsel on the two sides were at a loss to explain the purpose of this provision. It was referred to for the appellants as conveying indubitably a power of making Constitutional laws, to the "Legislature of the Dominion", but that appears in clearer terms from section 8 (1) of the

same Act. It might have been thought that an' autonomous Legislature, such as was intended by subsections (1) and (2) of the same section, would possess the capacity to limit its own legislative compe*tence, e.g., in the interest of a harmonious operation of legisla*tive powers distributed between the Centre and the Province. Such a distribution already existed, and might conceivably have been thought to be likely to continue under the future arrangements.

In my opinion, the true explanation of section 6 (6) is to be found in the presence of section 8 (3) of the Indian Inde*pendence Act, which reads as follows : .

"(3) Any provision of the Government of India Act, 1935, which, as applied to either of the new Dominions by subsection (2) of this section and the orders therein referred to, operates to limit the power of the legis*lature of that Dominion shall, unless and until other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion in accordance with the provisions of subsection (1) of this sec*tion, have the like effect as a law of the Legislature of the Dominion limiting for the future the powers of that Legislature."

The operation of "deeming" involves the supposition that a thing is that which is not. All the limitation on the powers of the legislature of the Dominion" with a small `1' indicating as Mr. Diplock thought, that the reference might be to the .Legislature, which had power to legislate for the whole of British India before the transfer of power were limitations imposed upon it by the British Parlia*ment. The delicate design and intention of section 6 (6) and section 8 (3) seems clearly enough to be, to cause it to appear, for the satisfaction of all those who were sensitive to controls from outside the country, that the limitations were of local origin, and-for the time being only, until the Cons*tituent Assembly should see fit to remove or alter them.

As the Governor-General's power of granting assent to laws of the Legislature of the Dominion" was uncontrolled from without, complete autonomy was secured to the new Dominion in the legislative sphere, by virtue of the 'terms employed in the relevant documents, if and when it should be equipped with a Legislature of the Dominion". In the interim period, the position was, if anything superior, in point of freedom, for the Constituent Assembly, 'which was to legislate in the place both of the self-effaced British Parliament, as well as of the dissolved Federal of Indian Legislature, was a body which ex hypothesis was free of all forms of legal or other control.

But, in the operation of a Constitution, there frequently arise occasions where the meaning of one or more of its provisions,' or the intention in a particular respect of the instru*ment as a whole, gives rise to doubt. With respect to th

necessity of assent by the Governor-General to laws of constitutional nature passed by the Constituent Assembly, this doubt arose at a very early stage. The Court is indebt to the learned Advocate-General of Pakistan for the assertion, made on more than one occasion, that the Law Ministry of the Government of Pakistan (by which was meant the body of permanent officials constituting the staff of the Minister under the Law . Minister) had consistently advised the Minister that such assent was sine qua non. On the other hand, the Constituent Assembly had throughout maintained the view that assent was not necessary, and acting on that vie, had made and promulgated a rule, No. 62 in the Rules o the Constituent Assembly to give formal expression to that view. This rule, as originally framed on the 24th February I, 1948, at a meeting presided over by the President, the late Quaid-e-Azam Muhammad Ali Jinnah, merely provided that when a Bill had been passed by the Assembly, a copy of it should be signed by the President. As this was not followed by any provision for submission to the Governor-General for his assent, it was understood to provide a sufficient formal act to give validity as law to the Bill as passed, but it appears that doubts were felt on this subject, and the rule was amended at a meeting presided over by the Deputy President, Mr. Tamizuddin Khan, and held on the 22nd May, 1948, to read as follows :-

“When a Bill is passed by the assembly a copy thereof shall be signed by the President, and it shall become law on being published in the official Gazette of Pakistan under authority of the President."

No words could express more clearly the opinion of the Constituent Assembly, passed nearly seven years ago, on the question which is now before the Court. I quote here from Craies on -Statute Law, 5th Edn. at page 11 :-

"Parliament is the supreme authority for interpretation of Statutes parliament has power to declare by statute the common law or the meaning of any prior statute, and may declare wrong and repeal any -judicial legislation effected by interpretation or misinterpretation of statutes, and may make the declaratory - or repealing statute retrospective."

It is argued, however, for the appellants ,that a rule of the Constituent Assembly is not a law. The proposition, on the face of it, seems valid, but it is permissible to observe that there are several other rules made by the Constituent Assembly, which it alone was competent to make, which have been acted upon, and which in their character and essence are not only laws in the most thorough-going sense, but must also be placed in the very highest category of laws, viz., constitu*tional laws. I cite three instances below. Rule 6 of the Rules makes elaborate provision for filling of "casual vacan*cies" in the membership of the Assembly. By the first pro*viso to

subsection (3) of section 19 Indian Independence Act, 19.47, it was declared that "nothing in this subsection shall be construed as preventing the filling of casual vacancies in the (Constituent Assembly of Pakistan). . . and the powers of, the said (Assembly) shall extend; an& be deemed always to have extended, to the making of provision for the matters specified in this proviso".

I do not construe this proviso. as conferring any power upon the Constituent Assembly which it did not inherently possess ; it is obviously intended for the avoidance of doubts which might. have been founded on the wording of sub*section (3). But it would seem' clear enough that, in the eye of the British Parliament, the matter was one of "powers" and not merely of administrative or incidental or ancillary nature so that the exercise of the power in question would, I apprehend,. lead to the creation of law.

Next, I refer to Rule 6-B which provides for "Disqualifi*cation from membership", and lays down a large number of conditions which individually shall be sufficient to cause vacation of his seat by a member. In one case, the President is enjoined to direct, upon -being satisfied of the conditions, that the disqualified member ceases to be a member and to declare his seat vacant ; and it is further provided that the President's decision shall be final and shall not be questioned in any Court of law or before any other authority. A fine of rupees five hundred per day, recoverable as a debt to the Federation, is prescribed for any person who sits or votes as a member of the Constituent Assembly, while under the disqualification or prohibition. that by this rule, the constituent assembly purported to make law.`

Rules 75 to 86 of the Rules relate to "Doubts and Disputes as to Elections" to membership of the Constituent Assembly. No possible doubt can be entertained regarding these rules that they constitute law. It is true that they were not made in the form prescribed for a statute, but there is authority for the view that in the case of a sovereign body, like the Constituent Assembly, it is the substance and not the form which determines whether the expressed will of such a body constitutes law. I reproduce a below the observations of a learned an much respected American authority on Constitutional Law. In Cooley's Constitutional Limitations, Eighth Edition, at page 266, at the commencement of the chapter entitled "On the Enactment of Laws", there occurs the following passage, which. is deserving of careful study

"When the supreme power of a country is wielded by a single man, or by a single body of men, any discussion, in the Courts, of the rules which should be observed, the enactment 'of laws must. generally be without 'practical value, and in fact impertinent; for, whenever the unfettered sovereign power of any country expresses its will in the promulgation of a rule of law, the expression must be conclusive, though proper and suitable forms may have been wholly omitted in declaring it. It is necessary attribute of sovereignty that the expressed will of the sovereign is

law; saw an while 'we may question and cross-question the words employed, to make certain of the real meaning, and may hesitate and doubt concerning it, yet, when the intent is made out, it must govern, and it is idle to talk of forms that should have surrounded the expression, but do not."

But even if statutory authority be not conceded in favour of rule. 62, on the ground discussed above, it cannot be denied that it embodies a "parliamentary exposition" - of the highest importance. I quote again from Craies on,Statute Law, p. 137:-

"But Acts of Parliament, without having been passed for the. express purpose of explaining previous Acts, are, sometimes spoken of as being "legislative declarations" or "parliamentary expositions" of the meaning of some earlier Act. This in Battersby v. Kirk ((1836) 2 Bing. N C 584, 609), Tindal C. J. said "We cannot but consider these legislative enactments as forming a . glossary for the proper interpretation of the expressions in the Bristol Dock Act which are considered to be left in doubt". . . : . But, as has been pointed out; , it is the Courts of law and not the Legislature, who are the authorised expositors of the statute law of the land, so that anything 'in the nature of a "parliamentary exposition", of an Act of Parliament is only an argument that may be proved in aid of attaching some certain meaning to a statute and cannot be treated as-per se conclusive."

If the matter related to the meaning of a doubtful expression in some Act making a substantive provision, so clear an expression of opinion by the Constituent Assembly would carry very great weight. The question here is of the mode of enactment of constitutional laws. Here, I am concerned to point out that the major limb of the three great limbs .of the autonomous State of Pakistan had clearly expressed in 1948 its view on this question, which has . now assumed so high an importance. I place the Constituent Assembly above the Governor-General, the chief Executive of the State, for two reasons, firstly that the Constituent Assembly was a sovereign body, and secondly because the statutes under and in accordance with which the Governor General was required to function, were within the competence of the Constituent Assembly to amend.

The a second -great limb of the State, namely the Executive Government of the Federation, hays never, until after the event of the 24th October 1954, shown any sign of doubt of this point. This was in the highest, degree natural, for not only the three successive Governors-General of Pakistan, but with a few exceptions, mostly of very recent date, every Minister of the Federal Government has been a member of the Constituent Assembly. The first Governor-General, 'the late Quaid-e-Azam Muhammad Ali Jinnah, and the second Governor-General Khwaja Nazimuddin were original members of the Constituent Assembly, as appears from the

notification on the subject in the Gazette of India of the 26th July 1947. The third Governor-General, H. E. Mr. Ghulam Muhammad, was elected as a member of the Constituent 'Assembly from East Bengal in June 1948, and retained his membership until July, 1953. The requirement that Ministers of the Federation should be members of the "Federal Legislature" was contained in the Government of India Act, 1935, and has already been cited. Thus it is possible to declare that the Government of Pakistan, composed of the Governor-General and his Ministers have, throughout the relevant period, been aware that the Constituent Assembly had formally declared that its constitutional laws became law under its own Rule 62, without the need of the Governor-General's assent. The knowledge was not passively ,possessed, for occasions when the' Federal Government was under the necessity of obtaining enactment of laws of a constitutional nature arose from a very early stage in the history of the country, and continued to arise with increasing frequency as it progressed. Not all these laws were of the same importance, and I shall therefore select for mention those which, in my humble opinion, are connected with matters of the highest importance to the State.

From the very inception of Pakistan, matters connected with defence have been germane to its very existence. It might reasonably be assumed that in obtaining a necessary law relating to the Defence Services, the -Federal Government would exercise the .utmost care to ensure that the mode of enactment was fully effective. Chapter I in Part -X of the Government of India Act, 1935, originally contained sections 232 to 239, which empowered His Majesty-in-Council in all necessary respects, and contained numerous references to "His Majesty's Forces". These sections were deleted at the adaptation prior to the transfer of power in. 1947, and were not replaced until 1950, when two new sections, viz., Nos. 232 and 233 were inserted in the Act, empowering the Governor-*General to raise and maintain - Forces and Reserves, to grant Commissions in the Forces and Reserves, to appoint Com*manders-in-Chief of the three Services, and to fix their emoluments, etc, These powers, , which of necessity are frequently exercised, thus derive from an Act of the Constit*uent Assembly, viz., the Government of India (Second Amendment) Act, 1950, which was passed into law without the assent of the Governor-General.

The second instance I propose to cite is the Delimitation of Constituencies (Adult Franchise) Act, 1951, which was passed by the Constituent Assembly -in the same form. This Act was designed to extend adult franchise to the Provinces of Pakistan, and' provided for the necessary increase of -seats and readjustment of constituencies, on the basis of a report to be submitted by a Committee to be appointed to each Province where an election was to be held,' which Committee would be appointed by . the Central Government. That Government was empowered to amend and modify the scheme of delimitation proposed by- the Committee, . and the Governor*-General was empowered, by order, to make consequential amendments in the Government of India (Provincial Legislative Assemblies) Order, 1936. So far as I am aware, action has been taken in regard to three Provinces, under powers derived from this Act, and consequential amendments have also been made in the appropriate schedule of the Government of India Act. "

As a consequence, these Provinces, namely East Bengal, Sind and the N.-W. F. Province are today equipped with Legislative Assemblies elected on the basis of adult franchise, and so far as I am aware, these Assemblies have during their term already passed numerous laws of far-reaching effect, touching great numbers of citizens and a great many rights, in property and otherwise. All concerned, including the Provincial executive authorities, and the newly elected Legislatures themselves have acted throughout in the firm belief that they were doing so effectively.

I shall mention the third instance very briefly. Under the original Government 'of India Act, the Federation had power under List I, Item 1 of the Legislative Lists, to legislate on "preventive detention for reasons of State connected with defence or external affairs," while the Provinces had power under List II, Item 1, to legislate on "preventive detention for reasons connected with the maintenance of public order.". The division of powers being found inconvenient, the Government of India (Second Amendment) Act, 1952, was passed by the Constituent Assembly whereby in List I, Item 1, the relevant entry was altered so as to read "preventive detention for reasons of state connected with defence, external affairs, or the security of Pakistan or any part thereof", the relevant words in List II, Item 1 were deleted, and in their place a new entry was added in List III as Item 1-A, so as to come within the legislative competence of the Federation as well as the Provinces, which reads as follows : "Preventive detention for reasons connec*ted with the maintenance of public order, or the maintenance of supplies and services essential to the community." The law did not receive the assent of the Governor-General, -but that it was initiated by the Federal Government is evident from the fact that in the same year, a comprehensive measure entitled the Security of Pakistan Act, 1952, was moved by that Government in the Federal Legislature, which took advantage of the access of power derived from the amendment of the Lists, to make necessary provisions "to deal with persons acting in a manner pre-judical to the defence, external affairs and , security of Pakistan, or. the maintenance of supplies and services essential for the community, or for the maintenance of public order". Here again was a matter touching the safety of Pakistan, on which the Federal Government might have been expected to act with the utmost circumspection. There can be no doubt that they did so, and the Court is indebted to the learned Advocate-General of Pakistan for the assurance that, throughout, the Federal Government was in possession of the advice consistently given by the permanent .staff of the Law Ministry that assent was essential. The possibility of action per incuriam is ruled out conclusively.

The third great limb of the, State is the Judicature, and as was brought out in the course of the argument, the question has been before superior Courts in Pakistan on three occasions. The first was in early 1950, in the Sind Chief Court, in the case M. A. Khuhro v. The Federation of Pakistan (1950-51 FYC R 24=P L D 1950 F C 15) decided on 20th March, 1950. The appellant had been an original member of the Constituent Assembly of Pakistan, but by virtue of an order of disqualification made by the Governor-*General under section 3 of the Public and Representative Offices (Disqualification) Act, 1949, he had been disqualified for three years for holding any political office, including membership of the Constituent Assembly. The other

features of the case are not relevant for the purposes of the discussion. It will be sufficient to say that Mr. M. A. Khuhro raised squarely the contention that the Act under which he had been disqualified was invalid because it had not been assented to by ,the Governor-General. The Federation of Pakistan met the contention squarely by assenting that no such assent was necessary because the Act was passed by the Constituent Assembly sitting as a Constituent-making body and not as Federal Legislature. The Judge (Hassanally. Agha, J) held that no assent was necessary, and reference to the words in section 6 (3) "the Governor-General shall have full power to assent in His Majesty's name (the last four words were deleted by the Constituent Assembly in 1950 to any lava of the Legislature of the Dominion", he observed

"All that this clause says is that in cases where the assent of His Majesty may be necessary, it shall be given in His Majesty's name."

The attitude taken by the Federation of Pakistan in that case was the exact reverse of that presented before this Court. It was in complete accordance with the view of the Constituent Assembly with which, of course, the plaintiff Mr. M. A. Khuhro, who had been disqualified for membership, could not be expected to agree. The condition of the initiating, party in the next case, viz. Khan Iftikhar Husain Khan of Mamdot v. The Crown (P L D 1950 Sind 49) in this respect, was not productive of the same degree of antagonism: The case was decided on the 19th May, 1950. The Khan of Mamdot was an original member of the Constituent Assembly of Pakistan, and he too had been respondent in a case under the same Act as Mr. M. A. Khuhro. At the stage at which he brought his case before the Federal Court, there had been an equal division among the Judges of the Lahore High Court who had tried the case, as to the question ' of guilt on several charges and a Full Bench of the same Court had decided that the matter should be referred to a third Judge for final decision. .It was against the decision of the Full Bench that the Khan of Mamdot, who was still a member of the Constituent Assembly appealed to the Federal Court, through a very senior and experienced Advocate., Dr. Khalifa Shuja-ud-Din, Barister-at.Law' The Federation of Pakistan was represented at the hearing. The question of assent to the Public and Representative Offices (Disquali*fication) Act, 1949, was raised in the following form, viz :-

"The Act should have been passed, not by the Constituent Assembly, but by the Federal Legislature of Pakistan, and it should have received the assent of the Governor-Genenral of Pakistan in accordance with the provisions of the Government of India Act. The Act, having been passed by the Constituent Assembly and not having received the assent of the Governor-General in accordance with the provisions . of the Government of India Act, was void and ultra vires . . . ."

The reply to the argument was that the Act was a "constitu*tional law" and "therefore, if fell within the purview of the words `for the purpose of making provision as to the Constitution of the Dominion', as they occur in subsection (1) of section 8 of the Independence Act, 1947." This argument was accepted by the Federal Court in full, and the appeal was accordingly dismissed. There are no words in the judgment of Sir Abdul Rashid (then Chief Justice of Pakistan) which amount to formulation of the proposition for which the petitioner contends, but the proposition necessarily follows from the conclusion that the appeal must fail, although there was no assent by - the Governor-General, because the law was a `constitutional law'. The absence of assent being pro*minently before the Court, the sufficiency of -the finding -that the law was a `constitutional law' to put the appellant out of Court, clearly leads to the inference drawn above.

The third case on the subject arose about four years later, also in the Federal Court. It is reported as ,ex-Major-General Akbar Khan and Faiz Ahmad Faiz v. The Crown (P L D 1955 F C 185) and was decided on the 21st December 1953. The appellants were two of the persons convicted in proceedings held under the Rawalpindi Conspiracy (Special Tribunal) Act, 1951, and were represented by an eminent English barrister with much experience of constitutional law cases, namely, Mr. D. N. Pritt, Q. C. Here also the argument put forward was that the Act under which the appellants had been tried and convicted needed assent because it related to the sphere of Federal legislation and the latter contention being negatived, by reason of the presence of a provision having. the effect of avoiding an appeal in the Federal Court, whose jurisdiction is a matter to be regulated by the Constitution, the appeal was dismissed. In both these cases, the argument that assent was necessary even' to a constitutional law, which arose in the most obvious manner, was not taken, and the Court in dealing with the two *pronged argument that the decision of the Court below should be upset (1) because the law under which it was passed, was a law within the Federal sphere of legislation. and (2) because the law had not received the assent of the Governor-General, thought that a reply sufficient to defeat the argument was that the law was a constitutional law. By clear implication, it was held that assent was not ' non for a constitutional law. [I should add here that. since the First March, 1955, it has been laid down by this Court that it is not bound by its previous decisions; Criminal Appeal No. 50 of 1953, Anwar and Nawaz v. The Crown] (P L D 1954 F C 87). Thus, for the first seven years of Pakistan's existence, the three great limbs of this new "autonomous community exhibited complete harmony of view in regard to the point this'! Court is now called upon to decide. They had not reached their conclusions in any superficial way. Throughout there was awareness of the status of the country as a "Dominion" and of the existence of the link with the 'British Crown. In the case of Sarfaraz Khan (P L R 1950 Lab. 658 P L D 1950 Lah. 384) it appeared, among the relevant facts, that the Governor-General's assent had been given to the Punjab Public Safety Act, 1949, .in a form from which the words "in His Majesty's name" had been scored out. Shortly after, the Constitution Act was amended' by -the Constituent Assembly, wherever necessary, to exclude these words from provisions relating to the grant of assent by the Governor *General and the Governors, thereby evincing an intention to retain the link at a purely nominal level.

These actions were plainly performed in compliance with a clearly-formed notice regarding the nature of the autonomy enjoyed by the country as an "Independent Dominion". They of indicate a determination to manifest freedom from everything M resembling control from without, and in that respect, they did no more than to confirm and continue that spirit which had inspired the people of the country in their struggle for independence which had achieved success in 1947. The autonomy of the country, its independent power to control its own affairs, both internal and external,. was embodied in the three great agencies of the State, the Constituent Assembly, the Executive, and the Judicature, and all three were agreed that the country was independent in all but name, and that they were entirely free to adopt their own methods, in regard to matters such as legislation, without reference to any practice prevailing else*where, and without suffering from any sense of obligation, as the price of their continuing membership of the Common*wealth, to follow any methods, or assume any ideology, except such as was found suitable to their own requirements. True, they had undertaken to perform their tasks in accordance with the Indian Independence Act and the adapted Government of India Act, but that was the initial step only, for the Con*stituent Assembly had sovereign legislative power; including power to alter these instruments, which in relation to the Government of India Act, was repeatedly mentioned in the Indian Independence Act. The interpretation of the latter Act too was now a purely domestic matter, in which no outside interference, or sense of obligation to any outside person, or State, or organisation of States, could compel the autonomous State of Pakistan in favour of one view rather than of another.

I conceive that the settled and complete unanimity on be the point now in dispute of the three major organs of the State is most properly to be regarded, from this point of view, as a manifestation of their conception of the country's autonomy, in the particular sphere. Such a temper accorded with the still active demand for complete independence. In assuming such a -temper, while accepting the appellation of an "independent Dominion" Pakistan need not have feared to involve itself in any inconsistency, or any behaviour such as might bring about its expulsion from the Commonwealth. For it was a "free association of free peoples", and the merest link with the British Crown was the sole necessary qualification for retention of membership. There was an example of a European nation, namely the people of the Irish Free State, who in 1947 continued to be accepted by the United Kingdom and the other Dominions as one of themselves despite having broken off, by unilateral act, nearly every possible link with the Crown. It could hardly have been expected, in the light of the views held at the time, that the great organs of the State of Pakistan, an Asiatic country, to which a degree of emancipation from every form of control exercisable by the British Sovereign or the British Parliament, had been accorded which far transcended anything previously granted to any of the senior self-governing Dominions, should, in regard to the question of assent to constitutional laws made by its Constituent Assembly, assume an attitude less resistant to controls from the old masters than was evinced by Ireland.

On this point, moreover, they could find direct support in the practice of the great American . Republic of the United States, a practice consistently followed since the year 1798. I refer once

again to Cooley's Constitutional Limitations, Eighth Edition, at page 70, where the mode of amendment of the Constitution of the United States is dealt with, and it is said, in the simplest language-

"The submission of an amendment does not require the action of the President."

Two cases are cited- namely (Holingsworth v. , Virginia ((1789) U S S C R Lawyers Ed. 644) and Hawke v. Smith (1919 U S S C R 64 Lawyers Ed. 871). A clear statement of the opinions expressed in both these judgments appears from the following paragraph which I extract from the later judgment :-

"At an early day this Court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the 11th Amendment. 'Hollingsworth v. Virginia (3 Dall. 378 I L'Ed. 644). In that case it was contended that the amendment had not been proposed in the manner provided, in the Constitution, as an inspection of the original roll showed that it had never been submitted to the President for his approval in accordance with article 1; section 7, of the Constitution. The Attorney *General answered . that the case of amendment's is a substan*tive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Con*stitution -investing the President with a qualified negative on the acts and resolutions of Congress. In , a footnote to this argument of the Attorney-General, Justice Chase said

"There can surely be no necessity to answer that .argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the pro*position, or adoption, of amendment to the Constitution", The Court by a unanimous judgment held that the amend*ment was constitutionally adopted."

The Constituent Assembly too was a supra , legal body, not acting in its constitution-making capacity within the; Constitution. It was not to be presumed that, in this, capacity, its proceedings and decisions were subject to the qualified negative of the Governor-General, who was a statutory authority, owing existence to the interim Constitution.

This, then, was the situation on the 24th October, 1954, and it was only thereafter that, for the first time, the Federal Government of Pakistan raised the plea that all Constitutional Acts of the

Constituent Assembly needed the Governor-General's assent. It is permissible, perhaps, at this stage, to refer to the argument ab inconvenienti, which arises naturally enough whenever a long course of legislative, administrative and judicial action has been based upon a certain view of law which is sought to be upset. Certain events have followed the pronouncement of the orders in this case, which necessitate -the exercise of great caution in making these comments, lest they may influence and perhaps confuse the decision of matters already pending before other Courts. I will content myself with citing a few extracts from Cooly's Constitutional Limitations, and from Crawford's Statutory Construction (Thomas Law Book Co. St. Louis, 1940).

At page 144 of Cooley's book, I find the following obser*vations :-

"Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those -who had the . opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the cons*truction rightly interprets the intention."

Three passages from Crawford's book are relevant. At page 381, he says :-

"Where the meaning of a statute is in doubt, the Court may resort to contemporaneous construction-that is, the construction placed upon the statute by its contemporaries, at the time of its enactment and soon there after *for assistance in removing any doubt. Similarly, resort may also be had to the usage or course of conduct based upon a certain construction of the statute soon after its enactment, and acquiesced in- by the Courts arid the Legis*lature for a long period of time."

And, speaking of "departmental construction" which means "construction by the Executive Department", the learned author says at page 395 and page 399-

"And where vested rights have grown up under the departmental construction, the Courts are , justified in being more reluctant than in ordinary cases in adopting a construction which will

destroy or disturb such rights."

" where the executive construction has been for a long time, an element of estoppel seems to be involved. Naturally, many rights will grow up in reliance upon the interpretation placed upon a. statute by those whose duty it is to execute it."

The kind of case to which these observations, in their terms apply, is however of importance far below that of the present case. The present is not a case where a mere "depart*mental construction", or even a judicial or legislative construction is. put forward, as a caution against lightly disturbing that which has been accepted and acted upon as settled law for a period, leading to development of vested rights. The rule . of stare decisis is altogether too small III its content to fit the case. Here, the greatest organs and agencies of the State have been consciously and unanimously holding a certain belief, and have been acting upon

it in numerous respects 'affecting the most fundamental right of the entire people. It is difficult to imagine a law which affects so large a proportion of the public a does a law designed to grant adult suffrage, and to determine the composition of Provincial Legislatures on that basis. The Delimitation of Constituencies (Adult Franchise) Act, 1951, was procured by the Federal Government, was passed by the Constituent Assembly, was put into operation by the combined labours of the Federal and Provincial Govern*ments, and has borne fruit in the shape - of new Legislative Assemblies, which have been busy ever since passing new laws and in other ways, regulating the lives of the people. It is beyond conception to tabulate all the vested rights and interests which have developed in consequence of this law. And there are many other laws which have pro*duced extensive effects, which cannot possibly be ascertained with exactness. These circumstances should, in my opinion, furnish an argument of almost insuperable character, in favour of upholding what has been the practice hitherto in regard to assent to constitutional laws.

I now take up for examination the final argument for the appellants, namely, that assent of the Governor-General is rendered essential by the formula appearing in section 6 (3) of the Indian Independence Act, viz.-

"The Governor-General of each of the new Dominions shall have full power to assent to any law of the Legislature of that Dominion "

The argument was supported by reference to section 5, which lays down that the Governor-General shall represent His Majesty for the purposes. of the government of the Dominions." It was said that by this simple formula His Majesty transferred all his Royal prerogatives to the Governor-General, including the prerogative of assent, which it thereafter became incumbent upon the Governor-General to employ, and upon the Legislature of the Dominion to seek. In my humble opinion, the argument is unsound, and for the following reasons. Assent is a matter which is not dealt with in any document issued to Governor-General of Dominions from His Majesty direct, except in relation to the question of reservation of Bills for His Majesty's own assent, when it finds place in the Instrument of Instruc*tions. But in the Constitution of every Dominion, there are precise provisions relating to the presentation of Bills to the Governor-General for his assent, and for the action which he is to take thereon.

The Indian Independence Act, 1947, expressly deals with a, field of legislation, viz., constitutional legislation, lying outside the scope of the Government of India Act, 1935, in which .there was, as has been seen already, a specific provision relating to assent to Bills passed within the powers of the Federal Legislature. This provision was in the full terms already in use, since 1867, in relation to other Domi*nions. In 1947, when transferring additional legislative powers to the new Dominions the British Parliament were aware that express provision for assent was necessary in relation to laws made in exercise of these powers, if such assent was to be prescribed. The provision would have been in the nature of conveyance of His Majesty's prero*gative, which in this respect had been placed at the disposal of the British Parliament. That Parliament chose to make the provision in the terms reproduced above from section. 6 (3). It is settled that when the British Sovereign parts with any of his prerogatives in the shape of a grant to a country with representative institutions, then unless there is an express reservation (which is not found here), the grant is final and cannot be revoked. (Sammut - v. Mrickland) (1). Therefore, section 5 cannot be referred to for enlarging the power which the words of sections 6 (3), Indian Independence Act, operate to convey.

I propose to examine the effect of those words in three parts, viz., firstly the words "shall have full power", secondly the words "any law" and lastly the words of the Legislature of the Dominion".

It , will not, I think be disputed that the words "shall have full power" convey no more than a power or capacity: I have already stated my opinion that the word . "full" signifies the withdrawal of pre-existing restraints, appearing tfie original the Government of India Act, 1935, and in. the Instru*ment of Instructions, etc. Indirectly, it may also be thought to indicate a variation from, and an improvement upon, the limited , powers conferred in the same respect by the Constitution Acts of the older Dominions. But I do not read it in any sense such as might impose obligations, besides conferring a capacity. It is one thing to enlarge a ' capacity to the utmost; it is quite another thing to covert it into a duty. These words purport plainly and

unambiguously to convey a power. The circumstances in which such words occurring in an English statute may be construed to impose a duty have been considered and passed upon by the House of Lords in the case of Jilivs v. Bishop of Oxford (5 Appeal Cases Page 214). Lord Cairns L. C. stated the matter in the following terms regarding the meaning of the words `,`It shall be lawful":-

"They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty . or power, and they do not themselves confer more than a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for , whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so . . . . . And the words "It shall be lawful" being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of. the case something which according to the principles I have mentioned,, creates this obligation.."

A little further on; the learned Lord Chancellor observed as follows:-

“ the cases to which I have referred, appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

Similar views . were expressed by the other three noble Lords who heard the case. Lord Penzance said:-

"The conclusion then, at which I arrive is, that the Appellant has not established his case. The words `It shall be lawful' are permissive and enabling only. It devolved upon him 'to show that the Legislature intended the exercise of the power, thus conferred, to be a duty, in the performance of which the Bishop was not intended to have any discretion-."

And Lord Blackburn observed:

"The enabling words are construed as compulsory when*ever the object of the power is to effectuate a legal right."

I am not aware that the construction thus placed upon words which are, in themselves, merely potential, or per*missive or enabling, i.e., words which create a mere faculty or power, has been varied or departed from in any judgment of equivalent authority. It therefore becomes necessary to examine why the same Parliament, which in relation of the other Dominions, and even to India, had, in this respect always made the, most precise and specific provision, requiring that Bills when passed should be submitted to the Governor-*General, who should either assent in His Majesty's name, or withhold assent, or reserve the Bill for signification of His Majesty's pleasure, should on this occasion have,. elected to employ simpler language, conveying no more than a mere power of assent.

Two reasons stand out at once. The Constituent Assembly being designed to be a sovereign body and to exercise sovereign power, including power to alter the Constitution subject to which the Governor-General was intended to act, it would clearly be , inconsistent with that . design and purpose if the `qualified negative" of assent by the Governor-General were imposed upon its constitutional laws. Secondly, it being within the complete power of the Constituent Assembly to determine the Constitution of the "Legislature of the Dominion", or Union Legislature, and to determine the scope of its legislative competency as well the mode in which its laws should be enacted, the British Parliament could not" affect to prescribe the requirement of assent, as an essential formality, in respect of the laws made by such a Legislature. This would be to usurp the functions of the Constituent Assembly. To impose such a requirement upon laws of a constitutional nature made by the Constituent Assembly would be a direct affront to the position and authority of that body. Hence the careful use of expressions in section 8, Indian Independence Act, to indicate that the necessary powers of legislation should be exercisable by the Constituent Assembly. The words signify' the courtesy owed by one sovereign body to another. There was no direct imposition of obligations, but the need being indicated, it was indicated also that the Constituent Assembly, as previously agreed upon by the plenipotentiaries in the negotiations between the United Kingdom Government and the representatives of the Indian people, might fulfil the need.

I conceive that it was for these and possibly other similar reasons that a form of words was chosen which created no more than the power, without specifying the occasion and manner of its exercise. I do not agree that the words can mean that the British Parliament intended or assumed that assent was an essential requisite. I find it impossible to spell out, of the words used any obligation upon any Legislature, be it the Constituent Assembly acting as such or the "Legisla*ture of the Dominion", to present the laws made by them, for assent ; that, in my

opinion, must have been separately provided, to make it essential, and the absence of such provision, in the Indian Independence Act, when contrasted with its presence in the Government of India Act, 1935, and in the Constitutions of nearly all other British Possessions, having representative institutions, be they Dominions or merely Colonies or "realms and territories", strongly inclines me to the view that such prescription was deliberately avoided by the British Parliament, in view of the special conditions created by the Indian Independence Act, and otherwise, at the time when Pakistan came into being.

On this view the conception of an obligation resting on the Legislature in relation to the Governor-General cannot be thought to arise out of the terms of the section in the Indian Independence Act, whatever the condition might have been at a later date under the new Constitution, or under any provisions which the Constituent Assembly might have thought fit to make in respect of its constitutional laws. As has been pointed out above the Constituent Assembly, as early as May, 1948, formally recorded its considered will that its constitutional laws should become operative with no more formality than (a) the President's signature on a copy of the Bill, by way of authentication and (b) publication, in the Federal Government's Gazette under the authority of the President. What right could then bethought to be effectuated by applying a compulsive effect to the disputed words of mere potentiality ? The argument of the appellants seemed to be that the right inhered in the Governor-General by virtue of his being the representative of His Majesty, and from the fact that. Pakistan was a Dominion.

I have already shown that section 5, Indian Independence Act, cannot operate to confer any right to grant assent beyond that conveyed by , the relevant words in section 6 (3). Therefore, to draw the right of assent from section 5 seems to me to be impossible. Moreover, the position of the Governor General was such that there was no power on earth which could compel him to exercise any power vested in him, unless it was or became coupled with a duty, as indicated in the case of Julius v: Bishop of Oxford (cited above), in which case recourse might perhaps be had to the Courts. For over seven years, the Governor-General had, despite advice being given by the permanent staff of the Law Ministry in the contrary sense, decided and acted on the basis that he did not possess any such right as that which was claimed for the first 'time in the present case. The sovereign body in the State, namely the Constituent Assembly, had declared to this effect, and the view was confirmed on three occasions by the highest Courts in the land.

To derive the right or duty from the. idea of Dominion Status seems to me an even more difficult operation. It may be entirely proper for a new member of a club to conform, as nearly as may be, to the manners and practices of the oldest and most influential members. That is the -part of wisdom, if the new member sets a value upon his membership. But the sanction thus conceived is a social or communal sanction ; it is entirely different from a legal sanction. Indeed, where the

club is composed of "autonomous communities" the entire conception of communal sanctions being applied, through legal process, to enforce any kind of obligation in the 'discharge of domestic functions of any one member, is fallacious. The question of assent by the Governor-General to constitutional laws was purley a domestic matter for Pakistan to settle for itself ; and the three great limbs of the State had settled it, and were content with the settlement for seven years. No one in the club of Commonwealth countries had objected, or could object, to this practice. The club tolerated the greatest divergence of practice among its members and even of belief regarding the existence of any obligations whatsoever inter se among the members. When Pakistan, as a country whose people were intent upon securing their absolute independence, entered the club, there was among the members a country, namely Ireland, which had even renounced allegiance to the British Sovereign, and replaced the Governor-General by a President. Three years later, another republic, namely India was allowed to continue its membership, on a slightly altered basis. There was apparently no limit to which the members could not go, in regard to what were habitually thought, not many years ago, to be the basic essentials, for acquiring and retaining Dominion Status, without incurring the least danger of forfeiting that status.

In these circumstances, was it unnatural that the State of Pakistan should evince, from the date of its admission to membership, a clear intention and determination -to accept only the minimum possible obligations ? If that be granted it, seems to me. a very difficult proposition to suppose that the new State accepted, as a condition of membership, that all its laws would be subject to assent by the Governor-General. Such ' an inference is the precise opposite of the definitive opinion which the State, through its three great organs, displayed in all its relevant actions over the first seven years of its existence. What they have been given to run was an autonomous State. not academy for the advancement of a particular school of political philosophy. it would be a denial o t e autonomy of a State of Pakistan to declare that its opinion in this matter was wrong.

It seems to me that to 'enforce the right of assent in favour of the Federal Government would come clearly in conflict with the principle of "approbation and reprobation". To enforce it in the interest of the community o nations known as the Commonwealth would be absurd, because, firstly, it was not regarded as a necessary qualification for membership of the community when Pakistan was admitted, and, secondly, it conflicts with the clear principle of, non-interference in the domestic affairs of an autonomous State. To enforce it, as an obligation arising out of the mere idea of Dominion Status, is to confer upon that idea a shape and a certitude which, if it ever existed, had quite definitely been blurred into vagueness by the toleration, at least since 1933, of widely variant practices and conditions among Dominion countries, in regard to the most essential features of their organisation.

The other two matters arising in respect of the relevant words in section 6 (3), Indian Independence Act, may be very briefly dealt with. The argument for the petitioner, Mr. ,

Tamiz-ud-Din Khan, that "any law" meant only such instru*ments as had already acquired legal effect is plainly unacceptable. In the context, "any law" must mean "any law requiring assent for it to become operative", i.e., any Bill passed by the "Legislature of the Dominion", which under any provision of law required to be presented to the Governor General for his assent, and to receive assent before it could) become operative.

As for the term "Legislature of the Dominion", I have already indicated my view that it cannot be, and was no p intended to be, regarded as equivalent, at any time, to the o Constituent Assembly. The mere provision, specific though it be, that certain powers stated in section 8 (1) of the Indian Independence Act to be powers of the "Legislature of the Dominion" were to be exercisable by the Constituent Assembly cannot operate to produce any such identity even for the limited purpose of these powers. The further provision in this subsection that "reference to the Legislature of the Dominion shall be construed accordingly" must be confined in its meaning and application, by the .earlier provision that the relevant powers were exercisable by another body. If the effect of section 8 (I) were to make the "Legislature of the Dominion" and the Constituent Assembly identical in all respects, in relation to the power of constitution-making, there would be no reason whatsoever for providing in section 8 (3) that limitations on the power of the "legislature of the Dominion" appearing in the Government of India Act should be deemed to .have the same effect as similar limitations imposed by a law of the - "Legislature of the Dominion" unless and until other provision is made by or in accordance with a, law made by the Constituent Assembly of the Dominion in accordance with the provisions of subsection (1) of this section. The underlined words appear as they are in section 8 (3). 1 can only regard them as the clearest possible indication that the Constituent Assembly and the "legislature of the Dominion" were treated in the Act, and were intended by the British Parliament to be entirely distinct bodies. As I have pointed out already, one of the functions of the Constituent Assembly, in preparing the new Constitution, was expected to be to provide the country with a "Legislature of the Dominion," if it was to remain a Dominion. An instance of a law to the British Parliament making the powers of one Legis*lature exercisable by another and wholly distinct Legislature, which the former was intended to replace in .due time, may be found in section 316 of the original Government of Indian Act, 1935. The two Legislatures in question were the Federal Legislature, for whose constitution specific provision was made under the Act of 1935, but which could not come into being until certain things were accomplished; and the "Indian Legisla*ture" constituted under the Government of India Act, 1919, by whom the powers of the Federal Legislature, as specified in the Act of 1935 were. declared to be exercisable in the interim period. No one would suggest that by virtue of this provision, the "Indian Legislature" became the Federal Legislature.

As a consequence of my conclusion on this subject, it is unnecessary for me to pronounce upon the further question whether, in the absence-and seemingly studied absence-of expression in the relevant instruments, the British Sovereign, or the Governor-General must be deemed to be a part of the "Legislature of the Dominion". I consider, however, that there can be no possible doubt that neither the British Sovereign nor the Governor-General, as such, was a part of the

Constituent Assembly.

The conclusion of this discussion enables me to reach and record my final decision, which is that on the most careful consideration of the matter of which I am capable, I cannot find that there is anything in section 6 (3), Indian Independence Act, or in the status of Pakistan as a Dominion which creates the obligation that all laws made by the Constituent Assembly, Q of a constitutional nature, require the assent of the Governor- Q General, for their validity and operation. On this view; the appeal would appear not to be concluded, but as . my Lord the Chief Justice and my brothers are of the contrary opinion, and as on the basis of that opinion, the appeal is indeed entitled to succeed, the result must be that the appeal be allowed, and the writ petition of Mr. Tamiz-ud-Din Khan being dismissed, the ' writs should be recalled. On the question of costs, I agree that in the circumstances of the case, each party should bear its own costs.

MUHAMMAD SHARIF, J.-I agree with my Lord the Chief Justice.

S. A. RAHMAN, J.: The material facts of this case have been sufficiently set out in the judgment of my Lord the Chief Justice and need not be reiterated. The only question that was argued in full before us is whether it was necessary for legislation passed by the Constituent Assembly to receive the assent of the Governor-General before it could be accorded the status of law. I find myself in respectful agreement with the reasoning of my Lord and the conclusions reached by him on that point. In view of the importance of the legal issues involved in the case, however, I am tempted to make a few observations of my own:

The question turns on the construction of section 6 of the Indian Independence Act, 1947, which created the two new independent Dominions of India and Pakistan. The provisions of that section have to be read, for that purpose, with those of sections 5 and 8 of the Act. Section 5 provides for the appointment of a Governor-General by His Majesty in each Dominion and declares that he shall represent His Majesty for the purposes of the Government of the Dominion. Section 6, inter alia, confers full legislative sovereignty on the Legislature of each Dominion, inasmuch as it is authorised to pass laws repugnant to any existing or future Act of -the British Parliament (including the Indian Independence Ac itself) or any order, rule or regulation passed thereunder. The power thus conferred is expressly extended to include the power to repeal or amend any such Act, order, etc., and to the making of laws limiting for the future the powers of the Legislature of the Dominion thus .permitting the setting up of a federal type of Constitution. By subsection (3) of this section, full power to assent to any law of the Legislature of the Dominion is vested in the Governor-General and it is added that so much of any Act "as relates to the disallowance of laws by His Majesty or the reservation of laws for the signifi*cation of His

Majesty's pleasure thereon or the suspension of the operation of laws until such signification, shall not apply to laws of the Legislature of the Dominion". Legislative autonomy of the Dominion is further ensured by providing in subsections (4) and (5) of this section that no Act of the British Parliament, on order or rule; etc., promulgated under such Act and no Order-in-Council made on or after the 15th of August 1947, shall extend or be deemed to extend to either Dominion, as part of its law, unless so extended by a law of the Legislature of the Dominion itself. Section 8 of the Act makes temporary provision for the Government of each of the new Dominion. Subsection (1) of this section lays down that the powers of the Legislature of the Dominion referred to in section 6, shall be exercisable, in the first instance, by the Constituent Assembly of the Dominion, for the purpose of making provision as to the constitution of the Dominion and references in the Act to the Legislature of the Dominion are required to be construed accordingly. Subject to laws thus made by the Constituent Assembly and the provisions of the Indian Independence Act, the government of 'the Dominion is to be carried on by virtue of subsection (2), in accordance with the Government of India Act, 1935, and the Orders-in-Council, rules, etc., made thereunder, so far as applicable, with such adaptations and modifications as may be 'specified by the Governor-General under section 9 of the Act. The provisions requiring the Governor-General or any Governor ' to act in his discretion or in his individual judgment in respect of any matter, were to cease to have any effect, all control by His Majesty's Government was removed and the necessity of reserving Provincial Bills for the signifi*cation of His Majesty's pleasure was done away with. The powers of the Federal Legislature or Indian Legislature under the Government - of India Act, 1935, as in force in relation to each Dominion, were, , in the first instance, made exercise able by the Constituent Assembly, in addition to the powers referred to in subsection (1) of section 8. The limitations placed by the adapted Government of India Act, 1935, on the legislative powers of the Dominion Legislature (which must be understood to mean the Federal or Indian Legislature in this context) were to have effect as a restrictive law of the Legislature of the Dominion, within the meaning of subsection (6) of- section 6 of the Indian Independence Act.

It is suggested on behalf of the respondent that sub*section (3) of section 6 of the Indian Independence Act should be so interpreted as to equate the expression "Legislature of the Dominion" occurring therein, ,with the Federal Legis*lature functioning under the adapted- Government of India Act, 1935, and that it should be held that the subsection was merely intended to give the Governor-General plenary powers of assent within the limited legislative field of the latter Act.

The - position seems to me to be untenable on several grounds. If that had been the sole object aimed at, it could have been effectively achieved without using the general words "full power to assent to any law of the Legis*lature of that Dominion, in the first part of the sub*section and by merely enacting the subsequent part of the subsection beginning with the words "so much of an Act. The argument raised - imputes a redundancy to the British *Parliament without . any apparent necessity. The interpreta*tion ,contended for would cut down the generality of the words in the beginning of the subsection and impose a limita*tion on them, to be imported from

the latter part of the subsection, a procedure not warranted by the context! Again, it should . have been easy enough to use the words "Federal Legislature" instead of the comprehensive expression "Legis*lature of the Dominion" and thus to have ensured perfect clarity, if the intention sought to be read into this subsection was the correct one.

It is clear that at the time of the passing of the' Indian Independence Act or even on the Appointed Day, no Legislature of the Dominion, envisaged in section 6 of the Act, actually existed. Mr. Chundrigar conceded at the Bar that the relevant expression occurring in this section would cover the future Legislature of the Dominion which the framers of the Act anticipated, was likely to be set .up under .the new, constitutional provision to be made by the Constituent Assembly under subsection (1) of section 6 read with sub*section (I) of section 8 of the Act. It was further admitted as is also apparent from the plain language of section 6, that such a Legislature would be competent to pass laws including constitutional laws and that if subsection (3) was allowed to stand in its present form, the subsection would subject ail such laws to the necessity of assent by the Governor-General. For the interim period, however, while the Provisional Con*stitution embodied in, the adapted Government of India Act, 1935, and the Indian Independence Act, 1947, is in force, it was contended, the position was different qua the Constituent Assembly. The argument was raised that though subsec*tion (1) of section 8 made the constitution-making powers included in subsection (1) of section 6, exercisable in the first instance (the phrase "in the first instance" needs to be speci*fically emphasised in this connection) by the Constituent Assembly, the latter body was not identifiable with the "Legislature of the Dominion" within the meaning of sub*section (3) of section 6. A similar formula contained, in proviso (e) to subsection (2) of section 8, makes the powers of the Federal Legislature or Indian Legislature, exercisable in the first instance by the same Constituent Assembly. After, a comparison of sections 6 and 8, the inference seems to be irresistible that during the interregnum prior to the promulgation of a fresh constitution the Constituent Assembly in fact functions as the Legislature of the Dominion. It is only thus that full meaning can be given to the words of subsection (1) of section "references in this Act to the Legis*lature of the Dominion shall be construed accordingly" and to the provision contained in subsection (3) of section 8. The plenary law-making powers of Legislature of the Dominion mentioned in section 6 had to be divided into two compart*ments for the transitional period, in order to keep the legis*lative machinery of the Government of India Act, 1935, working order, with all its limitations, side by side with the enactment of a new Constitution. For the purpose of func*tioning as the Federal Legislature under the Government of India Act, 1935, the Constituent Assembly as the Legislature of the Dominion; should be deemed to have placed the incident limitations on itself, under the provisions of sub*section (6) of section 6 read with subsection (3) of section 8. I confess I am unable to follow the process of reasoning which seeks to give a different meaning to "Legislature of the Domin*ion" occurring in subsection (3) from that possessed by the ex*pression in other subsections of section 6. The attempt seems to be directed towards investing the Constituent Assembly 'with all the powers under section 6, without attracting the restric*tion (if restriction it really be) regarding assent, provided for in the same section. The two submissions made that sub*section (3) is confined to the Federal Legislature functioning under the Government of India Act, 1935, and that the sub*section would also be applicable to laws passed by the future Legislature of the Dominion, appear to me

to be mutually contradictory. The word `law' or laws' used in subsection (3) obviously includes - laws of a constitutional character as a reading, of the whole of section 6 shows and must clearly mean enactments passed by the Legislature and awaiting assent of competent authority.

The mere absence of an express provision included in the Indian Independence Act for Bills being presented to the Governor-General for assent, after being passed by the Constituent Assembly when sitting as the Legislature of the Dominion to frame the Constitution and the fact that discre*tion to withhold assent is not specifically mentioned, though provision to that effect .exists in the Government of India Act, 1935, or in the Constitutions of other Dominions, strike me as of no material significance. The words "full power" amply connote discretion to give or withhold assent, beside indicatings freedom from extraneous control, in full measure. The presumption is implicit in the subsection that all, such laws shall be submitted to the Governor-General for his assent.

It seems to me that the attitude, adopted on behalf of the respondent rests on the fallacious premise that the prescription of the formality of assent for laws passed by the Constituent Assembly, would detract from the legislative ,sovereignty of that body, undoubtedly conferred on it by the Indian Independence Act. In the background of this attitude there appears to lurk the spectre of a full sovereignty, not merely in the legislative field but in all spheres, claimed for the, Constituent Assembly, somewhat feebly, it is true, at one stage of the arguments: That the Constituent Assembly is not sovereign in the full sense of the term, it was later admitted. What was not realised was that the - provision regarding assent should not be regarded as a clog on the legislative sovereignty of that body, in the context of an "Independent Dominion" free from all control by His Majesty's Government in England. The Governor-General of such a Dominion is no doubt formally appointed by His Majesty but in effect the appointment rests with the responsible Ministry whose advice would, as a matter of settled convention, be accepted in all cases by the King or Queen. The Ministry would have the means, for the same reason, of arranging the recall of a Governor-General who intended to flout their wishes in any matter. This aspect of the case has been exhaustively dealt with in the judgment of my Lord the Chief Justice and I need not labour the point further. '

A reference to the history of prerogative of the Crown in England would also lend support to the conclusion that the above interpretation of subsection (3) of section 6 is correct. In my humble judgment, no other construction of 'that sub*section would be acceptable and I only wish to draw additional strength for this construction from a consideration of the constitutional history of England. Assent to legislation is one of the most important prerogatives of the Crown in England, There is also ample authority for the proposition that the prerogative of the Crown extends to the Colonies and Dominions of His Majesty beyond the Seas. See Halsbury's Law's of England, 2nd Edition, Volume VI, page 445, paragraph 513 ; New Brunswick case (1892 A C

437 (at page -441)), and Re Bateman's Trust (IS E C 355). Only express words or necessary intendment of a statute can take away a . prerogative and the presumption would be against such a result. Reference in this connection may be made to British Coal Corporation v. King (1935 A C 500) and Mayor of Weymouth's case (141 R R 392). I can discover nothing in the Indian Independence Act which could support the plea of express or implied abrogation of the prerogative of assent in the case of laws enacted by the Constituent Assembly sitting as the Legislature of the Dominion to frame the Constitution. On the other hand, a reading of section 5 and 6 together would lead to the inference that henceforth the prerogative, of the Crown as respects assent, would, in the case of each new Dominion, be exercised by the Governor-General as T representing His Majesty. Allegiance to the Crown, however tenuous the bond may in practice turn out to be, is an essential incident of Dominion Status. Nothing seems to turn in this connection on the form of the oath taken by the Governor*-General or by members of the Provincial Legislatures in Pakistan or on the form of the Royal Style and Titles adopted in this country. This position would continue to hold good in Pakistan as long as it is a Dominion, 'albeit an "Independent Dominion", unless of course it is altered by a proper constitu*tional provision. From the expression "Independent Domi*nion", merely constitutional autonomy and not full political' sovereignty in the legal sense, can be spelt out, though the latter status would . be potentially within the Dominion Legis*lature's grasp.

The doctrine of "Departmental Construction" applied by American Courts to the interpretation of the Statutes, was also sought to be pressed into service on . behalf of the .respon*dent, to favour a particular construction of subsection (3) of section 6 of the Indian Independence Act. Reliance was placed or rule 62 of the rules of procedure framed by the Constituent Assembly, of Pakistan and the practice that has been followed hitherto, of not submitting laws passed by the Constituent Assembly to the Governor-General for his assent. These -facts were, however, not advanced as raising the bar of estoppel against any party. Even in America the rule is not regarded as conclusive and is obviously available only to resolve doubts in cases where the language used in a statute is equivocal. The present does not appear to me to fall in that category of cases. As long ago as 1889, Lord Esher laid down the rule in Sharpe v. Wakefield (22 Q B D 239 (242)) that an Act ought to construed as it would have been the day after Act was passed, unless some subsequent statute declares that another construction was to be adopted. It must follow as a corollary that the subsequent conduct of any functionaries in purported pursuance of an Act, would not be decisive of the interpretation to be placed on the statute. A practice in contravention of a constitutional provision contained in a statute can never abrogate or repeal a rule of strict law, with which alone the Courts are concerned-See Disallowance and Reservation References (1938 S C R 71), and The Statute of Westminster and Dominion Statute ; 1949 Edition, by K. C. Wheare, pages 18 and 292. It is doubtful if the prac*tice or usage mentioned has hardened into an obligatory constitutional convention. Even if that were the position, it would require to be translated into or supplemented by a statute, if it is to be recognised by Courts (K. C. Wheare s Book, page 18 et seq). As has been pointed out by my Lord the Chief Justice, rule 62 of the Constituent Assembly rules, is not really in conflict with the provisions, of subsection (3) of section 6 of the Indian Independence Act and, in any case, it does not operate to effect the necessary constitutional amendment, eve-n under the rules of that body, which prescribe a specific procedure for constitutional legislation.

Finally I am not impressed by the argument which seems have found favour with some of the learned Judges of the Sind Chief Court that the omission to deal with the question of assent in earlier cases amounts to an indirect decision on that point. Every case is aft authority for the point or points actually decided by it ether expressly or by necessary impli*cation and no more. The point was not expressly raised or decided in those cases and I can find little in them to support the theory of an implied decision. The only precedent which deals directly with the point is Khuhro's case (P L D 1950 Sind 49) in which a learned Single Judge of the Sind Chief Court held that no assent was required under the law, for legislation passed by the Constituent Assembly. The ratio decidendi in that case was the assumption of unfettered legislative power possessed by the Constituent Assembly and the relevant provisions of the Indian Independence Act were not fully examined.

A. H. Appeal accepted.

Case 2
The Dosso case

P L D 1958 Supreme Court (Pak.) 533

Present: Muhammad Munir, C. J., M. Shahabuddin, A. R. Cornelius and Amiruddin Ahmad, JJ

Constitutional Criminal Appeal No. 1 of 1957, Criminal Appeal No. 24 of 1957 & Criminal Appeals Nos. 60 and 67 of 1958, decided on 27th October 1958.

Constitutional Criminal Appeal No. 1 of 1957

THE STATE.-Appellant

Versus

DOSSO and another-Respondents

(On appeal from the judgment and order of the High Court of West Pakistan, Lahore dated the 9th August 1957, in Writ v. Petition No. 21 of 1957).

Criminal Appeal No. 24 of 1957

SABZ ALI and another-Appellants

Versus

GOVERNMENT OF WEST PAKISTAN and others-Respondents

(On appeal from the judgment and order of the High Court of West Pakistan, Lahore, dated the 15th May 1956, in Writ

Petition No. 149 of 1956.)

Criminal Appeal No. 60 of 1957

THE DISTRICT MAGISTRATE & DEPUTY COMMISSIONER SIBI AT ZIARAT and another-Appellants

Versus

MALIK TOTI KHAN and another-Respondents

(On appeal from the judgment and order of the High Court of West Pakistan, Quetta Circuit, Quetta, dated the 5th August 1957, in Writ Petition No. 17 of 1957).

AND

Criminal Appeal No. 67 of 1958

THE STATE-Appellant

Versus

ABDUL LATIF KHAN-Respondent

(On appeal from the order of the High Court of West Pakistan, Peshawar Bench, Peshawar, dated the 11th November 1957, in Misc. Application No. 93 of 1954).

(a) Constitution--Destruction of, by successful revolutionary change in Government-Effect on prevalent law "-Validity depends upon will of new law-creating organ-Constitution of Pakistan--Abrogation of, by President-Laws Continuance in Force, Order (Post-Proclamation') (I of 1958) Art. II cls. 1, 4 & 7, Art IV cl. I-Effect-Frontier Crimes Regulation (111 of 19013, continues in force-Pending proceedings, on writ applications based on infraction of a Fundamental right granted by abrogated Constitution, abate-Constitution of Pakistan (1956), Arts. 4, 5, 170.

By the Proclamation of October 7, 1958, the President of Pakistan annulled the Constitution of 2nd March 1956, dismissed the Central Cabinet and the Provincial Cabinets and. dissolved the National Assembly and both the Provincial Assemblies. Simultaneously, Martial Law was declared throughout the country, and, Commander-in-Chief of-.the Pakistan Army, was appointed as the Chief 'Martial Law Administrator: Three days later was promulgated by' the President the Laws Continuance in Force' Order, 1958, the general effect of which was the validation of laws, other than- the late Constitution, that were in force before the Proclamation, and restoration of the jurisdiction of all Courts including the Supreme Court and the High Courts. The Order contained the further direction that the country, thereafter to be known as Pakistan and not the Islamic Republic of Pakistan, should be governed as nearly as may be in accordance with the late Constitution.

Each of the four appeals before the Supreme Court involved the question whether the writs-issued by the High Court in respect of orders of reference to a Council of Elders or convictions under S. 11 of the Frontier Crimes Regulation (111 of 1901) on the ground of the invalidity of the latter Regulation as contravening Art. 5 of the late Constitution-had abated under cl. 7 of Art. 1 of the Laws Continuance in Force Order, 1958 promulgated by the President on October 10, 1958.

Held (per Muhammad Munir, C. J.,) that since Art. 5 of the late Constitution itself had now disappeared from the new legal order the Frontier Crimes Regulation (111 of 1901) by reason of Article IV of the Laws Continuance in Force Order, 1958, was still in force and all proceedings in cases in which the validity of that Regulation had been called in question having abated, the convictions recorded and the references made to the Council of Elders were good.

A victorious revolution or a successful coup d' E' tat is an internationally recognised legal method of changing a Constitution.

After a change of that character has taken place, the national legal order, must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution.

If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus or international entity of the State and the revolutionary government and the new Constitution are, according to International Law, the legitimate government and the valid Constitution of the State.

[Hans Kelsen: "General Theory of Law & State" translated by Anders Wedberg; 20th Century Legal Philosophy Series pp. 117-118].

Where revolution, is successful it satisfies the test of efficacy and becomes a basic law-creating fact. On that assumption the Laws Continuance in Force Order, however transitory or imperfect, was a new legal order and it was in accordance with that Order that the validity of the laws and the correctness of judicial decisions had to be determined.

Jibendra Kishore Achharyya Chowdhury and 58 others v. The Province of East Pakistan & Secretary, Finance and Revenue (Revenue Department, -Government of East Pakistan P L D 1957 S C (Pak.) 9 ref.

The Order applied to the situation that came into existence under the President's Proclamation of October 7. The laws that were in force after that date were enumerated in Article IV, but- from the list of such laws the Constitution of 23rd March 1956 had been expressly excluded. This meant that when under clause (4) of Article II of the Order the Supreme Court or the High Court was moved for a writ, the ground for the writ, could only be the infraction of any of the laws mentioned in Article IV, or any right recognised by that Order and not the violation of a right created by the late Constitution. The so-called fundamental rights which were described in Part II of the late Constitution were therefore no longer a part of the national legal order and neither the Supreme Court nor the High Court had under the new Order the authority to issue any writ on the ground of the violation of any of the fundamental rights . . . . . Under the new legal Order any law could at any time be changed by the President and therefore there was no such thing as a fundamental right, there being no restriction on the President's law-making power. Under Article 4 of the late Constitution there was a restriction on the power of the legislature to make laws involving breaches of fundamental rights and invalidity attached to all existing laws, customs and usages having the force of law if they were inconsistent with any of the fundamental rights. This test to determine the validity of the laws and the fetters on the power of the legislature to make laws had both disappeared under the new Order. Unless therefore the President expressly enacted the provisions relating to fundamental rights, they were not a part of the law of the land and no writs could issue on - their basis.

It was true that Article II provided that Pakistan shall be governed as nearly as may be in accordance with the late Constitution but this provision did not have the effect of restoring fundamental, rights because the reference to Government- in this Article was to the structure and outline of Government and not to the laws of the late Constitution which had been expressly abrogated by Article IV. Article II and Article IV could therefore stand together and there was no conflict between them. But even if some inconsistency be supposed to exist between the two, the provisions of Article IV which were more specific and later must override those of Article II.

Position in regard to future applications for writs, therefore is that they lie only on the ground that any one or more of the laws mentioned in Article IV or any other right preserved by the Laws Continuance in Force Order has been contravened.

As regards pending applications for writs or writs already issued but which are either sub judice before the Supreme Court or require enforcement, the relevant provision is clause (7) of Article II. This provision means that, excepting the writs issued by the Supreme Court after the Proclamation and before the promulgation of the Order, no writ or order for a writ issued or made after the Proclamation shall have any legal effect unless the writ was issued on the ground that any one or more of the laws mentioned in Article IV or any other right kept alive by the new Order had been contravened. And if there be a pending application or proceeding in respect of a writ which is not covered by clause (4) of Article II, or any other provision of the new Order, that is to say, the application or proceeding relates to a writ sought on the ground that a fundamental right has been contravened, then the application or the proceeding shall abate forthwith. This means that not only the application for the writ would abate but also the proceedings, which require the enforcement of that writ. The abatement must therefore be held to govern all those writs, which were the subject-matter of appeal before the Supreme Court either on certificate or by special leave.

No judgment, order, or writ of a High Court can considered to be final when either that Court has certified the case to be a fit one for appeal and proceedings for appeal have been taken or when the Supreme Court itself has granted special leave to appeal from that judgment, order or writ.

Cornelius, J., was unable to hold beyond doubt that the concluding words of subsection (7) of S. 2 of the Laws (Continuance in Force) Order, 1958 had the effect of bringing to an abrupt end in the circumstances of the two cases, the proceedings in the High Court which were under-examination before the Supreme Court in Appeals No. 1 of 1957 and 60 of 1958.

Per Cornelius, J.-"I am unable to hold beyond doubt that the concluding words of subsection (7) of section 2 of the Order of the 10th October 1958, have the effect of bringing to an abrupt end the proceedings in the petitions before the High Courts commenced by the convicted persons in the two cases here under consideration. I do not therefore consider that it is open to me to reverse the judgment of the High Court in these two cases and to re-call the writs issued by them unless I am satisfied that the view of the High Court on the point of repugnancy to Article 5 of the Constitution of 1956 is not tenable."

His Lordship held that that view was not tenable.

(b) Frontier Crimes Regulation (III of 1901), S. 11-Council of Elders ceasing to function-Case on remand may be referred to another Council.

(c) Frontier Crimes Regulation (III of 1901), S. II-Deputy Commissioner after referring case to Council of Elders is empowered to issue directions in regard to custody of accused.

(d) "Abatement"-Concept examined.

(e) Frontier Crimes Regulation (III of 1901)–Whether necessarily an illiberal instrument.

(f) Frontier Crimes Regulation (III of 1901), S. 11-Not a discriminatory provision-Constitution of Pakistan (1956), Art. 5.

(g) Frontier Crimes Regulation (North-West Frontier Province Amendment) Act (X111 of 1954)-Validity.

(h) Constitution of Pakistan (1956), Art. 178-High Court not competent to declare invalid a conviction had in a "special area" though the convicted person was later confined in a place within jurisdiction of the High Court-Prisoners Act (Ill of 1900), Ss. 15 & 16.

Constitutional Criminal Appeal No. 1 of 1957.

Mushtaq Ahmad, Advocate-General, West Pakistan (Iftikhar-ul-Haq Khan, Advocate, Supreme Court, with him), instructed by Ijaz Ali, Attorney for Appellant.

Respondents: not represented.

Criminal Appeal No. 24 of 1957.

Muhammad Shafi, Advocate, Supreme Court, instructed by Mushtaq Ahmad, Attorney for Appellants.

Mushtaq Ahmad, Advocate-General, West Pakistan (Iftikhar-ul-Haq Khan, Advocate Supreme Court, with him), instructed by

Ijaz Ali, Attorney for Respondents.

Faiyaz Ali, Attorney-General for Pakistan, instructed by Iftikhar-ud-Din Ahmad, Attorney, under O. XIV, r. 1, S. C. R. 1956.

Criminal Appeal No. 60 of 1958.

Mushtaq Ahmad, Advocate-General, West Pakistan (Iftikhar-ul-Haq Khan, Advocate, Supreme Court, with him), instructed by Ijaz Ali, Attorney for Appellants.

Yahya Bakhtiar, Advocate, Supreme Court, instructed by Siddique & Co., Attorneys for Respondents.

Criminal Appeal No. 67 of 1958.

Mushtaq Ahmad, Advocate-General, of West Pakistan, (Iftikhar-ul-Haq Khan, Advocate, Supreme Court, with him), instructed by Ijaz All, Attorney for Appellant.

Abdul Latif in person.

Dates of hearing : October 13 and 14, 1958.

JUDGMENT

MUHAMMAD MUNIR, C. J.-This order will determine Constitutional Criminal Appeal No. I of 1957, Criminal Appeal No. 24 of 1957 and Criminal Appeals Nos. 60 and 67 of 1958, which arise out of orders made either by the Lahore or by the Peshawar Bench of the High Court of West Pakistan on certain petitions for writs under Article 170 of the late Constitution successfully calling in question either an order referring the case to a Council of Elders or a conviction recorded under S. 11 of the Frontier Crimes Regulation, Act III of 1901. Constitutional Criminal Appeal No. 1 of 1957 is a certified appeal, while the others are by special leave of this Court. The question involved. in each one of them is whether the writ issued by the High Court abates under clause (7) of Article 1 of the Laws Continuance in Force Order, promulgated by the President on October 10, 1958.

By the Proclamation of October 7, the President annulled the Constitution of 2nd March 1956, dismissed the Central Cabinet and the Provincial Cabinets and dissolved the National Assembly and both the Provincial Assemblies. Simultaneously, Martial Law was declared throughout the country and General Muhammad Ayub Khan, Commander-in-Chief of the Pakistan Army, was appointed as the Chief Martial Law Administrator. Three days later was promulgated by the President, the Laws Continuance in Force Order, the general effect of which is the validation of laws, other than the late Constitution, that were in force before the Proclamation, and restoration of the jurisdiction of all Courts including the Supreme Court and the High Courts. The Order contained the further direction that the Government of the country, thereafter. to be known as Pakistan and not the Islamic Republic of Pakistan, shall be governed as nearly as may be in accordance with the late Constitution.

As we will have to interpret some of the provisions of this Order, it is necessary to appraise the existing constitutional position in the light of the juristic principles, which determine the validity or otherwise of law-creating organs in modern States which being members of the comity of nations are governed by International Law. In judging the validity of laws at a given time, one of the basic doctrines of legal positivism, on which the whole science of modern jurisprudence rests, requires a jurist to presuppose the validity of historically the first Constitution whether it was given by an internal usurper, an external invader or a national hero or by a popular or other assembly of persons. Subsequent alterations in the Constitution and the validity of all laws made thereunder is determined by the first Constitution. Where a Constitution presents such continuity, a law once made continues in force until it is repealed, altered or amended in accordance with the Constitution. It sometimes happens, however, that a. Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order. A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change maybe attended by violence or it may be perfectly peaceful. It may take the form of a coup d' E' tat by a political adventurer or it may be effected by persons already in public positions. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends. For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and .the annulment is effective. If .the attempt to break, the Constitution fails those who sponsor or organise it are judged by the existing Constitution as guilty of the crime of treason. But if the revolution is victorious in the success that the persons assuming power under the change can successfully require the inhabitants of the country to conform to' the new regime, then the

revolution itself becomes a law-creating -fact because thereafter its own legality is judged note by reference to the annulled Constitution but by' reference to its own success: On the same principle the validity of the -laws to-be made thereafter is judged by reference to the new and not the annulled Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change. In the circumstances supposed no new State is brought into existence though Aristotle thought otherwise. If the territory and the people remain substantially the same, there is, under the modern juristic doctrine., no change in the corpus or international entity of the State' and. the revolutionary government and the new constitution ace, according to International Law, the' legitimate government and the valid Constitution of the State. Thus a victorious revolution or a successful coup d E'tat is an internationally recognised legal method of changing a Constitution.

After a change of the character I have mentioned has taken place, the national legal order must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdictions; and can function only to the extent and in the manner determined by the new constitution. While on this subject Hans Kelsen, a renowned modern jurist, says-:

"From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order remains valid also within the frame of the new order. But the phrase `remains valid', does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution, which is not the result of a constitutional alteration of the former. If laws, which, are introduced under the old constitution continue to be valid under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution. * * * * * * * *

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The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus it is never the constitution merely but always the entire legal order that is changed by a revolution.

> "This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only de facto but also de jure. No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in -force, on the ground that they have not been nullified in a manner anticipated by the old order itself. Every jurist will presume that the old order-to which no political reality any longer corresponds-has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution, It follows that, from this juristic point- of

view, the norms of the old order can no longer be recognised as valid norms. [General Theory of Law & State translated by Anders Wedberg, 20th Century Legal Philosophy Series,

Bearing in mind the principle just stated let us now approach the question involved in these cases. If what I have already stated is correct, then the revolution having been successful it satisfies the test of efficacy and becomes a basic law-creating fact. On that assumption the Laws Continuance in Force Order, however transitory or imperfect it may be, is a new legal order and it is in accordance with that Order that the validity of the laws and the correctness of judicial decisions has to be determined. The relevant provisions of this Order are:

Article II-1. Notwithstanding the abrogation of the Constitution of the 23rd March 56, hereinafter referred to as the late Constitution by the Proclamation and subject to any order of the President or Regulation made by the Chief Administrator of Martial Law the Republic to be known henceforward as Pakistan, shall be governed as nearly as may be in accordance with the late Constitution . . . . . .

4. The Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari . . . . .

Article IV-Notwithstanding the abrogation] of the late Constitution, and subject to any order of the President or regulation, made by the Chief Administrator of Martial Law, all laws, other than the late Constitution, and all Ordinances, Orders-in-Council, orders other than orders made by the President under the late Constitution, as are set out in the schedules to this order, rules, by-laws, regulations, notifications, and other legal instruments in force in Pakistan or in any part thereof, or having extra-territorial validity, immediately before the Proclamation, shall, so far as applicable and with such necessary adaptations as the President- may see fit to make, continue in force until altered, repealed or amended by competent authority.

(2) In this article a law is said to be in force if it has effect as law whether or not the law has been brought into operation.

(3) No Court shall call into question any adaptation made by the President under clause "1"

The Order applies to the situation that came into existence under the President's Proclamation of October 7. The laws that are in force after that date are enumerated in Article IV, but from the list of such laws the Constitution of 23rd March 1956, has been expressly excluded. This means that when under clause (4) of Article II of the Order the Supreme Court or the High Court is moved for a writ; the ground for the writ can only be the infraction of any of the laws mentioned in Article IV, or any right recognised by that Order and not the violation of a right created by the late Constitution. The so-called fundamental rights which were described in Part II of the late Constitution are therefore no longer a part of the national legal order and neither the Supreme Court nor the High Court has under the new Order the authority-to issue any writ on the ground of the violation of any of the fundamental rights. The very essence of a fundamental right is that it is more or less permanent and cannot be changed like the ordinary law. In Jibendra Kishore Achharyya Chowdhury and- 58 others v. The Province of East Pakistan & Secretary, Finance and Revenue (Revenue) Department, Government of East _Pakistan (P L R 1957 W P 684 (Vol. II): P

L D 1957 S C (Pak.) 9), I had the occasion to point out that the very conception of a fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law and that it is .not only technically inartistic but a fraud on the citizens for the makers of a Constitution to say that a right is fundamental but that it may be taken away by the law. Under the new legal Order any law may at any time be changed by the President and therefore there is no such thing as a fundamental right there being no restriction on the President's law-making power. Under Article 4 of the late Constitution there was a restriction on the power of the legislature to make laws involving breaches of fundamental rights and invalidity attached to all existing laws, customs and usages having the force of law if they were inconsistent with any of the fundamental rights. This test to determine the validity of the laws and the fetters on the power of the legislature to make laws have both disappeared under the new Order. Unless therefore the President expressly enacts the provisions relating to fundamental rights, they are not a part of the law of the land and no writs can issue on their basis. It is true that Article II provides that Pakistan shall be governed as nearly as may be in accordance with the late Constitution but this provision does not have the effect of restoring fundamental rights because the reference to Government in this Article is to the structure and outline of Government and not to the laws of the late Constitution which have been expressly abrogated by Article IV. Article II and Article IV can therefore stand together and there is no conflict between them. But even if some inconsistency be supposed to exist between the two, the provisions of Article IV which are more specific and later must override those of Article II:

The position in regard to future applications for writs therefore is that they lie only on the ground that any one or more of the laws mentioned in Article IV or any other right reserved by the Laws Continuance in Force Order has been contravened.

As regards pending applications for writs or writs already issued but which are either sub judice before the Supreme Court or require enforcement, the relevant provision is clause (7) of Article II which provides

> "All orders and judgments made and given by the Supreme Court between the Proclamation and the promulgation of this order are hereby declared valid and binding on all Courts and authorities in Pakistan, but saving these orders and judgments no writ or order for a writ issued or made after the Proclamation shall hate effect unless it is provided for by this order, and all applications and proceedings in respect of any writ which is not so provided for sate forthwith".

Analyzed, this provision means that excepting the writs issued by the Supreme Court after the Proclamation and before the1 promulgation of the Order, no writ or order for a writ issued or made after the Proclamation shall have any legal effect unless the writ was issued on the ground that any one or more of the laws mentioned in Article IV or any other right kept alive by the new order had been contravened, And if there be a pending application or proceeding in respect of a writ which is not covered by clause (4) of Article II, or any other provision of the new Order that is to say, the application or proceeding relates to a writ sought on the ground that a fundamental right has been contravened, then the application or the proceeding shall abate forthwith. This means that not only the application for the writ would abate but also the proceedings which require the enforcement of that writ, The abatement must therefore be held to govern all those writs which were the subject-matte of appeal before the Supreme Court either on certificate or by special leave. No judgment, order or writ of a High Court can be considered to be final when either that Court has

certified the case to be a fit one for appeal and proceedings for appeal, have been taken or when the Supreme Court itself has granted special leave to appeal from that judgment, order or writ. I am therefore of the view that the writs issued by the High Court in these cases are not final writs, and that all proceedings in connection with such writs, including the original applications in the High Court, have abated.

The Frontier Crimes Regulation had been held by the High Court to be invalid on the ground that it contravened Article 5 of the Constitution and since that Article itself has now disappeared from the new legal order that Regulation by reason of Article IV is still in force and all proceedings in these cases in which the validity of that Regulation had been called in question having abated, the convictions recorded and the references made to the Council of Elders are good.

In making this order I have not given effect to the contention raised in Criminal Appeal No. 24 of 1957 that the reference to the Council of Elders was bad because the Deputy Commissioner had not stated in his order that it was inexpedient that the question of guilt or innocence of the accused should be determined by an ordinary Court or the contention in Criminal Appeal No. 60 of 1958 that the reference to the second Council after remand to the original Council was illegal. In the former the reference was not under S. 11 but under S. 15 which does not require any such expediency or inexpediency as is mentioned in S. 11 and in the latter the remand to the original Council j proved infructuous as the Council declined to function after the remand. I have also rejected the argument in the first of these appeals that after a case is referred to a Council, the Deputy Commissioner ceases to have the jurisdiction to detain an accused person in custody. Every Deputy Commissioner acting in criminal proceedings under the Regulation is necessarily ' a Magistrate and as such is competent to issue directions as to the custody of the accused.

Parties will bear their own costs throughout.

SHAHABUDDIN, J.-These I are appeals against the decisions of the High Court of West Pakistan, Constitutional Criminal No. 1 of 1957 on a certificate granted by the High Court and the other three by special leave. In stating the facts giving rise to these appeals it is convenient to take up Criminal Appeals Nos. 60 & 67 of 1958 first.

A case of murder against Malik Toti Khan and Mehraban Khan, respondents in Criminal Appeal No. 60 of 1958, and several others was referred by the District Magistrate and the Deputy Commissioner, Sibbi, under S. 11 of the Frontier Crimes Regulation to a Council of Elders, who while finding the others guilty held that these respondents were not guilty. Under S. 11 (3) the Deputy Commissioner could accept the finding or remand the case to the same Council of Elders for a further finding or refer it to another Council of Elders. He adopted the second of the above courses but the Council of Elders after keeping the case pending for sometime expressed their inability to give an opinion on the ground that the parties had approached them and they did not have an open mind on the question. The case was then referred to another Council of Elders (Special Jirga) who found the respondents guilty, whereupon the Deputy Commissioner convicted them under S. 302/149, P. P. C. and sentenced them to rigorous imprisonment for five years and a fine of Rs. 500 each. The respondents then applied to the High Court for a writ. ,or habeas corpus and certiorari on the ground that the provisions of the Frontier Crimes Regulation enabling the executive authorities to refer criminal cases to a Council of Elders were void under Art. 4 of the Constitution of the Republic of Pakistan, being repugnant to Art. 5 of that Constitution. This

contention was accepted by the High Court. The learned Judges held that as the provisions referred to above could be enforced under subsection (4) of S. 1 of the Regulation only against Pathans and Baluchis and against such other class of persons the local Government may notify and as this was not a reasonable classification those provisions were ultra vires of Art. 5 of the Constitution. The convictions and sentences were set aside, and the respondents were ordered to be treated as undertrial prisoners, it being left to Government to refer their cases to a Court of law. The State has preferred this appeal by special leave, which was granted for considering whether the above said provisions of the Frontier Crime Regulation were unconstitutional by reason of Art. 5 of the Constitution.

A case of criminal breach of trust against the respondent in Criminal Appeal No. 67 of 1958 Abdul Latif Khan said to have been committed in Peshawar was referred by the Deputy Commissioner of Peshawar under the Frontier Crimes Regulation to a Council of Elders. An application was made by him to the High Court for a writ of certiorari on the same ground as in the first mentioned case and the High Court accepted that application had issued the writ prayed for. This appeal (Cr. A. No. 67/58) was preferred by the State with the special leave granted by this Court for considering whether Ss, 11 to 20 of the Frontier Crimes Regulation were repugnant to Art. 5 of the Constitution.

The respondents in Cr. A. No. 1 of 1957 Dosso and Muhammad Khan who were convicted by the District Magistrate Loralai in the special areas under. S. 376 read with S. 12 (2) of the Frontier Crimes Regulation and sentenced to five years' rigorous imprisonment each on the basis of an award by a Jirga (Council of Elders) and were detained in jail at Machh which is outside the special area and within the jurisdiction of the High Court, applied to that Court for an 'appropriate writ for their being set at liberty on the ground that they were being illegally detained. The learned Judges for the reason given in the case mentioned above of Malik Toti Khan and Mehraban Khan via. that the relevant provisions of the Frontier Crimes Regulation were void being repugnant to Art. 5 of the Constitution, held that the convictions of Dosso and Muhammad Khan were without jurisdiction; but they found themselves unable to set them aside as the trial had taken place, in special areas which under Art. 178 of the Constitution was not within their jurisdiction. They however ordered their release on the ground that they were illegally detained. A certificate was granted to the State to enable it to appeal to this Court.

The appellants Sabz Ali and Muhammad Akbar in appeal No. 24 of 1957 were committed to the Court of Session under Ss. 302 & 307, P. P. C. but the Public Prosecutor withdrew from the prosecution under S. 15, Frontier Crimes Regulation, whereupon as required under that provision the Sessions Judge stayed the proceedings and the Deputy Commissioner referred the case to a Council of Elders consisting of three Magistrates and a non-official. The appellants applied for a writ directing that the trial be not proceeded with under the Frontier Crimes Regulation, that the reference to the Council of Elders be quashed and that the respondents should be tried in a Court of law. The contentions were (1) that a- trial before the Council of Elders deprived them of their fundamental right of consulting a counsel given under Art. 7 of the Constitution; (2) that their detention being by a Deputy Commissioner was illegal as under the said Article detention could be only with the authority of a Magistrate; (3) that the reference was invalid as it did not expressly say that the Deputy Commissioner considered it expedient to have petitioners tried in a Court of law and that (4) the Council of Elders was illegally constituted as three of the four members were Magistrates. The learned Judges held that the Frontier Crimes Regulation did not become unlawful

because it did not allow the appearance of counsel and that Art. 7 of the Constitution could be treated as part of every law relating to the trial. of an offence. They, therefore, gave a direction that no evidence should be heard or recorded before the accused were given an opportunity of defending themselves by a pleader. As for the second-contention their view was that the Deputy Commissioner was acting as a Magistrate. The other two contentions also were not accepted. Absence of the word 'inexpedient' in the reference did not, they held, make it invalid and as far as the composition of the Council of Elders was concerned they found that as long as the members were Pathans or Baluchis their being Magistrates did not matter. Special leave was granted to consider the last three questions i.e., contentions 2 to 4 mentioned above. Though in' this case the question that the Frontier Crimes Regulation was in conflict with Art. 5 of the Constitution was not raised yet there was a reference to the fundamental right under Art. 7. In the other three cases the main question was whether the Frontier Crimes Regulation was in conflict with Article 5 of the Constitution.

While these appeals stood posted to the 13th October for hearing the President abrogated the Constitution by a Proclamation issued on the 7th; and then on the 10th he promulgated "the Laws (Continuance in Force) Order, 1958 which for the sake of convenience will be referred to hereafter as `the nevi order' empowering all the Courts in existence immediately before the Proclamation toJ1 continue in being and exercise their powers and jurisdiction subject to the provisions of the said Order.

Its relevant provisions with reference to which the points raised before us have to be considered are these.

> "2(1) Notwithstanding the abrogation' of the Constitution of the 23rd March 1956, hereinafter referred to as the late Constitution, by the Proclamation and subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law the Republic to be known henceforward as Pakistan, shall be 'governed as nearly as may be in accordance with the late Constitution.
>
> (2) Subject as aforesaid all Courts in existence immediately before the Constitution shall continue in being and, subject further to the provisions of this Order, in their .powers and jurisdictions.

(4) The Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus prohibition quo warranto and certiorari.

(7) All orders and judgments made or given by the Supreme Court between the Proclamation and Promulgation of this Order are hereby declared valid and binding on all Courts and authorities in Pakistan, but saving those orders and judgments no writ or order for a writ issued or made after the Proclamation shall have effect unless it is provided for by this Order, and all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith.

3 (1) No Court or person shall call or permit to be called in question-

(i) the Proclamation;

4 (1) Notwithstanding the abrogation of the late Constitution and subject to any Order of .the President or Regulation made by the Chief Administrator of Martial Law, all laws, other than the late Constitution, and all Ordinances, Orders in Council, Orders other than Orders made by the President under the late Constitution, (such orders made by the President under the late Constitution as are set out in the Schedule to this Order, Rules, bye-laws, Regulations, Notifications, and other legal instruments in force in Pakistan or in any part thereof, or having extra-territorial validity, immediately before proclamation, shall, so far as applicable and with such necessary adaptations as the President may see fit to make, continue in force until altered, replaced or amended by competent authority".

It was contended for the State by the learned Attorney-General and. the learned Advocate-General that as the late Constitution was no longer in force, Art. 5 of that Constitution did not apply and the Frontier Crimes Regulation, which comes within the expression `all laws' in paragraph 4 (1) of the new order having been validated thereunder was applicable, subject only to the limitation indicated therein and not to the provisions of the late Constitution, which is specifically excluded in the said clause. Mr. Bakhtayar for the respondents in Criminal Appeal No. 60 of 1958, on the other hand, argued that the fundamental rights are preserved by `the new order' as according to its Art. 2 (1) Pakistan `shall be governed as nearly as may, be in accordance with the late Constitution'. According to hire the expression `govern' includes governance by laws also. The respondent in Cr. A. No. 67 of 1958 who appeared in person had nothing to say on the question while the respondents in Cr. A. No. 1 of 1957 did not appear. The learned advocate for the appellants in Cr. A. No. 24 of 1957 did not address us on the question of fundamental rights, but confined his arguments only to the contention that the order of reference was invalid as the Deputy Commissioner did not expressly say that he considered it inexpedient to allow the case to be tried in a Court of law. This point, which is raised on the provisions of the Frontier Crimes Regulation will be considered after the main point stated above is dealt with.

According to the Proclamation which is not and cannot be called or permitted to be called in question as well as in actual effect the late Constitution stands abrogated, and the new order under which the Courts are exercising their respective jurisdictions at present takes its place with regard to the matters to which it relates. The adoption in the new order of any of the provisions of the late Constitution does not affect the abrogation, as those provisions, as pointed out by Hans Kelsen in his book General Theory of Law and State (translated by Anders Wedberg, 20th Century Legal Philosophy Series)- relied on by the learned Attorney-General, receive validity only from the new Order. In the words of the learned author "the laws, which in the ordinary inaccurate parlance, continue to be valid are, from a juristic view point, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity 4s the new, not the old constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other". Therefore, for such provisions to have. in the new Order the same effect as in the old, there must be a clear indication in the new order that they were adopted with that intention. Viewing the provisions oh the new order from this standpoint I am unable to agree with Mr. Bakhtayar that fundamental rights are preserved by it. It is true that under Art. 2 (1) "Pakistan shall be governed as nearly -as may be in accordance with the late Constitution", but there is also a specific provision in the same Order, Art. 4 (1) which validates all laws in force immediately before the Proclamation other than the late Constitution. This specific exclusion of the late Constitution means that it is not amongst the laws, which have received validity from the new Order and therefore none of its

provisions can affect the laws validated in Art. 4 (1) which includes the Frontier Crimes Regulation. The words in Art. 2 (1)1 relied on by Mr. Bakhtayar have to be taken to refer rather toy the machinery of Government than to legislation and matters, affecting the validity of laws. Art. 2 (1) and Art. 4 (4) should be' read together and so read they do not conflict with each other. '

It was then contended by Nor. Bakhtayar that this might be so with regard to a future applications for writs, but as in these cases the High Court had issued the writ when the late Constitution was in force, we should not interfere at this stage. This argument overlooks clause (7) of Art. 2 of the new Order where under pending applications and proceedings in respect of any of the writs not provided for by the new order, shall abate forthwith. The writs provided for by the new order i.e., those mentioned in clause (4) of Article 2 cannot be utilised to enforce the fundamental rights conferred by the late Constitution, as, for reasons already stated, those rights no longer exist as such. The, fact that the High Court has issued the writs and only appeals are pending in this Court does not save the orders of the High Court as in the above-mentioned clause "all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith". In the present cases, the entire proceedings are before this Court in virtue of the special leave granted in three of them and the certificate of the High Court in the fourth.

In Appeals Nos. 1 of 1957 and 60 and 67 o€ '1958, therefore, the applications and proceedings in respect of the writs which were based on Art. 5 of the late Constitution have to be regarded as having abated. It was however contended in Appeal No. 60 of 19.58 that the Deputy Commissioner Sibi having once remanded the case to the Jirga, which had given its award had no jurisdiction to send it again to a second Jirga. This point was not raised specifically in the application, nor does it appear to have been raised before the High Court. However, there is no force in it. Section 11 (3) no doubt empowers the Deputy Commissioner to adopt only one of the courses indicated in it, but the order of remand. in this case proved infructuous as the Jirga concerned was unable to reconsider the matter. Had it given an award on a reconsideration of the case the Deputy Commissioner would not have had jurisdiction to refer the case to a second Jigra. The result, therefore, is that tht convictions and sentences imposed on the respondents in Appeals Nos. 1 of 1957 and 60 of 1958 and the order of the Deputy Commissioner, Peshawar, referring the case of the respondent in Appeal No. 67 of 1958 to a Jirga get restored in consequence of the abatement.

In Cr. A. No. 24 of 1957 the proceedings in respect of the writ have to be taken as having abated only as far as' the direction given- by the High Court that no evidence shall be heard and recorded before the appellants have been given an opportunity of defending themselves by a pleader is concerned, because that direction was based on Art. 7 of the late Constitution. But the other questions to consider which special leave was granted arise on the provisions of the Frontier Crimes Regulation independent of the late Constitution. , The learned advocate' for the appellants however pressed only one of those three points, viz., that in the absence of a finding of the Deputy Commissioner that it was inexpedient that they should be tried by a Court of law, the order of reference to a Jirga was not valid. I see no force in this argument. As already stated, the reference in this case, was made under S. 15 of the Frontier 'Crimes Regulation which is to the effect that when a trial before a Court of Session the Public Prosecutor at any time before an order of conviction or acquittal withdraws from the prosecution the, Sessions Judge shall stay proceedings and the Deputy Commissioner shall refer' the case to a Council of Elders. There is nothing in this section requiring the Deputy Commissioner to determine the question of expediency. He has no

choice as he is bound to make a reference. This appeal has to be dismissed in respect of this contention. The result will be that the trial of the appellants before the Jirga will proceed according to the Frontier Crimes Regulation and the direction of the High Court referred to above will have no effect.

I would determine these appeals in the manner indicated above _ and pass no order, as to costs.

CORNELIUS, J.-I agree with the resulting order proposed in these cases by my Lord the Chief Justice, with whom my learned brothers have concurred, but as on certain points I find myself, with great regret, unable to accede to the reasoning which has prevailed with my Lord and my learned brothers, it is necessary that I should give my own reasons for varying the orders made in these four cases by the learned Judges of the High Court of West Pakistan, in my own words.

It will be convenient to state, at the outset, the nature of the orders, which came under consideration in each of these cases in the High Court. In Constitutional Criminal Appeal No. 1 of 1957, which has been preferred by the State against Dosso and Muhammad Khan, the position was that Dosso and Muhammad Khan had been convicted under the Frontier Crimes Regulation, 1901 by the Deputy Commissioner of Loralai, a "special area" excluded from the jurisdiction of the High Court (as well as of this Court) by Article 178 of the late Constitution (to which I shall refer hereafter as the Constitution of 1956), and had been sentenced to imprisonment of certain terms. They were undergoing imprisonment in a jail at Machh in Baluchistan, which is within the jurisdiction of the High Court as well as of this Court. It was represented before the High Court by Dosso and Muhammad Khan that their detention at Machh was illegal, on the major ground that the provisions of the Regulation relating to criminal references were void by operation of Article 4 of the Constitution of 1956, as these provisions involved discrimination on grounds of race. Article 5 of the Constitution of 1956, which declared that all citizens were equal before the law and were entitled to equal protection of law, was cited in this behalf. A Division Bench of the High Court allowed the petition which was for a writ of habeas corpus on the ground that the High Court had jurisdiction in respect of persons detained within their territorial jurisdiction, and as for the conviction, it was held to be without valid legal sanction having been obtained by a proceeding under section 11 and other relevant provisions of the Regulation, which were repugnant to Article 5 and consequently were void under Article 4 of the Constitution of 1956. A number of questions arose out of the case. The first was whether the Jailer of the Machh jail was acting in compliance with a valid warrant in detaining the two petitioners. This question does not appear to have received any consideration at the hands of the learned Judges. The second question is whether in the absence of jurisdiction in respect of things done within the "special areas" in which Loralai is included, the High Court acted properly in declaring that the conviction by the Deputy Commissioner of Loralai was "an illegal order". .

Criminal Appeal No. 24 of 1957 has been brought by Sabz Ali and Muhammad Akbar, by special leave granted to them to consider the following questions, namely, (i) whether Sabz Ali's detention by order of the Deputy Commissioner was legal; in view of the fact that he was being tried by a jirga, (if) whether the Deputy Commissioner's order referring the case to jirga was legal, in the absence of' an expression of an opinion that trial in the ordinary Courts was "inexpedient", and (iii) whether the constitution of the jirga was proper in view of a certain decision by the Supreme Court, notwithstanding that it was in compliance with an Act of the North-West Frontier Province passed

in 1954. The first question had been agitated before the High Court, which had held that the detention of Sabz Ali was under the orders of a Magistrate and that those orders were not rendered unlawful by the fact that the case had been preferred to a jirga for enquiry and report. As regards the second question of fact the reply of the High Court was that the reference to jirga had been made under section 15 of the Regulation and necessarily implied that the Deputy Commissioner had decided that it was inconvenient to have the question of the guilt or innocence of the accused persons tried by the ordinary Courts. On the third question, the learned Judges were of the view that the constitution of the jirga, which consisted of three Magistrates and one non-official was not illegal. The High Court decided one further matter, namely, that the petitioners were entitled to be defended by a lawyer at the trial, and made a direction accordingly acting under Article 7 of the Constitution of 1956. This question will also require to be considered in this judgment.

Criminal Appeal No. 60 of 1958 has been brought by the Deputy Commissioner of Sibi and the Superintendent of the Central Jail at Machh to call in question the writ granted by the High Court of West Pakistan, in favour of two convicted persons Malik Toti Khan and Mehrban Khan, setting aside the convictions and sentences awarded by the Deputy Commissioner under the Regulation and directing him not to refer the case against these two persons to a jirga, while leaving it open to the authorities to proceed against them in the ordinary Courts. This case related to a settled area in Baluchistan, i.e., not a "special area", and the facts were as follows. A case instituted against Malik Toti Khan, Mehrban Khan and I1 other persons for the murder of one Zarif, had been referred to the district jirga, which found certain persons to be guilty, but recommended the acquittal of the two appellants. The Deputy Commissioner "did not feel satisfied" in regard to the jirga's proceedings, upon which the recommendation in favour of Malik Toti Khan and Mehrban Khan were based. He accordingly remanded the case to the same jirga, which at first asked for time, but after some five months, when the case again came before the same jirga, the members returned it to the Deputy Commissioner expressing "inability to submit a final award as they thought that their minds had been greatly prejudiced by the approach of different persons on behalf of the parties". Thereupon, the Deputy Commissioner constituted a special jirga of four persons from other areas, which made different recommendations, and in particular reported that Malik Toti Khan and Mehrban Khan were accomplices and abettors in the murder of Zarif. The Deputy Commissioner accepted this recommendation after having obtained from the special jirga replies to various objections raised to their report by the different accused persons and other parties to the case. He convicted Malik Toti Khan and Mehrban Khan along with other persons and sentenced them to undergo terms of imprisonment. This was on the 22nd April 1957, and on the 5th of August 1957, the High Court of West Pakistan issued the writ of certiorari mentioned above. They held that the provisions of the Frontier Crimes Regulation under which the enquiry had been made into the question of the guilt or innocence of Malik Toti Khan and Mehrban Khan were void, as offending against the provision of Article 5 of the Constitution of 1956, on two grounds. The first ground accepted by the learned Judges was that the Regulation was intended to apply in the first instance to Pathans and Baluchis, and being based principally on recial or tribal considerations, could not be regarded as falling within the rule of reasonable classification. The learned Judges also referred to the power given by the Regulation to extend its provisions, and inferred therefrom with respect to the discrimination effected by the Regulation that "classification may be wholly arbitrary and capricious at the sweet will of the executive". The second ground on which these provisions were held to be discriminatory was that the executive authority viz., the Deputy

Commissioner had an unfettered discretion as to the choice of persons "belonging even to Baluch or Pathan tribes as to whether their cases should go to a regular Court of law or to a jirga". It was held that the choice was arbitrary and was not governed by any guiding principle applicable to its exercise by the executive authorities. Special Leave to Appeal was granted to consider whether the provisions in question did indeed contravene the provisions of Article 5 of the Constitution of 1956. It may conveniently be mentioned here that it was stated at the Bar by Mr. Yahya Bakhtiar for the respondents that by a notification issued many years ago, the application of the Regulation to f` British Baluchistan" was put on a territorial basis, thus excluding discrimination 'on the ground of race.

Criminal Appeal No. 67 of 1958, relates to the North-West Frontier Province, like the appeal of Sabz Ali and Muhammad Akbar. It is brought by the State against one Abdul Latif Khan who is an accused person in a case of embezzlement in the capacity of treasurer to the Government treasuries at Peshawar, Charsadda, and Naushera. The case against him was referred by the Deputy Commissioner, Peshawar to a jirga consisting of the City Magistrate, Peshawar, the Assistant Commissioner, Peshawar, the Assistant Secretary, Public Works Department, Peshawar and an Assistant Secretary in the Finance Department of the North West Frontier Province Government. The High Court of West Pakistan upon motion by Abdul Latif Khan held that the relevant provisions of the Regulation offended against Article 5 of the Constitution of 1956, and granted a writ as prayed. All the three learned Judges who heard the case were of the opinion that section 11 of the Regulation offended against the equality clause, because there were no well-defined rules to guide and control the discretion vested in the executive authorities to withdraw a case from the ordinary Courts and refer it to a jirga for trial. Two of them held that there was no discrimination such as to offend against Article 5 by reason of subsection (4) of section 1 of the Regulation providing for application in the first instance to Pathans and Baluchis, and such other clauses as the Provincial Government with the previous sanction of the Governor-General in Council, might declare to be subject thereto. It may be noted here that all the three learned Judges who heard the case have mentioned that by a notification published many years ago, the provisions in question were extended to all persons residing in the territories included in the North-West Frontier Province, which was absorbed in the Province of West Pakistan in 1955. In this case also leave was granted to consider whether the relevant provisions of the Regulation were repugnant to Article 5 of the Constitution of 1956.

The cases, before the Court thus fall into two classes. Two of them relate to orders of reference to jirgas by Deputy Commissioners. The other two relate to orders of conviction by Deputy Commissioners and therefore to what might be described as completed proceedings. The cases of Sabz Ali and of Abdul Latif Khan fail in the first category, but the orders made in these cases are not by any means similar. In Sabz All's case, it has been held that the reference to the jirga was valid under law and should be allowed to proceed except that, by way of enforcement of Article 7 of the Constitution of 1956, a direction has been made that the accused persons should be allowed, the benefit of counsel at the trial. In the latter case, on the other hand, the finding of .the High Court is that the reference- is illegal because it was made under a law offending against Article 5 of the Constitution of 1956, and they have directed that it should not be proceeded with. The question common to both these cases is whether today, and for the future, which is important since the trial in each case is yet to commence, the law allows of the making of references to jirgas, and the other consequential proceedings provided for by the Regulation. For, as from the 7th October 1958, a great change has come about in respect of the fundamental law of Pakistan. On

that date, the President of Pakistan made a Proclamation whereby he abrogated the Constitution, and declared Martial Law in the entire country. On the 10th October, 1958, however, the President, acting in the capacity assumed under the Proclamation, made an Order providing for the continuance of laws which is Order (Post-Proclamation) No. 1 of 1958 and is described as the Laws (Continuance in Force) Order, 1958. This Order is deemed to have taken effect upon the making of the aforesaid Proclamation and proceeds to declare in section 2 that "the Republic, to be known henceforward as Pakistan, shall be governed as nearly as may be in accordance with the late Constitution", this however being expressly made "subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law". Then in section 4 it is declared that "notwithstanding the abrogation of the late Constitution" all laws other than the late Constitution and all Ordinances and other legal instruments, a number of which were expressly mentioned, were to continue to have legal force, "until altered, repealed or amended by competent authority" and in the section itself it was provided that the validity was to be "subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law".

The Frontier Crimes Regulation is a law, which was in force immediately before the Proclamation, and as such, this law is saved by section 4, which however expressly does not retain the provisions of the Constitution of 1956 as law. Now, the question in the first two cases viz., those of Sabz Ali and of Abdul Latif Khan is whether the provisions of the Regulation are to be applied according to their tenor and without reference to Articles 5 and 7 of the Constitution of 1956 which are included in Part 11 of that Constitution under the heading "Fundamental Rights". Article 4 in that part provided that every law and every custom or usage having the force of law should be void to the extent of its inconsistency with the Fundamental Rights. It is clear that these Fundamental Rights and the supporting Article 4 have not been retained as law, whereas the provisions of the Regulation have been so retained. This is so far as section 4 of the President's Order of the 10th October 1958, goes, but we were invited to say that because, by that Order, it is also provided that the country "shall be governed as' nearly as may be in accordance with the late Constitution", therefore, the Fundamental Rights, being related generally to all matters within the province of Government, should be deemed to have been kept alive. The argument is 'attractive, but does not take into account the discrepancy between the direct provision in the Order, which makes the Frontier Crimes Regulation a law with effect from the 7th October 1958 (in continuance of its previous existence as law under other instruments up to the 7th October 1958), and the equally direct exclusion of the provisions of the Constitution of 1956, from the laws of Pakistan. The Order does not furnish any indication, which might tend to weaken the primary and basic proposition upon which the Order itself is based, namely that the Constitution of 1956 is abrogated. To say that the Government of the country shall be carried on "in accordance with the late Constitution" is not equivalent to giving new life to that Constitution, or accepting that any of its provisions retained the slightest validity, of their own force. For that Constitution, as well as for the new dispensation, which replaced it, the date 7th October 1958, marks a point of no return. The abrogation of the Constitution of 1956 represents an irrevocable act of the Supreme authority by which it was performed. It has a definitive effect in relation, both to that Constitution, as well as to the order of things, which has replaced it. Consequently, the words in section 2 of the Order, viz., "in accordance with the late Constitution" only mean that in matters affecting the Government of the country, for which no provision is made in any instruments issued under the authority of the new regime, where guidance is needed, it is to be sought by reference to the wording of provisions contained in the Constitution of 1956 applicable in the like case. The direction is one, which operates by reference to a previous instrument, without giving validity to that instrument. Equally,

the supreme authority may have declared that in some particular respect the actions of the Government would be in accordance with some provision contained in the Government of India Act, 1935, or other constitutional instrument, or even in a constitution of some other country. By the Constitution of 1956, the highest authority of an overriding character, governing all laws and legislation in the country, had been given to the principles, which were set out and enumerated as Fundamental Rights in Part II thereof. No law could be made in contravention of those rights on pain of invalidity. That prohibition is obviously not intended to continue, for the Order gives overriding power now to the President and the Chief Administrator of Martial Law to make Orders and Regulations contrary to anything appearing from the words used in the Constitution of 1956. Therefore, there is no room for the argument that the Frontier Crimes Regulation must still, in the new order of things, conform to the requirements of Part II of the Constitution of 1956. It derives its validity afresh from the Order, and its vires must be tested by reference to that Order only. On that basis, it is clear that the

Regulation may be applied, as from the 7th October 1958, according to its terms.

In the case of Sabz Ali a reference to jirga had been made, which must be held to be valid under the existing law. The direction by the High Court in Sabz Ali's case that he should be allowed to be defended by counsel at the jirga trial, being founded on Article 7 of the Constitution of 1956, is today without force and must therefore be set aside. The other questions arising in that case present little difficulty. It was said that the detention of one of the accused persons under the orders of the Deputy Commissioner, pending the proceedings before the jirga was illegal, because such detention should, after the making of the reference, be solely within the jurisdiction of the jirga. The argument is fallacious for, it does not appear that such a jurisdiction vests in the jirga, and since the function of the jirga is to enquire into the matter and report to the Deputy Commissioner as to the guilt or innocence of the accused persons, upon which recommendation the Deputy Commissioner is empowered to act in one of several ways, it seems clear that the duty of deciding as to whether or not the accused person shall remain in custody pending the disposal of his case, still inheres in the Deputy Commissioner despite the reference to the Jirga. It is o course perfectly clear that all Deputy Commissioners are Magistrates, and in that capacity qualified to order the detention of persons accused of criminal offences. The second point, as to the validity of the reference for lack of expression of an opinion as to the expediency of trial before the ordinary Courts is equally, of no weight, for the reference in this case was under section 15 of the Regulation which by its terms enables a Deputy Commissioner to instruct a Public Prosecutor to withdraw from a prosecution before a Court of Sessions at any time prior to the making of a final order in the case, with the object that the case may be referred to a jirga, and thereupon the Sessions Court is required to stay proceedings and the Deputy Commissioner is required to refer the case to a jirga. The law does not require any declaration as to inexpediency or otherwise. The third question raised was as to the constitution of the jirga i.e., whether it was constituted in accordance with the Pathan or Baluch usage. It seems that out of the jirga members nominated, three were stipendiary Magistrates. The High Court has held that this circumstance by itself did not vitiate the constitution of the jirga so long as it was convened "according to the Pathan, Baluch or other usage". Reference was also made to Act XIII of 1954 passed by the North-West Frontier Province Legislative Assembly providing that jirgas should consist of three or more persons, whether officials or otherwise, convened by the Deputy Commissioner and presided over by a section 30 Magistrate. At a later stage in this judgment, I propose to consider the purpose and effect of this amendment at length, but at this point I think it is sufficient to say that like the Frontier Crimes Regulation of

1901, this amending Act of 1954, is law having full validity in the new dispensation and therefore it is not open to any party today to challenge the legality of a reference to a jirga, so long as that jirga is constituted in accordance with the law as at present in force: Reference was made in the arguments to the decision of this Court in the case Crown v. Ghulam Muhammad Khan of Lundkhowar (P L D1956 F C 197), where also the jirga had included a majority of officials, but no reference was made during the arguments in that case to Act X111 of 1954 mentioned above, as will appear from the following observations of my Lord the Chief Justice in his judgment :-

> "It seems to us to be clear that this letter has the effect of amending the Regulation, and that for that reason it was ultra vires the Provincial Government. Neither before the Court of the Judicial Commissioner nor in the concise statement or arguments before us was any provision mentioned under which the Provincial Government could amend the procedure laid down in the Regulation for the Constitution of the Council of Elders".

(The letter in question had been issued by the N.-W. F. P. Government to ail Deputy Commissioners directing them to form jirgas of competent Magistrates and where a sufficient number, that is to say three, of competent Magistrates were not available to appoint Tehsildars in lieu). That judgment clearly does not provide authority for holding that the 9onstitution of the jirga in the case of Sabz Ali is not in accordance with law, since there is a valid legislative enactment under which such a jirga may be appointed. Accordingly; it would seem that the appeal of Sabz Ali and Muhammad Akbar should fail, and, further more, the direction that these persons must be allowed the benefit of counsel before the jirga, must be cancelled as not being valid in law.

In the case of Abdul Latif Khan, also, the jirga was composed of officials. By itself, that circumstance does not affect the legality of its constitution. The other questions raised in this case as to the effect of Article 5 of the Constitution of 1956 upon the relevant provisions of the Regulation, is no longer, since the 7th October 1958, a living issue in view of the lapse of Article 5 along with other Fundamental Rights enumerated in the Constitution of 1956. These conclusions are sufficient for holding that the writ issued in this case by the High Court must be set aside, and the case against Abdul Latif Khan should be allowed to proceed before the jirga to which it has been referred by the Deputy, Commissioner. In the view, which I am inclined to take regarding .the effect of the Order of the 10th October, 1958, upon completed proceedings of prior date, it will be necessary for me later in this judgment to examine the question whether indeed the relevant provisions of the Frontier Crimes Regulation offended against Article 5 of the Constitution of 1956. But as to the case of Abdul Latif Khan, I am of the opinion that the appeal of the State should be allowed and the writ issued by the High Court should be withdrawn.

I proceed now to the consideration of the cases of Dosso and Malik Toti Khan, both of which come from that part of West Pakistan Province, which was previously described as Balouchistan. The first question, which arises is whether these two appeals can continue, in face of the provisions contained on the, Order of the 10th October 1958. In other words, is it within the expression and the intention of that Order that proceedings of the nature of these two appeals should be continued to a proper conclusion, or is it by expression and intention, the effect of that Order upon these appeals, that they should abate? It is on this point that I find myself with regret, at variance with the view which has found favour with my Lord the Chief Justice and my learned brethren.

The point falls to be considered upon the reading and interpretation of subsections (4) to (7) of section 2 of the Order of the 10th October 1958. These provisions are reproduced below:-

> "(4) The Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari.
>
> (5) No writ shall be issued against the Chief Administrator of Martial Law, or the Deputy Chief Administrator of Martial Law, or any person exercising powers or jurisdiction under the authority of either.
>
> (6) Where a writ has been sought against an authority which has been succeeded by an authority mentioned in the preceding clause, and the writ sought is a writ provided for in clause (4) of this Article, the Court notwithstanding that no writ may be issued against an authority so mentioned may 'send to that authority its opinion on a question of law raised.
>
> (7) All orders and judgments made or given by the Supreme Court between the Proclamation and the proclamation of this Order are hereby declared valid and binding on all Courts and authorities in Pakistan, but saving those orders and judgments no writ or order for a writ issued or made after the Proclamation shall have effect unless it is provided for by this Order, and all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith".

The particular words whose effect is to be judged are the words at the very end of subsection (7) proving that "all applications and proceedings in respect of any writ which is nod' so provided for shall abate forthwith". It is necessary for the purpose of this judgment to ascertain which is meant by the expression "abate" in this sentence and further what "applications and proceedings" are to suffer abatement.

The expressions "abate" and "abatement" do not appear to be capable of being defined generally with any exactness. They are used in a number of legal contexts, and their effect in each case may be gauged with precision, either from the context or from the terms of the relevant statute. The incidents of abatement vary from law to law. In several forms of law, one prominent feature of abatement is that the proceedings may be revived upon the happening of certain events, and the performance of certain conditions, so that it might be thought that in such cases, abatement is not a final conclusion, but has the effect of keeping the matter in a state of suspense, pending certain developments.

It seems scarcely possible to apply that conception of abatement to the provision here under examination. Every circumstance combines to create the impression that the provision is for an immediate and peremptory cessation, beyond hope of recall. It for that reason all the more necessary that it should be ascertained with precision, what applications and proceedings are Mended by this Order to suffer immediate and final cessation.

Abatement is ordinarily a concept of the procedural law. It takes effect frequently upon a proceeding becoming defective by the death or loss of capacity of any of the parties to a cause or matter. It may be based upon a defect of form, i.e., the plea may be raised on account of an informality or it may be founded upon a change or transfer of interest. The common cases of abatement in the Civil Law arise upon the death or bankruptcy of the party or upon the devolution

of the estate in dispute. In all these cases there is provision for substitution of parties and for the proceedings to continue thereafter. In the law of election petitions a petition abates upon the death of a sole or the last surviving petitioner, but it may be revived by a competent person entitled to pursue it. In affiliation proceedings, i.e., proceedings commenced by a mother to obtain maintenance for an illegitimate child from the putative father, it has been held that the proceedings abate upon the death of the mother, because only the mother is competent to commence them and equally they abate upon the death of the putative father. In these cases, the abatement is final. Proceedings in lunacy are abated by the death of the patient, and they remain so until a personal representative has been duly constituted, when they may be , revived.

These are the familiar cafes in which the law provides for abatement, but it is clear also that abatement may take place by operation of law. The last sentence in subsection (7) of section 2 of the Order of the 10th October 1958, is clearly such a law. It remains to consider what particular applications and proceedings are liable to abatement by the operation of this law. The proceedings with which we are concerned, namely, the convictions obtained in the two cases here under consideration, derive their force and owe their validity to the Constitution of 1956, and their validity would ordinarily fall to be judged against the provisions of that Constitution. The Order of the 10th October 1958 does not explicitly have any retrospective operation, and one would therefore hesitate, on the strength of a possible interpretation of the Order to declare the invalidity of anything done or suffered so long as the Constitution of 1956 was in force and operation. On the other hand, should the implication be clear, the Order of the 10th October 1958, must necessarily prevail over anything appearing in the Constitution of 1956 or anything seeming to have validity only by reference to the provisions of that Constitution.

We have been asked to declare that the proceedings instituted in the High Court to challenge the convictions in the two cases presently under discussion are being continued in this Court upon appeal, that these are proceedings "not so provided for", within the meaning of the last sentence in subsection (7) of section 2 of the Order of the 10th October 1958, and that they must consequently abate forthwith.

I have read with great care the reasons advanced in the judgments of my Lord the Chief Justice and my learned brethren which favour that conclusion, but I find myself still in doubt upon the question, and since the decision involves a question of the liberty of the subject, I feel that, consistently with the long accepted rules governing the interpretation and application of statutes, which is a matter strictly within the judicial field, it is my duty to refrain from coming to a conclusion in the sense desired by the learned Attorney-General arguing for the State. I shall state my reasons as briefly as may be.

To accept the proposition advanced by the Attorney-General amounts to holding that the provision in question provides for abatement of a proceeding not on the ground of procedural defect or lack of capacity or competency, but by reason of the cancellation of the Fundamental Rights which took effect from the 7th October 1958, so that as from that date, the validity of any law still in force was not to be judged in relation to those rights. Now, it will be clear from the discussion above in the cases of Sabz Ali and Abdul Latif Khan that, with reference to proceedings which on a date after the 7th October 1958 are still pending proceedings under section 11 of the Frontier Crimes Regulation, there can be no manner of doubt that the validity of these proceedings is not to be judged in the light of any of the Fundamental Rights enumerated in the Constitution of

1956, as from the 7th October 1958. But it is equally clear that up to that date, the duty of the Courts was plainly to declare any law, which did not comply with the said Fundamental Rights, to be invalid. Therefore, any words contained in the Order of the 10th October 1958, which are to have the effect of nullifying that duty as applying up to the 7th October 1958, must be words of the clearest possible import, since they would be words having retrospective operation in respect of the high judicial authority of the superior Courts. That authority has been maintained and continued by the Order of the 10th October 1958, and as has been seen, in relation to the questions before the Court, there are no words in the Order, which may be thought to have retrospective operation. Therefore, I hesitate to accept an interpretation which would involve retrospective deprivation of the jurisdiction and annulment of the duty of the High Courts, existing on a date in the past, when under the then prevailing instruments, that jurisdiction and that duty were plain for all to see.

Secondly, I do not recollect having found the expression "abatement" to be ever used in relation to the failure of a proceeding resulting from the failure of the right upon v, hick it T was based. Abatement ordinarily follows upon defect of form or procedure or loss of capacity in parties, and it may not be safe to assume that the meaning of the word "abate" as used in the Order of the 10th October 1958 is so widely different from the generally accepted senses of that word, as is claimed by the learned Attorney-General. It is true that if by the Order of the 10th October 1958, any law has been wholly destroyed or deprived of effect whatsoever, then the issue of a writ to enforce any right provided for by such law becomes impossible. Any application or proceeding that may be pending whose purpose may be to obtain enforcement of such a right must therefore fail by reason of the right no longer being available, and not by reason of procedural or formal defects, or loss of capacity etc. The Order of the 10th October 1958, could have been worded to provide that no writ should issue in such cases, although it might have been thought that such a provision was superfluous. But, does the last sentence in subsection (7) of section 2 make any such provision? I note that the words are not that "no writ which is not provided for shall abate forthwith" but they read "no writ which is not so provided for shall abate forthwith" and immediately it becomes clear that there is a reference, by the use of the word "so", to something which has been stated earlier. That something is contained in the immediately foregoing clause in subsection (7) of section 2 which reads as follows:-

> "no writ or order for a writ issued or made after the Proclamation shall have effect unless it is provided for by this Order . . . . . ."

It therefore becomes necessary to examine the Order to see what kinds of writs have been expressly provided for, and it is in my opinion a reasonable assumption that when the words ` unless it is provided for" are used what is meant is something stronger than a conclusion based upon mere inference, as to the provision. One must look diligently first for express provision, and if such be lacking, then for provision by implication of a strong and necessary character directly affecting not the right sought to be enforced by the writ, but the competency of the writ itself.

The search for expression in the above-mentioned sense need not take one far a field. In subsection (4) of section 2, it is expressly, stated that the Supreme Court and the High Courts shall have power to issue writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari. It is clear that there is provision empowering the issue of writs by the Courts mentioned, and also for the kinds of writs, which these Courts may issue. By the operation of the prohibitive provisions

in subsection (7), writs other than the writs provided for in subsection (4) cannot issue. But to the power given by subsection (4) there are exceptions contained in subsections (5) and (6). The Courts mentioned are expressly debarred from issuing writs of any of the kinds mentioned in subsection (4) against the Chief Administrator of Martial Law, the Deputy Chief Administrator of Martial Law, and any person exercising power or jurisdiction under the authority of either. Specifically then, the Order makes a prohibitive provision, in respect of every kind of writ against these authorities, and therefore under subsection (7) any writs directed to any of these authorities shall have no effect. In subsection (6) there is a further provision, saving the authorities specified in subsection (5) from receiving writs in the capacity of successors to some other authority, against whom it was competent for the Courts mentioned to issue writs. When such a replacement takes place, the proceedings do not immediately terminate, or become terminable. The Court may continue the proceeding, but at the conclusion thereof, if it is of the opinion that ordinarily a writ should have issued, it may instead send its opinion upon a point of law arising in the case, to the successor authority.

These matters, appearing from within section 2 itself, furnish direct instances of writs provided for as well as writs not provided for by that section. Still bearing in mind that abatement is an incident applicable ordinarily to procedure and on grounds of formality or capacity, to which may be added the ground of immunity, I think it is plain that the expression "any writ which is not so provided for shall abate forthwith" is capable of full application to matters specifically expressed within section 2 of the Order of the 10th October 1958. 1 have read the remainder of that Order with great care for the purpose of determining whether it contains any other words having a strong and necessary implication of the abatement of a writ; and in especial a writ, i.e., as a specific process or machinery by which law is enforced. If the concluding words in subsection (7) of section 2 of the Order had been devoid of meaning or application unless they were understood to bring about a termination of writs and proceedings relating thereto, which had the effect of enforcing rights which have ceased to be available after the 7th October 1958, although they were available and had in fact been enforced in relation to a matter concluded long before that date, I might have felt it necessary to accept that the words must have the latter meaning, but I find in section 2 itself, sufficient material to indicate what was meant by the draftsman in using the expression "unless it is provided for by this Order" and the further expression "which is not so provided for".

One final reason for my being in a state of doubt upon this question may be added in brief. It is that the validity of writs issued prior to the 7th October 1958, under the provisions of the Constitution of 1956 does not appear to be generally hit by anything contained in subsection (7) aforesaid, on the interpretation for which the learned Attorney-General has contended before us. Only those of such writs which happen to be still subject to legal revision upon the coming into force of the new regime are sought to be avoided on the basis of this interpretation, and this, not on any consideration whether they were rightly or wrongly granted at the time when they were issued in the eye of the law as then in force, but merely because they happen to be pending by virtue of having been appealed against. It is, in my view, more reasonable to infer, especially since the Order of the 10th October 1958, does not appear, by expression, to have retrospective effect, that as to matters which were concluded during the period which finally terminated on the 7th October 1958, the intention of the Order is that the law in force during that period, at the relevant time, should be allowed to prevail. For, it remains further to be said with reference to a number of Fundamental Rights enumerated in Part II of the Constitution of 1956 that they do not derive their

entire validity from the fact of having been formulated in words and enacted in that Constitution. A number of these rights are essential human rights which inherently belong to every citizen of a country governed in a civilised mode, and speaking with great respect, it seems to me that the view pressed before us by the learned Attorney-General involves a danger of denial of these elementary rights, at a time when they were expressly assured by writing in the fundamental law of the country, merely because that writing is no longer of any force.

For these reasons, I am unable to hold beyond doubt that the concluding words of subsection (7) of section 2 of the Order of the 10th October 1958, have the effect of bringing to an abrupt end the proceedings in the petitions before the High Court commenced by the convicted persons in the two cases here under consideration. I do not therefore consider that it is open to me to reverse the judgment of the High Court in these two cases and to recall the writs issued by them unless I am satisfied that the view of the High Court on the point of repugnancy to Article 5 of the Constitution of 1956 is not tenable.

The provisions of the Frontier Crimes Regulation with reference to the trial of crimes commence with section 11 and, as has been indicated already, they consist in the main of directions enabling executive officers where they think "it is inexpedient that the question of the guilt or innocence of any person or persons accused of any offence, or of any of several persons so accused should be tried by a Court of any of the classes mentioned in' section 6 of the Code of Criminal Procedure 1898" to refer the question to a Council of Elders (otherwise known as a jirga) and to require the Council to come to findings upon the questions arising. Upon receipt of those findings, the authority is to take requisite action which may be in the nature of acquittal or discharge, or of a remand to the same jirga, pr a reference to another jirga, and if the Deputy Commissioner convicts the accused person he must do so in accordance with a finding of not less than three-fourths of the members of the jirga. There are special provisions regarding sentences which are in the main lower than those provided by the Penal Code, and do not include a sentence of death. Power is given to the Deputy Commissioner acting through the Public Prosecutor to withdraw any case from a Court of Session and the law requires that when this power is exercised the case shall be referred to jirga. By section 48, appeals are prohibited, but by section 49 the Commissioner is empowered to revise all decisions in criminal cases inquired into by jirga, and to exercise the powers of an Appellate Court in the case as well as the power of enhancing any sentences. Final validity is given to a finding of a jirga on a question of fact where the finding has been accepted by the Deputy Commissioner by a provision barring interference by the Commissioner unless there has been a material irregularity or defect in the proceedings or such a procedure as is calculated to occasion miscarriage of justice. These provisions are materially different from those contained -in the Code of Criminal Procedure, and while in some respects, they might be thought to be less liberal than the latter provisions, in other respects, e.g. the binding nature of a finding of fact by a three-fourths majority of a jirga and in the matter of sentences, it may be thought that they are more advantageous to the accused person. The right of trial by one's equals or "peers" which is embodied in the mode of trial by jury, as known to British justice, is not one, which has been easily or cheaply won. It is certainly very highly valued in countries where it prevails, as affording a guarantee for the subject against the possibility of official oppression through the modes of justice. In the Frontier Crimes Regulation, this right is allowed to a very great extent. It is not a right which is allowed to the majority of the citizens of Pakistan. Indeed with the exception of a few districts in East Pakistan the right of trial by jury is practically non-existent in this country. Again, the punishments awardable under the Frontier Crimes Regulation certainly make a greater concession

to principles of humanity than those laid down by the Penal Code in operation all over Pakistan, as well as in most areas to which the Frontier Crimes Regulation applies. The absence of a right of appeal might be thought to be an illiberal provision. Yet it must be remembered that a sentence awarded by a Deputy Commissioner under the Frontier Crimes Regulation, upon the recommendation of a jirga does not merely present an isolated punitive action taken by the States against an erring subject. It must be regarded as an equation of all the considerations to which the parties attach importance with reference to a crime committed in their midst as well as considerations applying more directly to the administration of areas where the maintenance of law and order is no easy matter, e.g. the effect upon family and tribal feelings, the possible result in regard to the maintenance of good order within the affected area and adjacent areas and the interests of public policy generally. The correction of an order having this nature and quality cannot lie within the four corners of a precise appeal as understood in the Code of Criminal Procedure. I had occasion to consider this question, though not in the same context as in this case, in an earlier case before the Federal Court of Pakistan, which is published as Samundar v. Crown (PLD 1954 F C 228). I there expressed the opinion that if the trial of offences under section 1 I of the Regulation "can be regarded as a mode of justice at all, it is certainly not such a mode as is operated through the ordinary Courts of justice acting in accordance with the law of procedure and of evidence, but is rather to be assimilated to, and included among the agencies of the general administration". The question for decision in that case had been formulated as being "whether .the Commissioner or the Deputy Commissioner can be regarded as a Court of justice, or whether on the contrary these officers are not to be regarded as part of the administrative agency established for the settlement of criminal cases, under the special conditions obtaining in Frontier areas". With reference to decrees in civil matters which may be referred to jirga under section 8 of the Regulation, I made the following observation:-

> "Obviously, such a decree is no simple decree of the Civil Court of general jurisdiction. It is essentially to be regarded as an instrument embodying a settlement of rights between the contestants, which also satisfies the interests of public policy, by which can only be understood, in relation to any unsettled or frontier area, the general administrative policy of the Government".

These observations have some relevancy to this case. Even though the discussion of this question is confined to my judgment in the present cases, and the conclusion does not form the basis of the decision of the Court, yet it may be of some use in elucidating the matter in some later case. I conceive that it is by no means illogical, and from the point of view both of justice as well as of sound administration generally, it may in certain areas be by no means unwise, that the power to revise decisions by a Deputy Commissioner upon recommendations by a jirga should be placed in the hands of a higher executive authority, and that it should not be confined within the four corners of an appeal. Consequently if the conditions which make inquiry by jirga into criminal offences an appropriate mode of investigation of such offences for the purpose of imposition of punishment by the State be postulated, then I do not think that it can be denied that the mode of reviewing of convictions and sentences which has been laid down in the Frontier Crimes Regulation is appropriate to the requirements.

That in certain areas the conditions which rendered it necessary to maintain a system of investigation of crimes for the purpose of imposing punishments at the hands of the State, in the manner which was traditional in those areas, still continue to exist can hardly be denied. If there

be any doubt or difficulty, in the matter, it will in my opinion be found to affect only the question of the area within which or the persons to whom such a system may appropriately be applied. It is common knowledge that as the power of the British extended from Bengal in the East to the Khyber Pass in the West, in a period extending over something like a hundred years the British Administrators left behind them settled areas, and by successive stages, brought under their administration further areas which had up to that time been under less elaborate administration, and in some cases under no administration at all. In course of time, the eastern provinces of India, which had been for a considerable time under British Administration, came to be distinguished by the designation of "Regulation Provinces", and towards the west there were added one by one, provinces, which were known as "non-Regulation Provinces". In the Regulation Provinces the head of each district was known as the Collector and District Magistrate, thereby emphasising that he derived his powers from the revenue and criminal laws. In the non-Regulation Provinces, the head of the district was designated "Deputy Commissioner" emphasising his capacity as the local agent of the Government, and pointing to the possession of a high degree of initiative and freedom of action in the interests of firm and sound administration. The Punjab and the North-West Frontier Provinces were for a great many years treated.; as non-Regulation Provinces. Beyond the North-West Frontier Province were the "tribal areas" where the processes of government were distinctly loose and power was largely deposited in the hands of tribal leaders, whose actions were subject to supervision and correction by the representative of the suzerain power described as the Political Agent. A remnant of this arrangement may still be found in the "special areas" for which there was specific provision in the Constitution of 1956. It is agreed that in the "special areas" justice is administered by the jirga system alone. The Constitution of 1956 barred the jurisdiction of the High Court and the Supreme Court in respect of the special areas.

The North-West Frontier Province and Baluchistan were the particular areas where the non-Regulation provinces marched with the tribal areas, and where the new modes of trial of crimes under the Criminal Procedure Code came into contact directly with the earlier and more primitive modes operated through jirgas. A reasonable basis for the application of a measure of elasticity in dealing with crime arising within these areas was provided by reason of their being populated largely by people whose emancipation from their traditional modes of administration of justice was as yet partial, about the time when the present Frontier Crimes Regulation was enacted. When to these conditions are added the considerations that the areas in question are but sparsely populated for the most part, and that the population is largely nomadic, so that movement over the borders between the tribal areas and the provinces on the east and those areas and foreign countries on the west was constant, it wilt easily be appreciated that the decision as to whether in a particular case arising in the marginal areas, the more expedient course would be to sand the case for investigation to a jirga rather than to have it tried by one of the regular Courts, was by no means easy to make. It would involve in probably a majority of cases considerable knowledge and experience of the ways of life and habits of thought and degree of development of the parties to the case as well as of the witnesses, .and generally of the conditions prevailing among the people of the locality. To say that in every such case the authority charged with the exercise of the discretion should act so as to preserve only the recognised overriding principles of criminal justice as applied in the regular Courts e.g. of giving the benefit of every doubt to the accused, of presuming him to be innocent until he was proved to be guilty by evidence of a clearly admissible character, etc, would be to place too great a restraint upon the decision and a restraint whose operation could not by any means be regarded as advantageous to either the administration of justice or the administration of the area in general. If a legislature in such conditions left it to the

head of the local administration to decide whether in a particular case, there being concurrent jurisdiction, he should not allow the case to go before the ordinary Courts, but should have it investigated by a jirga, it would be hardly possible to condemn the provision as one designed merely to enable discrimination to be made between one person and another or one class and another within the area. As regards the question of discrimination between races, which has been discussed in some of the judgments under appeal, it falls to be observed that since notifications were made many years ago extending the provisions of the Frontier Crimes Regulation to the entire Province of Baluchistan, the statute cannot now be assailed upon this particular ground.

The High Court judgments are agreed that by placing it within the power of the Commissioner or the Deputy Commissioner to decide that a case should go before a jirga and be withdrawn from the jurisdiction of the ordinary Courts, the law has placed a naked and uncontrolled power of an arbitrary nature in their hands which was capable of producing inequality as between citizens placed in exactly similar circumstances. In coming to this conclusion, they have in my opinion overlooked the full force and effect of the words requiring that before taking a decision to this effect, the authorities should have formed the opinion that it is inexpedient that the case should go before the ordinary Criminal Courts. These authorities would be expected to exercise the power thus given to them by reference to all the considerations arising in relation to each case coming before them for an order under section 11. The word "inexpedient" is clearly not to be understood as making it a mere matter of short-sighted policy to gain a particular result. Expediency in this context is a matter to be judged widely in relation to all applicable considerations.

It has been urged that in many cases, the authorities have acted - merely because they wished to secure a conviction and knew that the evidence was such as would not satisfy a Court operating under the Code of Criminal -Procedure and the rules of evidence under the Evidence Act. But that is clearly not the same thing as saying that the authority was anxious to secure the conviction of an innocent person. There is an illuminating sentence in the judgment of the High Court in the case of Khair Muhammad Khan v. The Government of West Pakistan, which is printed in the paper-book of Sabz Ali's appeals, where speaking of the procedure adopted by jirgas, the learned Judge observes as follows:-

> "In practice even the Council holds what are called secret and open inquiries. It examines witnesses informally and visits the spot or its neighbourhood often incognito to ascertain the truth".

The difference between the attitude of a jirga when entering upon an investigation and that of a Court acting under the Code of Criminal Procedure and the law of evidence appears with great clearness in this statement. Only too often the ordinary Court considers that its d4ty is merely to produce a judgment upon strictly admissible evidence. A Court, which goes out of its way to ascertain the truth only too frequently falls into error, which may be visited by one of the corrective processes known to the ordinary criminal law. But for a jirga acting honestly, there is no duty except that ascertaining the truth by whatever means may be available to them, and there can be no doubt that in the Frontier areas, those means can hardly be confined with any hope of success within the rigid requirements of the aw of evidence and the Code of Criminal Procedure.

Therefore, it may be a fallacy to suppose that by reference of a case to jirga, ascertainment of the truth is prejudiced. On the other hand, it might often be made easier. It follows that such a reference is not necessarily to the disadvantage of an accused person and certainly it can only rarely be so in a-case where such person is innocent.

This is not say that the power under section 11 is not capable of abuse. Indeed, in one of the cases which have come under examination in these appeals, it does appear that the conditions which I may compendiously describe as "frontier conditions" are wholly absent, and the crime alleged has been committed not merely in a settled area but in old settled towns, and in all probability involves no evidence other than that of persons living in settled areas. The crime alleged is one of misappropriation of money, involving no violence. It may be a matter for consideration in revision by the Commissioner whether the reference in the case is appropriate, but a mere abuse of a statute is y certainly not sufficient for avoiding the statute on any ground relatable to such a provision as Article 5 of the Constitution of 1956.

For these reasons, I am of the view that section 11 of the Regulation is not a discriminatory provision inasmuch as treats of actual conditions existing in the areas in question, where the two separate jurisdictions, namely, the modern and the traditional, are both necessary, and the exercise of a choice as to which jurisdiction should apply to a particular case is entrusted to highly responsible officers, who are required by the statute to act upon a principle of expediency, having regard to the general administration of the area including the dispensation of justice in the particular case.

A word may be added regarding the new practice of appointing officials and Magistrates to be as members of jirga. Such a procedure may be thought to be inconsistent with the views expressed above as to the need for the jirga system in frontier areas. The appointment of Magistrates is now being' made under a legislative sanction which has become a part of the Regulation itself, and the Regulation as a whole not being contrary to the requirements of Article 5 of the Constitution of 1956, it follows that this amendment is equally saved. It may appear that this amendment does not in fact implement the purposes which underlay the enactment of the Regulation, but y that question does not affect the vires of the legislation. Moreover, it may be that the legislature has resorted to this device in order to introduce into the jirga system 'some of the practices and principles which lie at the foundation of the administration of justice by the ordinary Courts. In that view, the provision may be one in aid of gradual modernisation of ideas of justice in the areas concerned.

These reasons are sufficient for the disposal of the case of Malik Toti Khan and Mehrban Khan. It has not been shown to our satisfaction that the reference of the case by the Deputy Commissioner to a special jirga after the failure of the previous order of remand to the first jirga constitutes an illegality so as to vitiate the order of conviction (vide section 11 (3) of the x Regulation). In any case, that is a matter, which the Commissioner is competent to deal with. Accordingly, on the view I take, the appeal of the District Magistrate of Sibi against Malik Toti Khan and Mehrban Khan should be allowed and the writ issued by the High Court should be recalled.

In the case of Dosso and Muhammad Khan, the position is materially different in so far as the trial and all proceedings up to the conviction were held in a "special area" over which the High

Court had no jurisdiction. It follows that the High Court had no authority to decide whether the trial and conviction were legal or otherwise. The only matter of which they could be seized was whether these persons were properly held in custody by the Jailer at Machh. For the decision of that question the learned Judges should have referred to sections 15 & 16 of the Prisoners' Act of 1900. The Jailer at Machh was competent to give effect to a warrant for the detention of these two persons, according to the tenor of the warrant. Such a warrant under the official signature of a proper officer is by itself sufficient authority for holding these persons in custody. The judgment in the case does not show that the warrant was ever examined, much less that it was found to suffer from defect of any kind, and consequently the order for release of these two persons was clearly incorrect. It must accordingly be set aside and the appeal allowed for that purpose.

AMIRUDDIN AHMAD, J.-These four appeals arise out of orders made by the High Court of West Pakistan on petitions for issue of writs against convictions and orders made under the Frontier Crimes Regulation (III of 1901). As the orders of the High Court are based on Articles of the Constitution of 23rd March 1956 relating to Fundamental Rights given under Part of the said Constitution and the points involved are similar, the four appeals were heard together.

Appeal No. 1 of 1957 is a certificated appeal from the Quetta Circuit of the High Court, in which the respondents were convicted under section 376 of the Pakistan Penal Code and sentenced to five years' rigorous imprisonment by the District Magistrate of Loralai in the special areas, on the basis of an award by a jirga under the Frontier Crimes Regulation, but confined in the Machh Jail within the jurisdiction of the High Court. The High Court refused the prayer for quashing of conviction and sentences, but held that it was a detention under an illegal order as being repugnant to Article 5 of the Constitution and void under Article 4, and therefore the consequent detention was also illegal and as it was within the jurisdiction of the Court, a writ of habeas corpus was issued.

Criminal Appeal No. 60 of 1958 is by special leave of this Court from an order of the Quetta Circuit of the High Court. In this case the respondents were convicted by the District Magistrate and Deputy Commissioner, Sibi, on the basis of an award by the Council of Elders under the Frontier Crimes Regulation for instigating the murder of one Zarif and complicity in it under section 302 read with section 109 of the Pakistan Penal Code and sectenced to five years' rigorous imprionment with a fine of Rs. 500. The convictions and sentences were set aside by the High Court as being repugnant to Articles 5 & 4 of the old Constitution and the respondents were directed to be treated as under-trial prisoners.

Criminal Appeal No. 67 of 1958 is by special leave of this Court against an order of the Peshawar Bench of the High ` Court. The respondent was charged with offences under sections 409 & 420 of the Pakistan Penal Code and the case was referred by the Deputy Commissioner to the Council of Elders under the Frontier Crimes Regulation. The respondent applied for an injunction in a civil suit before the Sub-Judge for restraining the Government from taking action under section 11 of the Frontier Crimes Regulation, but the prayer was refused. The High Court on appeal granted temporary injunction and proceedings before the jirga came to a halt. The respondent then filed a petition under section 223-A of the Government of India Act, which gave the powers of issuing a writ to the High Court similar to those given by Article 170 of the Constitution of 1956, and the Peshawar Bench of the High Court quashed the proceedings before the

jirga holding sections 11 to 20 of the Frontier Crimes Regulation as repugnant to Article 5 of the Constitution of 1956 and holding that the reference to the jirga was void.

Criminal Appeal No. 24 of 1957 is by special leave of this Court from an order of the High Court of West Pakistan, Lahore. In this case the original prosecution was started before the Sessions Court, but on the application of the Public Prosecutor under section 15 of the Frontier Crimes Regulation the case was withdrawn and referred to a jirga. The charge was under section 302 read with section 34 of the Pakistan Penal Code of the murder of one Shah Zaman and was pending before the jirga, when the respondent applied for a writ of habeas corpus against his detention during trial. The High Court refused the issue of writ, but a direction was given that the respondent was Rot to be denied the right to consult, and be defended by, a legal practitioner, which was given by Article 7 of the Constitution of 1956.

These appeals came up for hearing before the Court on the 13th October 1958, when a radical change had been effected in the Government of the country, which had a far reaching effect on the laws of the land. The President of Pakistan, by a proclamation dated the 7th October 1958

(1) abrogated the Constitution of 23rd. March 1956 ;

(2) dismissed the Central and Provincial Governments with immediate effect ;

(3) dissolved the National Parliament and Provincial Assemblies ; and

(4) placed the whole country under Martial Law and appointed the then Commander-in-Chief as the Chief Martial Law Administrator of Pakistan.

On the 10th October 1958, the President promulgated the Laws (Continuance in Force) Order, which was to take effect immediately upon the making of the proclamation of 7th October 1958.

We are now to decide these appeals in the light of the change in the law brought about by the new Order becoming effective.

According to Continental Legal thought in Philosophy and Jurisprudence as represented by Hans Kelsen such a change has the effect of changing not merely the Constitution but the entire legal order. The laws that have been continued by the sub-,g sequent order are not identical with the old laws, because the reason for their validity is different and the continued laws receive their validity exclusively from the new order, subject to limitations put by the new order.

Article II of the Continuance of Laws Order provides that notwithstanding the abrogation of the Constitution and subject to any order of the President and Regulation made by the Chief Administrator of Martial Law, Pakistan shall be governed as nearly as may be in accordance with the late Constitution. By clause 4 of the said Article the Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari, except as to orders made under the authority of the Chief or the Deputy Chief Administrator of Martial Law. By clause 7 of the said Order, all orders and judgments of the Supreme Court made between the promulgation and the proclamation of the Order were declared to be valid and binding, but except these orders and judgments no writ or order for a writ issued or made after the

proclamation was to have effect unless provided for by this Order and all applications and proceedings in respect of any writ, which is not so provided for, shall abate forthwith. By Article IV of the Laws (Continuance in Force) Order, all laws other than the late Constitution subject to any order of the President or Regulation made by the Chief Administrator of Martial Law were continued. The result is that with the abrogation of the late Constitution the Fundamental Rights given i1-1 Part II of that Constitution, on the basis of which the writ petitions in these appeals were decided, are also abrogated. As an appeal is a continuation of the proceedings, the writ petitions, which originated these pending appeals, must also be deemed to be pending. Now we have to see whether there is any provision in the Laws (Continuance in Force) Order saving these writ petitions. Clause 7 of Article 11 of the Laws (Continuance in Force) Order says that no writ or order for a writ issued or made after the proclamation shall have effect unless it is provided for by this order. The Order only provides for issue of writ in clause 4 of Article II, and in view of the legal position that by the new Order having become effective, the new laws are not identical with the old laws, it must be held that writs can only be issued now in respect of rights given under the continued laws in the new Order, and not to enforce rights including Fundamental Rights given by the Constitution now abrogated.

It was argued in one of the appeals on behalf of the respondent that as under Article II of the Order, Pakistan is to be governed as nearly as may be in accordance with the late Constitution, the Fundamental Rights in Part II of the said Constitution are still available to the petitioners for writ. I am unable to accept that Fundamental Rights have been saved. The word `governed' relates to the structure and manner of Government, which has been changed by the dissolution of the legislative bodies and the dismissal of the Ministries, and the' words in the Article have not the effect of reviving the Funda-1 mental Rights. This view finds support also from the language of Article IV, clause 1 of the said Order.

One of the arguments raised in Appeal No. 24 of 1957 was that the order of reference to jirga made by the Deputy Commissioner does not say that it was expedient to make such a reference. The question of expediency arises only when the reference is made under section 11 of the Frontier Crimes Regulation, but in this case it was at the instance of the Public Prosecutor and the reference was made under section 15, subsection (2) of the Regulation, which leaves .no option with the Deputy Commissioner to refuse when asked to make a reference. In Appeal No. 60 of 1958 it was argued that the Deputy Commissioner having once remanded the case to a jirga was incompetent under the Frontier Crimes Regulation to make a second order of remand. I am unable to accept this proposition, as the first remand became ineffective, the jirga having expressed their inability to submit their final award, as they thought that their minds were greatly prejudiced by the approach of different persons on behalf of the parties and returned the case. In the circumstances I think the second remand was competent.

These appeals, which must be deemed to be a continuation of the proceedings originated by applications for writ before the High Court, and not provided for by the Order, abate under Article II, clause 7 of the Order. The result is that the parties are relegated to the position at which they were at the date at which the applications for writs in these appeals were made. As by the Laws (Continuance in Force) Order, the Frontier Crimes Regulation along with other laws has been continued freed from the trammels imposed by the late Constitution, I would order that the convictions and sentences in Appeal No. 1 of 1957 and Appeal No. 60 of 1958 will stand, and the

trials before the jirga in Appeal No. 67 of 1958 and Appeal No. 24 of 1957 will proceed in accordance with the provisions of the Frontier Crimes Regulation.

ORDER OF THE COURT

In accordance with the judgments of the majority, the proceedings for writs in each of these cases are held to have abated. The result is that the direction made by the High Court in the case of Sabz Ali and another (Criminal Appeal No. 24 of 1957) and the writs issued by the High Court in the other three cases are hereby set aside. There will be no order as to costs.

A. H. Order accordingly.

Case 3
Asma Jillani case

PLD 1972 Supreme Court 139

Present: Hamoodur Rahman, C. J., Muhammad Yaqub Ali, Sajjad Ahmad, Waheeduddin Ahmad and Salahuddin Ahmed, JJ

Criminal Appeal No. 19 of 1972

Miss ASMA JILANI-Appellant

Versus

THE GOVERNMENT OF THE PUNJAB AND ANOTHER----- Respondents

(On appeal from the judgment and order of Lahore High Court, Lahore, dated the 15th January 1972, in Writ Petition No. 1538 of 1971).

Criminal Appeal No. K-2 of 1972

Mst. ZARINA GAUHAR-Appellant

Versus

THE PROVINCE OF SIND AND 2 OTHERS-Respondents

(On appeal from the judgment and order of the High Court of Sind & Baluchistan, Karachi, dated the 18th February 1972, in Constitutional Petition No. 40 of 1972).

Criminal Appeals Nos. 19 and K-2 of 1972, decided on 20th April 1972.

(a) Constitution--------

-------Annulment and abrogation of Constitution by a successful Military revolution-Principle laid down in Dosso's case [P L D 1958 S C (Pak.) 533] that "where a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution, then such a change is a revolution and its legal effect is not only the destruction of the Constitution but also the validity of the national legal order, irrespective of how or by whom such a change is brought about"-Held, wholly unsustainable and cannot be treated as good law either on the principle of stare decisis or otherwise-Martial Law-Nature and scope of Proclamation of Martial Law does not by itself involve abrogation of civil law and functioning of civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country-Commander of Armed Forces ; bound by his oath to defend the Constitution-Doctrine of "legal positivism" propounded by Hans Kelsen--Examined-[State v. Dosso P L D 1958 S C (Pak.) 533 overruled].

The precise question before the Supreme Court was whether the High Courts had jurisdiction under Article 98 of the Constitution of Pakistan (1962) to enquire into the validity of detention under the Martial Law Regulation No. 78 of 1971 in view of the bar created by the provisions of the Jurisdiction of Courts (Removal of Doubts) Order, 1969. The further question was whether the doctrine enunciated in the case of State v. Dosso P L D 1958 S C (Pak.) 533 was correct. The successive manoeuvrings for usurpation of power under the Pseudonym of Martial Law, it was urged, were neither justified nor valid nor had even reached the effectiveness to merit the legal recognition that was given to them in the case of State v. Dosso.

Held, that in laying down a novel juristic principle of such far-reaching importance the Chief Justice in the case of State v. Dosso proceeded on the basis of certain assumptions, namely :-

(1) "That the basic doctrines of legal positivism", which he was accepting, were such firmly and universally accepted doctrines that "the whole science of modern jurisprudence" rested upon them ;

(2) that any "abrupt political change not within the contemplation of the Constitution" constitutes a revolution, no matter bow temporary or transitory the change, if no one has taken any step to oppose it ; and

(3) that the rule of international law with regard to the recognition of States can determine the validity also of the States' internal sovereignty.

These assumptions were not justified. Kelsen's theory was, by no means, a universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence, nor did Kelsen ever attempt to formulate any theory which "favours totalitarianism". Kelsen was only trying to lay down a pure theory of law as a rule of normative science consisting of "an aggregate or system of norms". He was propounding a theory of law as a "mere jurists' proposition about law". He was not attempting to lay down any legal norm or legal norms which are "the daily concerns of Judges, legal practitioners or administrators". Kelsen in his attempt to evolve a pure science of law as distinguished from a natural science attached the greatest importance to keeping law and might apart. He did not lay down the proposition that the command of the person in authority is a source of law. Kelsen's attempt to justify the principle of effectiveness from the standpoint of international law cannot also be justified, for, it assumes "the primacy of international law over national law." In doing so he has overlooked that for the purposes of international law the legal person is the State and not the community and that in international law there is no "legal order" as such. The recognition of a State under international law has nothing to do with the internal sovereignty of the State, and this kind of recognition of a State must not be confused with the recognition of the Head of a State or Government of a State. An individual does not become the Head of a State through the recognition of other States but through the municipal law of his own State. The question of recognition of a Government from the point of view of international law becomes important only when a change in the form of Government also involves a break in the legal continuity of the State, or where the question arises as to whether the new Government has a reasonable expectancy of permanence so as to be able to claim to represent the State.

The observations of the Chief Justice in Dosso's case are not correct that upon the principles of international law if the territory and the people remain substantially the same there is "no change in the corpus or international entity of the State and the revolutionary Government and the new State are, according to international law, the legitimate Government and the valid Constitution of the State". This proposition does not find support from any principle or international law. According to Oppenheim's view as propounded in his book on International Law if the revolutionary Government is ineffective and or has no "reasonable expectancy of permanence" and/or does not "enjoy the acquiescence of the population", then the international community may well refuse to recognise it, even though its territorial integrity remains unchanged and its people remain substantially the same. The criticism therefore, is true that the Chief Justice of the Supreme Court not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone.

In any event, if a grund-norm is necessary, Pakistan need not have to look to the Western legal theorists to discover it. Pakistan's own grund-norm is enshrined in its own doctrine that the legal

sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or civil. Indeed, it cannot be, for, !t is one of the fundamental principles enshrined in the Holy Quran:

Say, 'O Allah, Lord of sovereignty. Thou givest sovereignty to whomsoever Thou pleasest ; and Thou takest a Nay sovereignty from whomsoever Thou pleasest. Thou exaltest whomsoever Thou pleaaest and Thou abasest whomsoever Thou pleasest.-Holy Quran, Pt. 3, Chap. III, A1 'Imran, Ay. 27-The basic concept underlying this unalterable principle of sovereignty is that the entire body politic becomes a trustee for the discharge of sovereign functions. Since in a complex society every citizen cannot personally participate in the performance of the trust, the body politic appoints State functionaries to discharge these functions on its behalf and for its benefit, and has the right to remove the - functionary so appointed by it if he goes against the law of the legal sovereign, or commits any other breach of trust or fails to discharge his obligations under a trust. The functional Head of the State is chosen by the community and has to be assisted by a Council, which must hold its meetings in public view and remain accountable to public. It is under this system that the Government becomes a Government of laws and not of men, for no one is above the law. It is this that led Von Hammer, a renowned orientalist, to remark that under the Islamic system "the law rules through the utterance of justice, and the power of the Governor carries out the utterance of it.

The principle enunciated in Dosso's case, therefore, is wholly unsustainable, and it cannot be treated as good law either on the principle of stare decisis or even otherwise.

Now to judge the validity of the events that took place on and from the 24th of March 1969. Oar the 24th of March 1969, Field-Marshal Muhammad Ayub Khan, the then President of Pakistan, wrote a letter to the Commander-in-Chief of the army expressing his profound regret for coming to the conclusion that "all civil administration and constitutional authority in the country has become ineffective" and admitting after reciting the unhappy state of events that had taken place in the country earlier, that "it is beyond the capacity of the civil Government to deal with the present complex situation, and the defence forces must step in." In these circumstances, he thought that there was no option left for him but "to step aside and leave it to the defence forces of Pakistan, which today represent the only effective and legal instrument, to take over full control of the affairs of the country", and finally called upon the Commander-in-Chief to do the needful. This was followed by a Broadcast over the Radio network at 7-15 p.m., of the 25th of March 1969. There was nothing either in this letter or in this broadcast to show that he was appointing General Agha Muhammad Yahya Khan as his successor-in-office or was giving him any authority to abrogate the Constitution which he had himself given to the country in 1962.

Both these merely called upon the Commander-in-Chief of the army to discharge his legal and constitutional responsibility not only to defend the country against external aggression but also to save it from internal disorder and chaos. He did not even proclaim Martial Law. Nevertheless, the Commander-in- Chief on the very same day. namely, the 25th of March 1969, on his own proclaimed Martial Law throughout the length and breadth of Pakistan and assumed the powers of the Chief Martial Law Administrator. He also abrogated the Constitution, dissolved the National and Provincial Assemblies and declared that all persons holding office as President, members .of the President's Council, Ministers, Governors of Provinces and members of their Council of Ministers shall cease to hold office with immediate effect. Existing laws and Courts were, -however, preserved with the proviso that no writ or other order shall be issued against the Chief Martial Law Administrator or any person exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.

It is clear that under the Constitution of 1962, Field-Marshal Muhammad Ayub Khan had no power to hand over power to anybody. Under Article 12 of the Constitution he could resign his office by writing under his hand addressed to the Speaker of the National Assembly and then under Article 16 as soon as the office of President fell vacant the Speaker of the National Assembly had to take over as the acting President of the Country and an election had to be held within a period of 90 days to fill the vacancy. Under Article 30 the President could also proclaim an emergency if the security or economic life of Pakistan was threatened by internal disturbances beyond the power of a Provincial Government to control and may be for the present purposes that he could also proclaim Martial Law if the situation was not controllable by the civil administration. It is difficult, however, to appreciate under what authority a Military Commander could proclaim Martial Law.

Martial Law, in the present times in England, has acquired various senses. In its original sense ft is perhaps now only identifiable in the law relating to the enforcement of discipline in the forces at home and abroad. In this sense this branch of Martial Law is now better known as "military law" and is in time of peace enforced under various statutes, such as the Army Act, the Navy Act and the Air Force Act. It derives its authority from these statutes passed by the civil law-making bodies. In International Law Martial Law means the powers of a military commander in war time in enemy territory as part of the jus belli. In this sense as the Duke of Wellington once said in the House of Lords it is "neither more nor less than the will of the General who commands the army".

We must distinguish clearly between Martial Law as a machinery for the enforcement of internal order and Martial Law as a system of military rule of a conquered or invaded alien territory. Martial Law of the first category is normally brought in by a proclamation issued under the authority of the civil Government and it can displace the civil Government only where a situation has arisen in which it has become impossible for the civil Courts and other civil authorities to

function. The Imposition of Martial Law does not of its own force require the closing of the civil Courts or the abrogation of the authority of the civil Government. The maxim inter armes teges silent applies in the municipal field only where a situation has arisen in which tit has become impossible for the Courts to function, for, on the other hand, it is an equally well-established principle that where the civil Courts are sitting and civil authorities are functioning the establishment of Martial Law cannot be justified. The validity of Martial Law is, in this sense, always a judicial question, for, the Courts have always claimed and have in fact exercised the right to say whether the necessity for the imposition of Martial Law in this limited common law sense existed.

From the examination of the various authorities on the subject one is driven to the conclusion that the Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country. It would be paradoxical indeed if such a result could flow from the invocation in the aid of a State of an agency set up and maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the armed forces do not assist the State in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the State. It is, therefore, not correct to say that the proclamation of Martial Law by itself must necessarily give the Commander of the armed forces the power to abrogate the Constitution, which he is bound by his oath to defend.

Per Yaqoob Ali, J.-However, effective the Government of a usurper may be, it does not within the National Legal Order acquire legitimacy unless the Courts recognize the Government as de jure. International law is not concerned with these considerations. If a rebel Government has succeeded in gaining effective control over people and territory the other States may recognize it. But will the same rule apply to the municipal Courts. East Pakistan today provides a classic example of a successful revolution which destroyed the National Legal Order and became a new law-creating fact. East Pakistan has declared its self-independence and became a separate State under the name of Bangla Desh. Pakistan claims that East Pakistan is a part of Pakistan, but a. large number of States have already recognized it as an independent State. New Courts and Government services have been constituted in Bangla Desh which do not operate under the Legal Order of Pakistan. On these facts if a dispute arises involving the determination whether the new Government of East Pakistan is de jure, will the municipal Courts of West Pakistan confer recognition on it, because a victorious revolution is a legal method of changing the Constitution and the new order has become efficacious as the individuals whose behaviour the new order regulates actually behave by and large in conformity with new order. The answer is obvious. While under International law, East Pakistan has become an independent State, the municipal Courts of Pakistan will not confer recognition on it or act upon the legal order set up by the rebel Government. Yahya Khan's Government, therefore, remained de facto and not de jure up to 20th December 1971, when he stepped aside.

Kelsen invests revolutionary Government with legal authority on the basis of a pre-supposed norm that the victorious revolution and successful coup d'etat are law-creating facts. This is in the realm of a theory and not a part of the national legal order of any State. No municipal Court will, therefore, rely on it as a rule. It is a statement of law by Mr. Kelsen to which a large number of jurists have taken exception. What Kelsen has said about the legitimacy of norm and legal authority of a revolutionary Government must be read separately and not mixed up. While revolution may destroy the existing national legal order because after the change the reality of the State has, disappeared from behind that order, it does not follow that the legal order, which replaces it, is the expression of the superior will of one or more revolutionaries who staged victorious revolution or successful coup d'etat. This is explained by Kelsen himself in the remark, that "the efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A conditio sine qua non, but not a conditio per quam. The efficacy of the total legal order is a condition, but not the reason for the validity of its constituent norm. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way." So, after a change is brought by a revolution or coup d'etat, the State must have Constitution and subject itself to that order. Every single norm of the new legal order will be valid not because the order is efficacious, but because it is made in the manner provided by the constitution of the State. Kelsen, therefore, does not contemplate an all omnipotent President and Chief Martial Law Administrator sitting high above the society and handing its behests downwards. No single man can give a constitution to the society which. in one sense, is an agreement between the people to live together under an Order which will fulfil their expectations, reflect their, aspirations and hold promise for the realisation of themselves. It must, therefore, embody the will of the people which is usually expressed through the medium of chosen representatives. It must be this type of constitution from which the norms of the new legal order will derive their validity. If this appraisal of Kelsen is correct, then the decision in the case State v. Dosso upholding the validity of the Laws (Continuance in Force) Order must be held to be erroneous.

A person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of lawmaking. May be, that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper; he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would-be adventurers.

(b) Constitution of Pakistan (1952)------

------ Art. 2(2)-Term "Law" Concept of "Law".

Legal theorists have spent a great deal of time and energy in elucidating the concept of law. Some Continental jurists think of them as dictates of reason, others as commands, yet others would have us believe that whatever is habitually obeyed is law. Even the American jurists are not unanimous. Justice Cardoso makes an exception in the case of statutes, in so far as they are clear, and precedents which are clearly in point. Jerome Frank on the other hand thinks that Gray's view is not sufficiently radical. The task of a Judge in the circumstances, is not an easy one. But is it necessary for him to define law? Law itself is not a legal concept, for, what is law is really a theoretical question. Conclusions of law do not depend upon the definition of law nor are legal judgments based on definitions of law and, in fact, as Sir Ivor Jennings has said in his Article on the Institutional Theory published in Modern Theories of Law, Oxford University Press. 1933 (page 83) "the task which many writers on Jurisprudence attempt to fulfil in defining law is a futile one", for, according to him, "law has no definition except in a particular context." So far as a Judge is concerned, if a definition is necessary, all that he has to see is that the law which he is called upon to administer, is made by a person or authority legally competent to make laws and the law is capable of being enforced by the legal machinery.

Per Yaqoob Ali, J. "Law" was not defined in the Constitution. It is, therefore, for the Courts to lay down what 'law' is, and if any decree, or behest of Yahya Khan expressed as a Martial Law Order, Martial Law Regulation or Presidential Order or Ordinance, does not conform to the meaning of the term 'Law' in Article 2 of the Constitution of Pakistan (1962) these Regulations, Orders and Ordinances will be void and of no legal effect.

In introduction to "Law in the Making" C. K. Allen mentions two antithetic conceptions of growth of law : (i) law Is which is imposed by a sovereign will ; and (ii) law which .develops within society of its own vitality. He criticises Austin who defined "law" as the will of the sovereign and points out that whatever be the constitutional instrument which secures observance and enforcement of law-and some sanction of this kind is certainly indispensable--there is no historical justification for the view that this power always and necessarily must be a determinate, "human superior" which at the same time createsall law. It is impossible in every form of society governed by law to disengage and personify a "sovereign" as thus understood, with the artificial precision which Hobbes and Austin assume.

Salmond describes "law" as body of principles recognised and applied by the State in the administration of justice as the rules recognised and acted upon by Courts of justice. All the theories of law are at one in viewing law as consistent of rules. Such rules are regarded by natural law as dictates of reason, to positivism as decrees of the sovereign and by realism as the practice

of the Courts. The central notion of the natural law theory is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law which is valid of necessity, because the rules for human conduct are logically connected with truths concerning human nature. Diametrically opposed to the theory of natural law is the positivist or imperative theory of law. It seeks to define law not by reference to its condition. but according to the formal criteria which differentiate legal rule from other source such as those of morals, etiquette, and so on. It is a type of command, it is laid by a political sovereign and is enforceable by sanction. Realism, like positivism, looks on law as the expression of the will of the State as made through the medium of the Courts.

According to Holmes law is really what the Judge decides. This great American Judge sowed the seed of the American realism in a famous paper in which he put forward. a novel way of looking at law. If one wishes to know what law is, he said, one should view it through the eyes of a bad man, who is only concerned with what will happen to him if he does certain things. The prophecies of what the Courts will do to the bad man, in the opinion of Justice Holmes, is what he means by the law.

In "A Grammar of Politics" Laski adds: "To those for whom law is a simple command, legal by virtue of the source from which it comes, it is not likely that such complexities as these will be popular. We are urging that law is, in truth, not the will of the State, but that from which the will of the State derives whatever moral authority it may possess . . . . It assumes that the rationale of obedience is in all the intricate facts of social organisation and in no one group of facts. It denies at once the sovereignty of the State, and that more subtle doctrine by which the State is at once the master and the servant of law by willing to limit itself to certain tested rules of conduct. It insists that what is important in law is not the fact of command, but the end at which that command aims and the way it achieves the end.

Pakistan is an Islamic Republic. Its ideology is enshrined in the Objectives Resolution of the 7th April 1949, which inter alia declares "wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah". We should, therefore, turn more appropriately to Islamic Jurisprudence for the definition of "Law". One method of defining "Law" is to know its source. In Shari'at laws have divine origin. They are contained in the Holy Qaran, and Hadith, namely, precepts and actions of the Holy Prophet, peace be upon him. The other sources are Ijma' Consensus and juristic deductions including Qiyas : Analogy, Istihsen or Juristic Equity, Public Good, Istidlal : Reason and Ijtihad ; Juristic Exposition. While Juristic Deductions are judge-made laws, Ijma' is based on the doctrine of Imam Shafi'i that "the voice of the people is the voice of God", and is the most fruitful source of law-making in Shariat. In the present day

context the Legislative Assemblies comprising of chosen representatives of the people perform this function. Thus, in Islamic Jurisprudence, the will of a sovereign, be he the monarch, the President or the Chief Martial Law Administrator is not the source of law. The people as delegatee of the sovereignty of the Almighty alone can make laws which are in conformity with the Holy Quran and Sunnah.

The preponderant view appears to be that law is not the will of a sovereign. Law is a body of principles-called rules or norms-recognised and applied by the State in the administration of justice as rules recognised and acted upon by the Courts of justice. It must have the contents and form of law. It should contain one or more elements on which the different theories of law are based, and give expression to the will of the people whose conduct and behaviour the law is going to regulate. The will of the people is nowadays often expressed through the medium of Legislature comprising of the chosen representatives of the people. The will of a single man howsoever laudable or sordid is a behest or a command, but is certainly not law as understood in juristic sense.

(c) Constitution of Pakistan (1962)---

---Courts having given full effect to Constitution of 1962 and having adjudicated upon rights and duties of citizens in accordance with laws thereof, all laws made and acts done by Government thus acquired not only de facto validity but also de jure validity by reason of unquestioned recognition extended to them by Courts of highest jurisdiction in the country.

The Courts in the country gave full effect to the Constitution of 1962 and adjudicated upon the rights and duties of citizens in accordance with the terms thereof by recognizing this law constitutive medium as a competent authority to exercise that function as also enforced the laws created by that medium in a number of cases. Thus all the laws made and acts done by the various Governments, civil and military, became lawful and valid by reason of the recognition given to them by the new Constitution and the Courts. They had not only de facto validity but also acquired de jure validity by reason of the unquestioned recognition extended to them by the Courts of highest jurisdiction in the country. The validity of the acts done thereunder are no longer, therefore, open to challenge.

(d) Court duty of--------

----No duty cast on Courts to enter upon purely academic exercises or to pronounce upon hypothetical questions Court's judicial function: to adjudicate upon real and present controversy formally raised before it by litigant-Court would not suo motu raise a question and decide it.

The Courts do not decide abstract hypothetical or contingent questions or give mere declarations in the air. There is no duty cast on the Courts to enter upon purely academic exercises or to pronounce upon hypothetical questions. The Court's judicial function is to adjudicate upon a real and present controversy which is formally raised before it by a litigant. If the litigant does not choose to raise a question, however, important it might be, it is not for the Court to raise it suo motu.

(e) Stare decisis-Doctrine of stare decisis-------

----Flexible in its application -Law cannot stand still nor can the Courts and Judges be mere slaves of precedents.

In spite of a Judge's fondness for the written word and his normal inclination to adhere to prior precedents one cannot fail to recognise that it is equally important to remember that there is need for flexibility in the application of this rule, for, law cannot stand still nor can the Judge, become mere slaves of precedents. The rule of stare decisis does not apply with the same strictness in criminal, fiscal and constitutional matters where the liberty of the subject is involved or some other grave injustice is likely to occur by strict adherence to the rule.

Per Yaqoob Ali, J.-Stare decisis is the rule of expediency and public policy and is not inflexible and will not be applies where injustice is done or injury caused. This rule will also not apply if the language is not ambiguous. It will apply where two interpretations are open and Court having adopted one interpretation it may not depart from it, if it upsets contracts, titles and marriages, etc.

(f) Bias-------

---Bias in Judge-Mere association with drafting of a law-Does not necessarily disqualify a Judge from interpreting that law in the light of arguments advanced before him.

(g) Jurisdiction -----

------ Superior Courts are Judge of their own jurisdiction.

The Courts undoubtedly have the power to hear and determine any matter or controversy which is brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The superior Courts are, as is now well settled, the Judges of their own jurisdiction. This is a right which has consistently been claimed by Supreme Court and other Courts of superior jurisdiction in all civilised countries.

(h) Proclamation of Martial Law, 1969-----

------ Provisional Constitution Order 1969; Jurisdiction of Courts (Removal of Doubts) Order [President's order 3 of 1969] and Martial Law Regulation 78 [C. M.L.As.'] of 1971-Military rule sought to be imposed upon country by General Agha Muhammad Yahya Khan by Proclamation of Martial Law, 1969-Entirely illegal-Presidential Order 3 of 1969, being a sub-constitutional legislation, could not curtail jurisdiction conferred by Constitution of Pakistan (1962) upon Supreme Court and High Courts-Presidential Order 3 of 1969 ; an unconstitutional document Martial Law Regulation 78 ; not only invalid and illegitimate but also incapable of being sustained even on ground of necessity.

From the examination of the various authorities on the subject one is driven to the conclusion that the Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country. It would be paradoxical indeed if such a result could flow from the invocation in the aid of a State or an agency set up and. maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the armed forces. do not assist the State in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the State It is therefore not correct to say that the proclamation of Martial Law by itself must necessarily give the Commander of the armed forces the power to abrogate the Constitution, which he is bound by his oath to defend. If this be so, then from where did General Agha Muhammad Yahya Khan acquire the right to assume control of the reins of Government?

Field-Marshal Muhammad Ayub Khan did not appoint him as his successor by his letter of the 24th March 1969. He merely called upon him to perform his "constitutional and legal duty to restore order" in the country. If this was his authority, then the only authority he got was to restore order and nothing more. Even the imposition of Martial Law by his proclamation is of doubtful. validity, because the proclamation should have come from the civil authorities and it was only then that under the proclamation the Commander of the armed forces could have moved into action. There is no provision in any law which gives the Commander of the armed forces the right to proclaim Martini Law, although he has like all other loyal citizens of the country a bounden duty to assist the State, when called upon to do so. If the magnitude of the insurrection is so great that the Courts and the civil administration are unable to function, the military may exercise all such powers that may be necessary to achieve their objective and in doing so may even set up Military Tribunals to promptly punish wrong-doers but this, whether done throughout the country or in a restricted area within the country, merely temporarily suspends the functioning of the civil Courts and the civil administration. As soon as the necessity for the exercise of the military power is over, the civil administration must, of necessity, be restored, and assume its normal role. It is not without significance that after the so-called imposition of Martial Law in 1969 the Martial Law Authorities had no occasion to fire even a single shot and found the conditions so normal that the civil administration never ceased to function and all the Courts continued to sit for all purposes. In fact the situation was so normal that within a few days the reality had to be accepted and even the Constitution was brought back except in so far as it had been purported to be altered by the creation of the office of President and the assumption of that office by the Chief Martial Law Administrator. Protection was also purported to be given to the acts of all Martial Law Administrators and their subordinates acting under their orders to save them from the consequences of their otherwise illegal acts. If Martial Law was by itself a sufficient legal cover then why was this special protection necessary. This country was not a foreign country which had been invaded by any foreign army with General Agha Muhammad Yahya Khan at its head nor was it an alien territory which had been occupied by the said army. The question of imposition of "military rule" as an incident of jus belli of international law could not, in the circumstances, possibly have arisen. The only form of martial law, therefore, that could possibly have been imposed in this country, assuming that such a state of large scale disorder had come to prevail in the country as was suggested by Field-Marshal Muhammad Ayub Khan in his letter of the 24th of March 1969, was a martial law of the kind which could be imposed under the English common law and was imposed by the British from time to time in 1919 in Amritsar, Lahore and Gujranwala, in 1921 in the areas inhabited by the Moplas, in 1930 in Sholapur, in 1942 in areas occupied by Hurs in Sind and in 1953 in Lahore. Under these martial laws there was, of course, no question of abrogation of any Constitution or of the introduction of military rule in supersession of the civil administration normally functioning in other parts of the country. Looked at, therefore, either from the constitutional point of view or the Martial Law point of view whatever was done in March 1969, either by Field-Marshal Muhammad Ayub Khan or General Agha Muhammad Yahya Khan was entirely without any legal foundation. It was not even a revolution or a military coup d'etat in any sense of those terms. The Military Commander did not takeover the reins of Government by force nor did he oust the constitutional President. The constitutional President out of his own free will and accord in response to the public's demand, stepped aside and called upon the Military Commander to restore law and order, as he was bound to do both under the law and under the Constitution. On the stepping aside of the constitutional President the constitutional machinery should have

automatically come into effect and the Speaker should have taken over as Acting President until fresh elections were held for the choice of a successor. The political machinery would then have moved according to the Constitution and the National and Provincial Assemblies would have taken steps to resolve the political disputes, if any, if the Military Commander had not by an illegal order dissolved them. The Military Commander, however, did not allow the constitutional machinery to come into effect but usurped the functions of Government and started issuing all kinds of Martial Law Regulations, Presidential Orders and even. Ordinances.

Therefore, there can be no question that the military rule sought to be imposed upon the country by General Agha Muhammad Yahya Khan was entirely illegal.

The Presidential Order No. 3 of 1969 is a sub-constitutional legislation and it could not have curtailed the jurisdiction that was given to the High Courts and to the Supreme Court by the Constitution of 1962, for, that jurisdiction was preserved even by the Provisional Constitution Order.

Looking at the matter, therefore, from any point of view, whether, from the strictly legal and constitutional side, or on the basis of the principle of implied authority or even in terms of the so-called legal order purported to be created by the Provisional Constitution Order of 1969 itself, the conclusion cannot be escaped that the Presidential Order No. 3 was an unconstitutional document, General Agha Muhammad Yahya Khan had no authority to pass such legislation taking away the powers of the Courts in his capacity as President under the Provisional Constitution Order. The Martial Law introduced by him was illegal and, therefore, even as Chief Martial Law Administrator he was not competent to validly pass such laws, and it certainly was in excess of the implied authority, if any, given to him by the letter of Field-Marshal Muhammad Ayub Khan dated the 24th of March 1969.

The Martial Law Regulation No. 78 gives very wile powers to the Chief Martial Law Administrator and a Zonal Martial Law Administrator and even a Deputy Martial Law Administrator to detain a person without trial for any length of time, without giving him any reasons for such detention or any opportunity even of making any representation against such a detention. These are indeed very extraordinary powers for taking away the most cherished right of a citizen in a most arbitrary manner. They provide no machinery for seeking any redress against any possible abuse or misuse of power or for making any representation or even for an appeal from Ceaser to Ceaser.

Both the Presidential Order No. 3 of 1969 and the Martial Law Regulation No. 78 of 1971 were made by an incompetent authority and, therefore, lacked the attribute of legitimacy which is one of the essential characteristics of a valid law. The Presidential Order No. 3 of 1969 was also invalid on two additional grounds, namely, that it was a Presidential Order, which could not in terms of the Provisional Constitution Order itself amend the Constitution so as to take away the jurisdiction conferred upon the High Courts under Article 98 of the Constitution of Pakistan 1962 and that it certainly could not, in any event, take away the judicial power of the Courts to hear and determine questions pertaining even to their own jurisdiction and this power could not be vested in another authority as long as the Courts continued to exist.

Per Yaqoob Ali, J.-As both President's Order No. 3 of 1969 and Martial Law Regulation 78 were intended to deny to the Courts the performance of their judicial functions, an object opposed to the concept of law, neither would be recognised by Courts as law.

Martial Law is of three types: (i) the law regulating discipline and other matters determining the rule of conduct applicable to the Armed forces. The present case is not concerned with it; (ii) law which is imposed on an alien territory under occupation by an armed force. The classic function of this type of martial law was given by the Duke of Willington when he stated in the House of Lords that "Martial Law is neither more nor less than the will of the General who commands the Army. In fact, Martial Law means no law at all." This case is also not concerned with this type of Martial law; and (iii) law which relates to and arises out of a situation in which the civil power is unable to maintain law and order and the Military power is used to meet force and re-create conditions of peace and tranquility in which the civil power can re-assert its authority. The Martial Law Regulations and Martial Law Orders passed under this type of Martial Law must be germane only to the restoration of peace and tranquillity and induced during the period of unrest. In practice, the Martial Law imposed by Yahya Khan belonged to the second category. A large number of Martial Law Regulations and Martial Law Orders passed by him between 25th. March 1969 and 20th March 1971, had no nexus with civil disturbances. In fact, peace and tranquility was restored in the country within a few days of his stepping in. Martial Law should, therefore, have come to an end, but the entire structure of Institutions of Pakistan including superior Courts were made to appear by Yahya Khan as merely the expression of his will which a victorious military commander imposes on an alien territory to regulate the conduct and behaviour of its subjugated populace. Neither Pakistan was a conquered territory, nor the Pakistan Army commanded by Yahya Khan was an alien force to justify the imposition of this type of Martial Law. The Martial Law imposed by Yahya Khan was, therefore, in itself illegal and all Martial Law Regulations and Martial Law Orders issued by him were on this simple ground void ab initio and of no legal effect.

(i) Interpretation of statutes-----

-----Legislation-Illegal and illegitimate legislation-Doctrine of necessity-Illegal usurpation of power by a Military adventurer-All laws enacted during such regime illegal -Everything done during such intervening period both good and bad cannot, however, be treated in the same manner-Recourse could be had to the doctrine of necessity to condone the illegality and validate certain legislation in order to sane the country from greater chaos and the citizens from further difficulties.

The grabbing of power and installing himself as the President and Chief Martial Law Administrator of Pakistan by General Agha Muhammad Yahya Khan by the Proclamation of 1969 having been declared by the Supreme Court to be entirely illegal. The question arose whether everything (legislative measures and other acts) done during his illegal regime, whether good or bad, can be treated in the same manner and branded as illegal and of no effect.

Held : Grave responsibility, in such circumstances, rests upon Courts not to do anything which might make confusion worse confounded or create a greater state of chaos if that can possibly be avoided consistently with their duty to decide in accordance with law. Acts done by those actually in control without lawful authority may be recognized as valid or acted upon by the Courts within certain limitations, on principles of necessity. There is no doubt that a usurper may do things both good and bad, and he may have during the period of usurpation also made many Regulations or taken actions which would be valid if emanating from a lawful Government and which may well have, in the course of time, affected the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer of property and similar subjects. All these cannot be invalidated and toe country landed once again into confusion? Such a principle, has also been adopted in America in various cases which came up after the suppression of the rebellion of the Southern States and the American Courts too adopted the policy that where the acts done by the usurper were "necessary to peace and good order among citizens and had affected property or contractual rights they should not be invalidated", not because they were legal but because they would cause inconvenience to innocent persons and lead to further difficulties.

Recourse therefore has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but one has to disagree with the view that this is a doctrine for validating the illegal acts of usurpers. This doctrine can be Invoked in aid only after the Court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their Illegality in the wider public interest. This principle would be called a principle of condonation and not legitimization.

Applying this test the Court condoned (1) all transactions which are past and closed, for, no useful purpose can be served by re-opening them, (2) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order, (3) all acts which tend to advance or promote the good of the people, (4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of, the objectives mentioned in the Objectives Resolution of 1954. The Court would not, however, condone any act intended to entrench the usurper more firmly in his power or to directly help him to run the country contrary to its legitimate objectives. The Court would not also condone anything which seriously impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity.

Per Yaqoob Ali, J.-The Laws saved by the doctrine of State necessity do not achieve validity. They remain illegal, but acts done and proceedings undertaken under invalid laws may be condoned on the conditions that the recognition given by the Court is proportionate to the evil. to be averted, it is transitory and temporary in character and does not imply abdication of judicial review.

(j) Maxim--------

Salus populi cot suprema lox (the safety of the people is the supreme law).

(k) Maxim----

-- Inter arms leges silent (in the midst of arms the laws are silent).

Salmond on Jurisprudence ; George Whitecross Paton's Textbook on Jurisprudence ; Sir Ivor Jennings' Article on Institutional Theory in "Modern Theories of Law", 1933, p. 63 ; Dias' book on Jurisprudence, 3rd Edn., p. 93 ; Professor Lauter pacht's Article on Kelsen's Pure Science of Law in "Modern Theories of Law", 1933 ; Halsbury's Laws of England, 3rd Edn., Vols. 7 & 22, pp 260, 802 ;Corpus Juris Secundum, Vol. 21, para. 193 ; The Daily Pakistan Times, 11th November 1968 ; Laski's State in Theory and Practice, p. 27; Garner's Treaties on Political Science and Government, p.155; G. C. Field's Lectures on Political Theory, pp. 74-75; Dean Roscoe Pound's magnum opus on Jurisprudence, Vol. 1i, Part 3, p. 305; Frigowg's Supreme

Court in American History, pp. 76-82; Professor Julius Stone's Treaties on the Legal System and Lawyers' Reasoning, 1964 Edn., p. 121 ;Modern Law Review, Vol. 26, p. 35; Oppenhelm's International Law, Vol. I, p. 127 1 Holy Quran, Pt. 3, Ch. 3, A1 'Imran, Ay. 27 ; Article by Sir William Holdsworth in Law Quarterly Review, Vol. 18, p. 117 ; Hansard, Vol. CXV, Col. 880 ; A. V. Dicey's Law of the Constitution, p. 287 ; Blackstone's Commentaries, Vol. I, p. 381 ; Commentaries on the Constitution of the United States by Chester James : Grodus on De jure belli et pacis, Book 1, Chap. 4 ; Lakamani & Ola v. Attorney-General (West), Nigeria ref. In S. A. de Smith on Constitutional and Administration Law; The Attorney-General of the Republic. v. Mustafa Ibrahim and others 1964 C L R 195; 18 Law. Ed. 281; 87 Law. Ed. 1; 90 Law. Ed. 688; "A Grammar of Politics" by Laski; Yick Wo v. Hopking ; Law In The Making by C. K Allen; Modern Theories of Law, pp. 107-108; Friends Not Masters by Muhammad Ayub Khan and Fundamental Law of Pakistan, p. 598 by Brohi.

State v. Dosso P L D 1958 S C (Pak.) 533 ; Federation of Pakistan v. Mould Tamizuddin Khan P L D 1955 F C 240; Yusuf Patel v. The Crown P L D 1955 F C 387; Presidential Reference No. 1 of 1955 P L D 1955 F C 435 ; Fazlul Qadir Chowdhury anti others v. Muhammad Abdul Hague P L D 1963 S C 486; Syed Abul A'ala Maudoodi and another v. The Government of West Pakistan and another P L D 1964 S C 673; The Government of East Pakistan v. Mrs. Rowshan Bijoy Shaukat Ali Khan P L D 1966 S C 286; Malik Ghulam Jilani v. The Government of West Pakistan and another P L D 1967 S C 373; The Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri P L D 1969 S C 14; Province of East Pakistan v. Muhammad Mehdi Ali Khan P L D 1959 S C (Pak.) 387; Iftlkharuddin and another v. Muhammad Sarfaraz and another P L D 1961 S C 585; Muhammad Afzal v. The Commissioner, Lahore Division P L D 1963 S C 401; Ch. Tanbir Ahmad Siddiky v. Government of East Pakistan P L D 1968 S C 185; (1966) 1 W L R 1234 ; The. Governors of the Campbell College Belfast v. Commissioner of Valuation for Northern Ireland (1964) 2 A E R 705 ; The Attorney-General of the Commonwealth of Australia v. Reginam and others (1957) 2 A E R 45 (P C) ; Waterside Worker's Federation v. Alexander 25 C L R 434 ; Tilonka v. Attorney-General of Natal 1907 A C 93 ; Rex v. Allen (1921) 2 I R 241 ; Ex parte : Marias 1902 A C 109; Wolfe Tone's case (1798) 27 St. Tr. 614; Ex parte : Milligan 4 Wallace 121 ; Texas v. E. Constitution 77 U S S C R 375 (Lawyers' Edition); Mir Hassan and another v. The State P L D 1969 Lah. 786; Muhammad Ismail v. The State P L D 1969 S C 241; Mian Fazal Ahmad v. The State 1970 S C M R 650; Marriott's English Political Institutions, 1938 Edn., p. 293; Madzimbamuto v. Lardner-Burke and another (1968) 3 A E R 561 ; Texas v. White (1868) 7 Wallace 733; Horn v. Lockhart (1873) 17 Wallace 850; Baldy v. Hunter (1897) 171 U S 388; Uganda v. Commissioner of Prisons ; ex parte Matovu 1966 E A L R 514.

Criminal Appeal No. 19 of 1972

M. Anwar. S. M. Zafar and Ijaz Hussain Batalvi, Senior Advocates Supreme Court instructed by M. A. Rahman, Advocate-on-Record for Appellant.

M. B. Zaman, Advocate-General Punjab (M. Farani, A. G. Chowdhury and R. S. Sidhwa, Advocates Supreme Court with him) instructed by Ijaz Ali, Advocate-on-Record for Respondent No. 1.

Nemo for Respondent No. 2.

Under Order XLV, Supreme Court Rules:

Yahya Bakhtiar, Attorney-General for Pakistan (A. A..Zari, Advocate Supreme Court with him) instructed by Ifiikharuddin Ahmad, Advocate-on-Record.

A. H. Memon, Advocate-General Sind, Muhammad Ahmad Mirza, Advocate-General Baluchistan, Fakhre Alam, Advocate-General Peshawar (present up to 22-3-1972).

A. K. Brohi (present up to 24-3:1972), instructed by Fazal Hussain, Advocate-on-Record and Sharifuddin Peerzada, Senior Advocate Supreme Court Amicus curiae.

Criminal Appeal No. K-2 of 1972

Manzoor Qadir and Ijaz Hussain Batalvi, Senior Advocates Supreme Court (Mashir Ahmad Pesh Imam, Advocate Supreme Court with them) instructed by M. A. Rahman, Advocate-on-Record for Appellant. Abdul Hafiz Memon. Advocate-General Sind instructed by Shafiq Ahmad, Advocate-on-Record (present only on 16-3-1972) for Respondent No. 1.

Nemo for Respondent No. 2.

Yahya Bakhtiar, Attorney-General for Pakistan instructed by Masud Akhtar, Advocate-on-Record for Respondent No. 3.

Dates of hearing: 16th, 17th, 18th and 20th to 25th March 1972.

JUDGMENT

HAMOODUR RAHMAN, C. J.-These two appeals, by special leave, have been heard together, as they involve common questions of law.

Criminal Appeal No. 19 of 1972 (Miss Asma Jilani v. Province of Punjab) arises nut of a judgment of a learned Single Judge of the Lahore High Court, dismissing a petition under Article 98 (2) (b) (i) of the Constitution of 1962 filed to question the validity of the detention of the father of the petitioner. Malik Ghulam Jilani, the detenu in this case, eras arrested at Karachi under an order dated the 22nd of December 1971, purported to have been issued in exercise of powers conferred by clause (b) of sub-rule (1) of rule 32 read with rule 213 of the Defence of Pakistan Rules, 1971. This was the order that was originally challenged in the High Court. The High Court admitted the petition for regular hearing and issued notice to the Government of the Punjab for the 31st of December 1971. A day earlier on the 30th of December this order was rescinded and substituted by another order of the same day purported to have been issued by the Martial Law Administrator, Zone 'C', in exercise of the powers said to have been conferred on him by Martial Law Regulation No. 78.

The petition already filed was allowed to be amended on the 31st of December 1'971, by addition of fresh grounds attacking the legality of the second order of detention. When the petition came up for hearing on the lath of January 1972, the Government raised a preliminary objection that the High Court could not assume jurisdiction in the matter, because of the bar contained in the jurisdiction of Courts (Removal of Doubts) Order, 1969, promulgated by the last Martial Law regime.

The High Court relying on an earlier decision of this Court in the case of State v. Dosso (P L D 1958 S C (Pak.) 533) held that the Order of 1969 was a valid and binding law and that, as such, it had no jurisdiction in the matter by reason of the provisions of clause 2 of the abovementioned Order.

Leave was granted in this case to consider : (1) as to whether the doctrine enunciated in the case of State v. Dosso was correct, (2) even if correct, whether the doctrine applied to the facts and circumstances in which Field Marshal Ayub Khan transferred power to General Agha Muhammad Yahya Khan, and (3) if the source of power assumed by General Agha Muhammad Yahya Khan was illegal and unconstitutional then whether all legislative and executive acts done by him including the imposition of Martial Law and the promulgation of Martial Law Regulations and Orders were illegal.

Criminal Appeal No. K-2 of 1972 (Mrs. Zarina Gauhar v. Province of Sind and others) arises out of an order of a High Court dismissing an application under section 497 of the Code of Criminal Procedure read with Article 98 of the Constitution of 1962, challenging the arrest of Mr. Altaf Hussain Gauhar, Editor-in-Chief, Dawn, Karachi, during the night between the 4th and 5th of February 1972, from his house without any warrant and his subsequent detention under an order purported to have been issued by the Martial Law Administrator, Zone 'D' under Martial Law Regulation No. 78. In this case too a Division Bench of the High Court of Sind & Baluchistan sitting at Karachi dismissed the application on the 10th of February 1972, holding that the Court has no jurisdiction to grant relief against Martial Law Orders for substantially the same reasons as were given by the, Lahore High Court in the case of Malik Ghulam Jilani.

Leave was granted by a Bench of this Court sitting at Karachi on the 24th of February 1972, as the petition for leave to appeal raised the same questions of law which had been raised in the petition filed by the daughter of Malik Ghulam Jilani, and the appeal was ordered to be heard at Lahore by the Full Court Along with the appeal in the case of Malik Ghulam Jilani.

Although the main question for decision in these appeals is whether the High Courts had jurisdiction under Article 98 of, the constitution of 1962 to enquire into the validity of the detentions complained of in these cases 9n view of the 'oar created by the provisions of the Jurisdiction of Courts (Removal of Doubts) Order, 1969 (Presidential Order No. 3 of 1969), learned counsel appearing for the appellants have very adroitly analysed the political vicissitudes through which this unfortunate country has passed since 1954 in order to highlight their contention that the successive manoeuvrings for usurpation of power under the pseudonym of Martial Law were neither justified nor valid roe had ever reached the stage of effectiveness to merit the legal recognition that yeas given to them in the case of The Stare, v Dosso.

Mr. Manzoor Qadir appearing for the appellant in Criminal Appeal No. K-2 of 1972 has even gone to the extent of inviting us to lay down, if necessary, new norms and examine the

foundations of the norms themselves in order to determine the nature, scope and content of the "law" in accordance with which we are bound by our oaths to administer justice and according to which a citizen is entitled to demand justice in term" of the solemn undertaking contained in clause (2) of Article 2 of the Constitution, which is as follows:-

(2) In particular--

(a) no action detrimental to the life, liberty, body, reputation or property of ant parson shall be taken except in accordance with law;

(b) no person shall be prevented from, or be hindered in, doing that which is not prohibited by law; and

(c) no person shall be compelled to do that which the law does not require him to do."

But when it was pointed out to him that the problem of defining the "law" has become so engulfed in philosophical perplexities that it was well-nigh impossible to lay down any precise definition of the terra, he contented himself by referring to the definitions givers by the jurists of the American realist school of thought who by and large subscribe to the view that law is that which the Courts recognise as law. He adopts the definition of professor J. C. Gray that "the law of the State or of any organised body of men is composed of the rules which the Courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties". He also Quotes from Salmond on Jurisprudence and George Whitecross Paton's text book on Jurisprudence to show that jurists of other countries too hold the same view.

This may be a perfectly good definition from the legal practitioners' point of view but legal theorists have spent a great deal of time and energy in elucidating the concept of law. Some Continental jurists think of them as dictates of reason, others as commands, yet others would have us believe that whatever is habitually obeyed is law. Even the American jurists are not unanimous. Justice Cardozo snakes an exception in the case of statutes, in so far as they are clear, and precedents which are clearly in point. Jerome Frank on the other hand thinks that Gray's view is not sufficiently radical. The task of a Judge in the circumstances, is not an easy one. But is it necessary for him td define law? Law itself is not a legal concept, for, what is law is really a theoretical question. Conclusions of law do not depend upon the definition of law nor are legal

judgments based on definitions of law and, in fact, as Sir Iver Jennings has said in his Article on the Institutional Theory published in Modern Theories of Law, Oxford University Press, 1933 (page 83) "the task which many writes on Jurisprudence attempt to fulfil in defining law is a futile one"', for, according to him, "law has no definition except in a particular context"

So far as a Judge is concerned, if a definition is necessary, all that he has to see is that the law which he is called upon to administer is made by a person or authority legally competent to make laws and the law is capable of being enforced by the legal machinery. This, in my view, brings in the notion both of legitimacy and efficacy.

It is interesting to note that Dias in his book on Jurisprudence, Third Edition (page 93) describes legislation as "law made deliberately in a set form by an authority, which the Courts have accepted as competent to exercise that function." This brings in, of course, the concept of the legitimacy of laws but in addition to this Dias also thinks that there are other factors such as "adaptability, effectiveness, consonance with morality and the socio-political background", which might influence the Courts in giving recognition to laws, He, however thinks that "effectiveness" is not a condition of the "law-quality" of its enactments or even of itself, because. "the validity of laws and of the law constitutive medium are separate questions." According to him, "the effectiveness of the legislative authority is not a condition of the validity either of laws or even of itself. It is a factor which in time induces the Courts to accept such authority, and it is not the only one." The thesis of Dias is thus the same as that now adopted by the learned counsel; namely, that "the legality of the law-constitutive medium only comes about when the Courts accept, or are made to accept it."

From this it is argued that the power of pronouncing upon the validity of a law is an inherent power vested in the superior Courts as a necessary conmoitant of the judicial power itself and, therefore, any law, which purports to take away that power Itself and seeks to stultify the functioning of the Courts, cannot be recognised as a "law" in the strict juristic sense. It is further pointed out that this principle has also been consistently followed by the superior Courts in this country. Thus in the case of Federation of Pakistan v. Moulvi Tamizuddin Khan (P L D 1955 F C 240) the Federal Court, quite undeterred by the disastrous consequences that were likely to ensue, claimed that it had the right "to expound the law in complete in difference to any popular reaction", even if the result is disaster", and declared a constitutional amendment made by the sovereign Constituent Assembly of Pakistan invalid on the ground that it had not received the assent of the Governor-General, although admittedly the consistent practice of the Constituent Assembly since its inception had been that constitutional provisions enacted by it were not put up for the assent of the Governor-General and no Governor-General had hithertofore objected to this practice. In consequence of this decision it was found that a large number of constitutional enactments of the Constituent Assembly, which had not received the assent of the Governor-General, were likely to become invalid. The Governor-General, therefore, sought to

validate such acts by indicating his assent with retrospective effect by means of an Ordinance called the Emergency Powers Ordinance No. 9 of 1955. The Federal Court again in the case of Yusuf Patel v. The Crown (P L D 1955 F C 387) declared the Emergency Powers Ordinance itself to be invalid, as the Governor-General was not, under the Independence Act, an authority competent to legislate in the constitutional field which was the exclusive reserve of the Constituent Assembly.

The disaster, which was apprehended in the case of Moulvi Tamizuddin Khan, had occurred. The Governor-General had unconstitutionally dissolved the Constituent Assembly. Proceedings taken to question the validity of the Governor-General's action by invoking the jurisdiction of the High Court under section 223-A of the Government of India Act were held to be incompetent, because, that section itself had been incorporated in the Government of India Act by a resolution of the Constituent Assembly which had not, according to the practice up to that time prevailing, been formally put up for the assent of the Governor-General, though tacitly accepted and acted upon in a large number of cases. Thereafter when the Governor-General attempted to validate a vast body of such constitutional legislations, which had been passed between 1947 and 1954, retrospectively by an Ordinance, the Ordinance itself was struck down. In desperation the Governor-General in his turn invoked the advisory jurisdiction of the Federal Court under section 213 of the Government of India Act vide Governor-General's Reference No. 1 of 1955 (P L D 1955 F C 435), and asked the Court to find a solution for the "constitutional" impasse created by the judgments of the Court itself. The Federal Court again came to his rescue and although no "law" of any kind could be found to meet the situation, it invoked in aid "the supreme principle of necessity embodied in the maxim salus populi est suprema lex", and on the basis thereof evolved a new political formula for the setting up of a new Constituent Assembly, even though this very maxim when used in support of the contention of Moulvi Tamizuddin Khan that the invalidation of a large number of constitutional laws merely on the ground of want of formal assent of the Governor-General would cause "disaster" and create a "Constitutional impasse" had not found favour with the Court.

The object of the learned counsel in referring to these decisions is presumably to suggest that from this day onwards whatever constitutional developments took place were not strictly legal. The 1956-Constitution, under which the principle of parity was accepted and the country was divided into two Provinces of East and West Pakistan, was, it is alleged, a Constitution framed by an illegally constituted body which was, under the threat of refusal of assent, also coerced into electing General Iskander Mirza as the first President of Pakistan under the Constitution. The process of illegality thus set in motion led in its turn to the illegal usurpation of power by the President so elected under the said Constitution abrogating the Constitution and declaring Martial Law on the 7th of October 1958. This was followed three days later by the promulgation of the Laws (Continuance in Force) Order on the 10th of October 1958.

Within a few days thereafter a case which has now become a cause celebre under the title of the State v. Dosso, came up for hearing on the 13th of October 1958. The main question agitated there was as to whether the proceedings, which were for a writ of habeas corpus and/or certiorari had abated by reason of the provisions of the. Laws (Continuance in Force) Order, 1958. The Court on the very next day, i. e. the 14th of October 1958, announced its decision that they had abated but when giving its reasons for the decision on the 23rd of October 1958, went on also to accord legal recognition to the Martial Law itself by describing it as a successful revolution and, therefore, a fresh law creating organ. The very next day, however, the new law creator himself, who had purported to give the Laws (Continuance in Force) Order, 1958 under his command and the authority of the Martial Law proclaimed by him, was deposed by the Chief Administrator of Martial Law created in exercise of the same power. The latter subsequently, without creating any new organic law, quietly assumed the office of President also and continued to function as such until 1960 when he managed to secure a so-called mandate by some sort of a referendum to frame a Constitution. This Constitution was framed by him and came into operation from the 7th of June 1962. The country by and large accepted this Constitution and even the Judges took oath under the fresh Constitution. Two Presidential elections were held under this Constitution, the erstwhile Commander-in-Chief was elected on both occasions. National and Provincial Assemblies were set up and the country continued to be governed in accordance with its terms until the 25th of March 1969.

The Courts in the country also gave full effect to this Constitution and adjudicated upon the rights and duties of citizen in accordance with the terms thereof by recognizing this Law constitutive medium as a competent authority to exercise that function as also enforced the laws created by that medium in a number of cases. (Vide Mr. Fazlul Qadir Chowuhury and others v. Mr. Muhammad Abdul Haque (P L D 1963 S C 486). Syed Abut A'ala Maudoodi and another v. The Government of West Pakistan and another (P L D 1964 S C 673), The Government of East Pakistan v. Mrs. Roshan Bijoy Shaukat Ali Khan (P L D 1966 S C 286), Malik Ghulam Jilani v. The Government of West Pakistan and another (P L D 1967 S C 373) and The Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri (P L D 1969 S C 14).

Thus even according to the arguments advanced by the learned counsel appearing for the appellants all the laws made and acts done by the various Governments, civil and military, became lawful and valid by reason of the recognition given to them by the new Constitution and the Courts. They had not only de facto validity but also acquired de jure validity by reason of the unquestioned recognition extended to them by the Court of highest jurisdiction in the country. The validity of the acts done thereunder are no longer, therefore, open to challenge, even under the concept of law propounded by the realist school of jurists and adopted by the learned counsel for the appellants.

The question, however, with which we are now concerned is whether we should extend similar recognition on the basis of the principle enunciated in the case of State v. Dosso to what happened on and after the 25th of March 1969, and recognise as valid laws the Jurisdiction of Courts (Removal of Doubts) Order, 1969 (President's Order No. 3 of 1969), which purports to takeaway even our power to consider this question, and the Martial Law Regulation No. 78 promulgated on the 17th of April 1971, under which the detenus before us are now being detained.

In the above-mentioned case, as already pointed out, the question which fall to be determined was as to whether the writs issued by the High Court had abated by reason of the provisions of clause (7) of Article 2 of the Laws (Continuance in Force) Order promulgated on the 10th of October 1958, after the abrogation of the 1956-Constitution and the declaration of Martial Law by the then President, the late Mr. Iskander Mirza. From the report of the judgment in Dosso's case it does not appear that the question of the validity of the abrogation of the Constitution, or of the promulgation of Martial Law or of the Laws (Continuance in Force) Order, 1958, was directly put in issue. The learned Attorney-General, who then appeared for one of the respondents therein, has categorically stated from the Bar that he was not even allowed to raise this question. This Court, nevertheless, entered upon an appraisal of the constitutional position and purporting to apply the doctrine of "legal positivism" propounded by Hans Kelsen, came to the conclusion that where "a Constitution and the national legal order under fit is disrupted by an abrupt political change not within the contemplation of the Constitution", then such a change "is called a revolution and its legal effect Is not only the destruction of the existing Constitution but also the validity of the national legal order." Therefore any change, no matter how or by whom brought about, whether by violence or non-violent coup d'etat or even by a person already in a public position, is "in law a revolution if it annuls the Constitution and the annulment is effective". (The underlining is mine). Under this theory it was held that if persons assuming power under such a change "can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact, because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to Its own success." Thus the validity of the laws made thereafter has to be judged by reference to the new dispensation and not the annulled Constitution. This theory was further sought to be fortified on the basis that even according to the international law "a victorious revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution."

Learned counsel appearing in support of the appellants as also the learned counsel who have assisted the Court as amicii curiae have challenged the correctness of this theory and have contended that no such wide proposition had been propounded by Hans Kelsen and even if it had been it would be the solitary view of Hans Kelsen which has not been subscribed to by any other legal theorist. Indeed, it has been pointed out that Professor Lauterpacht in his Article on Kelsen's Pure Science of Law published in the Modern Theories of Law, Oxford University Press, 1933, goes to the extent of describing Kelsen as "an iconoclast" amongst jurists. In any event, it is contended that the Court in Dosso's case went even beyond Kelsen himself and the theory propounded by this Court actually amounts to making a rule of international law a rule of

decision in the field of municipal law. The learned Chief Justice who delivered the main judgment of the majority comprising the Court, it is urged, was fully aware that, even according to Kelsen, "the essential condition to determine whether a Constitution has been annulled is the efficacy of the change" but did not wait to see whether that efficacy had, in fact, been attained by the change to which he was giving legal recognition. The case, it is further pointed out, was heard and decided within six days of the promulgation of the Martial Law and within three days of the promulgation of the Laws (Continuance in Force) Order. It was too early yet to hazard even a guess as to its efficacy. Indeed had the learned Chief Justice waited a few more days he would have seen that the efficacy was non-existent. This was more than amply demonstrated by the removal of the so-called successful law-creator himself the very next day after the publication of the judgment of the Court. Where then, it is said, was "the essential condition" for the recognition of the change ?

On general principles too learned counsel have attempted to show that the theory of Hans Kelsen was itself not sound in several respects and the criticisms levelled against his doctrines were so forceful that he himself had been compelled later to modify his views.

The learned Attorney-General appearing for the State has made no serious attempt to support the reasonings in Dosso's case or to justify the theories of Hans Kelsen apart from referring to one or two passages from some other jurists who too had apparently advanced the view that the de facto sovereign may, in certain circumstances, also be treated as the de jure sovereign but what he has most strenuously contended is that the law laid down in Dosso's case has now become the law of the land. It has been re-armed in various subsequent decisions and thus acquired a position which cannot be now reversed after 13 years. The decision in Dosso's case is now, according to him, the legal order and that has to be followed. He has also invoked in aid the principle of stare decisis to support his contention that the law laid down in that case should not now be changed.

It is true that the decision in Dosso's case did come up for consideration subsequently in several other cases and the Court re-affirmed its decision. The first of these was the case of the Province of East Pakistan v. Muhammad Mehdi Ali Khan (P L D 1959 S C (Pak.) 387) and it may be worth while to quote what the learned Chief Justice himself stated with regard thereto :-

"I may now take up the question whether there are sufficient grounds for reviewing or revising the view taken by this Court in the case of Dosso. In approaching that question the first thing to be seen is what that case actually decides. In the judgment that was under appeal in that case some provisions of the Frontier Crimes Regulation had been held to be void because of their being inconsistent with a fundamental right and, before the appeal came up for hearing, the Laws (Continuance in Force) Order was promulgated by the President. The Court held that after the

coming into force of that Order no law could be declared or held to be void merely because it came into conflict with a fundamental right and that all pending applications for writs in which a law by reason of Part II of the Constitution had to be found to be void in order to grant the relief prayed for by a party had abated by force of clause (7) of Article 2 of that Order. The Court arrived at this result by reading Article 2(4) with Article 4(1) of the Order and by holding that after the promulgation of that Order Part 11 of the late Constitution had ceased to be available to adjudge the invalidity of the laws that were in force immediately before the Proclamation. The matter had not then been so fully and ably argued as now, but despite the ingenious and at times far-fetched arguments addressed, I am convinced more than before that case was rightly decided."

It will be observed from the above that the question of the validity of the Laws (Continuance in Force) Order, 1958, itself was not directly under challenge in Dosso's case but what was being contended there was that, in spite of the said Order, "all pending applications for writs, in which a law by reason of Part 11 of the Constitution (1956) had to be found to be void in order to grant the relief prayed for by a party, had abated by force of clause (7) of Article 2 of that Order.

The Court, as has been pointed out by the learned Attorney-General himself who appeared on behalf of one of the respondents in that case, in fact, proceeded on the assumption that the Laws (Continuance in Force) Order was a valid law and heard no arguments challenging the validity of the said Order itself. The observations in that judgment, based upon the theory of Hans Kelsen were, therefore, more in the nature of obiter dicta.

Dosso's case next came up for consideration again in the case of Ifiikharuddin and another v. Muhammad Sarfaraz and another (P L D 1961 S C 585=(1962) 2 P S C R 197). There too the propriety of an Order passed under Martial Law Regulation No. 72 was called in question and the Government pleaded immunity to jurisdiction. Again, the vires of the Laws (Continuance in Force) Order was not put in issue but all that was contended was as to whether the word "governed" referred to in that Order included also the legislative functions of Government. The Court by a majority judgment differed from the majority in Dosso's case and held that it was unable to agree that the words "all laws" referred to In that Order did not include the Constitution or so much of it as had been re-introduced by the Laws (Continuance in Force) Order. The majority judgment with which I concurred, observed :-

"The correct position is that in Article 2 of the Laws (Continuance in Force) Order, the Constitution had already been adopted, though with some modifications, but with a different status, and by Article 4 a provision was being made of a different category with respect to all other sub-constitutional laws. Read in this way, there is no inconsistency whatsoever between

the two Articles as was suggested in Dosso's case. As a matter of fact, it is only if we adopt the construction put upon Article 4 in Dosso's case that an inconsistency between Article 4 and Article 2 is created and it is an accepted principle that we should lean in favour of a construction that puts a consistent interpretation on the different parts of a statute."

S. A. Rahman, J. who wrote a separate judgment, although he concurred in the order proposed by the majority, too observed as follows:-

"In Dosso's case, the actual decision of this Court was that fundamental rights as embodied in Chapter II of the late Constitution, were no longer part of the law of the land, after the promulgation of the Laws (Continuance in Force) Order, 1958. That question does not fall for determination in the instant case, in the face of the pre-emptory provisions of the Martial Law Regulation No. 72 and the fact that the vires of the Ordinance No. XXIII of 1959 are not being assailed before us. The question is an important one and not free from difficulty. We did not bear the learned Attorney-General fully, on this aspect of the case and if Dosso's case requires re-consideration, in this respect, the question must be reserved for decision for a more appropriate occasion.

Some doubts had. therefore, begun to be cast by the Supreme Court, as then constituted, on the correctness of the decision in Dosso's cave even from 1961, but unfortunately this question was not brought before this Court in the same concrete form in which it has now come before us, by any one and since this Court like the Supreme Court of the United States of America strictly confines itself, as observed by Muhammad Munir. C. 1. himself in the case of the Province of East Pakistan . v. Mehdi All Khan, at page 407, "to pronounce for or against the litigated right or liability by determination of the law applicable to the facts though its decision may have repercussions on a statute or a part of it in respect of future cases," the occasion to reconsider the decision in Dosso's case never arose.

The Courts do not decide abstract hypothetical or contingent questions or give mere declarations in the air. "The determination of an abstract question of constitutional law divorced from the concrete facts of a case", as observed by the same learned Chief Justice, "floats in an atmosphere of unreality; it is a determination in vacuo and unless it amounts to a decision settling rights and obligations of the parties before the Court it is not an instance of the exercise of judicial power."

There is no duty cast on the Courts to enter upon purely academic exercises or to pronounce upon hypothetical questions. The Court's judicial function is to adjudicate upon a real and present

controversy which is formally raised before it by a litigant. If the litigant does not choose to raise a question, however, important it might be, it is not. for the Court to raise it sue motu. The matter thus remained where it was to this day, as no one raised the question before the Court.

The learned Attorney-General has placed very strong reliance upon a decision of this Court in the case of Muhammad Afzal v. The Commissioner, Lahore Division (P L D 1961 S C 401). in which the main judgment was written by myself, to support his contention that I too had given my clear approval to the derision in Dosso's case. Again, the question that arose fur decision in that case was as to whether Martial Law Orders issued by a Zonal Martial Law Administrator, which purported to make provisions inconsistent with the provisions of the Constitution of 1956 and other existing laws, were of any legal effect and could validly take away the rights of citizens acquired under the latter provisions. The main argument was built up again upon the language of Articles 2 and 4 of the Laws (Continuance in Force) Order without challenging the validity of the said Order itself and this Court held the impugned Martial Law Orders to be incompetent to the extent they were repugnant to the existing laws, even under the Scheme of the Laws (Continuance in Force) Order, 1958, and it is in that ,connection that I stated as follows:-

"If as observed in the majority judgment of this Court in the case of the State v. Dosso and another, a successful revolution is an internationally recognised legal method of changing a Constitution and that the revolution itself constitutes a new law creating organ whose will thenceforward becomes the law, then did not the Laws (Continuance in Force) Order, 1958, which was the expressed will of the Revolution of October 1958, become thenceforward the fundamental law of the country and an instrument of a constitutional nature for both the law-giver as well as those who were to be governed in accordance with its terms?"

It will be noticed that this passage begins with the important word "if" and by no means constitutes an unqualified acceptance of the principles enunciated in Dosso's case. Indeed it was not necessary for me in that case to pronounce upon the validity or ,the invalidity of the Laws (Continuance in Force) Order because all that I was attempting to do in that case was to take advantage of the principle enunciated in Dosso's case and put the Martial Law Administrator himself within the "straight jacket" of his own legal order which Dosso's case stated that he had created, and it was on that basis that I held that within the framework of that legal order itself "the law-giver" himself was bound, if it was a legal order and, therefore, he could not act outside that legal framework. It is not correct, therefore, to say that I too gave my apps oval to the majority decision in Dosso's case.

We come next to the case of Ch. Tanbir Ahmad Siddiky v. Government of East Pakistan (PLD 1968 S C 185), on which the learned Attorney-General has placed strong reliance, for showing

that by now the rule in Dosso's case had become so firmly entrenched as to acquire the status of a stare decisis. He quotes the observations of Cornelius, C. J. which are as follows:

"The pronouncement of the Supreme Court that writs for enforcement of the Fundamental Rights under the 1956-Constitution were not competent by reason of the Laws Continuance in Force) Order, was an interpretation of that Order, which bad effect as a part of that Order. To put it differently, that legal pronouncement became a part of Martial Law and had the effect that throughout the period that Martial Law was in operation, a period of over 3½ years during which an enormous number of executive actions were performed on the basis of laws of origin prior to the Martial Law as well as of laws made during the period of Martial Law, all in the belief sustained by the view of the Supreme Court that such actions were immune to challenge on the basis of Fundamental Rights in the Constitution of 1956.

To hold to the contrary today, if that were possible, would have the effect of disturbing a great many things done during the period of Martial Law, affecting individuals and institutions and in certain cases the whole of a Province, which things were valid in the period they were done, and have formed the basis of further actions by the authorities as well as by the citizens concerned. The period of Martial Law was governed by its own source of law, namely,- the Revolution of the 7th October 1958, and the actions that were done and brought to completion in that period, in compliance with laws derived from the said source are all covered by the Martial Law of which the decision in the case of Dosso, as confirmed in the case of Mehdi Ali Khan, was an essential part. The principle of stare decisis can have no more direct application than to the judicial interpretation of a major instrument by which the governance of an entire country was controlled during a limited period, and within the terminal points of that period. On general grounds, therefore, it is not open to this Court to, review its decision in the case of Dosso."

In this case again the only question argued was that fundamental rights had become unenforceable by reason of the provisions of the Laws (Continuance in Force) Order, 1958. The validity of the Laws (Continuance in Force) Order itself was not challenged but only the correctness of the interpretation given to its terms in Dosso's case was sought to be re-agitated. It is only in this connection that the learned Chief Justice thought that the principles of stare decisis could be legitimately applied to the interpretation given by the Supreme Court to the provisions of the said Order.

What then is this principle of stare decisis and does it apply to this Court?-Learned counsel appearing for the appellants as well as the learned counsel appearing as amicii curiae have, of course, contended that the principle is not applicable to this Court which is not bound by its earlier decisions. Indeed, they contend that the Constitution of 1962 and even the earlier

Constitution of 1956 had specifically provided in conformity with the universally accepted principle that the Court of ultimate jurisdiction must always have the power to review its own decisions (vide Article 62 of the 1962-Constitution). Even otherwise it is contended that the rule of stare decisis is merely a rule of expediency and not "a universal inexorable command". It has many exceptions to it, for, the doctrine cannot be allowed to become a "dead hand" nor should the law be submerged in "still waters in which there are only stagnation and depth." It is further pointed out that even the House of Lords of the United Kingdom has now recognised the wisdom underlying the freedom from the binding force of precedents In the case of Courts of ultimate jurisdiction. It no longer adheres to this rule and has altered its former practice under which it considered itself bound by its earlier decisions. [Vide (1966) 1 W L R 1234].

I am not unmindful of the importance of this doctrine but in spite of a Judge's fondness for the written word and his normal inclination to adhere to prior precedents I cannot fail to recognise that 9t is equally important to remember that there is need for flexibility in the application of this rule, for law cannot stand still nor can we become mere slaves of precedents.

As observed in Halsbury's Laws of England, Third Edition, Volume 22 at page 802, paragraph 1690, "the supreme appellate Court will, however, not shrink from overruling a decision, or series of decisions, which establish a doctrine plainly outside a statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing be altered by the remedy of a mistake; and, where the course of practice is founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes, at any rate that tribunal, from correcting the error, although the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless the House of Lords can say positively that it is wrong and productive of inconvenience."

To more or less the same effect is the principle enunciated in the Corpus Juris Secundum, Volume 21, paragraph 193, in these words :-

"The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case, but its application must be determined in each case by the discretion of the Court, and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong be the result . . . . . The doctrine of stare decisis cannot be invoked to sustain, as authority, a decision which is in conflict with the provisions of the state Constitution; or a decision which is in conflict with a previous statutory enactment to which the decision makes no reference, and. which is made without reviewing or construing the statute, and in such a case the statute should be followed rather than the, decision . . . . . "

Again at paragraph 215 it is opined that-

"the doctrine of stare decisis cannot control questions involving the construction and interpretation of the organic law at least where no rule of property is involved, or at least that the doctrine does not apply with the same force to decisions on constitutional questions as to other decisions, and while previous decisions will not be entirely disregarded and, may, in case of doubt, control the views of the Court, they will be considered merely as authorities tending to aid in arriving at a proper conclusion, and not as a rule to be followed without inquiry."

It will thus be seen that the rule of stare decisis does not apply with the same strictness in criminal, fiscal and constitutional matters where the liberty of the subject is involved or some other grave injustice is likely to occur by strict adherence to the rule.

Following this principle the House of Lords of the United Kingdom in the case of the Governors of the Campbell College Belfast v. Commissioner of Valuation for Northern Ireland ((1964) 2 A E R 705) set aside a decision which had held the field in Northern Ireland for 50 years by ruling that "the doctrine of stare decisis had but little application " in a case of a fiscal nature, where the decision "was plainly wrong, and had not been supported before the House."

That was a case of an interpretation of a fiscal provision which bad been followed throughout those 50 years and on the "faith of which businessmen and women, settlors and donors, may have made their dispositions" but even so the noble Lords felt that there was an equally important principle which, should not be overlooked, namely, that "where taxes or rates had been illegally demanded and paid on a clearly wrong construction of a statute justice demands that the illegal impost, however innocently made, should be terminated unless there is some very good reason to the contrary."

Similarly in the case of the Attorney-General of the Commonwealth of Australia v. Reginam and others ((1957) 2 A E R 45 (P C)) the Privy Council reversed a decision given in 1918 by the High Court of Australia in the case of Waterside Workers Federation v. Alexander (25 C L R 434), although they were conscious of the fact that "no one can doubt that it is a formidable question, why for a quarter of a century no litigant has attacked the validity of this obviously illegitimate union?--Why in Alexander's case itself was no challenge made?-How came it that in a series of cases, which were enumerated in the majority and the dissensient judgments, it was

assumed without question that the provisions now impugned were valid?" Notwithstanding this, they felt that whatever the reason may be "the question of the applicability of the doctrine of stare decisis to matters of far-reaching constitutional importance" would require consideration of the High Court of Australia itself. Thus indicating that the High Court of Australia might in view of the patent illegality discovered by the Judicial Committee itself wish to reconsider its decision in Alexander's case.

Upon these principles it has become necessary for me now to consider whether the wide principle enunciated in Dosso's case is so "plainly wrong" that it can be said to be "totally unsustainable", because, otherwise, in view of the high esteem I have and have always had for the profound legal learning and sound judgment of the learned author of the main opinion in Dosso's case I would not venture to depart from his views.

Learned counsel appearing for the appellants as well as the learned counsel appearing as amicii curiae have assailed this decision on a number of grounds. Mr. Manzoor Qadir has confined himself to saying that the legal theory of Hans Kelsen was misread and misapplied, because, the revolution contemplated by Kelsen was a revolution which completely disintegrated the old legal order and brought about a permanent ,transformation in the new body politic. Temporary or transitory changes were not even upon Kelsen's own principles, which clearly postulated the condition of efficacy of the change as a necessary test, qualified to be classed in the category of a revolution.

Mr. Anwar rejects the theory off-hand as being totally unacceptable. According to him, if any grund-norm was necessary for Pakistan it was to be found in the Objectives Resolution of 1954 which is a document which still holds the field and each of the successive regimes has attempted to justify its action on the ground that whatever was happening in the country when it took over was an attempt to subvert those very objectives and it had to step in merely to bring the country back on the rails by fulfilling those objectives.

Mr. Brohi is of the view that the fallacy underlying the decision in Dosso's case lies in the fact that it has accepted a purely legal theory of law as a question of law itself, although it was nothing more than "a question about law" and no legal judgment could possibly be based on such a purely hypothetical proposition. He is further of the view that the Court in making the impugned observations proceeded clearly upon the assumption that (a) the revolution, if any, had succeeded and (b) that its own authority was derived from the Laws (Continuance in Force) Order. Both these assumptions were wrong. The question as to whether the revolution, if any, had in fact succeeded in creating an effective legal order was a question of fact and had to be decided as

such objectively. It was not even gone into. The decision was, therefore, purely an ad hoc decision, which cannot be treated as binding.

Mr. Sharifuddin Peerzada, on the other hand. attacks the decision on a number of grounds which may be summarised as follows ;

(1) The decision was given in haste and against the principles .of natural justice, because, no opportunity at all was given to learned counsel appearing for the respondents to argue the contrary.

(2) The decision was vitiated by bias at least in the learned Chief Justice who, as he himself has subsequently disclosed, had a hand in the drafting of the Laws (Continuance in Force) Order (vide Article of the learned Chief Justice published in the Pakistan Times newspaper on the 11th of November 1968). It is contended that he should not have sat on this Bench, as he had already committed himself to granting legal recognition to the Regime and its Laws (Continuance in Force) Order.

(3) Being a Municipal Court it should not have made a rule of international law regarding recognition of States the basis of its decision.

(4) The Court's interpretation of Kelsen's doctrine was absolutely incorrect.

(5) In any event, the theory of Kelsen is not a universally accepted theory and should not have been applied to the circumstances then prevailing in Pakistan.

(6) The doctrine of necessity as a validating factor was not even noticed.

The learned Attorney-General, as earlier indicated, has made no serious attempt either to justify the correctness of this decision or to controvert that whatever was done by either late Iskander Mirza or Field Marshal Ayub Khan was proper and legal. Indeed, he has dubbed them both as

"usurpers" and even gone to the extent of characterising Governor-General late Ghulam Mohammad as the first "Guy Fawkes of Pakistan" but his main contention has been that whatever the merits or demerits of their vagaries Dosso's case had given them legal recognition and that being now the law of the land propounded by the highest Judicial authority and consistently recognised thereafter must prevail, no matter whether it "amounts to an invitation to revolution" or "serves as an encouragement to military adventurers" or "sounds the death-knell of the rule of law", as suggested by learned counsel on the other side.

The learned Attorney-General vigorously maintains that it makes no difference, for, it is now too firmly established to be altered or departed from whether it be on the principle of "stare decisis", as observed by Cornelius, C. J. in the case of Tanvir Ahmed, or upon general principles. Hans Kelsen, it is furthermore contend ed, is not the only legal theorist who thought that the de facto sovereign can also be regarded in the juridical concept as also the de jute sovereign in certain circumstances. He too supports the theory that an "abrupt disruption of a legal order" may well be characterised as a revolution, no matter what the motive or the means employed, peaceful or violent, if it in fact annuls the existing order and "the annulment is effective." He quotes a passage from Harold, J. Laski's book on the State in Theory and practice (page 27) to show that the latter too held the view that those "who control the use of the Armed Forces of the State are in fact the masters of its sovereignty."

Similarly he cites from Garner's Treaties on Political Science and Government (page 155) to maintain that the "sovereign who succeeds in maintaining his power usually becomes in the course of time the legal sovereign . . . . . somewhat as actual possession in private law ripens into legal ownership through prescription."

G. C. Field's Lectures on Political Theory (pages 74-75) are also referred to by the learned Attorney-General to point out that "legal sovereignty is not a separate thing which can be conferred or constituted in a different way from other kinds of sovereignty. Sovereignty, in any sense, is constituted by consent, the development of the habit of obedience, and by that alone."

He has also utilized some observations of Dean Roscoe Pound from his magnum opus on Jurisprudence (Vol. 11, Part 3, page 305), where it has been opined that "in case of an ultimately successful insurrection the Courts deriving from it would uphold acts of the insurgents from the beginning and Courts of other countries would do the same"

He has also recounted the story of the American General Cadwaladar, who had flouted Chief Justice Taney and refused to respond to the writ of habeas corpus issued by him. This action of the General was, it is said, supported even by President Lincoln on the ground that due to the state of insurrection then prevailing in the Southern States the President had lawfully authorized the General to suspend the writ of habeas corpus. The Chief Justice questioned the right of the President to do so. The President instead of replying to the Chief Justice referred the matter to the Congress which, after considerable deliberations. "begrudgingly", approved the President's proclamation, out of the high esteem it had for the President, and legalised his suspension of the writ. But soon thereafter, realizing the danger of the abuse of that power, passed another law adding provisos to the power of the President to suspend the writ of habeas corpus even in times of war. Under these provisos even In times of war the army officers in charge of prisoners were required to supply a list of all non-military persons held in detention in military prison to a civilian Court and they could detain them only until the next civilian grand jury met in the local Court House of that area. If the grand jury did not indict such a detained person then the local Civil Judge could order the military authorities to bring the man before the Court for hearing and discharge. (Vide Fribourg's Supreme Court in American History, pages 76-82).

While I must compliment the learned Attorney-General for his great industry in discovering these extracts, T regret I cannot agree with him that they in any way, support the broad principle sought to be adumbrated by him. With due respect to the learned Attorney-General I must point out that the passages quoted by him do not, when read in their proper context convey the sense which he wishes to put upon them. The theory that Herold Laski was putting forward was merely this that every State and every Government must have, of necessity, the legal power to use the armed forces of the State whenever its authority is threatened. Where it cannot do so "it must either change the law or abdicate". The purpose here sought to be pointed out was that "the armed forces of the State are there to protect, so far as may be, its sovereignty from invasion" and "it is the possession of this legal right to resort to coercion which distinguishes the Government of the State from the Government of all other associations". Professor Herold Laski was by no means advocating the theory that the Commander-in-Chief of the country who, in fact controls "the use of the armed forces", is in the ultimate resort the real master of the sovereignty of the State. On the other hand, Laski's thesis appears to me to be that the control of the armed forces of the State is an essential element of the sovereignty of the State and that the armed forces are under the command of the State. Once the State loses that command it becomes ineffective and must either then change the law or abdicate.

Similarly, the passage read from Garner's Political Science and Government occurs in a paragraph which bears the sub-heading of "de jure sovereignty". It begins with these very significant words, namely, that "de jure sovereignty on the other hand has its foundation in law, not in physical power alone and, the person or body of persons by whom it is exercised can always show s legal right to rule". It is in this context that he propounded the theory that even a sovereign in actual control must show a legal right to rule, i. e. his "physical power and mastery ought for rest upon legal rights" and not that legal rights depends upon physical power and

mastery. The de facto sovereign, according to Garner, could become de jure only "by election or ratification'" by the people. The physical force that he possesses can never by itself give him the legal right to convert his de facto claim into a de jure claim. It ii not also unimportant that the paragraph in question from which the citation has been made by the learned Attorney-General closes with these meaningful words:-

"There is, as Bryce well observed, a natural and instinctive opposition to submission to power which rests only on force."

G. C. Field also was only propounding the proposition that actual or de facto sovereignty becomes de jure by "consent and the development of the habit of obedience", and by that alone. "We begin", says Field, "to talk about legal sovereignty only when this habit has been definitely established."

Roscoe Pound, as is well known, thinks of the sovereign as "that particular organ or that complex or system of organs, which exercises its (State's) governmental functions" and with regard to civil war it is interesting to note that what he has to say is as follows:-

"A body of citizens may throw off their legal subjection for the time being and set up a new de facto internal sovereignty.. But if the insurgents are put down, the legal subjection is treated as uninterrupted. So one may be subject in law and yet not in fact. The law would hold him a subject, and yet he may have thrown off for a time his habitual obedience."

Internal sovereignty, according to him, therefore, is the aggregate of the powers of internal control possessed by the ruling organs of the society and under the American system he thinks that the sovereign is the ultimate repository of power", which can change the Constitution.

None of the learned authors cited, therefore, support the" proposition of the learned Attorney-General and it seems to ma that the farthest that these learned authors have gone is to expound that where a de facto sovereign has, in fact, got his position confirmed by an election or ratified by the people by habitual obedience over a sufficiently long period of time there alone he can claim to have acquired de jure sovereignty as well.

Let me now take up for consideration the criticisms levelled against the principles propounded in the judgment of the then learned Chief Justice in Dosso's case at pages 538 to 540. For this purpose I shall assume (without admitting) that the impugned observations were not merely obiter dicta, even though after reading the whole judgment with great care I regret that I have not been able to discover therein any reference to any argument advanced on behalf of the respondents with regard to the vires of the Laws (Continuance in Force) Order, 1958, itself. All that I have been able to discover is that it was sought to be contended that even under its provisions the fundamental rights given by the Constitution of 1956 to the citizens of this country still survived, particularly since the said Order was not given retrospective operation. Great reliance was also placed on the provisions of Article 2 of the said Order which, it was contended, had saved the -fundamental rights by providing "that Pakistan shall be governed as nearly as may be fn accordance with the late Constitution". The learned Attorney-General who, as already stated, appeared for one of the respondents in the said case, has also corroborated the criticism and stated at the Bar of this Court that he was not allowed to argue this particular question. It also appears that there is no finding in this judgment as regards the effectiveness of the new regime. The criticism, therefore, that the Court started with certain assumptions does not appear to be wholly unjustified.

As I have indicated earlier, Martial Law was imposed and the Constitution was abrogated by the then, President who had himself been appointed under the Constitution of 195-6, on the 7th of October 1958, and it was be who by his Proclamation of' the 7th of October 1958, abrogated the Constitution, dismissed the Central and Provincial Governments, dissolved the National Parliament and Provincial Assemblies, abolished all political parties, provided that until alternative arrangements are made Pakistan will come under Martial Law and appointed the then Commander-in-Chief of the Army as the Chief Martial Law Administrator. This Proclamation was made in his capacity as President and Head of the State by invoking in aid his "foremost duty before God and the people of Pakistan to maintain the integrity of Pakistan". Under this Order, therefore, he continued as President and in that capacity on the 10th of October 1958, issued the Laws (Continuance in Force) Order, 1958. Article 2 of this Order reads as follows :-

"2(1) Notwithstanding the abrogation of the Constitution of the 23rd March 1956, hereinafter referred to as the late Constitution, by the Proclamation and subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law the Republic, to be known henceforward as Pakistan, shall be governed as nearly as may be in accordance with the late Constitution.

(2) Subject as aforesaid all Courts in existence immediately before the Proclamation shall continue in being and, subject.. further to the provisions of this Order, in their powers and. jurisdictions.

(3) The law declared by the Supreme Court shall be binding on all Courts in Pakistan.

(4) The Supreme Court and the High Courts shall have power to issue the writs of habeas corpus, mandamus, prohibition, quo warrant.. and certiorari.

(5) No writ shall be issued against the Chief Administrator of Martial Law, or the Deputy Chief Administer-for of Martial Law, or any person exercising powers or jurisdiction under the authority of either.

(6) Where a writ has been sought against an authority which has been succeeded by an authority mentioned in the preceding clause, and the writ sought is a writ provided for in clause (4) of this Article, the Court notwithstanding that no writ may be issued against an authority so mentioned may send to that authority its opinion on a question of law raised.

(7) All orders and judgments made or given by the Supreme Court between the Proclamation and the promulgation of this Order are hereby declared valid and binding on all Courts and authorities in Pakistan, but saving those orders and judgments no writ or order for a writ issued or made after the Proclamation shall have effect unless it is provided for by this Order, and all applications and proceedings in respect of any writ which is not so provided for shall abate forthwith."

It will be observed that under these provisions there was no bar to the issuance of a writ of the kinds mentioned in clause (4) against any person exercising power or jurisdiction under the authority of the President, who was a distinct and separate superior functionary from the Chief Martial Law Administrator. The absolute bar was only to the issuance of writs against "the Chief Administrator of Martial Law or the Deputy Chief Administrator of Martial Law or any person exercising powers and jurisdiction under the authority of either". Under clause (7) the judgments of the Courts already given in writ matters were declared to be valid and binding on all Courts and authorities but with regard to future orders a bar was provided unless the writ was of a kind which had been provided for by the Order itself, and applications and proceedings in respect of any writ which was not so provided for in the Order, were to abate.

In Dosso's case the respondents had applied to the High Court for writs of habeas corpus and certiorari for quashing certain orders issued by the Deputy Commissioner referring certain cases pending against the respondents therein for trial before the Council-of-Elders (Special Jirga) and for their release from detention. The High Court had granted them those reliefs and appeals against the said orders filed in the Supreme Court by the State were pending decision. The writs, therefore, were of the nature which were permitted by clause (4) of Article 2 of the Laws (Continuance in Force) Order, 1958, and were certainly not directed against either the Chief Administrator of Martial Law or the Deputy Chief Administrator of Martial Law or any person exercising powers and jurisdiction under the authority of either. Nevertheless, the Court held that by reason of the provisions of clause (7) of Article 2 all those writs had abated.

If the question of the vires of the Laws (Continuance in .Fore) Order or the validity of the imposition of the Martial Law had not been raised, it was not necessary for the Court to give a certificate of validity in that behalf, but the Court thought fit to do so without even noticing that under the theory pronounced by Hans Kelsen himself efficacy was a pre-condition to the validity of the acts of a de facto sovereign. There is nothing in any law or either in Kelsen's book to show that this decision is of a purely subjective nature or that this too depends upon :he will of the de facto holder of power. In the circumstances .vas it not incumbent upon the Court to decide this question Objectively before pronouncing that the de facto holder of power had also become the de jure sovereign and a proper law-creating agency. Into this exercise the Court, unfortunately, did no enter. The criticism, therefore, that the Court started with the basic assumption that the President, who had usurped power and whose will, it was said, bad become a new law-creating medium, had acquired effective control by the habitual obedience rendered to his commands by the citizens of the country over a reasonable period of time.

The actual facts, on the other hand, disclose a different picture, for, they do show that the very next day after the publication of the judgment of the Court that individual himself was placed under arrest and packed out of the country. Where then was the efficacy of his will to which the Court had already given legal recognition ?-He was replaced by a creature of his own creation, namely, the Chief Administrator of Martial Law who, it has to be pointed out, created no other legal order himself. He did not abrogate the Laws (Continuance in Force) Order, 1958, but continued to function thereunder, although he subsequently assumed also the role of the President.

Even on the theory propounded by the learned Chief Justice himself was this subsequent change also a successful revolution? If so, by what test, because, on this occasion there was no annulment of any Constitution or of the grund-norm, of any kind.. which had been created by President Iskander Mirza?----What was, we may well ask, the grund-norm after the deposition of lskandar Mirza himself ?-----

intricate and difficult questions may arise in considering the questions relating to the validity of the regime from the day Field Marshal Ayub Khan took over and until his de facto regime received de jure recognition by his election as President under the Constitution of 1961, but it is unnecessary for our present purposes to enter into this challenging exercise----It will be sufficient for the present to point out that it does appear to us that the legal recognition given in Dosso's case to what was done by President Iskander Mirza was, to say the least, premature.

It is also true that the learned Chief Justice In an article published in the Pakistan Times on the 11th of November 1968, under the heading of "Days I remember" admitted that in spite of the Proclamation of Martial Law on the 7th of October 1958, he "did not stop the Supreme Court from functioning", because, he felt, "that the Supreme Court on being properly moved still had the right to say whether what had happened was legal or Illegal". (The underlining is mine). The next morning, however, the Zonal Martial Law Administrator of Lahore met him and told him that the Courts, including the Supreme Court, had lost their jurisdiction but a few hours later he received a summon from the President to proceed to Karachi where he was told that the intention of the regime was to keep the existing laws and the jurisdiction of the civil authorities alive. He was then shown a draft of the Laws (Continuance in Force) Order, 1958, whereby this intention was sought to be given effect. He suggested "certain modifications, particularly with reference to the superior Court's powers to issue writs and validation of the judgments which had been delivered after the Proclamation". I take it that these were accepted, for, they do in fact find place in the formal order that was ultimately promulgated on the 10th of October 1958. According to his own version, even at this time a doubt arose as to whether there was a President of the country or not but he himself posed the question "whether the army had been inducted into power by the President or whether it had acquired such power on its own"?---This evidently then silenced the Chief Administrator of Martial Law, for, the army had, in fact, been called in by the President.

The learned Chief Justice was, therefore, clear about the legal status of the Chief Administrator of Martial Law and since his interpretation was accepted the Order of 1958 was issued In the name of the President.

Learned counsel have sought to argue from this that the esteemed Chief Justice was thereby personally committed to give judicial recognition to the aforesaid Order of 1958 and was, therefore, disqualified from sitting on the Bench which heard Dosso's case. I am not inclined to agree with this view, for, having regard to the long experience of the learned Chief Justice as a member of the various Benches of superior Courts in this country and his vast judicial experience I am certain that he was, notwithstanding his association in the drafting of the Order, quite capable of keeping an open mind and expressing his independent judgment. Mere association

with the drafting of a law does not necessarily disqualify a judge from interpreting that law in the light of the arguments advanced before him.

Nevertheless, with utmost respect to the learned Chief Justice, I do feel that in laying down a novel juristic principle of such far-reaching importance he did proceed on the basis of certain assumptions, namely :----

(1) "that the basic doctrines of legal positivism". which he was accepting, were such firmly and universally accepted doctrines that "the whole science of modern jurisprudence" rested upon them ;

(2) that any "abrupt political change not within the contemplation of the Constitution" constitutes a revolution, no matter how temporary or transitory the change, if no one has taken any step to oppose it ; and

(3) that the rule of international law with regard to the recognition of States can determine the validity also of the States' internal sovereignty.

These assumptions were, in my humble opinion, not justified. As I have earlier indicated Kelsen's theory was, by no means, a universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence, nor did Kelsen ever attempt to formulate any theory which "favours totaliterianism".

Professor Julius Stone in his Treatise on the Legal System and Lawyers' Reasoning, 1964 Edition, page 121, observes as follows :-

"We would defend Kelsen, as vehemently as he himself, against the reproach that his theory favours totalitarianism. Yet we have to add that the above sins of pride in purity have contributed much to the confusion which has led leading minds, in perfect good faith, to make such a charge. But for the over-weening claim to monopolise both juristic and lawyers' concerns, it would be clear that analytical jurisprudence, being only a limited phase of merely juristic concern, could not assume to decide or influence greatly the mortal struggle between totalitarianism and

democracy. It is now clear to the world from such late publications as What is Justice ? (1957), as it may always have been to his intimates, that he is a convinced liberal democrat, and that 'purity' in this aspect of his thinking marches with commitment to freedom as a lawyer-citizen. We personally, therefore, deplore the charge, and its echo and re-echo. Professor Kelsen could help to quiet it by renouncing even -more clearly the impression he long gave that he regards the scope of the pure theory of law as exhausting the jurist's and the lawyer's concerns."

Kelsen has done so but unfortunately he still continues to be grievously misunderstood. He was only trying to lay down a pure theory of law as a rule of normative science consisting of "an aggregate or system of norms". He was propounding a theory of law as a "mere jurists' proposition about law". He was not attempting to lay down any legal norm or legal norms which are "the daily concerns of Judges, legal practitioners or administrators'", In his early works this distinction was not made clear but in 1960 he attempted in his book "Rechtslehre" to clarify the confusion by pointing out, as Julius Stone observes, "that the propositions of the pure theory of law are mere jurists' propositions about law and that they do not bind the Judge, in the way in which legal norms bind him". Hs also insisted throughout that the efficacy of the norm is an essential condition of its recognition in its nomodynamic aspect and this efficacy must be (a) "by and large" and (b) "in terms of conformity with principles of society to the norms, and the regular execution of sanctions for nonconformity." But he does not even now provide us with any guideline as to how his basic norm acquires validity. He frankly admits that this is a "meta-legal question and, therefore, incapable of any clear scientific declaration." Julius Stone thinks that in attempting to try to demonstrate the legal validity of Kelsen's original "grand-norm" subsequently redesignated by Kelsen himself as the "apex-norm" would be "to try to hoist oneself by one's own boot-straps".

Professor Stone observes that in Kelsen's theory "the apexnorm is neither legally valid nor invalid ; it is a hypothesis. How is the worth of such a hypothesis to be assessed ? Will it depend, for instance, on the extent to which the norms of the legal system of the particular society can be derived from it ? Or will it depend on how far the apex-norm, or a system of norms dependent on it, meet some extraneous test, such as efficacy or observance of the system as a whole by the society?"

Kelsen's position even now, as I shall presently endeavour to show, is not very clear, and as some critics seem to think "a whole idea of this basic norm still remains shrouded in mystery". (Vide Modern Law Review, Vol. XXVI, p. 35).

He sometimes characterises it as a "hypothesia" or a "postulate" and then again as something existing purely "in the juristic consciousness" and as nothing more than an "ultimate hypothesis

of positivism". It is, therefore, only a "thought norm" which could hardly be recognised as a legal norm furnishing a criteria of legal validity in any legal system. To give it the status of a legal norm or of a legal rule was thus, in my opinion, unjustified.

Kelsen in his attempt to evolve a pure science of law as distinguished from a natural science attached the greatest importance to keeping law and might apart. He did not lay k down the proposition that the command of the person in authority is a source of law. He, as Professor Leuterpacht observe in the Modern Theories of Law at page 117, considered that the command was only "a condition which the law posits .for the creation of duties of other persons just as the private agreement is a condition for the validation of a more general rule of law relating to the observance of contract . . . . . In both cases the expression of will-as commanded or as agreed upon-constitutes a concretization of the general rule of law."

He rebelled against the earlier conception or theories which put the State above the law and the most conspicuous of his theories was the "doctrine of the identity of a State and law". He considered the State merely as "a normative ordering coextensive with the normative ordering of the legal system". It was, by no means, his purpose to lay down any rule of law to the effect that every person who was successful in grabbing power could claim to have become also a law-creating agency. His purpose was to recognise that such things as revolutions do also happen but even when they are successful they do not acquire any valid authority to rule or annul the previous 'grand-norm' until they have themselves become a legal order by habitual obedience by the citizens of the country. It is not the success of the revolution, therefore, that gives it legal validity but the effectiveness it acquires by habitual submission to it from the citizens. The initial hypothesis, if a hypothesis is necessary, therefore, still remains, even under the theory of Kelsen, the ultimate will of the people as manifested by their habitual submission and not, as suggested in Dosso's case, the success of the revolution.

Kelsen's attempt to justify the' principle of effectiveness from the standpoint of International Law cannot also be justified, for, it assumes "the primacy of International Law over National Law." In doing so he has, to my mind, overlooked that for c the purposes of International Law the legal person is the State and not the community and that in International Lave there is no "legal order" as such. The recognition of a State under International Law has nothing to do with the internal sovereignty of the State, and this kind of recognition of a State must not be confused with the recognition of the Head of a State or Government of a State. An individual does not become the Head of a State through the recognition of other States but through the municipal law of his own State. The question of recognition of a Government from the point of view of International Law becomes important only when a change in the form of Government also involves a break in the legal continuity of the State or where the question arises as to whether the new Government has a reasonable expectancy of permanence so as to be able to claim to represent the State (Vide Oppenheim's International Law, Vol. I, page 127).

Thus where there is no break in the legal continuity of the State itself, no question of recognition of an internal Government of a State arises, although according to international practice whenever a new Head of a State assumes office the other States are as a matter of courtesy "notified and usually recognise the new Head by some formal act as a message of congratulation". (Oppenheim, Vol. I, page 126). In this view of the matter I cannot find any cogent reason for giving any primacy to International Law over national law. So far as the former is concerned, even Hans Kelsen himself was in difficulty in finding a grand-norm for it.

I am also unable to agree with the learned Chief Justice that upon the principles of International Law if the territory and the people remain substantially the same there is "no change in the corpus or international entity of the State and the revolutionary Government and the new State are, according to International Law, the legitimate Government and the valid Constitution of the State". With great respect I must point out that this proposition does not find support from any principle of International Law. According to Oppenheim's view as propounded in his book on International Law if the revolutionary Government is ineffective and or has no "reasonable expectancy of permanence" and/or does not "enjoy the acquiescence of the population", then the international community may well refuse to recognise it, even though its territorial integrity remains unchanged and its people remain substantially the same.

With the utmost respect, therefore, I would agree with the criticism that the learned Chief Justice not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone.

In any event, if a grund-norm is necessary for us I do not have to look to the Western legal theorists to discover one. Our own grund-norm is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This Resolution has been described by Mr. Brohi as the "corner stone of Pakistan's legal edifice" and recognised even by the learned Attorney-General himself "as the bond which binds the nation" and as a document from which the Constitution of Pakistan "must draw its inspiration". This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or Civil. Indeed, 9t cannot be, for, it is one of the fundamental principles enshrined in the Holy Qur'an;

Say, 'U Allah, Lord of sovereignty. Thou givest sovereignty to whomsoever Thou pleasest ; and Thou takest away sovereignty from whomsoever Thou pleasent. Thou exaltest whomsoever Thou pleasest and Thou abasest whomsoever Thou pleasest. (Pt. 3, Ch. 3, Al 'Imran, Ay, 27.)

The basic concept underlying this unalterable principle of sovereignty is that the entire body politic becomes a trustee for the discharge of sovereign functions. Since in a complex society every citizen cannot personally participate in the performance of the trust, the body politic appoints State functionaries to discharge these functions on its behalf and for its benefit, and bas the right to remove the functionary so appointed by it if he goes against the law of the legal sovereign, or commits any other breach of trust or fails to discharge his obligations under a trust. The functional Head of the State is chosen by the community and has to be assisted by a Council which must hold its meetings in public view and remain accountable to public. It is under this system that the Government becomes a Government of laws and not of men, for, no one is above the law. It is this that led Von Hammer, a renowned orientalist, to remark that under the Islamic system "the law rules through the utterance of justice, and the power of the Governor carries out the utterance of it."

This trust concept of Government filtered into Europe through Spain and even as early as 1685 John Locke rejected Hobbes' leviathan and propounded the theory that sovereignty vested in the people and they had the right not only to decide as to who should govern them but also to lay down the manner of Government which they thought to be best for the common good. Government was, therefore, according to Locke, essentially a moral trust which could be forfeited if the conditions of the trust were not fulfilled by the trustee or trustees, as the case may be.

The trustees under this concept of ours are referred to as "those who are in authority among you" (Pt. 4, Ch. 4, Ay, 60; Al-Nisa, p. 207) which again negates the possibility of absolute power being vested in a single hand, for, the reference as clearly to a plurality of persons and to an authority properly constituted by law.

Upon this analysis, I am, with the utmost respect for the then learned Chief Justice, unable to resist the conclusion that he erred both in interpreting Kelsen's theory and applying the same to the facts and circumstances of the case before him. The principle enunciated by him is, in my humble opinion, wholly unsustainable, and I am duty bound to say that it cannot bet treated as good law either on the principle of stare decisis or even otherwise.

This disposes of the arguments of the learned counsel on both sides relating to the principle enunciated in Dosso's case. Unfettered by this decision I propose now to judge the validity of the events that took place on and from the 24th of March 1969. On the 24th of March 1969, Field Marshal Muhammad Ayub Khan, the then President of Pakistan, wrote a letter to the Commander-in-Chief of the army expressing his profound regret for coming to the conclusion that "all civil administration and constitutional authority in the country has become ineffective" and admitting after reciting the unhappy state of events that had taken place in the country earlier, that "it is beyond the capacity of the civil Government to deal with the present complex situation, and the defence forces must step in." In these circumstances, he thought, that there was no option left for him but "to step aside and leave it to the defence force of Pakistan, which today represent the only effective and legal instrument, to take over full control of the affairs of the country", and finally called upon the Commander-in-Chief to do the needful in the following words :-

"It is your legal and constitutional responsibility to defend the country not only against external aggression but also to save it from internal disorder and chaos. The nation expects you to discharge this responsibility to preserve the security and integrity of the country and to restore normal, social, economic and administrative life."

This was followed by a Broadcast over the Radio network at 7-15 p. m., of the 25th of March 1969 which again after narrating the events which had led him to this conclusion, concluded with a parting request to his countrymen "to appreciate the delicate situation and assist your brethren in the defence forces in every conceivable manner to maintain law and order."

There was nothing either 'in this letter or in this broadcast to show that he was appointing General Agha Muhammad Yahya Khan as big successor-in-office or was giving him any authority to abrogate the Constitution which he had himself given to the country in 1962. Both these documents merely called upon the Commander-in-Chief of the army to discharge his legal and constitutional responsibility not only to defend the country against external aggression but also to save it from internal disorder and chaos. He did not even proclaim martial law. Nevertheless, the Commander-in-Chief on the very same day, namely, the 25th of March 1969, on his own proclaimed Martial Law throughout the length and breadth of. Pakistan and assume the powers of the Chief Martial Law Administrator. He also abrogated the Constitution, dissolved the National and Provincial Assemblies and declared that all persons holding office as President, members of the President's Council, Ministers, Governors of Provinces and members of their Council of Ministers shall cease to hold office with immediate effect. Existing laws and Courts were, however, preserved with the proviso that no writ or other order shall be issue against the Chief Martial Law Administrator or any person exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.

Although by the Proclamation of Martial Law the office of President had ceased to exist yet the General by another Proclamation of the 31st of March 1969, purported to assume the office of President of the Islamic Republic of Pakistan with retrospective effect from the 25th of March 1969. Thereafter, only on the 4th of April 1969 a Provisional Constitution Order was enacted whereby the Constitution of 1962, was by and large restored, and it was provided that the country was to be governed as nearly as may be in accordance with its terms subject to the Proclamation of Martial Law and subject to any Regulation or Order that may be made from time to time by the Chief Martial Law Administrator (Vide Article 3(1)).

The office of President was reintroduced by clause (2) of the same Article in the following terms :-

"The Chief Martial Law Administrator shall be the President of Pakistan hereinafter referred to as the President, and shall perform all functions assigned to the President of Pakistan by and under the said Constitution or by or under any law."

This clearly indicated that the President was a subordinate functionary created by the Chief Martial Law Administrator, although he was himself to hold the same office, because, the powers of the President were limited to performing the functions assigned to him under the abrogated Constitution or under any law. By the other clauses almost all the fundamental rights were taken away and the Courts were debarred from issuing any order against any Martial Law Authority. Power was given to the President by Article 4 to issue Ordinances but provisions in law providing for reference of a detention order to an advisory Board were declared to be of no effect by Article 7 (2), and by Article 8 the President was also given the power to make orders for making such provisions "including constitutional provisions", as he may deem fit for the administration of the affairs of the State.

The first question, therefore, that arises is as to whether General Agha Muhammad Yahya Khan acted legally in declaring Martial Law, abrogating the Constitution, making new constitutional provisions and assuming the office of President It is clear that under the Constitution of 1962 Field Marshal Muhammad Ayub Khan had no power to hand over power to anybody. Under Article 12 of that Constitution he could resign his office by writing under his hand addressed to the Speaker of the National Assembly and then under Article 16 as soon as the office of President fell vacant the Speaker of the National Assembly had to take over as the acting President of the country and an election had to be held within a period of 90 days to fill the vacancy. Under Article 30 the President could also proclaim an emergency if the security or economic life of Pakistan was threatened by internal disturbances beyond the power of a Provincial Government to control and I will assume for the present purposes that he could also proclaim Martial Law if

the situation was not controllable by the Civil administration. It is difficult however, to appreciate under what authority a Military Commander could proclaim Martial Law. Even in 1958 the Martial Law was proclaimed by the President. In my view, the Military Commander had no power also to abrogate the Constitution, although the learned Attorney-General has contended that the Proclamation of Martial Law by its own intrinsic force gave him the right to do so. even apart from anything said in Dosso's case.

This argument necessitates an examination into the nature and scope of Martial Law itself. Does the imposition of Martial Law ipso facto annul and abrogate everything and give the Military Commander the power to do anything he likes ?--Is Martial Law synonymous with military rule within the territorial limits of a national entity ?- Is the imposition of. Martial Law necessarily a coup d'etat or a revolution disintegrating the legal order itself?-Does the imposition of Martial Law absolve the Military Commander from the oath or affirmation that he takes under the Army Act at the time of his appointment as an officer to "be faithful and bear true allegiance to the Constitution and the Islamic Republic of Pakistan ?"

Martial Law, as pointed out by Sir William Holds-worth in his Article published in the Law Quarterly Review, Vol. 18, page 117, in England originally meant the law administered by the Court of the Constable and Marshal who had "jurisdiction over heraldry over words spoken to the disparagement of men of honour, and over contracts relating to war made out of the realm." Later they also acquired jurisdiction over a case of death or murder committed beyond the sea and over the offences and miscarriages of soldiers contrary to the laws and rules of the army. The Courts of Constable and Marshal, however, disappeared in course of time and the Marshal's jurisdiction, it appears, is now confined to merely some formal matters relating to pedigrees, escutcheons pennons and coat-armours.

Martial Law, in the present times in England, has acquired various senses. In its original sense it is perhaps now only identifiable in the law relating to the enforcement of discipline in the forces at home and abroad. In this sense this branch of Martial Law is now better known as "military law" and is in time of peace enforced under various statutes, such as the Army Act, the Navy Act and the Air Force Act. It derives its authority from these statutes passed by the civil law-making bodies.

In International law Martial Law means the powers of a military commander in war time in enemy territory as part of the jus belli. In this sense as the Duke of Wellington once said in the House of Lords it is "neither more nor less than the will of the General who commands the army." (Hansard, Vol. CXV, Col. 880).

Can Martial law in this form be exercised within the country ?

The position in England today, as mentioned in Halsbury's Laws of England, Vol. 7, Third Edition, page 260, is as follows;--

"The Crown may not issue commissions in time of peace to try civilians by martial law; but when a state of actual war, or of insurrection riot, or rebellion amounting to war, exists, the Crown and its officers may use the amount of force necessary fn the circumstances to restore order, and this use of force is sometimes termed martial law. When once this state of actual war exists the civil Courts have no authority to call in question the actions of the military authorities; but it is for the civil Courts to decide, if their jurisdiction is invoked. whether a state of war exists which justifies the application of martial law. The powers, such as they are, of the military authorities cease and those of the civil Courts are resumed ipso facto with the termination of the state of war; and, in the absence of an Act of Indemnity the civil Courts may inquire into the legality of anything done during the state of war; even if there is an Act of Indemnity couched in the usual terms, malicious acts will not be protected."

Under the Constitution of France, however, there is a procedure available for a "Declaration of a State of Siege", under which the authority vested in the civil power for the maintenance of order and police passes entirely to the army (autorite militaire), in consequence of tumult or insurrection in any part of the country.

On the proclamation of such a state of siege the constitutional guarantees become suspended and the Government of the affected area is temporarily placed under the control of the military.

"Martial Law" in this sense, namely, the suspension of the ordinary law and the temporary Government of a country or a part of it by the military is, according to A. V. Dicey (vide Law of the Constitution, page 287), "utterly unknown to the law of England", for, it has nothing equivalent to the French "declaration of State of siege".

This does not, however, exclude the possibility of the armed forces being employed, even under the Laws of England, for the suppression of riots, insurrection and rebellion, but in this sense,

according to Dicey, Martial Law is just "a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot or generally of any violent resistance to the law." He considers this right to be "essential to the very existence of orderly Government" and, as being as such "most assuredly recognised in the most ample manner by the law of England." This right has, however, according to him, "no special connection with the existence of an armed force," but pertains to the right of the Crown to put down breaches of peace for which purpose he may call upon any subject, whether civilian or soldier, to assist "as a matter of legal duty".

So far as England is concerned, no occasion has arisen to enforce even this type of common law martial law in the country since the civil wars of the Seventeenth Century, but martial law has been enforced in this form during the past century in South Africa, Southern Ireland, Palestine and parts of British India. Nevertheless, even in such cases the degree of freedom given to the military to exercise force has varied with the circumstances of each case. The test of interference always has been the necessity of performing the duty of repelling force and restoring order. In exceptional circumstances, the military may in such eventualities also find it necessary to set up Military Tribunals to try civilians and offenders may even be condemned to death but in every case the action taken has to be judged by the test of necessity. The Tribunals so set up are neither judicial bodies nor Courts Martial under the Army, Navy or the Air Force Acts but are merely bodies set up to advise the Military Commander as to 'the action he should take.

The English Courts also maintain that it is not the proclamation of Martial Law which justifies the use of force but rather the events which have created a situation in which the use of force in this form has become justified. Blackstone in his Commentaries, Vol. I, page 381, describes this kind of Martial Law "only as temporary exerescences bred out of the distemper of the State".

From the above it is clear that we must distinguish clearly between Martial Law as a machinery for the enforcement of internal order and Martial Law as a system of military rule of a conquered or invaded alien territory. Martial Law of the first category is normally brought in by a proclamation issued under the authority of the civil Government and it can displace the civil Government only where a situation has arisen in which it has become impossible for the civil Courts and other civil authorities to function. The imposition of Martial Law does not of its own force require the closing of the civil Courts or the abrogation of the authority of the civil Government. The maxim inter armes leges silent applies in the municipal field only where a situation has arisen in which it has become impossible for the Courts to function, for, on the other hand, it is an equally well-established principle that where the civil Courts are sitting and civil authorities are functioning the establishment of Martial Law cannot be justified. The validity of Martial Law is, in this sense, always a judicial question, for, the Courts have always claimed and have in fact exercised the right to say whether the necessity for the imposition of Martial Law in this limited common law sense existed.

In this connection it may be worthwhile quoting a passage from the opinion of the Earl of Halsbury in the case of Tilonko v. Attorney-General of Natal (1907 A C 93) which came up as an application for special leave to appeal by Tilonko who had been indicted before a Court Martial, sitting under a declaration of Martial Law, for the crimes of sedition and public violence. He objected to the jurisdiction of the Military Court on the ground that he was not a military man and had not been taken in the field of battle, as he had never taken up arms against the Government. He also questioned the validity of the imposition of Martial Law on the ground that the state of the country was not such as to justify it. The Government on the other hand claimed that the Court could net go behind the Proclamation. But the Noble Earl observed :

"The notion that martial law exists by reason of the proclamation-an expression which the learned counsel has more than once used-is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force but it is found convenient and decorous, from time to time, to authorize what are called Courts to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things alleged to have been done are proved . . . . . But the question whether war existed or not may, of course, from time to time be a question of doubt, and if that had been the question in this case, it is possible that some of the observations of the learned counsel with regard to the period of trial, and the course that has been pursued, might have required consideration"

This establishes beyond doubt that the Courts in England have always claimed the right in case of doubt to decide as to whether a state of war or insurrection exists which can justify the imposition of Martial Law.

Similarly in the case of Rex v. Allen ((1921) 21 R 241) the question arose for consideration whether Allen, a civilian, arrested after the proclamation of Martial law in Ireland, within the proclaimed area, in possession of arms and ammunition, was rightly convicted by a Military Court. The Chief Justice specifically formulated and dealt with, amongst others, the two following questions ;

(1) Was there a state of war in the area included in the Lord Lieutenant's proclamation justifying the application of Martial Law ? and

(2) Could the military Court act having regard to the fact that the Courts of justice in the area were open?

On the first question the Court, after going into evidence, came to the conclusion that at the time of the proclamation a State of war did actually exist and continued to exist at the time of the arrest of John Allen. On the next question too, after an exhaustive review of all earlier decisions, it found that when the "regular Courts were open so that criminals might be delivered over to them to be dealt with according to the ordinary law there was not any right in the Crown to adopt any other course or proceeding" bat relying on an earlier decision of the Privy Council in the case of Ex parte: Marias (1902 A C 109) held that where a system of guerilla warfare had come to be adopted by the rebels it could not be said that the "Courts were able to sit for all purposes" and to discharge their ordinary functions without hindrance.

In saying so they by-passed an earlier decision of the same Court in Wolfe Tone's case ((1798) 27 St. Tr. 614) where, according to Dicey (p. 294), the Court granted a writ of habeas corpus to Wolfe Tone who had admittedly participated in the French invasion of Ireland and thus stopped his execution ordered by a military Court.

The American view, as given in the Corpus Juris, Secundum, Vol. 93 at page 117, is clearly to the same effect that "the validity of Martial Law is always a judicial decision."

The American Courts from the case of Ex parte : Milligan (4 Wallace 121) decided in 1866 have consistently maintained that "Martial rule can never exist where the Courts are open, and in the proper and unobstructed exercise of their jurisdiction." (Vide Commentaries on the Constitution of the United States by Chester James Antieau).

The case of R. S. Sterling, Governor of the State of Texas v. E. Constantin (77 U S S C R 375 (L. Edn.)) also makes interesting reading. In this case the District Court of the United States for the Eastern District of Texas had passed an interlocutory order prohibiting the Governor, the Adjutant-General and the Commanding Officer of the Military District from enforcing their military or executive orders regulating or restricting the production of petroleum under a proclamation of Martial Law. The Supreme Court went into the question in detail on evidence first to consider as to whether there was a state of war or not and as to whether the Military Courts could adjudicate upon the rights of civilians when the ordinary Courts were functioning,

and came to the conclusion that there was "no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the action of the Governor in attempting to limit complainants' oil production, otherwise lawful ..... There was no exigency which justified the Governor in attempting to enforce by executive or military order the restriction which the District Judge has restrained pending proper enquiry. If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the Federal Court in the exercise of its jurisdiction and not to attempt to override It; to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared".

From this examination of the authorities I am driven to the conclusion that the Proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country. It would be paradoxical indeed if such a result could flow from the invocation in the aid of a State of any agency set up and maintained by the State itself for its own protection from external invasion and internal disorder. If the argument is valid that the proclamation of the Martial Law by itself leads to the complete destruction of the legal order, then the armed forces do not assist the state in suppressing disorder but actually create further disorder, by disrupting the entire legal order of the state. I cannot, therefore, agree with the learned Attorney-General that the proclamation of Martial Law by itself must necessarily give the Commander of the armed forces the power to abrogate the Constitution, which he is bound by his oath to defend.

If this be so, then from where did General Agha Muhammad Yahya Khan acquire the right to assume control of the reins of Government? Field Marshal Muhammad Ayub Khan did not appoint him as his successor by his letter of the 24th March 1969. He merely called upon him to perform his "constitutional and legal duty to restore order" in the country. If this was his authority, then the only authority he got was to restore order and nothing more.

Even the imposition of Martial Law by his proclamation is of doubtful validity, because the proclamation should have come from the civil authorities and it was only then that under the proclamation the Commander of the armed forces could have moved into action. I am not aware of any document or of any provision in any law which gives the Commander of the armed forces the right to proclaim Martial Law, although I am prepared to concede that he has like all other loyal citizens of the country a bounden duty to assist the State, when called upon to do so. If the magnitude of the insurrection is so great that the Courts and the civil administration are unable to function, the military may exercise all such powers that may be necessary to achieve their objective and in doing so may even set up Military Tribunals to promptly punish wrong-doers but this, whether done throughout the country or in a restricted area within the country, merely

temporarily suspends the functioning of the civil Courts and .the civil administration. As soon as the necessity for the exercise of the military power is over, the civil administration must, of necessity, be restored, and assume its normal role.

It is not without significance that after the so-called imposition of Martial Law in 1969 the Martial Law Authorities had no occasion to fire even a single shot and found the conditions so normal that the civil administration never ceased to function and all the Courts continued to sit for all purposes. In fact the situation was so normal that within a few days the reality had to be accepted and even the Constitution was brought back except in so far as it had been purported to be altered by the creation of the office of President and the assumption of that office by the Chief Martial Law Administrator. Protection was also purported to be given to the acts of all Martial Law Administrators and their subordinates acting under their orders to save them from the consequences of their otherwise illegal acts. If Martial Law was by itself a sufficient legal cover then why was this special protection necessary.

This country was not a foreign country which had been invaded by any foreign army with General Agha Muhammad Yahya Khan at its head nor was it an alien territory which had been occupied by the said army. The question of imposition of "military rule" as an incident of jus bells of international law could not, in the circumstances, possibly have arisen. The only form of Martial Law, therefore, that could possibly have been imposed in this country, assuming that such a state of large scale disorder had come to prevail in the country as was suggested by Field Marshal Muhammad Ayub Khan in his letter of the 24th of March 1969, was a Martial Law of the kind which could be (imposed under the English common law and was imposed by the British from time to time in 1919 in Amritsar, Lahore and Gujranwala, in 1921 in the areas inhabited by the Moplas, in 1930 in Sholapur, in 1942 In areas occupied by Hurs in Sind and in 1953 in Lahore. Under these Martial Laws there was, of course, no question of abrogation of any Constitution or of the introduction of military rule in supersession of the civil administration normally functioning in other parts of the country.

Looked at, therefore, either from the constitutional point of view or the Martial Law point of view whatever was done in March 1969, either by Field Marshal Muhammad Ayub Khan or General Agha Muhammad Yahya Khan was entirely without any legal foundation. It was not even a revolution or a military coup d'etat in any sense of those terms. The Military Commander did not take over the reins of Government by force nor did he oust the constitutional President. The constitutional President out of his own free will and accord in response to the public's demand, stepped aside and called upon the Military Commander to restore law and order, as he was bound to do both under the law and under the Constitution. On the stepping aside of the Constitutional President the constitutional machinery should have automatically come into effect and the Speaker should have taken over as Acting President until fresh elections were held for the choice of a successor. The political machinery would then have moved according to the

Constitution and the National and Provincial Assemblies would have taken steps to resolve the political disputes, if any, if the Military Commander had not by an illegal order dissolved them. The Military Commander, however, did not allow the constitutional machinery to come into effect but usurped the functions of Government and started issuing all kinds of Martial Law Regulations, Presidential Orders and even Ordinances.

It was in this state of affairs that the nature and scope of the Martial Law imposed in 1969 first came up for consideration before the Lahore High Court in the case of Mir Hassan and another v. The State (P L D 1969 Lah. 786). The question that fell to be decided there was as to whether the transference of certain criminal cases; during the pendency of applications under section 561-A of the Code of Criminal Procedure in the High Court-; in exercise of powers assumed under Martial Law Regulation No. 42, promulgated during the pendency of the said cases, was valid or not and as to whether the High Court had jurisdiction to enquire into the question of the validity of such transfer. A Full Bench of the High Court, after an exhaustive review of the opinions of jurists and the relevant law on the subject, came to the conclusion that the Martial Law imposed in 1969 was of the kind described by English authors as the Martial Law which can be imposed in exercise of the common law right vested in a State to suppress disorder and insurrection, and it was not of the type of military rule which can be enforced in an alien country by an invading or occupying army. The learned Judge, who delivered the main judgment, after examining the provisions of the letter of Field Marshal Muhammad Ayub Khan, the proclamation issued by General Agha Muhammad Yahya Khan and the Provisional Constitution Order promulgated on the 4th of April 1969, came to the conclusion that the "Martial Law was not imposed by the Chief Martial Law Administrator after having wrested power from the constitutional Government by force". In the circumstances, upon the public declarations of Field Marshal Muhammad Ayub Khan and General Agha Muhammad Yahya Khan themselves there was nothing to suggest that "the existing machinery for dispensing justice was found wanting or that it was to be subject to curbs or that a state of affairs was to be brought about in which the will of the Martial Law Commander was to be imposed." I entirely approve of these observations, for they conform with my own conclusions which I have expressed earlier and, therefore. There can be no question that the military rule sought to be imposed upon the country by General Agha Muhammad Yahya Khan was entirely Illegal.

Incidentally It may also be pointed out here that this particular aspect of the question was not considered in Dosso's case and, as such, the principles therein laid down did not debar the High Court from going into this question. The High Court was fully entitled to consider whether what happened in 1969 was either a revolution or a coup d'etat within the meaning in which they were considered in Dosso's case.

The judgment of the High Court in the above-mentioned case was not challenged by the then regime by any appeal to this Court but it resorted to the device of nullifying its effect by

promulgating a Presidential Order called the Jurisdiction of Courts (Removal of Doubts) Order, 1969. This was published in the Gazette, Extraordinary of Pakistan on the 30th of June 1969.

Since the validity of this Order has been called in question before us it is necessary that both this Order and the Provisional Constitution Order of the 4th April 1969, should be set out herein In extenso:-

I. PROVISIONAL CONSTITUTION ORDER, 1969

"In pursuance of the Proclamation of the 25th March 1969, and of all powers enabling him in that behalf, the Chief Martial Law Administrator is pleased to make and promulgate the following Order:-

1.- (1) This Order may be called the Provisional Constitution Order, 1969.

(2) It shall come into force at once and be deemed to have taken effect immediately upon the making of the Proclamation on the 25th day of March 1969, hereinafter referred to as the Proclamation.

(3) It extends to the whole of Pakistan.

2. Save as otherwise provided in this Order, the provisions of this Order shall be in addition to and not in derogation of the Proclamation and shall be read and construed accordingly.

3.-(1) Notwithstanding the abrogation of the Constitution of the Islamic Republic of Pakistan brought into force on the 8th day of June 1962, hereinafter referred to as the said Constitution, by the Proclamation and subject to any Regulation or Order made, from time to time, by the Chief Martial Law Administrator, the State of Pakistan, shall, except as otherwise provided in this Order, be governed as nearly as may be in accordance with the said Constitution.

(2) The Chief Martial Law Administrator shall be the President of Pakistan, hereinafter referred to as the President, and shall perform all functions assigned to the President of Pakistan by or under the said Constitution or by or under any law.

(3) Paragraphs 2, 4, 5, 6, 7, 8. 9, 13, 14, 15 and 17 of the Fundamental Rights set out in Chapter I of Part II of the said Constitution shall stand abrogated and all proceedings pending in any Court, in so far as they are for the enforcement of those Rights shall abate.

(4) No judgment, decree, writ, order or process whatsoever shall be made or issued by any Court or tribunal against the Chief Martial Law Administrator or a Deputy Chief Martial Law Administrator or any Martial Law Authority exercising powers or jurisdiction under the authority of either.

4.-(1) An Ordinance promulgated by the President or by the Governor of a Province shall not be subject to the limitation as to its duration prescribed in the said Constitution.

(2) The Provisions of clause (1) shall also apply to an Ordinance which was in force -immediately before the issue of the Proclamation.

5. No Court, tribunal or other authority shall call or permit to be called in question-

(a) the Proclamation;

(b) any Order made in pursuance of the Proclamation or any Martial Law Regulation or Martial Law Order; or

(c) any finding, sentence or order of a Special Military Court or a Summary Military Court.

6.-(1) No appeal shall lie to the Supreme Court from any judgment, final order or sentence of a High Court !n criminal proceedings except when the High Court-

(a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life; or

(b) has withdrawn for trial before itself any case from any Court subordinate to its authority, and has in such trial convicted the accused person and sentenced him as afore. said; or

(c) certifies that the case involves substantial question of law as to the interpretation of the said Constitution; or

(d) has imposed any punishment on any person for contempt of the High Court.

(2) Save as provided in clause (1), the Supreme Court, a High Court and all other Courts and tribunals shall have and exercise the same powers and jurisdiction as they had immediately before the issue of the Proclamation.

7.-(1) Nothing in this Order or in any law shall prejudice the operation of any Martial Law Regulation made by the Chief Martial Law Administrator or by any person having authority from him to make Martial Law Regulations and where any Ordinance made under Article 4 or any other law is repugnant to such Regulation, the Regulation shall prevail.

(2) Any provision 9n any law providing for the reference of a detention order to an Advisory Board shall be of no effect.

8. The President may, by Order, make such provisions, including constitutional provisions, as he may deem fit for the administration of the affairs of the State.

A. M. YAHYA KHAN,

General,

Chief Martial Law Administrator,

4th April 1969. Pakistan."

II. JURISDICTION OF COURTS (REMOVAL OF DOUBTS) ORDER, 1969 "No. F. 24 (1)/69-Pub.-The following order made by the President is hereby published for general information:-

THE JURISDICTION OF COURTS (REMOVAL OF DOUBTS) ORDER, 1969

President's Order No. 3 of 1969

Whereas doubts have arisen as to whether the Supreme Court pr g High Court has power to issue any writ, order, notice or' other process to or against a Special Military Court or a Summary Military Court, or in relation to any proceedings of, or any jurisdiction exercised by, any such Military Court, or any Martial Law Authority;

And whereas it is necessary to remove such doubts;

Now, therefore, in pursuance of the Proclamation of the 25th day of March 1969, and in exercise of all powers enabling him fn that behalf, the President and Chief Martial Law Administrator is pleased to make and promulgate the following Order:--

1.-(1) This Order may be called the Jurisdiction of Courts (Removal of Doubts) Order, 1969.

(2) It shall come into force at once and shall be deemed to have taken effect on the 25th day of March 1969.

2. This Order shall have effect notwithstanding anything contained in the Provisional Constitution Order, or any Martial Law Regulation, or any other law for the time being in force.

3.-(1) No Court, tribunal or other authority, including the Supreme Court and a High Court, shall----

(a) receive or entertain any complaint, petition, application or other representation whatsoever against, or in relation to the exercise of any power or jurisdiction by, any Special Military Court or Summary Military Court, or any Martial Law Authority or any person exercising powers or jurisdiction derived from Martial Law Authority;

(b) call or permit to be called in question in any manner whatsoever any finding, sentence, order, proceeding or other action of, by or before a Special Military Court or a Summary Military Court or any Martial Law Authority or any person exercising powers or jurisdiction derived from a Martial Law Authority;

(c) issue or make any writ, order, notice or other process whatsoever to or against, or in relation to the exercise of any power or jurisdiction by a Special Military Court or a Summary Military Court, or any Martial Law Authority or any person exercising powers or jurisdiction derived from a Martial Law Authority.

(2) Any decision given, judgment passed, writ, order, notice or process issued or made, or thing done in contravention of clause (1) shall be of no effect.

(3) If any question arises as to the correctness, legality or propriety of the exercise of any powers or jurisdiction by a Special Military Court or a Summary Military Court or a Martial Law Authority or any other person deriving powers from a Martial Law Authority, it shall be referred to the Chief Martial Law Administrator whose decision thereon shall be final.

Explanation.-"Martial Law Authority" means the Chief Martial Law Administrator and includes a Deputy Chief Martial Law Administrator, a Zonal Martial Law Administrator, a Sub-Administrator of Martial Law or any person designated as such by any of them.

4. If any question arises as to the interpretation of any Martial Law Regulation or a Martial Law Order, it shall be referred to the Martial Law Authority issuing the same for decision and the decision of such Martial Law Authority shall be final and shall not be questioned in any Court, Tribunal or other authority, including the Supreme Court and a High Court.

A. M. YAHYA KHAN, H. PK.. H. J.,

General,

President and Chief Martial Law

Administrator."

It will be noticed that the latter Order is described in the Gazette as an Order made by the President, although its Preamble states that it is being made :-

"In exercise of all powers enabling him in that behalf, the President and Chief Martial Law Administrator is pleased to make and promulgate the following Order."

It is signed by General A. M. Yahya Khan, who is described both as President and Chief Martial Law Administrator.

The former Order has been issued as an Order only of the Chief Martial Law Administrator and is signed as such.

It has become necessary to point out these facts, because, the argument has been advanced that the second Order is only a Presidential Order made in exercise of the powers given to the President either under Article 3 or Article 8 of the Provisional Constitution Order and, therefore, an order of a Sub-constitutional nature which could not alter or amend the

Constitution itself. This right having been specifically reserved for the Chief Martial Law Administrator by the express language of Article ?(1) of the Provisional Constitution Order. The Constitution could, therefore, it is argued be amended only by a "Regulation or Order made by the Chief Martial Law Administrator" and by no other means and by no one else, because, under the scheme of the Provisional Constitution Order itself the President was a subordinate authority created by the Martial Law and his functions were limited to the performance of "functions assigned to the President of Pakistan by or under the said Constitution or by or under any law". Article 8 of this Order was, it is said, not repugnant to the provisions of clause (1) of Article 3 and did not override the same, because, it could be given a harmonious interpretation by limiting the power of making orders by the President thereunder to orders of a constitutional nature necessary for the administration of the affairs of the State but only to the extent they did not conflict with the Constitution or those parts of it which bad been preserved by the Provisional Constitution Order or were not inconsistent with any Martial Law Regulation. The mere description given under the signature in the above-quoted Order No. 3 of 1969 or in the Preamble did not alter its true character or give to it the status of a Martial Law Regulation which alone could amend or alter the Constitution. It was and remained a Presidential Order and a sub-constitutional legislation.

It is further pointed out that in this respect the Provisional Constitution Order of 1969 also makes a radical departure from the Laws (Continuance in Force) Order of 1958. Under the latter the President as well as the Chief Administrator of Martial Law could both amend the Constitution but under the former only the Chief Martial Law Administrator could do so. The intention was, therefore, clear and under the principle of expressio unius est excluslo alterius there was no scope for holding that the Constitution could be amended by a Presidential Order.

The learned Attorney-General has attempted to draw our attention to a number of Orders issued in exercise of the powers given under section 8 of the Provisional Constitution Order to show that where an Order was made in exercise of this power it was expressly so mentioned but the mere recital of this fact in a particular Order does not necessarily mean that the non-recital of the said fact would give an order described and published in the Gazette as a Presidential Order a higher status. We have also discovered that no set practice was followed during this period for even Ordinances were made in the purported exercise of powers under the Proclamation and all other powers vested in that behalf in the President and the Chief Martial Law Administrator and were signed by the person concerned under the description of "President and Chief Martial Law Administrator". The official description of the legislative measure is, therefore, the only safe indication available of its true nature. I am, therefore, unable to agree with the learned Attorney-General that this Presidential Order could have amended the Constitution and taken away, as it has purported to do, the jurisdiction of the High Courts to even receive or entertain any complaint, petition, application or other representation whatsoever against, or in relation to the exercise of any power or jurisdiction by any Special Military Court or Summary Military Court or any Martial Law Authority or any person exercising power or jurisdiction derived from

the Martial Law Authority under Article 98 of the Constitution of 1962, which had been preserved even by the Provisional Constitution Order of 1969.

This provision, as very appropriately pointed out by Mr. Brohi, strikes at the very root of the judicial power of the Court to hear and determine a matter, even though it may relate to its own jurisdiction. The Courts undoubtedly have the power to hear and determine any matter or controversy which is brought before them, even if it be to decide whether they have the jurisdiction to determine such a matter or not. The superior Courts are, as is now well settled, the Judges of their own jurisdiction. This is a right which has consistently been claimed by this and other Courts of superior jurisdiction in all civilised countries and it is on the basis of this very right that this Court itself went into the question of the validity of the Martial Law in Dosso's case. If Muhammad Munir, C. J. in 1958 could feel that the Courts "on being properly moved still had the right to say whether what had happened was legal or illegal" then what has happened since to take away that right. What was done in 1958 can still be done even though the result might well be different.

Learned Attorney-General does not seriously dispute the correctness of the contention that "judicial power" is different from "jurisdiction" and so far as judicial power is concerned it must exist in Courts as long as the Courts are there. In fact, he has been bold enough, and I admire him for his boldness, in characterising these provisions of the Presidential Order No. 3 of 1969, which seek to take away the judicial power itself as "absurdities". He frankly concedes that the Courts have and must have the power to determine all questions of their own jurisdiction. It is a proposition so well-settled that no one can challenge it.

The learned Attorney-General has, however, sought to contend that where there is a written Constitution the Courts are themselves creatures of the Constitution and have only such jurisdictions as the Constitution chooses to confer upon them. I have no cavil with this proposition, as I have myself in several cases indicated, that the Constitution can confer or restrict the jurisdiction of even superior Courts but this is not the same thing as saying that it can also restrict or curtail the judicial power, because, that in effect would be denying to the Court the very function for which it exists, i.e. to decide a controversy even if it relates to its own jurisdiction.

In the view that I have taken of the Presidential Order No. 3 of 1969 that it is a sub-constitutional legislation I cannot but hold that it could not have curtailed the jurisdiction that was given to the High Courts and to this Court by the Constitution of 1962, for, that jurisdiction was preserved even by the Provisional Constitution Order,

Looking at the matter, therefore, from any point of view, whether, from the strictly legal and constitutional side, or on the basis of the principle of implied authority as suggested by Mr. A Manzoor Qadir, or even in terms of the so-called legal order purported to be created by the Provisional Constitution Order of 1969 itself, I cannot escape the conclusion that the Presidential Order No. 3 was an unconstitutional document. General Agha Mohammad Yahya Khan had according to me, no authority to pass such legislation taking away the powers of the Courts in his capacity as President under the Provisional Constitution Order. The Martial Law introduced by him was illegal and, therefore, even as Chief Martial Law Administrator he was not competent to validly pass such laws, and it certainly was in excess of the implied authority, if any, given to him by the letter of Field Marshal Muhammad Ayub Khan dated the 24th of March 1969.

The High Courts were, therefore, wrong in thinking that they had no jurisdiction to enquire into this matter.

I come now to the Martial Law Regulation No. 78 which was promulgated on the 17th of April 1971. This too has to be quoted in extenso. It reads as follows:-

"MARTIAL LAW REGULATION

BY

CHIEF MARTIAL LAW ADMINISTRATOR, PAKISTAN

Restriction of Movements of Suspected Persons, Restriction Orders and Detention Orders, Regulation.

REGULATION No. 78

1. The Chief Martial Law Administrator or a Martial Law Administrator or a Deputy Martial Law Administrator authorised by the Martial Law Administrator concerned in this behalf. If satisfied with respect to any particular person, that with a view to preventing him from acting in a seditious manner or in a manner prejudicial to the security, the public safety or interest or the defence of Pakistan. maintenance of public order, Pakistan's relations with any other power the maintenance of peaceful conditions In any part of Pakistan the maintenance of essential supplies and services, it Is necessary so to do, may make an order ;-

(a) directing such person to remove himself from Pakistan in such manner, by such time and by such route as may be specified In the order, and prohibiting his return to Pakistan ;

(A) directing that he be detained ;

(c) directing that he shall not remain within any specified area In Pakistan except on the conditions and subject to the restrictions specified in the order or to be specified by an authority or a person specified in the order ;

(d)"requiring him to reside or remain in such place or within such area in Pakistan as may be specified In the order or to proceed to a place or area within such time as may be specified in the order ;

(e) requiring him to notify his movements or to report himself or both to notify his movements and report himself in such manner at such times and to such authority or person as may be specified In the order ;

(f) imposing upon him such restrictions as may be specified in the order in respect of employment or business, in respect of his association or communication with other persons, and in respect of his activities in relation to the dissemination of news or propagation of opinions ;

(g) prohibiting or restricting the possession or use by him of any such article or articles as may be specified is the order ---

(h) otherwise regulating his conduct in regard to any matter as may be specified in the order;

Provided that no order shall be made under clause (a) of this paragraph against any citizen of Pakistan and by any person other than the Chief Martial Law Administrator.

2. Any order made under paragraph I may require the person against whom it is made to enter into a bond, with or without sureties, for the due observance of the restrictions and conditions specified in the order.

3. If any person remains in any area or place or fails to leave any area or place fn contravention of an order made under paragraph 1 he may be removed from the area or place by any police officer or "other person acting on behalf of the Chief Martial Law Administrator or a Martial Law Administrator or a Deputy Martial Law Administrator authorised by the Martial Law Administrator concerned in this behalf.

4. A person who is ordered to be detained under this Regulation shall be detained in such place and under such conditions as to maintenance, discipline and punishment for breaches of discipline, as the Chief Martial Law Administrator or a Martial Law Administrator or a Deputy Martial Law Administrator authorised by the Martial Law Administrator concerned in this behalf may from time to time determine.

5. The Chief Martial Law Administrator or a Martial Law Administrator or a Deputy Martial Law Administrator authorised by the Martial Law Administrator concerned in this behalf. if has reason to believe that a person in respect of whom an order under clause (b) of paragraph 1 has been made, has absconded or, is concealing himself so that the order cannot be executed, may-

(a) make a report in writing of the fact to a Magistrate of the first class having jurisdiction in the place where the said person was ordinarily residing and thereupon the provisions of sections 87, 88 and 89 of the Code of Criminal Procedure, 1898 (Act V of 1898) shall apply in respect of the said person and his property as if he were a person against whom a warrant had been issued by the Magistrate and was absconding; and

(b) by notified order direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction he shall, unless he proves that it was not possible for him to comply with the direction. and that he had, within the period specified in the order, informed the officer of the reason which had rendered compliance impossible and also of his whereabouts, be punishable with rigorous imprisonment for a term which may extend to seven years, or with fine, or with both.

6. (a) If any person contravenes any order made under this Regulation, he shall be punishable with rigorous imprisonment for a term which may extend to five years, or with fine, or with both.

(b) Where by reason of a contravention of an order made under this Regulation, a bond executed under paragraph 2 has been forfeited, the Court having jurisdiction to try the person who had contravened the order may call upon any person bound by the bond to pay the penalty thereof or to show cause why it should not be paid, and if sufficient cause is not shown -and the penalty is not paid, the Court may proceed to recover the same in the same manner, as a Court proceeding on the forfeiture, of a bond under the Code of Criminal Procedure, 1898 (Act V of 1893).

A. M. YAHYA KHAN GENERAL,

Commander-in-Chief, Pakistan Army and

Chief Martial Law Administrator.

Rawalpindi, the 9th April 1971. "

This gives very wide powers to the Chief Martial Law Administrator and a Zonal Martial Law Administrator and even a Deputy Martial Law Administrator to detain a person without r trial for any length of time, without giving him any reasons for such detention or any opportunity even of making any re-presentation against such a detention. These are indeed very extraordinary powers for taking away the most cherished right of a citizen in a most arbitrary manner. They

provide no machinery for seeking any redress against any possible abuse or misuse of power or for making any representation or even for an appeal from Ceaser to Ceaser. Learned counsel for the appellants contend that since the Provisional Constitution Order preserves Article 2 of the Constitution of 1962 and the Fundamental Right No. 1 given thereunder has not been abrogated, this measure even if it can be regarded as a `law' is void.

Article 2, as earlier indicated, assures a citizen that "no action detrimental to the life, liberty, body. reputation or property of any person shall be taken except in accordance with law", and Fundamental Right No. 1 guarantees that "no person shall be deprived of life or liberty save in accordance with law."

What is `law' has already been dealt with earlier in this judgment-so now I have to decide whether Martial Law Regulation No. 78 is a valid law. since I have already held that neither President's Order No. 3 of 1969 has succeeded in taking away that jurisdiction nor can the promulgation of Martial Law by itself produce that effect.

It is interesting to note that the impugned Regulation itself does not contemplate the ouster of the jurisdiction of the ordinary Courts of the land, for, the intrinsic evidence of its own terms is to the contrary. Paragraph 6(b) thereof clearly contemplates that if any person contravenes any order made under this Regulation he shall be tried by a "Court having jurisdiction to try the person". This can only mean the ordinary criminal Courts, for, no other machinery is provided for punishment In the case of such contravention. Again clause (a) of paragraph 5 speaks of a "Magistrate of the First Class" and refers to certain provisions of the Code of Criminal Procedure. Does this not mean that where a Court has tried anyone for the contravention of any order made under the Regulation the ordinary incidents of appeal and revision will also be attracted as a normal consequence of such a trial? The question of exclusion of the jurisdiction of the Courts, therefore, does not arise in terms of this Regulation. If it arises at all it arises under the Presidential Order No. 3 of 1969 with which I have already dealt.

However, as this question has been raised, regarding the validity of Martial Law Regulation No. 78, I must point out that it follows from what I have said earlier that it was made by an authority whose legal competence we have not been able to recognise on the ground of want of legal authority and the unconstitutional manner of arrogation of power.

The learned Attorney-General, however, insists that even this regime had received the legal recognition of this Court and, therefore, it had also acquired de jure authority to make laws.

Reference in this connection has been made to two decisions. The first was in the case of Muhammad Ismail v. The State (P L D 1969 S C 241) in which the judgment was delivered again by myself. The only question raised in this case was as to whether after the promulgation of Martial Law on the 25th of March 1969, and the enactment of the Provisional Constitution Order on the 4th of April 1969, this Court continued to retain the jurisdiction conferred upon it by the Constitution of 1962 to entertain petitions for special leave to appeal in criminal proceedings in view of the fact that the Provisional Constitution Order did not specifically provide for any appeal by special leave. No question was raised in this case as to the validity of the Martial Law or of the Provisional Constitution Order. The only question argued was whether on a proper construction of the language of this order an appeal for special leave in criminal proceedings was still within the competence of this Court. The Court held that upon a proper construction of the terms of the Order the Jurisdiction to entertain and hear appeals by special leave in criminal matters had not been taken away and that the jurisdiction given to it by Article 58 of the 1962-Constitution remained unaffected. There was no question, therefore, of any conscious application of the mind of the Court to the question of the validity of the regime or the legality of the Provisional Constitution Order nor was this Court called upon to give any decision thereon as the latter order had manifested no intention to alter that jurisdiction and there was no conflict between the two. It is not correct, therefore, to say that this decision in any way constitutes a conscious recognition in law of the new regime.

The next case referred to is that of Mian Fazal Ahmad v. The State (1970 S C M R 650). In this case, which was a petition for special leave from an order of the Lahore High Court dismissing an application under section 561-A of the Code of Criminal Procedure for quashment of certain criminal proceedings pending investigation by the police, the High Court had admitted the petition and directed the police not to put up any challan in any Court. The police did not do so but instead of submitting a challan before a criminal Court placed the matter before a Military Court and the. latter convicted the petitioner. Thereupon the petitioner moved the High Court, for taking action against the D S. P. in contempt for disobedience of its order. The High Court dismissed the application of the petitioner. and this Court by a very brief order dismissed the petition for special leave observing that "when the Military Court took cognizance of the offence and imposed a penalty on the petitioner the learned Judge in the High Court was right in dismissing the petitioner's application under section 561-A of the Code of Criminal Procedure." No other reason was given for the order.

Again, this does not show that the legality of the order of transfer of the case to the Military Court was ever challenged. The High Court's order was upheld possibly on the ground that the proceedings which were sought to be quashed by the original petition having been terminated by the transfer of the case to the Military Court, there was no further need of its quashment, and no question of commitment of the D. S. P. in contempt arose, as he had not violated the order of the High Court. In these circumstances, it can hardly be urged that this constitutes a conscious legal recognition of the military regime of 1969. Questions in dispute in these cases were entirely different and had nothing whatever to do with the question now before us. It s incorrect, therefore,

to say that this Court had given any legal recognition to the regime of General Agha Muhammad Yahya Khan.

The question, therefore, is still at large and has for the first time now been raised before this Court in this specific form. The learned Attorney-General's contention that even the tacit approval given by this Court by not questioning suo motu the various Martial Law Regulations made by the regime concerned during this period of 2J years is itself sufficient to preclude this Court from going into this question now, is not, in my opinion, tenable. The Courts, as I have already indicated, are not called upon to suo motu raise a controversy and then decide it. They can only do so if a litigant raises the controversy in a concrete form, as it has now been done before us. `-The Court", says Mr. Eaton Drome, has authority to expound the Constitution only in cases presented to it for adjudication. Its Judges may see the President usurping powers that do not belong to him, Congress exercising functions it is forbidden to exercise, a State asserting rights denied to it. The Court has no authority to interfere until its office is invoked in a case submitted to it in the manner prescribed by law." (Vide Marriot's English Political Institutions, 1938 Edn., p. 293).

Incidentally it may also be mentioned here that a great deal. that has been said about the oath of Judges is also not germane to the question now before us, for, in the view I take of the duty of a Judge to decide a controversy that is brought before him it cannot be said that any Judge of this Court has violated his oath which he took under the Constitution of 1962. He was not called upon to take any other oath thereafter and is still no doubt bound by that oath and will stand by it. But it must not be overlooked that since his own powers are limited to deciding a controversy properly brought before him by a litigant or on his behalf, an equal duty lay on the gentlemen of the Bar as well to raise this question. This was never done and it may be pertinent to point out that even the learned gentlemen of the Bar, except the learned Attorney-General, who have now argued this case, actively, at some stage or the other, co-operated with the various Martial Law regimes either as High Commissioner, Minister, Attorney-General, or Advocate-General. So far as this Court is concerned it has always acted in accordance with its oath and will continue to do so whenever a controversy is brought before it, no matter what the consequences.

Reverting now to the question of the legality of the Presidential Order No. 3 of 1969 and the Martial Law Regulation No. 78 of 1971 it follows from the reasons given earlier that they were both made by an incompetent authority and, therefore, lacked the attribute of legitimacy which is one of the essential: characteristics of a valid law. The Presidential Order No. 3 of 1969 was also invalid on two additional grounds, namely, that it was a Presidential Order, which could not in terms of the Pro visional Constitution Order itself amend the Constitution so as to take away the jurisdiction conferred upon the High Court under Article 98 and that it certainly could not, in any event, take away the judicial power of the Courts to hear and determine questions

pertaining even to their own jurisdiction and this power could not be vested in another authority as long as the Courts continued to exist.

This does not, however, dispose of the case, for we are again presented by the learned Attorney-General with the argument that a greater chaos might result by the acceptance of this principle of legitimacy. He has reminded the Court of the grave consequences that followed when in Moulvi Tamizuddin Khan's case a similar argument was spurned by the Federal Court and "disaster" brought in. I am not unmindful of the grave responsibility that rests upon Courts not to do anything which might make confusion worse confounded or create a greater state of chaos if that can possibly be avoided consistently with their duty to decide in accordance with law.

Some of the learned counsel appearing on the other side at first advocated that we should totally ignore this argument but Mr. Manzoor Qadir and Mr. Sharifuddin Pirzada frankly conceded that within certain limits validation can be given to certain acts of even a de facto usurper of power either on the ground of state necessity or implied authority. Mr. Anwar sought at one stage to disassociate himself with this view but when it was pointed out to him that the result would then be that even the Legal Framework Order (No. 2 of 1970) and the elections held thereunder would also become invalid, he too hesitated and thought that that might be going too far. Mr. Brohi on the other hand, is prepared to concede only this much that an usurper may be given the limited power of acting within the framework of the Constitution, but nothing beyond that.

This is a difficult question to decide and although I have for my guidance the example of our own Federal Court, which in Governor-General's Reference No. 1 of 1955 invoked the maxim of salus populi suprema lax to create some kind of an order out of chaos, I would like to proceed with great caution, for, I find it difficult to legitimize what I am convinced is illegitimate. I shall, therefore, first examine some other decisions which have been cited at the Bar before I begin to formulate my own views in the matter.

I have been referred to the decision of the Privy Council in the case of Madzimbamuto v. Lardner-Burke and another ((1968) 3 A E R 561) where Lord Pearce in a very elaborate dissenting judgment accepted that acts done by those actually in control without lawfull authority may be recognized as valid or acted upon by the Courts within certain limitations, on principles either of necessity or implied mandate, particularly where the enquiry is being made ex post facto, because, common sense dictates that every thing done during the intervening period, whether good or bad, cannot be treated in the same manner. In support of this proposition the noble lord refers also to a passage from Grotius' book on De Jure Belli et Pacis (Book 1, Ch. 4) where the following principle is enunciated :--

"Now while such a usurper is in possession, the acts of Government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the Courts."

There is no doubt that a usurper may do things both good, and bad; and he may have during the period of usurpation also made many Regulations or taken actions which would be valid if emanating from a lawful Government and which may well have, In the course of time, affected the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer of property and similar subjects. Are all these to be invalidated and the country landed once again into confusion?

Such a principle, it appears, has also been adopted in America In various cases which came up after the suppression of the rebellion of the Southern States and the American Courts roc adopted the policy that where the acts done by the usurper were "necessary to peace and good order among citizens and bat affected property or contractual rights they should not be invalidated", not because they were legal but because they would cause inconvenience to innocent persons and lead to further difficulties. Vide Texas v. White ((1868) 7 Wallace 733), Horn v, Loekhurt ((1373) 17 Wallace 850) and Baldy v. Hunter ((1897) 171 U S 388).

Lord Pearce himself indicated 3 limitations for the validation! of such acts, namely :--

"(1) So far as they are directed to and reasonably required: for ordinary orderly running of the State ;

(2) so far as they do not impair the rights of citizens under the lawful Constitution ; and

(3) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign."

The judgments of the Court of Appeal in Rhodesia in the same case and of a: Court in Uganda in the case of Uganda v. Commissioner of Prisons, Ex Parte Matovu (1966 E A L R - 514) have also been cited before us but I do not propose to deal with them, as they seem mainly to draw their inspiration from Hans Kelsen and the decision in Dosso's case. There is, however, another case from Nigeria where the military take over was not accepted as legitimate but condoned as a "manifestation of necessity" and not as "revolutionary breach of legal continuity". On this basis even the fundamental rights guaranteed by the pre-existing constitution were also maintained in the case of Lakamani and 0la v. Attorney General (West), Nigeria. (Unfortunately the full report of this decision is not available but it is referred to in S. A. de Smith's book on Constitutional and Administrative Law).

We have also in this connection been referred to a case from Cyprus sub-nomine. The Attorney-General of the Republic v. Mustafa Ibrahim and others (1964 C L R 196) where the Supreme Constitutional Court of Cyprus also applied the doctrine of necessity to validate a certain legislation which was otherwise to consistent with certain Articles of the Cyprus Constitution on the ground that they would be justified "if it can be shown that it was enacted only in order to avoid consequences which could not otherwise be avoided, and which if they had followed, would have inflicted upon the people of Cyprus, whoa the Executive and Legislative organs of the Republic are bound to protect, inevitable irreparable evil end furthermore if it can be shown that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by the enactment in question, was not disproportionate to the evil avoided" This the Court thought was its duty to do in view of its "all important and responsible function of transmitting legal theory into living law; applied to the acts bf daily life fur the preservation of social order"

I too am of the opinion that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but I respectfully beg to disagree with the view that this is a doctrine for validating the illegal acts of usurpers In my humble opinion, this doctrine can be invoke in aid only after the Court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization.

Applying this test I would condone (1) all transactions which are past and closed, for, no useful purpose can be served by reopening the n, (2) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order, (3) all acts which tend to advance or promote the good of the people, (4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of. in our case, the objectives mentioned In the Objectives Resolution of 1954. I would not, however, condone any act intended to Entrench the usurper more firmly in his power or to directly help him to run the country contrary to its legitimate

objectives. I would not also condone anything which seriously impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity.

Applying these tests to the President's Order No. 3 of 1969 and Martial Law Regulation No. 78 of 1971 lam not in a position to say that they fall in either of the categories mentioned above, although the learned Attorney-General has very strenuously contended that when Martial Law Regulation No. 78 was enacted a state of rebellion was prevailing in East Pakistan. Even if that was so, the Regulation could well have been restricted to the territories in which such a state of grave disorder prevailed. There is no evidence before us that there wag arty danger of such large scale disorder in West Pakistan. Furthermore, even if reasonable powers of preventive detention were necessary in West Pakistan to meet the case of any individual the security of Pakistan Act was available and at the time the impugned order of detention was actually made even the Defence of Pakistan Rules were available. Both of these contain ample provisions for detaining a person without trial. I am not in a position, there. fore, to say that Martial Law Regulation No. 78 was necessary for the ordinary orderly running of the State or for promoting the good of the people of West Pakistan. This Regulation cannot thus in my opinion, be justified even on the ground of necessity.

It is interesting to note that one of the detenus before us; namely, Malik Ghulam Jilani, was originally arrested under rule 32 read with rule 213 of the Defence of Pakistan Rules "with a view to preventing him from acting in a manner prejudicial to security, public safety and interest and defence of Pakistan." It was only subsequently that the order of detention was substituted by an order under Martial Law Regulation No. 78, but this too added no new grounds and all that it stated was that "whereas dl is necessary to prevent Malik Ghularn Jilani son of late Khan Bahadur Nazar Muhammad Khan, resident of 131/L-1, Gulberg III, Lahore, from acting in a manner prejudicial to security, public safety and interest, and defence of Pakistan". It is obvious therefore, from these orders themselves that what could be done under Martial Law Regulation No. 78 could also be done under the Defence of Pakistan Rules. The only object of converting the order into an order under Martial Law Regulation No. 78 was to deprive the Courts of their jurisdiction to entertain any application against such detention under the terms of President's Order No. 3 of 1969.

The latter Order too was clearly unnecessary, for, there is nothing to indicate that the Courts were, in any way, subverting the authority of Government or doing anything which could, by any stretch of imagination, be considered to be objectionable.

In these circumstances, I have, for the reasons given above, come to the conclusion that both these orders were not only Illegitimate but were also incapable of being maintained on the ground of necessity. The result which follows from this conclusion is that both the detentions were, in

my view, illegal and the High Court should have declared the impugned orders of detention to be void and of no legal effect.

It remains now for me only to consider another argument advanced by the le rued Attorney-General that the attack is directed really against the present regime and not against the regime of General Agha Muhammad Yahya Khan. The learned counsel, on the other side, have all protested that this is not so but in order to leave no room for doubt I wish to make it clear that this decision is confined to the question in issue before this Court, namely, the validity of the Presidential Order No. 3 of 1969 and Martial Law Regulation No. 78 of 1971 and has nothing whatsoever to do with the validity of the present regime. I am fully conscious of the fact that there were very important differences which may well have a bearing on this question. The circumstances may well have been totally dissimilar. Again since the preparation of this judgment further developments have taken place of which I am entitled to take notice. The National Assembly has met and ratified the assumption of power by the new President who is an elected representative of the people and the leader of the majority party in the National Assembly as now constituted. The Assembly has also, it is said, ratified an interim Constitution. Its terms are not known to the Court as yet but these developments may well hive radically altered the situation. However, since this question is not before this Court I refrain from expressing any definite opinion with regard thereto.

Before I conclude this judgment I feel it my duty also to place on record my appreciation of the very able assistance given to this Court by all the learned counsel concerned. In particular I wish to express my gratitude to both Mr. A. K. Brohi and Mr. Sharifuddin Pirzada for the enormous amount of research undertaken by them and the willing assistance rendered by them as amicus curiae in spite of their heavy engagements elsewhere.

In the result, therefore, I would allow both these appeals and declare both the impugned orders of detention to be void and without legal effect: The detenus should now be set at liberty forthwith unless they are being detained under any other order passed under any valid law.

MUHAMMAD YAQUB ALI, J.-These two appeals one filed by Miss Asma Jilani and the other by Mrs. Zarina Gauhar arise oat of habeas corpus 'petitions tiled by the first named in the; Punjab High Court for the release of her father Malik Ghulam Jilani and by the second named in the Sind Baluchistan High Court for the release of her husband Mr. Altaf Gauhar.

Malik Ghulam Jilani was taken into custody on the 20th December 1971, by the order of the Governor of the Punjab under rule 32, sub-rule (1), clause (b) read with rule 213 of the Defence of Pakistan Rules, 1971, on the ground that it was necessary to prevent him from acting in a manner prejudicial to security, public safety, interest and Defence of Pakistan. On the 23rd December 1971, Miss Asma Jilani, filed a habeas corpus petition under Article 98(2)(b)(i) of the Constitution of 1962 questioning the detention of her father on more than one ground. A learned Judge issued rule to the respondent for :the 31st December 1971 to show cause as to why the order of detention be not set aside. On the 30th December 1971, the Governor rescinded the order of detention and simultaneously, ,in his capacity as Martial Law Administrator, Zone 'C', passed .an order under Martial Law Regulation 78, directing that Malik Ghulam Mint be detained in his house situated in Gulberg III, Lahore, till further orders under such Police custody as the District Magistrate, Lahore, may deem necessary. He was -further restrained from making any speech, statement or utterance which may be seditious or prejudicial to the security, the public safety or interest, the defence of Pakistan, the maintenance of public order, Pakistan's relations with any other power, the maintenance of peaceful conditions in any part of Pakistan or the maintenance of essential supplies and services ; he shall not meet any person without the prior approval of the District Magistrate, Lahore, except the present inmates of the said house :and shall be responsible to bear his own expenses including that of medical aid.

On the 31st December 1971, Miss Asma Jilani obtained permission to file supplementary grounds in support of the habeas corpus petition and attacked the legality and propriety of the fresh order of detention. The case came up for hearing on 15th January 1972, before Shafiur Rahman, J.-whereupon the Advocate-General appearing for the respondent raised a preliminary objection that the High Court could not assume jurisdiction because of the bar captained in the Jurisdiction of Courts Removal of Doubts) Order 3 of 1969.

In reply the counsel for the petitioner contended that Martial Law Regulation 78 under which Malik Ghulam Jilani was being detained was not a part of the law of the land having been pro-mulgated by a person who had usurped power by "waging war against Pakistan" and that he took power from Ayub Khan in violation of the provisions of the Constitution of 1962, to protect and defend which Constitution both Ayub Khan and Yahya Khan had taken oaths. It was further maintained that the provisions of Martial Law Regulation 78 and the Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969, were controlled by Article 2 of the 1962-Constitution which envisaged due process of law.

The petition was dismissed by the learned Judge on account of the bar contained in the Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 excluding the jurisdiction of Courts.

including the High Courts and the Supreme Court to call in question any order passed by a Martial Law authority.

Mr. Altaf Gauhar was taken into custody on the night between 4th and 5th February 1972, from his residence in Karachi., under the order passed by the Martial Law Administrator,, Zone `D', under Martial Law Regulation 78. It was provided in the order that Mr. Altaf Gauhar was to be detained for a period of six months and committed to the custody of the Superintendent, Central Prison, Karachi. This part of the order,, of detention was, however, not implemented, and he was detained, in a private bungalow in Karachi, but no one knew his whereabouts. Later on, he was taken to a rest house in the Sihala Police Training School and lodged there.

On the following morning Mrs. Zarina Gauhar filed a habeas corpus petition in the High Court of Sind & Baluchistan under Article 98(2)(b)(i) of 1962-Constitution calling in question the detention of her husband as without lawful authority.

It was pleaded that the arrest of Mr. Altaf Gauhar in an unknown place was without lawful authority as no warrant of arrest was served upon him or shown to him. nor the authority under which he may have been detained in custody was disclosed. It was further urged : (i) that even if it was hereafter urged that Mr. Altaf Gauhar was detained under Martial Law Regulation 78 the detention was illegal and without lawful authority inasmuch as the Martial Law Regulation 78 itself does not constitute the law of the land ; (ii) that Martial Law, even if It be the will of an individual, Martial Law Ruler, who seizes power, is not a heritable commodity and vanishes with the original proclaimer, ceasing to exercise power for any reason and that there was no separate and independent Proclamation of Martial Law or Emergency by the present Chief Martial Law Administrator ; and (iii) that the exercise, by a civilian, of Martial Law powers is fundamentally opposed to the concept of Martial Law which signifies Military rule.

On the 7th February 1972, the petition was admitted the hearing by a Division Bench and a rule issued to the respondent for a date to be fixed in office. On the 11th of February: 1972, Mrs. Zarina Gauhar filed an application under section 497, Cr. P. C., read with Article 98(2)(b)(i) of 1962-Constitution for granting interim bail to Mr. Altaf Gauhar during the pendency of the hearing of the habeas corpus petition.

The petition for bail was heard on the 18th February 1972,. and dismissed by Dorab F. Patel and Imdad Ally H. Agha, JJ.,-

with the observation that the counsel for the petitioner had failed to pursuade them that the Court had jurisdiction to grant rule against Martial Law order. For the same reasons the habeas corpus too was dismissed.

In declining to interfere with the orders passed by Martial Law authorities, the High Courts of the Punjab and the Sind-Baluchistan relied on the judgment of this Court in the State v. Dosso and others (P L D 1958 S C (Pak.) 533). The following observations of Muhammad Munir, C. J.-were relied upon as conclusive and the validity of the Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 and Martial Law Regulation 78 of 1971;

"Thus a victorious revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution.

After a change of the Character, I have mentioned has taken place, the national legal order must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution."

In support of the petition for leave to appeal, it was inter alia contended that the dictum in Dosso's case require consideration and that even if the view expressed in it was accepted as correct no victorious revolution or successful coup d'etat had taken place on the 25th March 1969, when Field Marshal Muhammad Ayub Khan stepped aside from the office of the President and invited General Agha Muhammad Yahya Khan as Commander-in-Chief of the Pakistan Army to perform his constitutional and legal duty and defend the country from internal disorder and chaos which was beyond the capacity of the Civil Government. It was questioned how could the Commander-in-Chief in those circumstances be said to have staged a victorious revolution, or a successful coup d'etat. Appeal was made by the learned counsel also to the oath taken both by Field Marshal Muhammad Ayub Khan and General Agha Muhammad Yahya Khan to preserve, protect and defend the 1962-Constitution which inter alia provided that "If the President was unable to perform the functions of his office, the Speaker of the National Assembly shall act as President and shall perform the functions of the President". The assumption of the office of the President ; abrogation of the 1962-Constitution ; and the dissolution of the National and Provincial Assemblies by General Agha Muhammad Yahya Khan by the Proclamation issued by him on the 26th March 1969, were, on this premises, claimed to be unlawful acts which Courts of Justice will not recognize. All the Martial Law Regulations and Orders promulgated by him as President and as Chief Martial Law Administrator which were not relatable to immediate

restoration of law and order were on the same ground claimed to be unconstitutional, invalid and of no legal effect.

Leave to appeal was granted as questions of fundamental importance involving interpretation of the 1962-Constitution and correctness of the decision in the State v. Dosso were involved.

Before proceeding further we may notice briefly the constitutional developments which took place in Pakistan after it came into being on the 14th August 1947, consisting of two wings, namely, the Province of East Bengal in the East, and the Provinces of the Punjab, N.-W. F. P., Sind and Baluchistan in the West. The constitutional structure of the State was based on the Indian Independence Act, 1947 (10 and 11 Geo. 6, Ch. 30) and the Government of India Act, 1935 (26 Geo. 5, Ch. 2) as adopted by the Provisional Constitution Order, 1947. A constituent Assembly composed of Members from both Wings who had been elected earlier was to act both as the Constitution-making body and as Federal Legislature of Pakistan. These constitutional Instruments provided for a Federal Government and distribution of powers between the Executive. Legislative and Judicial organs of the State which is an essential element of a democratic State.

Pakistan was faced with innumerable difficulties from the very start. Firstly, there was an influx of nearly ten million people from the Indian dominion who had as a result of violent disturbances which accompanied Partition of the sub-continent were uprooted from their hearths and homes and entered Pakistan as destitute refugees. The rehabilitation and settlement of these refugees pre-empted most of the time of the Government for a number of years. Secondly, Quaid-i-Azam Muhammad Ali Jinnah, Founder of Pakistan, in whom people had implicit faith and who served as a symbol of the unity of the Nation died in September 1948. He was succeeded by Khawaja Nazimuddin, who was then the Chief Minister of the Province of East Bengal. On the 11th September 1951, Khan Liaqat Ali Khan, the first Prime Minister, on whom the political mental of Quaid-i-Azam had fallen and who commanded obedience of the people throughout the country was assassinated. A tussle for grabbing power among persons who held positions of advantage in the Government thereupon ensued and under its weight the foundation of the State started quivering. Eventually Mr. Ghulam Muhammad, an ex-Civil Servant, who was holding the portfolio of Finance became the Governor-General and Khawaja Nazimuddin as Leader of the majority party in the Constituent Assembly assumed the Office of the Prime Minister.

In April 1953, Mr. Ghulam Muhammad dismissed Khawaja Nazimuddin and his Cabinet although he commanded clear majority in the Constituent Assembly and made another civil servant Mr. Muhammad Ali Bogra, Pakistan's Ambassador to the United States of America, as the Prime Minister. Among others General Muhammad Ayub Khan, Commander-in-Chief of

Pakistan Army, joined his Cabinet as Defence Minister. This was the first constitutional mishap of Pakistan as Governor-General Mr. Ghulam Muhammad was only a constitutional head. He had to act on the advice given to him by the Prime Minister and under the Constitutional Instruments (Indian Independence Act, 1947, and the Government of India Act, 1935) he had no legal authority to dismiss the Prime Minister and assume to himself the role of a sovereign.

On the 7th March 1949, the Constituent Assembly passed the Objectives Resolution which embodies the "will" of the historically first Legislature of the country. The Resolution declared as under ;

"In the name of Allah, the Beneficent, the Merciful;

Whereas sovereignty over the entire universe belongs to God Almighty alone and the authority which he has delegated to the State of Pakistan 'through its people for being exercised within the limits prescribed by him is a sacred trust;

This Constituent Assembly representing the people of Pakistan resolves to frame a constitution for the sovereign independent State of Pakistan;

Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed ;

Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah;

Wherein adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures;

Whereby the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed;

Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;

Wherein the independence of the judiciary shall be fully secured;

Wherein the integrity of the territories of the Federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded;

So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity."

Counsel for the appellants and the amicus curiae named the Resolution as Grund-norm of Pakistan. The Attorney-General appearing for Martial Law Administrator, Zone `D', described, it as an Instrument which embodied the ideology of Pakistan and which was the only bond of its unity.

By 1954, the draft of the Constitution based on the Objectives Resolution had been prepared with the assent of the leaders of the various parties in the Constituent Assembly when on the 24th October 1954, Mr. Ghulam Muhammad knowing full well that the draft Constitution was ready, by a Proclamation, dissolved the Constituent Assembly, and placed armed guards outside the Assembly Hall. This was the second great mishap of Pakistan.

The order of the Governor-General was challenged by Maulvi Tamizuddin Khan, President of the Constituent Assembly, in the Chief Court of Sind by a Writ Petition filed under section 223-A of the Government of India Act, 1935, which was added by the Government of India (Amendment) Act, 1954, passed by the Constituent Assembly, on 16th July 1954. It empowered

the High Courts to issue Writs of mandamus, certiorari, quo warranto and habeas corpus. The order passed by Mr. Ghulam Muhammad was challenged as unauthorised by the Indian Independence Act or the Government of India Act, void and of no legal effect.

In defence of the Writ Petition, the Governor-General and the Members of the newly-constituted Cabinet, cited as respondents, Inter alia pleaded that the Chief Court of Sind had no jurisdiction to issue a Writ under the Government of India (Amendment) Act, 195-1, as it had not received the assent of the Governor-General.

A Full Bench of the Chief Court overruled the objection raised by the respondents and held that the order dissolving the Constituent Assembly was illegal and issued a Writ restraining the Governor-General; his newly appointed Cabinet Ministers; their agents and servants from implementing or otherwise giving effect to the Proclamation of 24th October 1954, and from interfering directly or indirectly with the functions of the Constituent Assembly.

The Governor-General and his Ministers thereupon filed an appeal in the Federal Court being Constitutional Appeal 1 of 1955 reiterating the objection that the Government of India (Amendment) Act, 1954, did not become a law as it had not received the assent of the Governor-General.

By a majority judgment delivered by Muhammad Munir, C. J. the appeal was allowed and the writ petition was dismissed on the finding that the Constituent Assembly when it functioned under subsection (1) of section 8 of the Indian Independence Act acted as Legislature of the Dominion within the meaning of section 6 of the Act and that under subsection (3) of the later section, the assent of the Governor-General was necessary to all legislation and that since section 223-A of the Government of India Act under which the Chief Court of Sind issued the Writ had not received such assent, it was not yet law and, therefore, that Court had no jurisdiction to issue the Writs. Cornelius, J. (as he then was) differed with this view and recorded a dissenting judgment holding that neither the British sovereign nor the Governor-General as such was a part of the Constituent Assembly. The assent of the Governor-General was, therefore, not necessary to give validity to the laws passed by the Constituent Assembly. With great respect to the learned Chief Justice the interpretation placed by him on sections 6 and 8 of the Indian Independence Act, 1947, as a result of which the appeal was allowed, is ex facie erroneous though we do not propose to examine in detail the reason given in the judgment.

Apart from the political cataclysm which the Proclamation of the 24th October, by Mr. Ghulam Muhammad brought into being a large number of laws passed by the Constituent Assembly which had from the very beginning not been placed before the Governor-General for assent were declared by the Court in the case of Maulvi Tamizuddin Khan as invalid. To meet this disaster the Governor-General purporting to act under section 42 of the Government of India Act promulgated an Ordinance called the Emergency Powers Ordinance IX of 1955 by which he sought to validate and to give retrospective effect to thirty-five constituent Acts which had been passed by the Constituent Assembly under subsection (1) of section 8 of the Indian Independence Act, 1947 (10 and 11 Geo. 6, Ch. 30). He also added a proviso to section 176 of the Government of India Act, 1935, forbidding "the bringing of suits or other proceedings against the Government or any Minister or Officer of the Government in respect of or arising out of anything done or omitted to be done by the Governor-General or by the Government or by any person under or in consequence of the Governor-General's Proclamation under section 102 of the Government of India Act, 1935, which had been issued simultaneously with the Ordinance". On the 15th April 1955. the Governor-General summoned a Constituent Convention for the 10th May 1955, for the purpose of making provision as to the Constitution of Pakistan, and on the following day issued a Proclamation assuming to himself until other provision was made by the Constituent Convention such powers as were necessary to validate and enforce the laws that were needed to avoid a breakdown in the constitutional and administrative machinery of the country or to preserve the State and maintain the Government of the country in its existing condition, and in exercise of those powers retrospectively validated and declared enforceable the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955.

The question of the validity of section 2 of the Emergency Powers Ordinance, 1955, came up before the Court in the case of one Asif Panel (P L D 1955 F C 387) within a few days of the decision in Maulvi Tamizuddin Khan's case. On the short ground that under section 42 of the Government of India Act, 1935, the Governor-General had no power to make by Ordinance any provision as to .the Constitution of the country. The Emergency Powers Ordinance IX of 1955 was held to be invalid whereupon the Governor-General made a Special Reference to the Federal Court which was answered on the 16th May 1955. Dealing with the validity of this action the Court expressed the opinion that the Constituent Assembly and not the Constituent Convention as was proposed to be set up by the Governor-General would be competent to exercise all powers conferred by the Indian Independence Act, 1947, and secondly that in the situation presented In the Reference, the Governor-General had during the interim period the power under the common law, special or state necessity of retrospectively validating the laws listed in the Schedule to the Ordinance, 1955, and all those laws now decided upon by the Constituent Assembly or during the aforesaid period shall be valid and enforced in the same way on which day they purported to have come into force.

Cornelius, J.-as he then was differed with the opinion of the Court that the Governor-General could on the basis of the State necessity validate the laws which were declared invalid by the Federal Court and opined that there was no provision in the Constitution and no rule of law applicable to the situation, by which the .Governor-General can, in the light of the Court's

decision in the case of Usif Patel by Proclamation or otherwise, validate laws enumerated in the Schedule to the Emergency Powers Ordinance, 1955, whether temporarily or permanently.

In accordance with the opinion given by the Federal Court, a new Constituent Assembly was elected and it eventually succeeded in framing a Constitution which came into force on the 23rd March 1956. The Constitution provided for a federal Government with equal representation of peoples of both the Wings in the National Assembly (Article 44). Fundamental rights and an independent judiciary to enforce those rights were guaranteed. Article 5 provided that all citizens are equal before law and are entitled to equal protection of law and that no person shall be deprived of life or liberty save in accordance with law. Provision was made for preventive detention for a period not exceeding three months unless the Board consisting of persons, appointed by the Chief Justice of Pakistan in the case of a person detained under a Central Act and a Board consisting of persona nominated by the Chief Justice of the High Court of the Province in the case of a person detained under a Provincial Act reported that there was a sufficient cause for such detention.

The Federal Government was to be headed by a President who under Article 35 (1) could be impeached on a charge of violating the Constitution or gross misconduct. He was to act as a constitutional head and under Article 37 was to act in accordance with the advice of the Cabinet or the appropriate Minister or Minister of State. To confer autonomy on the; Provinces, Article 107 provided that Provincial Legislature shall have an exclusive power to make laws with respect to any matter not enumerated in Federal, Provincial and Concurrent Lists.

A National Assembly was yet to be elected under the 1956 Constitution when Mr. Iskander Mirza who had become the first President by a Proclamation issued on the 7th October 1958, abrogated the Constitution; dissolved the National and. Provincial Assemblies and imposed Martial Law throughout the country : General Muhammad Ayub Khan, Commander-in-Chief of the Pakistan Army, mss appointed as the Chief Administrator of Martial Law. This was the third great mishap which hit Pakistan like a bolt from the blue.

On the 10th October 1958, Mr. Iskander Mirza issued the Laws (Continuance in Force) Order (1 of 1958) which inter alia provided;

"(1) Notwithstanding the abrogation of the Constitution of the 23rd March 1956, and subject to any order of the President or Regulation made by the Chief Administrator of Martial Law, the Republic, to be known henceforward as Pakistan, shall be governed as nearly as may be in accordance with the late Constitution."

On the 13th October 1958, Criminal Appeals State v. Dosso and three other connected matters came up for hearing before the Court. The respondents in these cases were convicted by Council-of-Elders under the Frontier Crimes, Regulation 3 of 1901. The High Court of West Pakistan (Quetta Seat) 'set aside their convictions on the finding that Frontier Crimes Regulation being repugnant to Article 5 of the Constitution, the convictions were bad in law. The question raised by the Court was whether under Article 7 of the Laws (Continuance in Force),Order, 1958, the writs issued by the High Court under Article 170 of the Constitution setting aside the convictions of the respondents had abated.

Delivering the majority judgment of the Court Munir, C. J. held that as Article 5 of the late Constitution itself had now disappeared from the new Legal Order, the Frontier Crimes Regulation (III of 1901) was by reason of Article IV of the Laws (Continuance in Fore) Order, 1958, still in force and all proceedings in cases in which the validity of that Regulation had been called in question having abated the convictions of the respondents recorded by the Council-of-Elders was good. The conclusion reached by the learned Chief Justice proceeded on the following reasons;

"As we will have to interpret some of the provisions of this Order, it is necessary to appraise the existing constitutional position in the light of the juristic principles which determine the validity or otherwise of law-creating organs in modern States which being members of the comity of nations are governed by International Law. In judging the validity of laws at a given time, one of the basic doctrines of legal positivism, on which the whole science of modern jurisprudence rests, requires a jurist to presuppose the validity of historically the first Constitution whether it was given by an internal usurper, an external invader or a national hero or by a popular or other assembly of persons. Subsequent alterations in the Constitution and the validity of all laws made thereunder is determined by the first Constitution. Where a Constitution presents such continuity, a law once made continues in force, until it is repealed, altered or amended in accordance with the Constitution. It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order. A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial, The change may be attended by violence or it may be perfectly peaceful. It may take the form of a coup d'etat by a political adventurer or it may be effected by persons already in public positions. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic Impulse or by the most sordid of ends. For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective. If the attempt to break the Constitution fails those who sponsor or organise it are judged by the existing Constitution as guilty of the crime of treason. But if the revolution is victorious in the sense that the parsons assuming power under the change can successfully require

the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change. In the circumstances supposed no new State is brought into existence though Aristotle thought otherwise. If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus or international entity of the State and the revolutionary Government and the new constitution are, according to International Law, the legitimate Government and the valid Constitution of the State. Thus a victorious revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution.

After a change of the character I have mentioned has taken place, the national legal order must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution. While on this subject, Hans Kelsen, a renowned modern jurist, say;--

"From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually, the new men whom a revolution brings to power annul only the constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order remains valid also within the frame of the new order. But the phrase 'remains valid', does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old constitution prescribed. That constitution is no longer in force; it is replaced by a new constitution which is not the result of a constitutional alteration of the former. If laws which are introduced under the old constitution continue to be valid under the new constitution, this is possible only because validity has expressly or tacitly been vested in them by the new constitution . . . . . .

The laws which, in, the ordinary inaccurate parlance, continue to be valid are, from a juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus It is never the constitution merely but always the entire legal order that is changed by a revolution.

"This shows that all norms of the .old order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only de facto but also de jure. No jurist would maintain that even after a successful revolution the old constitution and the laws based thereupon remain in force, on the ground that they have not been nullified in a manner. anticipated by the old order itself. Every jurist will presume that the old order-to which no political reality any longer corresponds-has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution. It follows that, from this juristic point of view, the storms of the old order can no longer be recognised as valid norms. (General Theory of Law and State translated by Anders Wedberg, 20th Century Legal Philosophy Series, pp. 117-118).

Bearing in mind the principle just stated let us now approach the question involved in these cases. If what I have already stated is correct, then the revolution having been successful it satisfies the test of efficacy, and becomes a basic law-creating fact. On that assumption the Laws (Continuance in Force) Order, however transitory or imperfect it may be, is a new legal order and it is in accordance with that order that the validity of the laws and the correctness of judicial decisions has to be determined."

The rest of the judgment dealing with the interpretation of the Laws (Continuance in Force) Order and their effect on pending cases with which we are not concerned.

The judgment in State v. Dosso set the seal of legitimacy on the Government of Iskander Mirza though he himself was deposed from office by Muhammad Ayub Khan, a day after the judgment was delivered on the 23rd October 1958, and he assumed to himself the office of the President. The judgments In the cases Maulvi Tamizuddin Khan ; Governor-General Reference 1 of 1955 and The State v. Dosso had profound effect on the constitutional developments in Pakistan. As a commentator has remarked, a perfectly good country was made into a laughing stock. A country which came into being with a written Constitution providing for a parliamentary form of Government with distribution of State power between the Executive, Legislature, and the Judiciary was soon converted into an autocracy and eventually degenerated into military dictatorship. From now onwards people who were the recipients of delegated sovereignty from the Almighty, ceased to have any share in the exercise of the State powers. An all omnipotent sovereign now ruled over the people in similar manner as the alien commander of the army who has conquered a country and "will" alone regulates the conduct and behaviour of the subjugated populace. Martial Law remained in force till the 7th of June 1962, when in pursuance to a Mandate he had obtained by some kind of referendum Muhammad Ayub Khan gave a Constitution to the country. Under it he himself became the first President ; revoked the Proclamation of 7th October 1958 and lifted Martial Law. By and large the people accepted the Constitution and among others the Judges of the Supreme Court and High Courts took oath of office under this Constitution. All legislative and administrative acts of Martial Law authorities and the President between 7th October 1958, and

7th June 1962, were validated by this Constitution. Some were continued as Central Acts while others were repealed. Article 250 inter alia provided : Where a law is repealed ; the repeal shall not affect the previous operation of the law or anything duly done or suffered under the law, affect any right, privilege or liability, any penalty etc. Action taken under all Martial Law Orders, Martial Law Regulations, Presidential Orders and Ordinances issued between 7th October 1958 to 7th June 1962, were thereby validated.

In early 1965 Muhammad Ayub Khan was re-elected as President. The general impression in the country was that the election was rigged. Towards the end of 1958, an agitation started against his despotic rule and the undemocratic Constitution which he had imposed on the country. the agitation gathered momentum every day and was accompanied by widespread disturbances throughout the country. In February 1969, Muhammad Ayub Khan called a round table conference of political leaders for resolving the political issues which had led to the disturbances. A solution was near insight, when all of a sudden Muhammad Ayub Khan decided to relinquish the office of the President and asked the Defence Forces to step in as it was "beyond the capacity of the Civil Government to deal with the present complex situation.

In the letter written to the Commander-in-Chief on the 24th March 1969, Muhammad Ayub Khan said;

"It is your legal and constitutional responsibility to defend the country not only against external aggression, but also to save it from internal disorder and chaos. The nation expects you to discharge this responsibility to preserve the security and integrity of the country and to restore normal social, economic and administrative life, let peace and happiness be brought back to this anguished land of 120 million people."

The Mandate given by the outgoing President to the Commander-in-Chief was thus to fulfil his constitutional responsibilities; to restore law and order; and to carry out his legal duty in this behalf.

Muhammad Yahya Khan. Commander-in-Chief, who had taken an oath, that he will be faithful to the Constitution of 1962 and to Pakistan, however, in disregard of his constitutional and legal duty by a Proclamation issued on the 26th March 1969, abrogated the Constitution; dissolved the National and Provincial Assemblies and imposed Martial Law throughout the country. This was the fourth great constitutional mishap which befell Pakistan in less than 16 years.

On the 31st March 1969, Yahya Khan promulgated the Provisional Constitution Order which with some variations followed the scheme of the Laws (Continuance in Force) Order, 1958. It was provided that no judgment, decree, writ or process whatsoever shall be made or issued by any Court or tribunal against the Chief Martial Law Administrator, Deputy Chief Martial Law Administrator or any Martial Law authority exercising power or jurisdiction under the authority of either (Article 3). Article 5 provided that;

"5. No Court, tribunal or other authority shall call or permit to be called in question:

(a) the Proclamation ;

(b) any order made in pursuance of the Proclamation or any Martial Law Regulation or Martial Law Order ; or

(c) any finding, sentence or order of a Special Military Court or a Summary Military Court.

Article 7 (2) laid down that : "Any provision in any law providing for the reference of a detention order to any Advisory Board shall be of no effect".

On 30th of June 1969, a Full Bench of the Punjab High Court in the case Mir Hassan and others v. The State (1) declared that Martial Law Regulation 42 by which the case pending against the petitioner under section 5 (2) of the Prevention of Corruption Act It of 1947 in the Court of a Special Judge was transferred to a Military Court was, in view of the Provisional Constitution Order and Martial Law Regulation 3, without jurisdiction and of no legal effect. It was observed by the learned Judges:

" Article 2 of Constitution (1962), declares that `every citizen of Pakistan is entitled to the protection of the law and to be treated in accordance with law and only in accordance with law . . . . .' The Article provides that no person shall be deprived of life, liberty, body, reputation or property without due process of law. It further declares that any public functionary or person taking any action affecting the life, liberty, body, property or reputation of a person or affecting his profession, trade or business must rely on some law to justify his action. In other words, every

public functionary or person must show legal authority for interference with the right of another person. Thus a direction or order by a public functionary would be invalid if it does not have the backing of a valid contemporaneous law. The Chief Martial Law Administrator by preserving Article 2 of the 1962-Constitution had made it clear once for ail that the intention of the Government was to act in accordance with law. Therefore, the action of any authority including Martial Law authority howsoever high (1) P L D 1969 Lah. 786 he may be, if it had not the backing of a constitutional provision was not immune from being struck down by the Courts of the country."

To overcome the decision of the High Court the Chief Martial Law Administrator on the same day promulgated Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969. Articles 3 and 4 of the Order provided:

"3. (1) No Court, tribunal or other authority, including the Supreme Court and a High Court, shall --

(a) receive or entertain any complaint, petition, application or other representation whatsoever against, or in relation to the exercise of any power or jurisdiction by, any Special Military Court or Summary Military Court, or any Martial Law Authority or any person exercising powers or jurisdiction derived from Martial Law Authority;

(b) call or permit to be called in question in any manner whatsoever any finding, sentence, order, proceeding or other action of, by or before a Special Military Court or a Summary Military Court or any Martial Law Authority or any person exercising powers or jurisdiction derived from a Martial Law Authority ;

(c) issue or make any writ, order, notice or other process whatsoever to or against, or in relation to the exercise of any power or jurisdiction by, a Special Military Court or a Summary Military Court, or any Martial Law Authority or any person exercising powers or jurisdiction derived from a Martial Law Authority.

(2) Any decision given, judgment passed, writ, order, notice or process issued or made, or thing done in contravention of clause (i) shall be of no effect.

(3) If any question arises as to the correctness, legality or propriety of the exercise of any powers or jurisdiction by a Special Military Court or a Summary Military Court or a Martial Law Authority or any other person deriving powers from a Martial Law Authority, it shall be referred to the Chief Martial Law Administrator whose decision thereon shall be final.

(4) If any question arises as to the interpretation of any Martial Law Regulation or a Martial Law Order, it shall be referred to the Martial Law Authority issuing the same for decision and the decision of such Martial Law Authority shall be final and shall not be questioned in any Court, Tribunal or other authority, including the Supreme Court and a High Court."

The Order was given retrospective effect from 25th March 1969, and was to override anything contained in the Provisional Constitution Order, any Martial Law Regulation or any other law for the time being in force. If any question arose as to the interpretation of any Martial Law Regulation or any Martial.

Law Order. it was to be referred to the Martial Law authority issuing the same and the decision of the said authority will be final and cannot be questioned in any Court, tribunal or any other authority including the Supreme Court or a High Court.

On the 30th March 1970, Yahya Khan promulgated the Legal Framework Order and under its provisions, elections were held in December 1970, to the National and Provincial Assemblies under the supervision of a Judge of this Court acting as the Chief Election Commissioner. After a good deal of political manoeuvring, the National Assembly was summoned by Muhammad Yahya Khan for the 3rd March 1971. However, shortly before that he postponed the session indefinitely. Awami League, the dominant political party of East Pakistan and who held a clear majority in the National Assembly reacted to this decision very sharply. To meet the situation Military action was taken on the 25th March 1971, which lasted for several months. These strong measures had, however, no effect on the events which were shaping fast in the Eastern Wing. It led to an armed surrection by Awami League and their supporters. On the 20th November 1971, Indian Armed Forces attacked East Pakistan and on 3rd December 1971, they attacked all along the West Pakistan border and the cease-fire line in Kashmir. On the 16th December Pakistan Army in East Pakistan surrendered to the Indian Army and with the fall of Dacca on that day, the curtain fell on the illegal regime of Muhammad Yahya Khan for ever. He resigned his office on the 20th December 1971, and was placed under arrest.

The history of the constitutional mishaps which befell Pakistan between 1953 and 1969 bringing ruination, and untold miseries to its 120 million people, forms the overcast background against which the Court is required to answer the questions which fall for decision in the two appeals. Firstly, weather the proclamation of the 26th March 1969, abrogating the 1962 Constitution, became a law creating fact, and the Courts lost their exiting jurisdiction could function only to the extent and in the manner determined by the "Laws" promulgated by Muhammad Yahya Khan ; secondly, what is "Law" and what should be its form and content to obtain recognition from Courts of justice; thirdly, whether the Executive and Legislative organs of the State can deny to the Courts, the performance of their judicial functions; and, fourthly, what is the true import of Hans Kelsen's Theory on which the decision in The State v. Dosso is based and whether it would be acted upon by Municipal Courts.

The arguments raised by Mr. Manzur Qadir, counsel for Mrs. Zarina Gauhar, may be paced in three different sections : (i) that the abrogation of the Constitution of 1962 and imposition of Martial Law by General Muhammad Yahya Khan by Proclamation of March 1969, for purposes other than immediate restoration of law and order was unconstitutional and did not at any point of time acquired legal sanctity ; (ii) that enforceability of laws is dependent on their recognition by Courts and only "those laws" promulgated by Agha Muhammad Yahya Khan may be recognized by Courts as are covered by the doctrine of State necessity ; and (iii) that "laws" which purport to deprive Courts of their legal functions and are repugnant to the basic laws of Pakistan viz. Objectives Resolution of the 7th March 1949, are void and of no legal effect.

Mr. M. Anwar appearing for Miss Asma Jilani went a step further and pleaded that notwithstanding the consequences, all legislative measures adopted by Agha Muhammad Yahya Khan being tainted with illegitimacy should be discarded enmass.

The Attorney-General conceded that the decision in State v. Dosso did not lay down the law correctly and stated that it encouraged revolutions and was a standing invitation to future adventurers. He, however, maintained that as a large number of laws were promulgated and actions taken under them both during the regime of Muhammad Ayub Khan and Muhammad Yahya Khan, the Court may uphold those laws under the doctrine of stare decisis. He also conceded that clause (a) of Article 3 of the Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 in so far as it purported to deprive the citizens from approaching Courts of law by providing that no Court will "receive" any complaint, petition, application or other representation whatsoever was a bad law as it purported to deprive the Courts of their judicial functions which include the jurisdiction to determine whether their jurisdiction to entertain a cause is excluded bylaw. He further agreed that "law" is that which is recognized by Courts and relied on the order passed by this Court in Mian Fazal Ahmad v. The State (1970 S C M R 650) in which a Bench of this Court declined to give leave to appeal from the order of the High Court of Punjab, whereby a petition filed by the petitioner under section 561-A, Cr. P. C. in that case to call in question the registration of a case

against him under the Sea Customs Act was dismissed on the ground that in the meantime a Military Court had tried and convicted him.

It was argued that this Court having already recognized President's Order 3 of 1969 as a law, should not go behind that decision. As regards the legality of the Proclamation of the 26th March 1969, issued by Muhammad Yahya Khan; the Attorney-General relied on the theory that habitual obedience by people makes the de facto rule of a usurper de jure. Finally, the Attorney-General posed the question that if the "Laws" promulgated by Muhammad Yahya Khan were illegitimate, as contended by the counsel for the appellants, what will happen to the elections to the National Assembly and the Provincial Assemblies which were held under the Legal Framework Order promulgated by Yahya Khan on 30th March 1970.

The Advocates-General for the Provinces of Punjab, Sind, N. W. F. P. and Baluchistan did not address the Court.

Mr. A. K. Brohi (amicus curiae) first argued the question that Courts of law are, as a matter of legal obligation, bound by the dictates of the 1962-Constitution and have not been absolved of that legal obligation by taking cognizance of the ties authority destructive of the established legal order. He also questioned the nature of the new legal order based on the system officially described as Martial Law. In his opinion this system was not regulated by any set of legal principles known to jurisprudence and was merely contingent on the will and whim of one man. If so, then what was the legal status of Courts which accept that their authority stems from one man of unbridled will? He referred in this respect to the oath of office taken by the Judges under the 1962-Constitution and maintained that Judges have since then not taken any oath per contra or by means of any legal or formal document accepted or declared their allegiance to any other source of legal authority. He also attacked the decision in Dosso's case and analysed Kelsen's theory on which that decision is based. It was argued that Kelsen's theory that a victorious revolution and successful coup d'etat are law-creating facts is a mere theory of law as distinguished from law itself. The function of a theory of law is to explain or to describe the nature of law or the nature of a legal system. It is, however, itself not a part of legal system or the law which it seeks to describe. This according to Mr. Brohi was the central fallacy in the judgment given by Muhammad Munir, C. J. He referred to a remark by Kelsen in "What is justice" (page 268) "the propositions of jurisprudence are not themselves norms. They establish neither duties nor rights. Norms by which individuals are obligated and empowered issue only from the law-creating authority. The jurist, as the theoretical exponent of the law, presents these norms in propositions that have a purely descriptive sense, statements which only describe the "ought" of the legal norm. It is of the greatest importance to distinguish clearly between legal norms which comprise the object of jurisprudence and the statements of jurisprudence describing that object. These statements were called "rule of law" in contradistinction to the "legal norms" issued by the legal authority.

Mr. Brohi next referred to the decision in the case of Madzimbamuto v. Lardner Burke ((1968) 3 All E R 561) in which Kelsen's theory of effectiveness was applied. This case is mentioned by some authors as the grund-norm case. He pointed out that the decision fn this case was the maximum success which Kelsen could have conceivably envisaged.

Mr. Brohi further explained the nature of Martial Law (i) as a law regulating discipline and other matters determining the rules of conduct applicable to the Armed Forces; (ii) law which is imposed on an alien territory under occupation by an Armed Force of which the classic definition was given by the Duke of Willington when he stated in a debate in the House of Lords in 1851 as follows;

"Martial Law is neither more nor less than the will of the General who commands the Army. In fact, Martial Law means no law at all."

and (iii) law which relates to and arises out of a situation in which the Civil power is unable to maintain law and order and thus of necessity the Military power has to resort to the use of force In order to re-create conditions of tranquillity in which the civil power can re-assert its authority. Reference was made to decided cases that the Courts of law have the authority to determine the Jurisdiction for the imposition of this type of Martial Law and also to make pronouncements regarding its valid continuance on its objective analysis of factual situation, i.e., whether the Civil power is really unable to assert itself in the maintenance of law and order and the continued presence of the military power is essential (R. V. Strickland) (i). In this connection Mr. Brohi referred to the Proclamation of Martial Law, and the radio broad. c Sat of Muhammad Ayub Khan in which he said ;

"The whole nation demands that General Yahya Khan, the Commander-in-Chief of Pakistan Army, should fulfil his constitutional responsibilities"...That "the security of the country demands that no impediment be placed in the way of the defence forces and they should be enabled to carry out freely their legal duties,"

and the letter he wrote to Muhammad Yahya Khan on 24th March 1969 to which reference has already been made earlier. He also referred to the first speech of Muhammad Yahya Khan in which he said : "My sole aim in imposing martial law is to protect life, liberty and property of the people and put the Administration back on the rails" and again "it is my firm belief that a sound, clean and honest administration is a pre-requisite for sane and constructive political life and for the

smooth transfer of power to the representatives of the people elected freely and Impartially on the basis of adult franchise. It will be the task of these elected representatives to give the country a workable constitution and find a solution of all other political, economic and social problems that have been agitating the minds of the people". This document in the opinion of Mr. Brohi leaves no doubt that the Martial Law which was imposed on the 26th March 1969, fell in the third category.

The various actions taken by Yahya Khan under the umbrella of Martial Law, however, proved that in practice the Martial Law imposed by him fell in the second category. That is, law which is imposed by invading army on a conquered territory, because it is only then as stated by the Duke of willington that the will of the army commander is law. 1f this be so, then the entire structure of all institutions in Pakistan including the superior Courts are merely an expression or aspect of one man's will, which a victorious military commander imposes no an alien territory and subjugated populace.

Continuing Mr. Brohi pointed out that the characteristic of all forms of civilised Government is that the structural distribution of power is regulated by law in a manner that every functionary, no matter so highly placed, Is the servant of the law, should a system of Government exist in which power is regulated and derived not from law, but from force such a system cannot claim to be a legal system of Government whatever else it may be. Dealing with the transfer of power by Muhammad Ayub Khan to Muhammad Yahya Khan he said that with the abrogation of 1963 Constitution not only the legal limitations on the exercise of power, but also the legal basis and source of power disappeared. Power conferred by the 1962-Constitution on the President vested in Muhammad Ayub Khan only by virtue of the Constitution. He had no other source of power outside it. His capacity to exercise transfer of power was thus contingent on the continuance of the 1962-Constitution. The transfer of power to the Commander-in-Chief by Muhammad Ayub Khan was to perform his constitutional obligations to restore law and order. He had no capacity to transfer total power of the State to Muhammad Yahya Khan. His act in transferring power to Yahya Khan was, therefore, a nullity. In any case the transfer was to be a limited power, ad hoc and temporary under which Yahya Khan could not have conceivably enjoyed unlimited power.

Lastly, Mr. Brohi argued that in Pakistan the real sovereign is God Almighty and the State of Pakistan has a limited power of which it is a recepient as a trustee or a delegatee. On this hypothesis he argued that the will of one man was repugnant to the grund-norm of Pakistan, viz. the Objectives Resolution and in Pakistan no single man could be the sole repository of state power. He referred to a passage from his book "The Fundamental Laws in Pakistan" that according to the Western Jurisprudence, legal sovereign are the people who give the first constitution; that in Pakistan the first sovereign is God Almighty and the power received from Him as a delegatee or a trustee is to be exercised by chosen representatives of the people and not by the will of one man.

Mr. Sharifuddin Pirzada (amicus curiae) supported the views expressed by Mr. A. K. Brohi that the abrogation of the 1962Constitution by Yahya Khan was illegal and in excess and abuse of the mandate given to him by Ayub Khan. Yahya Khan acted against his oath of office that he will be faithful to the Constitution and owe allegiance to Government of Pakistan.

The decision in State v. Dosso was challenged by him on the grounds :--

(i) that it was given in complete violation of rule of natural justice. Mr. Yahya Bakhtiar, the present Attorney-General, who was then counsel for Toti was not then allowed to challenge the vires of the Laws (Continuance in Force) Order (1 of 1958) ;

(ii) Munir, C. J. disclosed after retirement that the decision was not based on judicial considerations ;

(iii) the decision was even fn disregard of oath of office of the Judges. He referred in this connection to the decision of the Court in Fazlul Quader Chowdhury v. Mr. Mohammad Abdul Haq ;

(iv) the decision purported to legalise the so-called revolution without any conditions which authorised absolutism and sanctioned that might is right ;

(v) interpretation of Kelsenian theory of grund-norm in the judgment is absolutely incorrect. He pointed out that Kelsen has revised his own theory of grund-norm which is now called apex norm.

(vi) that "effectiveness" was not the only criterion of legitimacy ; and

(vii) that the doctrine of state necessity was overlooked by the Court.

As regards illegal usurpation of power by Yahya Khan, Mr. pirzada referred to cases from Uganda, Nigeria, Rhodesia and Cyprus. Two other points were made by Mr. Pirzada (i) that the doctrine of stare decisis has no application to the present case; and (ii) that Kelsen's theory on which the decision in Dosso's case is based is adversely criticised by some well-known jurists. He also traced the history of Martial Law promulgated in the sub-Continent between 1804 to 1953. He relied among others on the following decided cases : (1) 18 Lawyers Edition 281 1 (2) 87 Lawyers Edition 1 ; and (3) 90 Lawyers Edition 688.

We will first deal with the validity of the Proclamation issued on the 26th March 1969, abrogating the Constitution of 1962 and imposing Martial Law throughout the country. The legal mandate was to restore law and order, but in practice Yahya Khan used it for the purpose of setting up his personal rule. His will was to be the supreme law and all national institutions including Courts of justice were to function to the extent and in the manner permitted by him. He, accordingly, issued a large number of Martial Law Orders and Martial Law Regulations and Presidential Orders and Ordinances which were not at all germane to his "Constitution" and "Legal" duties. Though Dacca fell on the 16th December 1971, and East Pakistan declared itself an independent State under the name Bangla Desh, Yahya Khan had the draft of a Constitution prepared which was to be promulgated on the 20th December 1971, by a proclamation.

Article 16 of the draft Constitution which was printed by the Government of Pakistan, Ministry of Law and Parliamentary Affairs (Law Division) provided :-

"16. Notwithstanding anything contained in this Constitution : -

(a) the first President of Pakistan under this Constitution shall be General Agha Muhammad Yahya Khan, H.Pk., H.J.;

(b) General Agha Muhammad Yahya Khan, H.Pk., H. J., may continue to hold also the post of Commander-in-Chief of the Pakistan Army for a period not exceeding five years commencing on the date of coming into force of this Constitution ; and

Article 260 which should be read in continuation of Article 16 provided further that the Commander-in-Chief of the Pakistan Army may declare Martial Law and shall be revoked only by the Commander-in-Chief. After Martial Law is imposed

"(4) It shall be within the power of the Commander-in-Chief of the Pakistan Army who shall be the Chief Martial Law Administrator to suspend for the duration of the Martial Law, or any shorter period as may be specified, the operation of specified provisions of this Constitution, but the said Principal Authority shall not have power to abrogate this Constitution."

These two provisions of the Constitution which Yahya Khan proposed to impose on the country provide historical evidence of his mala fide intention not to transfer power to the people although he made them believe all along that he was holding the office of President temporarily to arrange smooth transfer of power to the people.

In view of the facts narrated above, it cannot be maintained that the people had by and large, knowingly accepted the Government of Yahya Khan and his Order as legal and by habit given obedience to his Government. He had staged no victorious revolution or a successful coup d'etat. The Kelsenian theory of the change of the basic norm did not, therefore, apply to the facts in which Yahya Khan had come to assume the State powers. He obligated the people to obey his behests, but in law they incurred no obligation to obey him.

Another view is that the Judges of Municipal Courts who have takes oath of office to preserve, protect and defend the Constitution will not break the oath and declare that because of the superior will of the usurper they have been relieved from their legal obligations. If the Judges find the executive organ of the State unwilling to enforce their decrees and orders, the only course open to them is to vacate their office. Those who are desirous of serving the usurper may take office under the Legal Order imposed by him, but this depends upon the discretion and personal decision of the Judges and has no legal effect. If they adopt the second course they will be acknowledging that "might" is "right" and become collaborators with the usurper. The same result is achieved if they foreswear their oath and accept as valid the destruction of the national order and confer recognition on the legislative, administrative, and executive acts of the usurper. In Fazlul Quader Chowdhry v. Mr. Muhammad Abdul Haque (PLD 1963 S C 486) this Court observed : -----

"The reasons why the Judges of the Supreme Court and the High Courts have to take a similar oath can in my opinion be found within the simple provisions of Article 58. It is there provided for all persons in Pakistan that in my case where it becomes necessary for them to assert in their interest, any provisions of the Constitution, they shall have access to the High Courts and through the High Courts to the Supreme Court as of right, and these two Courts are bound by their oath and duty to act so as to keep the provisions of the Constitution fully alive and operative, to preserve it in all respects safe from all defeat or harm, and to stand firm in defence of its

provisions against attack of any kind. The duty of interpreting the Constitution is, in fact a duty of enforcing the provisions of the Constitution in any particular case brought before the Courts in the form of litigation."

It should be remembered in this connection that, however, effective the Government of a usurper may be, it does not within the National Legal Order acquire legitimacy unless the Courts recognize the Government as de jure.

International law is not concerned with these considerations. If a rebel Government has succeeded in gaining effective control over people and territory the other States may recognize it. But will the same rule apply to-the Municipal Courts. East Pakistan today provides a classic example of a successful revolution which destroyed the National Legal Order and became a new law creating fact. East Pakistan has declared its self independence and became a separate State under the name of Bangla Dash. Pakistan claims that East Pakistan is a part of Pakistan, but a large number of States have already recognized it as an independent State. New Courts and Government services have been constituted in Bangla Desh which do not operate under the Legal Order of Pakistan. On these facts if a dispute arises involving the determination whether the new Government of East Pakistan is de jure, will the Municipal Courts of West Pakistan confer recognition on it, because a victorious revolution is a legal method of changing the Constitution and the new order has become efficacious as the individuals whose behaviour the new order regulates actually behave by and large in conformity with new order. The answer is obvious. While under International law, East Pakistan has become an independent State, the Municipal Courts of Pakistan will not confer recognition on it or act upon the legal order set up by the rebel Government. The Kelsen theory on which the Attorney-General relied for the proposition that the Government of Yahya Khan was de jute and the "laws" promulgated by him are valid is, therefore, wholly inapplicable to Municipal Courts.

Yahya Khan's Government, therefore, remained de facto and not de jute up to 20th December 19.71, when he stepped aside.

To determine whether the Martial Law Orders, Martial Law Regulations, Presidential Orders and Ordinances issued by him may be recognised by Courts, we must first turn to the definition of "law" as Article 2 of the Constitution of 1962, which remained operative either by its own vitality or by virtue of the Provisional Constitution Order dated 30th March 1969, provided in unequivocal terms ;

"2.-(1) To enjoy the protection of law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular-

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except !n accordance with law ;

(6) no person shall be prevented from, or be hindered in, doing that which is not prohibited by law-; and

(c) no person shall be compelled to do 'that which the law does not require him to do."

"Law" was not defined in the Constitution. It is, therefore, for the Courts to lay down what 'law' is, and if any decree, or behest of Yahya Khan expressed as a Martial Law Order, G Martial Law Regulation or Presidential Order, or Ordinance, does not conform to the meaning of the term 'law' in Article 2 these Regulations, Orders and Ordinances will be void and of no legal effect.

In Introduction to "Law In the Making" C. K. Allen mentions two antithetic conceptions of growth of law t (i) law is which is Imposed by a sovereign will ; and (ii) law which develops within society of its own vitality. He criticises Austin who defined "law" as the will of the sovereign and points out that whatever be the constitutional Instrument which secures observance and enforcement of law -and some sanction of this kind is certainly indispensable-there is no historical justification for the view that this power always and necessary be determinate, "human superior" which at the same time creates all law. It is Impossible in every form of society governed by law to disengage and personify a "sovereign" as thus understood, with the artificial precision which Hobbs and Austin assume.

Salmond describes "law" as body of principles recognized and applied by the State in the administration of justice as the rules recognised and acted by Courts of justice. All the theories of law are at one in viewing law as consistent of rules. Such rules are regarded by natural law as

dictates of reason, by positivism as decrees of the sovereign and by realism as the practice of the Courts. The central notion of the natural law theory is that there exist objective moral principles which depend on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles These principles of justice and morality constitute the natural law which is valid of necessity, because the rules for human conduct are logically connected with truths concerning human nature. Diametrically opposed to the theory of natural law is the positivist, or imperative theory of law, it seeks to define law not by reference to its condition, but according to the formal criteria which differentiate legal rule from other source such as those of morals, etiquette. and so on. It is a type of command, it is laid by a political sovereign and is enforceable by sanction. Realism, like positivism, looks on law as the expression of the will of the State as made through the medium of the Courts.

According to Holmes law is really what the Judge decides. This great American Judge sowed the seed of the American realism in a famous paper in which he put forward a novel way of looking at law. If one wishes to know what law is, he said, one should view it through the eyes of a bad man, who is only concerned with what will happen to him if he does certain things. The prophecies of what the Courts will do to the bad man, in the opinion of justice Holmes, is what he means by the law.

Paton defines "law" as the rules recognised and acted by Courts of justice. Dugit's definition is as follows;--

"Men live together in groups and societies ; they are dependent upon, solidarist with, one another. They have common needs which they cats satisfy only by a common life and, at the same time, they have different needs the satisfaction of which they assure by the exchange of reciprocal services. The progress of humanity is assured by the continuous growth, in both directions, of individual activity. Man, so placed in society, has the obligation to realize this progress, because in so doing he realizes himself. From the imminent force of things, therefore, there arises a rule of conduct which we may postulate as a rule of law."

Roscoe Pound states that more than one reason led American realists which define law in terms of judicial process. One is the central position of the Court in the Anglo-American legal system and the concrete character of a legal precept in that system as a product of the Courts rather than of the universities. Again, economic determinism and psychological realism lead to scrutiny of the work of individual Judges, and skeptical relativism leads to discounting of norms and rules and autho-ritative guides to determination. Certainly the judicial process (to which today we must add the

administrative process) is something of which a theory of the subject-matter of jurisprudence must take account.

Kelsen has developed the theory of "Pure Law" His method and approach to law are essentially those marked out by Kant. He does not regard law as the sum total of legal rules. Neither does he regard it as a command or psychological process or even a social reality. In his view, it is the produce of a mental operation. The norm which lies at the basis of his system although not arbitrary is purely relativist and hypothetical. He claims that his initial hypothesis transforms the "might" into "law". His theory on "Pure Law" eliminates the elements of ethics, politics, psychology, sociology and history.

Dias says that many writers while admiring Kelsen's structure, point out, that he provides no guidance whatever to a person in the actual application of the law. Thus, he shows how, in the process of concretising the general norms it may be necessary to make a choice either in decision or interpretation. The Judge or the official concerned is already aware of that necessity. His need is for some guidance as to how he should make his choice. The answer is not to be found in Kelsen's teachings, but in value considerations of one sort or another which Kelsen sedulously eschews. In "What is Justice" Kelsen at page 268 himself says;

"If jurisprudence is to present law as a system of valid norms, the propositions by which it describes its object must be "ought" propositions, statements in which an "ought", not an "is", is expressed. But the propositions of jurisprudence are not themselves norms. They establish neither duties nor rights. Norms by which individuals are obligated and empowered issue only from the law-creating authority. The jurist, as the theoretical exponent of the law. presents these norms in propositions that have a purely descriptive sense, statements which only describe the "ought" of the legal norm. It is of the greatest importance to distinguish clearly between legal norms which comprise the object of jurisprudence and the statements of jurisprudence describing that object. These statements may be called "rules of law" in contradistinction to the "legal norms" issued by the legal authority."

Dias proceeds that "a legal order is not merely the sum total of laws, but includes doctrines, principles, and standards, all of which are accepted as "legal" and which operate by influencing the application of rules. Their validity is not traceable to the grund-norm of the order. Are these, then, to be lumped with values and banished from a theory of law, even though they are admitted to be "legal"? If so, it is a grave weakness in any such theory."

Scandanavian school is opposed both to Salmond and Kelsen. It believes that there is no such things as rules, but that conformity with a rule consists really in habitual behaviour accompanied by a feeling of being bound to act in this habitual way.

Professor Goodhart differs with Kelsen in refusing to regard basic rules (norms) as hypothesis. According to him a norm is nonetheless a rule-a customary rule -acceptance and observance of which finds expression in social practice and the general attitude of society.

Discussing the classic approach of the pure jurist to the problem of law as that of Kelsen, Laski in "The State in Theory and Practice" points out : "The human mind, it may be said, revolts from a jurisprudence as bare and as formal as this. It remembers the long medieval effort to identify law with the will of God, the stoic notion of law as the voice of universal reason, the famous phrase of Utpian which makes of law the science of distinguishing between right and wrong in human conduct. It rejects the idea of law as that behind which there is found the sovereign power of the state . . . . . Law, to be law, it is widely felt, must correspond with something more valid than the will of an authority which grounds its claim to respect upon nothing more than the coercive power at its disposal". Laski proceeds to say : "We must not make it mean more than it announces itself as meaning. It is, so to speak, an abstract conceptualism in which, for certain clearly defined purposes, law is divorced from justice and made simply a final term in a hierarchy of wills behind which it is impossible to go. The jurist here is engaged on a purely formalistic analysis. He excludes from his field of discourse all considerations of what is ethically right or socially expedient and considers only as law that which emanates from a will whose source may be traced to the sovereign."

In "A Grammar of Politics" Laski adds : "To those for whom law is a simple command, legal by virtue of the source from which it comes, it is not likely that such complexities as these will be popular. We are urging that law is, In truth, not the will of the State, but that from which the will of the State derives whatever moral authority it may possess . . . It assumes that the rationale of obedience. is in all the intricate facts of social organisation and in no one group of facts. It denies at once the sovereignty of the State, and that more subtle doctrine by which the State is at once the master and the servant of law by willing to limit itself to certain tested rules of conduct. It insists that what is important in law is not the fact of command, but the end at which that command aims and the way it achieves the end. It sees society, not as a pyramid in which the State sits crowned upon the summit, but as a system of co-operating interests through which, and in which, the individual finds his scheme of values. It argues that each individual scheme so found gives to the law whatever of moral rightness it contains. "And" Any other view is seeking to Invest coercive authority with ethical content on grounds which analysis shows to be simply the fact of the power to coerce. That power may how its way to success, but 9t does not, by the fact of the victory, become a moral agent. We argue, rather, that our rules of conduct are justified only as what they are in working induces our allegiance to them".

The brief survey of the definition of "Law" will not be complete without quoting the observations of Mr. Justice Matthews in the case Yick Wo. v. Hogking;

"When we consider the nature and the theory of our institutions of Government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law but in our system, while sovereign powers are delegated to the agencies of Government, sovereignty itself remain with the people, by whom and for whom all Government exists and acts. And the law is the definition and limitation of power. It is indeed, quite true, that there must always be lodged some where, and in some person or body, the authority of final decision ; and, in many cases of mere administration the responsibility is purely political, no appeal lying expert to the ultimate tribunal of the public judgment, exercised either is the pressure of opinion or by means of the suffrage. But the fundamental to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are monuments showing the victorious progress of the race in securing the men the blessings of civilization under the reign of just and equal, laws, so that, in the famous language of the Massachusetts Bill of Rights, the Government of the Commonwealth "may be a Government of laws and not of men". For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of salary itself."

Pakistan is an Islamic Republic. Its ideology is enshrined in the Objectives Resolution of the 7th April 1949, which inter alia declares wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah. We should, therefore, turn more appropriately to Islamic Jurisprudence for the definition of "law". One method of defining "law,, is to know its source. In Shari'at law have divine origin. They are contained in the Holy Quran, and Hadith. namely, precepts and actions of the Holy Prophet (peace be upon him). The other sources are Ijma` : Consensus and juristic deductions including Qiyas ; Analogy, Istihsan or Juristic Equity, Public Good, Istidlal ; Reason and Ijtihad ; Juristic Exposition. While Juristic Deductions are judge-made laws, Ijma' is based on the docrtine of Imam Shafi'i that "the voice of the people is the voice of God", and is the most fruitful source of law-making in Shariat. In the present day context the Legislative Assemblies comprising of chosen representatives of the people perform this function. Thus, In Islamic Jurisprudence, the will of a sovereign, be he the monarch, the President or the Chief Martial Law Administrator is not the source of law. The people as delegatee of the Sovereignty of the Almighty alone can make laws which are in conformity with the Holy Quran and Sunnah. A remark may be added that often the head of the State or a Province of the State is

included in the composition of Legislature and if the Assembly is not sitting he may enact Ordinances which are temporary and expire when the Assembly meets.

I have burdened this order with different theories of law not only for the purpose of finding out the essential qualities of law, but also because during the last thirteen years or more we have so much gone astray from the rule of law that not only the common man, but the lawyers and Judges alike need to refresh their minds about the true import and form of law.

The preponderant view appears to be that law is not the will of a sovereign. Law is a body of principles called-rules or norms recognised and applied by the State in the administration justice as rules recognised and acted upon by the courts of justice. It must have the content and the form of law. It should contain one or more elements on which the different theories of law are based, and give expression to the will of the people whose conduct and behaviour the law is going to regulate. The will of the people is nowadays often expressed through the medium of Legislature comprising of the chosen representatives of the people. The will of a single man howsoever laudable or sordid is a behest or a command, but is certainly not law as understood in juristic sense.

Let us now examine the provisions of Presidential Order 3 of 1969 and Martial Law Regulation 78 of 1971 to determine whether they are at all laws in juristic sense. '

As mentioned earlier, a Full Bench of the High Court of West Pakistan (Lahore Seat) had in the case of Mir Hassan hold that the order transferring his case under the Prevention of Corruption Act II of 1947 from the Court of the Special Judge to a Military Court was illegal. It was reasoned by the learned Judges:-

" .Article 2 of the 1962-Constitution was kept intact. It declares that `every citizen of Pakistan is entitled to the protection of the law and to be treated in accordance with law and only in accordance with law . . .' The Article provides that no person shall be deprived of life, liberty, body, reputation or property without due process of law. It further declares that any public functionary or person taking any action affecting the life, liberty, body, property or reputation of a person or affecting his profession, trade or business must rely on some law to justify his action. In other words, every public functionary or- person must show legal authority for interference with the right of another person. Thus a direction or order by a public functionary would be invalid if it does not have the backing of a valid contemporaneous law. The Chief Martial Law Administrator by preserving Article 2 of the 1962 Constitution had made it clear once for all that the intention of the

Government was to act in accordance with law. Therefore, the action of any authority including Martial Law Authority howsoever high he may be, if it had not the backing of a constitutional provision was not immune from being struck down by the Courts of the country."

The judgment was announced in this case on the 30th June 1969. On the same day President's Order 3 of 1969 was issued. The purport of this order was to deny to the Courts the performance of their judicial functions. It did not contain a body of principles which may be recognized and acted upon by the Courts. It reflected only the will of the Chief Martial Law Administrator who ordained that no action taken by him or by any Martial Law Authority howsoever, unjust such action may be, shall be open to judicial review. In view of its offensive provisions, the Attorney-General conceded that Article 3 in so far as it laid down that "No Court, tribunal or other authority, including the Supreme Court and a High Court, shall-(a) receive' any complaint, petition, etc., was not a law, because it is essentially within the Jurisdiction of Courts to determine whether their jurisdiction to try a dispute is barred by law. The same reasons applied to Art. 4 which denied to Courts the function of interpretation of laws.

Martial Law Regulation 78 of 1971 inter alia provides:

"1. The Chief Martial Law Administrator or a Martial Law Administrator or a Deputy Martial Law Administrator authorised by the Martial Law Administrator concerned in this behalf, if satisfied with respect to any particular person, that with a view to preventing him from acting in a seditious manner or in a manner prejudicial to the security, the public safety or interest or the defence of Pakistan, the maintenance of public order, Pakistan's relations with any other power, the maintenance of peaceful conditions in any part of Pakistan, the maintenance of essential supplies and services, it is necessary so to do, may make an order ;

(a) . …….

(b) directing that he be detained ;

There were already two laws in the field on the same subject, Safety Act of Pakistan and the Defence of Pakistan Rules, 1965. These Rules were framed under the Defence of Pakistan Ordinance during the 1965 war with India, and re-enacted during the 1971 war. The provisions of these two laws are similar to the provisions of Martial Law Regulation 78. What was then the

necessity for promulgating Martial Law Regulation 78. The reason is not far to seek. An order passed under the Public Safety Act or the Defence of Pakistan Rules could be challenged in the High Court under Article 98 of the Constitution. It was so held by this Court in the case of Malik Ghulam Jilani and Shorish Kashmiri. An order passed under Martial Law Regulation 78 by a Martial Law authority could not, however, be challenged by virtue of Presidential Order 3 of 1969. The object with which this Regulation was issued was therefore to interfere with the judicial functions of Courts.

As both President's Order No. 3 of 1969 and Martial Law Regulation 78 were intended to deny to the Courts the performance of their judicial functions, an object opposed to the concept of law. Neither would be recognised by Courts as law.

We may now turn to the methodology of law-making during the Martial Law which was imposed by Yahya Khan on the 26th March 1969. Pakistan came into being with a written Constitution-Government of India Act, 1935 (26 Geo. 5, Ch. 2) and the India Independence Act, 1947 (10 & 11 Geo. 6, Ch. 30). These constitutional instruments were, in time, replaced by the Constitution of 1956 which in turn was substituted by the Constitution of 1962. It is still in force either by its own vitality or under the Provisional Constitution Order, 1969. The written Constitution of a State is, according to Kelsen, its basic norm. It regulates all other legal' norms. Pakistan has unfortunately suffered long spells of Martial Law, but its basic structure was democratic from its inception. There was distribution of powers between the executive, legislature and judiciary. During Martial Law the legislative powers of the State were usurped by the Executive and attempt made to deny to Courts the exercise of judicial functions. The usurpation of legislative powers of the stage by the Chief Martial Law Administrator was therefore against the basic norm. The new Legal Order consisting of Martial Law Orders, Martial Law Regulations, Presidential Orders and Presidential Ordinances was, therefore, unconstitutional and void ab initio. This Order would have become legal only if the Government of Yahya Khan was recognized by Courts as de jure and the Order he gave to the country was held valid. This question has already been answered in the negative.

In this connection, we may examine also the nature of Martial Law imposed by Yahya Khan on the 26th March 1969, for lest it is said that the Martial Law Regulations, and Martial Law Orders were not laws in juristic sense, but they derived their validity from the Proclamation of the 26th March 1962' Martial Law is of three types : (i) the law regulating discipline and other matters determining the rule of conduct applicable to the Armed forces. We are not concerned with it ; (ii) law which is imposed on an alien territory under occupation by an armed force. The classic function of this type of Martial Law was given by the Duke of Willington when he stated in the House of Lords that ' "Martial Law is neither more nor less than the will of the General who commands the Army. In fact Martial Law means no law at all." We are also not concerned with this type of Martial Law ; and (iii) law which relates to and arises out of a situation in which the

Civil power is unable to maintain law and order and the Military power is used to meet force and recreate conditions of peace and tranquillity in which the Civil power can re-assert its authority. The Martial Law Regulations and Martial Law Orders passed under this type of Martial Law must be germane only to the restoration of peace and tranquillity and induced during the period of unrest.

In practice, the Martial Law imposed by Yahya Khan belonged to the second category. A large number of Martial Law Regulations and Martial Law Orders passed by him between 25th March 1969, and 20th March 1971, had no nexus with civil disturbances. In fact, peace and tranquillity was restored in the country within a few days of his stepping in. Martial Law should, therefore, have come to an end but the entire structure of institutions of Pakistan including superior Courts were made to appear by Yahya Khan as merely the expression of his will which a victorious military commander imposes on an alien territory to regulate the conduct and behaviour of its subjugated populace. Neither Pakistan was a conquered territory, nor the Pakistan Army commanded by Yahya Khan was an alien force to justify the imposition of this type of Martial Law.

The Martial Law imposed by Yahya Khan was, therefore, in Itself illegal and all Martial Law Regulations and Martial Law Orders issued by him were on this simple ground void ab initio and of no legal effect.

Let us next examine the validity of the Presidential Orders and Ordinances issued by Yahya Khan between 26th March 1969, and 20th December 1971. He assumed the office of President on 31-3-1969 with effect from the 25th March 1969. Under Article 16 of the 1962-Constitution if at any time the President was unable to perform the functions of his office, the Speaker of the National Assembly was to act as President. Muhammad Ayub Khan could not, therefore, transfer the office of the President to Yahya Khan. Indeed, he did not even purport to do so. He simply asked him to perform his constitutional and legal responsibilities. Yahya Khan, therefore, assumed the office in violation of Article 16 of the Constitution to which he had taken oath of allegiance as Commander-in-Chief. It could not, therefore, be postulated that Yahya Khan had become the lawful President of Pakistan and was competent to promulgate Orders and Ordinances in exercise of the legislative functions conferred by the Constitution on the President. All Presidential Orders and Ordinances which were issued by him were, therefore, equally void and of no legal effect.

The next question which arises for determination is whether these illegal legislative acts are protected by the doctrine of State necessity. The Laws saved by this rule do not achieve validity. They remain illegal, but acts done and proceedings undertaken under invalid laws may be condoned on the conditions t that the recognition given by the Court is proportionate to the evil to

be averted, it is transitory and temporary in character does not imply abdication of judicial review. In the Southern Rhodesian case Madzimbamuto v. Lardner Burke only those legislative acts of the de facto Government of Smith were recognised which were necessary for the ordinary, orderly running of the Courts and which did not defeat their rights of the citizens and in its operation did not directly or indirectly entrench the usurpation (Field send, A. J. A.) Acts which are beneficial to the Society and provide their welfare, such as, appointment of Judges and other public functionaries by Yahya Khan will also be covered by the doctrine.

It has been noticed that both President's Order 3 of 1969 and Martial Law Regulation 78 of 1971 were intended only to deny to the Courts the performance of their judicial functions. No chaos or anarchy would have taken place in the Society if these 'laws' were not promulgated. Both Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 and Martial Law Regulation 78 are, therefore, not protected by the doctrine of State necessity.

We will now examine the case State v. Dosso on which the Attorney-General mainly relied in his submissions. As mentioned earlier the decision in this case is based on the Kelsenian theory of the change of basic norms as a result of victorious revolution and successful coup d'etat as law-creating facts according to International Law. It was contended by the counsel for the appellants and the amicus curiae that (i) Kelsen's theory was not a rule of law which would have primacy or the legal norms of the State; (ii) that as a theory it was criticised by some eminent jurists; and (iii) in any case It was not correctly applied In the case of State v. Dosso.

To appreciate the contentions we must first understand Kelsen's theory of "Pure Law" He differs with the theory of Imperative Law t Will of a Sovereign ; and Theory of Natural Law; Dictates of Reason; as well as with the Theory of Realism; Practice of the Courts. Kelsen does not regard the law conceived as the sum total of legal rules or as a will. Neither does he regard it as a command or psychological process or even a social reality. In his view law is the product of a mental operation.

It is a phenomenon in the category of essence (das Sollen) as distinguished from the category of existence (das Sein); which is an abstract way of saying that the science of law is a branch of normative sciences as distinguished from natural sciences 1 which is still another abstract way of saying that the legal rule is concerned with what the positive law says shall be, and not with the question why positive law is obeyed or what the positive law ought to be." (Modern Theory of Law, pp. 107-108). According to Kelsen law consists of norms which are free from elements of ethics, morals, psychology, history, sociology, etc. They are divided into basic norms and general norms. The document which embodies the first constitution is a real constitution, a binding norm, only on the condition that the basic norm is presupposed to be valid. Only upon this presupposition

are the declarations of those to whom the constitution confers law-creating power binding norms. A norm the validity of which cannot be derived from its superior norm is called a "basic" norm. All norms whose validity may be traced back to one of the same basic norm, form a system of norms, or an order. This basic norm constitutes, as a common source, the bond between all the different norms of which an order consists. The ultimate hypothesis of positivism is the norm authorising the historically first legislator. The whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act. The basic norm is not created in a legal procedure by a law-creating organ. It is not as a positive legal norm is valid.

Under the heading the "Principles of Legitimacy" Kelsen points out that legal norms may be limited in time. The end as well as the beginning of this validity is determined only by the order to which they belong. They remain valid as long as they have not been invalidated in the way which the legal order itself determines. This is the principle of legitimacy. He then describes an illegitimate way of change of legal norms. "It fails to hold in the case of a revolution, this word understood in the most general sense, so that it also covers the so-called coup d'etat. A revolution, in this wide sense, occurs whenever the legal order of a community is nullified and replaced by a new order in an illegitimate way, i.e., in a way not prescribed by the first order itself. It is in this context irrelevant whether or not this replacement is effected through a violent uprising against those individuals, who so far have been legitimate organs competent to create and amend the legal order. It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of the people or through actions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which former had not itself anticipated. Kelsen then refers to the change of the basic norm by revolution. If the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. If the order remains inefficacious, then their undertaking is interpreted as illegal act, as the crime of treason. The change of basic norm thus depends on the principle of effectiveness which is based on the presupposition, but the norms of the old order are regarded as devoid of validity, because the old constitution and legal norms based on this constitution, the old legal order as a whole, has lost its efficacy; because the actual behaviour of men does so longer conform to this old legal order. Every single nrom loses its validity when the total legal order to which it belongs loses its efficacy as a whole. The efficacy of the entire legal order is a necessary condition for the validity of every single nrom of the order. A conditio sine qua non, but not a conditio per quam. The efficacy of the total legal order is a condition, but not the reason for the validity of its constituent norm. These norms are valid not because the total order is efficacious, bat because they are created in a constitutional way.

The legality of the revolutionary Government is thus based upon a presupposed basic norm which is mentioned by Kelsen in the Chapter "The Unity of National and International Law" under the heading "Revolution and Coup d'etat and Law, Creating Facts. According to International Law"

Kelsen says : that victorious revolution and successful coup d'etat are law. creating facts. To assume that the continuity of national law, nor what amounts to the same the identity of the state, is not affected by revolution or coup d'etat, as long as the territory and the population remain by and large the same, is possible only if a norm of international law is presupposed recognising victorious revolution and successful coup d'etat as legal methods of changing the constitution". Kelsen is a great exponent of International Law while many jurists think that there is no such thing as International Law and that its principles are applicable only to the extent that the national legal order of a State adopts them. Kelsen postulates that the basic norms of all the States are in themselves norms of the International law. He says, "only because modern jurists-consciously or unconsciously-presupposed International law as a legal order determining the existence of the State in every respect, according to the principle of effectiveness, do they believe in the continuity of national law and the legal identity of the State in spite of a violent change of the constitution. In regulating, by its principle of effectiveness, the creation of the constitution of the State, International law also determines the reason of the validity of all national legal orders." So it becomes clear that Kelsen invests revolutionary Government wit legal authority on the basis of a presupposed norm that the victorious revolution and successful coup d'etate are law-creating v facts. This is in the realm of a theory and not a part of the national legal order of any State. No municipal Court will, therefore, rely on it as a rule. It is a statement of law by Mr. Kelsen to which a large number of jurists have taken exception.

What Kelsen has said about the legitimacy of norm and legal authority of a revolutionary Government must be read separately and not mixed up. While revolution may destroy the existing national legal odor base after the change the reality of the State has disappeared from behind that order, It does not follow that the legal order, which replaces it, is the expression of the superior will of one or more revolutionaries who staged victorious revolution or successful coup d'etat. This is explained by Kelsen himself in the remark, quoted above, that "the efficacy of the entire legal order is a necessary condition for the validity of every single norm of the order. A conditio sine qua non but not a conditio per quam. The efficacy of the total legal order is a condition, but not the reason for the validity of its constituent norm. These norms are valid not because the total order is efficacious, but because they are created in a constitutional way." So, after a change is brought by a revolution or coup d'etat, the State must have constitution and subject itself to that order. Every single norm of the new legal order will be valid not because the order is efficacious, but because it is made in the manner provided by the constitution of the State. Kelsen, therefore, does not contemplate an all omnipotent President and Chief Martial Law Administrator sitting high above the society and handing its behests downwards. No single man can give a constitution to the society which, in one sense, is an agreement between the people to live together under an Order which will fulfil their expectations, reflect their aspirations and hold promise for the realisation of their selves. It must, therefore, embody the will of the people which is usually expressed. through the medium of chosen representatives. It must be this type of constitution from which the norms of the new legal order will derive their validity.

If my appraisal of Kelsen is correct, then the decision in the case State v. Dosso upholding the validity of the Laws (Continuance in Force) Order must be held to be erroneous. The Court ought to have acted in the same manner as it partially did In the Governor-General's Reference No. 1 of 1955 and directed the President to call the National Parliament and adopt a new Constitution. Unless this direction was complied with, no new legal order would have come into being for neither Iskander Mirza nor Muhammad Ayub Khan could become a valid source of law-making. How could the Court accept one or the other as a law-making fact. No valid law can come into being from the foul breath or smeared pen of a person guilty of treason against the national order. This reasoning applies with greater force to the abrogation of the Constitution of 1962 by Yahya Khan on the 26th March 1969. The legal order imposed by him in the form of Martial Law Regulations and Orders and President's Orders and Ordinances were, therefore, tainted with illegality and would not be recognized by Courts.

Dias criticises the theory of Kelsen on which the decision in State v. Dossois based. Kelsen as a legal philosopher excluded from his theory of Pure Law of psychological, historical, sociological and ethical considerations. He Is not mindful as to how many revolutions take place in a country or into how many bits it falls apart as a result of his theory of victorious revolution and successful coup d'etar as law-making facts. Society, however, will not countenance such a phenomenon with equanimity. My own view is that person who destroys the national legal order in an illegitimate manner cannot be regarded as a valid source of law-making May be, that on account of his holding the coercive apparatus of the State, the people and the Courts are silenced temporarily, but let it be laid down firmly that the order which the usurper imposes will remain illegal and Courts will not recognize its rule and act upon them as de jure. As soon as the first opportunity arises, when the coercive apparatus falls from the hands of the usurper, he should be tried for high treason and suitably punished. This alone will serve as a deterrent to would be adventurers.

Before concluding the examination of Kelsen's theory of effectiveness, it may be mentioned that basides State v. Dosso, it was applied in three other cases. The first case is from South Rhodesia Madzimbamuto v. Lardner-Burke. In 1965, Smith Government overthrew the 1961-Constitution given to South Rhodesia, by the British Government and attempted to enforce its own laws. On several occasions Courts of law in South Rhodesia declined to recognize the "new laws". One of them being the detention law under which Lardner-Burke was detained. Dealing with its validity Beadle, C. J., the Chief Justice of the High Court held that "the status of the present Government today is that of a fully de facto Government in the sense that it is in fact in effective control of the territory and this control seems likely to continue", and, that "the present Government, having effectively usurped the Governmental powers granted Rhodesia under the 1901-Constitution, can now lawfully do anything which its predecessors could lawfully have done, but until its new constitution is firmly established and thus becomes the de jure constitution of the territary, its administrative and legislative acts must conform to the 1961-Constitution. Qunet, J.P. Macdonald, J. A., and Jarvis, A. J., generally agreed in the opinion given by Beadle, C. J. Fieldsond, A. J. A., expressed the view that "a Court created in terms of a written constitution has no jurisdiction to recognise, either as a de jure or de facto Government and Government other than that

constitutionally appointed under that constitution". He went on to consider the doctrine of necessity and concluded: "Necessity, however, provides a basis for the acceptance as valid by this Court of certain acts of the present authorities, provided that the Court is satisfied that-(a) any administrative or legislative act is directed to and reasonably required for the ordinary orderly running of the country ; (b) the just rights of citizens under the 1961-Constitution are not defeated; and (c) there is no consideration of public policy which precludes the Court from upholding the act, for instance if it were intended to or did in fact in its operation directly further or entrench the usurpation. . ." The decision was set aside by the Privy Council. Lord Reid delivering the majority judgment rejected the Kelsen's theory of effectiveness and held;---

"With regard to the question whether the usurping Government cap now be regarded as a lawful Government much was said about de facto and de jure Governments Those are conceptions of international law and in their Lordships' view they are quite inappropriate in dealing with the legal position of usurper within the territory of which he has acquired control. As was explained in Carl-Zeiss-Stiftung v. Raynor & Keelor Ltd. (No. 2) (1966) 2 All E R 536 ; (1967) 1 A C 853 when a question arises as to the status of a now regime in a foreign country the Court must ascertain the view of Her Majesty's Government and act on It as correct. In practice the Government have regard to certain rules, but those are not rules of law. And it happens not infrequently that the government recognise a usurper as the de facto Government of a territory while continuing to recognise the ousted Sovereign as the de jure Government. But the position is quite different where a Court sitting in a particular territory has to determine the status of a new regime which has usurped power and acquired control of that territory."

It was mentioned by Mr. Brohi that the view expressed by the Judges of the High Court of Rhodasia was the maximum success for the theory of effectiveness which Kelsen could have conceivably envisaged.

There are three other cases: one from Uganda; the other from Nigeria; and the third from Cyprus, on the same subject, but it is unnecessary to recount their facts. In Uganda v. Commissioner of Prisons (1966 B A I R 514), Sir Udo Udoma, C. J., following the State v. Dosso relied on the Kelsen's principles in arriving at the conclusion that the 1966-Constitution is a legally valid Constitution and the supreme law of Uganda and that the 1962-Constitution having been abolished by a victorious revolution, fn law, does no longer exist, nor does it now form part of the laws of Uganda, it having been deprived of its de facto and de jure validity.

We have not seen the case from Nigeria & Cyprus, but were informed that the line of reasoning runs through them. All these decisions are open to the common objections, firstly that Kelsen's theory of Pure Law was not a norm of the national order and a Court of justice could not have

relied on it in preference to the municipal laws. This is brought out by Kelsen himself in "What is Justice", page 286, wherein he says : "It is of the greatest importance to distinguish clearly between legal norms which comprise the object of jurisprudence and the statements to jurisprudence describing that object These statements may be called "rules of law" in contradistinction to the "legal norms" issued by the legal authority."

Secondly, Kelsen's theory of Pure Law stands in opposition to other theories of law, such as, Natural Law which is based on Reason and Realism which is based upon the practice of Courts. What is said by Kelsen is, not the last word He has his critics. With respect to the great Jurist, I question his statement that "It is equally irrelevant whether the replacement is effected through a movement emanating from the mass of people or through actions from those in governing positions. From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order". In one case the body politic has risen against an unrepresentative Government which has imposed a tyrinical Order on the people. They overthrew that Order and gave themselves a Constitution which will fulfil their aspirations holds promise of happiness and self-realization, and induces-allegiance. In the other case one or more persons "stage a victorious revolution" or "a successful coup d'etate", stifle the aspirations of the people, deprive them of their basic rights and cajole them into obedience. Kelsen as a legal philosopher should have preferred the former as legal rather than recognize the rule of might as de jure. I differ, therefore, with the theory of Kelsen on which the decision in the State v. Dosso is based.

As regards the application of the Kelsenian theory as mentioned already Mr. Iskander Mirza, and Mr. Ayub Khan had joined hands on the night between 7th and 8th October 1958, to overthrow the national legal order unmindful of the fact that by abrogating the 1956-Constitution they were not only committing acts of treason, but were also destroying for ever the agreement reached after laborious efforts between the citizens of East Pakistan and citizens of West Pakistan to live together as one Nation. The cessation of East Pakistan thirteen years later is, in my view, directly attributable to this tragic incident. On the 10th October 1958, Mr. Iskander Mirza promulgated the Laws (Continuance in Force) Order 1 of 1958. Mr. Yahya Bakhtiar the present Attorney-General who was counsel for Toti one of the respondents in the appeals disposed of alongwith the case of Dosso stated from the bar that on his way to Lahore for appearing before the Supreme Court, he read the text of the order in a daily newspaper. He found Mr. Fayyaz Ali, the then Attorney-General, present in Court to move a Reference by the President in the advisory jurisdiction of the Court presumably relating to the validity of the Laws (Continuance in Force) Order. After a hurried consultation in the Chamber of the Chief Justice Mr. Fayyaz Ali did not move the Reference and the Court raised this issue without giving him an opportunity to argue against it. Judgment in the case was announced on 27th October 1958. The State appeals were allowed on the finding that by virtue of the provisions of Article 7 of the Laws (Continuance in Force) Order the writs issued by the High Court setting aside the conviction of Dosso and others had abated. On the following day Mr. Iskander Mirza was deposed and Muhammad Ayub Khan assumed to him the office of President.

In was questioned how did the Court come to hold on the 13th October 1958, that the new Government was able to maintain its Constitution in an efficacious manner and that the old order as a whole had lost its efficacy "because the actual behaviour of men does no longer conform to this old legal order." Indeed, it was the recognition by the Court which made the now Government de jure and its Constitution efficacious.

Mr. Sharifuddin Pirzada drew our attention in this connection to the following extract from the Book "Friends Not Masters" by Muhammad Ayub Khan :-

"Meanwhile, the army's legal experts came up with the opinion that since the Constitution had been abrogated and Martial Law declared, and a Chief Martial Law Administrator appointed, the office of President was redundant. That according to their light, was the legal position. I said 'Now, don't you chaps start creating more problems for me. Why do you bother me? It will serve no useful purpose."

"Chief Justice Munir was there, I think, when this point came up for discussion. He had been advising Iskander Mirza about certain matters before the revolution. I called him and thought that I would see Iskander Mirza too. I asked Colonel Qazi to state his point of view. His position was that the President, no longer had any place in the new arrangement, Munir disagreed. I told Qazi, 'I agree with Munir. This is final. Accept this as a decision: I then asked him to leave."

In a rejoinder published in the Pakistan Times, dated 11th November 1968, under the title "The Days I Remember" by Muhammad Munir, C. J. (Retired) after recounting his past association with Iskander Mirza proceeded to state:-

"Some months before the 1956-Constitution was to come into force he (Iskander Mirza) casually mentioned to me that things were going bad to worse and that he intended to assume supreme power by dismissing the Ministers and dissolving the Assembly. He did not tell me that he intended to introduce Martial Law though he often used to say that the politicians were not to forget the army. He had not invited my opinion on the subject, but I pointed out to him that at that time he had little ground for taking the steps he was contemplating and that he should have the elections held under the new Constitution.

MARTIAL LAW

This happened perhaps in April and except at a lunch at Nathiagali I had no occasion to meet him until the Constitution having been abrogated and Martial Law declared in October 1958, I was summoned to Karachi. The President's proclamation abrogating the Constitution and introducing Martial Law was announced on the night of 7th October 1958. We in Lahore heard of it on the morning of 8th October add I of once realised the legal implications of what had happened if its legality was not questioned and professional politicians acquiesced in it. Though all laws, Courts and other civil authorities had lost their previous jurisdiction I did not stop the Supreme Court from functioning because I felt that the Supreme Court on being properly moved still had the right to say whether what had happened was legal or illegal.

On the morning of 9th October, General Mohammad Azam Khan, who was the Zonal Martial Law Administrator of Lahore, came to me and asked me whether I was aware of the legal implications of what had happened. He told me that Courts, including the Supreme Court had lost their jurisdiction and could function only to the extent the President or Chief Martial Law Administrator determined. He expressed his willingness to get for me such powers as I needed to run the judiciary. I told him that I had not made up my mind to stay or to go and that I wanted time to think over the matter. A few hours later I received through the army a message from the President calling me to Karachi. Accordingly I took the first available plane and flew to Karachi. General Burki who had a subtle smile on his face also travelled by the same plane.

At Karachi I was told that subject to any order by the President or Regulation by the Chief Martial Law Administrator it was intended to keep the existing laws and the jurisdiction of the civil authorities alive, and that I was to scrutinise the draft instrument which the Law Secretary had been required to prepare with that object. I was happy that some sort of civil Government and part of the Constitution were being restored. Therefore I saw the draft prepared by Sir Edward Snelson, and In a meeting which was attended by the President and Chief Martial Law Administrator who was accompanied by a young army officer, the Law Secretary and myself, I suggested certain modifications, particularly with reference to the superior Courts powers to issue writs and validation of judgments which had been delivered after the proclamation. The instrument was entitled the Laws Continuance in Force Order and purported to be promulgated in the name of the President."

It was urged by Mr. Sharifuddin Pirzada that the Chief Justice having associated himself with the drafting of The Laws (Continuance in Force) Order on the 9th October 1958, was in principle precluded from sitting in judgment on its validity. I can only venture to observe that no one was more deeply initiated in judicial propriety than the learned Chief Justice.

However, there is another aspect. Article 163 of the 1956 Constitution provided that the law declared by the Supreme Court shall be binding on all Courts in Pakistan and that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. By laying down the law that victorious revolution and successful coup d'etat are internationally recognised legal methods of changing a constitution and that the revolution itself become" a law-creation fact, and that Court can function only to the extent and in the manner declared by the new constitution, this Court closed the minds of all the Courts subordinate to it and bound down the hands of all executive authorities to accept the new Government as de jure. The Attorney. General did not hesitate in acknowledging that the decision in this case encourages revolutions and that it held out promise to future adventurers that if their acts of treason are crowned with success, Courts will act as their hirelings. No Judge who is true to the oath of his office can countenance such a course of action. Thus, with greatest respect to the learned Judges who are parties to the decision in the State v. Dosso we feel constrained to overrule it and hold that the statement of law contained in it is not correct.

It now remains to deal with the doctrine of stare decisis on which the Attorney-General relied for recognition of the Martial Law Regulations, Martial Law Orders, and Presidential Orders and Ordinance issued by Yahya Khan between the 25th March 1969 and the 20th December 1971. Besides State v. Dosso he relied on The Province of East Pakistan v. Mehdi Ali Khan and others (P L D 1959 S C (Pak.) 387), Tanvir Ahmad Siddiqi v. Province of West Pakistan (P L D 1968 S C 185) and Fazal Ahmad v. The State (1970 S C M R 650). The learned Judges in The Province of East Pakistan v. Mehdi Ali Khan were parties to the case State v. Dosso. In Tanvir Ahmad Siddiqi v. The Province of East Pakistan the validity of the Laws (Continuance in Force) Order, 1958, was not challenged. In Fazal Ahmad v. The State by a short order leave to appeal was refused by a Bench of this Court with the remarks: "when the Military Court took cognizance of the offence and imposed penalty upon the petitioner, the learned Judge of the High Court was right in dismissing the petitioner's application under section 561-A of the Code of. Criminal Procedure" A case under section 167 of the Sea Customs Act was registered against Fazal Ahmad by the Deputy Superintendent of Police, Lahore Cantt ; he thereupon moved the High Court for quashing the proceedings whereupon a learned Judge gave an interim direction to the Deputy Superintendent of Police to appear before him and produce file of the case and not to put up a challan against the petitioner in any Court. The Deputy Superintendent of Police, however, put up the challan before a Military Court whereupon Fazal Ahmad moved the High Court for initiating contempt proceedings against the Deputy Superintendent of Police. In the meantime, the Military Court convicted the petitioner and the High Court took no further action in the case on these facts leave to appeal was refused by a bench of this Court. The question whether the Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 was ultra vires of the Provisional Constitutional Order was not even raised in the petition for leave to appeal. There is no mention in it of any provision of that order which purported to exclude jurisdiction of the Courts to call in question the orders passed by the Martial Law authorities.

Stare desists is the rule of expediency and public policy and is not inflexible and will not be applied where injustice is done or injury caused. This rule will also not apply if the language is not ambiguous. It will apply where two interpretations are open and Court having adopted one interpretation it may not depart from it, if it upsets contracts, titles and marriages, etc we were referred to the case of Governors of the Campbell College Belfast v. Commissioner of Valuation for Northern Ireland ((1964) 2 All E R 705). it was held in this case that notwithstanding the long-standing practice of confining exemption for educational charities to those of an eleemosynary nature the Court was not required to refrain from giving effect to the true construction of section 2 of the Act of 1854-either by the doctrine of contemporanea expositio or by the doctrine of stare decisis for considering the practical defect, the importance of correcting the law with regard to rating outweighed in the present case any embarrassment that might be caused by allowing in the appeal.

Reference was also made to a decision from a foreign jurisdiction that so far as constitutional interpretation is concerned there is very little scope of the application of stare decisis. In the case Federation of Pakistan v. Maul vi Tamizuddin Khan it was contended on behalf of the respondent that because for several years no assent to an Act of the Constituent Assembly, while sitting as a constitution-making body under subsection (1) of section 8 of the Indian Independence Act was ever obtained and that some important Acts passed by the Assembly were treated as law by everyone concerned, though they had not received the assent of the Governor-General under subsection (3) of section 6 must be so interpreted as not to be applicable to the legislations passed by the Constituent Assembly under subsection (1) of section 8. In refuting the submission Munir, C. J. referred to cases cited in Crawford's "Statutory Construction" and Coolay's "Constitutional Limitation" and observed ;

"In all the cases where observations of this kind have been made, the true intention of the particular provisions in the constitution was ambiguous or doubtful, and I know of no instance where the words of the constitution being clear and consistent with a reasonable interpretation, any Court ever went to the extent of. misconstruing its true purpose merely because somebody else had taken a mistaken view of it. There is no question of estoppel in such cases, the correct description of the reasoning employed being argument ab inconvenienti. This mode of construction of written constitutions is, therefore, subject to an overriding consideration which has thus been stated by Coollay himself at pages 149-150."

This view is supported by Mr. Brohi, in his Book, "Fundamental Law of Pakistan", page 598 : It is said: "In the matter of constitutional adjudications the rule of stare decisis has, if at all, limited application".

Whatever be the scope of stare decisis and its limited application to the interpretation of constitutional instruments, Kelsen's theory on which Munir, C. J., relied was neither a norm of the National Legal Order, nor a statutory provision. Its application in upholding the "victorious revolution" by Iskander Mirza did not, therefore, attract the doctrine of stare dectsis. Moreover, it cannot be said that a right was created in Yahya Khan to rebel against the National Legal Order on the basis of the decision in the State v. Dosso.

The Attorney-General next contended that if all the laws given by Yahya Khan were declared to be invalid, the same would apply to the Legal Framework Order under which the elections to the National Assembly and Provincial Assemblies were held in December 1970. This contention was effectively answered by Mr. Manzur Qadir who stated that the concept of validity is derived from the will of body-politic. If the body politic gives an express answer that answer is valid and It does not matter who puts the question. He also pointed out a distinction between the status of a person who acquires power and the limits in which he exercises his power. The legality of the elections to the National and the Provincial Assemblies under the Legal Framework Order cannot, therefore, be doubted on the ground that Yahya Khan had no legal authority to promulgate this Order.

The Attorney-General lastly urged that by challenging the validity of Martial Law imposed by Yahya Khan who was no longer in power the intention, in fact, was to dispute the legality of the present Government. In reply, Mr. Manzur Qadir acknowledged the legitimacy of the Government headed by Mr. Zufiqar Ali Bhutto as Chairman of the majority party in the National Assembly and said It was based on the will of the chosen representatives of the people. This was the reason behind the plea raised by him that the invalidity in the Legal Framework Order did not affect the legality of the Elections held under it to the National Assembly and Provincial Assemblies. This coincided with the position taken up by the Attorney. General that Mr. Zulfiqar Ali Bhutto was not the recipient of power from Yahya Khan and that he held the office of the President as Leader of the majority party In the National Assembly. We also take judicial notice of the fact that after arguments were concluded in these appeals, the National Assembly met and unanimously expressed confidence in the Government of Mr. Zulfiqar Ali Bhutto. An Interim Constitution has also been passed and Mr. Zulfiqar Ali Bhutto is to be inaugurated as President under this Constitution on the 21st April 1972. The legitimacy of the present Government is thus beyond the shadow of doubt.

The text of the Interim Constitution adopted by the National Assembly on the 17th April 1972, has been published in the newspapers. Article 280 provides;-

"280.-(1) Except as provided by this Article, all existing laws shall, subject to this Constitution, continue in force, so far as applicable and with the necessary adaptations, until altered, repealed or amended by the appropriate Legislature.

(2) The Proclamation made on the twenty-fifth day of March 1969, is revoked with effect as from the commencing day, and the Orders specified in the Sixth Schedule and any Orders amending those Orders are repealed with effect as from that day, but this clause shall not affect any existing laws made under those Orders.

(3) All Martial Law Regulations and Martial Law Orders, except the Martial Law Regulations and the Martial Law Orders specified in the Seventh Schedule, are repealed with effect as from the commencing day, and on that day each Martial Law Regulation and the Martial Law Orders so specified shall be deemed to have become an Act of the appropriate Legislature and shall, with the necessary adaptations, have effect as such.

Article 281 further provides

"281.-(1) All Proclamations, President's Orders, Martial Law Regulation, Martial Law Orders, and all other laws made as from the twenty-fifth day of March 1969, are hereby declared, notwithstanding any judgment of any Court to have been validly made by competent authority, and shall not be called in question in any Court.

(2) All orders made, proceedings taken and acts done by any authority, or by any person, which were made, taken or done, or purported to have been made, taken or done, on or after the twenty-fifth day of March 1969, in exercise of the powers derived from any President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws, or in execution of any orders made or sentences passed by any authority in the exercise or purported exercise of powers as aforesaid, shall be deemed to be and always to have been validly made, taken or done.

(3) No suit or other legal proceedings shall lie in any Court against any authority or any person for or on account of or in respect of any order made, proceedings taken or act done, whether in the exercise or purported exercise of powers referred to in clause (2), or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.

The intended effect of these constitutional provisions is that among other Martial Law Regulations and Orders, Martial Law Regulation 78 and Jurisdiction of Courts (Removal of Doubts) Order 3 of 1969 will be deemed to have been validly made, but this is so not because Yahya Khan was competent in law to promulgate theca laws. They are valid, because the new Constitution of the State adopts them as constituents of the National Legal Order as from the commencing day, i.e. 21st April 1972, with retrospective effect from the 25th March 1969. In the words of Kelsen: If laws which were introduced under the old Constitution continue to be valid under the new Constitution this is possible only because validity has expressly or tacitly been vested in them by the new Constitution. The phenomenon is a case of reception. The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a Juristic viewpoint, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different.

Article 9 of the Interim Constitution secures Fundamental Rights including the right that no law providing for preventive detention shall authorise the detention of a person for a period exceeding three months unless the appropriate Advisory Board has reviewed his case and reports before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention: "Provided that such law shall also provide that the case of the person detained shall be brought before the appropriate Advisory Board for the first review within one month of the order of detention". Advisory Board means a Judge of the Supreme Court and Senior Officer in the service of Pakistan in relation to a person detained under a Federal law and a Judge of the High Court and a Senior Officer of the service of Pakistan in the case of a person detained under a Provincial Law. Martial Law Regulation 78 contains no such safeguards. Article 7(1)(2) declares:

"7.- (1) Any law, or any custom or usage having the force of law, in so far as it is a 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."

The First Schedule to the Constitution specifies Presidential Orders, Martial Law Regulations, and Acts passed by the National and Provincial Assemblies which are exempted from the operation of Article 7(1) and (2). Martial Law Regulation 78 and President's `Order 3 of 1969 are not included in the Schedule.

As seen Article 280 itself provides: all existing laws shall subject to this Constitution continue in force. Martial Law Regulation 78 has been repealed, but if it was continued being repugnant to Fundamental Rights contained in Article 9 it would have been void under Article 7(1). It follows that if the orders of detention passed under Martial Law Regulation 78 are by virtue of Articles 280 and 281 deemed to have been validly made, they would become unlawful from the commencing day, i.e. 21st April 1972. This result would have been avoided only if Martial Law Regulation 78 was continued as an Act of the appropriate Legislature and included in the 1st Schedule to the Constitution. The orders under which Malik Ghulam Jilani and Mr. Altaf Gauhar are being detained will, therefore, be liable to be set aside on the ground that continuation of their detention is in violation of Fundamental Rights.

On the findings recorded above, I will allow both the appeals and direct that the detenus be released forthwith unless required to be detained under any other lawful order.

SAJJAD AHMAD, J.-These two detention cases of Malik Ghulam Jilani and Mr. Altaf Gauhar, under Martial Law Regulation No. 78 promulgated by General Agha Muhammad Yahya Khan in the purported exercise of his powers as the Chief Martial Law Administrator, have spurted delicate constitutional and legal questions seemingly tied up with political concomitants. However, in the resolution of causes coming for determination before a Judge, his mind is sealed off against any extraneous influence. True to his sacred oath, he has to decide them to the best of his ability in accordance with law, doing justice to all manner of people, without fear or favour, malice or ill-will. The importance of the issues involved, which have engrossed my mind ever since the commencement of these proceedings in this Court, under the constant stress of my judicial oath, have impelled me to add my voice by this separate note to the weighty pronouncements made in the very elaborate and erudite judgments of my Lord, the Chief Justice and my brother M. Yaqub Ali, J. with whose conclusions I respectfully agree.

In fact, these judgments of my Lords and I say so unfeignedly, in their exhaustive discussion of all the salient points arising in these cases, leaves little or nothing to be added. It must also be gratefully acknowledged that all the related questions were argued before us in very great depth, with diligent research and marked ability by the learned counsel for the appellants, the learned Attorney-General, and Mr. Brohi and Mr. Sharifuddin Pirzada, who had appeared as amicii curiae at our request. In historical retrospect, they have called to mind the anguished memory of the constitutional tragedies that have afflicted this Muslim homeland of our dreams, playing havoc with the body politic. Twice the Constitution was abrogated, the abrogation being preceded and followed by reckless material greed, scramble for power and free run for political ambition and adventurism. On each occasion, the abrogation of the Constitution, first in 1958 and again in 1969, was accompanied by the simultaneous clamping of Martial Law on the entire country, associated

with its accursed terror and its potential mischief of coercive action in the destruction of democratic values and civilised pattern of life in the country. Contrary to its conventional and limited purpose in the domestic sphere to suppress turmoil and civil strife by the Civil Administration with the aid of the army, the Martial Law in Pakistan has come to mean the complete subjugation of all jurisdictions to the arbitrary will of one individual, who, by his fortuitous position as the head of the army for the time being becomes the self-appointed repository of all the State powers as the Chief Martial Law Administrator, wielding unbridled authority in the land. In this sense, Martial Law operates as if it were a part of jus belli imposed by the invading army on a foreign land brought into subjugation by conquest. Such a Martial Law, as once described by Lord Wellingdon in the House of Commons, is "nothing more nor less than the will of the general commanding the army. It is in fact no law at all." It cannot be gainsaid that after the bitter and ugly experiences of the two Martial Laws suffered by the nation within the span of the last 14 years, the very name of Martial Law has become an anathema and it is intolerably repugnant to the common people regardless of its necessity or potentiality for doing any public good, which cannot otherwise be done.

The story is long and painful, but for purposes of these appeals, it is not necessary to go beyond 25-3-69, when with the exit of F.M. Muhammad Ayub Khan, the then President of Pakistan, General Agha Muhammad Yahya Khan, the then Commander-in-Chief of the Pakistan Army, was ushered on the political scene. In his letter of March 24, 1969, the Field-Marshal, depicting the political and economic chaos that had overtaken the country, invited him to discharge his legal and constitutional responsibilities to defend the country not only against external aggression but also to save it from internal disorder and chaos.

Simultaneously, General Yahya Khan issued a Martial Law Proclamation on March 25, 1969, assuming to himself the powers of the Chief Martial Law Administrator and the Commander of the Armed Forces. On 31st March 1969, he also appointed himself as the President and assumed that office with effect from the 25th of March 1969. This was followed by the promulgation of the Provisional Constitution Order on the 4th of April 1969, by which it was ordained that notwithstanding the abrogation of the Constitution of 1962, the State of Pakistan shall be governed as nearly as may be, in accordance with the said Constitution, subject to any regulations or orders made from time to time by the Chief Martial Law Administrator. It hardly needs any argument to show that General Yahya Khan at the receiving end overstepped the mandate of the Field Marshal, as contained in the letter mentioned above, even if it were assumed to have any legal validity. But this mandate was wholly misconceived. Under Article 12 of the Constitution, which was then in force, if F. M. Muhammad Ayub Khan found himself unable to cope with the crisis created in the country, he should have resigned his office under Article 12 of the Constitution then in force, and the Speaker of the Legislative Assembly could then have stepped in his place under Article 16 thereof till the election of the new incumbent for that office within 90 days of that event. Alternatively, a state of emergency could have been declared under Article 30 of the Constitution and the military could have been summoned in aid of the Civil administration to quell the disturbances and to restore law and order. However, General Yahya Khan, instead of doing his constitutional duty, did not lose a minute to jettison the Constitution to the winds, which he had

undertaken by his oath as an army officer to defend and protect. Further he arrogated to himself the supreme powers of the Chief Martial Law Administrator. This assumption of power by General Yahya Khan was utterly an illegitimate and unconstitutional act of usurpation, which can, on no legal or valid basis, be accorded a de jure status by the Law Courts.

This position was not seriously contested by the learned Attorney-General, who has, however, argued that the very fact that General Yahya Khan took reins of power by overthrowing the old order in a manner not contemplated by the existing Constitution, amounted to a coup d'etat or a revolution on his part, which is an internationally recognised mode of changing the Constitution, thereby setting up a new law creating organ. He argued that the new order thus created by a successful revolution, which held effective away for 2 ½ years commanding submission and obedience from all quarters, including the judiciary, gave birth to a new law creating authority de facto as well as de jure, and that all legislative and administrative measures which flowed from this authority, were valid and immune from any challenge in the Courts, where such a challenge is forbidden by the supra-constitutional powers of the new authority. In support of his argument, the learned Attorney-General heavily relied on a decision of this Court in the famous case of State v. Dosso, wherein, Chief Justice Muhammad Munir, as he then was, by invoking Kelsen's theory of legal positivism, held that "where the Constitution and national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution, then such a change is called a revolution and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order. Therefore, any change, no matter how or by whom brought about, whether by violence or non-violence or by persons held in a public position, is in law a revolution, if it annuls the constitution and the annulment is effective. The legality of a successful revolution is judged not by reference to the annulled constitution but by reference to its own success and the validity of the laws thereafter has to be examined by reference to the new legal order and not the annulled constitution". The learned Attorney-General, who, ironically, was a counsel against the State In Dosso's case, admitted, with refreshing frankness, that that case was decided without affording him a chance to contend against the conclusions of the Court reached therein. He submitted that he wished that all the criticism now hurled on the decision in Dosso's case had been made at that time or on some other occasion soon thereafter to defeat it and that It was not challenged even in the causes that did arise in the superior Courts thereafter, with the result that it is now woven into the fabric of our laws and that it is too late in the day now after it has been allowed to hold the field for 13 years in public and political life, to reverse it, this would only result in judicial chaos. He argued very forcefully that this Court has undoubtedly got the powers to review that judgment, but that it should not review it, particularly at this stage when the usurper has been supplanted and a duly elected and an accredited democratic leader is in charge of the affairs of the country as the President and the Chief Martial Law Administrator. To this last argument, the short argument given by the learned counsel of the appellants was that the legality and legitimacy of the present regime is not in issue in these proceedings, although they stated that it was a painful anomaly that the present head of the State, who undoubtedly represents the body politic in his own right as the chosen leader of the largest political party in this wing of the country, should have, under the stress of circumstances, derived his authority not from the body politic, which he represents, but

from the erstwhile Chief Martial Lam Administrator, who has stated an exit. It is indeed most gratifying that this anomaly alluded to by the learned counsel has now come to an end.

The pivotal question that arises for determination in these appeals is whether Martial Law Regulation No. 78 under which the two detenus have been held, is valid law, and whether, as held by the learned Single Judge of the Lahore High Court, in dismissing the writ petition on behalf of the detenu Malik Ghulam Jilani, the Jurisdiction of Courts (Removal of Doubts) Order of 1969 (President's Order No. 3 of 1969) bars the jurisdiction of the Courts, including the Supreme Court and the High Courts, as it purports to do by its section 3, to examine the legality of the detenus detention under Martial Law Regulation No. 78 mentioned above. Section 3 aforesaid is couched in sweeping terms of complete ouster of jurisdiction, by stating that "No Court, Tribunal or other authority, including the Supreme Court and a High Court, shall---

(a) receive or entertain any complaint, or other representation whatsoever against in relation to the exercise of any power of jurisdiction by any Special Military Court or Summary Military Court or any Martial Law Authority or any person exercising powers or jurisdiction derived from Martial Law authority ;

(b) call or permit to be called in question in any manner whatsoever any finding, sentence, order, proceedings or other action of or before a Special Military Court or any Martial Law authority or any person exercising power or jurisdiction derived from a Martial Law authority;

(c) issue or make any writ, order, notice or other process whatsoever to or against or in relation to the exercise of any power or jurisdiction by a special Military Court or a Summary Military Court of any Martial Law authority or any person exercising powers. or jurisdiction derived from a Martial Law authority.

(2) Any decision given by his writ, order, notice or process issued or made or thing done in contravention of clause (1), shall be of no effect.

(3) If any question arises as to the correctness, legality or propriety of the exercise of any powers or jurisdiction by a special Military Court or a Summary Military Court or a Martial Law authority or any other person deriving power from a Martial Law authority, it shall be referred to the Chief Martial Law Administrator, whose decision thereon shall be final.

Explanation.-Martial Law authority means the Chief Martial Law Administrator and includes a Deputy Chief Martial Law Administrator, a Zonal Martial Law Administrator, a Sub. Administrator of Martial Law, or any person designated as such by any one of them.

(4) If any question arises as to the Interpretation of any Martial Law Regulation or a Martial Law Order, it shall be referred to the Martial Law authority issuing the same for decision, and the decision of such Martial Law authority shall be final and shall not be questioned is any Court, Tribunal or other authority, including the Supreme Court, and a High Court. This order is issued by General Agha Muhammad Yahya Khan, both as President and Chief Martial Law Administrator."

It was contended by the learned counsel for the appellants that this is a sub-constitutional legislation, being in the nature of a President's order and not one, which was Issued by the Chief Martial Law Administrator in his supra constitutional powers. From its tenor and the context in which it was issued, I am inclined to think that this order was promulgated by the Chief Martial Law Administrator in his dual capacity as the President and .the Chief Martial Law Administrator, and that it was essentially and primarily a Martial Law order made by the Chief Martial Law Administrator, to undo the judgment of the Lahore High Court rendered in the case of Mir Hassan and others v. The State (P L D 1969 Lah. 786), the same day or a day earlier, wherein Martial Law Regulation No. 42 promulgated during the pendency of the case before the High Court, was scrutinised, and it was held that it did not affect the powers of the High Court under section 561-A, Cr. P. C., which was (invoked to quash the proceedings in that case. This judgment further sought to confine the Martial Law to certain limitations in relation to the power of the High Court to dispense justice. Obviously, Order No. 3 was brought in to set this judgment at naught and to place it beyond the reach of the civil Courts. Nonetheless I am absolutely clear in my mind that Order No. 3 of 1969, is wholly indefensible both on account of the illegitimacy of its sources as well as the utter futility of its objective to defeat the judicial power legally and constitutionally vested in the judicature of the country.

In my humble view, and I say so with all respect, the decision in Dosso's case relied on by the learned Attorney-General which was based primarily on the Kelsonian theory mentioned above, did not lay down the correct law, and cannot, therefore, prop up the illegal usurpation of power by General Yahya Khan and his legislative or administrative actions. The theory propounded by Kelsen in its abstract form is at best a theory which, instead of receiving a ready acceptance by the jurists, has met with a large measure of opposition and rejection. The strongest objection, which is urged against it is that the basic norm of effectiveness and success of the new order brought in by a revolution or a coup d'etat can have no relevance in the sphere of domestic jurisdiction of the Municipal Courts of law, although it is so recognised to the international law.

Theories of law cannot take the place of law and are not immutable. They cannot be made generally applicable to all societies at all times. In Pakistan, in particular, we do not have to depend on Kelsen or other jurists or legal philosophers for constitutional inspiration. Our grund-norms are derived from our Islamic faith, which is not merely a religion but is a way of life. These grund-norms are unchangeable and are inseparable from our polity. These are epitomised in the Objectives Resolution passed by Constituent Assembly of Pakistan on 7-3-1949, and were incorporated in the first Constitution of the Islamic Republic of Pakistan of 1956 and repeated again in the Constitution of 1962. Its basic postulates are that sovereignty belongs to Allah Almighty, which is delegated to the people of Pakistan who have to exercise the stare powers and authority through their chosen representative on the principle of democracy, freedom, quality, tolerance, and social justice as enunciated by Islam, wherein the fundamental human rights are to be respected and the independence of the judiciary is to be fully secured. Can it be argue that any adventurer, who ray usurp control of the State power in Pakistan, can violate all these norms and create a new norm of his own in derogation of the same? The State of Pakistan was created in perpetuity based on Islamic ideology and has to be run and governed on all the basic norms of that ideology, unless the body politic of Pakistan as a whole, God forbid, is re-constituted on an un-Islamic pattern, which will, of course, mean total destruction of its original concept. The Objectives Resolution is not just a conventional preface. It embodies the spirit and the fundamental norms of the constitutional concept of Pakistan.

It was forcefully argued by Mr. Brohi that in deciding Dosso's case, their Lordships of the Supreme Court had assumed that the powers of the Court flowed from the Laws (Continuance in Force) Order, ignoring that the independent judicature in Pakistan, with the Supreme Court at its apex, is an indispensable link in the structure of Pakistan as a political entity. Here the Courts do not drive their powers from any individual, who may happen to have the control of the executive power for the time being. This judicial power as a trust from the Almighty Allah, is lodged in the society as a whole, which, in turn, is irrevocably committed to the Courts as trustees of the society. The decision in Dosso's case appears to be controlled by the Laws (Continuance in Force) Order of 1958, which the Court was itself called upon to legitimize as a new law-creating organ. The Court did not go into the question of the constitutional validity of that Order in all its details.

It was also argued by the learned counsel for the appellants that whether a revolution or a coup d'etat has been successfully achieved or not, is a justiciable issue, which is for the Courts to decide on evidence and relevant material, but the learned Judges, in deciding Dosso's case, proceeded to accept the mere proclamation by the usurper as proof of the accomplishment and success of the revolution. It was further submitted that Kelsen's theory that a successful revolution furnishings its own gaund-norm, is devoid of all ethical and moral fibre. Fieldson, A. J. A., in this judgment in the famous constitutional case of Rhodesia entitled Madzimbamuto v. Lardner Burke (1968 All E R 561), observed as follows:-

"Nothing can encourage instability more, than for any Saila revolutionary movement to know that if it succeeds in snatching power, it will be entitled to complete support of the pre-existing judiciary in the judicial capacity.

The weighty arguments against the correctness of the decision in Dosso's case have not been adequately countered by the learned Attorney-General. The mainstay of that decision, as already stated above, is the doubtful Kelsonian theory of legal positivism, which receives an indifferent support from some passages cited by the learned Attorney-General from Herald, J. Laski's book on "State, in Theory and Practice', from Garner's "Treatise on Political Science and Government", and G. C. Field's "Lectures on Political Theory". In fact, reading them in their true context, the' passages cited by the learned Attorney-General from the books mentioned above, do not support the theory in the terms as advanced by him. In this view of the matter, I feel constrained to state, with all, respect, that Dosso's case does not lay down the correct law.

The contention of the learned Attorney-General that the decision in Dosso's case having held the field for a number of years, must not now be reversed on the principle of stare decisis, as it would lead to chaos, does not rest on a sound footing. This rule of stare decisis is one of expediency and can have no claim to inflexibility or compulsive obedience. In case of constitutional decisions, this doctrine is to be strictly considered, so that the organic law of the land is not allowed to run in muddy channels. The error in a constitutional decision, which is manifestly apparent and which causes injury to the body politic, must unhesitatingly be set right.

On the point of acquiescence and obedience of all concerned to the acts of usurpation by General Yahya Khan and the submissive acceptance of the acts of his regime as constituting an estoppel, it would be useful to refer to Coolay's observation in his book entitled "Constitutional Limitation" at page 104:-

"Acquiescence for no length of time can legalise a clear usurpation of power where the people have plainly expressed their will in the constitution and upon the judicial tribunals to enforce it. A power is frequently yielded to, merely because it is claimed and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing or without any one being sufficiently interested in the subject to raise the question, but these circumstances cannot be altered to sanction the infraction of the constitution."

The learned Attorney-General very forcefully argued that the reversal of Dosso's decision at this stage, which may lead to the striking down of the laws and acts of the Yahya regime on the principle of legitimacy, will create a legal chaos. The Courts will not certainly be a party to creating a chaos in the body politic, and equally well they abhor any vacuum in the law. It is precisely to save this situation that the Courts are inclined to accord validation within recognised limits on the principle of efficacy, to the acts of a de facto usurper of power by invoking the doctrine of necessity or implied mandate from the lawful authority. Mr. Manzur Qadir very correctly pointed out that the doctrine of necessity has now come to be recognised as a law of Pakistan. The Federal Court of Pakistan in Governor-General's Reference No. 1 of 1955, invoked this doctrine by resort to the famous maxim of salus populi est suprema lex. This doctrine was succinetly explained by Fieldson, A. J. A. in the Rhodesian case, referred to above, in the following words, which may be usefully quoted;--

"The necessity relied on in the present case is the need to avoid the vacuum, which would result from a refusal to give validity to the acts and legislation of the present authorities in continuing to provide for the every-day requirements of the inhabitants of Rhodesia over a period of 2 years. If such acts were to be without validity, there will be no effective means of providing money for the hospitals, the police or the Courts, of making essential by-laws for new townships or of safeguarding the country and its people In any emergency, which might occur, and numerous matters which require attention in the complex and modern State. Without constant attention to such matters, the whole machinery of the administration would break down to be replaced by chaos, and the welfare of the inhabitants of all races would be grievously affected."

Lord Pearson, in his dissenting judgment fn the same case in the Privy Council, agreed with the views of Fieldson, A. J. A., and held that "on the doctrine of necessity, acts done by usurpers in effective control of authority may be recognised as valid and may be acted upon in the Courts but within set limitations". These limits were stated by him to be:-

(1) That the acts be directed and reasonably required for the orderly running of the State.

(2) That they do not impair the rights of the citizens under the lawful constitution.

(3) That they do not entrench the usurper in his power.

I feel persuaded to agree with these limitations as laid down by Lord Pearson. By and large, they provide a correct guideline for the Courts to examine the validity of the legislative or administrative acts of the usurper when they are brought in for their scrutiny. I would, however, like to add that the authentic verdict of the body politic cannot be turned down even if it happens to have been obtained by an unauthorised person.

It remains to consider whether the two impugned measures its these appeals, namely, President's Order No. 3 of 1969, and Martial Law Regulation No. 78 of 1971, which have proceeded from an illegitimate source, can be upheld on the doctrine of necessity or implied mandate. My answer definitely is No. It is the exclusive privilege of the Courts to identify laws from what are not laws or bad laws. A law is not law merely because it bears that label. It becomes law only if it satisfies the basic norms of the legal system of the country and receives the stamp of validity from the Law Courts. On this test alone, Order No. 3 of 1969 must be struck down, as it seeks to destroy the judicial power which vests inherently and constitutionally in the judicature of the country, which with the executive and the Legislature, form the three important limbs of the State. The totality of judicial powers resides in the judicature of Pakistan, whose powers for dispensation of justice as the trustee of the society, are indestructible, and cannot be taken away by the arbitrary will of an individual. To the judiciary is committed the duty of being the watch-dog of the actions and virtues of the other co-ordinate limbs of the State. This Court has plenary judicial power, and the contents of that power cannot be shared with any other 'limb of the Government, executive or Legislature. While the jurisdiction of superior Courts may be regulated by the Constitution, any effort to destroy the judicial power is a senseless exercise. It was once very, appropriately remarked by Justice Hughee that "there is no doubt that the Judges are under the constitution but the constitution is what the Judges say it is". The absurdity of Order No. 3 of 1969 is heightened by its presumptuous effort to lay down that no Court, including the Supreme Court and the High Court, shall even receive or entertain any complaint, petition or application or other representation whatsoever against or in relation to the exercise of any power or jurisdiction by any special Military Court or Summary Military Court or any Martial Law authority or any person exercising the authority or jurisdiction from Martial Law authority. It can never be disputed that the Courts alone have the power to determine all questions of their own jurisdiction, including the negative that they do not have the jurisdiction.

In view of what has been said above, I would unhesitatingly strike down Order No. 3 of 1969 as a bad and untenable measure. In regard to Martial Law Regulation No. 78 of 1971, I have simply to point out that it can have no validity in the eyes of law, firstly, because its authorship is unconstitutional being of a person who was a usurper and who had illegally arrogated to himself the powers of the Chief Martial Law Administrator to issue this regulation. It can also not be upheld on the doctrine of necessity or implied mandate, as there was, in fact, no need for it whatsoever, and it was enacted to give a free band to the usurper to gag any one who raised a voice against him, and to annihilate any opposition or supposed opposition to the firm entrenchment of his authority as a usurper, The object of preventive detention, for which this regulation was made, is already available in the existing law, namely, "The security of Pakistan Act, 1952 " and "The

Defence of Pakistan Rules, 1965". It is obvious that this Regulation was enacted merely to make arbitrary power more arbitrary.

I think I must now summarise my conclusion in these appeals as follows;--

(1) The decision of this Court in Dosso's case does not lay down good law, and must be overruled.

(2) The Martial Law as proclaimed by General Agha Mohammad Yahya Khan was illegal. The assumption of power by General Agha Mohammad Yahya Khan as the President and the Chief Martial Law Administrator was wholly unconstitutional, and cannot be recognised as valid.

(3) General Agha Mohammad Yahya Khan was no doubt in effective control of governmental power for the period that he remained in the saddle, and only those of his legislative and administrative acts can be recognised by the Courts, which may be found to be absolutely necessary on the doctrine of necessity within the limitations of that doctrine to be adjudged by the Courts.

(4) President's Order No. 3 of 1969 and Martial Law Regulation No. 78 of 1971, not being valid laws, cannot be recognised as such by the Court, and have to be struck down.

In the result, I would accept these two appeals, and direct that the detenus be set at liberty forthwith, unless they arc detained under any other valid law of the land.

WAHEEDUDDIN AHMAD, J.-I have had the advantage of reading the judgment of my Lord the Chief Justice. I fully agree with its reasoning and conclusions and have nothing to add.

SALAHUDDIN AHMED, J.-I have had the benefit of perusing 'the erudite judgment of my Lord the Chief Justice, and I fully agree with him. I should however, like to add a few observations of my own.

Both the detention orders have been passed under Martial Law Regulation No. 78, promulgated on 17-4-1971, by General Agha Muhammad Yahya Khan, and the main question for consideration before this Court is whether the detention of the two detenus under Martial Law Regulation No. 78 is legal. All other questions revolve round this.

Before, however, the Court can determine this question, it is confronted with the preliminary question, as to whether the Court can receive or entertain any complaint, petition, application, etc., against or relating to an order passed by a Martial Law Authority call or permit to be called in question etc., any order of such authority in view of the bar placed on the Courts under section 3 of the President's Order No. 3 of 1969. Two sub-questions flow from this preliminary question, and they are;

(i) Is President's Order No. 3 of 1969 binding in law ?

(ii) If so, does it still permit the Court to enquire into the validity of Martial Law Regulation No. 78 ?

It has been the Constitutional practice in the Indo-Pakistan sub-continent that whenever an existing Order ceased to be operative, either legally or illegally, the existing laws have been continued to remain valid by the new dispensation. Beginning from the Government of India Act (Consolidated in 1924) down to the Laws (Continuance in Force) Order, 1958, and the Proclamation of Martial Law by General Agha Muhammad Yahya Khan, the validity of existing laws were continued by this process. The details are as follows:----

Section 30 of the Government of India Act, 1919 (Consolidated in 1924); section 292 of the Government of India Act, 1935; section 18 of the Indian Independence Act, 1947; Articles 221 and 224 of the Constitution of Islamic Republic of Pakistan, 1956; Paragraph 4 of the Laws (Continuance in Force) Order, 1958; Article 225 of the Constitution of Pakistan, 1962; and paragraph 5 of the Proclamation of Martial Law dated the 25th March 1969. Similar is the provision in Article 372 of the Indian Constitution.

On the 20th of December 1971, Chief Martial Law Administrator and ex-President of Pakistan General Agha Muhammad Yahya Khan stepped down from his offices, and consequently all the existing laws lapsed, and unless they were saved by a competent authority under the subsequent dispensation, they ceased to have any sanction behind them. The 1962-Constitution having already been abrogated by him, the only sanction behind the various `Laws' that he purported to make was his individual 'will' and with his disappearance from the scene. all the existing `Laws' including President's Order No. 3 of 1969 and Martial Law Regulation No. 78 lapsed. There is nothing to show, and the learned Attorney-General has been unable to place before us anything from the now dispensation to show, that the existing laws were saved. He has, however, relied upon the proclamation of General Agha Muhammad Yahya Khan dated the 20th December 1971, whereby he transferred power to President Zulfikar Ali Bhutto for the purpose of showing that the existing laws were continued in force. In this Proclamation it has been stated that the Proclamation of the 25th March 1969 shall have effect subject to the Proclamation of the 20th December 1971, and inasmuch as the Proclamation of the 25th March 1969 had saved the existing laws, the Proclamation of the 20th December 1971, it has been contended, also operated to save the existing laws. It is to be noticed that the Proclamation of the 20th December 1971, itself was by General Agha Muhammad Yahya Khan and it derived its force and validity from his individual 'will'. As soon as, however, this 'will' ceased to exist on account of his exit, the very life line of the Proclamation of 20th December 1971, was cut off, I have, therefore, no hesitation in saying that neither President's Order No. 3 of 1969 nor Martial Law Regulation No. 78 is a valid existing law.

The next question is : whether President's Order No. 3 and Martial Law Regulation No. 78 can be saved on the doctrine of necessity. The doctrine of necessity is concomitant of the doctrine of legitimacy, and might have relevance in the regime of General Agha Muhammad Yahya Khan. As the legality of the present regime is not directly in issue before this Court, it is not called upon to consider it. The learned Attorney-General has submitted that the recipient of power in the present regime has legitimate credentials from the body politic itself and therefore, no limits can be placed on its power. As for the former, it is not before us as a specific issue; as for the latter it is not true. The corner stone of the State of Pakistan is that the sovereignty rests with Allah and Pakistan is his delegatee in the matter of the Governance of the State. It is natural, therefore, that the delegatee or for the matter of that any ruler, single or collective, in Pakistan can never have unlimited power. If the present regime has legitimate credentials, as claimed by the learned Attorney-General the application of the doctrine of necessity does not arise. It must rely on its own source of law. If it has not the validity of President's Order No. 3 and Martial Law Regulation No. 78 shall have to be

tested in the light of the following tests which Fieldsand, J. laid down in the Rhodesian case and which were approved in the Privy Council by Lord Pearce (1968) 3 A E R 561. If the taking over by the usurper is complete and effective and this 9s to be determined on evidence by the Court, the Court may as a matter of necessity treat a 'Law' as valid but only such parts as:

(a) are directed to and reasonably required for orderly running of the State;

(b) Such as do not impair the rights of the citizens under the previous lawful Constitution;

(c) Such as do not run counter to the previous lawful Constitution, and are not intended to strengthen the usurper.

President's Order No. 3 is bad for another reason; It is Inconsistent with the Rule of Law which is the basis of every civilised society. The order is inconsistent with the Rule of Law because it reflected the individual dominant `will' of one person, namely, General Agha Muhammad Yahya Khan and was based on no rule of conduct and also because it sought to make an Act or Order of any Martial Law Authority immune from attack in any Court of law.

Martial Law Regulation No. 78 is also repugnant to Islamic Law. The latter recognises detention as justified in two circumstances only, (i) by sentence of Court; and (ii) for the purpose of investigation. Vide p. 35 of Miras-e-Quaid-e-Azam by Dr. Javaid Iqbal.

President's Order No. 3 of 1969 has also been assailed on another ground. It has been contended that President's Order No. 3 contains supra-Constitutional Provisions namely, those barring the jurisdiction of the Court In regard to Act or Order of a Martial Law Authority and that any dispute in regard to the interpretation or application of a Martial Law Authority can only be referred to the Chief Martial Law Administrator for final interpretation. These supra-Constitutional provisions under the Provisional Constitution Order, 1969 could only be made by the Chief Martial Law Administrator and not the President who made President's Order No. 3. Tao two offices are separate and the former is superior to the latter as the office of the President was created by the Chief Martial Law Administrator under section 3(2) of the Provisional Constitution Order. This again is a question which the Court has to determine for it is the only limb of the State that can determine it. The learned Attorney-General has unsuccessfully tried to repel this and argued that the aforesaid two provisions are Constitutional matters and

these could under section 8 of the Provisional Constitution Order be made by the President. Inter alia, section 2 of the Order which says that "this Order shall have effect notwithstanding anything contained in the Provisional Constitution Order . . . . .", and sections 3(3) and 4 of the Order that give Martial Law Authority the sole jurisdiction to determine the correctness, legality or propriety of the exercise of any powers or jurisdiction by among others, a Martial Law Authority or to interpret any Martial Law Regulation or Martial Law Order, clearly show that President's Order No. 3, do contain supra-Constitutional provisions. Alternatively the learned Attorney-General has contended, that President's Order No. 3 of 1969 has been promulgated by the Chief Martial Law Authority and not by the President.

It has been submitted that the criteria for determining this question are three-fold. Firstly, the title or name of the Order ; secondly, description of the order and its authorship as given in the official Gazette, and thirdly, in the recital of the power in the Order. In regard to the first test, prima facie, it is a President's Order being President's Order No. 3 of 1969. The second test also shows that the order has been described as President's Order in the Gazette of Pakistan, Extraordinary, dated June 30, 1969. The Notification published in the Gazette contains the following;----

"The following Order made by the President is hereby published for general information:-"

As regards the third test, it has been stated in the preamble of the President's Order No. 3, that the Order is being made "by the President and Chief Martial Law Administrator." The learned Attorney-General has contended that the were addition of the description "Chief Martial Law Administrator" does not make it the Order of the Chief Martial Law Administrator. I think the said Notification clinches the issue for it leaves no room for doubt about the authorship of the Order. I, therefore, hold that President's Order No. 3 of 1969 is ultra vires on this ground.

In this context it has been brought to the notice of the Court that by the insertion of the condition "for the administration of the affairs of the State" in section 8 of the Provisional Constitution Order of 1969 President's Order No. 3, has been made justiciable and the Court accordingly can determine whether the provision contained in the President's Older No. 3, has in fact been made for the administration of the affairs of the State. I agree with this contention.

The position as it obtains vis-a-vis the President's Order No. 3, and Martial Law Regulation No. 78 is that there is a regime whose legality or legitimacy has not yet been questioned in any Court of law. This regime has chosen to act under a law that has ceased to exist with the disappearance of the maker of the law. What then is the consequence of such Act? In my opinion if the particular

law has not been adopted or continued in a competent manner by the new dispensation, the Act is a nullity.

I see no force In the contention advanced by the learned Attorney-General that President's Order No. 3, has been recognised as good law in Fazal Ahmed v. The Sate (P L D 1970 Lah. 741) and in Fazal Ahmed v. The State (1970 S C M R 650). In the first place both these cases were decided at a time when the old order was in existence. In the second place in none of these cases any specific issue was raised in regard to the validity of President's Order No. 3.

Assuming, however, the President's Order No. 3, and Martial Law Regulation No. 78 are still good laws, the question is whether this Court has the power to determine the legality of the detention of the petitioner's husband in view of the bar contained In President's Order No. 3 of 1969.

In my opinion this Court has the power to decide the issue as It is the sole Judge of its own jurisdiction including the negative, to hold that it has no jurisdiction. This proposition arises from the fact that being the highest Court of the land, the law declared by it is binding on all Courts and all Executive and Judicial Authorities throughout Pakistan, shall act in aid of the Supreme Court (viz. Article 64 of the 1962-Constitution). No doubt the 1962-Constitution contains certain provisions ousting the jurisdiction of the Supreme Court, the ouster, however, does not take away the jurisdiction of the Court in regard to this particular point in issue. Reference has been made to the 1962 Constitution, because that is the only legal instrument under which the institution of the Supreme Court was established. A pertinent question, however, arises as to whether after the abrogation of the 1962-Constitution by General Agha Muhammad Yahya Khan by his proclamation of the 25th March. 1969, this Court can still derive inspiration and authority from the said y Constitution. The one short answer to this is that as soon as `' General Agha Muhammad Yahya Khan made his exit from the scene, the Constitution, which had been dormant in the meantime, revived.

As regards the Judicial power of this Court it may be stated that the 1962-Constitution was based on a Presidential structure and it was accordingly erected on the theory of the separation of powers between the three limbs of the Government, namely, the Legislature, the Executive and the Judiciary The entire judicial power, including the concept of jurisdiction, was lodged with the judiciary. The Supreme Court is the creation of 1962-Constitution and its existence was continued under paragraph 5 of the Proclamation of Martial Law dated the 25th March 1969. As the proclamation of the 25th March 1969 and the Provisional Constitution Order, 1969, have ceased to exist due to the disappearance of General Agha Muhammad Yahya Khan from the scene, the 1962-Constitution has come back with full force and is operative until it is validly replaced by the elected representative of the people. In Pakistan the legal sovereignty rests with

Allah. Therefore, the judicial power has been conferred on the judiciary as agent of the Sovereign Authority, namely, Allah. In my opinion, therefore, this Court has the requisite power and jurisdiction to determine the questions that have been raised before it. The existence of the jurisdiction of this Court receives further support from the fact that the respondents have appeared before this Court and have submitted to the jurisdiction of this Court. After all, in a civilised society who else can determine a dispute between the State or its ruler and its citizens.

According to the common factor in the oaths of the Judges we have undertaken to discharge our duties and perform our functions in accordance with the laws of Pakistan which we have sworn to preserve, protect and defend. The oaths also have bound us to do justice according to law. This takes us to the question as to what is law'. 'Law' has not been defined in the 1962.-Constitution or in the Provisional Constitution Order of 1969. It is, therefore, the function of this Court to define 'law'. It has been rightly emphasized by Mr. Manzur Qadir that law its basic to orderly society and Courts are basic to law. It can hardly be disputed that apart from the law as we find in the Constitution and the various Statutes, there are a number of laws and legal principles which have been evolved by Courts in course of their decisions. For example in Pakistan the rule of audi alteram partem is a part of the law of Pakistan and it has to be read in a Statute which does not expressly oust the application of the principle of natural justice. Besides, in any case where vires or validity of a law is in question, it is the Court that has a final say in the matter. It has been truly said that 'law' is that which the Court recognises as such.

It has, therefore, been rightly contended that now that the validity of President's Order No. 3 or Martial Law Regulation No. 78 has been raised as a direct issue before this Court, it is the Court's decision that will finally put a seal on its validity or otherwise.

The learned Attorney-General has very frankly conceded that it is this Court that can put the final seal on the validity or otherwise of a law. He has also frankly conceded that it is difficult for him to support the provision of section 3(1)(a) of the President's Order No. 3 of 1969 which prohibits the Court from receiving or entertaining any complaint etc. The Court's power to discover law applicable to a situation has been accepted in the Governor-General's Reference No. 1 of 1955 (P L D 1955 F C 435). In the case under report the Governor-General having found himself in a difficult situation and having been unable to find any legal basis to meet the situation had to approach the then Federal Court for a solution of the problem and the Court answered the reference and indicated the manner in which the problem could be legally solved.

From the foregoing it is evident that, in the first place, President's Order No. 3 of 1969 and Martial Law Regulation No. Its do not exist so far as this Court is concerned, and therefore, they are not valid laws. In the second place even if it be assumed that they do exist, they can not deprive the

Court of its inherent jurisdiction to consider the validity or otherwise of those laws or any action taken thereunder. The following illustration will highlight this position. Supposing by an order passed under Martial Law Regulation No. 78, 'X' has been ordered to be detained. While executing this order, however, instead of 'X', 'Y' is arrested and detained. It is absurd to say that the Court is deprived of its jurisdiction to consider the validity of the order vis-a-vis the person detained merely because the order is by a Martial Law Authority. In the case of detenu Mr. Altaf Gauhar there is a similar question involved, for, while the Martial Law Administrator Zone 'D' passed the order directing that the detenu be kept confined by the Superintendent, Central Prison, Karachi, and granted Class 'B' during detention, the detenu admittedly was not committed to the requisite custody. Can it be said with any amount of reasonableness that the Court has no power even to see whether the action taken is in accordance with the order passed by the Martial Law Administrator? It is now an admitted fact that the detenu Altaf Gauhar was actually detained in places different from the one mentioned in the impugned order of detention, without any order by the Martial Law Administrator concerned. Even on this very limited ground I feel no hesitation in saying that this Court has the jurisdiction to pronounce the detention of Mr. Altaf Gauhar as illegal.

It has been contended by the learned Attorney-General that President's Order No. 3 has provided for a remedy in a matter like this. I am unable to agree with him. Having regard to the provisions made in section 3 of the President's Order No. 3 of 1969, any question regarding the correctness, legality or propriety of exercise of any powers or jurisdiction of a Martial Law Authority could only be referred to the Chief Martial Law Administrator for decision by a Martial Law Authority itself, for the Court's jurisdiction even to receive or entertain any complaint in that respect has been sought to be ousted. The position, therefore, is that any order passed by a Martial Law Authority, if it is labelled as such, it must be accepted as a good order whether it is in fact male or could be made under any Martial Law Order or Regulation, or not. Such an unlimited and undefined power, which is at the same time arbitrary and not governed by any rule of law, can never be accepted as good by any Court of law. Such an unlimited power is not only foreign to Islamic Law but is also not recognised in any modern society.

Dosso's case-P L D 1968 S C 533

There have been murmurs both inside and outside Pakistan as to the correctness of the decision in Dosso's case. It has now been mooted before this Court and the Court has been asked to review its own decision. There is no doubt about the competence of this Court to review its own decision. Article 62 of the 1962. Constitution, which established the Supreme Court, has provided as follows:

"The Supreme Court shall have power, subject to the provisions of any Act of the Central Legislature and of any Rules made by the Supreme Court, to review any judgment pronounced or any order made by it."

This case gives me the impression that law has been sacrificed on the alter of expediency. The entire legal system of Pakistan has been derailed as a result of this decision, and the system requires to be put back on the rail, if Pakistan Is to pursue its chartered course as laid down In the Objective Resolution passed by the People of Pakistan. Stare decfsis should have no application to Dosso's case. Schwartz in his book 'The Supreme Court' has observed as follows on stare decisis;

" . . In a judicial tribunal, stare decisis is not so much a virtue as a necessity . . . . . adherence to precedent is basis as a abstract desideratum of the law. But it must not take precedence over the need for the law to be right, particularly on Constitutional issues. Inherent in every system of law is the antinomy between certainty and change." (pp. 345-346).

I, therefore, fully agree that Dasso's case must be reviewed on the grounds mentioned by my Lord the Chief Justice.

Dosso's case came up for decision during the regime of General Muhammad Ayub Khan and it was decided therein that a successful revolution was entitled to the allegiance of the Courts of law. The decision is based on what the learned Judges thought was Kelsen's Theory of Jurisprudence. This theory was interpreted to provide the legal justification for the acceptance by the domestic Court of the success of an internal revolution within the State. It was not borne in mind, as it should have been, that Kelsen's was a 'pure theory of law' as distinguished from the 'law' itself. It is the overlooking of this obvious position that has caused the basic fallacies in the judgment. Kelsen himself was aware of the fact that this theory did not form part of any legal system. Furthermore the Court had assumed that there was a revolution and the revolution had succeeded. Both these questions were questions of fact and required to be decided upon evidence, and upon issues raised before the Court. There is nothing to show, that there was any rebellion or insurrection. The Proclamation of the 7th October 1958, by President Iskandar Mirza made no mention of any rebellion or insurrection.

It is thus evident that the very foundations upon which the decision rested did not exist. I, therefore, think that this Court should make it clear that the validity or otherwise of an existing order can only be determined with reference to the laws of Pakistan and not to any theory of international jurisprudence. It is also necessary to state firmly that the question of existence of a revolution or

its success are questions of fact which can only be decided upon evidence, and not assumed. This will remove once for all the temptations that have been placed in the way of an adventurer seizing power illegally and destroying an existing legal order.

Case 4

PLD 1977 S C 657

Present: Anwaral Haq, C. J., Waheeduddin Ahmad, Muhammad Afzal Cheema, Muhammad Akram. Dorab Patel, Qaisar Khan, Muhammad Haleem, G. Safdar Shah and' Nasim Hasan Shah, JJ .

BEGUM NUSRAT BHUTTO-petitioner

versus

CHIEF OF ARMY STAFF AND FEDERATION OF PAKISTAN-Respondents .

Constitutional Petition No. 1 of 1977, decided on 10th November 1977.

Per S. Anwaral Haq, C. J. [Waheeduddin Ahmed, Muhammad Afzal Cheema. Muhammad Akram, Dorab Patel, Muhammad Haleem, G. Safdar Shah and Nasim Hasan Shah, JJ. agreeing]:

(a) Constitution of Pakistan (1973)-

Art. 184 (3)-Maintainability of petition-Petition directed against Chief of Army Staff whereas impugned orders of detention passed by Chief Martial Law Administrator-Chief of .Army Staff also being Chief Martial Law Administrator, objection regarding non-maintainability of petition. on ground of not having been directed against Chief Martial Law Administrator, held, only technical since it could be easily rectified by adding words "Chief Martial Law Administrator" to description of respondent.- [Writ].

(b) Constitution of Pakistan (1973)-

.-- Art. 184(3) read with Art. 199-Aggrieved person-Petitioner moving petition in her capacity of wife of one of detenus and as Acting Chairman of Party to which all detenus belonged-Petitioner

though not alleging any contravention of her own Fundamental Rights yet in circumstances, held, an aggrieved person within meaning of Art. 199. [Aggrieved person].

Manzoor Elahi v. State P L D 1975 S C 66 ref.

(c) Precedents-

- Interpretation of-Apprehension that decision of Supreme Court in Asma Jillani's-case (P L D 1972 S C 139) in effect rendered illegal all successive Governments of Pakistan and Constitutions framed during relevant period, held, not well-founded.-[Interpretation of precedents].

State v. Dosso P L D 1958 S C (Pak.) 533 ; Quin v. Leathem 1901 A C 495; Prager v. Blatsplel, Stamp do Heaeock Ltd. (,1924) 1 K B 566; Read v. J. Lyons & Co. Ltd. 1947 A C .156; Candler v. Crane Christmass & Co. (1951) 1 All E R 426; State v. Zia-ur-Rehman P L D 1973 S C 49 and Miss Asma Jillani v. The Government of The Punjab and another P L D 1972 S C 139 ref.

(d) Precedents-

--Interpretation of-Judgments delivered in-Southern Rhodesian case of Madzimbamuto [(1968) 3 All E R 561]-Held, cannot be regarded as judicial authority for proposition that effectualness of new regime provides its own legality-Doctrine subjected to weighty criticism on ground of seeking to exclude all considerations of morality and justice from concept of law and legality.-[Interpretation of precedents Doctrine of necessity).

Madzimbamuto v. Lardner-Burke and another (1968) 3 All E R 561, Splitting the Grundnorm 1967 Modern Law Review, Vol. 30; The Judicial Process : UDI and the Southern Rhodesian Judiciary by Claire Pally; Legal Politics: Norms Behind the Grundnorm by R. W. M. Dias 1968 Cambridge Law Journal, Vol. 26 ref.

(e) Jurisprudence-

Kelsen's pure Theory of Law-Not universally accepted-Nor indeed a ,theory having become basic doctrine of science of modern jurisprudence-Theory not found consistent for full application in all revolutionary situations coming before Courts for adjudication as to validity of new Legal Orders resulting from such revolutions.-[Theory of law].

Principles of Revolutionary Legality-Oxford Essays on ,Jurisprudence, 2nd Series,, 1973 ; The Problem of Power in Legal Politics : Norm Behind the Grundnorm by R. W. M. Dias, Ch. 1V; Adams v. Adams (1970) 3 All E R 572; The Pure Theory in Legal Politics : Norms Behind the Grundmom by R. W. M. Dias, Ch. XVI and The 1965 Standford Law Review, Vol. 17 by Professor Julius Stone ref.

(f) Jurisprudence-

-- Kelsen's Theory-Open to serious criticism on ground of excluding from consideration sociological factors of morality and justice-Legal consequences of an abrupt political change by imposition of martial law-To be judged not by application of an abstract theory of law in vacuum but by consideration of total milieu preceding change, i.e., objective political situation prevailing at time, its historical imperatives and compulsions, motivations of persons bringing in change and extent of preservation or suppression of old Legal Order.-[Theory of law].

Kelsen's theory is open to serious criticism on the ground that by making effectiveness of the political change as the sole condition or criterion of its legality, it excludes from consideration sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. It must not be forgotten that the continued validity of the grundnorm has an ethical background, in so far as an element of morality is built in it as part of the criterion of its validity.

These considerations assume special importance in an ideological State like Pakistan, which was brought into being as a result of the demand of the Muslims of the Indo-Pakistan sub-continent for the establishment of a homeland in which they could order their lives in accordance with the teachings of the Holy Qur'an and Sunnah. When the demand was accepted, it was given effect to by means of a Constitution passed by the British Parliament, which held sovereignty over India in 1947. In other words, the birth of Pakistan is grounded both in ideology and legality. Accordingly,

a theory about Law which seeks to exclude these considerations, cannot be made the binding rule of decision in the Courts of this country.

It follows, therefore, that the legal consequences of an abrupt political change, of the kind with which the Court is dealing in this case, must be judged not by the application of an abstract theory of law in vacuum, but by a consideration of the total milieu in which the change is brought about, namely, the objective political situation prevailing at the time, its historical imperatives and compulsions; the motivation of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed. Only on a comprehensive view of all these factors can proper conclusions be reached as to the true character of the new Legal Order.

(g) Jurisprudence-

Kelsen's Theory-Theory of revolutionary legality-Can have no application or relevance where breach of legal continuity admitted or declared to be of a purely temporary nature and for a limited specified purpose-Such phenomenon-One of constitutional deviation rather than of revolution-Application of Kelsen's theory to such transient and limited change in legal or constitutional continuity of a country, held, inappropriate.-[Theory of law].

Per Waheeduddin Ahmad, J. (agreeing).

The principles laid down in Asma Jillani's case are not applicable to the facts of the present case. In the circumstances 'of the present case the principles enunciated in the Reference by His Excellency The Governor-General P L. D 1955 F C 435 will have to be invoked for solving the present constitutional deadlock.

Per Dorab Patel, J. (agreeing).

The principles laid down by the Federal Court in the Reference by His Excellency The Governor-General P L D 1955 F C 435 will have to be followed in resolving the impasse created by the, constitutional break-down.

Per Muhammad Akram, J. (agreeing).

Legality--Legality depends on the jurisdiction in which the matter is considered, quite apart from effectiveness. The effectiveness of the legislative authority is not a condition of the validity either of "laws" or even of itself. It is a factor which in time induces the Courts to accept such authority.

Ours is an ideological State of the Islamic Republic of Pakistan. Its ideology is firmly rooted in the Objectives Resolution with emphasis on Islamic Laws and concept of morality. In our way of life we do not and cannot divorce morality from law. Therefore the Pure Theory of law is not suited to the genesis of this State. It his no place in our body politics and is unacceptable to the judges charged with the administration of justice in this country:

Kelsen's General Theory of Law and State, pp. 118-119 ; State v. Dosso P L D 1958 S C (Pak.) 533; Miss Asma Jillani v. Government of the Punjab and another P L D 1972 S C 139; Adams v. Adams (1970) 3 All E R 572 and Lloyd's Introduction to Jurisprudence, Third Edn., p. 269 ref.

Per Nasim Hasan Shah, J. (agreeing).

In the facts and circumstances of our situation the doctrines propounded by Kelsen do not appear to be strictly applicable as the change-over which occurred on the 5th July 1977 cannot qualify as a "revolution" in Kelsenian terms. Although the Armed Forces are undoubtedly in effective control of the administration, it is neither their intention nor indeed have they established a new Legal Order in supersession of the existing Legal Order. The Constitution of 1973 remains the Supreme law of the land, subject to the condition that certain parts thereof have been held in abeyance. The President of Pakistan and the superior judiciary continue to function under the Constitution, subject to any limitations placed on their jurisdiction. The change is only in the nature of a constitutional deviation rather than the destruction of one Legal Order and its replacement by another. Even otherwise, the doctrines of Kelsen cannot be accepted in their entirety by Courts of law.

Whereas for Kelsen the efficacy of a revolution creates a new reality of which the pure science of law must take account, for the Courts involved in practical decisions the efficacy of a revolution creates a new legal situation which they must take note of and proceed to decide the matter as

raised before them by the contesting parties. In doing so they will have to take into account not only the efficacy of the change, but other values, such as the desirability of maintenance of peace, order, justice or good government, to fill the vacuum in law and to avoid chaos, presumption in favour of the old regime because of its original legal status or against it because of its record of unconstitutional actions and conduct. In short, the responsibility of the judge is not to the "objective reality" that exists for the academic observer but to the peace, order, justice, morality and good government. In fact, for judges involved in practical decisions acceptance of the changed Legal Order is not so much on account of its efficacy as such; but rather on necessity in the sense of "ID QUOD ALIAS NON EST LICITUM, NECESSITAS LICITUM FACIT" (that which otherwise is not lawful necessity makes lawful).

(h) Proclamation of Martial Law [dated 5-7-1977]-Qaiser Khan 7. (agreeing)

-- Justification of-State necessity and welfare of people-Widespread allegations of massive interference with sanctity of ballot by Government officials in favour of candidates of ruling party; national wave of resentment giving birth to country-wide protest agitation; disturbances getting out of control of civil Armed Forces and resulting in heavy loss of life and property; calling out of troops by Federal Government, consequent imposition of Local Martial Law in several important cities; requisitioning of military assistance by local authorities in smaller towns and cities not having desired result; rigging and official interference with elections in favour of ruling party candidates established by judicial decisions in some cases displaying general pattern of official interference; public statements of Election Commissioner concerned ratifying widespread allegations of Opposition regarding official interference with elections and endorsing demand for fresh elections; Prime Minister in circumstances offering himself to Referendum but such offer not having any impact at all and demand for his resignation and for fresh elections continuing unabated plan resultantly dropped; despite Prime Minister's dialogue with Opposition leaders and temporary suspension of movement officials charged with maintenance of law and order continuing to be apprehensive of terrible explosion beyond control of civilian authorities in event of failure of talks; talks between Prime Minister and Opposition leaders on basis of his offer for holding fresh elections dragging on for various reasons and ultimately Opposition party insisting on nine or ten points having yet to be resolved and Prime Minister also saying that his side would similarly forward another ten points if Opposition failed to ratify accord allegedly reached earlier; Punjab Government, during crucial days of deadlock, sanctioning distribution of fire-arms licences on a vast scale to its party members and provocative statements deliberately made by Prima Minister's Special Assistant; normal economic, social and educational activities seriously disrupted as a result of agitation and incalculable damage caused to nation and country-Prime Minister's constitutional and moral authority to rule country standing seriously eroded in consequence and his Government finding it difficult to maintain law and order, to run orderly ordinary administration, to keep open educational institutions, and to ensure normal economic activity-Situation deteriorating to such extent that either Prime Minister or Service Chiefs themselves felling necessity of a declaration of loyalty to Government so as to boost up Prime Minister's authority to help restore law and order and a return to normal conditions but even such

declaration not having any visible impact on momentum of agitation Constitutional authority of Prime Minister and other Federal Ministers as also of Provincial Governments repudiated on a large scale throughout country-Representative' character of National and Provincial Assemblies not accepted by people at large-Serious political crisis in country leading to break down of constitutional machinery concerning executive.. and legislative organs of State-Situation arising such for which no, solution provided for in Constitution-Armed Forces of country in such eventuality . intervening to save country from further chaos and bloodshed, to safeguard integrity and sovereignty of country and to separate warring factions-Step though extra-Constitutional yet obviously dictated by highest considerations of State necessity and welfare of people and for this reason spontaneously welcomed by almost all sections of population--Explanation given by Chief Martial Law Administrator for Army's intervention-A true reflection of situation-Sincere and unambiguous declaration of Chief Martial Law Administrator, to wit, he took over administration only for a short time to arrange for fresh elections fairly at shortest possible time and intended to hand over government to chosen representatives of people persuading people and Judges of Superior Courts to willingly accept such interim arrangements-New arrangement, dictated by considerations of State necessity and welfare of people, held, acquired its effectiveness owing to its moral content and promise of restoration of democratic institutions and justified in circumstances.-[Doctrine of necessity].

P L D 1977 Jour. 164; P L D 1977 Jour. 1; P L D 1977 Jour. 190; P L D 1977 Jour. 198; Statements made by the Chief Election Commissioner on the 17th of March 1977, 23rd of May 1977, and the 5th of June 1977; Minutes of certain Meetings of the Law and Order Committee, headed by Mr. Yahya Bakhtiar ; Speech made by General Muhammad Ziaul Haq on 5th of July 1977 ref.

Miss Asma Jillani v. Government of The Punjab and another P L D 1972 S C 139 and Stare v. Dosso P L D 1958 S C (Pak.) 533 distinguished.

Per Nasim Hasan Shah, J. (agreeing).-

The question whether the conditions obtaining in Pakistan necessitated the imposition of Martial Law has to he answered by reference to the happenings from 7th March, 1977 up to 5th July 1977, which reveal that the constitutional and moral authority of the National Assembly which had come into being as a result of the elections held on 7th March 1977, as well as the Federal and Provincial Governments formed thereafter had been continuously and forcefully repudiated throughout the country over a prolonged period of nearly four months with the result that the national-life stood disrupted. A situation had arisen for which the Constitution provided no solution. The atmosphere was surcharged with the possibility of further violence, confusion and chaos. As the Constitution itself could not measure up to the situation, the doctrine of State Necessity became applicable., for

where the safety of the State and the welfare of the people are in imminent danger, necessity justifies a departure from the ordinary principles of law. In these circumstances the step taken by the Armed Forces of imposing Martial Law stands validated, on the principle of State Necessity.

Per Qaiser Khan, J ----

A Constitution or the basic norm could be annulled, abrogated, destroyed or suspended in two ways, one by a Constitutional act, that is to say, by the method provided for in the Constitution for changing or replacing it and the other by an un-Constitutional act, say revolution or coup de'etat, which is known as extra-Constitutional act. In the instant case the Constitution of 1973 was put in abeyance, that is to say, suppressed for the time being by the Chief of the Army Staff by an extra-Constitutional act of issuing a Proclamation declaring himself as the Chief Martial Law Administrator. For the running of the Country the Chief Martial Law Administrator who had assumed all powers under the Proclamation issued the Laws (Continuance in Force) Order the same day.

Now the validity or invalidity of this action could not be tested on the basis of the Constitution of 1973 as it was no longer there having been suppressed and there was no other superior norm on the basis of which it could be tested. Such an action, according to some jurists, is called metalegal. For judging such a situation there are two authorities of the Supreme Court; in the field, that of Dosso P L D 1958 S C (Pak.) 180 and Asma Jillani, P L D 1972 S C 139. Dosso's case by which the new order could he legitimised cannot be applied as it has been overruled by the Asma Jillani's case. Asma Jillani's case does not apply in the present case as the facts and circumstances of this take-over are quite different from the facts and circumstances of the then take-over. In the present case under the circumstances prevailing in the Country of which the Court can take judicial notice the present takeover was quite justified for saving the State from total destruction and the Chief of the Army Staff under the circumstances could not be dubbed as a usurper.

(i) Laws (Continuance in Force) Order, 1977 [C. M. L. A's Order 1 of 1977]-

---- Doctrine of necessity-Contention that question of application of doctrine of necessity does not arise in present case since with suppression or destruction of old Order even such doctrine or concept disappeared and could no longer be regarded as part of judicial system obtaining in Pakistan--Held: Question of considering application of doctrine of necessity did arise in case in hand since Court not persuaded of military intervention providing its own legality simply for reason of its being accepted by people and becoming effective in such sense-Old Constitution even

if assumed to be completely destroyed or suppressed judicial concepts and notions of morality and justice, nevertheless not destroyed simply for reason of new Legal Order not mentioning anything about them--Laws (Continuance in Force) Order, 1977 on other hand clearly mentions governance of country, as nearly as may be, in . accordance with Constitution (19731 and to continue all laws for time being in force, indicating thereby an intention not to destroy legal continuity of country as distinguished strictly from constitutional continuity.-[Doctrine of necessity].

(j) Jurisprudence-

-- Usurpation of power---Power assumed in extra-Constitutional manner . by authority not mentioned in Constitution---Does not always amount to usurpation of power---Question to be determined in light of circumstances of particular case before Court. --[Usurpation of power].

(k) Jurisprudence----

-- Assumption of power once held valid, legality of actions taken by such authority to be judged in light of .principles pertaining to law of necessity-Concept of condonation as expostulated to Asma Jillani's case P L D 1972 S C 139.- [Doctrine of necessity].

The concept of condonation, as expostulated in Asma Jillani's case, has relevance not only to the acts of a usurper, but also to a situation which arises when power has fallen from the hands of the usurper, and the Court is confronted with protecting the rights and obligations which may have accrued under the acts of the usurper, during the time he was- in power. However, in the case of an authority, whose extra-Constitutional assumption of power is held valid by the Court on the doctrine of necessity, particularly when the authority concerned is still wielding State power, the concept of condonation will only have a negative effect and would not offer any solution for the continued administration of the country in accordance with tire requirements of State necessity and welfare of the people. It follows, therefore, that once the assumption of power is held to be valid, then the legality of the actions taken by such an authority would have to be judged in the light of the principles pertaining to the law of necessity.

(l) Islamic Jurisprudence--

Doctrine of necessity-Maxim : Salis populi suprema lex (Necessity makes prohibited things permissible)- Doctrine accepted not only in Islamic Jurisprudence but in other systems as well.- [Doctrine of necessity-Maxim].

Sura Al-Baqar and Sum Al-Nahal; Islamic Jurisprudence and Rule of Necessity and Need by Dr. Muslehuddin, 1975 Edition, pp. 60-63 ; Islamic Surveys by Coulson, p. 144; Muslim Conduct of State by Hamidullah, p. 33: Majolle, Arts. 17, 21, 22, 26; Rex v. Strettor (1779) Vol. 21; Howell's State Trials: Attorney. General of Duchy of Lancaster v. Duke of Devenshire (1884) 14 Q B D 273; The Attorney-General of Republic v. Mustafa Ibrahim 1964 C L R 195 ; E. O. Lakanml and another v. Attorney-General, West Nigerio P L D 1955 F C 435; Usif Patel v. Crown P L D 1955 F C 387 and The Search for a Grundnorm in Nigeria---The Lacknmi's ease by Abiola Oji ref. .

Per Muhammad Afzal Cheema, J. (agreeing)-

Islam being the ideological foundation of the State of Pakistan any man-made legal theory divorced from morality and coming into conflict with the Divine Law of Islam would be wholly irrelevant for our purposes. to the extent of its repugnancy to the latter. Unlike a pure theory of law, Islamic principles are subjectively centred round morality and are aimed at the establishment of an orderly and peaceful moral society by taking an equally pragmatic view in the matter of their application and placing the security, safety and welfare of the people above everything else. The doctrine of necessity is an inevitable outcome of this realistic approach and has been recognized by Islam both in the individual as. well as the collective field.

The raison d'etre of the doctrine -of individual necessity applies with full force to the doctrine of State necessity which is nearly an extension of the former and is invoked in graver situations of National importance and comprehension.

It is thus abundantly clear that submission to the authority of the ruler and obedience to his commands does not extend to illegal and un-Islamic directives or orders.

The Court could not fail to take judicial notice of the crisis which developed by way of protest against the alleged rigging of the General Elections when the entire nation rose against the previous Government. There was complete break-down of law and order, several precious lives were lost and the administration of the major cities had to be handed over by him to the Armed Forces which

too were unable to cope with the situation and restore normalcy. The allegations of huge purchases of arms and their large scale distribution amongst the members of the then ruling Party in the country with a view to prepare them for civil war do not appear to have been specifically denied in the rejoinders filed by the petitioner or by the then Prime Minister himself. It would not, therefore, be too much to hold that the country was on the verge of a conflagration. The Constitution did not contemplate such situation nor did it offer a solution of the crisis. It was in this background that the Chief of the Army Staff moved in for a temporary period and with the limited object of restoring normalcy and holding free and fair elections as repeatedly declared by him. The doctrine of necessity is. therefore, attracted with full force in these circumstances.

AL-BAQRA =II=173 ; AL-MAIDA=V=4 ; AL-INAM=VI=ll9, AL-NAHAL=XVI=115 ; Verse No. 106 of Sum XVI ; Traditions of the Holy Prophet (peace be upon him) ; General Theory of Law and State by Hans Kelsen, pp. 118-119 ref.

Per Muhammad Akram, J. (agreeing).-

The principle of necessity, rendering lawful what would otherwise be unlawful, is not unknown to English Law there is a defence of necessity (albeit of uncertain scope) in criminal law, and in constitutional lam, the application of martial law is but an extended application of this concept.

S. A. De Smith on Constitutional ands Administrative Law, Chap. XXII D. F. Marais v. The General Officer Commanding the Lines of Communication and the Attorney-General of the Colony 1902 A C 109; Frederick Pollock's Article in Law Quarterly Review, pp. 152-158 ; The National Security, Interest and Civil Liberties, (1971-72 Edn.) 85 Har. Law Review 1133/1326

Ex parte Milligan (1866) 71 U S 2 ; Moyer v. Peabody (1909) 212 U S 78 , Sterling v. Constantin (1932) 287 U S 378 ; Korematsu v. United States (1944) 323 U S 214 (223-24) and Hirabayashi v. United States (1943) 320 U S 81(95) ref.

Per Nasim Hasan Shah, J. (agreeing).

The doctrine of "necessity'", namely rendering lawful that which otherwise is unlawful, is well-established in jurisprudence ID QUOD ALIAS NON EST LICITUM, NECESSITAS LICITUM FACIT",-(that which otherwise is not lawful necessity makes lawful). In constitutional law the application of Martial Law is but an extended application of this concept of State necessity.

The doctrine of necessity was applied by the Federal Court of Pakistan only recently as a legal justification for ostensibly unconstitutional actions to fill a vacuum arising out of a' Court order.

Situations are conceivable where the normal law of the land tray have to give way before necessity, particularly in a situation where the welfare of the State and its subjects are at stake, and improper case it would be the Court's duty to recognize such a situation and to act upon the principle ".salus populi suprema les" despite the express provisions of the Constitution.

The doctrine of necessity is also recognized in Islamic Law. Even in the Holy Qur'an the application of-this doctrine is made permissible.

However, before this doctrine can be invoked the following conditions must pre-exist : (a) that which is forbidden by Allah can be taken only where one is driven to it by necessity ; (b) that there is neither craving nor the intention to transgress the limits set by Him ; and (c) that only that bare minimum is taken as is necessary to save life. Thus the principle of necessity as also the conditions in which it can be resorted to are clearly set forth in Islam.

Necessity can be accepted as a justification for an extra-legal act, in certain conditions. This position is also recognised in Islam. In the precedent , it has also been observed that "Martial Law is nothing more nor less than the law of self-defence or the law of necessity and that in constitutional law' the application of Martial Law is but an extended application of the concept of State necessity." Thus, in certain exceptional circumstances it is possible, as a measure of State necessity, to impose even martial law.

Reference by H. E. The Governor-General to the Federal Court P L D 1955 F C 435 ; The Attorney-General of the Republic v. Mustafa Ibrahim and others (1964) 3 Cyprus L R 195 ; Madzimhamuto v. Lardner-Burke (1968) 3 All E R 561 ; R. v. Bakker & Naude (1900) 17 S E: 340 ; White & Tucker v. Rudolph 1879 Kotze 115; Lakanmi & Oala v. Attorney-General (West), Nigeria and Uganda v. Commissioner of Prisons (1966) E A L R 514 ref.

(m) Proclamation of Martial Law [dated 5-7-1977]-

Doctrine of necessity-Act otherwise illegal becomes legal if done bona fide under stress of necessity referable to intention to preserve Constitution, State, or Society, and to prevent it from dissolution Extra-Constitutional step taken by Chief Martial Law Administrator to overthrow Federal and Provincial Governments and to dissolve Legislatures, held, stands validated in accordance with doctrine of necessity, action having been taken on high considerations of State necessity and welfare of people.-[Doctrine of necessity].

Reference by H. E. Governor-General to the Federal Court P L D 1955 F C 435 and Miss Asma Jillani v. The Government of the Punjab P L D 1972 S C 139 ref.

(n) Proclamation of Martial Law [dated 5-7-1977]-

-- Read with Laws (Continuance in Force) Order, 1977 [C. M. L. A.'s 1 of 1977]-

True legal position emerging out of law and facts of case, explained.

Held : (i) That the 1973 Constitution still remains the supreme law of the land. subject to the condition that certain parts thereof have been held in abeyance on account of State necessity ; (ii) That the President of Pakistan and the Superior Courts continue to function under the Constitution. The mere fact that the Judges of the superior Courts have taken a new oath after the proclamation of Martial Law, does not in any manner derogate from the position, as the Courts had been originally established under the 1973 Constitution, and have continued in their functions in spite of the Proclamation of Martial Law ; (iii) That the Chief Martial Law Administrator, having validly assumed power by means of an extra-Constitutional step, in the interest of the State necessity and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity, namely :-(a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it ; (b) All acts which tend to advance or promote the good of the people ; (c) All acts required to be done for ordinary orderly running of the State ; and (d) Ail such measures as would establish or lead to

the establishment of the declared objectives of the Proclamation of Martial Law, namely, restoration of law and order, and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution ; (iv) That these acts, or any of them, may be performed or carried out by means of Presidential Orders, Ordinances, Martial Law Regulations, or Orders, as the occasion may require ; and (v) That the superior Courts continue to have the power of judicial review to judge the validity of an act or action of the Martial Law Authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 ref the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance.

(o) Proclamation of Martial Law [dated 5-7-1977]-.

Read with Laws (Continuance in Force) Order, 1977 [C.M.L.A.'s 1 of 1977] and Constitution of Pakistan (1973), Arts. 199 & 184(3)-Power of judicial review of superior Courts-Held, not taken away by Proclamation of Martial Law (dated 5-7-1977).-[Judicial review].

Certain writers and contemporary jurists support the proposition that the Courts established under the pre-existing Legal Order continue to have the power and jurisdiction to adjudicate upon the validity and effectiveness of the new Legal Order. As the new Legal Order is only for a temporary period, and for a specified and ;united purpose, and does not seek to destroy the old Legal Order but merely to hold certain parts thereof in abeyance or to subject it to certain limitations on the ground of State necessity or on the principle of salus populi supremo lex, the superior Courts continue to remain the judges of the validity of the actions of the new regime in the light of the doctrine of necessity, for the new regime then represents not a new Legal Order, but only a phase of constitutional deviation dictated by necessity.

There is yet another, and a stronger reason for holding that the power of judicial review continues. The 1973 Constitution provides for a clear trichotomy of powers between the executive, legislative and judicial organs of the State. However, owing to reasons of necessity, the executive and the legislative power now stands combined in one authority, for the reason that these two organs of the State had lost their constitutional and moral authority in the circumstances arising since the 7th of March 1977, but no such considerations arose in regard to the judicial organ of the State. Accordingly, on no principle of necessity could powers of judicial review vested in the superior Courts under the 1973 Constitution, he taken away.

Next, even a for any reason the principle or power. of judicial review embodied in the relevant provisions of the 1973 Constitution be held not to be available under the new dispensation, the fact remains that the ideology of Pakistan embodying the doctrine that sovereignty belongs to Allah and is to be exercised on His behalf as a sacred trust by the chosen representatives of the people, strongly militates"` against placing the ruler for the time being above the law, and not accountable to any one in the realm. Muslim rulers have always regarded themselves as being accountable to the Courts of the land for all their actions and have never claimed exemption even from personal appearance in the Courts. The Courts of justice are an embodiment and a symbol of the conscience of the Millat (Muslim community), and provide an effective safeguard for the rights of the subjects. On this principle as well, the power of judicial review for judging the validity of the actions of the Martial Law Authorities must continue to remain in the superior Courts.

A perusal of the provisions of the Laws (Continuance in Force) Order also shows that they are primarily designed to give effect to the purposes of the proclamation. As however this Order is an offspring of necessity, the superior Courts continue to have the power of judicial review, notwithstanding anything to the contrary contained in this Order, to test the validity of its provisions and any action taken there under, :u the light of the principles regulating the application of the law and doctrine of necessity.

(p) Laws (Continuance in Force) Order, 1977 [C. M. L. A.'s 1 of 1977]-

Read with Constitution of Pakistan (1973), Arts. 184(3) & 199-Judicial review, power of-Laws of laud-Kept alive under C. M. L. A.'s Order 1 of 1977-Full provision made for their adjudication by ordinary Courts-Matters falling within authority of civil Court to decide--Held, must continue to fall outside purview of Martial Law Authorities-Remedy to citizens against any such encroachement--Can be had by way of judicial review in superior Courts.-.[Judicial review]

(q) Proclamation of Martial Law [dated 5-7-19771-

And Laws (Continuance in Force) Order, 1977--Not supra--Constitutional instruments but of extra-Constitutional nature so as to conform to description of action by virtue of which Chief Martial Law Administrator assumed administration of country.

(r) Laws (Continuance in Force) Order, 1977 (C. M. L. A.'s 1 of 1977)-

Art. 2(3) read with Constitution of Pakistan (1973), Art. 232 (I), Fundamental Rights, suspension of-Chief Martial Law Administrator, held, justified in suspending right to enforce Fundamental Rights and Art. 2 (3) of C. M. L. A.'s Order 1 of 1977 not open to challenge. [Fundamental rights].

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

In view of the suspension of Fundamental Rights by subsection (3) of auction 2 of the Laws (Continuance in Force) Order, 1977, the Supreme Court has. no jurisdiction to grant to petitioners any relief.

(s) Proclamation of Martial hays [dated 5-7-1977]-

---- Implementation of solemn pledge given by Chief Martial Law Administrator to hold free and fair elections and restore democratic rule-Court observations.

While the Court does not consider it appropriate to issue any directions as to a definite time-table for the holding of elections, the Court would like to state in clear terms that it has found it possible to validate the extra-Constitutional action of the Chief Martial Law Administrator not only for the reason that he stepped in to save the country at a time of grave national crisis and constitutional break-down, but also because of the solemn pledge given by him that the period of constitutional deviation shall be of as short a duration as possible, and that during this period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections, leading to the restoration of democratic rule in accordance with the 'dictates of the Constitution. The Court, therefore, expects the Chief Martial Law Administrator to redeem this pledge, which

must be construed in the nature of a mandate from the people of Pakistan, who have, by and large, willingly accepted his administration as the interim Government of Pakistan.

Per Qaiser Khan, J.-

(t) Proclamation of Martial Law [dated 5-7-1977]-

Read with Laws (Continuance in Force) Order, 1977 (C. M. L. A. 's 1 of 1977), Arts. 2, Proviso & 4 and Constitution of Pakistan (1973), Art. 184(3)-Jurisdiction-Maintainability of petition under Art. 184(3), Constitution of Pakistan (1973)-C. M. L. A.'s Order 1 of 1977-New Legal Order for time being--Supreme Court deriving its jurisdiction from new Legal Order, orders of detention, held, cannot be challenged and petition liable to dismissal.-[Jurisdiction].

Since the Courts including the Supreme Court were revived by the Laws (Continuance.. in Force) Order and continued to work under its authority, they therefore derived their jurisdiction also from the said Order. For example, if after the issuance of the Proclamation the Chief Martial Law Administrator had not issued the Laws (Continuance in Force) Order and had started ruling by decrees through his officers then ,where would have been this Court and whet jurisdiction it would have had.

Otherwise too allegiance is always due to the de facto Government for it is this Government which can provide protection to the citizens and allegiance to the State imposes as one of its most important duty obedience to the laws of the sovereign power for the time being within the State. The municipal Courts have always to enforce the laws of the de facto Government and it is such a Government which can enact law, can appoint Judges and can enforce the execution of law.

So long as there was a provision in the new Legal Order for dealing with a case or situation the doctrine of necessity could not be resorted to. Any action of the Martial Law authorities which is taken in consequence of any Martial Law Regulation or Martial Law Order could not, therefore, be challenged or questioned on the doctrine-of necessity.

All the actions of the de facto Government can be tested only when the said Government comes to an end and the old Legal Order is revived. In that case the action of the Martial Law authorities would be tested on the basis of the old Legal Order.

The Courts cannot give any direction 'that the Chief Martial Law Administrator is to do such and such thing or not to do such and such thing and within such and such time simply because he had made certain statements and promises. This is outside the scope of the jurisdiction of the Court. The upshot of the above discussion is :-(I) That the Laws (Continuance in Force) Order which is effectual for the time being is the new Legal Order for the time being. (2) That the new Legal Order has suppressed the old Legal Order (Constitution) for the time being. (3) That the Supreme Court derives its jurisdiction from the new Legal Order and that the orders of detentions in question cannot be challenged in the Supreme Court in view of the proviso to Article 2 and Article 4 of the Order.

State v. Zia-ur-Rehman P L D 1973 S C 49; Stanford Law Review, Vol. 17-Professor Stone and the Pure Theory of Law, p. 1139; Madzimbamuto v. Lardner-Burke (1968) 3 All E R 561; Salmond on Jurisprudence, 11th Edn., p. 25 and Muhammad Umar Khan v. Crown P L D 1953 Lah. 528 ref.

Mir Hassan v. State P L D 1969 Lah. 786 and Dosso v. State P L D 1958 S C (Pak.) 533 distinguished.

Yahya Bakhtlar, Senior Advocate and Ghularn Ali Memon, Advocate-on-Record for Petitioner..

Nemo for Respondent No. 1. .

A. K. Brohi, Senior Advocate, Riaz Ahmad, Assistant Advocate-General Punjab and Fazal-i-Hussain, Advocate-on-Record for Respondent No. 2.

Sharifuddin Pirzada, Attorney-General for Pakistan, Dilawar Mahmood, Deputy Attorney-General and M. Afzal Lone, Advocate as Law Officers of the Court.

Dates of hearing : 20th, 25th, 26th September; 1st, 10th to 12th, 18th to 20th, 22nd to 26th, 29th to 31st October and 1st November 1977.

JUDGMENT

S. ANWARUL HAQ C J.--'This petition by Begum Nusrat Bhutto, under Article 184 (3) of the 1973 Constitution of the Islamic Republic of Pakistan, seeks to challenge the detention of Mr. Zulfikar Ali Bhutto, former Prime Minister of Pakistan, and ten other leaders of the Pakistan People's Party under Martial Law Order No. 12 of 1977. It raises several difficult questions of far-reaching constitutional importance. Besides addressing elaborate arguments as to the validity and legal effect of the imposition of Martial Law by the Chief of the Army Staff. the parties as well as two of the detenus, namely, Mr. Zulfikar Ali Bhutto and Mr. Abdul Hafeez Pirzada, have filed lengthy written statements on the factual aspects of the case, setting out their respective versions of the events culminating in the Proclamation of Martial Law on the 54th of July, 1977. These two detenus have also personally appeared before the Court and made detailed oral submissions in support of their positron. A third detenu, viz. Mr. Mumtaz Ali Bhutto, has also filed a written statement. The other eight detenus have neither filed written statements nor asked to be heard personally.

The petition states that Mr. Zulfikar Ali Bhutto and the ten other leaders of the Pakistan people's Party were arrested in the early hours of the 17th of September, 1977, and detained in various prisons in the four Provinces of Pakistan. It is stated that on the evening of the 17th of September, 1977, the Chief of the Army Staff made a public statement, in which he levelled highly unfair and incorrect allegations against the Pakistan People's Party Government and the detenus by way of explaining away their arrest and detention. He also indicated his intention of placing the detenus before military Courts or tribunals for trial so as to enforce the principle of public accountability. The petition avers that this action has been taken against the detenus in a mala fide manner, with the ulterior purpose of preventing the Pakistan People's Party from effectively participating in the forthcoming elections which were scheduled to be held during the month of October, 1977.

Relying mainly on the judgment of this Court in Miss Asma Jillani v. The Government of the Punjab and another PLD1972SC139, Mr. Yahya Bakhtiar, learned counsel for the petitioner, contends that the Chief of Staff of the Pakistan Army had no authority under the 1973 Constitution to impose Martial Lave on the country; that this intervention by the respondent amounts to an act of treason in terms of Article 6 of the Constitution; that as a consequence the Proclamation of Martial Law dated the 5th of July 1977, the Laws (Continuance in Force) Order, 1977, as well as Martial Law Order No. 12, under which the detenus have been arrested and detained, are all without lawful authority; that even if all or any of these acts or actions may be justified on the

doctrine of necessity, yet arrest and detention of the top leadership of the Pakistan People's Party is highly discriminatory and mala fide, intended solely for the purpose of keeping the Pakistan People's Party out of the forthcoming elections; and that the respondent cannot place himself beyond the reach of the Courts by relying on an order promulgated by himself, as the 1973 Constitution continues to be the supreme legal instrument of the country, especially as the respondent himself has declared that this Constitution was not being abrogated but only certain parts thereof were being held in abeyance for the time being so as to create a peaceful atmosphere for the holding of elections and restoration of democratic institutions.

Mr. Yahya Bakhtiar submits that, in the circumstances, the orders of detention have resulted in a flagrant violation of the detenus Fundamental Rights, as contained in Chapter I, Part II of the Constitution, particularly Articles 9, 10, 17 and 25 thereof, which relate to the security of person, safeguards as to arrest and detention, freedom of association and equality of all citizen before law. He further submits that as the detenus are being held in various prisons all over Pakistan, therefore, it is not possible for them to move the various provincial High Courts for relief. He contends that this is eminently a case requiring redress by the Supreme Court under clause of Article 184 of the Constitution, which specifically empowers this Court to make an order for the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II, if the Court considers that a question of public importance with reference thereto is involved.

Mr. A. K. Borhi, learned counsel appearing for the Federation of Pakistan, which was also made a patty at his request, has taken two preliminary objections as to the maintainability of this petition

(a) That it is directed against the Chief of the Army Staff, whereas the orders of detention had been passed by the Chief Martial Law Administrator; and

(b) That the petitioner is not an aggrieved person in terms of Article 184 (3) of the Constitution read with Article 199 thereof, as she does not allege any violation of her own Fundamental Rights, but only those of the detenus.

He also maintains that this Court has no jurisdiction to grant any relief 3n this matter owing to the prohibition contained in Articles 4 and 5 of the Laws (Continuance in Force; Order, 1977, which clearly contemplate that no Court, including the High Court and the Supreme Court, can question the validity of any Martial Law Order or Regulation, or any order made there under by a Martial Law Authority. He submits that under clause (3) of Article 2 of the aforesaid Laws (Continuance

in Force) Order the right to enforce Fundamental Rights stands suspended, and for this reason as well the petition is not maintainable.

As to the legal character of the new regime, and the validity of the Laws (Continuance in Force) Order, 1977, and the various Martial Law Regulations and Orders issued by the Chief Martial Law Administrator and the President under its authority, Mr. Brohi submits that up to the 5th of July 1977, Pakistan was being governed under the 1973 Constitution, but on that day a new Legal Order came into force by virtue of the Proclamation issued by the Chief Martial Law Administrator, and this Legal Order has displaced-albeit temporarily-the old Legal Order. The validity or legality of any action which takes place after the 5th of July 1977 can only be tested against the guidelines provided by the new Legal Order. According to him, the grundnorm of the old Legal Order, us provided by the 1973 Constitution, has given way to a new, grundnorm provided by the Proclamation and the Laws (Continuance in Force) Order, and to that extent the jurisdiction of the superior Courts has been altered. He submits that as the transition from the old Legal Order to the new Legal Order has not been brought about by any means recognised or contemplated by the 1973 Constitution, therefore, it constitutes a meta-legal or extra-Constitutional fact, attracting the doctrine of "revolutionary legality". In this context, according to Mr. Brohi, whenever a Constitution and the national Legal Order under it are disrupted by at, abrupt political change not within the contemplation of the Constitution, such a change is called a revolution, which tear, also includes coupe d'etate. In such a situation the Court has to determine certain facts which may be termed "constitutional facts", which relate to the. existence of the Legal Order within tine framework of ,which the Court itself .-exists and function. If it finds that all the institutions of State power have, as a matter of fact, accepted the existence of the new Legal Order, which has thus become effective, then all questions cal' legality or illegality are to be determined within the framework of the pew Legal Order. Mr. Brohi submits that, on this view of the matter, a viable alternative can be found between the two extreme positions adopted by this Court in Dosso's case P L D 1958 S C (Pak) 533, and Asma Jillani's case-one holding that every revolution, once successful is legal, and the other holding that a revolution as such is illegal. According to him, the Supreme Court in Dosso's case could have decided the controversy by simply holding that, as a matter of constitutional fact, a new Legal Order had come into being in the country, and the question in issue in that case could only be decided by reference to this new Legal Order which had attained effectualness. He contends that the view taken by the Supreme Court in Asma Jillani's case leaves several questions unanswered, by rejecting Kelsen's pure theory of law, because it does not provide any guidelines as to what law the Courts ought to apply in case a revolution has become effective by suppressing or destroying the old Legal Order. As a result. Mr. Brohi submits that this Court should, therefore, lean in favour of holding that a new Legal Order has effectively emerged in Pakistan by means of a meta-legal or extra-Constitutional range, and for the time being this is the legal framework according to which all questions coming before the Court must be decided. In his view it is not necessary for the Court, nor is it a concomitant of judicial power to either side with the revolution or to act as a counter revolutionary, by giving its seal of approval to a military intervention or to condemn it by describing it as illegal. Judicial restraint requires that the Court should only take judicial notice of events which have transpired in the country, and decide as a constitutional fact, whether the new Legal Order has become effective or not.

As to the necessity for the imposition of Martial Law on the 5th of July 1977, Mr. Brohi has stated that the events leading thereto fall into two phases.

(i) Tile first phase relates to the unconstitutional and illegal governance of this country by the detenus and their associates and terminates on the eve of the imposition of Martial Law; and

(ii) The second phase relates to the preparations which were being made by detenus and their associates for the fomenting of civil war within the country and their intention to frustrate and prevent the holding of free and fair elections and thereby consolidate their illegal tenure of office.

He submits that the Court may take judicial notice of the picture emerging from the mosaic of these events, which are cited merely to illustrate the overall pattern of events, and not to embark upon a detailed factual inquiry which would be outside the scope of these proceedings. According to the learned counsel, the specific illegalities committed by or at the instance of the former Government will form the subject-matter of independent legal proceedings in which the persons concerned will be afforded a reasonable opportunity for their defence in accordance with law.

Mr. Brohi goes on to state that massive rigging took place during the elections held on the 7th of March 1977 in accordance with the directions issued at the highest Government level, and that the then Chief Election Commissioner. in an interview given to the daily Millat, Karachi, pointedly commented on the widespread irregularities committed in relation to these elections, and recorded his opinion that results in more than 50% of the seats were affected thereby. He bad further expressed the view that the appropriate course would be to hold fresh elections Mr. Brohi contends that the evidence now available leads to the inescapable conclusion that there was a master-plan for the rigging of the elections which had been conceived, directed and implemented by the then Prime Minister, Mr. Z. A. Bhutto. The learned counsel submits that as a result ~ of this massive rigging of the elections in violation of the mandate of the Constitution for holding free and fair elections, Mr: Bhutto's Government lost whatever constitutional validity it had earlier possessed, and there were widespread disturbances throughout the country, amounting to a repudiation of Mr. Bhutto's authority to rule the country. Mr. Bhutto prolonged the dialogue between himself and. the leaders of the Pakistan National Alliance in a mala fide manner, that the nation reached a critical juncture and the spectre of civil war loomed ahead. It became clear beyond doubt that no possibility of a free and fair election being held existed as long as the levers of power remained in Mr. Bhutto's hands. He asserts that there was a general recognition of this fact which also led to widespread public demands that the Army should accept responsibility for the holding of elections. According to the learned counsel, in the circumstances, it became imperative for the Army to act, and the

imposition of Martial Law on the 5tb of July 1977 was greeted with a sigh of relief throughout the country. He states that in the three months since the imposition of Martial Law peace and quiet has been restored; the national economy which had reached the stage of collapse is slowly being brought back to normalcy; Government institutions which were on the verge of disintegration are being restored to health; and the country's foreign policy is being conducted in the national interest and not for the aggrandizement of Mr. Bhutto or the projection of his personal image. Mr. Brohi adds that the Chief Martial Law Administrator has already declared his intention to hold elections as soon as possible, and the postponement of the October elections has been ordered in response to the public demand for enforcing accountability in relation to the top leadership of the Pakistan People's Party. In this view of the learned counsel, it can thus be seen that Martial Law was imposed not in order to displace a constitutional authority, but in order to provide a bridge to enable the country to return to the path of constitutional rule.

Mr. Sharifuddin Pirzada, the learned .Attorney-General, appearing as the Law Officer of the Court. has supported Mr. Brohi's submission that the change which took place in Pakistan on the 5th of July 1977 did not amount to usurpation of State power by the Chief of the Army Staff, but was in fact intended to oust the usurper who had illegally assumed power as a result of massive rigging of the elections of the 7th of March 1977. It was also' intended to displace the illegally constituted legislative assemblies both at the Centre and in the Provinces, as majority of the members had succeeded in the elections by corrupt and criminal practices. Mr. Pirzada accordingly contends that the present situation is not governed by the dicta of this Court in the two well-known cases of Dosso and Asma Jillani for the reason that the circumstances here are radically different, in that in those cases the change brought about by the military intervention was of a permanent nature, whereas the avowed purpose of the present Chief Martial Law Administrator is to remain in power only for a limited and temporary period so as to hold free and fair elections for the restoration of democratic institutions.

Mr. Sharifuddin Pirzada next submits that although he would generally support Mr. Brohi's submissions as to the legal character of an effective revolution, yet he does not wish to adopt a position contrary to the one he took up while appearing as amicus curtae in Asma Jillani's case, regarding the validity and applicability of Kelsen's pure theory of law relating to the metalegal character of the change and the birth of a new gruridnorm. He submits that there are several renowned jurists who do not fully subscribe to Kelsen's views and consider that effectualness alone, to the exclusion of all considerations of morality and justice, cannot be made a condition of the validity of the new Legal Order. The learned counsel, however, submits that the circumstances culminating in the imposition of Martial Law on the 5th of July 1977 fully attract the doctrine of State necessity and of salus populi est suprema lex, with the result that the action taken by the Chief Martial Law Administrator must be regarded as valid, and the Laws (Continuance in Force) Order, 1977, must be treated as being a supra-Constitutional instrument, now regulating the governance of the country. The learned Attorney-General contends that the doctrine of necessity is not only a part of the legal systems of several European countries, including Britain, but is also recognised by the Holy Qur'an. He contends that consequently all actions taken by the Chief

Martial Law Administrator to meet the exigencies of the situation and to prepare the country for future elections with a view to the restoration of democratic institutions must be accepted by the Courts as valid, and there can be no question of condonation, which concept can apply only in the case of the acts of a usurper. On this view of the matter, Mr. Sharifuddin Pirzada submits that the Court cannot grant any relief to the detenus, under Article 184 (3) of the Constitution, as the Fundamental Rights stand suspended by virtue of clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1971.

Mr. Brohi as well as Mr. Sharifuddin Pirzada were also asked to address the Court on the possible effect and implications of the new oath of office administered to the Judges of the Supreme Court and the High Courts after the imposition of Martial Law. They both stated that, in their view, the new oath has not in any manner restricted the independence of the superior judiciary, nor affected their obligation to perform their judicial functions according to law; it only indicates that the superior judiciary, like the rest of the country, has accepted the fact, which is even otherwise also evident, that on the 5th of July 1977, a radical transformation took place in the pre-existing Legal Order. Both the learned counsel are agreed, and Mr. Yahya Bakhtiar, learned counsel for the petitioner, joins them, that the taking of the fresh oath by the Judges of this Court does not in any way preclude them from examining the question of the validity of the new Legal Order and decide the same in accordance with their conscience and the law.

I shall first take up the preliminary objections raised by Mr. A. K. Brohi, and supported by Mr. Sharifuddin Pirzada, regarding the maintainability of the present petition.

The first objection is that the petition is directed against the Chief of V Army Staff whereas the orders of detention had been passed by the Chief Martial Law Administrator. It is clear that the objection is only in the nature of a technicality, as the Chief of the Army Staff is also the Chief Martial Law Administrator, and the objection could, therefore, be easily rectified by adding the words Chief Martial Law Administrator to the description of the respondent as stated in the petition.

The second objection is that the Petitioner, namely petition Nusrat Bhutto is not an aggrieved person in terms of Article 194 (3) of that Constitution read with Article 199 thereof, as she does not allege any violation of her own Fundamental Rights; but only those of the detenus. Clause (3) of Article 184 of the Constitution gives a concurrent power to the Supreme Court to make an order for the enforcement of Fundamental Rights in the same terms as could be made by a High Court under the provisions of Article 199. Clause (l) (c) of Article 199 does indeed contemplate that an application for the enforcement of Fundamental Rights has to be made by an aggrieved person. Now, it is true that in the case before us the petitioner is not alleging an contravention of her own Fundamental Rights, but she has moved the present petition in two capacities, namely, as wife of

one of the detenu and as Acting Chairman of the Pakistan People's Party, to which all the detenus belong. In the circumstances, it is difficult to agree with Mr. Brohi that Begum Nusrat Bhutto is not an aggrieved person within the meaning of Article 199. In more or less similar circumstances in Manzoor Elahi v. State P L D 1975 S C 66 this Court entertained a petition under Article 184 (3) of the Constitution although it was not moved by the detenu himself but by his brother. I consider, therefore, that both the preliminary objections raised as to the maintainability of the petition have no merit.

The main question which arises for determination in this case is regarding the legal character of the new regime which has come into existence in Pakistan as a result of the Proclamation of Martial Law on the 5th of July 1977.

In the comparatively short period of thirty years since attaining Independence Pakistan has passed through six periods of Martial Law:

(i) Martial Law imposed under the orders of the Federal Government in 1953 in Lahore in order to suppress anti-Ahmedia agitation and the disturbances arising there from;

(ii) The 1958 Martial Law imposed by President Iskander Mirza and Field Marshal Muhammad Ayub Khan;

(iii) The 1969 Martial Law imposed by General Agha Muhammad Yahya Khan to depose Field Marshal Muhammad Ayub Khan;

(iv) Continuation of the 1969 Martial Law by Mr. Z. A. Bhutto on assuming power on the 20th of December 1971 and becoming the first civilian Chief Martial Law Administrator in our history;

(v) Local Martial Law imposed in April 1977 in several cities of Pakistan by Mr. Bhutto's Federal Government under Article ?45 of the 1973 Constitution; and

(vi) Martial Law imposed on the 5th of July 1977 by the Chief of the Army Staff, General Muhammad Ziaul Haq.

As many of the, actions taken by the Martial Law Authorities during the first five periods were challenged before the Courts, the question of the legality and the extent of the powers enjoyed by these Authorities has been repeatedly examined by the Courts in this country. One may in this behalf refer to Muhammad Umar Khan v. Crown P L D 1953 Lah.528, Dosso v. State P L D 1958 S C (Pak.) 533, Muhammad Ayub. Khoro v. Pakistan P L D 1960 S -C 237, Guloh Din v. Major A. T. Shaukat P L D 1961. Lah. 952, M fir Hassan v. State P L D 1969 Lab. 786 and Asma Jillani's case already referred to. It does not, however, appear to me to be necessary to examine this particular aspect at this stage for the reason that on Mr. Brohi's argument the legality of the actions taken by the new regime is not dependent on any power derived from Martial Law as such, but rests on considerations arising out of the alleged break-down of the pre-existing Legal Order. According to him, it is immaterial whether the new regime is called a Martial Law regime, or by any other name. However, it will be necessary to advert to this question when considering the learned Attorney-General's contentions.

As already stated, Mr. Brohi has placed reliance on the concept of revolutionary legality, as expounded by Professor Hans Kelsen. This concept was adopted by this Court in Dosso's case, already referred to, but rejected as in the case of Asn:a Allanl. It, therefore, becomes necessary to examine these two cases in the light of the submissions now made by Mr. Brohi in this behalf.

The facts in Dosso's case were that by a Proclamation made on the 7th of F; October 1958, the President dismissed the Central Cabinet and the Provincial Cabinets and dissolved the National Assembly and both the Provincial Assemblies of East Pakistan and West Pakistan: Simultaneously, Martial Law was declared throughout the country and General Muhammad Ayub Khan, Commander-in-Chief of the Pakistan Army was appointed as the Chief Martial Law Administrator. Three days later, the President promulgated the Laws (Continuance in Force) Order; -1958, the general effect of which was the validation of laws, other than the late Constitution, that were in force before the proclamation, and restoration of the jurisdiction of all Courts including the Supreme Court and the High Courts. The order contained the further direction that the Government of the country, thereafter to be known as Pakistan and not the Islamic Republic of Pakistan, shall be governed as nearly as may be in accordance with the late Constitution. The question raised before the Court was whether certain prerogative writs issued by the High Courts had abated by reason of the provisions of clause (7) of Article 2 of the aforesaid Order.

Delivering the judgment of the Court, Muhammad Munir, C. J. observed that "as we will have to interpret some of the provisions of this Order, it is necessary to appraise the existing constitutional

position in the light of the juristic principles which determine the validity or otherwise of law-creating organs in modern States, which being members of the comity of nations are governed by International Law. In judging the validity of laws at a given time one of the basic doctrines of positivism on which the whole science of modern jurisprudence rests, requires a jurist to presuppose the validity of historically the first Constitution whether it was given by an internal usurper, an external invader or a national hero or by a popular or other assembly of persons. Subsequent alterations in the Constitution and the validity of all laws made there under is determined by the first Constitution. Where a Constitution presents such continuity. a law once made continues in force until it is repealed, altered or amended in accordance with the Constitution. It sometimes happens, however, that a Constitution and the national Legal Order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national Legal Order. A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change may be attended by violence or it may be perfectly peaceful. It may take the form of a coup d'etat by a political adventurer or it may be effected by persons already in- public positions. Equally irrelevant in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends. For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective. If the attempt to break the Constitution fails those who sponsor or organise it are judged by the existing Constitution as guilty of the crime of treason. But if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judgment by reference to the annulled Constitution but by reference to its own success . On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change . In the circumstances supposed no new State is brought in to existence though Aristotle thought otherwise. If the territory and the' people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus or inter- national entity of the State and the revolutionary Government and the new constitution are, according to International Law, the legitimate Government and the valid Constitution of the State. Thus a victorious revolution or a successful coup d'etat is n international recognised legal method of changing a Constitution".

"After a change of the character I have mentioned has taken place, the national Legal Order must for its validity depend upon the new law-creating organ. Even Courts lose their existing jurisdiction, and can function only to the extent and in the manner determined by the new constitution."

In support of these conclusions, the learned Chief Justice cited a passage from Hans Kelsen's "General Theory of Law and State", inter alia, to the effect that:

"This shows that all norms of the old Order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived .dot only de facto but also de jure. No jurist would maintain that 'I even after a successful revolution the old Constitution and the laws based thereupon remain in force, on the ground that they have not been annulled in a manner anticipated by the old Order itself."

Mr. Brohi, as already stated, has precisely taken this stand before us, except that instead of describing the revolution as successful he would use the word effectual or effective, and would not also go to the extent of conferring permanent legitimacy on the new Legal Order, leaving this question to be determined by the future course of events including an Act of indemnity, if any, by a future Parliament.

The view taken by the Supreme Court in Dosso's case continued to hold the field for almost fourteen years until it was brought under challenge in Asma Jillani's case in connection with an order of detention made under a Martial Law Order issued by General Agha Muhammad Yahya Khan and inherited by Mr. Z. A. Bhutto on his assumption of power as Chief Martial law Administrator on the 20th of December 1971. It is interesting to observe that in Asma Jillani's case Mr. Yahya Bakhtiar, the learned counsel appearing for Begum Nusrat Bhutto, defended the decision in Dosso's case on various grounds including that of stare decision whereas the present Attorney General, Mr. Sharifuddin Pirzada and Mr. A. K. Brohi, learned counsel for the respondent, criticised this decision while appearing as amicii curiae. Although a counsel is not bound by the position he may have taken on a previous occasion, it would be instructive to note the point of view then advocated by Mr. Brohi as regards the correctness of the decision in Dosso's case. On page 171 of the Report, Hamoodur Rahman, C. J. has observed:

"Mr. Brohi is of the view that the fallacy underlying the decision in Dosso's case lies in they fact that it has accepted a purely legal theory of law as a question of law itself. although it was nothing more than "a question about law" and no legal judgment could possibly be based on such a purely hypothetical proposition. He is further of the view that the Court in making the impugned observations proceeded clearly upon the assumption that (a) the revolution, if any, had succeeded and (b) that its own authority was derived from the Laws (Continuance in Force) Order. Both these assumptions were wrong. The question as to whether the revolution, if any, had in fact succeeded in creating an effective legal order was a question of fact and had to be decided as such objectively. It was not even gone into. The decision was, therefore, purely an ad hoc decision, which cannot be treated as binding."

Muhammad Yaqub Ali, J. summed up Mr. Brohi's position (on pp. 224-225 the Report), in the following words:

"Mr. A. K. Brohi (amicus curiae) first argued the question that Courts of Law are, as a matter of legal obligation, bound by the dictates of the 1962 Constitution and have not been absolved of that legal obligation by taking cognizance of the new authority destructive of the established legal order. He also questioned the nature of the new Legal Order based on the system officially described as Martial Law. In his opinion this system was not regulated by any set of legal principles known to jurisprudence and was merely contingent on the will and whim of one man . . . . . He also attacked the decision in Dosso's case and analysed Kelsen's theory on which that decision is based. It was argued that Kelsen's theory that a victorious revolution and successful coup d'eter are law-creating facts is a mere theory of law as distinguished from law itself. The function of a theory of law is to explain or to describe the nature of law or the nature of s legal system. It is, however, itself not a part of legal system or the law which it seeks to describe. This according to Mr. Brohi was the central fallacy in the judgment given by Muhammad Munir, C. J."

"Mr. Brohi next referred to the decision in the case of Madzirnbamuto v. Lardner-Burke [(1968) 3 All E R 561] in which Kelsen's theory of effectiveness was applied. This case is mentioned by some authors as the grundnorm case. He pointed out that the decision in this case was the maximum success which Kelsen could have conceivably envisaged "

"Continuing, Mr. Brohi pointed out that the characteristic o! forms of civilised Government is that the structural distribution of power is regulated in a manner that every, functionary no matter so highly placed is the servant of the law should a system of Government exist in which power is regulated and derived not from law, but from force such a system cannot claim to be a legal system of Government whatever else it may be ……..'

"Lastly, Mr. Brohi argued that in Pakistan the real sovereign is God Almighty and the State of Pakistan has a limited power of which it is a recipient as a trustee or a delegatee. On this hyp9thesis he argued that the will of one man was repugnant to the grundnorm of Pakistan, viz. the Objectives Resolution and in Pakistan no single man could be the sole repository of State power. He referred to a passage from his book: "The Fundamental Laws of Pakistan" that according to the Western Jurisprudence legal sovereign are the people who give the first Constitution; that in Pakistan the first sovereign is God Almighty and the power received from Him as a delegatee or a trustee is to be exercised by chosen representatives of the people and not by the will of one man."

The stand taken by Mr. Sharifuddin Pirzada while appearing as amicus curiae in Asma Jillani's case may also be briefly mentioned. Besides contending that toe decision in Dosso's case was given in haste and against the principles of natural justice, because no opportunity at all was given to learned counsel appearing for the respondents to argue the contrary, he submitted that being a Municipal Court, the Supreme Court should not have made a rule of International Law regarding recognition of States the basis of its decision; that the Court's interpretation of Kelsen's doctrine was incorrect; that in any event the theory of Kelsen is not a universally accepted theory and should not have been applied to the circumstances then prevailing in Pakistan; and that the doctrine of necessity as a validating factor was not even noticed. According to Muhammad Yaqub Ali, J., Mr. Sharifuddin Pirzada added that the decision in Dosso's case purported to legalise the so-called revolution without any conditions which authorised absolutism and sanctioned that might is right; and that effectiveness was not the only criterion of legitimacy.

It appears that the learned Judges hearing Asma Jillani's case were greatly impressed by the submissions made by Messrs A. K. Brohi and Shariluddin Pirzada, with the result that they unanimously came to the conclusion that Dosso's case had not been correctly decided. They accordingly proceeded to overrule the same. In doing so, Hamoodur Rehman, C. J. observed that "in laying down a novel juristic principle of such far-reaching importance the Chief Justice in the case of State v. Dosso proceeded on the basis of certain assumptions, namely, (i) that the basic doctrines of legal positivism which he was accepting were such firmly and universally accepted doctrines that the whole science of modern jurisprudence rested , upon,. them; (ii) that any abrupt political change not within the contemplation of the Constitution constitutes a revolution, no matter how temporary or transitory the change if, no one has taken any step to oppose it; and (iii) that the rule of International Law with regard to the recognition of States can determine the validity also of the States' internal sovereignty . . . . . ."

These assumptions were not justified. Kelsen's theory was, by no means, g universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence nor did Kelsen ever admit to formulate any theory which favours totaliterianism . . . . Kelsen was only trying to lay down a pure theory of law as a rule of normative science consisting of an aggregate or system of norms. He was propounding a theory of law as a mere jurist's proposition about law. He was not attempting to lay down any legal norm or norms which are the daily concerns of Judges, legal practitioners or administrators. . . . . .

"Kelsen in his attempt to evolve a pure science of law as distinguished from a natural science attached the greatest importance to keeping law and might apart. Fee did not lay down the proposition that the command of e person in' authorities a source-of law . . . . Kelsen's attempt to justify the principle of effectiveness from the stand-point of International Law cannot also be justified, for it assumes the primacy of International Law over national law. In doing so he has overlooked that for the purpose of international Law the legal person is the State and not the

community and that in International Law there is no 'Legal Order as such. The recognition of a State under International Law has nothing to do with the internal sovereignty of the State, and this kind of recogrition of a State must not be confused with the recognition of the head of a State or Government of a State. An individual does not become the head of a State through the recognition of other States but through the municipal law of his own State. The question of recognition of a Government from the point of view of International Law becomes important only when a change in the form of Government also involves a break in the legal continuity of the State or where the question arises as to whether the new Government has a reasonable expectancy of permanence so as to be able to claim to represent the State ....

"The criticism, therefore, is true that the Chief Justice of the Supreme Court not only misapplied the doctrine of Hans Kelsen but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence. Even the disciples of Kelsen have hesitated to go as far as Kelsen had gone . . . . ."

"In any event, if a grundnorm is necessary, Pakistan need not have to look to the Western legal theorists to discover it. Pakistan's own grundnorm is enshrined in its own doctrine that the legal sovereignty over the entire Universe belongs to Almighty Allah alone and the authority exerciseable by the people within the limits prescribed by Him i9 a sacred trust. This is an immutable and unalterable form which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March 1949. This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or civil. Indeed it cannot be, for it is one of the Fundamental Principles enshrined in the Holy Qur'an . . . . It is under this system that the Government becomes a Government of laws and not of men, for no one is above the law . . . . ."

"The principle enunciated in Dosso's case, therefore, is wholly unsustainable and it cannot be treated as good law either on the principle of stare decisis or even otherwise."

In view of the position taken up by Mr. Brohi in Asma Jillani's case, and the success he had in persuading the Court to agree with him, Mr. Brohi has indeed faced an uphill task before us to question the correctness of this judgment, in so far as it rejects the application of Kelsen's pure theory of law as providing validity to the new Legal Order emerging as a result of a coup d'etat. He submits that the learned Judges were in error in analysing the decision in Dossr's cc- as if they were sitting in appeal; that they also erred in going behind the facts proved or assumed to have been proved in that case, namely, that the revolution had become successful; and that in any case they were not clear in their mind as to whether Muhammad Munir, C. J. had misunderstood Kelsen"s theory or misapplied it when deciding Dosso's case. He has referred us to Quin v.

Learhem 1901 A C 495 , Prager v. Blatspiel, Stamp & Heacock Ltd. 1947 A C 156 , Read v. J. Lyons & Co. Ltd. (1924) 1 K B 566 and Candler v. Crane Christmass & Co. (1951) 1 All E R 426, in support of the proposition that a judicial precedent is not . to be criticised or taken to pieces in the manner in which Dosso's case was treated by this Court.

In the first-mentioned case, it was observed by Lord Halsbury that "while considering a precedent, we must look at the. hypothesis of fact upon which the case was decided by the majority of those .who took part in the decision." In the second case, it was observed that "the object of the common law is to solve difficulties and adjust relations in social and commercial life. It must meet,. so far as it can, sets of fact abnormal as well as usual. It must grow with, the development of the nation. It must face and deal with changing normal circumstances. Unless it can do that, it fails in its function and declines in its dignity and value. An expanding society demands an expanding common law." In the next case, the observation relied upon by Mr. Brohi is to the effect that "your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalise the law of England. That attractive if perilous field may also be left to other hands to cultivate." In the last case referred to by Mr. Brohi, it was said by Lord Denning L. J. that "this argument about the novelty of the action does not appeal to me. It has been put forward in all the great cases which have been mile-stone of progress in law and it has nearly always been rejected ... It was fortunate for. the common law that the progressive view prevailed."

I have no cavil with the propositions and observations referred to by Mr. Brohi, but I do not see how they affect the correctness of the view taken in Asma Jillani's case. Even if the Court erred in observing that the assumption regarding the success of the revolution was not justified for the reason that a few days after the pronouncement of the Court President Iskander Mirza was himself deposed by Field Marshal Muhammad Ayub Khan, and the Court should have assumed the facts as stated by Muhammad Munir, C. J., the view taken by the Court as to the applicability of Kelsen's theory is not affected by this error. The Court has given sound reasons for rejecting it, particularly the fact that it was at best a theory about law, which had not been universally accepted by other renowned jurists. Unless, therefore, compelling reasons are shown for departing from the view taken by this Court in Asma Jillani's case, I would like to adhere to the same for the reasons so ably stated in the judgments of Hamoodur Rehman, C. J. and Muhammad Yaqub Ali, J. (as he then was).

Mr. Brohi submits that the logical consequence of this Court's decision in Asma Jillani's case would be to render illegal, with retroactive effect, all actions taken during the time of Field Marshal Mohammad Ayub Khan, including the Constitution of 1962 which he gave to the nation as the will of one man ; that the regime of his successor, General Agha Mohammad Yahya Khan having been specifically declared to be illegal by the Supreme Court, the usurper could not legitimately hand over power to Mr. Z. A. Bhutto on the 20th of December 1971, nor could the latter derive validity for his Government by getting the Interim Constitution of 1972, and the permanent

Constitution of 1973 passed by a truncated National Assembly, which was not attended by nearly 160 members belonging to Fan: Pakistan which had by that time seceded from Pakistan,, under the name of Bangla Desh. It appears to Mr. Brohi that these consequence, were overlooked boy the learned Judges who decided Asma Jillani's case and rejected Kelsen's theory regarding the legality of a successful revolution. Mr. Brohi next submits that in any case, in the subsequent case of State v. Zia-ur-Rehman P L D 1973 S C 49, the Supreme Court itself backed away from the grundnorm provided by the Objectives Resolution, on which it had tried to base itself in Asma Jillani's case in the absence of any other concept of legitimacy.

The answer to some of these criticisms is to be found in the several judgments delivered in Asma Jillani's case. On p. 161 of the Report, it is observed by Hamoodur Rehman, C. J. that "the country by and large accepted the 1962 Constitution and even the Judges took oath under the fresh Constitution. Two President:--elections were held under this Constitution, the erstwhile Commander-in-Chief was elected on both occasions. National arid Provincial Assemblies were set up and the country continued to be governed era accordance with its term-- till the 25th of March 1969 . . . . ."

"The Courts is the country also gave full effect to this Constitution and adjudicated upon the rights and duties of citizens in accordance with the terms thereof by recognising this law constitutive medium as a competent authority to exercise that function and also enforce the laws created by that medium in a number of cases . . . . . ."

"Thus even -according to the arguments advanced by the learned counsel appearing for the appellant: all the laws made and acts done by the various Governments, civil and military, became lawful and valid by reason of the recognition given to them by the new Constitution and the Courts. They had riot only de facto validity but also acquired de jure validity by reason of the unquestioned recognition extended to them by the Courts of highest jurisdiction in the country. The validity of the acts done there under is no longer, therefore, open to challenge, even under the concept of law propounded by the realist school of jurists and adopted by the learned counsel for the appellants."

On the same subject. Mohammad Yaqub Ali, J. went a step further and remarked as under;--'

"The Attorney-General lastly urged that by challenging the validity of Martial Law imposed by Yahya Khan who was no longer in power the intention in fact was to dispute the legality of the present Government. In reply, Mr. Manzoor Qadir acknowledged the legitimacy of the Government headed by Mr. Z. A. Bhutto as Chairman of the majority party in the National

Assembly, and said it was based on the will of the chosen representatives of the people. This was the reason behind the plea raised by him that the invalidity in the Legal Framework Order (issued by General Yahya Khan;) did not affect the legality of the Elections held under it to the National Assembly and the Provincial Assemblies. This coincided with the position taken up by the Attorney- General that Mr. Z. A. Bhutto was not the recipient of power from Yahya Khan and that he held the office of President as leader of the majority party in the National Assembly. We also take judicial notice of the fact that after arguments were concluded in these appeals, tile National Assembly met and unanimously expressed confidence in the Government of Mr. Z. A. Bhutto. An Interim Constitution has also been passed and Mr. Z. A. Bhutto is to be inaugurated as President under this Constitution on the 21st of April 1972. The legitimacy of tier, present Government is thus beyond the shadow of doubt." .

In the judgment of Salahuddin Ahmed, J. it was observed that the Supreme Court had derived its power from the 1962` Constitution, because that was the only legal instrument under which the instrument of Supreme Court was established. The learned Judge wells can to state that as soon as General Agha Mohammad Yahya Khan made his exit from the scene the 1962 Constitution which had been dormant in the meantime revived.

It will thus appear that all the members of the Court which decided Asma Jillani's case, were ,agreed that even though the 1962 Constitution was given by one man, namely, Field Marshal Mohammad Ayub Khan, it . had acquired validity by its general acceptance by the people of Pakistan and recognition by the superior Courts, and. it was on the basis of this assumption that they declared General Agha Mohammad Yahya Khan to be a usurper, inasmuch as he had abrogated, without lawful authority, the pre-existing 1962 Constitution of the Islamic Republic of Pakistan. The observations made by Mohammad Yaqub Ali, J. regarding the legitimacy of the successor Government of Mr. Z. A. Bhutto were not endorsed by ~ the other Judges of the Court but this question was directly answered in the affirmative in the subsequent case of Zia-ur-Rehman, when it was observed that ;---

"After the abrogation of the Constitution of 1962 and the establishment of military rule, the Legal Framework Order was clearly an endeavour to restore the principles of democracy wherein the State was to exercise its powers through the chosen representatives of the people and frame a Constitution for the State of Pakistan, wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah as envisaged by the Objectives Resolution itself. This was clearly, therefore, a step towards achieving the goals set out in the Objectives Resolution and for making provisions for the orderly and ordinary running of the Government of the country through the chosen representatives of the people. If there was any act of the usurper which could be condoned on the basis of the doctrine of necessity, then this was pre-eminently such an act. This was the first time that the representatives of the people had been chosen in the country by fret: and

fair elections on the basis of adult franchise. The credentials of the people so elected were not, therefore, open to challenge on any principle of democracy, and since they had been elected under the Legal Framework Order, they had also been given a mandate by the people to make provision for the Constitution of Pakistan.

"The question then arises as to whether the fact that 160 male and seven female members (from East Pakistan) could not or did not participate in the proceedings of the National Assembly would make a difference either to the effective working of the Assembly or to the validity of the Constitution unanimously adopted by it. If the majority of the members had been forcibly prevented or otherwise wrongfully excluded from participating in its proceedings, there may have been some scope for contending that the Constitution produced was not a valid document. In the absence, however of any evidence to show that any one was so prevented, excluded or prohibited from attending the meeting of the National Assembly convened for the purpose of framing the Constitution, it cannot be said that the meeting of the National Assembly, which mustered the necessary quorum required by Article 17 of the Legal Framework Order and adopted a Constitution, was lacking in competence or was not a legally constituted body or that its acts were open to challenge on the ground that the majority of the members of the House were not present . . . . It cannot be invalidated 'merely on the ground that a large number of members were not present or did not participate."

Nothing was said at the Bar by Mr. Brohi to persuade the Court to take a view different from the one reproduced above in regard to the validity of the Constitutions of 1962, 1972 and of 1973. Accordingly, it seems to me that the apprehension expressed by the learned counsel that the decision of this Court in Asma Jillani's case had the effect of rendering illegal all the successive governments of Pakistan, and the Constitutions framed during their times is not well-founded, and in any case stands effectively repelled by the decisions just mentioned. As a result, it follows that the controversy in the present case must proceed on the assumption that - the 1973 Constitution had been validly framed and was in force when the Chief of the Army Staff proclaimed Martial Law on the 5th of July 1977.

Similarly, Mr. Brohi's criticism that, in Ziaur Rehman's case, the Supreme Court has itself backed away from the grundnorm provided by the Objectives Resolution on which it had tried to base itself in Asma Jillani's case, is not justified. While explaining his observations on this subject in Asma Jillani's case, Hamoodur Rehman, C. J. stated that it was not correct to say that in that case the Court had declared that the Objectives Resolution adopted by the first Constituent . Assembly of Pakistan on the 7th of March 1949 was the grundnorm for Pakistan, and therefore, impliedly held that it stood above even the Interim 'Constitution or any Constitution that might be framed in the future. After citing the relevant passages from the various judgments delivered in Asma Allani's case, his Lordship concluded that "it will be observed that this does not say that the Objectives Resolution is the grundnorm but that the r norm is the thereof legal sovereignty accepted the people

of Pakistan an to consequences that the flow from it I did not described the objectives Resolutions as a corner-stone of Pakistan's legal edifice, but merely pointed out that one of the learned counsel appearing in the case had described it as such . . . . ." His Lordship then proceeded to clarify that "The Supreme Court has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution." I think these observations by Hamoodur Rehman, C. J. effectively answer the point sought to be made by Mr. Brohi.

The question, however, is whether these opinions about the status of the Objectives Resolution or the legal doctrine of sovereignty obtaining in Islam, serving as grundnorm for Pakistan, even if somewhat contradictory in character as considered by Mr. Brohi, affect the correctness of the view taken by the Court in Asma Jillani's case regarding the concept of revolutionary legality. It appears to me that while a mention of the concept of grundnorm become: unavoidable when discussing Hans Kelsen's pure theory of law, yet the opinion of the Court as to its soundness and application to the circumstances presented by the seizure of power by General Agha Mohammad Yahya Khan in March 1969 is not based on these considerations ; rather it proceeds on a detailed consideration of the opinions of Western jurists regarding the concept of law, which reject the idea of effectiveness or effectualness as being the only criterion for its validity. Such being the case, no modification of the view taken in Asma Jillani's case is called for simply on the ground that in Zia-ur-Rehman's case. the Objectives Resolution of 1949 was not treated as the grundnorm for Pakistan, although it appeared to have been so treated in Asma Jillani's case.

Mr. Brohi submits that the position taken up by him regarding the legality of an effectual new regime established as a result of suppression or destruction of the old Legal Order finds full support from the several judgments delivered by the High Court in the famous case from Southern Rhodesia, the Privy Council judgment in which is reported as Madaimbamuto v. LardnerBurke and another (1968) 3 All E R 561. Learned counsel wishes to adopt the reasoning of Macdonald, J. of the Appellate Division of the High Court of Rhodesia as embodying his submissions in this behalf.

I find that this case was fully noticed in the judgment of Muhammad Yaqub Ali, J. in the case of Asma Allani, and the learned Judge expressed his agreement with the submission made by Mr. Brohi on that occasion that "the view expressed by the Judges of the High Court of Rhodesia was the maximum success for the theory of effectiveness which Kelsen could have conceivably envisaged." This remark appears to imply that the judgment did not really go far enough to support Kelsen's theory in its entirety. In the circumstances, it would not have been necessary to go over the same ground again, except for the fact that Mr. Brohi relies very heavily on the propositions stated by Macdonald, J.

The facts of that case need not be stated at any length except to say that in 1965 the Government of Ian Smith overthrew the 1961 Constitution given to Southern Rhodesia by the British Parliament, and made a Unilateral Declaration of Independence to the effect that Southern Rhodesia was no longer a Crown colony but an independent sovereign State. The Parliament of the United Kingdom did not recognise this Unilateral Declaration of Independence, but continued to assert that it had responsibility and jurisdiction for the colony. The Governor, appointed by Her Majesty the Queen, dismissed Mr. Smith and other Government Ministers and called on all citizens to refrain from acts which would further the objectives of the illegal authorities, but added that it was a duty of all citizens to maintain law and order and to carry out their normal tasks. . This applied equally to the Judiciary, the Armed Forces, the Police and the public service. The dismissal of the Prime Minister and other ministers was ignored and a new Constitution was adopted, and thereafter the usurping Government proceeded on the basis that the 1965 Constitution had superseded the 1961 Constitution. Madzimbamuto, the appellant before the Privy Council, questioned the legality of her husband's detention under an Emergency Regulation continued in force by the Rhodesian authorities after the Unilateral Declaration of Independence.

The case first came up before a Division Bench comprising Lewis, J. and Goldin, J., who held that the 1965 Constitution was not the lawful Constitution and that Mr. Smith's Government was not a lawful Government but they held that necessity required that effect should be given to the emergency power Regulations and, therefore, the detention of the appellant's husband was lawful. The five Judges of the Appellate Division delivered separate judgments. Beadle, C. J. took the view that "The status of the present Government today is that of a fully de facto Government in the sense that it is in fact in effective control of the territory and this control seems likely to continue. At this stage, however, it cannot be said that it is yet so firmly established as to justify a finding that its status is that of a de jure Government." He further held that "the present Government, having effectively usurped the Governmental powers granted to Rhodesia under the 1961 Constitution, can now lawfully do anything, which its predecessors could lawfully have done, but until its new Constitution is firmly established and thus becomes the de lure Constitution of the country, its administrative and legislative acts must conform to the 1961 Constitution. Jarvis, A. J. A. was in general agreement with Beadle, C. J., whereas Field send, A. J. A. expressed his conviction that a Court created in terms of a written Constitution bad no jurisdiction to recognise either as a de jure or de facto Government, any Government other than that constitutionally appointed under that Constitution. However, he went on to consider the doctrine of necessity for validating certain acts of the present authorities. Macdonald, A. J. A. and Quenet, J. took the view that "allegiance to the State imposes as one of its most important duties obedience to the laws of the sovereign power for the time being within the State", and "so far as a municipal Court is concerned a de facto Government is a de jure Government in the sense that it is the only law-making and law -enforcing Government functioning for the time being within the State."

Mr. Brohi submits that in coming to this conclusion this learned Judge was influenced, among others, by the opinion expressed by Sir Ivor Jennings in his book "The Law and the Constitution" to the effect that "All revolutions are legal when they have succeeded and it is the success denoted

by acquiescence which makes their Constitutions law." Mr. Brohi also draws our attention to the fact that Macdonald, A. J. A., has, in the body of his judgment, exhaustively traced the history of constitutional development in England for coming to the conclusion that under the English law duty of allegiance lies to a de facto sovereign. The learned counsel particularly wishes to rely on the conclusions reached by this learned Judge to the effect that "the lesson to be gleaned from the history of the English law is that Judges should not allow themselves to be embroiled in political controversy and in particular should not take part in revolutionary or counter revolutionary activity ….The more unsettled the time an the greater the tendency towards the disintegration of established institutions, the more important it is that the Court should proceed with the vital, albeit, unspectacular task of maintaining law and order and by so doing act as a stabilising force within the community. This objective can only be achieved if the acts of a Government for the time being within the State are given the force of law".

On appeal to the Privy Council, Lord Reid, delivering the majority judgment, rejected Kelsen's theory of effectiveness and held "with regard to the question whether the usurping Government can now be regarded as a lawful Government, much was said about de facto and de lure Government. Those are concepts of International Law and, in their Lordships' view, .they are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control . . . . . It happens not infrequently that the Government recognises a usurper as the de facto Government of a territory while continuing to recognise the ousted sovereign as the de lure Government. But the position is quite different where a Court sitting to a particular territory has to determine the status of a new regime which has usurped power and acquired control of that territory."

Lord Pearce, in a dissenting judgment, observed that "the de facto status of sovereignty could not be conceded to a rebel Government as against the true sovereign in the latter's own Courts, but the principle of implied mandate (i.e. that acts done by those actually in control without lawful validity) might be recognised as valid or acted on provided that they were directed to and reasonably required for ordinary, orderly running of the State. that they did not impair the rights of the citizens under the lawful Constitution, and that they were not intended to (and did not in fact) directly help the usurpation and did not run contrary to the policy of the lawful sovereign."

Considering the divergence of opinion expressed by the learned Judges who have dealt with this case at various stages, it cannot be said that it provides any effective judicial precedent, capable of application in subsequent cases. The decision in this case has, however, been commented upon by several learned authors, and it may be useful td briefly refer to them at this stage.

In an Article entitled "Splitting the Grundnorm", printed in 1967 Modern Law Review, Vol. 30, J. M. Eekelaar has analysed the various judgments at some length, and reached the conclusion that they have the effect of splitting the grundnorm between the de lure Constitution of 1961 and the de facto authority of Ian Smith who gave the 1965 Constitution. He observes that the Smith regime would find little comfort in the judgment as it does not recognise its legality but merely treats it as a de facto authority in Southern Rhodesia.

In another Article appearing in the same volume of Modern Law Review under the heading "The Judicial Process: UDI and the Southern Rhodesian Judiciary", by Claire Palley, the social backgrounds of the Judges concerned have been mentioned as influencing the view they took in this case, and it is stated that the Judges were reluctant to pronounce on the validity of Smith regime, although they were willing to validate actions of the regime on the doctrine of necessity." As a result, "although they virtually rejected the Kelsen's doctrine and the 1965 Constitution, and distinguished between de lure authority and legality which they would not enforce. and effective authority and law and order which they would enforce, it is clear that in Rhodesia the regimes edicts are laws enforced in the Austinian sense by the Courts".

Commenting on this case under the heading "Legal Politics: Norms Behind the Grundnorm" in 1968 Cambridge Law Journal (Vol. 26), R. W. M. Dias observes that "the above review of the case shows that as to the lawfulness of the Smith regime, the weight of judicial opinion was overwhelmingly against it, notwithstanding its effectiveness." He is also critical of the judgment delivered by Macdonald, J. observing that: "In the first place, he begs the essential question which is not whether there is a duty to obey the laws of the Government for the time being but whether its decrees are laws. Secondly, to make effectiveness the only criterion of its legality is to abandon judicial independence . . . . . Fourthly, what an incentive to rebellion the judgment provides." The learned author goes on to state "What then are the implications of the grundnorm case. The most obvious one is that it has revealed shortcomings in what Kelsen has taught. He said in one place that the grundnorm imparts legality as long as the total Legal Order is effective. The grundnorm case shows that although the Smith regime was totally effective, it was not lawful. But at the same time that only some of its decrees were to be treated as laws: On the other hand, the old order was totally ineffective, yet it possessed an important controlling influence." He remarks further "when there is as yet no accepted grundnorm, as in the midst of a revolution, the Courts may nonetheless accept as laws propositions identified with reference to whatever criterion they choose; which is precisely what happened in the grundnorm case. This, as pointed out earlier, is how laws and lawfulness of their origin come to be distinguishable".

This Article contains very useful observations as to the content of law, which have direct relevance for us in the present context. Dias observes that "Rules and legal phenomenon do not exist only for the instant; they endure, be it for short or indefinite periods. The concept of enduring laws is more in accord with experience than that of instantaneous laws just as enduring human

beings are more real than instantaneous ones. The concept of any phenomenon as a continuing thing must necessarily include the factors essential to continuing as an integral part of it . These would includes the factors but for which it would not have come into being and continued to be, as well as those involved in its function and functioning . . . . . The grundnorm is an enduring phenomenon, and , it is insufficiently appreciated that not only effectiveness but also conformity to morality and justice is among the very springs of its, being and on continued life".

The above reviews of the judgments delivered in the Southern Rhodesian case are, I think, sufficient to show that this case cannot be regarded as a judicial authority for the proposition canvassed by Mr. Brohi, namely, that effectualness of the new regime provides its own legality. On the contrary, of weighty criticism has been levelled against the doctrine on the ground that it seeks to exclude all considerations of morality and justice from the concept of law and legality.

In the two leading judgments delivered in Asma Jillani's case by Hamoodur Rehman, C. J. and Muhammad Yaqub Ali, J. (as he then was) copious references have been made to the opinions of renowned writers who do not endorse Kelsen's view regarding revolutionary legality. It was pointed out that writers like Garner, G. C. Field, Professor Harold Laski and Dean Roscoe Pound had not supported the proposition that a de facto sovereign could become de jure by exacting obedience by force or coercion; on the other hand, they had expounded the doctrine that de facto sovereignty becomes de jure by consent and the development of the habit of obedience, and that a de facto sovereign gets his position confirmed by an election or ratification by the people by habitual obedience over a sufficiently long period of time, and then alone he can claim to have acquired de lure sovereignty as well.

A brief reference has already been made to the views of more modern writers like Eekelaar and Dias. A few further references will not be out of place. In an Article entitled "Principles. of Revolutionary Legality" included in the Oxford Essays on Jurisprudence, 2nd Series, 1973, the first-mentioned author has attempted to enumerate the principles that may be relevant to a division whether revolutionary activity should be given legal justification, so as to salvage this area of investigation from total extinction by the operation of positivist dogmatism. In his view the principles pertaining to revolutionary situations are:-

(i) The principle of effectiveness;

(ii) The , principle of legitimate disobedience to authority exercised for improper purpose;

(iii) The principle of necessity;

(iv) The principles that violation of a right demands a remedy and that no one should profit from his own wrongful act. As a revolution will invariably have involved the violation of some of the rights protected by the previous Constitution, a combination of these principles suggests that, even if the new order is considered legitimate, some recompense should be offered to those whose rights were infringed;

(v) The principle that a Court will not permit itself to be used as an instrument of injustice;

(vi) The principle that it is in the public interest that those in de facto impregnable control should be accorded legal recognition. It gives effect to the acceptable policy value that it is in the interest of the community that order be preserved. But one might be reluctant to hold that it is the only relevant principle and that there cannot be others which would militate against automatically accepting revolutionaries as legitimate regardless of any other circumstance;

(vii) The principle that Government should be by the consent of the governed, whether voters or not. There is nothing new in this principle. Authority can be found in political writings at least from the middle ages to the present day.

It appears to the learned author that "the most important advantage to be gained by the recognition of principles of this kind is that revolutionary situations would no longer be seen in absolute terms : that either the usurpers must always and inevitably remain illegitimate, or that they must always and inevitably be held legitimate once they have succeeded, irrespective of the reasons why they took power, how they have behaved while in power and how long they have held power. The answer to the problem of legitimacy may be a qualified one, involving the judicious balancing of a wide variety of factors".

The views of Dias on the Rhodesian case, and incidentally on Kelsen's theory, as appearing in an Article written by him, have already been mentioned. Reference may also be made to some observations appearing in his book on Jurisprudence. In Chapter IV under the heading "The Problem of Power'.", Dias writes that "the effectiveness of a legislative medium, it should be

emphasized, is not a condition of its own law quality or of its enactments, but only a factor which influences Courts to accept and continue accepting- it. A situation may be supposed in the midst of a revolution where the old order has gone and no new order has effectively replaced it. In such a lacuna the Courts can continue to apply as laws the enactments of the old order even though it is no longer effective . . . ."

"Not only is the legality of a revolutionary regime independent of effectiveness, but it also has jurisdictional and temporal dimensions. Thus. although the Rhodesian regime was eventually accepted as legal by the Rhodesian Courts, (A. 0- intervening) [(1970) 3 All E R 572), a British Court refused to recognise a divorce decree pronounced by a Rhodesian Judge who had not taken the oath under the 1961 Constitution. This shows that legality depends on the jurisdiction in which the matter is considered, quite apart' from effectiveness. The temporal dimension is brought out by a decision of the Pakistan Supreme Court, Jillani v, Government of Punjab, which rejected effectiveness altogether as the criterion of legality. In an earlier case The State v. Dosso, the Supreme Court bad held that a revolutionary regime, which was effectively in power was legal and had thereby destroyed the previous Constitution no matter how or by whom that change had been brought out. In Jillani's case, the Supreme Court rejected this as a wholly unsustainable pro-position and overruled Dosso. The point, however, is that this decision was given after that revolutionary regime had been itself overthrown so that the declaration that it was illegal ab initio was retrospective."

He goes on to state that "In the result it would seem that the effectiveness of the legislative authority is not a condition of the validity either of laws or even of itself. It is a factor which in time induces the Court to accept such authority . . . That consonance with morality and the social political background also play a part in bringing about the acceptance of a law constitutive medium . . . . There L thus an arguable case for saying that Courts should .take account of the morality for which a law constitutive medium stands in deciding Miether to accept it or not . . . . .

'In Chapter XVI of the same book under the heading "The Pure Theory", Dias examines Kelsen's theory at some length, and, after discussing the concept of the grundnorm, he observes that; some writers have pointed out, with a hint , f criticism; that in whatever way effectiveness of grundnorm is measured. Kelsen's theory has ceased to be pure on this point. for b effectiveness would seem to depend on, those very sociological factors which he so vehemently excluded from his theory of law . .-. . . , The force of this point may a seen when one asks why a particular grundnorm was accepted, especially if it followed on a revolution, might it not be that the new criterion of validity was able to command a minimum of effectiveness because it was thought to guarantee that measure of justice and morality which the, previous criterion did not . On this line . of argument the grundnorm is effective, and continues to be effective, in so far as an element of morality is built in as part of the criterion of validity. If so, the continued validity of every proposition of law derived from the validating source has an ethical background and the separation of law from

morality would cease to exist . . . . . All this amounts to a formidable argument levelled not merely at Kelsen, but at positivism in genera, It is sufficient here to observe that, if sound, it would strike at the foundation of his separation of is and ought."

A brief reference may also be made to the views expressed by De Smith in his book "Constitutional and Administrative Law". In Chapter III, under the heading "Ultimate Authority in Constitutional Law", he discusses the problems posed by situations involving a breach of legal continuity, be it peaceful or accompanied by coercion and violence. Such a situation may have to be treated as superseding the Constitutional and Legal Order and replacing it by a new one. He states that "Legal theorists have no option but to accommodate their concepts to the facts of political life. Successful revolution sooner or later begets its own legality. If, as Bans Keen arms postulated , the basic norm or ultimate principle underlying a constitutional order is that the Constitution ought to be obeyed then the disappearance of that order followed by acquiescence on the part of officials, Judges and the general public in laws, rules and orders issued by the now holders of power, will displace the old basic norm or ultimate principle and give rise to a new one. Thus might becomes right in the eye of the law."

"This is a persuasive rationalisation of the legal consequence of a successful revolution like the rebellion of the American Colonists or the English revolution of 1688. It does not, however, answer all questions. It ode description not a prescription It does not dictate what attitude Judges and official ought to adopt when the purported breach of legal continuity takes place . . . . .'

"Sooner or later a breach of legal continuity will be treated as laying down legitimate foundations for a new constitutional order, provided that the revolution is successful, there is, however, no neat rule of thumb available to Judges during or immediately after the revolution for the purpose of determining whether the old order survives wholly, in part or not at all."

"One other comment must be made. In some situations where unconstitutional action has been taken by persona wielding effective political power, it is open to a Judge to steer a middle course. He may find it possible to hold that that framework of the pre-existing order still survives, but that deviations from its norms can be justified on grounds of necessity. The principle of necessity rendering lawful what would otherwise be unlawful, is not unknown to English Law; there is a defence of necessity, (albeit of uncertain scope) in criminal law- and- in -constitutional law the application f Martial Law is but an extended application of this concept But the necessity must be proportionate to the evil to be averted and acceptance of the principle does not normally imply total abdication from judicial review, or acquiescence in suppression of the Legal Order; it is essentially a transient violation. State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the

constitutional order in Pakistan, Cyprus, Rhodesia and Nigeria. To this extent it has been recognised as an implied exception to the letter of the Constitution. And perhaps it can be stretched far enough to bridge the gap between the old Legal Order and its successor."

Lastly, it would be instructive to refer to certain statements made by Professor Kelsen himself while replying to certain criticisms made against his pure theory of law by Professor Julius Stone of the University of Sydney, Australia. Writing in the 1965 Stanford Law Review (Vol. 17), Kelsen first quotes a passage from Professor Stone to the effect that "The fact . . . . . that Kelsen's theory at its formulative stage did not clearly distinguish the legal norms from the propositions at sheds revealing light on one of the most dogmatic of Kelsen's early positions. This is that a Judge (and indeed any lawyer) must, in order properly to perform his function, operate in accordance with the pure theory of law . . . . . As soon, however, as they (the proposition about law) are distinguished, as Kelsen now admits they must be, then it is clear that the propositions of the pure theory of law are mere juristists' propositions about law, and they do not bind the Judge, in the way in which legal norms bind him." He then proceeds to reply to this criticism by saying that "Never, not even in the earliest formulation of the pure theory of law did I express the foolish opinion that the propositions of pure theory of law bind the Judge in the way in which legal norms bind him. In so far as the Judge in performing his function of applying and creating law adopts a theory of law his position is the same as that of any other lawyer. And as far as the lawyers are concerned, I tried, of course, to convince them that my theory is correct, as every body who presents a theory tries to convince others of its correctness. But this does not mean that I considered the propositions of the pure theory of law as legally binding . . . . ."

From what has been said in the preceding paragraphs, it become abundantly clear that Kelsen's pure theory of law has not been universally accepted; nor is it indeed a theory which could claim to have become basic doctrine of the science of modern jurisprudence. It has also no found consistent or full application in all revolutionary situations which have come before the Courts for adjudication as to the validity of the new Legal Orders resulting from such revolutions. Indeed, Professor Kelsen has himself stated that never did he express the foolish opinion that the propositions of his pure theory of law bind the Judge in the way in which legal norms bind him. Hamoodur Rehman, C. J. has rightly observed in Asma Jillani's case that Kelsen was propounding a theory of law as a mere jurists' proposition about law but was not attempting to lay down any legal norm or norms which are the daily concern of Judges, legal practitioners or administrators: and that Kelsen did not attempt to formulate a theory which favoured totalitarianism as he attached the greatest importance to keeping law and might apart.

Kelsen's theory is also open to serious criticism on the ground that by making effectiveness of the political change as the sole condition o criterion of its legality, it excludes from consideration sociological facto of morality and ,justice which contribute to the acceptance or effectiveness of the new Legal Order. It must not be forgotten that the continued validity of the grundnorm has an

ethical background, in so far as an element of morality is built in it as part of the criterion of its validity.

These considerations assume special importance in an ideological State like Pakistan. which was brought into being as a result of the demand of the Muslims of the Indo-Pakistan sub-continent for the establishment of a homeland in which they could order their lives in accordance with the teachings of the Holy Qur'an and Sunnah. When the demand was accepted, it was given effect to by means of a Constitution passed by the British Parliament, which held sovereignty over India in 1947. In other words, the birth of Pakistan is grounded both in ideology and legality. Accordingly, a theory about law which seeks to exclude these considerations, cannot be made the binding rule of decision in the Courts of this country.

It follows, therefore, that the legal consequences of an abrupt political change, of the kind with which we are dealing in this case, must be judge not by the application of an abstract theory of law in vacuum, but by consideration of the total milieu in which the change is brought about, namely, the objective political situation prevailing at the time, its historical imperatives and compulsions; the motivation of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed. Only on a comprehensive view of all these factors can proper conclusions be reached as to the true character of the new Legal Order.

One last comment may also be offered in this behalf, namely, that the theory of revolutionary legality, as propounded by Mr. A. K. Brohi can have no, application or relevance to a situation where the breach of legal continuity is admitted, or declared, to be of a purely temporary nature and for a specified limited purpose. Such a phenomenon can more appropriately be described as one of constitutional deviation rather than o revolution. It will indeed be highly inappropriate to seek to apply Kelsen's theory to such a transient and limited change in the legal o constitutional continuity of a country, thus giving rise to unwarranted consequences of a far-reaching character not intended by those responsible for the temporary change.

On this view of the matter, I consider that no justification has been made out for resurrecting Dosso's case in supersession of the view adopted by this Court in Asma Jillani's case regarding the application of Kelsen's theory of revolutionary legality in the circumstances obtaining in Pakistan In other words, I would still prefer the view advocated by Mr. Brohi in that case to the stand taken by him before us, which seeks to rob the present political change of all its moral content, and also leaves its legal character uncertain and undecided.

The stage has now been reached for a somewhat detailed examination of the circumstances culminating in the imposition of Martial Law on the 5th of July 1977. A brief mention thereof has already been made in the earlier part of this judgment while summarising the contentions raised by Messrs A. K. Brohi and Sharifuddin Pirzada. It may be stated that many of the averments made in this behalf in the written statement filed by Mr. A. K Brohi have teen strenuously controverted by the detenus who have filed written rejoinders and also appeared in person before the Court. Mr. A. K. Brohi has filed a rejoinder in reply to these statements of the detenus, and Mr. Zulfikar Ali Bhutto has filed a further written statement in response thereto. An affidavit of General (Rtd.) Tikka Khan, a former Chief of Stall' of the Pakistan Army and Minister of State in Mr. Bhutto's Government has also been placed on the record in refutation of certain actions attributed to him in the respondent's written statement. While taking note of all these statements and counter statements, I think that in the present proceedings the Court is not called upon to record a judicial finding as to the factual correctness or otherwise of the several allegations and counter allegations made by the parties against each other. The Court is primarily concerned with ascertaining the broad trends and circumstances which culminated in the overthrow of the Government of Mr. Z. A. Bhutto. For this purpose, we must take judicial notice of various events which happened in the country during the period commencing from the 7th of March 1977 on which date the general Elections to the National Assembly of Pakistan were held, resulting in an overwhelming majority for the Pakistan People's Party led by Mr. Z. A. Bhutto. Ample material appears to be available on the record of this Court to enable us to arrive at the necessary conclusions.

The National Assembly of Pakistan, consisting of members elected from the four Provinces of West Pakistan in 1971, was dissolved in January this year by the President of Pakistan acting on the advice of the then Prim Minister Mr. Z. A. Bhutto; similar action was taken by the Governors of the four Provinces in respect of the Provincial Assemblies in the Punjab, Sind, N.-W. F. P. and Baluchistan. Fresh elections were ordered to be held to all these legislative bodies within 90 days of the date of dissolution as required by clause (2) of Article 224 of the 1973 Constitution. An intensive politics campaign was launched by the Pakistan People's Party, and the Pakistan National Alliance, a combination of Nine Opposition parties, headed by Maulana Mufti Mahmood. Most political observers, including the to leadership of the Pakistan People's Party, expressed the view that the election were going to be hotly contested between the two major parties, although Mr. Z. A. Bhutto and other leaders of his party expressed the confidence that they would get comfortable majority at the Centre and in all the four Provinces so as to be able to form the Federal and the Provincial Governments. However, when the results of the polling to the National Assembly seats were announced by the evening of the 7th of March 1977, the People's Party was found to have obtained U5 seats out of the total of 200 seats of the National Assembly, including a large number of those seats, particularly in the Punjab, where its success was, to say the least. very doubtful.

The Pakistan National Alliance refused to accept the results. and alleged massive rigging of the elections by Government officials under the direction of Mr: Z. A. Bhutto. They also decided to boycott the polling to the Provincial Assemblies which was to be held three days later. The Pakistan .National Alliance called for a country-wide protest movement against the rigging of

elections in contravention of the constitutional mandate. The agitation gained rapid momentum and spread to all parts of the country. The main demands of the Opposition were resignation of the Prime Minister, resignation of the then Chief Election Commissioner, and fresh elections to the National and Provincial Assemblies. As the demands were not conceded, the agitation continued and soon assumed a violent form resulting in widespread disturbances, which continued to grow in magnitude. It soon became apparent that they were beyond the control of the civil armed forces, with the result that the Army had to be called out in many places. On the 21st of April 1977, the Federal Government of Mr. Z. A. Bhutto issued a direction under Article 245 of the Constitution calling upon the Armed Forces to act in aid of civil power in Karachi, Lahore and Hyderabad towns. Troops were also called out in aid of civil power by the local executive authorities in many other towns under .the provisions of the Code of Criminal Procedure.

The agitation, however, continued unabated, resulting in extensive damage to public and private property and heavy loss of life, details of which will be given presently. Protest marches continued in defiance of the orders made by the local Martial Law Administrators, and many instances of ridiculing army personnel were reported from various towns. The top leadership of the Pakistan National Alliance, and a large number of their followers were arrested throughout the country, and their trial by military Courts was also authorised. As these repressive measures did not appear to produce the desired results, Mr. Z. A. Bhutto announced in May 1977 that as he could not sacrifice the National Assembly on the demand of the Opposition, he would offer himself for a Referendum as to whether he should continue as the Prime Minister of the country or not, and for this purpose Seventh Amendment to the Constitution was passed by the National Assembly on the 12th of May 1977. However, the Opposition rejected this device and the agitation continued.

In these circumstances Mr. Bhutto agreed in principle" to hold fresh elections to the National Assembly, and offered to enter into a dialogue with the leaders of the Pakistan National Alliance. The talks commenced on the 3rd of June 1977 on which date a joint appeal was made by Mr. Z. A. Bhutto and the leaders of the Opposition for calling off the strike during the continuance of the talks. As a result of this joint appeal, the protest movement was temporarily called off. The direction issued by the Federal Government under Article 245 of the Constitution was also withdrawn, and the troops were gradually pulled out from the riot torn areas.

The talks continued until about the 15th or 16th of June 1977, when it was announced that an accord had been reached between the parties, and that the same would now be reduced into writing. The Prime Minister then left for a short tour of some friendly countries, but during his absence the task of drafting the accord could not make much progress. Fresh efforts were made to break the dead-lock, and a night long session between the two negotiating teams was held on the grid of July 1977, resulting in an announcement on the morning of the 3rd of July 1977 that full accord had been reached and the formal agreement would soon be signed by both the parties after it had been formally ratified by the General Council of the Pakistan National Alliance. Unfortunately,

differences again arose, and at a press conference convened by the Prime Minister late on the 4th of July 1977 it was announced that fresh talks will be held between Mr. Abdul Hafeez Pirzada of the Pakistan People's Party and Professor Ghafoor Ahmed of the Pakistan National Alliance to iron out these differences. The Prime Minister, however, announced that his party would also raise ten or twelve other issues as was being done by the Pakistan National Alliance. It appears that the take-over by the military authorities was carried out in the early hours of the 5th of July 1977 sooty after this announcement by the Prime Minister.

The allegation that there was massive rigging of the elections under the directions of Mr. Z. A. Bhutto has been strenuously denied by Mr. Z. A. Bhutto himself and by Mr. Yahya Bakhtiar on behalf of the Pakistan People's Party. However, the important point for our present purpose is not whether in fact there was massive rigging of the elections or not, but that the people all over Pakistan protested that there had been massive rigging by the Government functionaries. In addition, we have before us material in the form of certain actions taken in this behalf by the Government and the Chief Election Commissioner. In the first place, there is the fact that the results of the elections were not announced by the Chief Election Commissioner until the 21st of March 1977, which was the last date-permitted for this purpose by clause (2) of Article 224 of the Constitution and he did so only when he had been given summary powers by the Federal Government, by means of Amending Ordinance XV of 1977, to examine the validity of individual elections and to set them aside by reason of any illegality or corrupt practice which may have vitiated the result. He took up twenty-six cases for investigation under these summary powers and set aside the results of six constituencies, unseating important members belonging to the Pakistan People's Party. Show-cause notices had been issued by the Chief Election Commissioner to at least two other important members of the party, namely, the former Attorney-General, Mr. Yahya Bakhtiar, and the Federal Law Minister, Malik Mohammad Akhtar, when the summary powers previously conferred on the Chief Election Commissioner were suddenly withdrawn by the President on the 12th of May 1977 under clause (2)(6) of Article 89 of the Constitution, Chief Election Commissioner, and that the withdrawal of the summary powers had nothing to do with the pendency of his case. That may or may not be so, as the relevant fact for our present purpose is that the powers in question were suddenly withdrawn, thus giving the impression that the withdrawal was intended to protect certain important members of the Pakistan People's Party from being unseated. In the present proceedings we have merely taken judicial notice the events which generated discontent against Mr. Z. A. Bhutto's Government, and are not called upon to record a judicial finding as to whether the dissatisfaction was in fact justified or not. A further fact to be noticed in this behalf is that the Chief Election Commissioner had called for the files of eighty-five other constituencies when these powers were withdrawn.

Four orders passed by the Election Commission in the exercise of the summary powers mentioned above have been placed on the record. They make very instructive reading. It may be stated that at the relevant time the Election Commission was headed by a retiree: Judge of the Supreme Court of Pakistan, Mr. Justice Sajjad Ahmed Jan as the Chief Election Commissioner, and had two

members drawn from the serving Judges of the High Courts, namely, Mr. Justice Sa'ad Saood Jan of the Lahore High Court and Mr. Justice Abdul Hafeez Memon from the Sind High Court.

The first case deals with the election of a former Federal Minister, Mr. Hafeezullah Cheema, to the National Assembly from Constituency No. NA-57, Sargodha-5. On page 176 of the reported judgment (P L D 1977 Jour. 164) the Election Commission has recorded the following conclusions:

"We do not think it necessary to make any comments on the patent facts disclosed from our scrutiny of the record and the evidence mentioned above, as they speak for themselves. The only possible conclusion which can be drawn from them is that the polls were rigged in the polling stations mentioned above and the election was thus reduced to a farce. The several telegraphic complaints sent by Mr. Zafarullah Khan on the day of the poll have been proved to be substantially correct. The events clearly reveal a pre-planned design to subvert the electoral process and to secure a victory for Mr. Hafeezullah Cheema at all costs by resort to the foulest possible means. As stated above, no polling took place at some of the polling stations and yet the results were manipulated for these polling stations giving to Mr. Cheema a land-slide victory. 1t is painful to observe that Mr. Cheema in his position as the Federal Minister of the Central Government should have resorted to such foul methods, throwing to the winds all norms of decency and democratic behaviour in his blind desire to win the seat for himself anyhow, totally unmindful of the consequences. 'He and his henchmen indulged in violence and intimidation with reckless bravado to achieve their nefarious designs."

In the second case, reported as P L D 1977 Jour. 183 relating to the election of Mr. Amir Abdullah Khan, a nominee of the Pakistan People's Party from National Assembly Constituency No. NA-61, Mianwali-II, the Election Commission has observed, on page 187 of the Report, that :-

"The events as disclosed by the evidence mentioned above, speak for themselves. The election in this constituency was a mockery and a sham. The sanctity of the ballot paper was destroyed by the foulest methods, regardless of consequences. In the circumstances, we have no hesitation in declaring, as already stated in our short order dated the 20th of April, 1977, that the polls in this constituency are vitiated by grave illegalities and are, therefore, null and void and that fresh election will be held in this constituency as required by section 108 of the Representation of the People Act, 1976."

In the third case, reported as P L D 1977 Jour. 190 relating to the election of Mr. Ghulam Nabi Chaudhry, a nominee of the Pakistan People's Party from Constituency No. NA-76, Lyallpur-IX, the Election Commission observed on p. 197 of the Report:-

"The resume of the evidence led in the case and the description of some of the incidents that took place during the polls in this Constituency leave no room for doubt that the polls are tainted by grave illegalities and violations of law. The respondent resorted to violence and even abducted a Presiding Officer and subverted the electoral processes to make sure about his victory at all costs."

In the last case brought to our notice, reported as P L D 1977 Jour. 198, relating to the election of Sardar Ahmed Ali, a nominee of the People's party, from National Assembly Constituency No. NA-89, Kasur-I, the Election Commission came to the conclusion on p. 202 of the Report that:-

"The whole evidence as discussed above leaves no room fur doubt that a fraud has been played on the electorate by resort to despicable acts like stealing the ballot boxes and the ballot papers, shoving in bogus votes in the ballot boxes and later bringing them into the polling stations for being included in the count. The only result that follows is that this poll which was farcical, has to be declared as null and void."

It is true that the specific judgments referred to by the learned Attorney-General relate only to four cases, but the conclusions recorded by the Election Commission in each of them 'are significant, as revealing a certain pattern of interference by the Government functionaries with the sanctity of the ballot.. Enormity of this interference appears to be further highlighted by at least three public statements made by the Chief Election Commissioner on the 17th of March 1977, 23rd of May 1977, and the 5th of June 1977 respectively.

The firs statement appeared in the daily newspaper 'Nawa-i-Waqt' (Annexure F. 12 on p. 150 of the respondent's rejoinder filed on 26-10-77) reporting the proceedings of a Press Conference held by the Chief Election Commissioner in his office, in which, after reciting the various irregularities noticed by him, he expressed the view that there were allegations of rigging against almost all the ministers of the Government, and that, if possible, fresh elections should be held to all the 200 seats of the National Assembly, and even the elections to the Provincial Assemblies should be reviewed, so as to inspire confidence in the purity of the electoral process.

The second statement referred to by Mr. Sharifuddin Pirzada was reported in a weekly Urdu magazine 'Chatan', published in Lahore (Annexure F. 13 on p. 152 of the aforesaid rejoinder), bearing the date-line 23rd of May 1977. It refers to an interview given by the Chief Election Commissioner to the Voice of America reiterating his view that there had been massive rigging in the elections to the National Assembly held on the 7th of March 1977, and that he had advised Prime Minister Bhutto to held fresh elections, According to the correspondent of the Voice of America stationed in Islamabad, the Chief Election Commissioner had re-affirmed his earlier statement that the results of at least 100 constituencies of the National Assembly were not above suspicion. .

The third statement dated the 5th of June 1977 appeared in a newspaper called the daily `Millat' published in Karachi, in the Gujerati language. An English translation of this news item is to be found in Annexure R/ I to the first written statement filed in this Court by Mr. A. K. Brohi on behalf of the Federation of Pakistan. It bears the caption "Savad shocked by election rigging. Suggests new election instead of inquiry." The body of the news item states that:---

"In view of the grave irregularities that have come. to the knowledge of the Election Commission during the inquiry held into election to 24 seats, the Commission has decided to hold inquiry into another 80 seats.

Records of the elections of these 80 seats have been sealed under the orders of the Commission. The Chief Election Commissioner, Mr. Justice Sajjad Ahmed Jan is shocked to learn of the grave irregularities committed in regard to more than 50 % of the seats during elections. In view of these irregularities on such a large scale Mr. Justice Sajjad Ahmed Jan feels that it will be better to hold elections afresh."

Mr. Brohi has also drawn our attention to para. 48 of his written statement to the effect that the then Punjab Government had sanctioned, on 15-5-77. the distribution of fire-arms licences on a vast scale to its party members. This allegation has not been denied by Mr. Bhutto and Mr. Abdul Hafeez Piriada, either orally or in their rejoinder statements.

Mr. A. K. Brohi has also brought on the record certain other material suggestive of the fact that such large scale rigging had 'in fact been planned and directed at the highest level, namely, that of the Prime Minister himself, but I consider that it is not necessary to go into those details, the relevant fact in the present proceedings being that there were widespread allegations of massive rigging in the elections in favour of candidates of the Pakistan People's Party, and that these

allegations find prima facie support from the orders and statements made by the then Chief Election Commissioner and the members of the Election Commission as mentioned above. These circumstances explain the genesis of the protest movement launched by the Opposition against Mr. Z. A. Bhutto and his Government.

As to the magnitude of the movement, certain salient facts have already been stated, namely, that Mr. Bhutto was obliged to call in the Armed Forces in aid of the civil power in a large number of cities and towns of Pakistan owing to the fact that the civil authorities were unable to cope with the disturbances.

As regards the casualties suffered and the damage caused to public and private property, Mr. Sharifuddin Pirzada, the learned Attorney-General, has invited us to take judicial notice of the submissions made before the Supreme Court by the former Attorney-General, Mr. Yahya Bakhtiar. who now appears for the petitioner Begum Nusrat Bhutto, on the 6th of June 1977. While arguing an appeal on behalf of the Federal Government against the decision of the Lahore High Court declaring as unlawful the imposition of local Martial Law by the Armed Forces of Pakistan in pursuance of a direction issued by the Federal Government under Article 245 of the Constitution, Mr. Yahya Bakhtiar gave certain facts and figures in justification of the action taken by the Federal Government. He stated that during the 2) months of agitation 4653 processions were taken out by the public, including 248 processions by women, 92 by the members of the legal profession. 18 by Ulema or religious scholars, 248 by students and 57 by boys and children. According to Mr. Yahya Bakhtiar, these figures related to the period from March 14 to May 17, 1977.

Mr. Yahya Bakbtiar further informed the Court on that occasion that 241 civilians, belonging to both the political parties, were killed, and 1195 were injured, whereas nine members of the security forces were killed and 531 of them were injured. There were 162 acts of sabotage and arson, besides large scale destruction of property as follows:-

Installations	18
Shops	74
Banks	58
Vehicles on the road	1622 (They did not include the vehicles burnt in the Republic

Karachi)

Hotels	7
Cinemas	11
Offices (public & private)	56
Railways, whether bogies were burnt or otherwise damaged	27

These losses and casualties, which according to Mr. Yahya dakhtiar were unprecedented, appear to me to lend full support to the submission made by Mr. Sharifuddin Pirzada that the protest movement launched by the Opposition against the alleged massive rigging of the elections organised by Mr. Z. A. Bhutto's Government had assumed very serious proportions indeed, comparable almost to the well-known agitation movements launched in the undivided India, like the Khilafat Movement, the Quit India Movement of 1942, etc.

Certain other aspects of the prevailing political and law and order situation may also be noticed. It has already bee" stated that as a result of the joint appeal made by the Prime Minister, Mr. Z. A. Bhutto and the top leadership of the Pakistan National Alliance on the 3rd of June 1977, the agitation was called off for the time being and the troops were withdrawn from their duties in aid of civil power. Mr. Yahya Bakhtiar submits that, in these circumstances, it would be wrong to say that the law and order situation in the country continued to be serious, or that there was any real danger of widespread disturbances or civil war as alleged by the respondent.

In controverting these submissions, Mr. Sharifuddin Pirzada has drawn our attention to the minutes of certain meetings of the Law and Order Committee, headed by Mr. Yahya Bakhtiar himself, in his capacity as the then Attorney-General The membership of this Committee included several Secretaries to the Federal Government, Heads of Civil Armed Forces, Heads of Intelligence Services, Chief of General Staff of the Pakistan Army, Chief Secretaries of all the four Provincial Governments and their Inspectors-General of Police. It was thus a very high-powered Committee.

Mr. Sharifuddin Pirzada first refers to the minutes of the meeting of this Committee held on the 11 the of June 1977 (Annexure F. 33 of respondent's rejoinder), under the chairmanship of Mr. Yahya Bakhtiar. As the: agitation had been temporarily called off on the 3rd of June 197,7 on the commencement of the dialogue between the Government and the Pakistan National Alliance, the Committee noted that the general law and order situation in the country was reported to be satisfactory, but there was information that certain sections were intending to continue

demonstrations of "belicosity" through processions in Lahore, Karachi and Hyderabad in case the talks fail. Paragraph 4 of the minutes of this meeting states that "in reviewing the situation in the respective Provinces, Chief Secretaries and Inspectors-General of Police stated that, although law and order situation was near normal everywhere, ail provinces were tense and could break out into serious trouble, worse in intensity than hithertofore, should the Government . . . . P. N. A. talks fail. The agitation this time may take the form of sabotage, arson and assasinations in addition to large scale demonstrations in the streets."

"It was generally agreed that the prospects of maintaining law and order in the eventuality of a break-down of talks were bleak."

In the minutes of the meeting of the Committee held on the 27th of June 1977 (Annexure F. 54 on p. 244), it is stated that:-

"The political situation in the country was discussed in totality. Main features of the discussions are briefly stated as under:-

(ii) Exposition of political situation in the country by various officers attending the meeting revealed that the P. N. A. was gradually building up a tempo of agitation in anticipation of a break-down of talks.

(iii) Although different leaders of P. N. A. blew hot and cold, there remained cohesion and unity in their ranks, which quality was lacking in the P. P. F.

(iv) In Punjab the various forces of law and order including the Police might, at best, be able to buy time for the Government for a month or so but they would not be able to beat back a full-blooded agitation by P. N. A.

(v) The P. N. A. agitation would, this time, also take the form of sabotage and attempts on the lives of certain political leaders and Government officials.

(ix) In Sind the P. P. P. was in disarray. Clashes in Karachi and Hyderabad were inevitable whether there is a Government-P. N. A. accord or not."

Again the minutes of the meeting of the committee held on the 2nd of July 1977 (Annexure F. 55 on p. 248) recite that:-

"In giving a run-down of the law and order situation in the country, the D. I. B. expressed apprehension of large scale clashes between supporters of P. P. P. and P. N. A. during the forthcoming electioneering campaign. Mr. G. M. Khar's return to the P. P. P. fold and his open challenge to the P. N. A. is a grave provocation to the blooded veterans of the recent country-wide agitation. The path of clashes is, therefore, fraught with dangers, the least of these being demoralisation of rank and file of the P. P. P. should there be a single reverse on the street. In fact the latest trends of P. N. A. workers show that the desparate ones among them may no longer be amenable to party discipline.

Rumours are being spread that Mr. Khar went to Peshawar to acquire arms in large quantity for P. P. P. workers."

It needs to be mentioned that Mr. G. M. Khar, referred to in the minutes, noticed in the preceding paragraph, was at one time a very prominent member of the Pakistan People's Party, and mentioned as a possible successor by Mr. Z. A. Bhutto. He was appointed Governor of the Punjab and later Chief Minister of the Punjab, before falling out with Mr. Bhutto. After various vicissitudes in his fortune, he returned to the fold of the Pakistan People's Party, and was appointed by Mr. Bhutto as a Special Assistant to the Prime Minister as late as the 16th of June 1977. Immediately on appointment in this capacity, he started making belligerent speeches against the Opposition, which were given great prominence by Radio, Television and the official press. The reference in the minutes of the meeting of the Law and Order Committee is to these speeches made by Mr. G. M. Khar from the safety of the Prime Minister's Secretariat.

On the basis of the material thus brought to the notice of the Court by Messrs A. K. Brohi and Sharifuddin Pirzada, consisting mostly of official reports and decisions as well as contemporary reports in the official newspapers, I think the Court is entitled to take judicial notice of the following facts :-

(1) That from the evening of the 7th of March 1977 there were widespread allegations of massive official interference with the sanctity of the ballot in favour of candidates of the Pakistan People's Party ;

(2) That these allegations, amounting almost to widespread belief among the people, generated a national wave of resentment and gave birth to a protest agitation which soon spread from Karachi to Khyber and assumed very serious proportions ;

(3) That the disturbances resulting from this movement became beyond the control of the civil armed forces ;

(4) That the disturbances resulted in heavy loss of life and property throughout the country ; ,

(5) That even the calling out of the troops under Article 245 of the Constitution by the Federal Government and the consequent imposition of local Martial Law in several important cities of Pakistan, and the calling out of troops by the local authorities under the provisions of the Code of Criminal Procedure in smaller cities and towns did not have the desired effect, and the agitation continued unabated ;

(6) That the allegations of rigging and official interference with elections in favour of candidates of the ruling party were found to be established by judicial decisions in at least four cases, which displayed a general. pattern of official interference ;

(7) That public statements made by the then Chief Election Commissioner confirmed the widespread allegations made by the Opposition regarding official interference with the elections, and endorsed the demand for fresh elections ;

(8) That in the circumstances, Mr. Z. A. Bhutto felt compelled to offer himself to a referendum under the Seventh Amendment to the Constitution, but the offer did not have any impact at all on the course of the agitation, and the demand for his resignation and for fresh elections continued unabated with .the result that the Referendum Plan, had to be dropped ;

(9) That in spite of Mr. Bhutto's dialogue with the leaders of the Pakistan National Alliance and the temporary suspension of the Movement against the Government, officials charged with maintaining law and order continued to be apprehensive that in the event of the failure of the talks there would be a terrible explosion beyond the control of the civilian authorities ;

(10) That although the talks between Mr. Bhutto and the Pakistan National Alliance leadership had commenced on the 3rd of June 1977, on the basis of his offer for holding fresh elections to the National and Provincial Assemblies, yet they had dragged on for various reasons, and as late as the 4th of July 1977, the Pakistan National Alliance leadership was insisting that nine or ten points remained to be resolved and Mr. Bhutto ,vas also saying that his side would similarly put forward another ten points if the General Council o P. N. A. would not ratify the accord as already reached on the morning of the 3rd of July 1977.

(11) That during the crucial days of the dead-lock between Mr. Z. A. Bhutto and the Pakistan National Alliance leadership the Punjab Government sanctioned the distribution of fire-arms licences on a vast scale, to its party members, and provocative statements were deliberately made by the Prime Minister's Special Assistant, Mr. G. M. Khar, who had patched up his differences with the Prime Minister and secured this appointment as late as the 16th of June, 1977 ; and

(12) That as a result of the agitation all normal economic, social an educational activities in the country stood seriously disrupted, wit incalculable damage to the nation and the country.

In the light of these facts, it becomes clear, therefore, that from the 7th of March 1977 onward, Mr. Z. A. Bhutto's constitutional and moral authority to rule the country as Prime Minister stood seriously eroded. His Government was finding it more and more difficult to maintain law and order to run the orderly ordinary administration of the country, to keep open educational institutions and to ensure normal economic activity. These conclusions find support from the declaration of loyalty to Mr. Z. A. Bhutto' Government made by the Chairman of the Joint Chiefs of Staff and the Chiefs of Staff of the Pakistan Army, Pakistan Navy and Pakistan Air Force on the 28th of April 1977. There has been some controversy between the parties as to' whether Mr. Bhutto had requested the Service Chiefs for such a declaration, or it was voluntarily made by them on their own initiative, but the fact remains that the situation had deteriorated to such an extent that either Mr. Bhutto or the Service Chiefs themselves felt that a declaration of loyalty to Mr. Bhutto's Government was needed at that critical juncture so as to boost up his authority and to help in the restoration of law and order and a return to normal conditions. 1t is again a fact that even this declaration did no have

any visible impact on the momentum of the agitation launched by the Opposition which continued unabated.

The Constitutional authority of not only the Prime Minister but also of the other Federal Ministers, as well as of the Provincial Governments was being repudiated on a large scale throughout the country. The representative character of the National and the Provincial Assemblies was also not being accepted by the people at large. There was thus a serious political crisis in the country leading to a break-down of the constitutional machinery in so far as the executive and the legislative organs of the State were concerned. A situation had, therefore, arisen for which the Constitution provided no solution. It was in these circumstances that the Armed Forces of Pakistan, headed by the Chief of Staff of the Pakistan Army, General Mohammad Ziaul Haq intervened to save the country from further chaos and bloodshed, to safeguard its integrity and .sovereignty, and to separate the warring factions which had brought the country to the brink of disaster. It was undoubtedly an extra-constitutional step, but obviously dictated by the highest considerations of State necessity and welfare of the people. It was precisely for this reason that the declaration of Martial Law on the morning of the 5th of July 1977 was spontaneously welcomed by almost all sections of the population which heaved a sigh of relief after having suffered extreme hardships during the unprecedented disturbances spread over a period of nearly four months.

This seems to me to be the proper place for mentioning some of the salient points of the speech made by General Mohammad Ziaul Haq on the evening of the 5th of July 1977 to explain the reasons for the action he had taken to overthrow the Government of Mr. Z. A. Bhutto and to dissolve the Federal and Provincial Legislatures. Addressing his countrymen, the General said :-

"The Army take-over is never a pleasant act because the Armed Forces of Pakistan genuinely want that the administration of the country should remain in the hands of the representatives of the people who are its real masters. The people exercise this right through their elected representatives who are chosen in every democratic country through periodic elections.

The elections were held in our beloved homeland on March 7 last. The election results, however, were rejected by one of the contending parties, namely, the Pakistan National Alliance. They alleged that the elections had been rigged on a large scale and demanded fresh elections. To press their demand for re-elections, they launched a movement which assumed such dimensions that people even started saying that democracy was not workable in Pakistan. But, I genuinely feel that the survival of this country lies in democracy and democracy alone. It is mainly due to this belief that the Armed Forces resisted the temptation to take over during the recent provocative circumstances in spite of diverse massive political pressures. The Armed Forces have always desired and tried for the political solution to political problems. That is why the Armed Forces

stressed on the then Government that they should reach a compromise with their political rivals without any loss of time. The Government needed time to hold these talks. The Armed Forces bought them this valuable period of time by maintaining law and order in the country. The Armed Forces were subjected to criticism from certain quarters for their role in aid of the civil administration, but we tolerated this criticism acid ridicules in the hope that it was a passing phase. We hoped that when this climate of agitational frenzy comes to an end, the nation would be able to appreciate the correct and constitutional role of the Armed Forces and all fears would be allayed.

I have just given you a very broad-outline picture of the situation obtaining in the country. It must be quite clear to you now that when the political leaders failed to steer the country out of a crisis, it is an inexcusable sin for the Armed Forces to sit as silent spectators. It is primarily, for this reason, that the Army, perforce had to intervene to save the country.

I would like to point out here that I saw no prospects of a compromise between the People's Party and the P. N. A. because of their mutual distrust and lack of faith. It was feared that the failure of the P. N. A. and P. P. P. to reach a compromise would throw the country into chaos and the country would thus be plunged into a more serious crisis. This risk could not be taken in view of the larger interests of the country. The Army had, therefore, to act as a result of which the Government of Mr. Bhutto hoc ceased to exist ; martial law has been imposed throughout the country ; the National and Provincial Assemblies have been dissolved and the Provincial Governors and Ministers have been removed."

It will be 'seen that the explanation given by General Mohammad Ziaul Haq for the Army's intervention is a true reflection of the situation which had been developing over the past four months as a result of the Pakistan National Alliance agitation and repudiation of Mr. Bhutto's constitutional and moral authority as Prime Minister of Pakistan. The statement correct brings out the necessity for the imposition of Martial Law. It is also clear that this sincere and unambiguous declaration of his objectives by the Chief Martial Law Administrator was a major factor in persuading the people of Pakistan to .willingly accept the new dispensation as an interim arrangement to bridge the gap between .the break-down of .the previous administration and the induction of the new elected Government under the terms of the 1973 Constitution. The new arrangement, therefore, acquired its effectiveness owing to its moral content and promise of restoration of democratic institutions. I may add here that the willingness of the Judges of the superior Courts to take the new oath after the proclamation of Martial Law was also founded upon the same considerations.

It is strenuously contended by Mr. Yahya Bakhtiar that the accord between the Government and the Pakistan National Alliance was delayed by certain actions and attitudes of the Chief of the

Army Staff' as he insisted that the demands of the Pakistan National Alliance regarding the release of the accused persons facing trial before the Hyderabad Special Court (namely, Messrs Wali Khan and others) and regarding the withdrawal of the Army from Baluchistan should not be accepted by the Government at any cost. In support of this submission he refers us to certain averments made by Mr. Z. A. Bhutto in his written statement and rejoinder. Mr. Yahya Bakhtiar also submits that in spite of these hurdles created .by the respondent, accord had in fact been reached on the morning of the 3rd of July 1977, and a formal accord would have been signed if the Army had not intervened on the night between the 4th and the 5th of July 1977.

I have already stated that in the present proceedings it is not our function to examine individual incidents or allegations, and for this very reason I have not taken into account the large number of allegations appearing in the written statement filed by Mr. A. K. Brohi regarding the abuse of power by Mr. Z. A. Bhutto or misuse of official authority and funds, as they are not directly germane to the circumstances culminating in the imposition of Martial Law. From the objective narration of events as they were happening from the 7th of March 1977 onwards, one is left in no doubt that the constitutional and moral authority of the National Assembly which had come into being as a result of the elections held on the 7th of March 1977, as well as of the Federal and Provincial Governments formed thereafter as a result of mandates given to them by the National and the Provincial Assemblies had been continuously and forcefully repudiated throughout the country over a prolonged period of nearly four months, thus resulting in 1. serious disruption in all spheres of national life. It can only be a matter of conjecture at this stage, whether an accord between the Government and the Pakistan National Alliance would have finally emerged if the Army had not intervened. From the material placed on the record, in the shape of deliberations of official committees, it has become abundantly clear that the situation was surcharged with possibilities of further violence, confusion and chaos.

Having found that the extra-Constitutional step taken by the Armed Forces of Pakistan was justified by requirements of State necessity and welfare of the people it is now necessary to examine its legal consequences.

The learned Attorney-General contends that the doctrine of necessity is fully applicable to the facts obtaining in the present case, and would validate that which was not sanctioned by the Constitution, as the country and the people could not be sacrificed at the alter of the letter of the Constitution, when its spirit had already been killed owing to the massive rigging of the elections indulged in by Mr. Z. A. Bhutto and the Government functionaries acting under his order ; that the doctrine of necessity is fully recognised by the Holy Qu'ran as well as by the juridical systems of Western countries; that it has also been accepted in several precedent cases by the Supreme Court of Pakistan; and that the authorities inducted into power on account of State necessity and the principle of salus populi suprema lex are fully entitled to administer the country and exercise supra-Constitutional powers for this purpose.

Mr. A. K. Brohi, appearing for the Federation of Pakistan has, however, adopted a somewhat different .position, by contending that the question of the application of the doctrine of necessity does not at all arise to this case, as with the suppression or destruction of the old- Legal Order, even this doctrine or concept has disappeared, and can no longer be regarded as part of the juridical system now obtaining in Pakistan. He submits that the doctrine of necessity can apply only if breaches take place within a given legal system like a man who has suffered a fracture is put in plaster or is given other clinical treatment to repair the damage, but no such repair is possible if he has already met his death. According to him all the cases cited at the Bar in support of the application of this doctrine presented a situation in which the Legal Order was intact but had suffered partial damage, a situation which was distinguishable from the present case where whole of the country was placed under Martial Law and the Constitution had been suspended with a view to restoring it to life after the holding of elections. Finally, Mr. Brohi contends that even if the doctrine were to apply, only the initial act of taking-over by. the Army could be tested, but all subsequent actions could not be judged in the light of this doctrine, as the Judges would have no objective tests to apply, and that in any case the Courts were now governed by the limitations placed upon them by the Laws (Continuance in Force) Order, 1977.

Mr. Yahya Bakhtiar, learned counsel appearing for the petitioner, submits that even if the Court were to come to the conclusion that the intervention by the Armed Forces had become necessary in the situation then prevailing the action would still remain in the nature of usurpation of power as held by the Supreme Court in Asma Jillani's case; and in such a situation only certain acts of the usurper could be condoned which fell directly within the ambit of the 1973 Constitution. He further submits that the Chief Martial Law Administrator being a usurper must be directed by the Court to hold elections as early as possible according to his original intention, and should not be permitted to prolong his rule indefinitely on the ground that he wants to enforce the principle of accountability against political leaders. Mr. Yahya Bakhtiar submits that even now it should be possible for the respondent to hold general elections before the end of the current year.

It seems to me that the view expressed by Mr. A. K. Brohi is not at all tenable. The question of considering the application of the doctrine o necessity has obviously arisen in this case as the Court, is not persuaded that the military intervention provides its own legality simply for the reason that it has been accepted by the people of Pakistan, and has become effective in that sense. Even otherwise, if it is assumed that the old Constitution has been completely suppressed or destroyed, it does not follow that all the juridical concepts and notions of morality arid justice have also been destroyed, simply for the reason that the new Legal Order does not mention anything about them: On the contrary, I find that the Laws (Continuance in Force) Order makes it clear that, subject to certain limitations, Pakistan is to be governed as nearly as may be in accordance with the 1973 Constitution, and all laws for the time being in force shall continue. These provisions clearly indicate that there is no intention to destroy iii e legal continuity of the country, as distinguished strictly from the Constitutional continuity.

At this stage, it will be convenient to examine Mr. Yahya Bakhtiar's contention that the dictum in Asma Jillaiii's case as to usurpation of power fully applies even if the imposition of Martial Law is assumed to be justified by State necessity, and therefore, the utmost that the Court can do is to condone certain actions of the Martial Law Authorities, and no question of validation arises.

Having dealt with the untenability of Kelsen's theory and the decision of the Supreme Court in Dosso's case, Hamoodur Rahman, C. J. has observed on page 183 of the Report, that "unfettered by this decision I propose now to judge the validity of the events that took place on and from the 24th of March 1969", on which date Field Marshal Muhammad Ayub Khan, the then President of Pakistan, wrote, a letter to the Commander-in-Chief of Pakistan Army expressing his profound regret for coming to the conclusion that "All civil administration and constitutional authority in the country has become ineffective," and that "it is beyond the capacity of the Civil Government to deal with the present political situation, and the defence forces must step in". In these circumstances, he thought that there was no option left for him but "To step aside and leave it to the defence forces of Pakistan, which today present the only effective and legal instrument to take over full control of the affairs of the country." He accordingly called upon the Commander-in-Chief to perform his legal and constitutional responsibility to defend the country not only against external aggression but also to save it from internal disorder and chaos.

The learned Chief Justice has commented on this letter in the following words:-

"There was nothing either in this letter or in his broadcast (by Field Marshal Muhammad Ayub Khan to show that he was appointing General Agha Muhammad Yahya Khan) as his successor in office or was giving him any authority to abrogate the Constitution which he had himself given to the country in 1962."

His Lordship has further remarked that "it is clear that under the Constitution of 1962, Field Marshal Muhammad Ayub Khan had no power to hand over power to any body. Under Article 12 of that Constitution he could resign his office by writing under his hand addressed to the Speaker of the National Assembly and then under Article 16 as soon as the office of President fell vacant the Speaker of the National Assembly had to take over as the Acting President of the country and an election had to be held within a period of 90 days to fill the vacancy." After examining the nature of Martial Law, the learned Chief Justice further observed that--

"'From this examination of the authorities I am driven to the conclusion that the proclamation of Martial Law does not by itself involve the abrogation of the civil law and the functioning of the civil authorities and certainly does not vest the Commander of the Armed Forces with the power of abrogating the fundamental law of the country . . . . ,

It was not even a revolution, or a military coup d'elat in any sense .of those terms . . . . . Therefore, there can be no question that the military rule sought to be imposed upon the country by General Agha Muhammad Yahya Khan was entirely illegal."

Having thus held that the seizure of power by General Agha Muhammad Yahya Khan was illegal and amounted to an act of usurpation, the learned Chief Justice observed that:-

"Recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disasterous consequences to the body politic and upset the social order itself, but I respectfully beg to disagree with the view that this is a doctrine for Validating illegal acts of the usurper. In my humble opinion, this doctrine could be invoked in aid only if the Curt bas come to the conclusion that the acts of the usurper were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization "

The other learned Judges agreed with this line of reasoning, and have apparently endorsed the tour principles enunciated by the learned Chief Justice on page 207 of the Report for condoning certain categories of acts of the usurper.

Now, it will be seen that in Asma Jilani's case the Court has taken the view that the abrogation of .the Constitution and assumption of all governmental power by the Army . Commander-in-Chief was illegal because it was not justified by the circumstances in which he was called upon by the then President, Field Marshal Muhammad Ayub Khan to perform his legal and constitutional duty of restoring law and order. The Court took note of the fact that the Constitution itself contained a provision for the Speaker of the National Assembly to assume the office of Acting President, in case the sitting President wanted to resign or step aside, but this constitutional provision was frustrated by General Yahya Khan when he proclaimed himself to be the President of the country as well as the Chief Martial Law Administrator. and abrogated the 1962 Constitution without there being any justification for the same. It is clear, therefore, that the conclusion that the acts of General Muhammad Yahya Khan amounted to a usurpation of powers flows directly from the

circumstances obtaining in that case, and is not t be regarded as a general proposition of law to the effect that whenever power is assumed in an extra-Constitutional manner by an authority not mentioned in the Constitution, then it must amount to usurpation in all events. It would obviously be a question for determination in the circumstances of the particular case before the Court as to whether the assumption of power amounts to usurpation or not.

It is also clear. from the various judgments delivered in Asma Jillani's case that the question of condonation arose only on the view that the Army Commander-in- Chief was a usurper. The learned Attorney General is, therefore, right in saying that in a case where extra-constitutional intervention is justified by necessity, then different considerations arise from those which would be relevant for judging the acts of a usurper.

'It has also to be noticed that the concept of condonation, as expostulated in Asma Jillani's case, has relevance not only to the acts of a usurper, but also to a situation which arises when power has fallen from the hands of the usurper, and the Court is confronted with protecting the rights and obligations which may have accrued under the acts of the usurper, during the time he was in power. However, in the case of an authority, whose extra-Constitutional assumption of power is held valid by the Court on the doctrine of o necessity, particularly when the authority concerned is still welding State power, the concept of condonation will only have a negative effect and would not offer any solution for the continued administration of the country in accordance with the requirements of State necessity and welfare of the people. It follows, therefore, that once the assumption of power is. held to be valid, then the legality of the actions taken by such an authority would have to be judged in the light of the principles pertaining to the law of necessity.

As already stated. the learned Attorney General submits that the doctrine of necessity is recognised by Islam. He has in this connection, in the first place, drawn our attention to the injunctions contained in Sura Al-Baqar and Sura Al-Nahal, which are in almost identical terms and permit, if one is .forced by necessity, without wilful disobedience, nor transgressing due limits, that which is forbidden, namely- dead meat and blood and the flesh of swine -and any food over which the name of other than Allah has been invoked. He also refers to certain observations appearing in Islamic Jurisprudence and Rule of Necessity and need by Dr. Muslehuddin, 1975 Edition, (pp. 60-63), Islamic Surveys by Coulson (p. 144), and the Muslim Conduct of State by Hamidullah (p. 331. These writings lend support to the maxim that "Necessity makes prohibited things permissible."

Mr. Sharifudin Pirzada has next drawn our attention to certain Articles in the Majelle in support of his proposition. Article 17 enjoins that "Hardship causes the giving of facility that is to say, difficulty becomes a cause of facility, and in times of embarrassment it becomes necessary that

latitude should be shown." Article 21 says that "Necessities make forbidden things canonically harmless". Article 22 lays down that necessities are estimated according to their quantity, and Article 26 embodies the maxim salus populi suprema let by saying that "To repel a public damage a private damage is preferred " He submits that although these maxims are directly relevant to cases of private necessity but the principle can certainly be extended to State necessity.

In support of his. contention that the doctrine or law of necessity is recognised in most Western systems of Jurisprudence, and has also been followed in Pakistan, the learned Attorney-General has referred us to Rex v. Stretton (1779) reported in Vol. 21, Howell's State Trials; Attorney - General of Duchy of Lancaster v. Duke of Devenshire ((1884) 14 Q B D 273); the well-known case from Cyprus, The Attorney-General of Republic v. Mustafa Ibrahim (1964 C L R 195); the well-known case from Nigeria reported as E. U. Lakanmi and another v. Attorney-General, West Nigeria, Reference by H. E. The Governor-General P L D 1955 F C 435 and of course observations appearing in the case of Asma Jillani.

He also relies upon the dissenting judgment delivered by Lord Pearce in the Rhodesian case, already referred to earlier in another context, namely, ' Madirnbamuta v. Lardner-Burke (1968) 3 All E R 561.

I find that in the Federal Court case, relied upon by the learned Attorney-General, namely, Reference by H. E. Governor-General; the implications of the law of necessity were discussed at some length by Muhammad Munir, C. J., and accordingly it will be useful to refer to it in the first instance.

After referring to several authorities. including some of those now mentioned by Mr. Sharifuddin Pirzada, his Lordship stated, particularly relying on the address of Lord Mansfield in the proceedings against George Stretton and others that "the principle clearly emerging from this address of Lord Mansfield is that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the Constitution, the State or the society and to prevent it from dissolution, and affirms Chitty's statement that necessity knows no law, and the maxim cited by Bracton that necessity makes lawful which otherwise is not lawful." Having stated this principle, the learned Chief Justice, with whom the majority of the Judges agreed, proceeded to answer the questions referred to the Court by the Governor-General, and suggested certain arrangements for the setting up of a Constituent Convention, which he preferred to call Constituent Assembly, and for which there was otherwise no provision in the Government of India Act, which then served as the Constitution for Pakistan. The opinion recorded by the Federal Court in this case provides a striking example of the

invocation of the law of necessity to validate certain extra-Constitutional measures dictated by the considerations of the welfare of the people and the avoidance of a legal vacuum owing to an earlier judgment of the Federal Court in Usif Patel v. Crown PLD 1955 F C 387. The measures in question were validated and not sought to be condoned.

In the case from the Cyprus jurisdiction a more or less similar situation bad arisen owing to the difficulty of the Turkish members of the Cyprus Parliament participating for the passing of a law regarding the functioning of the Supreme Court itself. In a very elaborate judgment, after surveying the concept of the doctrine or law of necessity as obtaining in, different countries the Court came to the conclusion that the Cyprus Constitution should be deemed to include the doctrine of necessity in exceptional circumstances which is an implied exception to particular provisions of the Constitution, and this in order to ensure the very existence of the State. It was further stated that the following pre-requisites must be satisfied before this doctrine can become applicable :-

(a) An imperative and. inevitable necessity or exceptional circumstances;

(b) No other remedy to apply;

(c) The measure taken must be proportionate to the necessity; and

(d) It must be of a temporary character limited to the duration of the exceptional circumstances.

It was added that "A law thus enacted is subject to the control of this Court to decide whether the aforesaid pre-requisites are satisfied, that is, whether there exists such a necessity and whether the measures taken were necessary to meet it".

It seems to me that this summing up of the law of necessity by one of the learned Judges of the Cyprus Supreme Court embodies the true essence of the doctrine, and provides useful practical guidelines for its application.

Reference may now be made to the case of F.. O. Lakanmi in which the question of the validity of a Decree issued by the Federal Military Government of Nigeria came up for examination. Nigeria was being governed by -the Republican Constitution of 1963, when a section of the Army rebelled in different parts of the country on the 15th of January, 1966. Two regional premiers were put to death and the Prime Minister of the Federation and one of his Ministers were captured and taken to an unknown destination; also some senior members of the Army were killed. The Council of Ministers met without the Prime Minister and decided to hand over the administration of the country to the Armed Forces before the situation got worsened. The Acting President of Nigeria himself announced the handing over of the administration of the country to the Armed Forces. This announcement was followed by a speech by the General Officer Commanding the Nigerian Army in which he declared that he had accepted the invitation of the Acting President to form the interim military Government, and had suspended certain parts of the Constitution relating to the office of President, the establishment of Parliament and of the office of the Prime Minister, and certain offices relating to the Regions.

The Supreme Court of Nigeria took the view that these events did not amount to a revolution, and that the situation was distinguishable from that obtaining in Dosso's ease in Pakistan, where the President bad issued a proclamation anulling the existing Constitution. It stated that the Federal Military Government of Nigeria was not a revolutionary Government, as it had made it clear before assuming power that the Constitution of the country will remain in force excepting certain sections which were being suspended. They went on to say that "We have tried to ensure that the country is governed by the Constitution and Decrees which, from time to time, are enacted when the necessity arises and are then supreme when they are in conflict with the Constitution. It is clear that the Federal Military Government decided to govern the country by means of a Constitution and Decrees. The necessity must arise before a Decree is passed ousting any portion of the Constitution. In effect, the Constitution still remains the law of the country and all laws are subject to the Constitution excepting so far as by necessity the Constitution is amended by a Decree. This does riot mean that the Constitution the country ceases to have effect as a superior norm. From the facts of the taking-over, as we have pointed out that the Federal Military Government is an interim Government of necessity concerned in the political cauldron of its inception as a means of dealing with the situation which has arisen and its main object is to protect lives and property and to maintain law and order."

The learned Judges of the Supreme Court went on to observe that "by recognising the fact that there is a doctrine of necessity, we do not alter the law but apply it to facts as they do exist." They then proceeded to examine the 'validity of the impugned Decree by posing the question whether it went beyond the requirements or demands of the necessity of the case. They came to the conclusion that the Decree in question was nothing short of a legislative judgment, an exercise of judicial power and, therefore, ultra vires and invalid under the Constitution which envisaged a clear separation of judicial and legislative functions of the State.

This judgment supports the learned Attorney-General on the point that necessity validates actions which would .otherwise not be lawful but it also spells out the principle that all actions taken in pursuance of necessity could be tested on that ground by way of judicial review. The, learned Attorney-General submits that the second part of the judgment was not accepted by the Federal Military Government of Nigeria, which proceeded to pass certain other Decrees to nullify the effect of the verdict of the Supreme Court. In support of this submission, he drew our attention to an article entitled "The Search for a Grundnorm in Nigeria---The Lakanmi's case", written by a Nigerian Jurist, named Abiola Oji. The author of the Article is critical of the judgment of the Supreme Court as he would have preferred the Court to apply Kelsen's theory regarding the legality of a successful revolution. On the question of judicial review a very pertinent observation appearing in this Article is that the Supreme Court had placed itself in the wrong by striking down a Decree which was intended to forfeit stolen public money. That may have been the reason for the reaction of the Military Government to the decision of the Court, but this reaction does not necessarily mean that the Court was in error on the plane of legal and judicial principles.

I would also like to observe that, as I am not fully conversant with the political situation and the legal traditions of Nigeria, it is not possible for me nor is it desirable to offer any comments on the propriety of the action takers by the Federal Military Government of Nigeria in the wake of the judgment of the Supreme Court in the case we are discussing. I can, however, say about our own situation, namely, that the Supreme Court of Pakistan, as at present constituted, does not feel itself under an inhibition or restraint in taking a view in this case which appears to be dictated by the highest considerations' of law, justice, equity and good, conscience, and I also see no reason why the Martial Law Administration should not accept the decision of this Court in the same spirit. I, therefore, venture to say that reference to the aftermath of the judgment of the Nigerian Supreme Court is completely misconceived and irrelevant to the legal questions we are considering here.

Reverting now to the observations made by the Court in Asma Jillani's case on the doctrine of necessity, I find that Hamoodur Rahman, C. J. has referred with approval to the decision in the Cyprus case as well as to the formulation of the doctrine by Lord Pearce, who delivered the dissenting judgment in the Privy Council in the Rhodesian case, already referred to. In that judgment, Lord Pearce had indicated three limitations for the validation of acts of the Smith Government, namely, (i) So far as they are directed to and reasonably required for ordinary .orderly running of the State; (ii) So far as they do not impair the rights of citizens under the lawful Constitution; and (iii) So far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful sovereign. The learned Chief Justice adopted these principles but preferred to treat them as basis of condonation and not legitimization, as he was dealing, ex post facto with the acts of the usurper.

A review of the concept of the law of necessity, as recognized in various jurisdictions, clearly confirms the statement made in this behalf b Muhammad Munir, C. J. in Reference by H. E.

Governor-General P L D 1955 F C 435, to the effect that an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the Constitution, the State or the society and to prevent it from dissolution. The principle has been reiterated by the Supreme Court m Asma Jillani's case with the difference that where the Court is dealing with the acts of a usurper, such acts may be condoned and T not validated by the application of the taw of necessity. It seems tome ,l therefore, that on facts, of which we have taken judicial notice, namely, that the imposition of Martial Law was impelled by .high consideration of State necessity and welfare of the people, the extra-constitutional step taken by the Chief of the Army Staff to overthrow the Government of Mr. Z. A. Bhutto as well as the Provincial Governments and to dissolve the Federal and the Provincial Legislatures stands validated in accordance with the doctrine of necessity.

The question now arises as to what is the extent and scope of the powers which the Chief Martial Law Administrator may exercise during the temporary period for which he has taken control of the administration in Pakistan. It is contended by the learned Attorney-General that once the take-over is validated on the-principle of necessity, then the Chief Martial Law Administrator would have the right to govern the country in any manner he thinks best, and the Courts in Pakistan will be bound by the provisions of the Laws (Continuance in Force) Order, 1977, which must henceforth be treated as a supra-Constitutional instrument, binding all authorities in Pakistan. He seeks to re-inforce this submission by referring to the implications of Martial Law as described in Corpus Juris Secundum Vol. 93, and "Salmond on Jurisprudence", p. 190, 11th Edition.

According to the definition given on p. 115 of the Corpus Juris Secundum, Martial Law, or more appropriately martial rule, is the temporary government by military force and authority of territory in which, by reason of the existence of war or public commotion, the civil government is inadequate to the preservation of order and the enforcement of law. The definition continues to add that "In strictness it is not law at all, but rather a cessation of all municipal law as an incident of jus belli and because of paramount necessity, it depends, for its existence, operation and extent, on the imminence of public peril and the obligation to provide for the general safety. It is essentially a law or rule of force, a purely military measure, and in final analysis is only the will of the Officer Commanding the Military Force. As the offspring of necessity, it transcends and displaces the ordinary laws of the land, and it applies alike to military and non-military persons and is exercisable alike over friends and enemies, citizens and aliens." The authors also state that "The validity of Martial Law is always a judicial question", and the establishment of Martial Law does not itself oust or suspend civil authority or jurisdiction, but is rather a recognition that the civil authority had been suspended or has broken down as a result of the conditions inducing the proclamation of martial rule.

According to Salmond, there are three kinds of martial law, namely, (i) the law for the discipline and the government of the Army itself; or (ii) the law by which the Army in time of war governs

foreign territory in its military occupation outside the realm; or (iii) the law by which in time of war the Army governs the realm, which is in derogation e" civil law, so far as required by military necessity and the public safety. In the present context, we are concerned with the third and last kind of Martial Law. After discussing various legal opinions as to the legality of such a Martial Law, the author says that "It is sufficient to say that the better opinion would seem to be that even within the realm itself the existence of the state of war and of national danger justifies. in law the temporary establishment of a system of military government and military justice in derogation of the ordinary law of the land, in so far as this is reasonably deemed necessary for the public safety .... with the acts of military authorities done in pursuance of such a system the civil Courts of law will not concern themselves in time of war. In short, the legal basis of Martial Law in this third sense is simply the common law doctrine of necessity."

In an earlier part of this judgment, I have stated that it was not necessary to discuss at any length the various kinds of Martial Law, for the reason that the legal character of the change which has taken place in Pakistan was not dependent upon the name given to the new regime, as the authorities overthrowing Mr. Z. A. Bhutto could have governed by decree or by Martial Law Regulations etc. once they had seized power by an extra-Constitutional step. In spite of the reference made by the learned Attorney-General to the textbooks mentioned above, I am of the view that the definitions given here are irrelevant. We are not dealing with a situation contemplated in the statements relied upon by the learned Attorney-General; rather with a situation of a more fundamental character, where the constitutional machinery has broken down or its authority has been eroded by factors of a political nature. The disturbances which. ensued as a consequence were not the direct cause, they were only the result of a fundamental malady which was of a constitutional nature. 1t is also to be noticed that the Proclamation of Martial Law and the speech made by the Chief Martial Law Administrator on the evening of the 5th of July 1977 clearly speak of the civilian President continuing in office under the Constitution, and they also contemplate that the civil Courts including the High Courts and the Supreme Court shall continue to function as before, subject to certain limitations spelt out in the Laws (Continuance in Force) Order, to which I shall advert later. I mention these facts to show that it would be inappropriate to judge the present situation by reference to classical statements as to the state of war contemplated by textbook writers in relation to martial law.

In order to determine the true nature of the change, we must examine, as already stated, all the surrounding circumstances including the motivation of those who have brought about the change and the objectives declared by them as justifying the change. I would like to clarify here that the use of what may be described as "the declaration of intent" is not to be construed in the limited sense in which the preamble to a statute or even the Constitution may be looked at for ascertaining its true meaning. We are still in the realm of ascertaining the true legal character of the abrupt political change which has been brought about by means of an extra-Constitutional measure, and for this reason the declaration of intent is relevant for this higher purpose, and is not to be confused with the limited use which may be made of a preamble to a formal statute.

I have already referred in another context, to the speech made by the Chief Martial Law Administrator on the evening of the 5th of July 1977 to explain the reasons for his take-over of the administration. He stated inter alia that:-

"But the Constitution has not been abrogated. Only the operation of certain parts of the Constitution has been held in abeyance. Mr. Fazal Elahi Chaudhry has very kindly consented to continue to discharge his duties as President of Pakistan as heretofore under the same Constitution. I am grateful to him for this. To assist him in the discharge of his national duties, a four-member Military Council has been formed. The Council consists of the Chairman, Joint Chiefs of Stag', and Chiefs of Staff of the Army, Navy and the Air Force.

I will discharge the duties of the Chief of Army Staff and Chief Martial Law Administrator. Martial Law Orders and instructions as and when required will be issued under my orders."

He further stated on this occasion that:

"I want to make it absolutely clear that neither I have any political ambitions nor does the Army want to be detracted from its profession of soldiering. I was obliged to step in to fill in the vacuum created by the political leaders. I have accepted this challenge as a true soldier of Islam. My sole aim is to organise free and fair elections which would be held in October this year. Soon after the polls power will be transferred to the elected representatives of the people. I give a solemn assurance that I will not deviate from this schedule. During the next three months my total attention will be concentrated on the holding of elections and I would not like to .dissipate my powers and energies as Chief Martial Law Administrator on anything else."

As to the place of Judiciary, he stated that:-

"It will not be out of place to mention here that I hold the Judiciary of the country in high esteem. I will do my best to refrain from doing anything which is likely to restrict the power of the Judiciary. However, under unavoidable circumstances, if and when Martial Law Orders and Martial Law Regulations are issued, they would not be challenged in any Court of law."

It will be seen that the declared objectives of the imposition of Martial Law are to create conditions suitable for the holding of free and fair elections in terms of the 1973 Constitution, which was not being abrogated, and only certain parts of which were being held in abeyance, namely, the parts dealing with the Federal and the Provincial executives and Legislatures. The President of Pakistan was to continue to discharge his duties as heretofore under the same Constitution. Soon after the polls the power is to be transferred to the elected representatives of the people. It is true that owing to the necessity of completing the process of accountability of holders of public offices, the holding of elections had to be postponed for the time being but the declared) intention of the Chief Martial Law Administrator still remains the same, namely, that he has stepped in for a temporary period and for the limited purpose of arranging free and fair elections so as to enable the country to return to a democratic way of life.

In the presence of these unambiguous declarations, it would be high unfair and uncharitable to attribute any other intention to the Chief Martian Law Administrator, and to insinuate that he has not assumed power for the purposes stated by him, or that he does not intend to restore democratic institutions in terms of the 1973 Constitution. Such being the case, in m opinion. the remarks made by De Smith in his book "Constitutional an Administrative Law, to which reference has already been made earlier, appeal with full force to the situation prevailing at present in Pakistan, namely:-

"In some situations where unconstitutional action has been taken by person wielding effective political power, it is open to a Judge to steer middle course. He may find it possible to ask that the frame world of the pre-existing order survives but the deviation from these norm can be justified on the grounds of necessity. The principle of necessity, rendering lawful what would otherwise be unlawful is not unknown to English law; there is a defence of necessity, albeit of uncertain scope, in criminal law and in constitutional law, the application o martial law is but an extended application of this concept. But the necessity must be proportionate to the evil to be averted, and acceptance of the principle does not normally imply total abdication from judicial review or acquiescence in the supersession of the Legal Order; it t essentially a transient phenomenon."

As a result, the true legal position which, therefore, emerges is:-

(i) That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity;

(ii) That the President of Pakistan and the superior Courts continue to function under the Constitution. The mere fact that the Judges of the superior Courts have taken a new oath after the Proclamation of Martial Law, does not in any manner derogate from this position, as the Courts had been originally established under the 1973 Constitution, and have continued in their functions in spite of the proclamation of Martial Law;

(iii) That the Chief Martial Law Administrator, having validly assumed power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity, namely:-

(a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power toll amend it;

(b) All acts which tend to advance or promote the good of the people;

(c) All acts required to be done for the ordinary orderly running of the State; and

(d) All such measures as would establish or lead to the establishment of the declared objectives of the proclamation of Martial Law, namely, restoration of law and order, and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of. restoration of democratic institutions under the 1973 Constitution;

(iv) That these acts, or any of them, may be performed or carried out by means of Presidential Orders, Ordinances, Martial Law Regulations, or. Orders, as the occasion may require; and

(v) That the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law' Authorities, if challenged, in the light of the principles underlying the, law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance.

This last point needs a little explanation. In the body of this judgment opinions of certain textbook writers and contemporary jurists have been quoted in support of the proposition that the Courts established under the pre-existing Legal Order continue to have the power and jurisdiction t adjudicate upon the validity and effectiveness of the new Legal Order. As I have held that the new Legal Order is only for a temporary period, and for specified and limited purpose, and does not seek to destroy the old Legal Order but merely to hold certain parts thereof in abeyance or to subject it to certain limitations on the ground of State necessity or on the principle d salus populi suprema lex, the superior Courts continue to remain the Judges of the validity of the actions of the new regime in the light of the doctrine y of necessity, for the new regime then represents not a new Legal Order, but only a phase of constitutional deviation dictated by necessity.

There is yet another, and a stronger reason for holding that the power of judicial review continues. The 1973 Constitution provides for a clear trichotomy of powers between the executive, legislative and judicial organs of the State. However, owing to reasons of necessity, the executive and the legislative power now stands combined in one authority, for the reason that these two organs of the State had lost their constitutional and moral authority in the circumstances arising since the 7th of March 1977, but no such considerations arose in regard to the judicial organ of the State. Accordingly, on no principle of necessity could powers of judicial review vested in the superior Courts under the 1973 Constitution, be taken away.

Next, even if for any reason the principle or power of judicial review embodied in the relevant provisions of the 1973 Constitution be held not to. be available under the new dispensation, the fact remains that the ideology, of Pakistan embodying the doctrine that sovereignty belongs to Allah and is to be exercised on his behalf as a sacred trust by the chosen representatives of the people, strongly militates against placing the ruler for the time being above the law, and not accountable to any one in the realm. Muslim rulers have always regarded themselves as being accountable to the Courts of the land for all their actions and have never claimed exemption even from personal appearance in the Courts. The Courts of Justice are an embodiment and a symbol of the conscience of the Millat (Muslim community), and provide an effective safeguard for the rights of the subjects. On this principle a well, the power of judicial review for judging the validity of the actions of the Martial Law Authorities must continue to remain in the superior Courts.

Lastly, the Court is bound to take note of the fact that already several instances have been brought to its notice where the ordinary civil rights of the people are being interfered with by the subordinate Martial La Authorities even though the laws of the land, which have been kept alive under the Laws (Continuance in Force) Order, 1977, make full provision for their adjudication. In some cases, interference has occurred even when the w contending parties had already been litigating in the civil Courts regarding the same disputes. The necessity which justified the

Proclamation of Martial Law, did not arise owing to the failure of the Courts to adjudicate on these matters Such matters must, therefore, continue to fall outside the purview of the Martial Law Authorities, and the only remedy to the citizens against any such encroachment can be by way of judicial review in the superior Courts.

I now proceed to examine the provisions of the Proclamation as well as of the Laws (Continuance in Force) Order,. 1977, in the light of the principles just stated. There has been considerable argument at the Bar as to the correct description of these legal instruments. Mr. Sharifuddin Pirzada would like to describe them as supra-Constitutional instruments, for, in his opinion, they override the 1973 Constitution and are binding on every one by virtue of their oven force. As I am not persuaded to accept this last contention for the reason already stated, namely, that the power of the Court to test the validity of all actions of the Chief Martial Law Administrator on the touchstone of necessity remains, I would accordingly describe these instruments as being of an extra-Constitutional nature so as to conform to the description of the action by virtue of which the Chief Martial Law Administrator has assumed the administration of Pakistan.

For facility of reference, the Proclamation and the Laws (Continuance in Force) Order, 1977, as originally promulgated may be reproduced here:-

"PROCLAMATION

Whereas, I, General Mohammad Zia-ul-Haq, Chief of the Army Staff, have proclaimed Martial Law throughout Pakistan and assumed the office of the Chief Martial Law Administrator, hereby order and proclaim as follows:-

(A) The Constitution of the Islamic Republic of Pakistan shall remain in abeyance;

(B) The National Assembly. the Senate and the Provincial Assemblies ' shall stand dissolved;

(C) The Prune Minister, the Federal Ministers, Ministers of State, Advisers to the Prime Minister, the Speaker and Deputy Speaker of the National Assembly and the Provincial .Assemblies, the

Chairman and Deputy Chairman of the Senate, the Provincial Governors, the Provincial Chief Ministers and the Provincial Ministers shall cease to hold office;

(D) The President of Pakistan shall continue in Office ; and

(E) The whole of Pakistan will come under Martial Law.

THE LAWS (CONTINUANCE IN FORCE) ORDER, 1977

C. M. L. A. ORDER NO. 1 OF 1977

In pursuance of the Proclamation of the fifth day of July 1977 and in exercise of all powers enabling him in that behalf, the Chief Martial Law Administrator is pleased to make and promulgate the following Order:

1----(1) This Order may be called the Laws (Continuance in Force) Order, 1977.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

2.--(1) Notwithstanding the abeyance of the provisions of the Constitution of the Islamic Republic of Pakistan hereinafter referred to as the Constitution, Pakistan. shall, subject to this Order and any order made by the President and any regulation made by the Chief Martial Law Administrator, be governed as nearly as may be in accordance with the Constitution.

(2) Subject as aforesaid, all Courts in existence immediately before the commencement of this Order shall continue to function and to exercise their respective powers and jurisdictions:

Provided that the Supreme Court or a High Court shall not have the power to make any order of the nature mentioned in Article 199 of the ., Constitution against the Chief Martial Law Administrator or a Martial s Law Administrator or an. person exercising powers or jurisdiction under the authority of either.

(3) The Fundamental Rights conferred by Chapter I of Part II of the Constitution, and all proceedings pending in any Court, in so far as they are for the enforcement of any of those rights shall stand suspended.

3.- (1) The President shall act on and in accordance with the advice of the Chief Martial Law Administrator.

(2) The Governor of a Province shall act on, and in accordance with, the advice of the Martial Law Administrator appointed by the Chief Martial Law Administrator for the Province.

4.-(1) No Court, tribunal or other authority shall call or permit to be called in question the proclamation of the fifth day of July, 1977, or any Order or Ordinance made in pursuance thereof or any Martial Law Regulation or Martial Law Order.

(2) No judgment, decree, writ, order or process whatsoever shall be made or issued by a Court or tribunal against the Chief Martial Law Administrator or any Martial Law Authority exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.

5.-(1) Notwithstanding the abeyance of the provisions of the Constitution, but subject to any order of the President or regulation made by the Chief Martial Law Administrator, all laws, other than the Constitution, and all Ordinances, Orders-in-Council, Orders made by the President, Rules, by-laws, regulations, notifications and other legal instruments in Pakistan or any part thereof, or having extra-territorial validity shall, so far as may be and with such adaptation as the President may see fit to make, continue in force until altered, amended or repealed by competent authority.

(2) In clause (1) "in force", in relation to any law, means having effect as law whether or not the law has been brought into operation.

6. Subject to clause (2) of Article 3, the powers of a Governor . shall be those which he would have had the Federal Government directed him to assume on its behalf all the functions of the Government of the province under the provisions of Article 232 of the Constitution.

7.-(1) An Ordinance promulgated by the President or by the Governor of a province shall not be subject to the limitation as to its duration prescribed in the Constitution.

(2) The provisions of clause (1) shall also apply to an Ordinance ?Which was in force immediately before the commencement of this Order.

8. All persons who, immediately before the commencement of this Order, were in the service of Pakistan as defined in Article 260 of the Constitution and those persons who immediately before such commencement were in office as Judge of the Supreme Court or a High Court or Auditor-General, shall continue in the said service on the same terms and conditions and shall enjoy the same privileges, if any.

9. Any provision in any law, providing for the reference of a detention order to a Review Board shall be of no effect.

10. The Proclamation of Emergency referred to in Article 280 of the Constitution, as in force immediately before the commencement of this Order, shall continue in force."

It will be seen that the Proclamation embodies and describes in legal form, the extra-constitutional action which the Chief of the Army Staff has taken on the ground of necessity. The proclamation must, therefore, be held valid for the same reason; in fact, the entire controversy dealt with in the preceding pages has concerned this Proclamation and nothing else.

A perusal of the provisions of the Laws (Continuance in Force) Orderly also shows that they are primarily designed to give effect to the purposes of the Proclamation. As however this Order is an offspring of necessity, the superior Courts continue to have the power of judicial review, notwithstanding anything to the contrary contained in this Order, to test the validity of its provisions and any action taken there under, in the light of the principles regulating the application of the law and doctrine of necessity, as already set put earlier.

I now turn to the examination of the last question arising in this case, namely, whether the Fundamental Rights can still be enforced in spite of the prohibition contained in clause (3) of Article 2 of the Laws (Continuance in Force) Order, vi:., that "The Fundamental Rights conferred by Chapter I of Part II of the Constitution, and all proceedings pending in any Court, in so far as they are for the enforcement of any of those rights shall stand suspended." '1 he contention of Mr. Yahya Bakhtiar is that the right to enforce the Fundamental Rights could be suspended only during the continuance of an Emergency under Article 232 of the Constitution, and that too in terms of an Order made by the President under clause (2) of Article 233 thereof, but the Emergency already proclaimed in Pakistan has since been revoked by the respondent with effect from the 15th of September 1977, with the result that the Fundamental Rights stand revived. Messrs A. K. Brohi and Sharifuddin Pirzada, however, contend that in spite of the revocation of Emergency, the Fundamental Rights remain suspended under Article 2(3) of the Laws (Continuance in Force) Order, 1977, which is independent of the Emergency contemplated in Article 232 of the Constitution.

It may be stated that the Emergency proclaimed by General Agha Mohammad Yahya Khan, as President of Pakistan, on the 23rd of November 1971, was continued in force under Article 260 of the 1973 Constitution. It was varied by a Proclamation on the 21st of April 1977 so as to include internal Emergency under Article 236 of the Constitution, and it was revoked altogether on the 15th of September 1977. An order was made on the 15th of August 1973 by the President under Article 233(2) of the Constitution suspending the right to enforce certain specified Fundamental Rights, but this Order was rescinded on the 14th of August 1974.

The right to enforce Fundamental Rights was again suspended under Article 245 of the Constitution with effect from the 21st of April 1977, in respect of areas where the Armed Forces had been called out in aid of civil power under the directions of the Federal Government. The present position, however, is that the Emergency having been revoked altogether with effect from the 15th of September 1977, there is no operative order in the field in terms of the Constitution, suspending the right to enforce Fundamental Rights.

The question, therefore, is whether the provision embodied in this behalf in clause (3) of Article 2 of the Laws (Continuance in Force) Order is valid in the light of the principles governing the application of the law of necessity. One of the conditions stated in this behalf is that the Chief Martial Law Administrator is entitled to perform all acts and take such legislative measures which are in accordance with, or could have been made under the 1973 Constitution. Now, the Constitution does permit the suspension of the right to enforce Fundamental Rights in case of an Emergency of the nature contemplated in Article 232 thereof. Clause (1) of this Article says that "If the President is satisfied that a grave Emergency exists in which the security of Pakistan or any part thereof is threatened by war or external aggression or by internal disturbances beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency." If, therefore, it is found that the situation of the kind contemplated by this provision of the Constitution exists in Pakistan, then the Chief Martial Law Administrator would be entitled to make an order of the kind which could be made under clause (2) of Article 233 of the Constitution suspending the right to enforce. Fundamental Rights.

It has already been seen that the conditions culminating in the Proclamation of Martial Law on the 5th of July 1977, were so grave that the very existence of the country was threatened, that chaos and bloodshed, was apprehended and there was complete erosion of the constitutional authority of the Federal Government, leave alone that of the various Provincial Governments. The situation had indeed deteriorated to such an extent that it justified an extra-Constitutional step, resulting in the suspension of certain parts of the Constitution itself by the Armed Forces. Such being the case, the situation was obviously at least of the kind contemplated by clause (1) of Article 232 of the Constitution. In the circumstances, the Chief Martial Law Administrator was justified in providing in clause (3) of Article 2 of the Laws (Continuance in Force) Order that the right to enforce Fundamental Rights shall be suspend-: ed. It was clearly an order which could have been made under the 1973 Constitution. No exception can, therefore, be taken to the validity of this provision.

As the present petition under clause (3) of Article 184 of the Constitution is intended for the enforcement of certain Fundamental Rights of the detenus, it is not maintainable for the reason that the Fundamental Rights stand validly suspended since the 5th of July 1977, under clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977. On this view of the matter, it is not necessary for this Court to examine the contention that the Martial Law Order No. 12 under which detentions have been ordered is not valid, or that the detentions are mala fide.

The final position as emerging from this somewhat lengthy discussion of the various questions arising in this case may briefly be summed up as follows :-

(i) That the legal character and validity of any abrupt political change, brought about in a manner not contemplated by the .pre-existing Constitution or Legal Order, cannot be judged by the sole criterion of its success or effectiveness, as contemplated by Kelsen's pure theory of law. Not only has this theory not been universally accepted, or applied, it is also open to serious criticism on the ground that, by making effectiveness of the political change as the sole condition or criterion of its legality, it excludes from consideration sociological factors or morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. The legal consequences of such a change must, therefore, be determined by a consideration of the total milieu in which the change is brought about, including the motivation of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed ;

(ii) That in any case the theory of revoluntionary legality can have no application or relevance to a situation where the breach of legal continuity -is of a purely temporary nature and for a specified limited purpose Such a phenomenon can more appropriately be described as one of constitutional deviation rather than of revolution ;

(iii) That examined in this light, the Proclamation of Martial Law on the 5th of July 1977, appears to be an extra-Constitutional step necessitated by the complete break-down and erosion of the constitutional and moral authority of the Government of Mr. Z. A. Bhutto, as a result of the unprecedented protest movement launched by the Pakistan National Alliance against the alleged massive rigging of elections to the National Assembly, held on the 7th of March 1977. It was a situation for which the Constitution provided no solution, and the Armed Forces had, therefore, to intervene to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster ;

(iv) That the imposition of Martial Law, therefore, stands validated on the doctrine of necessity, and the Chief Martial Law Administrator is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity ;

(v) That it has also become clear from a review of the events resulting in the culmination of Martial Law, and the declaration of intent made by the Chief Martial Law Administrator, that the 1973 Constitution still remains the supreme law, subject to the condition that certain parts thereof have been held in abeyance on account of State necessity; and the President of Pakistan. as well as the superior Courts continue to function under this Constitution. In other words, this is not a case where the old Legal Order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a temporary period and for a specified and limited objective, namely,

the restoration of law and order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of the restoration of democratic institutions under the 1973 Constitution ;

(vi) That, accordingly, the superior Courts continue to have the power of judicial review to judge the validity of any act or action. of the Martial Law Authorities if challenged in the light of the principles underlying the law of necessity as set out in this judgment. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance ; and

(vii) That the provisions contained in clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977, suspending the right to enforce Fundamental Rights are valid for the reason that the situation prevailing in the country was obviously of such a nature as to amount to an Emergency contemplated by clause (1) of Article 232 of the Constitution, and the right to enforce Fundamental Rights could, therefore, be legitimately suspended by an order of the kind which could have been made under clause (2) of Article 233 of the Constitution.

As a result, the present petition fails and is hereby dismissed. However, it will be for the detenus, if so advised, to move the High Courts concerned under Article 199 of the Constitution.

Before parting with this judgment, it is necessary to refer to certain misgivings and apprehensions expressed by Mr. Yahya Bakhtiar, learned counsel for the petitioner, to the effect that the postponement of the elections scheduled to be held on the 18th of October 1977, has cast a shadow on the declared objectives of the Chief Martial Law Administrator. After seeking instructions from his client, Mr. A. K. Brohi has informed the Court that the Chief Martial Law Administrator intends to hold elections as soon as the process of the accountability of the holders of public offices is completed, and the time factor depends upon the speed with which these cases are disposed of by the civil Courts concerned. The learned Attorney-General has stated at the Bar that, in his opinion, a period of about six months is needed for this purpose, and thereafter it will be possible to hold the elections within two months.

While the Court does not consider it appropriate to issue any directions, as suggested by Mr. Yahya Bakhtiar, as to a definite time-table for the holding of elections, the Court would like to state in clear terms that it has found it possible to validate the extra-Constitutional action of the Chief Martial Law Administrator not only for the reason that he stepped in to save the country at a time

of grave national crisis and constitutional break-down, but also because of the solemn pledge given by him that the period of constitutional deviation shall be of as short a duration as possible, and that during this period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections, leading to the restoration of democratic rule in accordance with the dictates of the Constitution. The Court, therefore, expects the Chief Martial Law Administrator to redeem this pledge, which must be construed in the nature of a mandate from the people of Pakistan, who have, by and large, willingly accepted his administration as the interim Government of Pakistan.

In the end, we would like to express our deep appreciation for the valuable assistance rendered by the learned Attorney-General for Pakistan, Mr. Sharifuddin Pirzada, and the learned counsel for the parties, namely, Mr. Yahya Bakhtiar for the petitioner and Mr. A. K. Brohi for the respondent, in the decision of this case, which has raised difficult and complicated questions of constitutional law.

WAHEEDUDDIN AHMAD, J.-I have had the advantage of reading the judgment of my Lord the Chief Justice. I am in respectful agreement with the reasoning and conclusions reached by him. I cannot add anything further usefully to the contribution already made by him.

I was a party to the judgment of this Court in Asma Jillani's case an I am of the considered view that the principles laid down in the above ca are not applicable to the facts of the present case. In the circumstances of the present case the principles enunciated in the Reference by His Excellence The Governor-General (P L D 1955 F C 435) will have to be invoked for solving the present constitutional dead-lock.

MUHAMMAD AFZAL CHEEMA, J.-I have had the privilege of going through the elaborate judgment proposed to be delivered by my Lord the Chief Justice and am in respectful agreement with the views expressed and the conclusions reached therein. However, I feel tempted to make a few observations in order to highlight one or two aspects of my Lord's judgment.

1t needs hardly to be mentioned that this case besides involving determination of extremely complicated constitutional issues having far-reaching implications and a direct and immediate impact on the entire nation which is anxiously awaiting its decision, also calls for the resolution of the conflict of views expressed by this Court in Dosso's case (P L D 1958 S C (Pak.) 533) and Asma Jillani's case (P L D 1972 S C 139) or reaffirmation of one of them. Both the judgments having been widely published and internationally commented upon.

Mr. Brohi's arguments. were mainly directed towards the defence of the Kelsonian theory and if accepted would have in substance led to the restoration of this Court's dictum in Dosso's case. It may be observed with respect that Islam being the ideological foundation of the State of Pakistan any man-made legal theory divorced from morality and coming into conflict with the Divine Law of Islam would be wholly irrelevant for our purposes to the extent of its repugnancy to the latter. Unlike a pure theory of law, Islamic principles are subjectively centred round morality and are aimed at the establishment of an C orderly and peaceful moral society by taking an equally, pragmatic view in the matter of their application and placing the security safety and welfare of the people about everything else. The doctrine of necessity is an inevitable outcome of this realistic approach and has been recognized by Islam both in the individual as well as the collective field.

The object of legal principles is to ensure proper regulation of human conduct and behaviour to the benefit of the individual and the society. Islam has permitted and condoned a departure from their strict observance and application in cases of extreme necessity and compulsion. The principle of public welfare (Salus populi est supremo lex) follows as a necessary corollary from this. There are several instances when in a peculiar situation strict compliance with the Qur'anic injunction was found to result in greater hardship and mischief and likely to create more complications the remedy proving worse than the disease, the Holy Prophet or the Caliphs did not insist on its enforcement and temporarily suspended it on ground of expediency. The doctrine of necessity is not, therefore, a juristic concept of the West but is of Islamic origin having been based on and deduced from the following Verses of the Holy Qur'an :-

(1) Al- Baqara II-173;

He hath only forbidden you dead meat, and blood, and the flesh of swine, and that on which any other name hath been invoked besides that of God. But if one is forced by necessity, without lawful disobedience, nor transgressing due limits, then he is guiltless, for God is oft-forgiving Most Merciful.

(2) Al-Maeda V=4;

Forbidden to you (for food) are dead meat, blood, the flesh of swine, and that on which hath been invoked the name of other than God . . . . but .if any one is forced by hunger, with no inclination to transgression, God is indeed of forgiving, Most Merciful.

(3) Al-Inaam VI=119:

He has explained to you in detail what is forbidden to you except under compulsion of necessity.

(4) Al-Nahal XVI=115:

He has only forbidden you dead meat and blood and the flesh of swine…….but if one is forced by necessity nor transgressing due limits, then God is oft-giving, Most Merciful.

The Muslim exegesists and jurists have also deduced the above principle from Verse No. 106 of Sura XVI: "Any one who after accepting faith in God utters unbelief except under compulsion remaining firm in faith . . . . . ."

It would be abundantly clear from this that in order to save his skin, a Muslim has been permitted even to go to the extent of a verbal denial of his belief and making a sacrilegious utterance.

These Verses found further support from the following traditions of the Holy Prophet (peace be upon him) .-

This in substance means that the principal objective of avoiding harm or damage should always be kept in view and never lost sight of.

In these two traditions of which one is reported from (Umme-Kalsoom) and the other from (Asma Binte Yazid), the Holy Prophet condoned misstatements of fact made bona fide .during (i) war, (ii) for effecting compromise amongst the people in general, and (iii) for bringing about reconciliation between husband and wife in particular.

It would not be out of place to refer in context to two important historical incidents. One is that the Holy Prophet prohibited the cutting of hands for an established theft during battle and the other is that of suspension of the imposition of this Hadd by Caliph Omar during the year of famine.

From the above verses, traditions and incidents the Muslim exegesis's and doctors formulated the following juristic principles :-

(1) Necessities make permissible acts otherwise, prohibited.

(2) Harm or damage has to be done away with.

(3) Specific harm or damage can be tolerated in order to obviate general harm or damage.

(4) While confronted with two evils one should choose the lesser evil.

(5) The obviation of a greater harm may be sought through a lesser harm.

(6) Removal of evils is more important than achievement of good and shall take precedence over it as the Sharia pays more heed to the observance of prohibitions than compliance with affirmative commandments.

According to Imam Al-Ghazali the doctrine of necessity could be legitimately invoked for the preservation of (i) religion (ii) life (iii) reason (iv) progeny and (v) property .

The raison d'etre of the doctrine of individual necessity applies with full force to the doctrine of State necessity which is nearly an extension of the v former -and is invoked in graver situations of National importance and comprehension.

In Verse 59 of "Sura AL-Nissa" the Muslims have been enjoined to submit to Allah, His messenger and those in authority from amongst them.

The obedience of the latter is not, however, absolute and unqualified but is subject to the condition that the commands of the ruler should be in conformity with and not in violation of the Islamic injunctions so much so that even the allegiance to the Holy Prophet has been made contingent on this very condition as would be clear from Verse 12l of Sura Al-Mumtahnah :-.

They shall not disobey thee in any just matter.

This is further clear from the following two traditions of the Holy Prophet (peace be upon him);--

(1) Whoever disobeys Allah shall not be obeyed.

(2) There is no obedience of the creature in disobedience of the Creator.

On assumption of the Office of Amir-ul-Momineen, Abu Bakar, the First Caliph addressed the audience in the following words :-

Obey me so long as I obey God and His messenger and if I disobey them don't obey me.

It is thus abundantly clear that submission to the authority of the ruler and obedience to his commands does not extend to illegal and un-Islamic directives or orders. During the Umayyad and the Abbasid Caliphates when the Muslims had to deal with unjust and tyrannical rulers, the

Muslim doctors were often confronted with the problem as to whether the community should unquestionably submit to the authority of these rulers, or whether in view of the above injunctions and traditions the people were under an obligation to rise and revolt against them. It would not be out of place to refer in this context to two technical expressions used by the Muslim jurists. One is "Umam Matghalib" a ruler who captures political power and takes effective control of the administration of the country. In fact " Redulmuhtar" refers to three modes of appointment of the Imam : (i) By the allegiance of the leading personalities ; (ii) By nomination of the predecessor ; and (iii) By capturing political power by force i.e "Umam Matghalib". According to the Hanfis such a ruler could be accepted on the. doctrine of necessity. The other expression is "Kharooj" i. e. to rise in revolt against the ruler of the time who is unjust, tyrannical and habitually disobeys the Islamic injunctions. It would be interesting to note that Imam Abu Hanifa had used the technical expressions of Imam Bil-Haq and Imam Bil-Fehl which are respectively synonymous -with de jute and de facto, the two oft-repeated terms with which we are so familiar. In fact one is deeply impressed by the most reasonable and realistic attitude of the Muslim jurists in regard to this very sensitive and complicated issue. While on the one hand great emphasis is laid on the maximum tolerance of an unjust ruler in the wider interests of public order, prevention of chaos, and bloodshed, such considerations become irrelevant when he openly transgresses the limits of Allah, and is unjust and tyrannical. Taking a balanced view Imam Abu Hanifa adopted a middle of the road course and did not subscribe to the extremist stand taken by the Moatazzilites and the Khawarij. on one hand and the reactionary Murhiba on the other. He held that "Kharooj" against an unjust ruler was not lawful so long as there was no interference with the orderly running of the Government, people were free to offer prayers. perform pilgrimage and the Courts of law continued to function properly. His own conduct in supporting the "Kharooj of Zain Bin Ali grandson of Imam Hussain and brother of Imam Baqar in the first instance and subsequently of Muhammad Bin Abdullah in 145 Hijra against the Abbasid Caliph Al-Mansoor is also very significant. This balanced attitude of Imam Abu Hanifa was based on a rational interpretation of the two apparently divergent traditions of the Holy Prophet. In one of these emphasis was laid on the imperativeness of the obedience of "Umam Matghalib" a de facto ruler and it was observed that people were under an obligation to obey him even if he were an ugly abyssinian with chopped off nose provided he captured power with a bona fide intention of delivering the Nation from the clutches of an unjust tyrant and himself observed the limitats of Allah. In the other the Muslims have been enjoined to rise in revolt against an unjust ruler and if killed in action have been described as martyrs.

Coming now to the circumstances of the instant case, my Lord the Chief Justice has fully explained the factual position as it obtained before the Arm took over on 5-7-1977. The Court could not fail to take judicial notice o F the crisis which developed by way of protest against the alleged rigging of the General Elections when the entire nation rose against the Government of Mr. Bhutto. There was complete break-down of law and order, several precious lives were lost and the administration of the major cities had to be handed over by him to the Armed Forces which too were unable to cope with the situation and restore normalcy. The allegations of huge purchases of arms and their large-scale distribution amongst the members of the PPP in the country with a view to prepare them for civil war do not appear to have been specifically denied in the rejoinders filed by the petitioner or by Mr. Bhutto himself. It would not therefore, be too much to hold that the country

was on the verge of a conflagration. The Constitution did not contemplate such a situation nor did it offer a resolution of the crisis. It was in this background that respondent No. 1 moved in, for a temporary period and with the limited object of restoring normalcy and holding free and fair Elections as repeatedly declared by him. The doctrine of necessity is, therefore, attracted with full force in these circumstances as explained by my Lord the Chief Justice. I fully endorse his Lordship's exposition of the constitutional position in regard to the scope of the validity of the actions of the new Regime and the conditions and limitations attached thereto.

MUHAMMAD AKRAM, J.-I have the advantage of having gone through the leading judgment proposed by my Lord, the Chief Justice for announcement. I have no hesitation in fully agreeing with his masterly. analysis of the facts, exposition of the legal tangles and conclusions so lucidly recorded by him in this case involving very difficult and complicated questions of great constitutional importance. I would, however, respectfully like to dilate upon some of the legal aspects of Hans Kelsen's Pure Theory of Law (positivism), the implications of the Martial Law currently in-force in the country and the doctrine of necessity, invoked before us, merely to supplement what has already fallen from his pen.

Hans Kelsen's Pure. Theory of Law.

Mr. A. K. Brohi, appearing for the Federation of Pakistan, with his great erudition and philosophy that he brought. to bear into this case, has done his best to analyses and explain this theory and its implications at length before us. Therefore, in fairness to him it is necessary in the first instance to enter upon a detailed analysis of this theory as advocated before us.

The positivist movement started with the beginning of the nineteenth century. It represented a reaction against the a priori method of thinking that characterised the preceding age. Prevailing theories of Natural Law shared the common feature of turning away from the realities of actual law in order to discover in nature or reason principles of universal validity. Actual laws were then explained or condemned according to these canons. But the positivists believed that law as it is actually laid down (positivism) has to be kept separate from the law that ought to be. They made the distinction between "what the law is" from "what the law ought to be".

Bentham (1748 1832) and . Austin (1790-1859) were the protagonists of the British theory of positivism with their firm belief in the separation of law and morals. Thus according to them laws even if morally outrageous, were still laws. After them Professor H. L. A. Hart is regarded as the leading contemporary representative of British positivism. He defends the Positivist School of

Jurisprudence from many of the criticisms which have been levied against its insistence on distinguishing the law that "is" from the law that "ought" to be.

But the pure theory of law propounded by Professor Hans Kelsen (1881-1973) marks the refined development to date of analytical positivism. He argued that a theory of Law must deal with law as actually laid down, not as it' ought to and it must be shorn of and free from all variable factors such as ethics, politics, sociology, history etc. It must, in other words, be "pure" (rein). Knowledge of law, according to Kelsen, meant a knowledge of "norms". ; and a norm is a proposition in hypothetical form. Jurisprudence consists of the examination of the nature and organisation of normative propositions. It includes all norms created in the process of applying some general norm to a. specific action. According to Kelsen, a dynamic system is one .in which fresh norms are constantly being created on the authority of an original, or basic norm, a "Grundnorm". Around these points, Kelsen unfolded his picture of law. It appears to him as a hierarchy of norms with the "Grundnorm" forming the apex of the pyramid. If a new fact or event is observed which fails to conform to a scientific "law", then that "law" has to be modified to include it. It is a cardinal feature of Kelsen's theory that laws consist of "ought" propositions. The prescription of sanction imparts law-quality to a norm, or putting it in another way, "Law is the primary norm, which stipulates the sanction."

According to Kelsen, in every legal order, no matter with what proposition of law one begins, a hierarchy of "oughts" is traceable back to some initial, fundamental "ought" on which the validity of all the others ultimately rests. This is the Grundnorm, the basic or fundamental or apex norm. The Grundnorm need not be the same in every legal order, but a Grundnorm of some kind there will always be, whether, e.g. a written Constitution or will of a dictator. The Grundnorm is not the Constitution, it is simply the presupposition, demanded by theory, that this Constitution ought to be obeyed. Therefore, the Grundnorm is always adapted to the prevailing state of affairs. The Grundnorm only imparts validity to the Constitution and all other norms derived from it. In Great Britain, for instance, the entire legal order is traceable to the propositions that the enactments of the Crown in Parliament and judicial precedents ought to be treated as "law". According to Kelsen every rule of law derives its validity from some other rule standing behind it. But the Grundnorm has no rule behind it. Its validity has therefore to be assumed for the purpose of theory. A rule is valid, not because it is, or is likely to be, obeyed by those to whom it is addressed, but by virtue of another rule imparting validity to it. The validity of each. individual rule does depend on the effectiveness of the legal order as a whole, or in case it is "by and large" effective.

It is of the utmost importance that the Grundnorm should secure for itself a minimum of effectiveness, i. e., a certain number of persons who are willing to abide by it and it should command a minimum of effectiveness. If a Grundnorm ceases to drive a minimum of support, it ceases to be the basis of the legal order, and any other proposition which does obtain support will replace it. Such a change in the state of affairs is said to amount to a "revolution" in law.

From the above premises, Hans Kelsen in his General Theory of Law ,and State (pages 118-119), proceeds on to the discussion of the subject of "Change of the Basic Norm" or the Grundnorm. In this connection he observed;----

"It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose, that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new ' order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norms endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of -a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm."

It is this passage in Kelsen which forms the basis of the decision by the Supreme Court of Pakistan in the State v. Dosso P L D 1958 S C (Pak.) 533, and which is the corner stone of. the entire argument elaborately advanced before us by Mr. A. K. Brohi for the respondent in support of the Proclamation of Martial Law and the regime with its new Legal Order that has allegedly become effective and has supplanted the old Legal Order.

Dias in his Jurisprudence (Fourth Edition), has adversely criticised Kelsen s theory. He observed that the Grundnorm is a key concept in his theory but that it raises many difficulties. Some writers have pointed out, with a hint of criticism, that in whatever way effectiveness of the Grundnorm is measured Kelsen's theory has ceased to be "pure" at this point. For effectiveness would seem to depend on those very sociological 'factors which he so vehemently excluded from his theory of law. If, ' then, the Grundnorm upon which the validity of all other norms depends is tainted with impurity, it is arguable that the others are similarly tainted. Another line of attack on the claim to purity is that Kelsen's whole scheme is an a priori one dependent on empirical observations for confirmation. He offered it. as a "theory of interpretation", which implies that it is not a description but a model and thus evaluative in function. This criticism touches, riot the theory, but his claim to its purity. According to him the effectiveness of the legal order as a whole is prerequisite to the validity of each single rule- in it. If as seems clear, some inquiry into political and sociological factors has to precede, or at least is implicit in, the adaptation of a particular Grundnorm as the

criterion of validity and if the validity of every part of the system is dependent upon the continued effectiveness of the whole, then on his own showing the study of jurisprudence should include the study of the social environment. Dias has further pointed out that Kelsen's picture is that of a legal order viewed only in the present time-frame, which explains his exclusion of moral, sociological and other considerations from the question of the validity of any rule.

Dias has emphasised that the effectiveness of a legislative .medium is not a condition of its own "law quality" but only a factor which influences Courts to accept and continue accepting it. He further observed that a situation may be supposed in the midst of a' revolution when the old order has gone and no new order has effectively replaced it. In such a lacuna the Court can continue to apply as "laws" the enactments of the old order even though it is no longer effective. The label "laws" attaches to whatever the Courts are prepared to accept as such. Even if the old order is ineffective and there is a new, effective order, the Courts may still treat the old order as "legal" and the new as "illegal" or simply "de factor". Not only is the legality of a revolutionary regime independent of effectiveness, but it also has jurisdictional (spatial) and temporal dimensions. Thus, although the Rhodesian regime was eventually accepted as legal by the Rhodesian Courts, British Courts have still not done so. In Adams v. Adams (A. G. intervening) ((1970) 3 All E R 572) a British Court refused to recognise a divorce decree pronounced by a Rhodesian Judge who had not taken the oath under the 1961 Constitution. This shows that legality depends .on the jurisdiction in which the matter is considered, quite apart from effectiveness. The temporal dimension is brought out by a decision of the Pakistan Supreme Court in Jillani v. Government of Punjab (P L D 1972 S C 139) which rejected. effectiveness altogether as the criterion of legality.

In conclusion, according to Dias the effectiveness of the legislative authority is not a condition of the validity either of "laws" or even of itself. It is a factor which in time induces the Courts to accept such authority. Nor is it the only such factor. Others are farce propaganda and packing the Bench with Judges who will comply, all of which only reinforce the contention that the legality of the law-constitutive medium only comes about when the Courts accept, or are made to accept it.

These are some of the formidable arguments levelled by Dias, not merely at Kelsen, but at positivism in general. Kelsen gave no criterion by which the minimum of effectiveness is to be measured. All he maintained was that the Grundnorm imparts validity as long as the "total legal order" remains effective, or, as he later put it, "by and large" effective. As to this it may be asked, in the first place, for how long must effectiveness be maintained for the requirement to be satisfied. Kelsen drew no distinction; between effectiveness, which makes people obliged to obey, and effectiveness which makes them feel under an obligation to do so:

Dias maintains that Grundnorm is a very weak point in Kelsen's theory. It does not apply in revolutionary situations, in which case it ceases to be a "general theory" or, if general it ceases to be true. In settled conditions it teaches nothing new in revolutionary conditions, where guidance is needed, it is useless, for the choice of a Grundnorm is not dictated inflexibly by effectiveness but is a political decision, as Kelsen himself admitted.

Lord Lloyd in his Introduction to Jurisprudence (Third Edition), on page 269, in all fairness, while criticising Hans Kelsen's theory, has at the same time paid compliments to him and said that there is perhaps, no single writer in this century who has made a more illuminating analysis of the legal process than him, by his lucid exposition. But according to Lord Lloyd the Basic norm is a very troublesome feature of Kelsen's system. We are not clear what sort of norm this really is, nor what it does, nor indeed, where and how to find it. In his latest formulation he tells us that it is not "positive", but is presupposed in juristic thinking and is "meta-legal" only. Professor Goodhart was doubtful of the value of an analysis which did not explain the existence of the basic norm on which the whole system was founded. According to Lord Lloyd it may be argued that Kelsen's theory, being description of legal science, can only indicate the role of the jurist and can in no way assist the Judge. This would suggest that those Judges who relied upon Kelseri's theory to solve past-revolution legal problems were labouring under the self-deception that he would assist them. The analysis of Kelsen's theory has raised some of the difficulties inherent in' his basic norm. His theory is only useful to the legal. scientist and not the Judge and only in a residual case, and, further, that the kingpin of the whole structure rests upon the shaky foundation of a loose concept of "effectiveness"

Gustov Radbrach was a German thinker who had lived through .the Nazi regime and reflected upon its evil manifestations in the legal system. He was a protagonist of the positivist doctrine until the Nazi tyranny, but he was converted by his experience of the environments round him. In 1944 a woman, wishing to be rid of her husband, denounced him to the authorities for insulting remarks he had made about Hitler while home on leave from the German army. The wife was under no legal duty to report his acts, though what he had said was apparently in violation of statutes making it illegal to make statements detrimental to the Government of the Third Reich or to impair by any means the military defence of the German people. The husband was arrested and sentenced to death, apparently pursuant to these statutes, though he was not executed but was sent to the front. In 1949 the wife was prosecuted in a West German Court for an offence described as illegally depriving a person of his freedom (rechtswidrige Freiheitsbe-raubung). This was punishable as a crime under the German Criminal Code of 1871 which had remained in force continuously since its enactment. The wife pleaded that her husband's imprisonment was pursuant to the Nazi statutes and hence that she had committed no crime. The Court of appeal to which the. case ultimately came held that the wife was guilty of procuring the deprivation of her husband's liberty by denouncing him to the German Courts, even though he had been sentenced by a Court for having. violated a statute, since, to quote the words of the Court, the statute "was contrary to the sound conscience and sense of justice of all human beings." This reasoning was followed in many cases which have been hailed as a triumph of the doctrines of natural law and as signalling

the overthrow of positivism. The bitter experiences in these cases have thus made a great dent into -the Pure Theory of Law (See 71 Harward Law Review 591 at pages 618-619).

Similarly a number of authors in their articles in some of the leading law journals (1970) 28 Cambridge Law Journal 75 by Dias ; (1968) 26 Cambridge Law Journal 223 by Dias; 1971 Cambridge Law Journal 103 by Harris; 1963 Modern Law Review 34 by Julius Stone; and .1967 Modern Law Review 1.57 by Erie have exposed the weaknesses in this theory.

In addition to these in Miss Asma Jillani v. The Government of the Punjab this Court has held that Kelsen's theory was, by no means, a universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence. . He was propounding a theory of law as a "niece jurists' proposition about law". He did not lay down any legal norm or legal norms which are "the daily concerns of Judges, legal practitioners or administrators"

Moreover, as observed by my Lord, the Chief Justice, ours is an ideological State of the Islamic Republic of Pakistan. Its ideology is firmly rooted in the Objectives Resolution with emphasis on Islamic laws and concept of I morality. In our way of life we do not and cannot divorce morality from f law. Therefore the Pure Theory of Law is not suited to the genesis of this State. It has no place in our body politics and is unacceptable to the Judges charged with the administration of justice in this country.

In the light of the above discussion, before us Mr. A. K. Brohi, learned counsel for the respondent, undertook in vain to salvage Dosso's case after it had been effectively overruled in Miss Asma Jillani's case by rejecting Kelsen's Pure Theory of Law.

MARTIAL LAW AND NECESSITY

S. A. De Smith in his invaluable treatise on the "Constitutional and Administrative Law" (Chapter 22) has observed that when an unlawful assembly is proceeding to the execution of its purpose, it constitutes a riot. If it goes on to execute that purpose in a violent manner which alarms a person of reasonable courage in the neighbourhood, it constitutes a riot. Akin to riot is the common-law offence of causing an affray by fighting or threats of force giving rise to alarm in the neighbourhood. Troops may be called in to disperse rioters in the last resort they should normally

act only under the direction of the competent civil authorities, and the degree of force they use must be proportionate to the evil to be averted.

In dealing with the problems of "National Emergencies" (Chapter 23) the learned author further observed that the military officer on the spot may have to make a snap decision whether -to use force, and if so, how much, to quell a not Judges and writers have insisted many times over that soldiers are entitled, indeed obliged at common law, to use all necessary force, including deadly violence in the last resort, to disperse rioters who are doing serious and extensive damages to property. But when riot passes into rebellion or guerilla warfare, emphases shift and other principles intrude. The civil power primarily responsible for containing and suppressing an uprising must be the Government in office: The military authorities will be obliged to act in its support.

If the situation moves a stage farther and the civil authorities become incapable of governing' because of large-scale insurrection, powers to do whatever may be needed to restore peace, may be handed over to (or assumed by) the military authorities. This is a new situation, different both in degree and kind. A state of Martial Law will then exist and the powers of-the General' Officer Commanding the Forces will, so it is usually thought, become non-justiciable, and for the time being, absolute, subject only to consultation with the civil power. According to the learned author martial law has been aptly described as "a peculiar system of legal relations" which arise in time of civil war or insurrection, or, it may be added, invasion. It is a state of affairs, not a settled body of rules, though rules and orders will be promulgated and enforced by the military authorities as they see fit.

Again Martial Law can be used to describe an entirely different kind of situation-one where military officers overthrow the legitimate Government, establish a new regime and proclaim a state of Martial Law. The phenomenon is all too familiar in many countries. It has not arisen in Britain in modern times and the constitutional law books of that country are therefore, silent on its legal consequences. Briefly, one can say that the Judges and officials are not obliged to recognize the validity of such a proclamation, any more than they are obliged accept any other revolutionary coup d'etat, but that if they defy the mailed fist, they cannot expect to retain office for long. If they do recognize the suppression of the old order as valid, successful revolution has begotten its own legality.

In this connection the learned author has further observed that a state of Martial Law may be introduced by or without a proclamation. A proclamation purporting to introduce a state of Martial Law is of no legal effect in itself ; Martial Law is justified only by paramount necessity. If the ordinary Courts are still sitting, it seems that they have jurisdiction to determine whether "a state

of war" (not necessarily war in the international sense, but a state of affairs requiring military pacification by the imposition of Martial Law) exists in an area where they normally have jurisdiction. In determining this question they will give heavy weight to the opinion of the local military commander, but his opinion is not binding on them. If they decide that a `state of war' does exist, then (according to the present weight of legal opinion) they should decline to review the legality of anything done by the military authorities in the purported discharge of military responsibilities till, in their independent judgment, the `state of war' has terminated.

In the case of D. F. Marais v. The General Officer Commanding the Lines of Communication and the Attorney-General of the Colony 1902 A C 109, in South Africa an application was made on behalf of Marais, a civilian subject of the Crown, for his immediate release from military custody, on the ground that his arrest and imprisonment were in violation of the fundamental liberties to which subjects of His Majesty were entitled. But his application was dismissed by the Supreme Court of the Cape of Good Hope, inter alia, relying on an affidavit of the gaoler concerned to the effect that be was detained by. an order of the military authorities for contravening certain Martial Law Regulation though owing to military exigencies he was not prepared at the time to disclose the charges against him. The Privy Council refused the petition for special leave to appeal from the order of the Supreme Court with the observations that :- .

"The truth is that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities.

Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established.

It may often be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all has not been treated with an excessive severity, and whether the intervention of the military force was necessary but once let the fact of actual war be established, and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities."

Coke, Rolle and Hale were of the opinion that time of peace is when the civil Courts are open, and that when they are closed it is time of war. The decision in Marais's case, however, shows that this test is not conclusive and that existence of a state of war in a given district is compatible with the continued functioning for some purposes of the civil Courts within the district. This decision gave rise to four articles on martial law in (1902). 18 Law Quarterly Review 117; 113, 143 & 152. H.

Erie Richards in his article on pages 133/142 has mentioned that this decision has met with some criticism even from those whose legal vision is not coloured by their political sympathies. In the context of the above findings the learned author remarked that "it must be left to Courts to determine whether any particular act be or be not in excess of necessity of the occasion in question in each case." He further observed that in times of emergency, falling short of war, the Court may decide "whether there was sufficient necessity to justify any suppression of the ordinary law and indeed there would be no security for the subject at any time if it was left to the uncontrolled discretion of the military to take such action at their pleasure. But when once war is declared and is raging in the country, that question is no longer open to doubts that it is then necessary to interfere with the ordinary law to some extent, ..."

The learned author, in offering his further comments on the judgment in Marais's case observed that it has been contended that the existence of war in the view of the law does not depend on the actual fact of whether war is raging in the country or not, but is to be determined by the fact of whether the Courts continue to sit ; an artificial rule which does not commend itself, apart from authority, to reason. The necessity for taking action which infringes on rights of property or liberty cannot depend on the fact that the Courts continue or do not continue to sit it depends on the necessity created by the presence of an enemy in the country. The military indeed can at their will prevent or allow the continuance of the sittings of the Courts. The real test is the necessity of the occasion in each case. In summing up the learned author remarked that "War is self-evident, and the fact that the Courts may continue to sit cannot prevent the existence of war."

According to another article on "the case of Marais" contributed by Cyril Dodd (pages 143-151) martial law arises from the State necessity, and is justified at the, common law by necessity, and by necessity alone-a necessity which the Courts may at- any time inquire into, so far at any rate as they reasonably can without injury to the State arising from the disclosure of matters contrary to the public interest and endangering the public safety. The learned author observed that in Marais's case when the petition came before the Privy Council the chief argument, indeed the only argument really relied on, was that there was a fixed principle that, if the ordinary Courts were open, civilians must be dealt with by them if charged with offences, and not by military persons or tribunals ; that a place where the Courts open crust be regarded at a place in which there is peace, and that when the Court are open it is `time of peace' for all legal purposes and in all Courts of law, This contention. in his opinion was undoubtedly supported by a considerable show of authority, and would appear in more ancient times to have been generally held as a true statement of the law. But this supposition was based on fiction rather than on reality. 1n the opinion of the learned author it was not to be expected that a Committee of the Privy Council should feel bound by any such general rule to the extent of being compelled to hold, contrary- to actual fact, that war did not exist, simply because where the war in fact existed the Courts were sitting. It distinctly puts an end to the ancient rule, that because for some purposes the Courts are open at a place, that place must .be held to be one where peace exists, no matter what the actual fact may be. According to the learned author in the case of Marais even the limited proposition that the authorities are not responsible to the Courts sitting during the war. would appear too wide. It would seem to depend upon the

question of whether the Courts are able to sit for all purposes, and are allowed by the military power to do, so, and upon whether the matter is one they can, without danger to public safety and the proper prosecution of the war, investigate and deal with.

Likewise Frederick Pollock in his article (pages 152-158) of the Law Quarterly . Review has commented on the Privy Council judgment in Marais's case and in his opinion the only point decided then was that the absence of visible disorders and the continued sitting of Courts are not conclusive evidence of state of peace. In the fourth article (pages 117-7 32) W. S. Holdsworth, on the authority of Cockburn, C: J. observed that martial law of the kind, as a distinct code of rules, does not exist. It is merely the application of the common law principle "that life may be protected and crime prevented by the immediate application of any amount of force which, under the circumstances may be necessary." It allows an amount of force exactly proportionate to the necessities of the case. This is the view most strongly supported, especially by the more recent authorities.

The American views on the subject are contained in a copy of a letter of Pennsylvania Assembly to Governor Robert Marris, November 11, 1755 under the heading "The National Security Interest and Civil Liberties" published in (1971-72) 85 Harward Law Review, 1133/1326. In this a separate section is devoted to the subject . of "The Exercise of Emergency Powers" to cope with disorders of sufficient magnitude and intensity assuming national importance and threatening the functioning of the Government. In such cases safeguards of judicial review are necessary as a check against any abuse of power. But in this connection the standard laid down by the Supreme Court of America for reviewing the use of emergency measures has varied widely. In Ex Parte Milligan ((1866) 71 U S 2) which involved emergency measures taken by President Lincoln during the Civil War, the Court verged on taking the extreme view that' Government action in emergencies is subject to the same constitutional limitations as are actions taken in normal times. But in contrast to this, the Supreme Court appears to have gone to the other extreme in Moyer v. Peabody ((1909) 212 U S 78), a 1909 case reviewing actions taken by a State Governor pursuant to a proclamation of martial law during a violent labour dispute. The Court seemed to view the choice of what particular measures to take during an emergency as an exercise of political power with which the Courts should not interfere as long, at least, as the choice was made in good faith. Moreover, the Court held "that the Governor's declaration that a state of insurrection existed is conclusive of the fact." Thus, Moyer came to stand for the proposition that the executive has nearly complete discretion in its exercise of emergency powers, both with respect to. declaring the emergency and to choosing the means of meeting it.

This stance, however, granted an excessive degree of latitude to the executive and was ultimately replaced in the case of Sterling v. Constantin (1932) 287 U S 378, by a standard of review that scrutinized the Government response to find a "direct relation" between the "measure taken and the goal of restoring order." In Sterling the Governor of Texas bad declared martial law in order

to have the militia impose a production limit which a Federal Court bad enjoined the State's regulatory commission from imposing. The emergency claim was based upon an alleged but unsubstantiated fear that the local populace would rise up in order to stop the plunder of the vicinity's oil resources. In the face of this claim the Court refused to follow Moyer, first distinguishing between the conclusiveness of the executive's declaration of emergency and its choice of measures, and then subjecting the latter to a "direct relation test." Similarly, in Korematsu v. United States ((1944) 323 U S 214 (223-224)) and Hirabayashi v. United States ((1943) 320 U S 81 (95)) the most recent cases in which the Supreme Court decided the constitutionality of emergency measures taken by the Federal Government during wartime, the Court undertook an independent, albeit restrained, inquiry as to whether there was a reasonable basis in fact for the conclusion that the measures were "necessary" to meet the particular dangers posed by the emergency situation. However, on facts in these two cases the Court concluded that the Government's fear of espionage and sabotage by persons of Japanese ancestry was reasonable and therefore, upheld the curfew directed against them and an executive order passed against them excluding them from the West Coast.

In the above-mentioned letter it is observed that to prevent the abuse of emergency powers, Courts must review both whether an emergency existed, and, more important whether the measures taken were necessary to restore order. "The best standard to adopt would be a strict standard of necessity, which would require that there not be available to the Government alternative means of coping with the emergency that were as effective as the measures employed but less restrictive of individual liberties". The less-restrictive alternative analysis is in a sense inherent in any judicial review of Government actions on the basis of their reasonableness, since the reasonableness of a measure necessarily depends on the alternatives available. However, the proposed application of less-restrictive-alternative analysis is broader, for it implies that whenever a less restrictive alternative of equal effectiveness can be shown, the measure taken will be invalidated. (See pages 1294-1297 of the Report).

In this connection (on pages 1321-22) it is observed that emergency situations, whether characterized primarily by mass public disturbances or by guerilla-like violence, can differ greatly as to their magnitude. At the most severe extreme, the Government might be faced with a rebellion so widespread and intense that it was unable to carry out its normal functions through civilian institutions. It might then be necessary to govern by martial law. Although there has been much confusion as to the meaning of this term, it is clear that martial law is not "law" at all in the sense of a body of rules, but rather refers to the way in - which governmental power may be exercised. Commentators generally define martial law as the use of military forces to carry on the functions of civil Government, carefully distinguishing it from. the mere use of the military as an aid to the civilian Government. Although Courts still occasionally use language suggesting that a declaration of martial law results in the complete abandonment of constitutional safeguards against actions taken by the military, the "direction relation" test of Sterling v. Constantin was formulated with reference to and applied to overturn emergency measures taken by the military pursuant to an executive declaration of martial law. There is. no reason to believe, therefore, that judicial review

of Government actions in an emergency should depend in any way on whether there had been a declaration of martial law or on whether the emergency measures were carried out by military or civilian authorities. In either case the standard should be the necessity of the measure to restore order.

The learned author of "the Constitutional and Administrative laws" has also discussed the subject of the "Ultimate Authority in Constitutional law" (Chapter 3) in its historical background. This presents a very useful, absorbing and greatly informative study of the problems engaging our attention. I cannot resist in quoting here from him in extenso. He observes that a written constitution is regarded as the primary source of legal authority within a State. But then what is it that confers this legitimating quality on the constitution ?, he asks and in his opinion this question produces some convoluted answers. In the large majority of independent States,-in Australia there has been, at one time or another, a breach of legal continuity, and a constitution has been adopted or changed in a manner unauthorized by the pre-existing legal order. This is already true of a high proportion of the African States which have become independent during the last decade or so. Since independence they have had revolutions and coups d'etate ; often the constitutional instrument has itself been abrogated and replaced, or suspended and modified, in a manner precluded by the independence constitution. And a few countries have deliberately chosen to adopt a new constitution peacefully but in a manner unauthorised by the pre-existing constitution. This is an assertion of legal nationalism, of what is called `constitutional autochthony, designed to demonstrate that the authority of the constitution is rooted in native soil, not derived from an imperial predecessor. Such a course has been followed in Eire (the Republic of Ireland), India and Sri Lanka (Ceylon). A constitution is adopted by a Constituent Assembly in the name of people, or presented to the people for their approval it will not receive the royal assent like normal constitutional amendments.

Take again the constitution of the United States of America. Since its adoption in 1787 it has remained intact, apart from amendments duly made in terms of the Constitution. But was the Constitution valid in the first place, and if so, why ? In 1776 the Thirteen Colonies had unlawfully 'declared their independence of Britain, and had repudiated the sovereignty of the United Kingdom Parliament. `We, the People of the United States', proceed to `ordain and establish a constitution'. In fact it was formulated at a convention consisting of delegates from the several- States and then ratified by the Congress. The name of the `sovereign' People was invoked to confer upon the constitution moral authority and binding force.

The learned author says that the vague concept that ultimate `sovereignty' resides in the `people' is widely acceptable because of its political overtones. Even where a constitution has been overturned from above or below by manifestly illegitimate means, it is commonplace for the de facto holders of power to assert that they derive their mandate from the people, because it is awkward to be

stigmatized as an undemocratic usurper. And by producing a constitution approved. by or on behalf of the people, the accolade of legitimacy is achieved.

It is one thing to say that Government should rest on the consent of the governed ; it is another thing to proclaim that a Constitution has acquired the force of supreme law merely because it has obtained the approval of an irregularly convened Constituent Assembly or of a majority of the electorate or both. Yet to assert that all constitutions (or constitutional amendments) procured in a manner inconsistent with the pre-existing legal order are legally invalid will land one in a morass of absurd and insoluble difficulties. If the Constitution of the United States is a nullity, then presumably only the United Kingdom can validate (with retroactive effect) the millions of governmental measures and judicial decisions taken in that country since Independence. This is plainly ridiculous, for nobody doubts that the United States became an independent State in international law before the end of the eighteenth century. In any case, whence did the United Kingdom Parliament derive its omni-competence ? In July 1688 James II dissolved his Parliament. In December he fled the country, having dropped the Great Seal of the Realm in the Thames a few days earlier. William of Orange, having reached London, met groups of peers, former members of Parliament and other notables ; they advised him that elections should be held in the boroughs and counties. The Convention of Lords and Commons met in January 1689, and next month offered the Crown to William and Mary jointly, subject to conditions set out in a Declaration of Rights. The offer having been accepted, the Convention passed an Act asserting that it was Parliament, acid then enacted the Bill of Rights, incorporating the Declaration of Rights. Clearly the Convention `Parliament' has been irregularly summoned ; its affirmation of its own legal authority carried the matter no farther ; there had been no King from December 1688 (assuming that James It was deemed to have abdicated or to have forfeited the Crown) till February 1689 ; William III had no hereditary legal title to the throne and therefore had no authority to assent to bills. Has every purported Act of Parliament since 1688 been a nullity ? Is a Stuart still the rightful King ?

Once questions such as these are asked, one must acknowledge that in. certain circumstances a breach of legal continuity, be it peaceful or accompanied by coercion and violence, may have to be treated as superseding the constitutional and legal order and replacing it by a new one. Legal theorists have no option but to accommodate their concepts to the facts of political life.

These are some of the perplexing questions that have buffled the legal theorists. One of them Hans Kelsen advanced his Pure Theory of- Law which has already been rejected by us as unacceptable to the norms of our own country. But I find that the principles of State necessity and the maxim "Salus populi suprema lex" is fully attracted to the peculiar facts and circumstances of this case as a validating factor.

According to S. A. de Smith the principle of necessity, rendering lawful what would otherwise be unlawful, is not unknown to English law ; there is defence of necessity (albeit of uncertain scope) in criminal law, and in constitutional law the application of martial law is but an extended application of this concept. But the necessity must be proportionate to the evil to be) averted, and acceptance of the principle does not normally imply total abdication from judicial review or acquiescence in the supersession of the legal order ; it is essentially a transient phenomenon. State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order in Pakistan, Cyprus, Rhodesia and Nigeria. To this extent it has been recognised as an implied exception to the letter of the constitution. And perhaps it can be stretched far enough to bridge the gap between the old legal order and its successor."

In these circumstances and for these additional and supplementary reasons I have agreed with my Lord, the Chief Justice on the facts and law, as well as the conclusions formulated by him.

DORAB PATEL, J.--I have had the advantage of reading the judgment proposed to be delivered by my Lord the Chief Justice. I respectfully agree with it and would further observe that in my humble opinion the principle laid down by the Federal Court in the Reference by His Excellency The Governor-General PLD1955FC435, will have to be followed in resolving the impasse created by the constitutional break-down.

QAISAR KHAN, J.--After going through the very elaborate, illuminating and scholarly judgment of my Lord the Chief Justice proposed to be delivered in this case, it is with the greatest respect that I have to state that though 1 agree with my Lord the Chief Justice that (he petition be dismissed but I have arrived at the conclusion on quite different grounds and I shall, therefore, record my own judgment. The facts and circumstances leading to the filing of this petition under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1971 need not be reiterated as these have already been given in great detail in the proposed judgment of my Lord the Chief Justice.

In my opinion the main point for determination in this case is as to whether this Court has the jurisdiction to entertain and adjudicate upon the petition in view of the Proclamation of the 5th of July 1977 and the Laws (Continuance in Force) Order, 1977 of the same date.

After hearing very learned and lengthy arguments of the learned counsel for the parties and the learned Attorney-General I have come to the conclusion that this Court has no jurisdiction in the matter. My reasons for coming to this conclusion are few and simple.

The Constitution of the Islamic Republic of Pakistan was the basic norm of the Country which is also described as the grundnorm, the apex norm or the total Legal Order. This Court was the creation of the said Constitution and jurisdiction had also been conferred on it by the said Constitution. The validity or invalidity of any and every action was tested by the Courts with reference to the Constitution. It may, however, be mentioned here that the provisions of the said Constitution themselves could not be questioned by the Courts. The Courts could not say that such and such a provision of the Constitution was good and such and such bad or that such and such a provision should have been there and such and such should not have been there.

At some stage in the arguments it was suggested that the Resolution of March 1949 was the grundnorm in Pakistan and action should be tested keeping that as a touchstone. There is, however, no force in this contention as no body in Islam is above law but under our Constitution of 1973 the President and the Governors had been placed above law and they were not answerable to any Court of law nor could they be tried in any Court. The offence of murder is compoundable according to the Holy Qur'an but we in Courts could not accept compromise in murder cases. The resolution was the wish and ultimate aim for the realisation of the Islamic order but it was not the grundnorm in Pakistan. It was also held so by this Court in the case of Zla-ur-Rahman PLD1973SC49.

It is common knowledge and does not require any jurist to be quoted in its support that a Constitution -or the basic norm could be annulled, abrogated, destroyed or suspended in two way, one by a Constitutional act, that is to say, by the method provided for in the Constitution for changing or replacing it and the other by an un-Constitutional act, say revolution or; coup d'etat, which is known as extra-Constitutional act. In the instant case the Constitution of 1973 was put in abeyance, that is to say, suppressed for) the time being by the Chief of the Army Staff by an extra-Constitutional act) of issuing a Proclamation on the 5th of July 1977 declaring himself as the Chief Martial Law Administrator. For the running of the Country the Chief Martial Law Administrator who had assumed all powers under the Proclamation issued the Laws (Continuance in Force) Order the same day i.e., 5th of July 1977.

Now the validity or invalidity of this action could not be tested on the basis of the Constitution of 1973 as it was no longer there having been suppressed and there was no other superior norm on the basis of which it could be tested. such an action, according to some jurists as Mr. Brohi puts it, is called meta-legal. For judging such a situation we have two authorities of this Court in the field, that of Dosso P L D 1958 S C (Pak.) 531, and Asma Jillani P L D 1972 S C 139. Dosso's case by which the new order could be legitimised cannot be applied as it has been overruled by the Asma's case. Asma Jillani's case does not apply in the present case a the facts and circumstances of this take-over are quite different from the facts and circumstances of the then take-over. In the present case under the circumstances prevailing in the country of which we can take judicial not the present

take-over was quite justified for saving the State from total destruction and the Chief of the Army Staff under the circumstances could not be dubbed as a usurper.

Now what is to be done .in such a case. Here I agree with Mr. Brohi that in such a situation the Court has to determine certain facts which are even more basic than jurisdictional facts. These are facts which may be termed as Constitutional facts. These facts relate to the existence of the Legal Order within the framework by which the Court itself exists and functions. Jurisdictional facts only relate to the jurisdiction of the Court but Constitutional facts relate to the legal structure within which that jurisdiction is located. The inquiry as to Constitutional facts is factual and not a legal inquiry. The Court has to find as a matter of fact as to what Legal Order is in operation in the country.

There are several indicia which furnish clues to the existence of any particular Legal Order. The most. important of these relate to the aegises under which the three principal organs of the State function. These organs are the Legislature, the executive and the judiciary. Let us examine the position of each in relation to the present situation.

The National Assembly constituted under the 1973 Constitution is evidently no longer in existence. It does not even purport to exist. There is no legislative body in existence in Pakistan today which can claim that it is a Legislature within the meaning of that term used in the 1973 Constitution. The executive i.e., the Government servants have accepted the new Legal Order and are working under it. Similarly the People's Party's Government has ceased to exist as a matter of fact. The members who constituted that Government did not even profess to be exercising power and authority in Pakistan today. On the other hand almost all of them including the former Prime Minister have taken an oath in connection with election under the new Legal Order thereby admitting its factual existence. The same is the position of the judiciary. Judges had taken oath under the Constitution of 1973 and there was no provision in the said Constitution for a second oath to be taken by Judges. However, under the President's Post Proclamation Order 9 of 1977 we were directed to take a new oath or to quit. As a result of the said directive we took the new oath in which there was no mention of the Constitution of 1973.

This oath was prescribed by a Presidential Order not in the exercise of powers under the. Constitution of 1973 but in exercise of powers under the Proclamation and the Laws (Continuance in Force) Order of the 5th of July 1977. Incidentally it may be mentioned here that according to Article 2, sub-Article (3) of this Order the President acts only on the advice of the Chief Martial Law Administrator. Now by taking this oath we have conceded the de facto existence of the new Legal Order. Furthermore, amendment was also brought about in the suppressed Constitution which we accepted as valid. The existence of the new Legal Order as a fact has therefore been

accepted by all and since it is admittedly effectual beyond doubt for the time being it is therefore to be accepted as the de facto new Legal Order for the time being. So far as I have been able to understand effectualness is the only touch stone on the basis of which recognition to a de facto Government could be accorded by municipal Courts and support for this can be had from STANFORD LAW REVIEW, VOL. 17 PROFESSOR STONE AND THE PURE THEORY OF LAW (Page 1139). Since the Order is of a supra-Constitutional nature all questions are now to be answered with reference to it.

The assertion that the Courts were functioning under the old Constitution which has been revived by the Laws (Continuance in Force) Order is fallacious. When by the Proclamation the Constitution was put in abeyance the Courts automatically ceased to exist. They started functioning again only by the force of the Laws (Continuance in Force) Order and not by virtue of the old Constitution. The Laws (Continuance in Force) Order nowhere lays down that the Constitution has been revived. As a matter of fact section 5 of it which is reproduced below clearly lays down that it is still in abeyance:

"Notwithstanding the abeyance of the provisions of the Constitution subject to any order of the President or Regulation made by the Chief Martial Law Administrator all laws other than the Constitution and all Ordinances, Orders-in-Council, Orders made by the President, Rules, Bye-Laws, Regulations, Notifications and other legal instruments inforce in Pakistan or any part thereof or having extra-territorial validity shall so far as may be and with such adaptation as the President may see fit may continue in force until altered, amended or repealed by competent authority."

The reference in the Order to the provision of the Constitution of 1973 was only an easy and expeditious way of devising a new Legal Order. Since the Courts including this Court were revived by the Laws (Continuance in Force) Order and continued to work under its authority, they therefore derived their jurisdiction also from the said Order. For example, if after the issuance of the Proclamation the Chief Martial Law Administrator bad not issued the Laws (Continuance in Force) Order and had started ruling by decrees through his officers then where would have been this Court and what jurisdiction it would have had.

Otherwise too allegiance is always due to the de facto Government for it is this Government which can provide protection to the citizens and allegiance to the State imposes as one of its most important duty obedience to the laws of the sovereign power for the time being within the State. The municipal Courts have always to enforce the laws of the de facto Government as it is such a Government which can enact law, can appoint Judges and can enforce the execution of law.

In this connection the following passages from the Rhodesian case which was quoted at the Bar and which are based on the views of the various authorities are worth perusal :-

"A municipal Court recognizes the legality of the only law-making and law-enforcing Government functioning "for the time being" within the State. It cannot do more and, in particular, it is not possible for a municipal Court to ascribe to Governments under which it functions. different degrees of legality. From the point of view of a municipal Court a Government either is or is not lawful. 1 am satisfied that the present Government is the only existing law-making and law-enforcing Government within the State of Rhodesia and if I am to carry on my functions as a Judge I must enforce laws passed in accordance with the 1965 Constitution. To do so is in accordance with, and not in breach of, my allegiance to the State of Rhodesia. It is important, in this .connection, to remember that in law it is the State and not a Government within a State which has the quality of "perpetual continuance". Allegiance is owed to the State as a legal entity with perpetual existence. Obedience to the laws of the Government "for the time being," and service under the Government "for the time being," are requirements of the allegiance owed to the State and it is only in a loose and inexact sense that it is possible to speak of allegiance being owed to a particular Government." (Page 160).

"Judicial power presupposes an established Government capable of enacting laws and enforcing their execution, and of appointing Judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the Government from which .it is derived. And if the authority of that Government is annulled and overthrown; the power of its Courts and other officers is annulled with it. And if a State Court should enter

upon the inquiry proposed in this case, and should come to the conclusion that the Government under which it acted had been put aside and displaced by an opposing Government it would cease to be a Court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a Court, it necessarily affirms the existence and authority of the Government under which it is exercising judicial power." (Page 156).

"The English law on this aspect is summed up pithily by Hobbes in his statement (adopted by. Austin and cited above) that, "the legislator is he not by whose authority the law was first made but by whose authority it continues to be law". And this is the effect of the definition of "sovereign" in the Interpretation Act, 1889. There is no difference in law between a written constitution and an unwritten constitution and under English constitutional law respect is paid not to a constitution as

such but to the Government which by its authority gives the constitution the force of law." (Page 155).

"The lesson to be gleaned from the history of English law is that the Judges should. not allow themselves to become embroiled in political controversy and, in particular, should not take part in revolutionary or counter, revolutionary activity. If a Judge believes that a situation has arisen which in all conscience compels him to exercise the "sacred right" of revolution or counter-revolution he should leave the Bench and not seek to use his position on it to further his revolutionary or counter-revolutionary designs. The more unsettled the times and the greater the tendency towards the disintegration of established institutions, the more important it is that the Court should proceed with the vital, albeit unspectacular, task of maintaining law and order and by so doing act as a stabilizing force within the community. This objective can only be achieved if the acts of a Government "for the time being" within the State are given the force of law. Under English law Judges, in common with all other citizens, owe allegiance to the State and this allegiance involves obedience to and service under the Government `for the time being" within the State." (Page 154).

"The early history of England and the English law relating to the allegiance due to a de facto sovereign explain in large measure the view strongly adhered to by all English Judges that the judiciary should not meddle in politics." (Page 151).

"This allegiance to Rhodesia imposes a duty of obedience to the laws which continue in force under the authority of the de facto Government, as well as in laws passed by it; provided, of course, these are passed in accordance with the de facto constitution." (Page 149).

"It is not essential, however, to resolve the dispute between Hale and Black-stone on the one hand, and Hawkins and Foster on the other for the purpose of deciding the fundamental constitutional issue in this case which is whether the laws of a Government `for the time being", that is, of a de facto Government, must be obeyed. On this aspect there is no disagreement at all between English jurists." (Page 144).

"A sharp distinction is drawn in law between persons who set up a de facto Government by revolution and persons who, taking no part in the revolution, obey the laws of the de facto Government in pursuance of the duty of allegiance owed to the State. If obedience to the laws of a de facto Government were not enjoined by the law, anarchy would be likely to ensue. In a choice

between anarchy and order the law wisely makes a realistic and sensible choice of order." (Page 129). .

"There are a number of reasons for the unanimous acceptance by English jurists of a duty to obey the laws of a sovereign power established within the State by revolution:

(i) First and foremost among these is the fundamental concept that allegiance is due in return for actual . protection. The corollary of this is that allegiance is not due to a sovereign power which, while claiming the theoretical right to protect, fails to afford protection.

(ii) Secondly, and most importantly, there is the need in the interests of the State and its people to ensure the continuity of the law and avoid the anarchy which would result from a legal vacuum.

(iii) A third reason, refreshingly free from cant and hypocrisy, is the appreciation by jurists that because Governments without exception have an extra-legal origin, Courts exercising jurisdiction within a State must, if they are to function at all, obey the laws of the Government `for the time being". If a Court of law anywhere in the world were to insist that only the laws of a Government with a legal origin may be obeyed and enforced, it would not be able to function because there is no such Government. The feature which distinguishes one Government from another is not that some have an extra-legal and others a legal origin but simply the variation in the length of time separating all existing Governments from their extra-legal origin. Although Government "for the time being" within a State shares with all other Governments the taint of extra-legal origin it has the obvious merit of being the only effective law-making and law-enforcing body within the State. To refuse to obey the laws of such a Government is to take not a legal but a revolutionary or a counter-revolutionary stand." (Page 121).

"A municipal Court is concerned not with the question of whether the State has been or should be accepted into the international community, but simply with the existence or non-existence of a law-making and law-enforcing Government within the territory in which it exercises jurisdiction.". (Page 110).

"My approach to the position of the Judges and of the High Court and, indeed, to these cases as a whole, is a "positivist" approach; because I think that in the situation which exists in Rhodesia

today what "is" or what "is not" the law can only be decided on the basis of accepting things as they actually "are" and not simply as they "ought to be". (Page 47).

"It seems to me that at any one time in any one place there can only be one correct law. That law cannot vary with the political views of the individual Judge who "declares" it. This, of course, is, by no means the same thing as saying that the Judge, having declared the law as he finds it to be, or even before so declaring, must necessarily remain in office and apply that law. Here his personal views may play a part; because in certain circumstances the Judge may decide that rather than continue as a Judge and apply such law he will go. So long, however, as he continues to sit as a Judge he must declare the law as it "is", and not as it "was", or as what he thinks it "ought" to be." (Page 48).

"If the entire Constitution under which a Court is created disappears or is completely suspended, the Court created under it must also disappear or be suspended alongwith the Constitution. A revolutionary Government cannot. be held to be a de facto Government (in the sense in which I have used the words) unless the old Constitution is at least entirely suspended. This I consider to be the case in Rhodesia today, because as a matter of political reality no writ of any Government purporting to govern under the 1.961 Constitution runs in Rhodesia. What, then, is the position of this Court at the present time? Strange as the conception might be, it cannot be said that the Court owes its present existence to or derives its present authority from the old 1961 Constitution. It owes its existence to and derives its authority today from the fact that the present de facto Government which is to full control of the Government of the country, knowing that the Court as such has not "joined the revolution", has nonetheless permitted it to continue and exercise its functions as a Court, and has authorized its public officials to enforce the Court's judgments and orders. The orders of the High Court today are not enforced by any remnant of a Government governing under the 1961 Constitution. They are enforced by the officials of the present de facto Government." (Page 52).

"In these circumstances it seems to me that the Court can only be regarded as deriving its authority from the fact that the present de facto Government allows it to function and allows its officials to enforce its orders." (Page 55).

From the above with which I fully agree it is abundantly clear that this Court derives its jurisdiction from the Laws (Continuance in Force) Order and that it has to accept and enforce law of the de facto Government for the time being, Courts have always to see that conflict between the Court and the State is avoided even if the Government be a de facto one. If we hold that on the basis of legality the new legal order then this Court would be signing down death warrant for then there would be no Government at all. For argument sake if the Judges do not rely on the new norms then

what norms are available for them to proceed with. In a revolutionary situation like the present one they have either to quit or to accept the new norms.

The mere fact that according to the new Legal Order the jurisdiction of this Court has been curtailed somewhat is no ground for questioning the validity of the order. Even under the Constitution of 1973 the jurisdiction of the superior Courts could be curtailed and had in fact been curtailed a number of times by a number of amendments in the Constitution. Could not an amendment be validly made in the Constitution of 1973 for deleting clause (3) of Article 184 altogether. Could then it be asserted that our judicial power which could not be taken away had been taken away. Judicial power is quite different from jurisdiction. The judicial power always rests in Courts and that has not been taken away by the new Legal Order. It has however now to be exercised within the framework of the new Legal Order.

So far as the doctrine of necessity is concerned it is not an independent legal system. It is always an integral part of the framework of a total Legal Order. When there is no provision in the total Legal Order for dealing with a particular situations then the doctrine of necessity is resorted to. The situation in Pakistan on the; 4th of July 1977, was such that there was total breakdown of law and order and a situation had arisen for which the Constitution. of 197 3 had no provision to deal with. The Chief of the Army Staff, therefore, resorted to the doctrine of necessity and issued the Proclamation of the 5th of July suspending the Constitution and proclaiming himself as Chief Martial Law Administrator. Now when by the Proclamation the Constitution was suspended the doctrine of necessity automatically got suspended with it and was not thereafter available for controlling the Martial Law or the actions to be taken under it. On the issuance of the Laws (Continuance in Force) Order a new Legal Order came into being and the doctrine of necessity again automatically reappeared with it, but within the framework of the new Legal Order. In future if no provision can be found for dealing with z situation that might arise under the new Legal Order then the doctrine of necessity can again be resorted to. But so long as there was a provision in the new. Legal Order for dealing with a case or situation the doctrine of necessity could) not be resorted to. Any action of the .Martial Law authorities which is taken) in consequence of any Martial Law Regulation or Martial Law Order could not, therefore, be challenged or questioned on the doctrine of necessity.

All the actions of the de facto Government can be tested only when the said Government comes to' an end and the old Legal Order is revived. In` that case the action of the Martial law authorities would be tested on the) basis of the old Legal Order. In this connection reference can be made to, Salmond on Jurisprudence, 11th Edition, page 25, relevant para. from which is reproduced below :-

"The formal establishment of such, a system of military Government and justice in time of internal war or rebellion is commonly known as the proclamation of martial law. With the acts of the military authorities done in pursuance of such a system the civil Courts of law will not concern themselves in time of war."

Reference may also be made to the authority reported in P L D 1953 Lah. 528. The following passage from this authority is worth perusal;--

"But so long as Martial Law lasts such orders cannot form justiciable issues before the civil Courts, not because the civil Courts have no jurisdiction but because their jurisdiction can at any time be ended by show or use of force by the military. Once, however, Martial Law is lifted, the threat to the existence of the Civil Courts disappears and they can then not only function in a normal way but also call in question the acts of the military whose only defence an either be the right of private defence or the right disperse unlawful assembly or some indemnity legislation."

This observation was made despite the fact that in the case in question no new Legal Order had at all been established. The above would therefore show that during the continuance of Martial Law the action of the Martial Law authorities could not be questioned in civil Courts.

The argument that a decision holding the action of the Martial Law authority immune from judicial scrutiny by Courts would encourage revolutions and coups d'etat has no substance in it as revolutions and coups d'etat cannot be prevented by judgments. Despite the judgment of this Court in Asma Jillani's case .a coup d'etat did take place, for whatever reason, it is immaterial. We daily see the revolutions and coups d'etat do take place despite provisions regarding treason in Constitutions of the countries. The persons who, want to stage a revolution or coups d'etat do not have any regard for the judgments or the Constitutional provisions. They go forward despite these and rule if they succeed or are executed if they fail. Only recently we have noticed such instances in our neighbouring countries.

The assertion that the Chief Martial Law Administrator had given statements and made pledges that he would do this and in such and such time does not detract from the existence of the Martial Law or the powers which are exercised under it. The Courts have nothing to do with these statements as such like statements and pledges are not enforceable under any law in any Court. Even in legal Governments the Prime Ministers who are 'generally the Chief Executives make wild promises either at the time of elections or even thereafter but no Court can come forward and direct them to fulfil their promise. This is a matter between them and the people. If they fulfil their

promises people will be pleased with them but if they do not then it is for the people to resort to any action they might like to, but the Courts have nothing to do with that. The Courts cannot give any direction that the Chief Martial Law Administrator is to do such and such thing or not to do such and such thing and within such and such time simply because he had wade certain statements and promises. This is outside the scope of the jurisdiction of the Court.

The upshot of the above discussion is :-

(1) That the Laws (Continuance in Force) Order which is effectual for the time being is the new Legal Order for the time being.

(2) That the new Legal Order has suppressed the old Legal Order (Constitution) for the time being.

(3) That this Court derives its jurisdiction from the new Legal Order and that the orders of detentions in question cannot be challenged in this Court in view of the proviso to Article 2 and Article 4 of the Order. The petition is therefore dismissed.

MUHAMMAD HALEEM, J. -I have had the advantage of reading -the judgment proposed to be delivered by my Lord the Chief Justice and concur with it in full and have nothing further to add.

G. SAFDAR SHAH, J.-During the course of rather extended, albeit, able arguments addressed to us by Mr. Sharifuddin Pirzada, learned Attorney-General for Pakistan, Mr. A. K. Brohi, learned counsel for the Federation of Pakistan and Mr. Yahya Bakhtiar, learned counsel for the petitioners, I was tempted to write a separate judgment But after going through the judgment of my Lord the Chief Justice 1 abandoned the idea as I thought it would simply duplicate the process. The lucid and able exposition by my Lord the Chief Justice of the various complicated and difficult Constitutional issues in this case is indeed worthy of admiration, particularly when his Lordship was able to finalise his judgment within a very short time.

Respectfully, therefore, concurring in the judgment of my Lord the Chief Justice, and being of the same opinion that in view of the suspension off Fundamental Rights by subsection (3) of section

2 of the Laws (Continuance' in Force) Order, 1977, this Court has no jurisdiction to grant to petitioners' any relief. This petition is therefore dismissed.

DR. NASIM HASAN SHAH, J.-I have had the advantage of perusing the judgment proposed to be delivered by my Lord the Chief Justice and am in respectful agreement with it. As I consider that some aspects of the questions which fall for decision may usefully be highlighted further, I venture to add a few words of my own.

2. The facts which form the background have been lucidly set out in the judgment of my Lord the Chief Justice and need not be repeated. As I appreciate the problems that arise in this case, they are, firstly, to ascertain the precise nature of the change that took place by the issuance of the Proclamation of Martial Law on 5th July 1977, and the promulgation on the same day of the Laws (Continuance in Force) Order-r 1977; secondly, to determine the legal effect of these steps and, thirdly, in case these acts are not lawful, whether they can be validated on any juristic principle.

3. The consideration of our political history shows that the Armed Forces have, during the past two decades, stepped in to govern the country on three different occasions. In October 1958, when the 1956 Constitution was in force, the President of the Republic, General Iskandar Mirza, in collaboration with the Army, took over the country, abrogated the Constitution and placed the country under Martial Law, appointing General Muhammad Ayub Khan to govern the country, through a legal instrument, called the Laws (Continuance in Force) Order, 1958. The latter, who shortly thereafter had also assumed the office of President, framed a Constitution for the country, which was promulgated on 7th June 1962. This Constitution remained in force till 25th March 1969, when President Ayub Khan, being unable to control the agitation mounted against his rule, invited the Commander-in-Chief of the Army to step to save the country from internal disorder and chaos. The Commander-in-Chief, General Muhammad Yahya Khan, willingly obliged again placed the country under Martial Law by the Proclamation issued by him on 26th March 1969, abrogated the Constitution of 1962 and dissolved the National and Provincial Assemblies. A few days thereafter, on 31st March 1969, he promulgated the Provisional Constitution Order, which, with some variations, followed the scheme of the Laws (Continuance in Force) Order, 1958. This was the second intervention.

4. The events that took place thereafter are recent history. General Elections, on the basis of One-man One-vote were held throughout the country in December 1970, in pursuance of the Legal Framework Order, promulgated earlier on 30th March 1970. These resulted in a land-slide victory for Sh. Mujib-ur-Rehman's Awami League in East Pakistan and an impressive victory for Mr. Z. A. Bhutto's People's Party in West Pakistan. Owing to the secessionist movement started by the Awami League, the follies of General Muhammad Yahya Khan and the massive intervention of

India, followed by armed aggression, East Pakistan was dismembered from the mother country on 16th December 1971. Thereafter the elected representatives belonging to Western Wing, alongwith two members from East Pakistan, met in Islamabad on April 14, 1972, as the National Assembly of Pakistan and proceeded to enact the Interim Constitution on April 21, 1972. Subsequently, this body framed the Permanent Constitution of Pakistan, which came into force on 14th August 1973. Some four years later country-wide elections were held on 7th March 1977, under its provisions. However, as soon as the Election Results were announced, practically the whole country rose in protest against them, being convinced that they were manipulated and the outcome of massive rigging. The main demands made in the general agitation that followed were that the Prime Minister should resign and that fair and free elections be held afresh. The ruling People's Party and the Opposition Parties, represented by an alliance, called the Pakistan National Alliance, held lengthy Conferences to resolve this grave problem, but without success. This led to the third Military intervention, in the early hours of 5th July 1977.

5. The Chief of the Army Staff General Muhammad Zia-ul-Haq proclaimed Martial Law, the Constitution was ordered to remain in abeyance, the National Assembly, Senate and Provincial Assemblies were dissolved, the Prime Minister and other Ministers ceased to hold offices. However, the President of Pakistan was continued in the office. On the same day the Laws (Continuance in Force) Order, 1977 was promulgated providing for the governance of the country in accordance with the provisions of the 1973 Constitution as nearly as may be, notwithstanding its abeyance, subject to certain stipulations.

6. So far as the two earlier interventions of October 1958, and March 1969, are concerned, this Court has had the occasion to examine the question of their legal effect. The legal effect of the intervention of 1958 came up for consideration in the case State v. Dossa P L D 1958 S C (Pak.) 23. Muhammad Munir, C. J., who wrote the leading judgment, observed therein that "it sometimes happens however that a Constitution and the national Legal Order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution and its legal effect is not only the destruction of the existing Constitution but also the validity of the national Legal Order." The learned Chief Justice went on to observe "the essential condition to determine whether a Constitution has been annulled is the efficacy of the change." In other words, if a revolution a legalised illegality. The revolution itself becomes a law creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. For this view, reliance was placed on the writings of Hans Kelsen contained in his Book on the "General Theory of Law and State." Th., Court held that the 1958 revolution satisfied the test of efficacy and had thus become a basic law creating fact. It was accordingly. found that the Laws (Continuance in Force) Order, 1958, however transitory or imperfect it might be, was a new Legal Order and had destroyed the old Legal Order, with the result that the validity of the laws and correctness of judicial decisions were to be determined with reference to that Order and not the earlier Order.

7. However, when the validity of the second intervention of 1969 came up for examination, a totally different view was taken of its legal effect. This is evident from the judgment of this Court in the case entitled Asma Allani v. Government of Punjab P L D 1972 S C 139. Herein also the Proclamation of Martial Law by General Muhammad Yahya Khan and the abrogation of 1962 Constitution so as to introduce military rule, were considered and it was held that the assumption of power by General Muhammad Yahya Khan and installation of himself as the President and Chief Martial Law Administrator by the Proclamation of 1969 was entirely illegal. The ruling in Dossu's case that where a Constitution and the national Legal Order under it is disrupted by an abrupt political change not within the contemplation of the Constitution, such a change is called revolution and its legal effect is not only the destruction of the existing Constitution 'out also of the validity of the national Legal Order, irrespective of how and by whom such a change is brought about, was held not to be good law. General Yahya Khan was held to be a usurper and all the actions taken by him found to be illegal and illegitimate. In order to avoid the disastrous consequences of declaring all acts done during his rule, whether legislative or otherwise, to be of no legal effect, it was, however, held that those which were in the wider public interest could be condoned on the principle of condonation, notwithstanding their illegality.

8. This brings us to the consideration of the legal effect of the third and present intervention. The contention on behalf of the petitioner, of course, is that the acts of General Muhammad Zia-ul-Haq in placing the country under Martial Law, suspending the Constitution and ordering the governance of the country in accordance with the provisions of the Laws (Continuance in Force) Order, 1977, are, as held by this Court in Asma Jilani's case, illegal. Hence the Proclamation of Martial Law and the Laws (Continuance in Force) Order are liable to be declared as without lawful authority.

9. This contention is refuted by Mr. A. K. Brohi, appearing on behalf of the Federation of .Pakistan, who submits that the view of the consequences of the military take-over by this Court in Anna Jillani's case was not correct. On the other hand, the conclusions arrived at by this Court in the earlier case of Dosso were correct, because even an extra-legal act not within the contemplation of the Constitution which effectively destroys or supersedes the old national Legal Order is a law-creating fact and the validity of the said action is to be judged not by reference to the old Legal Order, but by reference to the new Legal Order.

10. The question, therefore, is as to which of the two views is correct? However, to ascertain whether the rule to be applied in the present case should be the one laid down in Dosso's case or the one laid down in Asma Jillani's; it must first be examined if the nature of the military interventions that took place in October 1958 and March 1969 are similar in character to the intervention now in question.

11. The Proclamation of Martial Law issued by the President Iskandar Mirza in October 1958, shows that he decided that :-

(a) The Constitution of the 23rd March 1956 will be arbrogated.

(b) The Central and Provincial Governments will be dismissed with immediate effect.

(c) The National Parliament and Provincial Assemblies will be dissolved.

(d) All political parties will be abolished.

(e) Until alternative arrangements are made, Pakistan will come under Martial Law.

General Muhammad Ayub Khan, Commander-in-Chief of Pakistan Army was, accordingly, appointed as the Chief Martial Law Administrator and all the Armed Forces of Pakistan placed under his command. Explaining the reasons for these steps the President, inter alia, observed .-

"The Constitution which was brought into being on 23rd March 1956, after so many tribulations, is unworkable. It is full of dangerous compromises, that Pakistan will soon disintegrate internally if the inherent malaise is not removed. To rectify them, the country must first be taken to sanity by a peaceful revolution. Then, it is my intention to collect a number of patriotic persons to examine our problems in -the political field and devise a Constitution more suitable to the genius of the Muslim people. When it is ready, and at the appropriate time, it will be submitted to the referendum of the people."

The Proclamation read with the above declaration of intent shows . that the intention was to destroy the old national Legal Order. Accordingly the Constitution was abrogated and it was clarified that it was proposed to replace it by a new one. Although the Laws (Continuance in Force) Order, 1958 provided for the governance of the country as nearly as may be, in accordance with the Constitution of 1956, yet this was only for the interregnum. The said Constitution described as the late

Constitution in the Laws (Continuance in Force) Order and, of course, was subject to any Order of the President or Regulation made by the Chief Administrator of Martial Law. Hence it could truly be said that the intervention of 1958 was intended to and did in effect supersede the old national Order, ,"substituting it by a new national Legal Order.

11. The position of the 1969 intervention was similar to the 1958 intervention. By the Proclamation of Martial Law of 25th March, 1969, the whole of Pakistan was placed under Martial Law and the Constitution of the Islamic Republic of Pakistan, 1962, was abrogated. In the broadcast made by General Yahya Khan, Commander-in-Chief of the Pakistan Army, on the following day, I.e. 26th March, 1969, it was unambiguously stated that the Constitution of 1962 was to be replaced by a new Constitution as is evident from the following extract from his speech;

". . . It is my firm belief that a sound, clean and honest administration is a prerequisite for sane arid constructive . political life and for the smooth transfer of power to the representatives of the people elected freely and impartially on the basis of adult franchise. It will be the task of these elected representatives to give the country a workable constitution. . . , . ."

Thus in both the above-noted instances the purpose of the intervention was not only to suppress the existing Constitutions, but to replace them by new Constitutions. The old Legal Order was to be replaced by a new legal Order.

12. The present situation, however, is radically different. Although by the Proclamation of 5th July, 1977 the whole of Pakistan has come under Martial Law, the Constitution has not been abrogated but merely kept in abeyance. The President of Pakistan elected under the 1973 Constitution is to continue in office. Furthermore, there is no intention to substitute the present Legal Order by a new Legal Order, for this Legal Order is to be revived after fresh' elections have been held. These too will be held under the provisions of the 1973 Constitution. The real character of the present intervention has been explained by the Chief Martial Law Administrator himself in his speech made on 5th July, 1977, the relevant portion whereof may usefully be reproduced below;--

". . But the Constitution has not been abrogated. Only the operation of certain parts of the Constitution has been held in abeyance. Mr. Fazal Elahi Chaudhary has very kindly consented to continue to discharge his duties as President of Pakistan as heretofore under the same Constitution. I. am grateful to him for this. To assist him in the discharge of his national duties, a four-member Military Council has been formed. The Council consists of the Chairman, Joint Chiefs of Staff, and Chiefs of Staff of the Army, Navy ;end Air Force.

I will discharge the duties of the Chief of Army Staff and Chief Martial Law Administrator. Martial Law Orders and Instructions, as and when required, will be issued under my orders."

The reasons necessitating the intervention were explained in the following words;---

"The elections were held in our beloved homeland on March 7 last. The election results, however. were rejected by one of the contending parties, namely the Pakistan National Alliance. They alleged that the elections had been rigged on a large scale and demanded fresh elections. To press their demand for re-elections, they launched a movement which assumed such dimensions ?`pat people even started saying that democracy was not workable :n Pakistan. But, I genuinely feel that the survival of this country lies in democracy alone. It is mainly due to this belief that the Armed Forces resisted the temptation to take over during the recent provocative circumstances in spite of diverse massive political pressures. The Armed Forces have always desired and tried for the political solution to political problems. That is why the Armed Forces stressed on the then Government that they should reach a compromise with their political rivals without any loss of time... It must; be quite clear to you now that when the political leaders failed to steer the country of a crisis, it is an inexcusable sin for the Armed Forces to sit as silent spectators. It is primarily, for this reason, that the Army, perforce had to intervene to save the country.

I would like to point out that I saw no prospects of a compromise between the People's Party and the P. N. A., because of their mutual distrust and lack of faith. It was feared that the failure of the P. N. A. and P. P. P. to reach a compromise would throw the country into chaos and the country would thus be plunged into a more serious crisis. This risk could not be taken in view of the larger interests of the country. The Army had, therefore, to act as a result of which the Government of Mr. Bhutto has ceased to exist ; martial law has been imposed throughout the country ; the National and Provincial Assemblies have been dissolved and the Provincial Governors and Ministers have been removed."

However, a categorical assurance that there was no intention to establish a new Legal Order, but merely to help the country to get back on the rails of constitutionalism was thereafter given, in the following words;--

" . I was obliged to step in to fill in the vacuum created by the Political leaders. I have accepted this challenge as a true soldier of Islam. My sole aim Is to organise free and fair elections which

would be held in October this year. Soon after the polls, power will be transferred to, the elected representatives of the people . . . ."

The intervention thus appears to be for a temporary period and for limited purpose of arranging fair and free elections so as to enable the country to return to the democratic way of life. Thus on the present occasion the Proclamation of Martial Law does not appear to be of the same type as the Proclamations of Martial Laws of 1958 and 1969, whereby not only the existing Constitutions were abrogated but that this was done with the intention of replacing them with new Constitutions. The purpose there was to destroy the existing Legal Orders and replace them with new Legal Orders. In the present case the situation is quite different. In view of the. break-down of the normal constitutional machinery and to fill the vacuum, the Armed Forces were obliged to take an extra-constitutional step. Martial Law was imposed, in the picturesque words used in the written statement filed by Mr. Brohi, not "in order to disable the constitutional authority, but in order to provide a bridge to enable the country to return to the path of constitutional rule." In the felicitous phrase of my Lord the Chief Justice, the act was more in the nature of a "constitutional deviation" rather than an overthrow of the Constitution. The Constitution of 1973 is not buried but merely suspended. It, however, continues to be the governing instrument subject to the provisions of the Laws (Continuance in Force) Order, 1977. In these circumstances neither the ratio decidendi of Dosso v. State nor that of Asma Jillani v. The Punjab Government is strictly applicable to the present case.

13. The question next arises whether the above intervention was a step which could lawfully be taken. So far as this point is concerned, it is an admitted position that there is no provision in the Constitution authorising the Army Commander, even in the event of the break-down of the constitutional machinery to intervene in the manner that he did. But Mr. Sharif-ud-Din Pirzada, Attorney-General of Pakistan, submitted before us that since the country cannot be allowed to perish for the sake of the Constitution, the intervention was justified on the doctrine of State necessity, while Mr. Brohi contended that as the old Legal Order had been effectively replaced by a new Legal Order, henceforth all questions of legality were answerable with reference to it, in other words all such questions were to be determined not on the basis of the previous Legal Order but with reference to the Laws (Continuance in Force) Order, 1977.

14. The doctrine of "necessity", namely rendering lawful that which otherwise is unlawful, is well-established in jurisprudence (ID QUOD -ALIAS NON EST LICITUM, NECESSITAS LICITLJM FACIT"-that which otherwise is not lawful necessity makes lawful). In constitutional law the N application of Martial Law is but an extended application of this concept N of State necessity. The doctrine of necessity was applied by the Federal Court of Pakistan only recently as a legal justification for ostensibly unconstitutional actions to fill a vacuum arising out of a Court order. See Reference by H. E. The Governor-General to the Federal Court P L D 1955 F C 435. It will be recalled that the reference was necessitated, inter alia, to overcome, the difficulty caused

by the circumstance that forty; four, Acts passed by the Constituent Assembly of Pakistan had not received the assent of the Governor-General, ac required by law. The Constituent Assembly had been dissolved by the Governor-General in October, 1954, and had not been reconstituted. By a Proclamation made on 16th April 1955, the Governor-General declared certain essential laws to be enforceable until their validity was decided upon by the new Constituent Assembly. It was held that he bad acted in order to avert an impending disaster and to prevent the State. and society from dissolution and that on the ground of necessity his Proclamation should be treated as having been given the force of law to the measures specified. The principal authority relied upon was the address to the Jury by Lord Mansfield in the case of R. V. Stratton and others (1779) 21 St. Tr. 1222. The Governor of Madras acted illegally and unconstitutionally in refusing to count the votes of some of the members of his Council. The Councillors accordingly imprisoned him for eight months and carried on the Government themselves. Upon being indicted in England they set up the defence of necessity. Lord Mansfield directed the jury that the defence was one of `civil' or `State necessity'. He remarked;--

"In India you may suppose a possible case, but in that case, it must be imminent, extreme necessity ; there must be no other remedy to apply to for redress ; and in the whole they do, they must appear clearly to do it with a view of preserving the society and themselves. What immense mischief would have arisen to have waited for the interposition of the Council at Bengal."

The principle clearly emerging from this address is that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done bona fide under the stress of necessity, the necessity being referable to an intention to preserve the Constitution, the State or the society and to prevent it from dissolution, and affirms Chitty's statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful which otherwise is not lawful.

15. Situations are conceivable where the normal law of the land may have to give way before necessity, particularly in a situation where the welfare of the State and its subjects are at stake, and in proper G case it would be the Court's duty to recognize such a situation and to act 0 upon the principle "salus populi suprema lex" despite the express provisions of the Constitution. An instance .of this is furnished by the case . The Attorney-General of the Republic v. Mustafa Ibrahim and others (1964) 3 Cyprus L R 195. To appreciate the background of this decision, it may be mentioned that by December 1963 the structure of the Constitution of Cyprus had broken down. The island divided up into armed camps. The Vice-President and the Turkish Cypriot members of the Council of Ministers ceased participating in the machinery of government; the Turkish Cypriot representatives no longer sat in the House of the Representatives; but the Constitution required the concurrence of Greek and Turkish Cypriots for many important purposes. The administration of justice was thrown into chaos. For some months Turkish Judges did not attend their Courts. The mixed Courts which had to be convened to dispose of cases where the parties belonged to different

communities could not be constituted. The Supreme Constitutional Court had not met since August 1963, when its neutral ,President had resigned; and by July 1964 over 400 cases were awaiting trial by the Court. In June 1964 the neutral President of the High Court resigned.

16. In July 1964 the House of Representatives, sitting without its Turkish Cypriot members, passed a law to establish a Supreme Court which was to exercise the functions previously vested in the Supreme Constitutional Court and the High Court. This law was inconsistent with a number of important articles of the 1960 Constitution; it had not been passed in the manner prescribed by the Constitution; indeed, it included provisions which conflicted with certain articles declared by the Constitution to be unalterable.

17. In August 1964 four persons charged with serious offences and committed for trial at assizes were granted bail by a District Judge. The Attorney-General appealed to the Supreme Court against this order for bail; three Judges nominated by the Court in accordance with the ? 96.1 law heard the appeal. For the respondent it was argued that the 1964 law was a nullity as it was unconstitutional, so that the Court had no valid existence. The Court unanimously rejected this plea and held that it was validly constituted and had jurisdiction to entertain the appeal. The Constitution of 1960, it was observed, had not ceased to have legal force, but it had to be read subject to the doctrine of necessity. Measures not sanctioned by the letter of the Constitution could properly be taken if they were necessary to avert a grave public evil and were proportionate to the evil to be averted. In Cyprus the presuppositions of inter-communal co-operation, on which the Constitution had been based, had foundered, and the Constitution had become unworkable. The steps taken to rectify the situation were reasonably required in the circumstances. In support of this conclusion some pertinent observations were made by the three Judges constituting the Bench. Vassiliades, J., observed;--

"This Court now, in its all important and responsible function of transforming legal theory into living law, applied to the facts of daily life for the preservation of social order, is faced with the question whether the legal doctrine of necessity . . . . should or should not, be read into the provisions of the written Constitution of the Republic of Cyprus. Our unanimous view is in the affirmative.

The enactment of the Administration of Justice (Miscellaneous Provisions) Law, 1964, which would otherwise appear to be inconsistent with Articles 133.1 and 153.1 of the Constitution, can be justified, if it can be shown that it was enacted only to avoid consequences which could not otherwise be avoided and which; if they had followed, would have inflicted upon the people of Cyprus, when the Executive and Legislative Organs of the Republic are bound to protect, inevitable irreparable evil; and furthermore if it can be shown that no more was done than was

reasonably necessary for the purpose, and that the evil inflicted by the enactment in question was not disproportionate to the evil avoided-Law was justified notwithstanding the provisions of Articles 133.1 and 153.1 of the Constitution."

Triantafyllides, J., after reproducing the facts of .the Constitutional impasse observed:-

"Organs of Government set up under a Constitution are vested expressly with the competence granted to them by such constitution, but they have always an implied duty to govern too., It would be absurd to accept that if, for one reason -or other, an emergency arises, which cannot be met within the express letter of the constitution, then such organs need not take the necessary measures in the matter, and that they would be entitled to abdicate their responsibilities and watch helplessly the disintegration of the country or an essential function of the State, such as the administration of justice. Notwithstanding a constitutional deadlock, the State continues to exist and together with it continues to exist the need for proper government. The Government and the Legislature are empowered and bound to see that legislative measures are taken in ensuring proper administration where what has- been provided for under the Constitution, for the purpose, has ceased to function"

He went on to observe :-

"…….Having considered the jurisprudence and authoritative writings of other countries to which this Court has been referred, as well as some others, I am of the opinion that the doctrine of necessity in public law is in reality, the acceptance of necessity as a source of authority for acting m a manner not regulated by law but required, in prevailing circumstances, by supreme public interest, for the salvation of the State and its people. In such cases `salus populi' becomes `supremo lex'. "

Another pertinent observation may also be reproduced:

"Even though the Constitution is deemed to be a supreme law limiting the sovereignty of the Legislature, nevertheless, where the Constitution itself cannot, measure up to a situation which has arisen, especially where such situation is contrary to its fundamental theme, or where an organ set up under the Constitution cannot function and where, furthermore, in view of the nature of the Constitution it is not possible for the sovereign will of the people to manifest itself, through an amendment of the Constitution, in redressing the position, then, in my opinion according to the

doctrine of necessity the legislative power, under Article 61 remains unhindered by Article 179, and not only it can, but it must, be exercised for the benefit of the people."

He then went on to make the observation relied upon by Mr. Sharifuddin Pirzada that a State and people should not be allowed to perish for the sake of Constitution. On the contrary, the Constitution should exist for the preservation of the State and welfare of the people. However, he qualified his observations by laying down that where the doctrine of necessity has been invoked it is for the judiciary to determine if the necessity in question actually exists and also if the measures taken were warranted thereby.

Josephides, J., also held that he interpreted the Constitution to include the doctrine of necessity in exceptional circumstances, as an implied exception to particular provisions of the Constitution in order to ensure the very existence of the State. Commenting on the situation that had arisen he remarked.

"Faced with the non-functioning of the two superior Courts of the land and the partial break-down of the District Court, the Government had to choose between the alternatives, viz. either to comply with the strict letter of the Constitution (the relevant articles being unalterable under any Condition), that is, cross its arms and do nothing but witness the complete paralysis of the judicial power, which is one of the three pillars of the State; or to deviate from the letter of the constitution, which had been rendered inoperative by the force of events (which situation could not be foreseen by the framers of the Constitution) . . . . ."

However, he laid down the following pre-requisites to be satisfied before this doctrine could become applicable :-

(a) an imperative and inevitable necessity or exceptional circumstances; (b) no other remedy to apply;

(c) the measure taken must be proportionate to the necessity; and

(d) it must be of a temporary character limited to the duration of the exceptional circumstances.

18. The doctrine of necessity was also invoked by two Judges of the Divisional Bench of the High Court of Southern Rhodesia (Lewis and Goldin, JJ.) in the famous ease Madzimbamuto v. V. Lardner-Burke (1967) 83 L Q R 64. The Divisional Bench held that although the existing Government of Mr. Smith and his colleagues was not the lawful Government of the Southern Rhodesia (having unilaterally declared independence -UDI- and broken away from the British Crown and framed its own Constitution in 1965, in supersession of the Constitution enacted by the British Parliament in 1961) the Government could nevertheless continue to retain without trial two persons in terms of a Southern Rhodesia's statute which conferred the power to detain persons without trial only upon the lawful Government of Southern Rhodesia. This finding was grounded on the following hypothesis:

"The Government is, however, the only effective Government of the country, and therefore on the basis of necessity and in order to avoid chaos and a vacuum in the law, this Court should give effect to such measures of the effective Government, both legislative and administrative, as could lawfully have been taken by the lawful Government under the 1961 Constitution for the preservation of peace and good Government and the' maintenance of law and order."

19. The appeal from this judgment was heard by a Bench of five Judges of the Appellate Division of the Rhodesian High Court (1968) 2 S A, of whom only one, Fieldsend A. J. A. agreed with the first Court with respect to the doctrine of necessity. According to him "in considering each individual case that comes before it the Court must not lose sight of the political situation and the political realities. The question is whether these political realities create such a situation that, judged by the yardstick of 1961 Constitution the Court should decide that situation sanctions for the accord of validity to some acts of measures done or enacted otherwise than by the machinery of that Constitution." He went on to add: "Lewis, J., in the Court fully relied on the maxim "salus populi suprema lex", which is in effect the doctrine of State necessity to justify a departure from the express terms of the 1961. Constitution. In his alternative argument in this Court Mr. Rathouse said that he preferred not to put his case squarely upon this basis, but to rely rather upon what he termed "natural necessity" to determine whether or not there is any room for the introduction of a doctrine of necessity to mitigate the strict application of the Constitution it is necessary first to ascertain the principles underlying the commonly accepted meaning of the doctrine. This can best be done by reference to certain of the cases from which these emerge." He then referred to several cases, of which the following two are of particular interest and are accordingly being reproduced hereunder. In R. v. Bekker & Naude (1900) 17 SC 340, Solomon, J., said at page 355 :-

"Martial Law is nothing more nor less than the law of self-defence or the law of necessity. It is put in force in times of public danger, when the maxim salus reipublicae extrema lex applies, and when in consequence it becomes necessary for the military authorities to assume control and to take the

law into their own hands for the very purpose of preserving that Constitution which is the foundation of all the rights and liberties of its subjects. When such a state of things arises in any district, the ordinary rights and liberties of the inhabitants are subordinated to the paramount interest of the safety of the State . . . . Both the justification for proclaiming martial law and the actual exercise of authority there under are strictly limited by the necessities of the situation ;"

and in White & Tucker v. Rudolph 1879 Kotze 15, Kotze, J. said at page 124:

"It must be admitted that the law distinctly recognizes the maxim necessitas non habet legem, quod cogit defendit. The meaning of this is not, as some writers lay down, that necessity overrides all law, and is superior to it; but that the law justifies in certain cases, as where the safety of the State is in imminent danger, a departure from the ordinary principles protecting the subject in his right of private property. This right of private property is sacred and inviolable: any interference with it is, prima facie, wrongful and unlawful, and it is incumbent upon the respondent in the present instance to justify what he has done by showing that it was dictated by necessity that will justify a departure from the ordinary principles of law. It must be necessity extreme and imminent."

His conclusion was expressed as follows :-

"From a consideration of all these sources and their similarities to and differences from the cases now under consideration, it seems that the only proper conclusion is that natural justice, in the form of a controlled common sense, dictates that, for the welfare of the mass of people innocently caught up in these events, validly must be accorded to some acts of the usurping authorities, provided that no consideration of public policy to the contrary has to prevail. It is unnecessary, and indeed undesirable, to attempt to define precisely, the limits within which this validity will be accorded. The basis being broadly necessity, the decision is one which must be arrived at in the light of the circumstances of each case."

The above view was favourably commented upon in the dissenting judgment of Lord Pearce in the Privy Council, although the majority rejected the principle of necessity as applied by the Rhodesian Judges (Madzimbamuto v. Lardner-Burke (1968) 3 All E R 561. Lord Pearce stressed that the British Parliament and Government had really made no effort whatever to govern Rhodesia after UDI and the argument that it was only Parliament and Parliament alone to determine whether maintenance of law and order would justify giving effect to laws made by the usurping Government to such extent as may be necessary for that purpose was altogether elusive and unreal if read as a response to the question whether and under what circumstances the necessity of

avoiding chaos can be regarded (as it was conceded by the appellants that it can be regarded) as a source of law.

His Lordship quoted with approval the following extract from the judgment of Fieldsend, J. :-

"The necessity relied on in the present case is the need to fill the vacuum which would result from a refusal to give the validity to the acts and legislation of the present authorities in continuing to provide for tile every day requirements of the inhabitants of Rhodesia over a period of two years. If such acts ware to be without validity there would be no effective means of providing money for the hospitals, the police, or the Courts, of making essential by-laws for new townships or of safeguarding the country and its people in any emergency which might occur, to mention but a few of the numerous matters which require regular attention in the complex modern state. Without constant attention to such matters the whole machinery of the administration would break down to be replaced by chaos, and the welfare of the inhabitants of all races would be grievously affected."

Lord Pearce went on to observe;

"The lawful Government has not attempted or purported to make any provision for such matters or for any lawful needs of the country, because it cannot. It has of necessity left all those things to the illegal . Government and its Ministers to provide. It has appointed no lawful Ministers. If one disregards all illegal provisions for the needs of the country, there is a vacuum and chaos.

In my view the principle of necessity or implied mandate applies to the present circumstances in Rhodesia. I cannot accept the argument that there was no necessity since the illegal regime can always solve the problem by capaitulating. So too a foreign army of invasion can always return home. The principle of necessity or implied mandate is for the preservation of the citizen, for keeping law and order, rebus sic stantibus, regardless of whose fault it is that the crisis has been created or persists. Subject therefore to the facts fulfilling the three necessary questions, the principle of necessity or implied mandate applies in this case. This according to Lord Mansfield with whom I agree, is a question of fact.

Does the ordinary orderly running of the country reasonably require it? Fieldsend, J., held that it did. The other Judges accepted different principles, and therefore their overall' conclusion is not

of much assistance on this point. But Fieldsend, J., approached the case from what in my view is the right angle, and I would therefore accept his finding . . . . ."

20. Another instance wherein the principle of necessity was found to be applicable is furnished by the decision of the Supreme Court of Nigeria in the case Lakamni & Oala v. Attonery-General (West) decided on 24th April, 1970. After the rebellion in different parts of Nigeria, in January 1966, the Acting President handed over the country to the Armed Forces. The General Officer commanding the Nigerian Army accepted the invitation to form an interim Military Government. He suspended some parts of the Constitution and started to administer the country. The State Government of Western Nigeria started to investigate the activities of public officers including E. O. Lakanmi and some members of his family. The Chairman of the Tribunal of Inquiry into the assets of such public officers made an order under Edict No. 5 of 1967 restraining the appellants (Lakanmi etc.) from disposing of their real property until the Military Government of the State directed.

21. The appellants sought certiorari to quash the order on the grounds that Edict No- 5 was void, since it purported to operate in the same field as the Federal Military Government's Decree No. 51 of 1966 which had earlier "covered the filed", and that .certain of its provisions were inconsistent with the Decree. The High Court of Ibadan rejected these arguments and the appellants appealed; while the appeal was pending, the federal Military Government passed three further Decrees in the same field, Nos. 37, 43 and 45 of 1968. The respondents took a preliminary objection that the High Court of Appeal had no jurisdiction, since the order complained of had been validated by Decree No. 45 of 1968. The Court of Appeal agreed. On a further appeal to the Supreme Court, the question arose of the validity of Decree No. 45.

22. The appellants argued that the Federal Military Government was not a revolutionary Government but a constitutional interim Government whose object was to uphold the 1963 Constitution except where the necessity to depart from it arose. The separation of powers was accordingly preserved after 1966 and the Government's power to make laws by Decrees was not therefore unfettered. Decree No. 45 could therefore be regarded as a legislative act which constituted an executive interference in the sphere of the judiciary, and was to that extent invalid.

23. The respondents argued that the Federal Military Government was a revolutionary Government which had unfettered power to rule by Decree. Nothing in the Constitution could make a Decree void, and validation laws should be regarded as a normal exercise of legislative functions.

24. The Supreme Court held that Edict No. 5 was ultra vires as Decree No. 51 covered the field. As to the validity of Decree No. 45, they accepted the appellants' argument and decided that the Federal Military Government was indeed a constitutional rather than a revolutionary Government, and that the 1963 Constitution remained law, except as derogated from under the doctrine of necessity. They refused to accept the view that the Federal Military Government derived its authority from the 1966 revolution and not from the 1963 Constitution. Separation of powers remained a part of the Constitution which had not been superseded under the doctrine of necessity; and as Decree No. 45 was not itself justified by the doctrine, it was invalid.

25. In taking the above decision the Supreme Court of Nigeria made several interesting observations and some of these may be reproduced there under with advantage :-

"It is to be noted from the Government Notice (No. 148) set out above that the invitation to the Armed Forces, which was duly accepted, was to form an interim Military Government. and it was made clear that only certain sections of the Constitution would be suspended. It was evident that the Government thus formed is an interim Government which would uphold the Constitution of Nigeria and would only suspend certain sections as the necessity arises."

Thereafter the Court discussed the case of Uganda v. Commissioner of Prisons (1966) E A L 8,514, which followed the decision of this Court in State v. Dosso P L D 1958 S C (Pak.) 53. But the Court, however, reiterated its view that the Federal Military Government was not revolutionary Government and went on to observe;--

". . . It made it clear before assuming power that the Constitution of the country still remains in force, excepting certain sections which are suspended. We have tried to show that the country is governed by the Constitution and Decrees which, from time to time, are enacted when the necessity arises and are then supreme when they are in conflict with the Constitution. It is clear that the Federal Military Government decided to govern the country by means of the Constitution and Decrees. The necessity must arise before a decree is passed ousting any portion of the Constitution. In effect, the Constitution still remains the law of the country and all laws are subject to the Constitution excepting so far as by necessity the Constitution is amended by a Decree. This does not mean that the Constitution of the country cease, to have effect as a superior norm. From the facts of the taking-over, as we have pointed out, the Federal Military Government is an interim Government of necessity concerned in the political cauldron of its inception as a means of dealing effectively with the situation which has arisen and its main object is to protect lives and property and to maintain law and order . . . ."

It was also observed that "by recognizing the fact that there is a doctrine of necessity, we do not alter the law but apply it to facts as they do exist."

26. The doctrine of necessity is also recognised in Islamic Law. Event in the Holy Qur'an the application of this doctrine is made permissible Verse, 173 of Chapter II (Sura-al-Baqr) as translated by Marmaduke Pickthal refers to it thus;

"173. He hath forbidden you only carrion, and blood, and swine flesh, and that which hath been immolated to (the name of) any other than Allah. But he who is driven by necessity, neither craving nor transgressing, it is no sin for him. Lo ! Allah is Forgiving, Merciful."

27. However, before this doctrine can be invoked the following conditions must pre-exist : (a) that which is forbidden by Allah can be taken only where one is driven to it by necessity ; (b) that there is neither craving nor the intention to transgress the limits set by him ; (c) that oily that bare minimum is s taken as is necessary to save life. Thus the principle of necessity as also the conditions in which it can be resorted to are clearly set forth in Islam.

28. This somewhat lengthy review of the case-law of this country, the judgments of the superior Courts of Cyprus, Rhodesia, Nigeria and even the Privy Council show that necessity can be accepted as a justification for an extralegal act, in certain conditions. This position is also recognised in Islam. In the precedent cases, cited above it has also been observed that "Martial Law is nothing more nor less than the law of self-defence or the law of necessity (In R. v. Bekkar & Naude)", and that in constitutional law the application of Martial Law is but an extended application of the concept of State necessity (See Reference by H. E. The Governor-General to the Federal Court of Pakistan). Thus, in certain exceptional circumstances it is possible, as a measure of State necessity, to impose even Martial Law.

29. The question whether the conditions obtaining in Pakistan necessitated the above step has to be answered by reference to the happenings from 7th of March, 1977, up to 5th July, 1977, which reveal that the constitutional and moral authority of the National Assembly which had come into being as a result of the elections held on 7th March, 1977, as well as the Federal and Provincial Governments formed thereafter had been continuously and forcefully repudiated throughout the country over a prolonged of nearly four months, with the result that the national life stood d. A situation had arisen for which the Constitution provided no solution. The atmosphere was surcharged with the possibility of furthers violence, confusion and chaos. As the Constitution itself could not measure u to the situation the doctrine of State Necessity became applicable, for where

the safety of the State and the welfare of the people are. in imminent danger necessity justifies a departure from the ordinary principles of law. In there circumstances the step taken by the Armed Forces of imposing Martial Law stands validated, on the principle of State Necessity, as urged by the learned Attorney-General. But by the same token this deviation must be of a temporary character, limited to the duration of the exceptional circumstances. Moreover the actions taken during this period will, for the reasons set forth so admirably by my Lord the Chief Justice, be open to judicial review.

30. I may now briefly comment upon the stand taken up by Mr. Brohi on this point. According to him the legal effect of the intervention was to be adjudged with reference to the new Legal Order, namely, the Laws (Continuance in Force) Order, 1977, and not the old Legal Order, namely, the Constitution of 1973, because, the aforesaid Order had been effectively replaced by the new Legal Order, the efficacy of the change being the basis of its validity. In this connection Mr. Brohi relied upon the doctrine of Kelsen enunciated in his works on the Pure Theory of Law and the General Theory of Law and State. The views of Kelsen advocated by him in these works were explained to us by Mr. Brohi in some detail. However, in the facts and circumstances of our situation the doctrines propounded by Kelsen do not appear to be strictly applicable as the change-over which occurred on the 5th July 1977 cannot qualify as a "revolution" in Kelsenian terms. Although the Armed Forces are undoubtedly in effective control of the administration, it is neither their intention nor indeed have they established a new Legal Order in supersession of the existing Legal Order. The Constitution of 1973 remains the supreme law of the land, subject to the condition that certain parts thereof have bee held in abeyance. The President of Pakistan and the superior judiciary continue to function under the Constitution, subject to any limitations placed on their jurisdiction. The change is only in the nature of a constitutional deviation rather than the destruction of one Legal Order and its replacement by another. Even otherwise, the doctrines of Kelsen cannot be accepted in their entirety by Courts of Law. Whereas for Kelsen the efficacy of a revolution creates a new reality of which the pure science of law must take account for the Courts involved in practical decisions the efficacy of a revolution creates a new legal situation which they must take note of and proceed to decide the matter as raised before them by the contesting parties. In doing so they will have to take into account not only the efficacy of the change, but other values, such as the desirability of maintenance of peace, order, justice or good Government, to fill the vacuum in law and to avoid chaos, presumption in favour of the old regime because of its original legal status or against it because of its record of unconstitutional actions and conduct. In short, the responsibility of the Judge is not to the "objective reality" that exists for the academic observer but to the peace, order, justice, morality and good government. In fact, for Judges involved in practical decisions acceptance of the changed Legal Order is not so much on account of its efficacy as such but rather on necessity in the sense of "ID QUOD ALIAS NON EST. LICITUM, NECESSITAS LICITUM FACIT" (that which otherwise is not lawful necessity makes lawful).

31. As for the other points arising in the case and dealt with by my Lord the Chief Justice in his judgment, I am in complete agreement therewith and have nothing to add.

ORDER OF THE COURT

According to the unanimous view of the Court, this petition is dismissed as not being maintainable.

S. A. H. Petition dismissed.

Case 5

PLD 1993 Supreme Court 473

[Original Jurisdiction]

Present. Nashn Hasan Shah, CJ., Shaflur Rahman,

Saad Saood Jan, Abdul Qadeer Chaudliry, Ajnial Mian,

Muhammad Aftab Lone, SajjadAli Shah, Multanimad Rafique Tarar,

Saleem Akhtar,, Saeeduzzanian Siddiqui and Fazal Elahi 10tan, J1

Mian MUHAMMAD NAWAZ SHARIF --- Petitioner

versus

PRESIDENT OF PAKISTAN and others --- Respondents

Constitutional Petition No. 8 of 1993, decided on 26th May, 1993.

Per Dr. Nasim Hasan Shah, C.J.; Abdul Qudeer Chaudhry and Fazal Elahi Khan, JJ. agreeing; Sajjad All Miah, J. Contra---

(a) Constitution of Pakistan (1973)--

---- Arts. 184(3) & 58(2)(b) --- Constitutional petition under Art.184(3) before Supreme Court --- Maintainability --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President of Pakistan under Art.58(2)(b) of the Constitution --- Petition under Art.184(3) of the Constitution praying that order of dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President be declared mala fide, without lawful authority, null and void and of no legal effect and all steps taken in implementation of or taken as a result of the said order of dissolution including the appointment of the Care-taker Cabinet be also declared as null and void with a further prayer that the President of Pakistan and others be- restrained from interfering with the functions and duties of the elected Government headed by the petitioner and no impediments be placed in the functioning of the National

Assembly --- Preliminary objection was raised to the effect that petition filed under Art,184(3) of the Constitution directly before the Supreme

Court was not maintainable and was liable to be dismissed on that ground-- Supreme Court proceeded to join the preliminary objection (regarding the maintainability of the petition) with the questions arising on merits and observed that both of these questions shall be heard and decided together and adjourned the matter for full and final arguments, the parties having been directed to complete the records in the meanwhile.

(b) Constitution of Pakistan (1973)--

---- Part 11, Chap. 1 --- Fundamental rights --- Concept --- Fundamental rights are to be construed in consonance with the changed conditions of the society and must be viewed and interpreted with a vision to the future --- Need to reevaluate the essence and soul of Fundamental Rights as originally provided in the Constitution emphasized.

Fundamental Rights in essence are restraints on the arbitrary exercise of power by the State in relation to any activity that an individual can engage. Although Constitutional guarantees are often couched in permissive terminology, in essence they impose limitations on the power of the State to restrict such activities. Moreover, Basic or Fundamental Rights of individuals which presently stand formally incorporated in the modern Constitutional documents derive their lineage from and are traceable to the ancient Natural Law. With the passage of time and the evolution of civil society great changes occur in the political, social and economic conditions of society. There is, therefore, the corresponding need to re-evaluate the essence and soul of the fundamental rights as originally provided in the Constitution. They require to be construed in consonance with the changed conditions of the society and must be viewed and interpreted with a vision to the future.

Hurtadc v. California 110 US 516 and Benazir Bhutto's case PLD 1988

(c) Constitution of Pakistan (1973)--

---- Art. 17 --- Term "operating" occurring in Art.17(2) --- Connotation--Fundamental Right guaranteed by Art.17(2) --- Scope and extent --- Right conferred by Art.17 includes not merely the right to form a political party but comprises also other consequential rights --- Guarantee "to form a political party' must be deemed to comprise also the right by that political party to form the Government, wherever the said political party possesses the requisite majority in the Assembly---Any unlawful order which results in frustrating such activity, by removing such party from office before the completion of its normal tenure would, therefore, constitute an infringement of Fundamental Right guaranteed in Art. 17(2) of the Constitution.

i Term “operating” as used in Article 17(2) includes both healthy and unhealthy operation of a political party. While Article 17 contains limitations and checks against unhealthy operation of the political party; no provision exists therein in relation to its healthy operation. However, the mere omission to make any specific provision in regard to this aspect does not imply that Fundamental Right 17 does not also comprise this aspect of the matter. Indeed, a positive right implies, as part of the same right, a negative right and vice versa.

The right conferred by Article 17 includes not merely the right to form a political party but comprises also other consequential rights.

Fundamental Right conferred by Article 17(2) of the Constitution whereby every citizen has been given “the right” to form or to be a member of a political party comprises the right to participate in and contest an election.

Forming of associations necessarily implies carrying on the activities of an association, for the mere forming of association would be of no avail.

The ordinary conception of a political party includes a right within the framework of the Constitution to exert itself through its following and Organization, and using all available channels of mass communication, to propagate its views in relation to the whole complex of the administrative machine, including the Legislatures, in respect of matters which appear to it to require attention for the amelioration of conditions generally throughout the nation, for improvements particularly in administrative procedures and policies as well as in the legislative field, even to the extent of proposing and pressing for amendment of the Constitution itself.

Reading Article 17(2) of the Constitution as a whole it not only guarantees the right to form or be a member of a political party but also to operate as a political party ... ... Again, the forming of a political party necessarily implies the right of carrying on of all its activities as otherwise the formation itself would be of no consequence. In other words, the functioning is implicit in the formation of the party

Article 17(2) provides a basic guarantee to the citizen against usurpation of his will to freely participate in the affairs and governance of Pakistan through political activity relating thereto.

Thus, in the scheme of the Constitution, the guarantee "to form a political party' must be deemed to comprise also the right by that political party to form the Government, wherever the said political party possesses the requisite majority in the Assembly.

Accordingly, the basic right "to form or be a member of a political party" conferred by Article 17(2) comprises the right of that political party not only to form a political party, contest elections under its banner but also, after successfully contesting the elections, the right to form the Government if its members, elected to that body, are in possession of the requisite majority. The Government of the political party so formed must implement the programme of the political party which the electorate has mandated it to carry into effect. Any unlawful order which results in frustrating this activity, by removing it from office before the completion of its normal tenure would, therefore, constitute an infringement of this Fundamental Right.

if the lawful functioning of Government of a political party is frustrated (by its dismissal) by an unlawful order, such an order is an impediment in the healthy functioning of the political party and would, therefore, constitute an infringement of the fundamental right conferred by Article 17(2). A petition under Article 184(3) for its enforcement would, accordingly, be maintainable.

View that rights guaranteed under Article 17(2) extend only to the right to form a political party and the right to become a member of a political party or for that matter the right guaranteed under Article 17(2) extends only to all the political processes culminating in the election of its members to the National Assembly and no more, cannot therefore be accepted.

Hurtade v. California 110 US 516; Benazir Bhutto's case PLD 1988 SC 416; Symbol's case PLD 1989 SC 66; Maudoodi's case PLD 1964 SC 673 and West Virginia State Board of Education v. Barnette (1942) 319 US 624 ref.

d) Constitution of Pakistan (1973)--

---- Arts. 184(3), 17(2) & 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and Cabinet by the President of Pakistan under Art.58(2)(b) of the Constitution---Petition

under Art.184(3) of the Constitution to the Supreme Court praying that order of dissolution of National Assembly and dismissal of the Prime Minister by the President be declared as mala fide, without lawful authority, null and void and of no legal effect and ail steps taken in implementation of or taken as result of the said order of dissolution including the appointment of the Care-taker Cabinet be also declared as null and void with a further prayer that the President of Pakistan and others be restrained from interfering with the functions and duties of the elected Government headed by the petitioner and no impediment be placed in the

functioning of the National Assembly --- Maintainability of petition under Art.184(3) challenged --- Held, if the lawful functioning of a Government of political party was frustrated by its dismissal by an unlawful order, such an order being an impediment in the healthy functioning of the political party would constitute an infringement of Fundamental Right conferred by Art.17(2)

and petition under Art. 184(3) for its enforcement would be maintainable.

Term "operating" as used in Article 17(2) includes both healthy and unhealthy operation of a- political party. While Article 17 contains limitations and checks against unhealthy operation of the political party; no provision exists therein in relation to its healthy operation. However, the mere omission to make any specific provision in regard to this aspect does not imply that Fundamental Right 17 does not also comprise this aspect of the matter. Indeed, a positive right implies, as part of the same right, a negative right and vice versa.

If the lawful functioning, of a Government of political party is frustrated. (by its dismissal) by an unlawful order, such an order is an impediment in the healthy functioning of the political party and would, therefore, constitute an infringement of the fundamental right conferred by Article 17(2). A petition under Article 184(3) for its enforcement would, accordingly, be maintainable.

View that rights guaranteed under Article 17(2) extend only to the fight to form a political party and the, right to become a member of a political party or for that matter the right guaranteed under Article 17(2) extends only to all the political processes culminating in the election of its member to the National Assembly and no more, cannot therefore be accepted.

The preliminary objection that petition under Article 184(3) of the, Constitution was not maintainable could not be sustained.

Hurtade v. California 110 US 516; Benazir Bhutto's case PLD 1988 SC 416; Symbol's case PLD 1989 SC 60; Maudoodi's case PLD 1964 SC 673 and West Virginia State Board of Education v. Barnette (1942) 319 US 624 ref.

(e) Constitution of Pakistan (1973)--

---- Arts. 184(3) & 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President of Pakistan under Art.58(2)(b) of the Constitution of Pakistan---Grounds and material which form the basis of the order of dissolution are open to scrutiny and judicially reviewable.

Haji Muhammad Saifullah's cage PLD 1989 SC 166 ref.

(f) Constitution of Pakistan (1973)--

---- Art. 58(2)(b) [as added by Constitution (Eighth Amendment) Act (XVIII of 1985), S.5(b)] --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President of Pakistan under Art.58(2)(b)-- Such an action of the President proceeded on an incorrect appreciation of the role assigned to him in the Constitution and of the powers vested in him after the amendment made in' the Constitution of Pakistan (1973) by the Constitution (Eighth Amendment) Act, 1985.

Dissolution of National Assembly and dismissal of Prime Minister and Cabinet proceeds on an incorrect appreciation of the role assigned to the President in the Constitution and of the powers vested in him after the amendment made in the Constitution of 1973 by the Constitution (Eighth Amendment) Act, 1985 introduced in the Constitution of 1973 shortly before its revival on 30th December, 1985.

(g) Constitution of Pakistan (1973)--

---- Art. 58(2)(b) [as added by Constitution (Eighth Amendment) Act (XVIII of 1985), S.5(b)] --- Legislative history and effect of constitutional amendments including amendment of Arts. 58 and 48.

(h) Constitution of Pakistan (1973)-

---- Art. 58(2)(b)---Dissolution Of National Assembly and dismissal of Prime Minister and Cabinet by the President of Pakistan under Art.58(2)(b) of the Constitution --- Held, if it could be shown

that no grounds existed on the basis of which an honest opinion could be formed "that a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary" the exercise of the power by the President would be unconstitutional and open to correction through judicial review.

Haji Muhammad Saifullah's case PLD 1989 SC 166 quoted and observation made that after having found that order of dissolution was not sustainable Court should have granted consequential relief.

Kh. Ahmed Tariq Rahim's case PLD 1992 SC 646 distinguished.

(i) Constitution of Pakistan (1973)--

---- Arts. 58(2)(b), 46, 48(l)(6), 101, 91(4)(5), 242(IA), 243(2)(c) & 213 [as added by Constitution (Eighth Amendment) Act (XVIII of 1985), Preamble]--Role assigned to the President and the powers vested in him after the adoption of the Constitution (Eighth Amendment) Act, 1985 and responsibilities of the Prime Minister expounded --- Distinctive features of a written Constitution--Constitution of Pakistan creates. a parliamentary democracy --- Scheme of Constitution vis-a-vis working relationship of President and Prime Minister elaborated.

The role assigned to the President and the powers vested in him after the adoption of the Constitution (Eighth Amendment) Act, 1985, to dissolve the National Assembly by clause (2) of Article 58, which power was not earlier vested in him, in addition he was empowered also to appoint, in his discretion, the Chief Election Commissioner (Article 213), the Chairman of the Public Service Commission (Article 242 (IA)) and the Chairman, Joint Chiefs of Staff Committee (Article 243(2)(c)). He was also empowered to appoint the Governors of the Provinces after consulting the Prime Minister (Article 101). Powers were also conferred on him to refer any matter of national importance to a referendum (Article 48(6)). Duty was cast on the Prime Minister vide the substituted Article 46 to keep the President fully cognizant of the doings of his Government.

In view of newly-added provisions in the Constitution of Pakistan (1973) by the Constitution (Eighth Amendment) Act, 1985, it was argued in the present case, wherein the President had dissolved the National Assembly and dismissed the Prime Minister and the Cabinet under Article 58(2)(b), that a pre-eminent role had been assigned to the President. He was not now merely the Constitutional Head of the State simply enjoying a high ceremonial office but had, in fact, become a full partner in the governance of the country and indeed the more important partner. In view of this pre-eminent position as the* Head of the State and in consonance with the spirit of the modified Constitution (after the amendments made therein during the Martial Law period and sanctified by the 8th Constitutional Amendment adopted in 1995) the Prime Minister was expected

to accept the guidance of the President and to act in accordance with his advice and to mould his conduct accordingly. This perception of the President became manifest from the terms of the impugned order of dissolution itself. Reliance was placed not only on the specific powers conferred on him by clause (2)(b) of Article 58 but also on "all other powers enabling him" in that behalf. This was indicative of his belief that besides the powers specifically conferred upon him by the terms of the Constitution, some residual or implied powers also inhere in him.

Unfortunately, this belief that he enjoys some inherent or implied powers besides those specifically conferred on him under Articles 46, 48(6), 101, 242 (1A) and 243(2)(c) is a mistaken one. In a Constitution contained in a written document wherein the powers and duties of the various agencies established by it are formulated with precision, it is the wording of the Constitution itself that is enforced and applied and this wording can never be overridden or supplemented by extraneous principles or non-specified enabling powers not explicitly incorporated in the Constitution itself. In view of the express provisions of written Constitution of Pakistan detailing with fullness, the powers and duties of the various agencies of the Government that it holds in balance there is no room of any residual or enabling powers inhering in any authority established by it besides those conferred upon it by specific words.

Constitution of Pakistan, in fact, is designed to create a parliamentary democracy. The President in this set-up is bound to act, in the exercise of his functions, in -accordance with the advice of the Cabinet or the Prime Minister (Article 48(l)) and the Cabinet in its turn is collectively responsible to the National Assembly (Article 91(4)) though the Prime Minister holds office at the pleasure of the President. However, the President cannot remove him from

his office as long as he commands the confidence of the majority of the members of the National Assembly (Article 91(5)). In view of these provisions, the system of Government envisaged by the Constitution of 1973 is of the parliamentary type wherein the Prime Minister as Head of the Cabinet is responsible to the -Parliament, which consists of the representatives of the nation.

It is manifest, therefore, that in the scheme of the Constitution of Pakistan the Prime Minister in administering the affairs of the Government is neither answerable to the President nor in any way subordinate to him. In formulation of the policies of his Government and in the running of its affairs, the Prime Minister is answerable only to the National Assembly and not to the President. Indeed, it is the President who is bound by the advice of the Prime Minister or the Cabinet in all matters concerning formulation of policies and administration of the affairs of the Government and not the other way about, as appears to have been mistakenly understood. Undoubtedly, the President may require the Cabinet or the Prime Minister, as the case may be, to reconsider any advice tendered to him but the President is bound to act on the advice tendered, even if it be the same, after reconsideration. Undoubtedly, both are expected to work in harmony and in close collaboration for the efficient running of the affairs of the State but as their roles in the constitution

are defined, which do not overlap, both can exercise their respective functions unhindered and without bringing the machinery of the Government to a standstill. Despite personal likes or dislikes, the two can co-exist constitutionally. Their personal likes or dislikes are irrelevant so far as the discharge of their constitutional obligations are concerned. Despite personal rancour, ill-will and incompatibility of temperament, no deadlock, no stalemate, no breakdown can arise if both act in accordance with the terms of the Oath taken by them, while accepting their high office.

a) Constitution of Pakistan (1973)--

---- Art. 58(2)(b) --- President of Pakistan can pass order of dissolution of National Assembly and appeal to the electorate can be made only when the machinery of the Government has broken down completely, its authority eroded and the Government cannot be carried on in accordance with the provisions of the Constitution.

The people of Pakistan have willed to establish an order wherein the State shall exercise its powers and authority through the chosen representatives of the people; wherein the principles of democracy,' freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed (Article 2A).

No one man how-high-so-ever can, therefore, destroy an organ consisting of chosen representatives of the people unless cogent, proper and sufficient cause exists for taking such a grave action. Article 58(2)(b), no doubt, empowers the President to take this action but only where it is shown that "a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution".

The expression 'cannot be carried on' sandwiched as it is between 'Federal Government' and 'in accordance with the provisions of the Constitution' acquires a very potent, a very positive and a very concrete content. Nothing has been left to surmises, likes or dislikes, opinion or view. It does not concern itself with the pace of progress, the shade of the quality or the degree of the performance or the quantum of the achievement. It concerns itself with the breakdown of the Constitutional mechanism, a stalemate, a deadlock in ensuring the observance of the provisions of the Constitution.

The intention of the law-makers, as evidenced from their speeches and the terms in which the law was enacted, shows that any order of dissolution by the President can be passed and an appeal to the electorate made only when the machinery of the Government has broken down completely, its

authority eroded and the Government cannot be carried on in accordance with the provisions of the Constitution.

Constitution of Pakistan (1973)--

---- Art. 41 --- President as the symbol of the unity of the Federation is entitled to the highest respect and esteem by all the functionaries of the State, but this respect and esteem will be forthcoming if he conducts himself with utmost impartiality and neutrality, that he keeps himself entirely aloof from party politics and does not give the impression to any one that he is siding with one faction or working against the other.

(1) Constitution of Pakistan (1973)-.

---- Arts. 58(2)(b), 17 & 184(3) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet under Art.58(2)(b) of the Constitution of Pakistan by the President of Pakistan vide Order dated 18th April, 1993 being not within the ambit of the powers conferred on the President of Pakistan under Art.58(2)(b) of the Constitution of Pakistan and other enabling powers available to him in that behalf, was violative of Art. 17 of the Constitution and without lawful authority and of no legal effect--National Assembly, Prime Minister and the Cabinet consequently were to stand restored and entitled to function as immediately before the Presidential Order of 18th April, 1993 was passed; all steps taken pursuant to the Presidential Order dated 18th April, 1993 passed under Art. 58(2)(b) of the Constitution of Pakistan such as appointment of Care-taker Cabinet etc. were to be of no legal effect --- Supreme Court, however, observed that all orders passed, acts done and measures taken in the meanwhile by the Care-taker Government which had been done, taken and given effect to in accordance with the terms of the Constitution and were required to be done or taken for the ordinary orderly running of the State would all be deemed to have been validly and legally done.

(in) Interpretation or constitution---

---- Held, in a Constitution ‘ contained in a written document wherein the powers and duties of the various agencies established by it were formulated with precision, it was the wording of the Constitution itself that was enforced and applied and this wording could never be overriden or supplemented by extraneous principles or non-specified enabling powers not explicitly incorporated in the Constitution itself.

Per Shaflur Rahman, J.; Nasim Hasan Shah, C.J.; Saad Saood Jan; Ajmal Mian; Muhammad Afzal Lone; Muhammad Rdfiq Tarar; Saleem Akhtar and Saeeduzzaman Siddiqui, JJ. agreeing; Saiiad Ali Shah, J. Contra---

(n) Constitution of Pakistan (1973)---

-Part 11, Chap. Fundamental Rights --- Fundamental Rights guaranteed in any Constitution, an organic instrument, -are not capable of precise or permanent definition and cannot be charted on a piece of paper delineating their boundaries for all times to come.

(o) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Interpretation --- Article 58(2)(b) of the Constitution empowers the executive head to destroy the legislature and to remove the chosen representatives --- Provision conferring an exceptional power provided for an exceptional situation must receive the narrowest interpretation.

Federation of Pakistan and others v. Haji Muhammad Saifullah Khan and others PLD 1989 SC 166 ref.

Per Saijad All Shah, J. (Contra)---

Article 58(2)(b) of the Constitution has come to stay in the Constitution whether it is liked or abhorred. Constitutions of two countries are not alike because Constitution of each country is framed keeping in view the objective conditions, historical and cultural background with pronounced customs and religious ethos. If Article 58(2)(b) has come into existence and forms part of the Constitution on account of some compromise and it is disapproved now it can be removed or diluted or amended in the manner prescribed in the Constitution. It is the function of the legislature to legislate and of the Court to interpret the law. The Court cannot and should not take upon itself the duty of entering into the field of legislature but should confine itself to its original function of interpreting the provisions of the Constitution as they are and other laws. While interpreting the provisions of the Constitution, it becomes the duty of the Court to see that interpretation is done in such a manner which advances the noble object of workability of the Constitution. The provisions of the Constitution cannot be interpreted by the Court in such narrow form to make that provision almost redundant and meaningless.

By rejecting the material in support of grounds of dissolution in the instant case, interpretation of Article 58(2)(b) is rendered by Supreme Court narrowing down its scope to almost zero point which amounts to declaring that no President would be able to ever dissolve the National Assembly and dismiss the Government of the Prime Minister in spite of the fact that he has substantial material in his possession because the Court is not satisfied with intrinsic value of the material. In other words Article 58(2)(b) is rendered almost redundant which can be done by the legislature only.

Supreme Court as highest Court of the country has to act within the limitations prescribed by the law while in the process of interpretation of the Constitution and the law. Supreme Court can interpret but not legislate and while interpreting can narrow down 'the scope but not so much that the provision under the comment is rendered almost redundant . So far Article 58(2)(b) of the Constitution is concerned, it is already interpreted and construed very ably in the cases of Haji Saifullah Khan and Khawaja Ahmed Tariq Rahim. Power under Article 58(2)(b) can be exercised by the President when there is actually an imminent breakdown of the Constitutional machinery and there is failure of not one but many provisions of the Constitution giving impression that country is being run by methods extra-Constitutional. The President must form his opinion on the basis of material before him.

Article 58(2)(b) is an independent provision under which the President is empowered to dissolve the National Assembly in his discretion if he is satisfied that a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. Opinion of the President cannot be substituted by the Court. If he has formed such opinion and the grounds of dissolution are supported by material which was available before him at the time of formation of such opinion, the Court should allow order to stand and political sovereign to give final decision.

(P) Constitution of Pakistan (1973)

---- Arts. 58(2)(b) & 64 --- Rules of Procedure and Conduct of Business in the National Assembly, 1992, R. 25 --- Resignations by members of National Assembly --- President of Pakistan could not have received such resignations at all muchless have acted on them for any purpose before they reached the Speaker --- Act of the President of receiving, entertaining and acting on such resignations of dissatisfied members of the National Assembly shifted the venue constitutionally provided for showing no confidence in the Government from the National Assembly to the Presidency --- Dissolution of National

Assembly and dismissal of the Prime Minister and the Cabinet by the President under Art. 58(2)(b) of the Constitution on the ground of such resignations, thus, was misconceived.

S.R. Bommai and others v. Union of India and others AIR 1990 Karnataka 5; A.K. Fazalul Ouader Chaudhury v. Sycd Sha h Nawaz and 2 others PLD 1966 SC 105 and Mirza Tahir Bcg v. Syed Kausar Ali Shah and others PLD 1976 SC 504 ref.

(q) Constitution of Pakistan (1973)...

---- Art. 58(2) (b)--Mal-administ ration and the political victimisation were not the type of constitutional problems which could justify the dissolution of National Assembly by the President---Proper course in such matters was to go to the constitutional and statutory bodies like the Parliament, the Courts and the press for redress rather than obtain and justify dissolution of the established Government of the country.

Haji Muhammad Saifullah Khan's case PLD 1989 SC 166 ref.

W Constitution of Pakistan (1973)---

---- Art. 58(2)(b)-Allegations made in the Press which remain undecided in Court of law in accordance with the prescribed procedure could not be taken as a ground for dissolution of National Assembly by the President under Art.58(2)(b) --- Such allegations were made basis for forming the opinion giving harsh constitutional treatment to an established Government enjoying the support of the majority of the people.

(s) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and Cabinet, inter alia,. on the ground of Prime Minister being. Guilty of subversion which was in fact high treason under the law --- Held, such an indictment and verdict given in a constitutional document was political career killer and such a finding could only be recorded after a judicial pronouncement and not in an executive and political instrument made under -Art. 58(2)(b) of the Constitution.

W Constitution of Pakistan (1973)---

---- Part II, Chap. I --- Fundamental Rights, enforcement of --- Constraints of adversary litigation do not inhibit the Court in the matter of enforcement of Fundamental Rights.

(u) Constitution of Pakistan (1973)...

---- Arts. 6 & 12 --- High Treason (punishment) Act (LXVIII of 1973), Ss. 3 & 2 --- Punishment for high treason --- Procedure --- Failure of Federal Government in designating the authorised person on whose complaint offence of high treason can be taken cognizance of by the Court --- Such failure is not of the Constitution and Parliament but of the executive Government and that too since 1973 of not giving a salutary constitutional provision a meaningful content and operational mechanism thereby frustrating same altogether.

(v) Interpretation of Constitution-

---- Three rules of interpretation peculiar to the Constitution distinguishing it from every other instrument, stated.

There are three rules of interpretation peculiar to the Constitution distinguishing it from every other instrument. These principles stand recognised in all countries having written Constitutions.

While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning.

The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the, other but each sustaining the other.

This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.

The words of the written Constitution prevail over all unwritten Conventions, Precedents and Practices.

Paul M. Sweezy v. State of New Hampshire by Louis C. Wyman, Attorney-General 354 US 134 = 1 L ed 2d 1311 = 77 S Ct 1203 and Hurtado v. California 110 US 516, 528, 529 = 28 L ed 232, 236 = 4 S Ct 111, 292 and M'Culloch v. Maryland (US) 4 Wheat 316, 4 L ed 579.

Per Sajjad Ali Shah, J. Contra-

It is the function of the, legislature to legislate and of the Court to interpret the law. The Court cannot and should not take upon itself the duty of entering into the field of legislature but should confine itself to its original function of interpreting the provisions of the Constitution as they are and other laws. While interpreting the provisions of the Constitution, it becomes the duty of the Court to see that interpretation is done in such a manner which advances the noble object of workability of the Constitution. The provisions o the Constitution cannot be interpreted by the Court in such narrow form to make that provision almost redundant and meaningless.

(w) Constitution---

---- What judgment and value to be brought to bear on the Constitutional provisions stated.

In the evaluation of facts, logic, experience and intuitions of public policy play mutually complementary parts. Without logic the law would be wholly at large, at the mercy of every gust of chance and favour; without experience, without clear intuitions of public policy, the consistency of concepts would exact too high a price of inconsistency with history, practical convenience and the welfare of society. The logic of law is the discipline which gives it such form and consistency as it may attain at successive stages of its development. Experience is the rich inheritance of its past development. Neither logic nor experience affords a sufficient, nor sometimes a relevant, answer to essentially new problems. To resolve such problems one must have recourse 'to the deeper recesses of the mind. The facts define the problem. Neither they nor logic can solve it. Imagination furnishes an answer. The answer must be reconcilable with the facts and defensible in logic, but the test of its relevance and adequacy is neither the facts nor logic but purposes and values.

"Logic, Experience and Intuition" in A New World of Law by C Wilfred Jenks (1969), Chap. 19 ref.

(x) Constitution of Pakistan (1973)-

---- Art. 64 --- Resignation---"Resignation from a public office"--Meaning--Resignation from a public office has a very definite connotation and is defined as formal renouncement or relinquishment of an office --- Resignation must be made with intention of relinquishing the office accompanied by act of relinquishment.

Black's Law Dictionary ref.

(y) Constitution of Pakistan (1973).

---- Art. 64 --- Rules of Procedure and Conduct of Business in the National Assembly, 1992, R. 25 --- Resignation by member of National Assembly--Procedure --- Resignation is not only required to be addressed to the Speaker but it should be intended to be passed on to the Speaker of the Assembly--Pivotal role which Speaker plays in this regard and sanctity of the elected office stated --- Receiving of resignation outside the Parliament and non-transmission 'to the addressee so as to use the same, or permit its use by others as a negotiable instrument or as a weapon of offence directed against the opponent was not only grossly violating the Constitution but also indulging in a highly politically unethical conduct which was deplorable.

Not only is the resignation required to, be addressed to the Speaker but that it should be intended to be passed on to the Speaker of the Assembly

The Speaker in a Parliamentary form of Government holds an office of highest distinction and has the sole responsibility cast on him of maintaining the prestige and the dignity of the House and each and every member composing the House. It is precisely for this reason that the Constitution has ordained that a resignation by a member is effective only when it is "addressed" to the Speaker: it was not intended to be an idle formality. To relinquish a Parliamentary scat by resignation is a grave and a solemn act. By and large our political institutions are fashioned on the pattern of those obtaining in England and it is a settled principle of Parliamentary law in England that a member of Parliament after he is duly chosen, cannot relinquish his scat by unilaterally resigning his membership. In order to evade this restriction a member who wishes to relinquish his seat, accepts office under the Crown which legally vacates his seat. This is enough to underline the gravity of the matter.

Resignations are resignations. If they are not resignations they are not worth the paper on which they arc written. in view of the established Constitutional and legal position in the country and abroad with regard to resignation from office by elected representative none so elected can draft a

resignation, address it to the proper authority and yet not transmit to the addressee so as to use it, or permit its use by others as a negotiable instrument or as a weapon of offence directed against the opponents. Any one engaging in such an activity and associating himself with it is not only grossly violating the Constitution but also indulging in a highly politically unethical conduct. That it happened on such a large scale in this case, at such a high level, and outside the Parliament is deplorable. Before any one rejects parliamentary democracy as unsuited to our conditions, let him see the mutilation of it, the level and by persons at whose hands it has taken place.

The preamble to our Constitution prescribes that "the State shall exercise its powers and authority through the chosen representatives of the people". Defection of elected members has many vices. In the first place, if the member has been elected on the basis of a manifesto, or on account of his affiliation with a political party or on account of his particular stand on a question of public importance, his defection amounts to a clear breach of confidence reposed in him by the electorate. If his conscience dictates to him so, or he considers it expedient, the only course open to him is to resign, to shed off his representative character which he no longer represents and to right ,a re-election. This will make him honourable, politics clean, and emergence of principled leadership possible. The second and more important, the political sovereign is rendered helpless by such betrayal of its own representative. In the normal course, the elector has to wait for years, till new elections take place, to repudiate such a person. In the meantime, the defector flourishes and continues to enjoy all the wordly gains. The third is that it destroys the normative moorings of the Constitution of an Islamic State. The normative moorings of the Constitution prescribe that "sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust" and the State is enjoined to "exercise its powers and authority through the chosen representatives of the people". An elected representative who defects his professed cause, his electorate, his party, his mandate, destroys his own representative character. He cannot on the mandated Constitutional prescription participate in the exercise of State power and authority. Even by purely secular standards carrying on of the Government in the face of such defections, and on the basis of such defections, is considered to be nothing but .mockery of the democratic Constitutional process".

Mirza Tahir Beg v. Syed Kausar Ali Shah and others PLD 1976 SC 504 and Parliamentary Practice by May, 18th Edn., p. 45 rer.

Per Saijad Ali Shah, J. Contra---

The question here is not of intrinsic value of resignations in the hands of the President, which are in transit and have not reached the Speaker, but these resignations are to be considered as material in support of the ground that members of the National Assembly had lost confidence in the Federal Government headed by the petitioner as Prime Minister and in such circumstances need was felt with justification by the President for exercise of his power and discretion under Article 58(2)(b) to dissolve the Assembly after objective assessment of the situation.

Without going into the question as to when in point of time the resignations would be deemed as valid causing vacancies stricto senso, it can be said that this material as such in the hands of the President could be considered by him to form an opinion that 88 members who resigned could turn the scales in conjunction with other concomitant circumstances showing that Federal Government headed by the Prime Minister and National Assembly had lost its mandate in the sense that its representative character was not same as it was before when people voted for it.

Resignations with the President can be considered as material in support of the ground of dissolution that National Assembly has lost representative character and mandate.

(Z) Constitution of Pakistan (1973)...

---- Art. 91(5)---Held, the only way open to the President under the Constitution for coming to the conclusion whether the Prime Minister did, or did not command confidence of the majority of the National Assembly was by summoning the National Assembly and requiring the Prime Minister to obtain a vote of confidence from the Assembly --- Any other method adopted for achieving the object, for forming an opinion, for giving effect to it was not permissible.

There are three positive compulsive indicators in Article 91(5) of the Constitution of Pakistan. Firstly, there is the use of negative imperative "the President shall not exercise his power". It operates as a mandatory prohibition. The second is the statement of the jurisdictional requirement and coupling it to the exercise of power- by the use of the word "unless". The jurisdictional requirement is satisfaction of the President that the Prime Minister does not command the confidence of the majority of the members of the National Assembly. Thirdly the only course left constitutionally open for the President for arriving at his satisfaction in this matter is to "summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly". Such a comprehensiveness, such a clarity and such attention to the details is all in strict conformity with the established conventions of Parliamentary democracy, as practised in countries having no written Constitution.

The only way open to the President under the Constitution for coming to the conclusion whether the Prime Minister does or does not command confidence of the majority of the National Assembly is by summoning the National Assembly and requiring the Prime Minister to obtain a vote of confidence from the Assembly. Any other method adopted for achieving the object, for forming an opinion, for giving effect to it, is impermissible.

Per Saijad Ali Shah, J. Contra---

When Constitutional petition, was entertained in the case in Supreme Court straight away without allowing it to be heard in the High Court and since there is no other forum of appeal after Supreme Court, it was the bounden duty of Supreme Court to have scrutinised the material produced in support of grounds of dissolution with more care and caution in conformity with guidelines laid down in the cases of Haji Saifullah Khan and Khawaja Ahmed Tariq Rahim decided by Supreme Court earlier in point of time.

(aa) Words and phrases---

... Shall"---Connotation.

The word "shall" is generally imperative or mandatory. It is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning and is generally imperative or mandatory. This word is defined as a mandate where appearing in a constitutional provision. The word "shall" be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction.

Black's Law Dictionary and Ballentine's Law Dictionary ref.

(bb) Interpretation of Constitution-

---- Prohibitory language in Constitution --- Rule of construction -Maxim "Expressio unius est exclusio alterius --- Application.

The word "shall" is generally imperative or mandatory. It is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning and is generally imperative or mandatory. This word is defined as a mandate where appearing in a constitutional provision. The word "shall" be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction.

Prohibitory language stated in a Constitution is nearly always construed as mandatory.

The general rule has been laid down that if directions arc given respecting the time and mode of proceeding in which a power should be exercised, there is at least a strong presumption that tile people designed it to be exercised in that time and mode only. And constitutional provisions imposing duties upon the Governor and the legislature have been held mandatory.

A specific constitutional provision that its provisions are mandatory and prohibitory unless by express words declared to be otherwise will, of course, be given effect. Such a declaration applies to all sections of the Constitution alike, and is binding on every department of the State Government, whether legislative, executive, or judicial. And, as a result of the adoption of such a provision, a Court is not at liberty to say that any constitutional prerequisite to the validity of a law is of no practical effect, or to consider the policy of a provision whose language seems plain and positive. Although it has been stated that even in the absence of a declaration that its provisions arc mandatory and prohibitory, the Courts would not treat the provisions of a Constitution as merely directory or unessential, it has also been suggested that the reason for the insertion of a specific statement on the matter in the Constitution of one State was that certain decisions had previously held that the provisions of the State's earlier Constitution regarding the titles of legislative acts were directory and not mandatory.

The word "shall" or "ought", as used in a constitutional provision, is usually imperative or mandatory ... ... Mandatory constitutional provisions are binding on all departments of the Government. Long usage can neither repeal, nor justify the violation of such provisions, and disobedience or evasion is not permissible, even though the best interests of the public might apparently be promoted in some respects . ... Restrictions and prohibitions in constitutional provisions arc mandatory and must be obeyed . ... Generally, constitutional provisions that designate in express terms the time or manner of doing particular acts and that are silent as to performance in any other manner are mandatory and must be followed. Such provisions are, in general, exclusive in respect of the manner of performance and impliedly forbid performance in a. substantially different manner.

In the constitutional provision the word "not" following "shall" makes the requirement of the provision negative imperative leaving no scope for a departure therefrom. The word "unless" also limits and identifies the jurisdictional requirement and the prescription of the method by which that jurisdictional requirement is to be satisfied.

As a general rule, in the interpretation of statutes, the mention of one thing implies the exclusion of another thing. It therefore logically follows that if a statute enumerates the things upon which it is to operate, everything else must necessarily, and by implication, be excluded from its operation and effect. For instance if the statute in question enumerates the matters over which a Court has jurisdiction, no other matters may be included. Similarly, where a statute forbids the performance of certain things, only those things expressly mentioned are forbidden. So also, if the statute directs that certain acts shall be done in a specified manner, or by certain persons, their performance in any other manner than that specified, or by -any other person than one of those named, is impliedly prohibited.

Words of the written Constitution govern rather than are governed by Parliamentary Convention.

I

Pleasure in appointment and holding of office unless qualified also includes power of dismissal.

Limitations cannot be read in general words used in the constitutional provisions conferring power.

Court should not be swayed by considerations of Policy and Propriety while interpreting provisions of a written Constitution.

16 American Jurisprudence 2d at p. 507; Corpus Juris Sccundum, Vol. 16, p.175; BBC English Dictionary and Alhaji D.S. Adegbenro's case (1963) AC 614 rer.

(cc) Constitution of Pakistan (1973)---

---- Arts' 92(3) & 64---Rcsignations submitted by the Ministers from the Cabinet fall in a category quite different from those of the members of the National Assembly --- If the resignation by the Minister is addressed to the President and is presented directly to the President and is given effect to by the President, then it is indeed in full compliance of Art. 92(3) of the Constitution.

(dd) Constitution of Pakistan (1973)--

92 --- Cabinet --- Collective responsibility of Ministers of the 2abinct.

Collective Ministerial Responsibility and Collective Solidarily by David Ellis, published in Public Law (1980), pp. 307--390 ref.

(ee) Constitution of Pakistan (1973)---

---- Art. 94 --- Prime Minister --- Collective responsibility and consultation with the Ministers.

Public Law (1982) on Choosing a Prime Minister by Rodney Brazier; Modern Foreign Governments by Frederic A. Ogg; Public Law (1968) on Prime Ministerial Powcr.by A.H. Brown and Indian Constitution by Jain, 1987 Edn., pp.102-103 ref.

Per Sajjad Ali Shah, J. Contra---

Under Article 46 it is the duty of the Prime Minister to communicate to the President all decisions of the Cabinet, relating to the administration of the -affairs of the Federation and proposals for legislation. Under this provision the President can require to submit for consideration of Cabinet matter on which decision had been taken by the Prime Minister or' a Minister but which had not been considered by the Cabinet. Under Article 48 the President is to act on the advice of the Cabinet or the Prime Minister. Clause (4) of this Article provides that the question whether any, and if so what, advice was tendered to the President by the Cabinet, the Prime Minister, a Minister or Minister of State shall not be inquired into in, or by, any Court, Tribunal or other Authority. This shows that the President can see the Ministers as permitted by the Constitution.

YT) Constitution of Pakistan (1973)---

---- Arts. 58(2)(b) & 92(3) --- Resignation of Minister --- Effect --- Resignations of Ministers cannot form a ground for taking action under Art. 58(2)(b) of the Constitution, they being wholly irrelevant.

Resignations from the Cabinet are not at all a sure indication of lack of confidence in the Government nor do they affect or impair the smooth functioning of Parliamentary democracy.

The resignations of the Ministers should not have found place at all in the dissolution order, nor could they have been taken into consideration or formed ground for taking action under Article 58(2)(b) of the Constitution. They are wholly irrelevant.

Cabinet Government in India by R.J. Venkateswaran ref,

(gg) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and Cabinet by the President under Art. 58(2)(b) --- Recourse to any residual power cannot be had in view of the express provisions of the Constitution detailing in fullness both the procedure and power.

(hh) Constitution of Pakistan (1973)...

---- Arts. 58(2)(b) & 14 --- Dissolution of National Assembly and dismissal of Prime Minister and Cabinet by the President under Art. 58(2)(b) on the ground of speech by the Prime Minister which as alleged amounted to subversion --- Held, subversion being high treason which is regarded as the highest crime known to law and the most serious offence that may be committed against one's own country, President had no authority under the Constitution to pronounce such a finding and to make a declaration against a citizen of Pakistan, 'a leader 6f the majority Prliamentry party, the Prime Minister of the country, for sustaining order of dissolution of National Assembly and dismissal of Prime Minister and the Cabinet which was clearly violative of first part of Art. 14 of the Constitution of Pakistan.

(I) Constitution of Pakistan (1973)---

~ --Art. 58(~)(b)- Dissolution of National Assembly and dismissal of Prime Minister and Cabinet by the President under Art. 58(2)(b) of the Constitution on the grounds of. improper functioning of various Constitutional bodies provided for securing integration, cohesion and understanding between the Provinces; Parliament having not discharged its Constitution functions to exercise its powers as required by Arts. 153 & 154 of the Constitution, and in relation to Art. 161, and particularly in the context -of privatisation of Industries in relation to item 3, Part 11 of the Federal Legislative List and item 34 of the Concurrent Legislative List of the Constitution and allegations of corruption, of mal-administration, of incorrect policies being pursued in matters financial, administrative and international --- Held, requirements of Art. 58(2)(b) of the Constitution of Pakistan were all objective and relatable to the various Constitutional provisions-If any of the Provincial Governments was dissatisfied with a decision of the Council of Common Interests it could refer the matter to the Parliament in a joint sitting where decision in that behalf was final, unless there was specific and serious constitutional objection raised by the Provinces, the conduct of policy in these matters should have been left to the Prime Minister, action of President under Art. 58(2)(b) of the Constitution was not justified; privatization of nationalised units had the requisite statutory cover and none of such statutes had been objected to by the President or sent for reconsideration by the Cabinet, action of President dissolving the National Assembly under Art. 58(2)(b) on such ground was not justified --- Allegations of corruption, of mal-administration, of incorrect policies being pursued in matters financial, administrative and international were

independently neither decisive nor within the domain of President for action under Art.58(2)(b) as these were wholly extraneous and could not sustain the order of the President dissolving the National Assembly.

(jj) Constitution of Pakistan (1973)--

---- Art. 58(2)(b) --- Diss0luti0n'of National Assembly and dismissal of Prime Minister and the Cabinet under Art.58(2)(b) of the Constitution of Pakistan by the President vide Order dated 18th April, 1993 --- Held, none of the ground made the basis of the action had been established; that they bore no nexus to the order passed and grounds totally extraneous and irrelevant and in clear departure of the constitutional provisions had been invoked for taking action.

The order of the President dissolving the National Assembly and dismissing the Prime Minister and the Cabinet has too many subjective elements not recognized by the Constitution for exercise of Presidential power of dissolution of National Assembly. For example, the anticipatory action that the Government of the Federation is not in a position to meet properly and positively the threat to the security and integrity of Pakistan and the grave economic situation confronting the country are no considerations, nor can the President make an assessment of it independent of the Federal Government headed by the Prime Minister, as the Parliament - is established for that purpose.

None of the grounds made the basis of the action has been established that they bear no nexus to the order passed and grounds totally extraneous and irrelevant and in clear departure of the Constitutional provisions have been invoked for taking action.

(kk) Constitution of Pakistan (1973)---

---- Arts. 58(2)(h), 14 & 91(5) --- President cannot dismiss the Prime Minister and his Cabinet while exercising powers under Art.58(2)(b).

(11) Constitution of Pakistan (1973)---

---- Art. 243 [as amended by Revival of the Constitution Order, 1985 and

Constitution (Eighth Amendment) Act (XVIII of 1985)] --- Scope -of the amendment --- Appointment of all the Chief-, of Army, Air Force and the Navy had to take place

on the advice of the Prime Minister --- Chairman Joint Chiefs of Staff Committee had to be appointed by the President in his discretion..

Prior to the amendment of Article 243 the appointment of all the Chiefs, of the Army, Air Force and the Navy had to take place on the advice of the Prime Minister. The content of the amendment introduced by the Revival of the Constitution Order was confined to one new post that was created, that was of the Chairman, Joint Chiefs of Staff Committee and in respect of that newly-created post the appointing authority was made the President and in making that appointment lie was to act in his discretion. Throughout the world interpreting and understanding the Constitution and legislative instruments the punctuation are not allowed to play any decisive role. Even if they do here the authorisation or empowering by the Parliament and the provisions of the Revival of the Constitution Order being confined to the post of Joint Chiefs of Staff Committee it could not on any interpretation be extended to the other Chiefs.

(mm) Interpretation of Constitution...

* --- Punctuations are not ‘allowed to play any decisive role while interpreting and understanding the Constitution and legislative instruments.

(nn) Constitution of Pakistan (1973)---

---- Arts. 184(3), 58(2)(b), 17 & 14 --- Constitutional petition under Art.184(3) directly before the Supreme Court against Order by the President of Pakistan dated 18th April, I~W dissolving National Assembly and dismissing the Prime Minister and the Cabinet under Art.58(2)(b) and other enabling powers available to him in that behalf --- Competence--- Held, provisions of the

Constitution which enabled political parties to reach the Government and after reaching the Government to continue their political purpose unimpeded were all directed towards ensuring fruition of Fundamental Rights guaranteed under Art.17 of the Constitution and the petition under Art.184(3) was not only competent because Fundamental Right 17 was directly involved but also because the first part of Art.14 of the Constitution stood violated by attributing subversion to the ousted Prime Minister and the Prime Minister was also being prevented by (lie President from extending the political activity of the Executive Government of the Federation to the Federally Administered Tribal Areas which too amounted to violation of Fundamental Right guaranteed under Art.17(2) of the Constitution.

“Political” has been defined as “pertaining or relating to the policy or the administration of Government, State or nation; pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of Government; relating to management of the affairs of the State”. “Political rights” have been defined as “those which may be exercised in the formation or administration of the Government, rights of citizens established or recognized by Constitutions which give them the power to participate directly or indirectly in the establishment or administration of Government.”

The expression “flowering of an idea, artistic style, or political movement is its successful development.

The provisions of the Constitution which enable political parties to reach the Government and after reaching the Government to continue (heir political purpose unimpeded are all directed towards ensuring fruition of Fundamental Right guaranteed under Art.17.

It was difficult to agree with the contention that clause (2) o Article 17 of the Constitution had a restricted field. If the Constitution-makers chose to treat it separately, compendiously and expressly, unlike any other known Constitution of the world, why should one restrict and limit it. For an extensive interpretation of it there was a positive indicator in the word .operating”. There was healthy operating, there was unhealthy operating. By taking care of unhealthy operating, healthy operation had been kept free of all limitations to flourish and flower inside the Government as well as outside it.

Petition under Article 184(3) of the Constitution of Pakistan was competent not only because Fundamental Right 17 was directly involved but also because the first part of Article 14 of the Constitution stood violated by attributing subversion to the ousted Prime Minister. Further, the Prime Minister was being prevented by the President from extending the political activity of the Executive Government of the Federation to the Federally Administered Tribal Areas. This too amounted to violation of Fundamental Right 17(2).

Black’s Law Dictionary and Miss Benazir Bhutto v. Federation of Pakistan and another P L D 1988 SC 416 rer.

Per SAUad Ali Shah, J. Contra---

Perusal of the Constitution shows that there are several other provisions which govern the continuation of the Government. Article 91(2A) envisages that the President shall invite the member of the National Assembly to be the Prime Minister who commands the confidence of the majority of the members and such person is to be given oath as is provided in clause (3) of the same Article. Clause (5) of Article 91 provides that the Prime Minister, who does not command confidence of the majority shall be required to obtain vote of confidence from the Assembly. Article 58(l) of the Constitution provides that the President shall dissolve the National Assembly if so advised by the Prime Minister. Clause (2) of this Article empowers the President to dissolve the National Assembly in his discretion. If provisions of the Constitution mentioned above, are read conjointly, it would appear that Article 17 gives right to form or be a , member of political party subject to any reasonable restrictions imposed by law but does not give any further Fundamental Right to that political party to continue the Government till its tenure has tome to an end.

Article 17(2) of the Constitution does not give Fundamental Right to the political party to conclude its tenure of office. Further I do not agree that by mentioning subversion of the Constitution in the order of dissolution, Fundamental Right of the Prime Minister under Article 14 of the Constitution is violated nor there is any justification to conclude that the Prime Minister was being prevented by the President from extending political activity of the executive Government of Federation to the Federally Administered Tribal Areas.

Ms. Benazir Bhutto v. Federation of Pakistan and another PLD 1988

In the instant case Article 184(3) cannot be invoked for the reason that impugned action of dissolution of the Assembly is not in conflict with Article 17(2) as there is no Fundamental Right available to the petitioner to continue the Government till the tenure comes to an end because that subject is covered by other provisions of the Constitution. Article 17(2) which guarantees Fundamental Right mentions such right to the extent of being a member of a political party subject to any reasonable restrictions imposed by law and nothing more than that. To continue in power for rive years till the end of tenure is a political wish and to be able to participate in political process, is governed by other Articles of the Constitution and not by Article 17(2). Article 17(2) mentions political party which has bundle of rights including political rights which are different from Fundamental Rights which are enumerated in the Constitution.

fundamental Rights are specifically mentioned in the Constitution Fundamental Right can be deemed to be there by implication if not mentioned specifically. If legislature wants to add any

Fundamental Right it can do so expressly. There is no dispute about the fact that Article 2A containing Objectives Resolution now is substantial part of the Constitution and this Article is now as good as any other Article of the Constitution and at par with it.

Petition under Article 184(3) cannot be riled straight away in the Supreme Court as Article 184(3) can be invoked only when question of public importance is involved with reference to the enforcement of any of Fundamental Rights and in the instant case petitioner cannot claim Fundamental Right under Article 17(2) to continue Government till its tenure comes to an end. Proper remedy for the petitioner was to rile the petition before the High Court under Article 199 of the Constitution and seek relief as contemplated therein challenging the validity of order of dissolution passed by the President.

Begum Nusr at Bhutto v. Chief of Army Staff etc. PLD 1977 SC 657 and Ms. Benazir Bhutto v. Fcd&ration of Pakistan PLD 1988 SC 416 rer.

The expression 'political justice' is very significant and it has been placed in the category of Fundamental Rights. Political parties have become a subject-matter of a Fundamental Right in consonance with the said provision in the Objectives Resolution. Even otherwise, speaking broadly, our Constitution is a Federal Constitution based on the model of Parliamentary form of representative Government prevalent in United Kingdom. It is also clear from the Objectives Resolution that principles of democracy as enunciated by Islam are to be fully observed. True and fair elections and the existence of political parties, is an essential adjunct of a functional democratic system of Government.

Reference to "political justice" is academic in nature because Fundamental Right is already mentioned in Article 17(2) which is right to form or be a member of political party.

In the instant case a petition under Article 184(3) of the Constitution directly filed in the Supreme Court is not maintainable and for that purpose resort should have been* made to the High Court.

The most important and pivotal point is the making of speech by the Prime Minister and its tenor and purport which is not disputed but on the contrary is being defended vociferously on the ground that the Prime Minister acted within his powers in the Constitution and the President had no business to advise the Prime Minister in, the Parliamentary form of Government. The tenor of the speech of the Prime Minister shows clearly that he endeavoured to take into confidence the Nation on the point that the situation had arisen in which the Government of Federation could not be carried on in accordance with the provisions of the Constitution and for such situation he was not to be blamed and the blame in its entirety lay on the door of the Presidency and the person of the

President who colluded with elements inside the Ruling Party and outside, who were hell-bent to destabilise the Government,

The question of apportionment of blame for creating such a situation is relegated in the background and the fact that such a situation is created bringing about deadlock and stalemate in the working relationship of two pillars of the Government of Federation had become a fait accompli which enabled the President to exercise his discretionary power under Article 58(2)(b).

It is clear that mandatory requirement of Article 154 was not followed and C.C.I. Was not called for to formulate and regulate policy giving opportunity to the Provinces to participate in the proceedings at such important stage.

Sale of properties owned by the Federal Government including Corporations was unconstitutional and in doing sd Articles 153, 154 and 156 read with Article 161 were violated by the petitioner and his Government.

-in respect of policy of privatisation, constitutional requirements of provisions regarding CCI and NEC were not followed and Provinces were not given opportunity to participate in the formulation of such policies. It also appears that on the ground of mal-administration, corruption and nepotism of the Federal Government there was sufficient material before the President which was considered in support of the ground of dissolution.

There is no reason to justify departure from the guidelines laid down in the cases of Haji Saifullah Khan and Khawaja Ahmad Tariq Rahim for consideration of material in support of grounds of dissolution. There is no difference in the material produced in support of grounds of dissolution in the case of Tariq Rahim and in the present case. The present line of reasoning in the majority judgment can be accepted only when positive assertion is made that case of Khawaja Ahmed Tariq Rahim was wrongly decided.

Supreme Court can examine the reasons and material in support of grounds of dissolution in order to find out whether it has any rational nexus with the satisfaction of the President.

S.R. Bonimai and others v. The Union of India and others AIR 1990 Karnataka 5; Mrs. Sajida Bcgum and others v. Union of India and others AIR 1977 SC 1301; A.K. Roy v. Union of India and ‘ another AIR 1982 SC 710; Capt. Kanwaijit Singh v. Union of India AIR I(Y)l Pb. and Har. 54; The State v. Ziaur-Rahman and others PLD 1973 SC 49; Fauji Foundation and another v. Shamimur Rchman PLD 1983 SC 457 and Dilip Kumar Sharma and others v. State of Madh. Pra. AIR 1976.SC 133 rer.

Decision of the Court should be strictly in accordance with law and not to please the nation. What may please the nation may turn out to be against the letter and spirit of the law and the Constitution.

Per Saad Saood Jan, J.; SaJJud All Shah, J. Contra.---

(oo) Constitution of Pakistan (1973)----

---- Art.175(2) --- Expression “jurisdiction” in Art.175(2), meaning --- Term ‘Jurisdiction” is defined to be the power of the Court to hear and determine a cause and exercise judicial power in relation to it --- No Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. 1p. 6411 A Chief Secretary v. Sikandar Hayat Khan PLD 1982 SC (AJ&K) 112

(pp) Constitution or Pakistan (1973)----

----Art.58(2)(b) --- Preconditions for the exercise of the power by the President under Art.58(2)(b).

The most important precondition laid down in Article 58(2)(b) for its exercise is that circumstances must exist which clearly indicate that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. The word ‘cannot’ as occurring in the clause brings in not only an element of impossibility but also that of permanence in its construction and thus the President can exercise his power thereunder only i there is material before him showing that the affairs of the State have come to such a stage that it is, no longer possible for the Government to function except by violating the Constitution.

Once the President forms an opinion that the Government of the Federation cannot be carried on in accordance with the Constitution he has just no option but to place the matter before the electorate, who are the political sovereign under the Constitution, to re-exercise their choice with regard to the composition of the Government. The Constitution does not provide any other way

out to the President for it is a parliamentary system of Government and except in some specified matters the President has to act on the advice of the Prime Minister in the performance of his functions irrespective of whether the latter is an elected one or merely his own nominee under Article 48(5)(b) of the Constitution.

Once the President is satisfied that the Government of the Federation cannot function in accordance with the Constitution he has no option but to place the matter before, i1he political sovereign of the country.

Under the system the Government of the Federation represents the majority of the members of the National Assembly and it cannot survive without their support. The Constitutional crisis or an impasse does not ordinarily develop overnight. If the majority of the members do not take remedial steps in time till the Constitutional stalemate actually occurs, the members can only blame themselves in the event the President intervenes to save the situation. Apart from that, dissolution of the Parliament is a normal incident of parliamentary democracy and no member can claim that he must be heard before dissolution.

Federation of Pakistan v. Muhammad Saifullah Khan PLD 1989 SC 166 and Ahmad Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646 ret

(qq) Constitution of Pakistan (1973)---

---- Arts.58(2)(b) & 54(3)---President can exercise power under Art..58(2)(b) when the National Assembly is in session in pursuance of the requisition of the members under Art.54(3)---Dissolution of National Assembly under Art.58(2) and summoning and prorogation of National Assembly under Art.54(3) are entirely different matters --- Summoning of National Assembly by Speaker under Art.54(3) does not operate as clog on the power of President under Art.58(2)(b).

(rr) Constitution of Pakistan (1973)...

---- Art.58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) vide Order dated 18-4-1993 --- Grounds mentioned in the said Order, could not at all lead to the conclusion that the Government of the Federation could

not be carried on in accordance with the Constitution and thus did not furnish an acceptable basis for the exercise of the discretionary power vested in the President under Art.58(2)(b) --- None of these grounds either by itself or in conjunction with others fulfilled the preconditions for the exerciser of the power under Art.58(2)(b).

Adegbenro v. Akintola and another (1963) 3 All ER 544 ref.

As to the maintainability of petition under Art.184(3) of the Constitution of Pakistan on the ground of violation of Fundamental Right guaranteed under Art.17(2) of the Constitution and elaboration of expression "Political justice" as contained in the Objectives Resolution --- [Minority view].

To invoke the jurisdiction of this Court under clause (3) of Article 184 it must be shown that the action complained against violates a Fundamental Right as set out in Chapter 1 of Part 11 either directly or transgresses the field in which the said right can reasonably be taken to be operative.

A perusal of Article 17(2) will show that the Fundamental Right contained therein has a somewhat limited scope inasmuch as it relates to the formation and membership of political parties. Thus, it no doubt gives freedom to the citizens to form political parties, enjoy the membership of the parties of their choice and by extension. of the said right to take part in all political activities; but then this Article was never intended to be a complete charter of all political rights. The content of the right which it guarantees is clearly delineated by the terms in which it is expressed and it is doubtful whether even by rule of progressive interpretation its scope can be extended to guaranteeing the right to the membership of legislative bodies or to the formation of the Government of the day.

Article 17(2) is not a check against all violations of the Constitution the terms in which it is expressed set out the content of the right guaranteed by it; it relates to the formation, membership and legitimate functioning of the political parties. It does not concern itself with the rights of the citizens when they sit as members of a legislative body. The term of the National Assembly, its constitution and the manner of its dissolution arc regulated by other Articles of the Constitution; Article 17(2) has nothing to do with these matters. If the National Assembly is dissolved illegally it will be violation of Articles 52 and 58. One cannot complain that by the dissolution of the Assembly his right under Article 17(2) has been impinged upon. He will no doubt have a remedy under Article 199 of the Constitution before the High Court; the jurisdiction conferred on this Court by Article 184(3) is, by the language in which it is couched, far too restricted to cover the petition.

The expression 'political justice' represents an idea with myriad of facets and for that very reason does not admit of a precise definition. Broadly speaking, every time a group or a class or even an

individual is deprived of a right or a privilege which is available to the majority of others similarly placed or is discriminated against, one immediately starts thinking in terms of political justice. So far as the Objectives Resolution is concerned it does not by itself add any new independent fundamental right in Chapter I of Part II of the Constitution so as to bring its violation within the compass of the jurisdiction conferred on this Court by Article 184(3).

Political justice has innumerable dimensions. Its theme runs throughout the Constitution. It is not confined to any particular portion thereof-, in fact, the various Articles of the Constitution receive inspiration from or reflect one or the other aspect of political justice. There seems little doubt that the paramount consideration before the Constitution-makers was that no section of the citizenry no matter how small it might be, should be deprived of equal participation in the national life and no one should feel that he has not had a fair deal.

The question was whether Supreme Court had the jurisdiction t entertain the petition directly; for that one has to show that there had been violation of his right as included in Chapter I of Part 11 of the Constitution. The mere assertion that the petitioner was seeking political justice was not sufficient in that regard. On the other hand, the dissolution of the National Assembly or the dismissal of the cabinet arc not matters which fall within the field in which Article 17(2) operates. The action of the President emanates from the provisions of Article 58(2)(b). Whether this action is legal or not has to be examined on the basis of the language of this clause and the relevancy of the material upon which it was stated to have been based. It has nothing to do with the violation of Article 17(2) for, the Fundamental Right incorporated in this clause does not extend to guaranteeing the duration of the membership of the National Assembly. Direct petition is not covered by clause (3) of Article 184 of the Constitution and as such it ought not to have been riled directly in the Supreme Court.

Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and PLD 1989 SC 00 distinguished.

Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and Hakam Khan v. Government of Pakistan PLD 1(Y)2 SC 595 rer.

Per Ajmul Mian, J.; Sullud All Sliali, J. Contra...

(ss) Constitution of Pakistan (1973)...

---- Art. 184(3)-‘ interpretation, scope and application of Art.184(3) of the Constitution.

A perusal of Article 184(3) of the Constitution of Pakistan (1973), indicates that without prejudice to the provisions of Article 199 of the Constitution, which confers constitutional jurisdiction on the High Courts, the Supreme Court has been empowered to make an order of the nature mentioned in the above Article 191) provided the following two conditions are fulfilled:---

(i) a question of public importance is involved;

with reference to the enforcement of any of the Fundamental Rights guaranteed by Chapter 1, Part, 11 of the Constitution, i.e. Articles 8 to 28.

(tt) Constitution of Pakistan (1973)...

.... Art. 2A --- Object of adopting the Objectives Resolution --- Fact that Objectives Resolution has been incorporated as a substantive part of the Constitution by virtue of Art.2A, does not justify reading into any additional Fundamental Rights in Chapter pertaining to Fundamental Rights contained in the Constitution --- Courts, however, while construing Fundamental Rights have to keep in view the Objectives Resolution and to place widest possible construction as to advance the goals targeted/envisaged therein.

Factum that the Objectives Resolution has been incorporated as a substantive part of the Constitution by virtue of Article 2A, does not justify reading into any additional Fundamental Rights in the Chapter pertaining to Fundamental Rights contained in the Constitution. The object of adopting the Objectives Resolution in 1949, was to provide guideline and to serve as a beacon light to the framers of Constitution but it was never intended or designed to be enforced as Fundamental Rights. The framers of the Constitution have in fact acted upon, on the Objectives Resolution by incorporating the various Fundamental Rights contained in Articles 8 to 27,

which cover Political, Social and Economic Justice, to add to the above list any other undamental right on the basis of the Objectives Resolution is the function of the Parliament and not of the Court. However, the Courts while construing Fundamental Rights should keep in view the Objectives Resolution and should place widest possible construction as to advance the goals targeted/envisaged therein.

Hakim Khan and 3 others v. Government of Pakistan PLD)92 SC

(uu) Constitution of Pakistan (1973)-

595 ref.

---- Part 11, Chap. 1 --- Fundamental Rights --- Courts, while construing Fundamental Rights have to keep in view Objectives Resolution and place widest possible' construction as to advance the goals targeted/envisaged therein.

Hakim Khan and 3 others v. Government of Pakistan PLD 1992 SC

(vv) Constitution of Pakistan (1973)---

---- Art. 17--"Political rights" and "Political justice" are inter linked with each other --- Guarantees ensured under "political rights" and "political justice" detailed --- Need for expanding the same through legislation and judicial creativity emphasised.

The political rights and the political justice are inter linked with each other. The former encompasses the right to participate directly or indirectly in the establishment or management of the Government. These rights are delineated and demarcated in the Constitution of every country; whereas the latter caters for providing in the Constitution equal rights to engage and participate in the public affairs. It envisages that the Constitution should guarantee equal liberty and provide an efficient and honest machinery/mechanism through which people can elect their representativ6s in a manner which should ensure that---

(i) each vote has approximately the same weight in determining the outcome of the election;

(ii) people similarly endowed and motivated should have roughly the same chance of attaining political authority irrespective of their economic and social class;

(iii) the majority should get into power.

The Fundamental Rights contained in the Constitution referred to herein above provide to some extent for the Political Rights and the Political Justice. However, there is a lot of scope for improving upon and expanding the same through legislation and the judicial creativity.

Justice and Natural Social and Political by Dr. Chatcrvedi; Black's Law Dictionary, 5th Edn.; Words and Phrases (Permanent Edition - West Publishing Co.), Vol. 32A; A Theory of Justice by John Rawls and Miss Benazir Bhutto v. Federation of Pakistan and others PLD 1988 SC 416 ref.

(ww) Constitution of Pakistan (1973)---

---- Art. 17---Scope of Art.17 --- Forming of a political party necessarily implies the carrying on of all its activities as otherwise the formation itself would be of no consequence.

A perusal of Article 17 of the Constitution of Pakistan (1973) indicates that clause (1) thereof confers on every citizen the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality. Whereas, clause (2) confers on every citizen, not being in the service of Pakistan, the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or intergtrity of Pakistan, it also empowers the Federal Government to declare that a political party has been formed, or is operating in a manner prejudicial to the sovereignty or intergtrity of Pakistan, subject to a reference to be made within 15 days from such declaration to the Supreme Court whose decision on such reference is to be final.

The forming of a political party necessarily implies the carrying on of all its activities as otherwise the formation itself would be of no consequence. [p. 0691 F

SC 416 ref.

Miss Benazir Bhutto v. Federation of Pakistan and others PLD 1988

(xx) Constitution or Pakistan (1973)---

---- Art. 184(3) --- Article 184(3) of the Constitution provides abundant scope for the enforcement of the Fundamental Rights of an individual or a group or class of persons in the event of their infraction --- Supreme Court has to lay down the contours generally in order to regulate the proceedings of group or class of actions from case to case.

Miss Benazir Bhutto v. Federation of Pakistan and others PLD 1988

(yy) Constitution of Pakistan (1973)---

---- Arts. 17(2) & 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) --- Right to form a political party and to be a member of a political party enshrined in Art.17(2) does not culminate upon winning of the elections but it. is a continuous political process which includes the right of a person to remain as a

member of the National Assembly or as a Prime Minister till the lifetime of the Assembly or the tenure of the Prime Minister ship is terminated lawfully in accordance with the provisions of the Constitution --- Member of National Assembly or Prime Minister, therefore, can claim that he should be allowed to function so long as the life of the Assembly or his tenure is not terminated in

accordance with the Constitution --- Any infraction of such right without legal basis will inter alia attract Art.17(2) of the Constitution besides being violative of the relevant Constitutional or statutory provision --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet being violative of the provisions of the Constitution, Art.17(2) was attracted as admittedly the ousted Prime Minister was the leader of a Political Party which commanded the majority in the National Assembly.

The right to form a political party and to be a member of a political party enshrined in clause (2) of Article 17 does not culminate upon winning of the elections but it is a continuous political process which includes the right of the petitioner to remain as a member of the National assembly or as a Prime Minister till the time the life of the Assembly or the tenure of the Prime Minister ship is terminated lawfully in accordance with the provisions of the Constitution. It is true that nobody

can claim any vested right to remain a member of the National Assembly or to be a Prime Minister for the period of five years but a Member of the National Assembly or a Primer Minister can claim that he should be allowed to function so long as the life of the Assembly or his tenure is not terminated in accordance with the provisions of the 'Constitution. Any infraction of the above right without legal basis will inter alia attract Article 17 (2) of the Constitution besides being violative of the relevant Constitutional or statutory provision. Since the impugn6d Presidential Order of 18th April, 1993, dissolving the National Assembly and dismissing the Prime Minister and the Cabinet does not fall, within the ambit of Article 58 (2) (b) of the Constitution, the termination of the life of the Assembly and the tenure of the petitioner as the Prime Minister besides being violative of the above provision of the Constitution, will also attract Article 17(2) of the Constitution, as admittedly the petitioner was the leader of a Political party which commanded the majority in the National Assembly.

Kh. Ahmad Tariq Rahim v. Federation of Pakistan PLD 1991 Lah. 78;

Reference by his Excellency the Governor-General PLD 1955 FC 435; State of Rajasthan v. Union of India AIR 1977 SC 1361; Capt. Kanwaijit Singh v. Union of Inida AIR 1991 Punj. 54 and All India Bank Employees' Association v. The National Industrial Tribunal (Bank Disputes) and others AIR 1962 SC 171 distinguished.

There is a marked distinction between interpreting a constitutional provision containing a Fundamental Right and a provision of an ordinary statute. A constitutional provision containing a Fundamental Right is a permanent provision intended to cater for all times to come and, therefore, while interpreting such a provision the approach of the Court should be dynamic, progressive and liberal keeping in view ideals of the people, socioeconomic and politico-cultural values (which in Pakistan are enshrined in the Objectives Resolution) so as to extend the benefit of the same to the maximum possible. This is also called judicial activism or judicial creativity. In other words, the role of the Courts is to expand the scope of such a provision and not to extenuate the same. The construction placed on Article 17 of the Constitution herein above is in consonance with the above rules of construction.

Olga Tellis and others v. Bombay Municipal Corporation and others AIR 1986 SC 180; State of Himachal Pradesh and another v. Umcd Ram Sharma and others AIR 1986 SC 847; IA. Sharwani and others v. Government of Pakistan 1991 SCMR 1041; Muhammad Nur Hussain v. The Province of East Pakistan and others PLD 1959 SC (Pak.) 470 and Dwarkadas Shrinivas v. The Sholapur Spinning & Weaving Co. Ltd. and others AIR 1954 SC.119 ref.

(zz) Interpretation of Constitution---

--- Fundamental Rights guaranteed in the Constitution --- While interpreting Fundamental Rights the approach of the Court should be dynamic, progressive and liberal keeping in view ideals of the people, socio-economic and politico-cultural values which in Pakistan are enshrined in the Objectives Resolution so as to extend the benefit of the same to the maximum possible.

There is a marked distinction between interpreting a constitutional provision containing a Fundamental Right and a provision of an ordinary statute. A constitutional provision containing Fundamental Right is a permanent provision intended to cater for all times to come and, therefore, while interpreting such a provision the approach of the Court should be dynamic, progressive and liberal keeping in view idea of the people, socioeconomic and politico-cultural values (which in Pakistan are enshrined in the Objectives Resolution) so as to extend the benefit of the same to the maximum possible. This is also called judicial activism or judicial creativity. In other words, the role of the Courts is to expand the scope of such a provision and not to extenuate the same.

(aaa) Constitution of Pakistan (1973)---

---- Art. 184(3)-~-Direct petition under Art.184(3) of the Constitution could be filed before the Supreme Court if a petitioner could demonstrate any infraction of any of the Fundamental Rights.

, Federation of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others v. Aftab Ahmad Khan Sherpao and others PLD 1992 SC 723 clarified.

(bbb) Constitution of Pakistan (1973)---

---- Arts. 58(2)(h) & 54(3)---Power of the President to dissolve the National Assembly under Art.58(2)(b) was not affected if the Speaker had already prorogued the National Assembly under Art.54(3) of the Constitution --- Once Parliament has been formally opened, it can be dissolved whether it is in session or not. the power to prorogue National Assembly is entirely distinct from the power to dissolve and, therefore, the factum that under clause (3) of Article 54 once the Speaker summons the National Assembly upon requisition signed by not less than one-fourth of the total membership of the National Assembly, he can only prorogue and not any other authority, does not, in any way, control or curtail the power conferred on the President under clause (2) (b) of Article 58 of the Constitution. If the National Assembly can be dissolved while in session, there seems to be no legal basis as to why it cannot be dissolved when it is not in session but is summoned upon requisition under clause (3) of Article 54 of the Constitution. [p. 67611

Theory and Practice of Dissolution of Parliament compiled by Cambridge and Studies in International and Comparative Law edited by C.J. Harrison and R.Y. Jennings ref.

(ccc) Constitution of Pakistan (1973)---

---- Art. 58 --- Interpretation and scope of Art.58 --- Power of President to dissolve National Assembly under Art.58(2)(b) --- Scope --- Dissolution of National Assembly under Art.58(2)(b) is inter linked with an appeal to the electorate --- Court will be entering into the domain of speculations, surmises and conjectures if it were to examine the question, whether an appeal to the electorate will achieve the desired result which is not warranted by the language of Art. 58.

A perusal of Article 58, Constitution of Pakistan shows that under clause (1), it is mandatory on the part of the President to dissolve the National Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646 and Federation of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary Affairs~ Islamabad and others v. Aftab Ahmad Khan Sherpao and others PLD 1992 SC 723 ref.

"Inter-Parliamentary Union" Parliaments of the World (A Reference Compendium)'by Valentine Herman and Francoise Mendel and the Theory and Practice of Dissolution of Parliaments, a Comparative Study with Special Reference to the United Kingdom and Greeks by B.S. Markesinis distinguished.

(eee) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and call to the electorate --- Effect --- Frequent dissolution of Assembly without justifiable reason affects adversely the democratic process, which results into instability in the country adversely affecting economic growth.

Indeed holding of a general election regularly in a democratic setup/polity is an essential element. It inculcates political maturity among the masses, brings political stability in the democratic institutions and gives the masses sense of participation, in the affairs of the State and generates in them sense of responsibility and patriotism. But frequent dissolution of an assembly without justifiable reason affects adversely the above democratic process, which results into instability in the country adversely affecting economic growth.

Introduction to the Study of the Law of the Constitution by A.V. Dicey, Tenth Edn. ref.

(M) Constitution of Pakistan (1973)--

---- Preamble --- Sovereignty --- Marked distinction exists between the Islamic concept of sovereignty and modern concept of sovereignty.

Islamic Jurisprudence and International Perspective by C.G. Weeramantry and Hakim Khan and 3 others v. Government of Pakistan PLD 1992 SC 595 rer.

(ggg) Constitution of Pakistan (1973)---

Assembly if so advised by the Prime Minister and unless sooner dissolved, it shall stand dissolved automatically at the expiration of f9rty-eight hours after the Prime Minister has so advised. However, explanation to the above clause puts clog on the above right of the Prime Minister by providing that he cannot tender above advice if notice of a resolution for a vote of no-confidence has been given against him.

Clause (2) provides that notwithstanding anything contained in clause (2) of Article 48 of the Constitution, the President may dissolve the National Assembly in his discretion where in his opinion---

(a) a vote of no-confidence has been passed against the Prime Minister and in the opinion of the President no other member of the National Assembly is likely to command the confidence of the majority of the members;

(b) the President may also dissolve the National Assembly in his discretion when in his opinion a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

Sub-clause (b) of clause (;) of Article 58 of the Constitution is pertinent once the President forms the opinion objectively on the question that a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution on the basis of the material having nexus with the above reason, he enters into the domain of discretion and it

is for him to decide, as to whether the proper action would be the dissolution of the Assembly or some other action warranted by some other provisions of the Constitution or law

The dissolution of an Assembly is inter linked with an appeal to the electorate. If an Assembly is to be, dissolved as a corollary, an appeal to the electorate is to be made. Courts will be entering into the domain of speculations, surmises and conjectures if they were to examine the question, whether an appeal to the electorate, will achieve the desired result 'which is not warranted by the language employed in the above provision of the Constitution. One cannot predict with certainty, what would be the outcome of an appeal to the electorate.

Kh. Ahmad Tariq Rahim~ v. Federation of Pakistan PLD 1991 SC 646

(ddd) Constitution or Pakistan (1973)---

---- Art. 58(2)(b) --- Expression "situation has arisen in which the Government cannot be carried on in accordance with the provisions of the Constitution" occurring in Art.58(2)(b) --- Interpretation.

Haji Muhammad Saifullath Khan's case PLD 1989 SC 166; Ahmad

---- Art. 64(l) --- Resignations of Members of National Assembly --- Sub mission of such resignations to the President of Pakistan had no legal effect as they were not handed over to the Speaker in terms of Art.64(1) of the Constitution.

A.K. Fazlul Quader Chaudhury v. Shahnawaz and others PLD 1966 SC 105 and Mirza Tahir Beg v. Syed Kausar Ali Shah and others PLD 1976 SC 504 ref.

(hhh) constitution of Pakistan

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) --- Ground that Members of National Assembly submitted resignations to achieve the object of ousting the Prime Minister's Government and

dissolution of Assembly was foreign to the grounds mentioned in Art.58(2)(b) of the Constitution --- What cannot be achieved directly cannot be achieved indirectly by pressing into service Art.58(2)(b) of the Constitution.

The object of submission of the above resignations to the President was to get the Prime Minister's Government ousted and in order to achieve the above object, the Assembly was to be dissolved. The above object is foreign to the ground mentioned in sub-clause (b) of clause (2) of Article 58 of the Constitution as the facturn that 88 MNAs had submitted resignations to the President instead of to the Speaker, would not show that the Assembly lost the mandate of the people or that a situation had arisen in which the Federation could not be carried on in accordance with the provisions of the Constitution

What cannot be achieved directly cannot be achieved indirectly by pressing into service sub-clause (b) of clause (2) of Article 58 of the Constitution. In this regard, it may be pertinent to mention that under clause (5) of Article 91 of the Constitution, it has been provided that the Prime Minister shall hold the office during the pleasure of the President but this pleasure is controlled by providing therein that the President shall not withdraw his pleasure under this clause unless he is satisfied that the Prime Minister does not command the confidence of majority of the members of the National Assembly in which case he shall summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly. If the Prime Minister fails to obtain . a vote of confidence, the President is entitled to withdraw his pleasure by dismissing the Cabinet and the Prime Minister. Reference may also be made to clause (1) 6f Article 95 of the Constitution which provides that a resolution for a vote of no-confidence moved by not less. than 20 per centum of the total membership of the National Assembly may be passed against the Prime Minister by the National Assembly. Whereas sub-clause (a) of clause (2) of Article 58 of the Constitution empowers the President to dissolve the Assembly in his discretion if a vote of no confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly. This is to be read with clause (5) of Article 48 which empowers the President upon dissolving the National Assembly either under sub-clause (a) or sub-clause (b) of clause (2) of Article 58 of the Constitution to---

(a) . appoint a date not later than 90 days from the date of dissolution for hold7mg of general elections to the Assembly; and

(b) appoint a Care-taker Cabinet which. includes Prime Minister.

There seems to be no other provision under the Constitution, whereby a Prime Minister commanding majority of the House can be removed or dismissed. The factum that 88 MNAs had submitted resignations with the above object had no nexus with the ground mentioned in sub-clause (b) of clause (2) of Article 58 of the Constitution. Even if the above 88 resignations would have been submitted to the Speaker, that would not have been sufficient to conclude that the situation had arisen in which the Government of the Federation could not be carried on in accordance with the provisions of the Constitution as the law provides the requisite provision for bye-elections for filling in such vacancies.

The persons desirous to achieve the ouster of a Government commanding majority in the National Assembly cannot be allowed to achieve the above object by adopting the above mechanism instead of defeating the(Government through no-confidence votes. The intention of the above MNA to submit their resignations was to oust the Government which command majority and to get into power through this indirect means, which fact stands established from the factum that Mr. Mir Balakh Sher Mazari was inducted as the Care-taker Prime Minister and the Ministers who had resigned from the petitioner's Cabinet were taken as the Care-taker Ministers besides taking majority of the MNAs who submitted their resignations as Care-taker Ministers in the Care-taker Cabinet.

Adegbcrno v. Akintola and another '(1963) 3 All ER 544

(iii) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Exercise of powers under Art.58(2)(b) by the President-- Conditions --- Article 58(2)(b) was not intended and designed to be pressed into service at the behest of the elements hostile to the Government in power to oust it though it may command majority in the National Assembly --- If the exercise ' of the power is tainted with personal likes or dislikes, the same shall stand vitiated.

Under Article 41 of the Constitution, the President is the Head of the State and represents the unity of the Republic. His position is of a non-partisan person. Article 58 (2) (b) of the Constitution was not intended and designed to be pressed into service at the behest of the elements hostile to the Government m power to oust it though it may command majority in the National Assembly The power under the above provision though discretionary, is to be exercised sparingly, independently, honestly, fairly and reasonably without any bias and ill-will. If the exercise of the above power is

tainted with personal likes or dislikes, the same shall stand vitiated. Furthermore, the above provision can be pressed into service when the machinery of Government is broken down

completely and its authority is eroded and that it does not concern with the pace of the progress, the shade of the quality or the degree of the performance or the quantum of achievement.

(W) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) inter alia on the ground of a speech by the Prime Minister --- Held, though the launching of personal attack by the Prime Minister was not warranted and desirable, but simpliciter, the same could not have furnished a ground to press into service Art.58(2)(b).

De Smith and Brazier Constitutional and Administrative Law, Sixth Edn. by Rodney Brazier and Constitutional and Administrative Law Text and Materials by David Pollard and David Hughes rer.

(kkk) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution inter alia on the ground of Prime Minister's alleged inaction on internal and international problems --- Held, such ground was not sustainable as it had no nexus to the reasons contained in Art.58(2)(b) of the Constitution of Pakistan especially when there was no inaction on the part of the petitioner of the nature warranting the dissolution of National Assembly and dismissal of Cabinet.

(111) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Powers to dissolve the National Assembly and to remove the Government by withdrawing the President's pleasure are governed by the Constitutional provisions and they are controlled by the conditions contained therein.

Ahmad Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646; Constitution of India by Mangal Chandra Jain Kagzi, 1987 Edn. Vol. 1 and De Smith and Brazier's Constitutional and Administrative Law Sixth Edn. by Rodney Brazier ref.

(mmm) Constitution of Pakistan (1973)---

Arts. 58(2)(b), 46 & 48 --- Status of President and the Prime Minister under the Constitution.

Article 46 of the Constitution imposes the following Constitutional duties on the Prime Minister:---

(a) to communicate to the President all decisions of the Cabinet relating

to the administration of the affairs of the federation and proposals for legislation;

(b) to furnish such information relating to the administration of the affairs of the Federation and proposals for legislation as the President may call for; and

(c) if the President so requires, to submit for the consideration of the Cabinet any matter on which a decision has been taken by the Prime Minister or a Minister but which has not been considered by the Cabinet.

The above Article is to be read with the I other provisions of the Constitution particularly with clause (2) of Article 58 of the Constitution, which empowers the President to dissolve the National Assembly and as a result of which the Cabinet is to cease to function. The above powers cannot be exercised by the President unless he keeps himself abreast of the day to day working of the

Government. The cumulative effect of the various provisions of -the Constitution relating to the President is that the President enjoys the right to be consulted, the right to encourage and the right to warn. In order to discharge his above constitutional duties, he is expected to be vigilant and to

keep his eyes and cars open.

But at the same time the Prime Minister's status is neither inferior nor is less important to that of the President. Except in the matters which are in the sole domain of the President, the President cannot act without the advice of the Prime Minister, whose advice is binding on him by virtue of Article 48(l) of the Constitution. The Prime Minister, in fact, runs the Government and formulates

its policies in terms of the Constitution and is accountable to the Parliament. He represents the will of the people. Prior to the Eighth Amendment the Prime Minister was all in all, but after the above amendment the position has changed considerably.

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(nnn) Constitution of Pakistan (1973)---

---- Art. 154 --- Privatization of National units --- Federal Government should have brought the matter of privatization in respect of the items covered by the Constitutional provisions before the C.C.I.

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(ooo) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution inter alia on the ground that privatization in respect of items covered by the Constitutional provisions was not put before the C.C.I.-Held, Privatization, which had the backing of law though should have been done through C.C.I. but it could not be said that lapse by the Government was of the nature, which hud jeopardised the very existence and subsistence of the Federation warranting to press into service Art. &'R(2)(b) of the Constitution of Pakistan.

(ppp) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) inter alia on the ground of mal-administration, corruption and nepotism etc.---Held, such grounds were not sufficient independently to warrant taking of action under Art.58(2)(b) of the Constitution and even not of the nature which could have nexus to the reasons mentioned in that Article.

Ahmed Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646 ref.

(qqq) Constitution or Pakistan (197.3)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) inter alia on the gr6iund that functionaries, authorities and agencies of the Government under the direction of Prime Minister and Ministers had unleashed a reign of terror against the opponents etc.---Held, such grounds (allegations) having not been investigated into by any competent agency/forum in order to determine truthfulness of the allegations besides being not founded on any material worth consideration had no nexus with the reasons mentioned in Art.58(2)(b) of the Constitution.

(rrr) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution inter alia on the ground that one or two ministers of the Cabinet who resigned had raised a grievance to the effect that there was a kitchen Cabinet for attending the important matters and they were not consulted--Held, such ministers might have individual grievance but the same could not be made a ground for the purpose of Art.58(2)(b) of the Constitution as that had no nexus with the reasons mentioned therein.

(sss) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) inter alia on the ground that Prime Minister had instructed the Cabinet Ministers not to call on the President --- Held, such a ground had no nexus to the reasons mentioned in Art.58(2)(b) 6f the Constitution of Pakistan.

(ttt) Constitution of Pakistan (1973)-

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) inter alia on the ground of mere allegations of irregularities/favours in the form of complaints or news items without ascertainment of their truthfulness --- Held, alleged irregularities/favours may be subject-matter of appropriate legal proceedings under the relevant law if they constituted breach of such laws and were true, but such individual instances could not have nexus with the grounds mentioned in Art.58(2)(b) of the Constitution --- If, however, the corruption, nepotism and favourtism were on such a large scale, that it resulted in the breakdown of Constitutional machinery completely, it might have nexus with Art.58(2)(b).

(uuu) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) inter alia on the ground that Prime Minister had made excess grants from his discretionary quota of Tameer-e-Watan Programme and extravagant expenses were incurred by him on foreign trips and in organising seminars in foreign countries for attracting foreign investments --- Held, all the allegations were no more than contained in the newspapers without any facts and figures as to excess amount wasted and therefore not worth relying upon --- Such irregularities could form the basis for some other appropriate proceedings under the appropriate laws if they constituted breach of such laws and were true, but they could not furnish foundation for passing order of dissolution under Art.58(2)(b).

(Yvv) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) inter alia on the ground of deficit financing and indebtedness both domestic and international--Held, such ground had no nexus with the reasons mentioned in Art.58(2)(b) of the Constitution.

(www) Constitution Of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) inter alia on the ground of deviation in respect of induction of rive persons in civil service--Held, such deviation could not be desirable for running an efficient civil service, but it could not cause breakdown of the constitutional machinery so as to attract the action under Art.58(2)(b).

(xxx) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) inter alia on the ground that wife of late Chief of Army Staff had alleged in a Press Conference that her husband did not die natural death but was poisoned --- held, Government had constituted on the same day when Press Conference was held a Commission comprising three Judges of the Supreme Court which had already submitted its report and statement of Army Medical Personnel recorded by the Commission and. reported in the Press in verbatim indicated that the late General died natural death --- Such ground which had no basis did not have any nexus with the conditions laid down in Art.58(2)(b) of the Constitution.

(yyy) Constitution of Pakistan (1973)---

---- Art. 184(l) --- Suit can be filed in Supreme Court under Art.184(l) in respect of any dispute between any two or more Governments.

(zzz) Constitution of Pakistan (1973)---

---- Arts. 154 & 155 --- Disputes between any two or more Governments can be brought before the Council of Common Interests.

(aaaa) Constitution of Pakistan (1973)---

---- Arts. 184(3), 199 & 58(2)(b) --- Constitutional petition --- Grant of relief--When can be denied --- If the petitioner succeeds in establishing breach of a Fundamental Right, he is entitled to the relief in exercise of Constitutional jurisdiction as a ‘matter of course --- Where the order of dissolution of National Assembly and dismissal of Prime Minister and the Cabinet was passed by the President under Art.58(2)(b) which order did not fall within the ambit of Art.58(2)(b) and there was no justifiable reason for that order, there was no reason to deny the restoration of the National Assembly and the Cabinet with the Prime Minister.

If a petitioner succeeds in establishing breach of a fundamental right, he is entitled to the relief in exercise of Constitutional jurisdiction as a matter of course. However, the Court may decline relief if the grant of the same, instead of advancing/fostering the cause of justice, would perpetuate injustice or where the Court feels that it would not be just and proper, for example, in

the President dissolves the National Assembly under Article 58(2)(b) of the Constitution and before the Court decides the legality of such an order, elections take place which may show that 70% voters have cast their votes against the political party which was commanding the majority in the House before its dissolution and that it could secure 2% or 3% only of the total votes cast. In such an event, it will not be just and proper on the part of the Court to defeat the will of the political sovereign by reinstating the dissolved Assembly in spite of the above overwhelming verdict of the political sovereign against it. The Courts are established for dispensing justice. So if the grant of a relief for the enforcement of a fundamental right or any other legal right instead of fostering/advancing cause of justice, will perpetuate injustice, the Court will decline the same. in this regard, there seems to be no distinction between the enforcement of a fundamental right and a legal right under a general law.

In the present case, the impugned order does not fall within the ambit of Article 58(2)(b) of the Constitution. There is no justifiable reason to deny the restoration of the National Assembly and the Cabinet with the Prime Minister.

Capt. Kanwaijit Singh v. Union of India A I R 1991 Punj. and Har. 54; S.R. Bommai and others v. Union of India'and others A I R 1990 Karnataka 5; State of Rajasthan's case A I R 1977 SC 1361 distinguished.

Sunderial Patwa v. The Union of India and others Misc. Petition No.~37 of 1993; Nawab Syed, Raunaq Ali etc. v. Chief Settlement Commissioner and others P L D 1973 SC 236; Wali Muhammad and others v. Sakhi Muhammad and others P L D 1974 SC 106; Chief Settlement Commissioner, Lahore v. Raja Muhammad Fazil Khan and others P L D 1975 SC 331; Syed Nazim Ali etc. v. Syed Mustafa Ali etc. 1981 S C M R 231; Muhammad Umar v. Member, Board of Revenue and 9 others 1985 S C M R 1591; Messrs Norwich Union Fire Insurance Society Limited v. Muhammad Javed lqbal and another 1986 S C M R 1071; Zameer Ahmad and another v. Bashir Ahmad and others 1988 S C M R 516; Syed Ali -Shah v. Abdul Saghir Khan Sherwani and others P L D 1990 SC 504; Inamur Rehman v. Federation of Pakistan and others 1992 S C M R 563; Daryao and others v. The State of U.P. and others A I R 1961 SC 1457; The Government of East Pakistan v. Mrs. Rowshan Bijaya Shaukat Ali Khan P L D 1966 SC -286; Ram Singh and others v. The State of Delhi' and another A I R 1951 SC 270; Messrs Tilokchand Motichand and others v. H.B. Munshi, Commissioner of Sales Tax, Bombay and another A I R 1970 SC 898 and Amrit Lai Berry and others v. Collector of Central Excise Central Revenue and others A I R 1975 SC 538 ref.

Per Muhammad Afzal Lone, J.; Sajjad Ali Shah, J. (Contra)---

(bbbb) Constitution of Pakistan (1973)--

---- Art. 184(3) --- Scope and application of Art.184(3) of the Constitution.

Article 184(3) of the Constitution of Pakistan pertains to original jurisdiction of the Supreme Court and its object is to ensure the enforcement of fundamental rights referred to therein. This provision is an edifice of democratic way of life and manifestation of responsibility cast on Supreme Court as a protector and guardian of the Constitution. The jurisdiction conferred by it is fairly wide and the Court can make an order of the nature envisaged by Article 199, in a case where a question of public importance, with reference to enforcement of any fundamental right conferred by Chapter 1 of Part 11 of the Constitution is involved. Article 184(3) is remedial in character and is conditioned by three prerequisites, namely----

(i) There is a question of public importance.

(ii) Such a question involves enforcement of fundamental right, and *

(iii) The fundamental right sought to be enforced - is conferred by

Chapter 1, Part 11 of the Constitution.

(cccc) Constitution of Pakistan (1973)--

---- Art. 17 --- Interpretation, guidelines---While construing Art.17 approach of the Court should not be narrow and pedantic but ‘ elastic enough to march with the changing times and guided by the object for which it was embodied in the Constitution --- Full import and meaning of Art.17 must be gathered from other provisions such as Preamble of the Constitution, Principles of Policy and the

Objectives Resolution, which shed luster on the whole Constitution.

Bcnazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 reE

(dddd) Constitution of Pakistan (1973)--

---- Art. 2A---"Political justice" and "political rights"---Concept --- Effective functioning of political system --- Essentials --- Principles of democracy as enunciated in Islam are to be fully observed and true and fair elections and the existence of political parties, is an essential adjunct of a functional democratic system of Government.

In every democratic set-up in the world, the political parties compete for the right to form a Government. It is the basic assumption of Parliamentary democracy that the party winning a majority of scats in the House should have complete control of Government. For democracy gives the majority the right to rule. Constitutionally, this power admits of no impediment. In British politics the "doctrine of mandate" signifies that the party which wins the general election has the right to implement its programme. In fact it is true of every country following parliamentary democracy. If a party attaining power fails to give effect to its manifesto it may be accused of deluding the electorate in catching the votes. For an effective functioning of a political system, the dominant institutions catered thereby though geared by the idea of contemporary social attitudes, must not be oblivious of moral and historical aspirations of the nation. The reason being that' neither constitutional principles nor political attitudes can properly be appreciated without understanding their roots in the historical experiences of the society. In this behalf the Objectives Resolution (Art.2A) represents such attitudes, ethos, and values behind the Constitution.

The expression "political justice" is very significant and it has been placed in the category of fundamental rights. Political parties have become a subject-matter of a fundamental right in consonance with the Objectives Resolution. Even otherwise, speaking broadly, the Constitution is a Federal Constitution based on the model of Parliamentary form of representative Government prevalent in United Kingdom. It is also clear from the Objectives Resolution that principles of democracy as enunciated by Islam are to be fully observed. True and fair elections and the existence of political parties, is an essential adjunct of a functional democratic system of Government.

Expression "political rights" is defined as those rights which may be exercised in the formation or administration of the Government . Rights of citizens established or recognized by Constitutions which give them the power to participate directly or indirectly in the establishment or administration of Government.

Benazir Bhutto v. Federation of Pakistan PLD 1968 SC 416 and Black's Law Dictionary, 1979 Edn.. ref.

A Theory of Justice by John Rawals commented.

victims of Politics by Kurt Glaser Stefan T. Possony, 1979 Edn., p.349 published by Columbia University Press, New York; Philip Pettit, Professor of Philosophy in University of Bradford in his work Judging Justice and David Lyons in his work Ethics and the Rule of Law cited.

(eeee) Constitution of Pakistan (1973)--

---- Arts. 17 & 184(3) --- Political justice --- Concept --- Illegal and unconstitutional denial to run the Government as long as one enjoyed the support of the majority in the House, will be the denial of political justice, guaranteed by Art.17 of the Constitution and petition under Art.184(3) of the Constitution will be maintainable against such denial.

The concept of political justice will also include the right to participate in political decision-making. Thus illegal and unconstitutional denial to run the Government as long as one enjoyed the support of the majority in the House, will be the denial of political justice, guaranteed by Article 17.

There is no valid basis to sustain the objection to the maintainability of the petition under Article 184(3) of the Constitution which on account of infringement of Fundamental Right No.17 lies before Supreme Court.

A Theory of Justice by.John Rawals commented.

Victims Of Politics by Kurt Glaser Stefan T. Possony, 1979 Edn., p.349 published by Columbia University Press, New York; Philip Pettit, Professor of Philosophy in University of Bradford in his work Judging Justice and David Lyons in his work Ethics and the Rule of Law cited.

(ffff) Constitution of Pakistan (1973)--

---- Art. 64 --- Rules of Procedure and Conduct of Business in the National Assembly, 1992, R.25 --- Resignation by member of the Assembly in writing under the hand of the member concerned addressed and delivered to the Speaker, if genuine and tendered voluntarily is sift qua nor, for its effectiveness.

(gggg) Constitution of Pakistan (1973)--

---- Arts. 58(2)(b) & 64 --- Resignations of Members of National Assembly addressed to the Speaker and delivered to the President who did not pass on the same to the Speaker cannot be a ground available to the President to take action under Art. 58(2)(b) of the Constitution.

In the present case the letters of resignations were addressed to the Speaker, except those tendered by the Ministers, which is 1he essential requirement of Article 64. Conceivably, there was no legal or constitutional justification for receipt and then retention th0rcof by the. President. If at all. these were presented to the President in all fairness in adherence to the provision of the Constitution he should have forwarded the same to the Speaker. Such a mode of tendering the resignations and then retention thereof by the President is a sheer perversion of the Constitution and no concomitant of the legitimate "pressure politics" known to the Parliamentary system of Government. Encouraging of such tactics may become an effective vehicle of blackmailing the party in power, resulting in subversion of the parliamentary democracy in the country. Within the ambit of Article 58(2)(b) this ground was not at all available.

From press clippings an inference was justifiably sought to be drawn that the President did not act impartially and rather extended an active cooperation to the opposition and other dissatisfied elements, which was highly objectionable and against the spirit of the Constitution.

Mirza Tahir Beg v. Syed Kausar Ali Shah PLD 1976 SC 504 ref.

(hhhh) Constitution of Pakistan (1973)--

---- Art. 19---"Freedom of expression"---Right of the citizenry to receive information can be spelt out from the "freedom of expression" guaranteed by Art.19 subject to inhibitions specified therein and such right must be preserved.

Party Politics, Vol.11, p.17 by Sir Ivon Jennings and The People and the Party System by Vernon Bogadanor ref.

(iiii) Constitution of Pakistan (1973)--

---- Art. 58(2)(b) --- Speech of the Prime Minister dated 17-4-1993 could not be made a lawful basis for dissolution of National Assembly under Art.58(2)(b) by the President.

QW) Constitution of Pakistan (1973)--

--Art. 58(2)(b) -Objections to the Policies of the Government in Presidential

Order dated 18-4-1993 dissolving the National Assembly under Art.58(2)(b) of the Constitution having not been established, could not be made basis for the said Order by the President.

(kkkk) Constitution of Pakistan (1973)--

---- Art. 58(2)(b) --- Two situations contemplated by Art.58(2)(b) to dissolve the National Assembly by the President stated.

Article 58(2) contemplates two situations for dissolution of National Assembly at the discretion of the President; firstly when a vote of no-confidence has been passed against the Prime Minister and no other member of the National Assembly is likely to command majority #of its members and secondly when the Government of the Federation cannot be carried on in accordance with provisions of the Constitution and an appeal to the electorate is necessary.

(1111) Constitution of Pakistan (1973)--

---- Arts. 193(l) & 48(l) --- President to act on advice---Question as to whether advice of Prime Minister is sine qua non for the validity of appointment of Judges of the High Court required serious research. [p. 75510 M.D. Tahir v. Federal Government 1988 CLC 1.309 mentioned.

(mmmm) Constitution of Pakistan (1973)--

---- Art. 91(l)(4) --- Parliamentary form of Government --- Salient features--Collective ministerial responsibility to the Parliament.

The salient features of the parliamentary form of Government are that real executive power is exercised by the Cabinet of the Ministers, with the Prime Minister at its head. The Crown (President) acts on the advice of the Cabinet, which is collectively responsible to the elected popular House.

Constitution ordains a parliamentary system of Government with collective ministerial responsibility to the Parliament.

Under Article 91(4) the Cabinet, together with the Ministers of State is collectively responsible to the National Assembly.

Theory and Practice of Modern Government, pp. 953,954 ref.

(nnnn) Constitution of Pakistan (1973)--

The compulsory nature of the principle of advice is quite obvious. The President is bound to act on the advice of Prime Minister/Cabinet, commanding majority in the House, except where he has discretion or exercises prerogative such as under Article 94 and his satisfaction is secured

(Articles 232, 234, 235); if such satisfaction is borne out from the advice tendered to him by the Prime Minister or the Cabinet.. Compliance with Article 48(l) by the President is ensured by Articles 42 and 47. Under Article 42 he takes the oath to perform his functions faithfully in accordance

with the Constitution and further to preserve, protect. and defend the same. If he misconducts or refuses to accept the advice, he can be impeached under Article 47 for violation of the Constitution.

The concept of responsible Government visualize that the head of State himself can do no wrong; he acts on the advice of his Ministers on whom the responsibility for such act lies; they arc answerable to the House. Under our Constitution the Executive authority of the Federation, like other democratic Constitutions vests in the Head of the State. This principle has received

recognition in Articic.90, which requires that the executive authority vesting in the President "shall be exercised by him either directly or through officers subordinate to him, in accordance with the Constitution". Since constitutionally the President is bound to follow the advice of the Prime Minister and Cabinet, the result is that practically the executive authority is placed in the hands of the Cabinet headed by the Prime Minister. The President is thus not responsible to anyone for the acts done in his name. The responsibility lies on the Cabinet alone.

. Since the Sovereign acts on the advice of the Cabinet, tendered through the Prime Minister, and the Government is carried on in the name of the Sovereign, the Cabinet is expected to keep the Sovereign informed of any departures in policy, of the general march of political events, and in particular of the deliberations of the Cabinet.

The above principle is embodied in Article 46, which casts an. obligation on the Prime Minister to communicate to the President all decisions of the Cabinet relating to the affairs of the State, including proposals of legislation. The President is also empowered to call for such information. Since the Cabinet is collectively responsible to the National Assembly, where a decision is taken by the Prime Minister or a Minister, but which has not been considered by the Cabinet, under Article 46(c) if the President so requires, it is the duty of the Prime Minister' to submit such matter to the Cabinet for its consideration. Constitution of Pakistan is federal in structure but the aforesaid provisions fairly indicate that it is fundamentally modelled on the pattern of British Parliamentary system.

Tendering of advice to the Government is not constitutional obligation of the President. Such a claim is not countenanced by the Constitution or the law; rather the dictates of the Constitution are otherwise. The Constitution confers such a right on the Prime Minister and the Cabinet; the advice tendered by them is imperative and binding on the President.

Constitutional and Administrative Law by 0. Hood Phillips, 4th Edn. p.308 and Constitution of India, Vol.1, p.182 by Kagzi ref,

(oooo) Constitution of Pakistan (1973)--

---- Part 111, Chap. 1---Powers and duties of the President are to be gathered from the Constitution itself and there is no question of enjoyment of any enabling or implied power by the President.

(pppp) Constitution of Pakistan (1973)--SC 166 ref.

---- Art.58(2)(b) --- Article 58(2)(b) of the Constitution was introduced in the Constitution for preventing a wrong rather than securing a right for the President --- Said provision exists for wise and careful employment in -grave situation within the parameters specified by Supreme Court in Federation of Pakistan v..Haji Muhammad Saifullah Khan PLD 1989 SC 166.

Federation of Pakistan v. Haji Muhammad 'Saifullah Khan PLD 1989

(qqqq) Constitution of Pakistan (1973)--

---- Art. 41 --- Role of President --- Regulation of relations between the President and the Prime Minister --- Norms for regulating the relationship between President and the Prime Minister for operation of constitutional prescription stated.

The President is a symbol of unity of Pakistan. He is elected by the

Provincial Assemblies as well as the National Assembly and is a binding force between the Federation and the federating units. In a pluralist Society rent with political polarization, ethnic, racial, provincialism and other diversities, for strengthening the process of social harmony, democracy and creative national enthusiasm, the role of the President becomes all the more important. These objects can meaningfully be achieved -if the President shuns politics and remains a non-controversial figure. Article 33 included in Chapter 2 of the Constitution under the "Principles of Policy" casts an obligation on the State to discourage parochial, racial, tribal, sectarian and provincial prejudices among the citizens. Under Article 29 it is the responsibility of each organ and authority of the State to act in accordance with these principles. Regulation of relations between the President and the Prime Minister is a paramount national requirement. Both are expected to exercise tolerance, exhibit endurance and act within the limits of Constitutional propriety. The President is constitutionally required to act on the advice of the Prime Minister/Cabinet, but such advice ought not to be loaded with a perception of dominance and veto power. If the President counsels the Prime Minister or the Cabinet, his counselling is entitled to weight. These are some of the norms of constitutional jurisprudence for successful operation of the constitutional prescription.

(rrrr) Constitution of Pakistan *(1973)*-.Vol. XLV

---- Art. 58(2)(b) --- Dissolution of National Assembly by the President vide Order dated 18-4-1993 --- Expressions employed, the views expressed and inferences drawn in the said Order, sufficiently indicate that the President not only acted against the spirit of the Constitution but also violated it and there were no reasonable basis either in law or on facts to act in the manner as the President chose to proceed --- Dissolution Order by the President therefore was unconstitutional and otherwise than bona ride and thus was unsustainable.

Per *Sajjad All* Shah, J.-

(ssss) Constitution of Pakistan *(1973)*--

---- Art. 184(3) --- Provision of Art.184(3) be given liberal interpretation to carve out and assert jurisdiction in respect of public interest litigation.

Per Muhammad Rafiq Turar, J.; Sajjad Ali Shah, J. (Contra).;--

(tttt) Constitution of Pakistan *(1973)*--

---- Art. 58(2)(b) --- Legislative history and interpretation of Art.58(2)(b) of the Constitution of Pakistan.

Haji Saifullah's case PLD 1989 SC 166 rer.

(Uuuu) Constitution 6f Pakistan *(1973)*--. I

---- Art. 58(2)(b) --- Action of President of Pakistan under Art.58(2)(b) is justiciable

(vvvv) Constitution of Pakistan, *(1973)*--

7 Art. 58(2)(b) --- Powers of President to dissolve the National Assembly -and dismiss the Cabinet --- Nature---Premature dissolution of National Assembly---Effect.

The President is empowered to dissolve the National Assembly but only in the situation mentioned in Article 58

Article 58(2)(b) of the Constitution of Pakistan mentions in its text, three organs of the State:

(i) The President;

(ii) The National Assembly; and

(iii) The Government of the Federation.

All these three organs are very important constituents of the State and the Constitution makes independent and distinct provisions for their creation and demise. It may be pertinent to note that the Cabinet and the Prime Minister do not figure there as such.

The National Assembly consists of the chosen representatives of the people, as mentioned in the Objectives Resolution. They are elected through adult franchise and they form/create the National Assembly under Article 51. Its normal term of office is 5 years. The members can individually resign under Article 64, so that if all the members resign, it will result in the dissolution of the entire National Assembly. However, Article 58 also empowers-both the President and the Prime Minister, separately, to dissolve the National Assembly, only for the specific reasons given there.

The President is part of the administration and has the power to influence the decisions of the Cabinet, the Prime Minister and the Ministers, which are to be made and enforced in his name.

I

President is the executive head of the Federation (Government of the Federation) and all actions are taken in his name. He also participates to some extent in the executive, decision-making. Being a part of the Government of the Federation, he cannot blame the Prime Minister and the Cabinet alone for any unwise, illegal or even unconstitutional acts, what to speak of punishing them. If the President thinks that the Cabinet was aiding and advising him illegally, unconstitutionally or against public interest, despite his caution and warning, the only way open to him, under the. Constitution', is to inform the National Assembly under Article 56 to which the Prime Minister/Cabinet is responsible or dissociate himself by resigning his office under Article 44(3) of the Constitution informing the nation about his doing so. However, he cannot blame the Prime Minister or the Cabinet in case the National Assembly raises no objection or endorses the objected to action or policy decision.

Again the President has no power to dismiss the Cabinet of his own. Sub-Article (5) of Article 91 provides that the Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his power unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly, in which case he shall summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly. *Thus,* the President has no power to remove the Prime Minister or dismiss the Cabinet as long *as* the National Assembly offers its confidence to him and protects him.

What is not permitted to be done directly cannot be done indirectly. The Prime Minister who enjoys the confidence of the National Assembly cannot be removed or dismissed by the President. The reason may be that only the chosen representatives of the people are the repository of the sovereign power. They, therefore, know best what is good for the people and what is not. So if they approve the , policies and the actions of the Government, the President has no power of his own of interference, in any way. Be that as it may, the President could not get rid of the Prime Minister or the Cabinet indirectly, foe the alleged faults of theirs, by dissolving the National Assembly.

The President has neither a power to dismiss the Cabinet nor is he a controller or a supervisor of the National Assembly. Rather, he is compelled to accept and give his assent to whatever is done by the Cabinet on the one hand and the National Assembly alongwith the Senate on the other. He, according to the various provisions of the Constitution can, at the most, participate, individually, as a counsel or a warning. Like any other member of the Cabinet, he can influence but cannot veto. Rather he has an edge over others as he can once veto the decision of the Prime Minister, the Cabinet or a Minister. However, if his counsel or warning is not heeded to, he has, like any other

member of the Cabinet, either to accept the things as presented to him, by the majority decision or quit if he so desires.

Therefore, after a decision is made, no constituent of that decisionmaking body can absolve himself of it, whether he participated in the decisionmaking or not; whether he opposed the motion or proposed any amendment; or was even absent at that time. In that view of the matter, the scrutiny of the governmental actions would thin lie with the Parliament, though even they cannot annul them as such, without formally legislating against them, or by passing a resolution disapproving a particular act of commission or omission of the Prime Minister or the Cabinet.

Article 91(5) lays down that the President cannot, straightaway, dissolve the National Assembly even if the Prime Minister fails to get a vote of confidence from the National Assembly. He has to first ascertain practically, under Article 58(2)(a), that no other member enjoys the confidence of the National Assembly, before he acts to dissolve. Thus the President has neither any control over the Cabinet nor has the National Assembly been placed at his mercy, in his discretion or at his bald pleasure. It is thus only the National Assembly which can decide the removal of one Prime Minister and his Cabinet, by withdrawing its support and electing another Prime Minister before the President may act under Article 58, for constitutional reasons, justiciable before the superior Courts of Pakistan.

The President has no power to dismiss a Prime Minister, directly or indirectly, howsoever illegal, unconstitutional or against public interest his actions might look to him. But if the person holding the office of the President pleases to remove a Prime Minister, who enjoys the confidence of the National Assembly, under the cloak of the powers contained in Article 58(2)(b) by dissolving the National Assembly, he may be accused of subverting the 4k~ Constitution within the meaning of Article 6 of the Constitution. It is pertinent to note that the protection provided in Article 248 from accountability and the remedy provided in Article 47 of impeachment, do not cover the acts of subversion or abrogation of the Constitution or even attempting or conspiring to do so. The dissolution of the National Assembly, therefore, must be . strictly covered by Article 58(2)(b), in order to be condoned by the Courts and to 4,N avoid an action under Article 6 of the Constitution.

Article 58(2)(b) foresees one and only one situation, for dissolution of the National Assembly and that is where in the opinion of the President, the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. It is thus not a mere omission to act, on or in violation of, one or more Articles of the Constitution but a state of checkmake or a deadlock, which may be brought about by violation of one or more provisions of the Constitution separately or collectively.

The Court has to test each and every ground of the President for dissolving the National Assembly, on the following touchstones, and see that they satisfy the prescribed requirements, in order to condone the action taken:

(a) Was there an actual or imminent breakdown of the Constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution?

(b) Has there taken place any extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but by methods extra-Constitutional?

(c) Is there an imminent danger of breakdown of the Constitutional machinery so as to take an immediate action for nipping it in the bud?

(d) Is it imperative to mend the ill-effects of a breakdown that has occurred.

The words "cannot be carried on" show the helplessness of the Cabinet, in, a situation, unchecked or brought about by the National Assembly or some outside force against which even the National Assembly cannot afford a protection or cure, so that the Cabinet cannot be helped to carry on the Government of the Federation and it will have to go, with the National Assembly.

Constitution does not permit P to punish- N for the offence of G. The import of the Fundamental Rights 9, 10 and 12 to 15 supports the view. No system of law anywhere in the world permits that. The Holy Qur'an announces emphatically that "Each man shall reap the fruits of his own deeds: no soul shall bear an other's burden". (Q.6:165). In that view of the matter it will be wrong to say that the President has the power, to dissolve the National Assembly, for the reason that the Government of the Federation, in his view, is acting in illegal or unconstitutional manner or it cannot be run in

accordance with the Constitution, because of its acts of commission or omission.

The fault has thus to be found, not in the working of the Prime Minister or the Cabinet but in the working of the National Assembly. Again, it is not every fault but only that fault which has rendered the working of the Government of the Federation impossible and has also made an appeal-to the electorate necessary.

So, no action in the nature of dissolution of the National Assembly or dismissal of the Cabinet by the President will be justified where the Prime Minister enjoys the confidence because of the working of the

of the House and no deadlock has appeared National Assembly. The result is that if the

National Assembly is working smoothly and there exists no deadlock for the Government to carry on its functions, the President neither has the power to dismiss the Prime Minister and his Cabinet nor can he dissolve the National Assembly.

Another important consideration to be closely looked at is about the phrase 'and an appeal to the electorate is necessary' as stipulated in Article 58(2)(b). The circumstances relied on by the President should not only show the situation in which 'the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution' but that nothing else in the Constitution can provide a remedy and therefore, 'an appeal to the electorate is necessary'. It means that the extreme measure of dissolution must not be resorted to if another alternative is available.

The order of the President dissolving the National Assembly is not maintainable yet on another ground also. The -provisions and the principles as contained in the Objectives Resolution are now the substantive and effective part of the Constitution, in view of its Article 2A. According to the opening . part of the Objectives Resolution the sovereignty over the entire Universe belongs to Allah Almighty alone. The law of Allah is thus supreme, immutable, insurmountable and unalterable and every other man-made law repugnant to it must be removed by Parliament or Courts or by other organs of the State in the mode contemplated in the Constitution. Almighty Allah has delegated His authority to be exercised by the people of Pakistan, within the limits prescribed by Him, as a sacred trust. Acting against it will thus be breach of trust also.

Premature dissolution of an Assembly is a very severe punishment to members and moreso to the people and the national exchequer. The members lose their remaining term of office, provided by the Constitution and they have to spend millions on fresh elections, with no guarantee of success.

The nation is deprived of the continuance of the policies and projects, is exposed to instability and uncertainty, loses the confidence of the Governments and investors at home and abroad, faces economic and administrative chaos and is required to spend crores of rupees on the new election. So, in the case of dissolution of Assembly, for the misdeeds of the Cabinet, the punishment is

awarded, not only to those few members who are in the Cabinet but also to the other majority whether they are in majority of the members of the National Assembly the Opposition, the Independents or with the Treasury and also the people, for no fault of theirs.

distinguished.

Ahmad Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646 lah Khan PLD 1989 SC 166;

KhawajaFederation of Pakistan v. Haji Saiful Muhammad Sharif v. Feder, ation of Pakistan PLD 1988 Lah. 725; Ahmad Tariq Rahim v. Federation of. Pakistan PLD 1991 Lah. 78; Ahmad

Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646; AIR 1977 SC 1361;

Law of the Constitution by Dicey, 1960 Edn., p.420 and Constitutional Law by

Wade, 7th Edn., p.118 ref.

(wwww) Constitution of Pakistan (1973)--

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) vide his Order dated 18th April, 1993 showed, that the grounds mentioned therein had no nexus or connection with the Constitutional power and the President punished the National Assembly for not withdrawing their support to an "insolent" and "rude" Prime Minister and the Cabinet --- Said Order was. passed in a fit o anger and vengeance and under a totally mistaken view that Constitution had conferred any such power on him --- Order of President dissolving the National Assembly and dismissing the Prime Minister and the Cabinet therefore could not be condoned and thus was declared to be unconstitutional and void.

Facts and circumstances of the case which persuaded the President to form his opinion to dissolve the National Assembly and dismiss the Cabinet go to show, without any doubt that they had no nexu's or connection with the Constitutional power and so the President was punishing the National Assembly for not withdrawing their support to an 'insolent' and 'rude' Prime Minister and the Cabinet.

Order was passed in a fit of anger and vengeance.

The President, unfortunately assumed to himself the position of a Judge sitting on the performance of the Government and thought that he had the power to punish the 1~abinct for the acts of omission and commission as ascertained by him. He, therefore, taking himself as the Authority and the Cabinet as civil servants, inflicted on them the major penalty, as under the Efficiency and Discipline Rules. He was, however, totally mistaken that the Constitution conferred any such power on him. The exclusive power in respect of all the charges levelled by him vested in the National Assembly, to whom the Prime Minister and the Cabinet were accountable. The National Assembly, however, did not find any fault with the performance of the Cabinet and consequently took no action. Obviously, the National Assembly seemed to have been punished by the President for that omission. His order, therefore, could not be condoned.

The President's Order, therefore, was declared to be unconstitutional and void and was to be deemed to have never been passed and promulgated. Therefore, the National Assembly and the Cabinet were to be placed in the same position in which they were before the impugned order of the President was promulgated.

Per Saleem Akhtar, J.; Saijad All Shah, J. Contra---

(xxxx) Constitution or Pakistan (1973)---

---- Art. 184--71ntcrpretation, scope, application and nature of Art.184--Article 184 is an effective weapon provided to secure and guarantee the fundamental rights.

Article 184(3) of the Constitution of Pakistan confers power on the Supreme Court to consider questions of public importance which are referable to the enforcement of any Fundamental Rights guaranteed by the Constitution and enumerated in Chapter 1 of Part 11. This power is without prejudice to the provisions of Article 199 which confer similar power with certain restrictions on the High Court. The power conferred depends upon two questions; one, that the case sought to be heard involves question of public importance and two, the question of public importance relates to the enforcement of Fundamental Rights. It is not every question of public importance which can be entertained by this Court, but such question should relate to the enforcement of Fundamental Rights. This provision confers a further safety and security to the Fundamental Rights conferred and guaranteed by the Constitution. This shows the importance which Fundamental Rights have in the scheme of the Constitution. They cannot be curtailed or abridged and any provision of law

or action taken which violates Fundamental Rights conferred by the Constitution shall be void. The nature of jurisdiction and the relief which can be granted under this Article is much wider than Article 199. It confers a power to make an order of the nature mentioned in Article 199. The word 'nature' is not restrictive in meaning but extends the jurisdiction to pass an order which may not be strictly in conformity with Article 199 but it may have the same colour and the same scheme without any restrictions imposed under it. Article 184 is an effective weapon provided to secure and guarantee the fundamental rights. It can be exercised where the Fundamental Right exists and a breach has been committed or is threatened. The attributes of Article 199 of being an aggrieved person or of having an alternate remedy and depending upon the facts and circumstances even laches cannot restrain the power or non-suit a petitioner from riling a petition under Article 184 and seeking relief under it. The relief being in the nature mentioned in Article 199 can be. modified and also consequential relief can be granted which may ensure effective protection and implementation of the Fundamental Rights. Even disputed questions of facts which do not require voluminous evidence can be looked into where Fundamental Right has been breached. However, in cases where intricate disputed questions of facts involving voluminous evidence are involved the Court will desist from entering into such controversies. Primarily, the questions involved are decided on admitted or prima facie established facts which can be determined by riling affidavits. Evidence in support of allegations can be taken orally in very exceptional cases where the breach is of a very serious nature affecting large section of the country and is of great general importance.

(yyyy) Constitution of Pakistan (1973)---

---- Arts.184(3), 17(2) & 58(2)(b) --- Political right guaranteed in Art.17(2)--Extent --- If the political right as conferred by Art.17 is violated in breach of the Constitution, Art. 184(3) can be invoked for violation of Fundamental Rights---Order of President dissolving the National Assembly and dismissing the Prime Minister and the Cabinet under Art.58(2)(b) affects the right conferred under Art.17(2) of the Constitution --- Fundamental Rights can be restricted or controlled in terms of the provisions of the Constitution and no authority can derive power from any other source to restrict, 41bridgc, offend or violate Fundamental Rights.

Article 17(2) of the Constitution guarantees the right to form or to be a member of a political party and to operate as the formation and operation of a political party are two such spheres which by a process of legal path as provided by the Constitution and law the party attains its goal inside and outside the Assembly. The political functioning and activities of a political party do not end once its members arc elected to any assembly. It has multifarious activities within the Assembly and outside the Assembly. Election is merely a process to choose its representatives by the political sovereign, i.e., the electorate to authorise them to continue their political activity inside the Assembly. Election is merely a road leading a successful member to enter the Assembly but it does not end there. The process continues transforming into formation of the Ministry or becoming a Minister or to be a leader of the Opposition or member of the Opposition Party, to participate in the debates and discharge all such Constitutional and legal duties which are enshrined in the Constitution, responsibility of which is cast on the members. The elected members have far more

responsibility than the members of the political parties working outside the Assembly as unelected representatives. The Minister is not only collectively responsible to the National Assembly, but he is also accountable to the people. Thus, if the political right as conferred by Article 17 is violated in breach of the provisions of the Constitution, Article 184(3) can be invoked for violation of Fundamental Rights.

he infringement of Fundamental Rights in be in many ways. Okt times even a law made by the legislature may offend a Fundamental Right and to that extent it may be void, but in certain cases the law may not be void, but the machinery adopted and the orders passed under it may be such which violate the Fundamental Rights, they are thus challengeable. The same principle will apply where the Constitution imposes any restriction on exercise of a Fundamental Right and provides parameters and conditions for exercise of such power. Any authority or person exceeding that jurisdiction passes an order which is not within the framework of the restrictions imposed, then such order violates the Fundamental Rights and can be scrutinized by Supreme Court as provided by the Constitution. Therefore, the order passed by the President dissolving National Assembly and dismissing the Prime Minister and the Cabinet under Article 58(2)(b) of the Constitution does affect the right conferred under Article 17(2). It is only to be seen that although the President of Pakistan is empowered to pass an order for dissolution of National Assembly in certain given circumstances, have they been observed without infringing the Fundamental Right. Because Fundamental Right can be restricted or controlled in terms of the provisions of the Constitution and no authority can derive power from any other source to restrict, abridge, offend or violate Fundamental Right.

Syed Abul A'ala Maudoodi's case PLD 1964 SC 673; Bcnazir Bhutto's case PLD 1988 SC 416 and Haji Saifullah's case PLD 1989 SC 166 ref.

(zzzz) Constitution of Pakistan (1973)---

---- Art.2A --- Provision of Art.2A is not a supra-Constitutional provision but is a part of the Constitution and does not override any other provision of the Constitution.

(aaaaa) Constitution of Pakistan (1973)...

---- Art.2A --- Political justice --- Article 2A having been enacted in the

Constitution, the political justice as guaranteed in the Objectives Resolution is recognised and guaranteed by the Constitution.

Hakim Khan's case PLD 1992 SC 595 ref.

(bbbbb) Constitution of Pakistan (1973)---

---- Art.17 --- Political right or political justice does not end with the election to the Assemblies but it is an on-going process which starts with the formation of the political parties, participation in the elections and thereafter to operate and participate in governance of the country by the majority rule --- Provisions of Arts.51, 52, 91 & 92 will not put an end to the Fundamental Rights which had started with the formation of political parties.

democracy is a method of life which provides and paves way for achieving political, economic and social rights which a human being is entitled to and almost all of them have been guaranteed by the Constitution as Fundamental Rights. The political right or political justice does not end with the election to the Assemblies. It is an on-going process which starts with the formation of the political parties, participation in the elections and thereafter to operate and participate in governance of the country by the majority rule. How can in these circumstances be it contended successfully that immediately after the election the political rights cease to exist. It is true that such Fundamental Rights which emanate from Article 17(2) travel to the Assemblies with the process of election and may be regulated by other provisions of the Constitution, namely, Articles 50, 51, 52, 91 and 92, but it will be a far cry to state that these provisions of the Constitution put an end to the Fundamental Rights which had started with the formation of political parties.

In a democratic just order every citizen has right to equal participation in the political process as required by the Constitution. Every citizen without any discrimination within the frontiers of the Constitution can profess, practise, exercise and operate his right to participate in the governance of the country. He is entitled to form or join a political party, contest for an elective position and to hold and exercise authority of politically elected office which by virtue of such political process he is entitled under the Constitution. If the objects of democracy have to be achieved, if economic, social and political justice as enshrined in the Constitution and proclaimed by a political democratic Government has to be attained, then the parties and the members of the Assemblies have to play their role inside the Assembly as well for governance of the country. So long they are not disqualified by Constitution or by law to remain as members of the National Assembly, their political right to operate in the Assembly cannot be curtailed, abridged or violated.

A Theory of Justice by John Rawl; The Foundations of Freedom by Durward V. Sandifer and L. Ronald Scheman and Universal Declaration of Human Rights, Art.21 ref.

Kh. Ahmad Tariq Rahim v. Federation of Pakistan PLD 1991 Lah.78 and PLD 1955 FC 435 distinguished.

(ccccc) Constitution of Pakistan (1973)---

---- Arts.184(3) & 17(2) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) --- Direct petition under Art.184(3) to the Supreme Court against such order is maintainable provided the petitioner is able to show that the impugned order has transgressed, impinged and infracted the Fundamental Rights of the petitioner or members of the Assembly or citizens-at-large.

(ddddd) Constitution or Pakistan (1973)---

---- Art,58(2)(b) --- Provision of Art.58(2)(b) is to be strictly construed --- Import, scope and extent of Art.58(2)(b) of the Constitution.

The President is empowered to dissolve the National Assembly if he forms an opinion that the Government cannot be run in accordance with the Constitution. This power is not absolute or unfettered. The President has first to form an opinion, an objective opinion on the basis of the material before him to come to the conclusion that the Government cannot be carried on in accordance with the Constitution. The formation of opinion being objective in nature can be judicially examined and reviewed by the Courts. While interpreting the Constitution one has to keep in mind the nature of this sacred document which is the supreme law and the law of the laws.

The Constitution is a living organism and has to be interpreted to keep alive the traditions of the past blended in the happenings of the present and keeping an eye on the future. Constitution is the symbol of statehood keeping united people of different races, diverse cultural, social, economic and historical traditions. It provides a method of legitimacy to the Government. it is the power behind the organs and institutions created by it. Constitution must be interpreted keeping in view the entire canvass of national fabric, be it political, social, economic or religious.

In interpreting Article 58(2)(b) the Constitutional background is to be taken into consideration. The Constitution envisages parliamentary form of Government. Therefore, if any provision has been inserted in the Constitution afterwards infringing, or impinging on the democratic and parliamentary system, it is to be construed in a manner that spirit and form of parliamentary system is not distorted. The conditions as laid down in Article 58(2)(b) should be strictly construed. Article

58(2)(b) conferring a power to dissolve the National Assembly in certain circumstances cannot be given a liberal or wide meaning. It has to be given a restricted meaning in the facts and circumstances of the case.

In the presence of clear and specific provisions in the Constitution, conventions and prerogatives of the United Kingdom can be of no avail and cannot be applied in this country.

Khalid Malik's case PLD 1991 Kar. 1; Federation of Pakistan v. Haji Muhammad Saifullah Khan PLD 1989 SC 166 and Khawaja Ahmad Tariq Rahim's case PLD 1992 SC 640 ref.

(eeeet) Constitution of Pakistan (1973)---

---- Arts. 64, 63, 58(2)(b) & 91(5) --- Rules of Procedure and Conduct of Business in the National Assembly, 1992, R.25 --- Procedure for submitting a resignation by a member of the National Assembly emerging from both the provisions as contained in' Art. 64 and Rule 25 of Rules of Procedure and Conduct of Business in the National Assembly --- Dut) of Speaker on receipt of resignation --- Resignation has T-o be voluntary, genuine and intended to vacate

the seat --- Resignallion.1s a voluntary act o(a member or person submitted with the intention to relinquish, relieve or quit that particular post or position and to vacate the same --- Resignations obtained by any person politically or officially in authority or not from the members and delivery to a third party other than the person authorised to receive them, with the intention to achieve political gains and create a ground for dissolution of the Assembly can neither form basis for such action nor be justified by any principle of law, morality and ethics.

From Article 64 of the Constitution of Pakistan and Rule 25 of the Rules of Procedure and Conduct of Business in the National Assembly, 1992 the procedure for submitting a resignation by a member of the National Assembly emerges as follows:--

(i) The resignation should be in writing under his hand and should be addressed to the Speaker.

(ii) The resignation may be delivered by the member personally or through any other means.

(iii) If the letter of resignation is delivered personally, then the Member should inform the Speaker that the resignation is voluntary and genuine.

(iv) If the resignation is delivered by any other means' then the Speaker shall make inquiry into the genuineness of the resignation and ascertain whether it is voluntary or not.

(v) The Speaker after satisfaction that the resignation is genuine and voluntary, shall inform the National Assembly and then the seat shall be declared vacant.

(vi) The date of resignation of a member shall be the same as specified in the letter of resignation or if no date has been given, then the date of receipt by the Speaker.

In order to make it valid and effective, besides complying with the procedure laid down, it should be voluntary, genuine and should be intended to vacate the seat. Resignation is a voluntary act of a member or person, submitted with the intention to relinquish, relieve or quit that particular post or position and to vacate the same. It cannot be a two-way traffic or an act to use it for any purpose liked by any third person. The resignations obtained by any person politically or officially in authority or not from the members and delivery to a third party other than the person authorised to receive them, with the intention to achieve political gains and create a ground for dissolution of the Assembly can neither form basis for such action nor be justified by any principle of law, morality and ethics.

The resignations should not only be addressed to the Speaker, but they should be intended to be delivered to the Speaker.

The Constitution has ordained that the resignation by a member is effective only when it is "addressed" to the Speaker: it is not intended to be an idle formality. To relinquish the parliamentary seat by resignation is a grave and a solemn act. The letter of resignation should be signed by the member voluntarily and submitted personally to the Speaker or transmitted through duly authorised person for delivery to the Speaker.

The Constitution has thus cast onerous duty on the Speaker to make inquiry into the genuineness and voluntary nature of the resignation and also that it has come through an authorised person, if not submitted personally. The Speaker can neither refuse to discharge this duty nor can any

authority bypass him. The solemnity and sanctity attached to the resignation by a member of the National Assembly shall be eroded if it is made in contravention of the provisions of the Constitution and the rules and furthermore if they are intended not to vacate the seat, but for any other purpose, ulterior, oblivious or clandestine. Such letters of resignation which do not have any validity or sanction under law can hardly be accepted muchless by a person of high position like the President to assess the confidence the members have in the Assembly and also to assess a situation whether the Government can be run in accordance with the Constitution. 1p. 81910

The exercise of pleasure by the President under Article 91(5) of the Constitution of Pakistan is conditional and not absolute. An embargo has been imposed on its exercise and the President is precluded from forming his opinion and satisfaction on the basis of anything but the votes given on the floor of the House. As the Constitution contains specific provisions for governing such a situation, and provides a procedure and manner for ascertaining the fact whether the Prime Minister has lost confidence of the House, no other mode of ascertainment can be adopted. If a statute provides anything to be done in a particular manner, no deviation from the give course is permissible. Any ascertainment of such fact in an unconstitutional manner or on extraneous consideration cannot be made basis for removing the Prime Minister. It is thus clear that most of the resignations collcoted and delivered to the President could not be made basis for reaching the conclusion or satisfying himself that the petitioner did not command confidence of the majority of the National Assembly. The only course open for the President was to summon the National Assembly and require the Prime Minister to obtain the vote of confidence from the Assembly. The determination of such fact is not left to the President or any authority except the National Assembly. Such resignations could hardly be made a ground for dissolving the National Assembly.

Speaker enjoys a unique position in the Constitutional structure of the country. He has to preside over the House and is required to maintain decorum and discipline. He should be impartial, just and disinterested and discharge his duties without fear or favour, ill-will or affection. His most important duty is to maintain discipline amongst the members of the Assembly in the House and also control their conduct and utterances House made in violation of [he Constitution. In this regard reference can be made to Article 63 of the Constitution which provides disqualification for membership of the Majlis-c-Shoora. It enumerates several conditions when a person shall be disqualified from being elected or chosen and from being a member of the Parliament. It not only specifies the disqualification attaching before the elections, but even the disqualification which may occur or may be carried unnoticed after the election to the House. Once such disqualification or misconduct as enumerated therein are noticed and a question arises whether he has become disqualified from being a member, the Speaker shall refer the question to the Chief Election Commissioner and if he declares him to be disqualified, he shall cease to be a member and his seat shall become vacant. Therefore, heavy responsibility has been cast on the Speaker to be watchful and to maintain discipline with strict observance of the provisions of the Constitution. Pointed reference can be made to Article 63(l)(g) which though in existence has never found its importance by any authority or the Speaker concerned. Under sub-clause (2) of Article 63 the Speaker should not wait for the question to be raised, but once it is brought to his notice or he suo motu notices

any breach of any provision of Article 63, it is his duty to refer the matter to the Chief Election Commissioner. The word 'shall' in Article 63(2)' indicates that a mandatory duty has been cast on the Speaker to refer the question to the Election commissioner. If any breach has been brought to his notice, it is not for him to decide it, but he is merely to refer it to the Chief Election Commissioner. Any unreasonable delay in sending such matter

to the Chief Election Commissioner is bound to cloud the high status of the Speaker.

even outside the

A.K. Fazalul Quader Chaudliry v. Syed Shah Nawaz and 2 others PLD 1966 SC 105 and Mirza Tahir Beg v. Syed Kausar Ali Shah PLD 1976 SC 504 ref.

Adegbenro v. Akintola and another 1963) 3 All ;R 544

distinguished.

(M11) constitution or Pakistan (1973)...

---- Art.58(2)(b) --- Mere speech by the Prime Minister in which innuendos have been made, person at tile highest office (President) has been attacked, does not amount to subversion and does not necessarily mean that the relationship has completely broken down and both ends cannot meet together thus warranting action under Art.58(2)(b) of the Constitution by the President.

The high offices require high standards, high status, high morality and large heartedness as well. Mere speech in which innuendos have been made, person at the highest office has been attacked, does not necessarily mean that the relationship has completely broken down and both ends cannot meet together. The high off-ice demands a sagacious, thoughtful, gracious and

benevolent attitude from the people at the high position and status. They should have the depth of the sea and the vastness of the horizon to absorb all sorts of follies, mistakes and even indecent conduct and attitude. There are instances in history that people at such high elected offices have been at variance, even belonging to different views and different parties, but in spite of that they have run the Government well and according to the Constitution. The best policy to run smoothly is to be above personalities and personal pride and prejudice. The tenor of the speech, in the background which would have subsided with the passage of time, though offensive in nature prima facie had some basis, but did not amount to subversion of the Constitution nor could it create a complete deadlock or stalemate resulting in collapse of the constitutional machinery. Subversion

of the Constitution is high treason punishable with death. It cannot be determined by referring to the speech alone and by an authority not competent to decide it.

Constitution maintains the foundation and spirit of the democratic principles enshrined in it. Although it may have a different look than Westminster democratic principles, the spirit and the form is democratic. The Constitution provides for specific powers of the President and the duties of the Prime Minister with a view to keep them within their' own boundaries and the limits provided by it.

(ggggg) Constitutiofi of Pakistan (1973)---

---- Part III, Chaps. 1 & 3 --- Duties and relationship of President and Prime Minister as provided in the Constitution detailed.

Khawaja Ahmad Tariq Rahim's case PLD 1992 SC 646 ref.

(hhhhh) Constitution of Pakistan (1973)---

---- Art.6 --- Subversion of the Constitution --- Effect, weight and impact of speech is to be judged from an overall appreciation by looking to its background, the truthful statement made in it and object with which it has been made --- If such a speech makes allegations or defames anyone without any justification, but does not create l4wlessness, disorder or threat to security or disruption it will hardly amount to subversion of the Constitution.

Right of expression and speech is conferred by the Constitution and is regulated by law. Every restriction on free speech must pass the test of reasonableness and overriding public interest. Restriction can be imposed and freedom of expression may be curtailed provided it is justified by the "clear and present danger" test that the substantive evil must be extremely serious and the degree of imminence extremely high. The danger should "imminently threaten immediate interference with the lawful and pressing purposes of the law" requiring immediate step to ensure security of the country. Speech would be unlawful if it is directed to inciting or producing imminent lawless action and is likely to produce such action. Speech and conduct are two different concepts. Speech relates to expression and conduct to action. Speech ends where conduct begins but if both are combined the Court has to draw the dividing line. The freedom of expression of

views is curtailed or restricted when they “threaten clearly and imminently to ripen into conduct against which the public has a right to protect itself.

Fear of serious injury cannot alone justify suppression of free speech and assembly ... there must be reasonable ground to fear that serious evil will result if free speech is practised. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one ... In order to support a finding of clear and present danger it must be shown either that immediate -serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

‘The effect, weight and impact of speech is to be judged from an overall appreciation by looking to its background, the truthful statement made in it and object with which it has been made. If such a speech makes allegation

or defames anyone without any justification disorder, or threat to security or disruption, i of the Constitution.

but does not create lawlessness, will hardly amount to subversion

Saia v. N.Y. (1948) 334 US 558; American Communications

,Association v. Douds (1950) 339 US 382 and Whitney v. California 274 US 357 (1927) ref.

(iiiii) Constitution of Pakistan (1973)-

---- Arts.153 & 154 --- Council of Common Interests --- Function.

I The Council of Common Interests is an important Constitutional institution which irons out differences, problems and irritants between the Provinces inter se and the Provinces and the

Federation in respect of matters specified in Article 154. The Council is responsible to Majlis-e-Shoora, which in joint sitting may from time to time by resolution issue directions through the Federal Government generally or in particular matters to take action as the Parliament may deem just and proper and such directions shall be binding or the Council.

(0) constitution of Pakistan (1973)---

---- Art.58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) inter aria on the ground . that Council of Common Interests had not discharged 'its Constitutional functions to exercise its powers particularly in the context of privatization of industries in relation to subject-matter mentioned in Art.154---

Held, objections raised were in respect Of matters which were yet to be considered and could have been sorted out in future, however, working, the performance, the actions taken by the Council during the past two years had not been commented upon or objected to --- Allegation that the performance was not in accordance with the Constitution or it was not perfect and proper could not be made a ground for dissolution of National Assembly in circumstances.

Khalid Malik's case PLD 1991 Kar. and Khawaja Ahmad Tariq Rahim's case PLD 1992 SC 646 distinguished.

(kkkkk) Constitution of Pakistan .(1973)...

---- Art.58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and Cabinet by the President under Art.58(2)(b) inter alia on the ground that Constitutional powers, rights and functions of the provinces had been usurped, frustrated and interfered with in violation of, inter alia, Art.97 of the Constitution --- Held, description of allegation being so vast, wide and

vague, the same could not justify the order of dissolution.

(11111) Words and phrases...

----"Corruption"---M caning.

The word ‘corruption’ has not been defined by any law, but it has diverse meanings and far-reaching effects on society, government and the people. It covers a wide field and can apply to any colour of influence, to any office, any institution, any forum or public. A person working corruptly acts inconsistent with the official duty, the rights of others and the law governing it with intention to obtain an improbable advantage for himself or someone else.

. Khalid Malik’s case PLD 1991 Kar. 1 ref.

(mmmmm) Constitution of Pakistan (1973)---

---- Art.58(2)(b) --- Grounds like corruption, nepotism, misuse of banks and lack of transparency in the process of privatization and sale of cement factories cannot form an independent ground for dissolution of National Assembly-by the President under Art.58(2)(b).

Ahmad Tariq Rahim’s case PLD 1992 SC (A6 ref.

(nnnnn) Constitution of Pakistan (1973)---

---- Art.58(2)(b) --- Ground of unleashing a reign of terror against the opponents of the Government including political and personal rivals/relatives and mediamen, under direction, control, collaboration and partronage of the Prime Minister and Ministers leading to a situation where the Government could not be carried on in accordance with the provisions of the Constitution and law being too vague, could not be considered for dissolving the National Assembly by the President under Art.58(2)(b) of the Constitution.

(ooooo) Constitution or Pakistan (1973)---

---- Art.91 --- Principle of collective responsibility of the Cabinet.ref.

Theory of collective responsibility will be applicable to the working of the Cabinet and the Government. In a parliamentary form of Government the leader of the majority party becomes the Prime Minister and forms the Government. The Cabinet Minister are appointed by the President on the advice of the Prime Ministers. The principle of collective responsibility applies to the Ministers. They may differ inside on an issue, but if the Cabinet has taken a decision, the dissenting Minister in all propriety avoids expressing disagreement in public. The Cabinet decision is binding on all the Ministers whether they agreed or not and whether they were present or not in the meeting.

The principle of collective responsibility, as applied to Cabinet Ministers, means that each Minister accepts responsibility for the decisions of the whole Cabinet. Inside the Cabinet, a Minister may argue for a different course of action but he is expected not to express public disagreement with

the course decided on though dispensation may be given to a Minister on a matter particularly affecting his constituency. If he feels very strongly on a matter he may resign in which case he will have an opportunity to make. a statement in Parliament. This version of the doctrine applies in the simplest case where Ministers are present at the Cabinet meeting where the decision is taken. But it also applies to Cabinet Ministers who are not present and so could not be said to participate in the making of the decision; and to those decisions of Cabinet Committees which are not required to be endorsed by the full Cabinet and the existence of which some Ministers may be unaware. The Chairman of each Cabinet Committee decides, after consultation with the Prime Minister (where the Chairman is not the Prime Minister), whether decisions of the Committee may be taken by a dissident Minister to the full Cabinet.

Practice and Procedures, p. 23 by J.A.G. Griffith and Michael Ryle

(ppppp) Constitution of Pakistan (1973)---

---- Art.58(2)(b) --- Mere instructions, orders or desire of the ?rime Minister asking the Ministers not to see the President cannot be , a ground for dissolution of the Assembly under Art.58(2)(1)).

(qqq(1(1) Constitution of Pakistan (1973)---

---- Art.58(2)(b) --- Financial irregularities could not be an independent ground for dissolving the National Assembly by the President under Art.58(2)(b) of the institution.

(rrrrr) Constitution or Pakistan (1973)

---- Art.58(2)(b) --- Allegation of wife of late Chief of Army Staff that her husband did not die the natural death but was poisoned was not a relevant ground for dissolving the National Assembly by the President.

(sssss) Constitution of Pakistan (1973)...

---- Art.58(2)(b) --- Two requirements of Art.58(2)(b), viz. Government could not be carried on in accordance with the provisions of the Constitution and situation required fresh public mandate

have to be satisfied --- Both the requisites being inseparable, if one requirement is not satisfied second requirement cannot be invoked.

That the Government cannot be carried on in accordance with the provisions of the Constitution and situation requires a fresh public mandate are the requirements of Article 58(2)(1)). These arc, two independent conditions and unless both are satisfied no order of dissolution can be passed. Both the conditions arc inter-related and inter-dependent. They are inseparable and indivisible. The second condition viz., "an appeal to the electorate is necessary' limits and circumscribes the dimension and scope of the first condition. The facts attracting the first -condition should be so dangerous and explosive that they call for a fresh mandate. The opinion to be formed whether fresh mandate is required will be objective in nature which can be judicially reviewed. If the first condition was not satisfied, the second condition could not be invoked.

(ttttt) Constitution of Pakistan (1973)---

---- Art.54(3) --- Article 54(3) of the Constitution does not limit the power of the President to dissolve the Assembly if Speaker had summoned the requisitioned meeting of the Assembly under said Article.

Per Sueeduzzurnan Sidoliqui, J.; Sajjad Ali Shah, J. Contra---

(uuuuu) Constitution (if Pakistan (1973)---

---- Arts. 17(2), 184(3) & 58(2)(b) --- Words "Political", "Political Party" and "operation" occurring in Art.17(2) --- Connotation --- Right to form a political party guaranteed under Art.17(2) of the Constitution necessarily includes in it, the right to continue in power, if duly elected by the people for the full tenure, subject to other provisions of the Constitution --- If duly elected Government is ousted or interrupted from continuing in power through unconstitutional

means, same can legitimately make a grievance that its fundamental right under Art.17(2) has been violated and Constitutional petition under Art.184(3) much order is maintainable.

The words 'Political' and 'Political Party' are terms of Political Science.

A Political Party is a voluntary association of persons, formed with the object of propagating a definite political opinion/view on a matter of public importance, having an ultimate aim to get into the power seat of a Government, through the process of election, in order to give effect to its programme.

There is nothing in the language of Article 17(2) to suggest t6t the word “operation” is to be given any restricted meaning.

Sub-clause (2) of Article 17 of the Constitution which guarantees the right to form and to become a member of a Political Party is a peculiarity of the Constitution, as no other Constitution of the world guaranteed such a right specifically under the Fundamental Right of freedom of Association. Specific mention of the right to form and to become a member of a Political Party in Article 17 of the Constitution, therefore, has to be given a special treatment in the scheme of the Constitution. It would not be correct to equate this specific right with the ordinary right of freedom of Association guaranteed under Article 17. In addition to the right to form and become a member of a Political Party, the Constitution also guaranteed Political Justice as a fundamental right, as would appear from the Objectives Resolution, which now forms part of the Constitution in the shape of Article 2A. The political activity of a Political Party does not terminate with the election of its members to the Assembly as election to Assembly is only a means and not the end for the objects of a Political Party.

The right to form a Political Party and to become its member has been specifically conferred by Article 17 of the Constitution. There is no other contemporary constitutional document in’ which a right to form a ‘Political Party’ and to become its member has been specifically guaranteed as a fundamental right under the concept of freedom of Association. It is a well established principle of interpretation that no surplusage or redundancy is to be attributed to the legislature, muchless to the framers of the Constitution. The Constitution is the basic and an organic document and therefore, every word used therein has to be assigned some meaning. Again the Courts while interpreting a provision of the Constitution relating to enforcement of Fundamental Right, will loan towards its more liberal and beneficial construction. Since the right to form a Political Party and to. become its member has been specifically guaranteed under Article 17 of the Constitution, it has to be given specific meaning apart from the general right of freedom of Association mentioned in Article 17. The expression ‘Political Party’ is not defined in the Constitution. However, the expression has been defined in section 2(c) of the Political Parties Act of 1962.

From the language of Article 7(2) it is quite clear that not only the formation and membership of a Political Party is within the contemplation of this Article but its operation and functioning is also within its purview. This is quite evident from the later part of Article 17(2) which provides that when the Federal Government declares that a Political Party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, it shall refer the matter to Supreme Court for decision.

The operation of a political party in its ambit includes the entire political process beginning from the formation of the party, propagation of its views on matters of public importance, taking part in elections and when Voted to power by a popular vote, to form the Government of its choice and to complete its term in tile office in accordance with the provisions of the Constitution. It needs no mention here that a long, vigorous and sustained effort is needed by a Political Party to win public support to its programme and sometimes it may require a lifetime effort by a Political Party to educate public opinion on issues of public importance 'propagated by it. Therefore, to get elected to Assemblies and to form the Government of its choice, in the event of success, is not only the paramount and cherished goal of every Political Party but it is inherent in its operation and functioning.

Considering in tile above context, the right. to form a Political Party guaranteed under Article 17(2) of the Constitution necessarily includes in it, the right to continue in power, if duly elected by the people, for the full tenure, subject to other provisions of the Constitution. It, therefore, necessarily follows that a duly elected political Government if ousted or interrupted from continuing in power through unconstitutional means, can legitimately make a grievance that its Fundamental Right under Article 17(2) of the Constitution has been violated.

The right to form a Political Party mentioned under Article 17(2) of the Constitution necessarily implies the right of a Political Party duly voted to power in an election, to continue as such, in accordance with the provisions of the Constitution.

If the petitioner, who was heading the Government of the Federation, formed by a Political Party, on the basis of its majority in the National Assembly, succeeded in showing that his right to continue in the Government was disrupted or discontinued illegally and through unconstitutional means, he could legitimately make a grievance about violation of his fundamental right guaranteed under Article 17(2) and could also maintain the petition under Article -184(3) of the Constitution before this Court to challenge the impugned action.

Miss Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Mrs. Benazir Bhutto v. Federation of Pakistan PLD 1.989 SC 66; Concise Oxford Dictionary; Corpus J uris Secundum, Vols. 29, 72, pp. 107, 222 and Black's Law Dictionary ref.

(vvvvy) Constitution or Pakistan (1973)---

---- Arts. 17(2) & 58(l.) --- Dissolution of National Assembly under the advice of the Prime Minister --- Prime Minister as leader of the House and as head of the Government, represents the will of the majority of the members of the National Assembly, when he advises dissolution of

Assembly, he in fact reflects the will of the majority of the members of the Assembly --- Minority, in such a situation cannot prevent dissolution on the ground of violation of their rights.

Tile right to continue as member of National Assembly for a period of five 'year's is subject to other provisions of the Constitution including those relating ,to its dissolution. Therefore, if the Assembly is dissolved validly in accordance with the provisions of the Constitution, no vested right could be claimed against such 'an action. The right to continue as member of the Assembly would only arise when the dissolution takes place contrary to the provisions of the Constitution. The dissolution of Assembly on the advice of Prime Minister is specifically provided for in the Constitution, and as such no question of Fundamental Right of any -member of the Assembly being infringed by such dissolution arises. Secondly, the Prime Minister as leader of the House and as head of the Government, represents the will of the majority of the members of the National Assembly. When the Prime Minister advises dissolution of Assembly, he in fact reflects the will of the majority of the members of the Assembly. Therefore, in such a situation the minority cannot prevent dissolution on the ground of violation of their rights as the National Assembly without majority : of1,.JLs,, members will otherwise become unrepresentative.

(wwwww) Constitution of Pakistan (1973)---

---- Art. 58(2)(b)-'--Parameters within which power to dissolve the National Assembly can be, exercised by the President under Art.58(2)(b) or the

Constitution enumerated.

. I The broad principles governing exercise of power by. the President under Article 58(2)(b) of the Constitution, may be summed up as follows:---

(i) The President, before exercising the power under Article 58 (2)(b) of the Constitution must form an opinion objectively that a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary;

(ii) that although the exercise of discretion vesting in the President under Article 58 (2)(b) of the Constitution is not subject to control by the Courts, the opinion of the President must satisfy an objective lost as nothing has been left to surmises, likes or dislikes in tile process of opinion forming;

(iii) that the grounds of dissolution must bear nexus to the preconditions mentioned in Article 58(2)(b) of the Constitution;

(iv) that the opinion formed by the President must be based on some material;

(v) that sufficiency or otherwise of the material before the President cannot be adjudicated upon by the Court while consider in the validity of dissolution order passed under Article 58(2)(b) of the Constitution;

(vi) that the Courts while commenting upon the Dissolution Order cannot substitute their own opinion for that of the President: and

.(vii) That the President having once validly formed the opinion that conditions prescribed in Article 58(2)(b) of the Constitution exist, is free to exercise the discretion one way or the other and existence of other alternate remedy in the Constitution could not control exercise of such discretion by the President.

Federation of Pakistan v. Haji Saifullah Khan P L D 1989 SC 106 and Khawaja Ahmed Tariq Rahim v. Federation of Pakistan P L D 1992 SC 646 ref.

(xxxxx) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Interpretation of Art.58(2)(b) --- Two objective conditions mentioned in Art.58(2)(b) of the Constitution are not in effect one and the same --- Where it is shown that the first condition, that a situation has arisen in which Of Government of Federation cannot be run in accordance with the provisions of the Constitution, exists in a case, the second condition, that an appeal to the electorate is necessary will not follows as a corollary of the first condition.

The use of conjunction “and” in between the expressions “a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution” and “an appeal to electorate is necessary” in Article 58(2)(b) of the Constitution, clearly indicates that the latter condition is to be- added to or taken alongwith the first condition.

4and' is used in Article 58(2)(b) in its ordinary grammatical meaning. The two conditions in Article 58(2)(b) of the Constitution arc distinct and separate conditions and their existence as such in a case is a sine qua non for exercise of power by the President to dissolve the National Assembly. What arc those facts and circumstances which justify an inference that these ' two objective conditions mentioned in Article' 58(2)(b) have been satisfied, must be answered with reference to the facts and circumstances of each, and no hard and fast rule in this regard can be laid down by the Courts.

The expression "the Government of Federation cannot be carried on in accordance with the provisions of the Constitution" in Article 58(2)(b)* contemplates a situation where the affairs of the Government arc not capable of being Tun in accordance with the provisions of the Constitution either on account of persistent, deliberate and continued violation of various provisions of the Constitution by the Government in power, or on account of some defect in the structure of the Government, its functioning in accordance with the provisions of the Constitution is rendered impossible. The use of expression "cannot be carried on" necessarily imports an element of impossibility and disability and refers to an irretrievable and irreversible situation. An unintentional and bona ride omission to follow a particular provision of the Constitution, not resulting in the breakdown of Government machinery or creating a situation of a stalemate or deadlock in the working of the Government, will not be covered in the situations contemplated under Article 58(2)(b) of the Constitution.

Similarly, the use of expression in Article 58(2)(b) that "an appeal to

electorate is necessary", implies that the Assembly has lost its representative character. This may happen where either majority of its members have resigned or where floor-crossing and 'horse-trading' by the members of the Assembly has become the order of the day, or there are other very strong circumstances suggesting that the electorate no more reposed confidence in the policies of the Government. The examples, referred above are, however, by no means exhaustive and there may be other facts and circumstances which may justify inference that a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

It is, therefore, not correct to say that the two objective conditions mentioned in Article 58(2)(b) of the Constitution arc in effect one and the same, and where it is shown that the first completion, that a situation has arisen in which the Government of Federation cannot be run in accordance with the provisions of the Constitution, exists in a case, the second condition, that an appeal to the electorate is necessary, will follow as condition.

Federation of Pakistan v. Muhammad Saifullah Khan P L D 1989 SC

166 and Khawaja Ahmed Tariq Rahim v. Federation of Pakistan P L D 1992 SC 646 ref.

a corollary of the first

(yyyyy) constitution or Pakistan (1973)---

---- Arts. 54 & 58 --- Exclusive power enjoyed by the Speaker to prorogue the session of National Assembly summoned by him under Art.54(3) is not at all determinative of the power of the President to dissolve the Assembly under Art .M of the Constitution --- Fact that Assembly is in session or that its session has been called or that it is not in session has no bearing on the exercise of the power of dissolution under Art.58 of the Constitution.

The exclusive power enjoyed by the Speaker to prorogue the session of National Assembly summoned by him under Article 54 (1) is not at all determinative of the power of the President to dissolve the Assembly under Article 58 of the Constitution. The power to dissolve the National Assembly under Article 58(2)(b) is undoubtedly a distinct and separate Constitutional power which is neither subordinate to nor controlled by the provisions of Article 54 of the Constitution. There is nothing in the language of Article 54 or Article 458 or in any other provision of the Constitution to suggest or indicate that When a session of the National Assembly is summoned either by the President himself (Article 54(l)) or by the Speaker (Article 54(3)), the power to dissolve the National Assembly will not be exercised by the President under Article 58 of the Constitution or that the power of President to dissolve the National Assembly will remain suspended or dormant until the session of the National Assembly summoned under Article 54 is' prorogued. The power to dissolve the Assembly under Article 58 4 the Constitution is an I 'independent and distinct power which can be exercised at any i I tine after the Ass6im6ry is

formally opened. The fact that Assembly is in session or that it's session has been called or that it is not in session has' no bearing on the exercise of the power of dissolution under Article 58 of the Constitution. [p. 80410 (zzzzz) Evidence-Press reports --- Evidentiary value

It is true that Press reports are not to be accepted as proof of facts stated therein but where such reports were -not contradicted by' the concerned authority or person at the relevant time and are subsequently relied by either side in a case, these may be taken into consideration for forming an opinion generally as to the prevailing state of affairs at the relevant time.

(aaaaaa) constitution of Pakistan:

---- Art. 64 --- Rules of Procedure and Conduct of Business in the National Assembly, 1992, R.25 --- Resignation by a Member of National Assembly-- Procedure to be followed for a resignation to be constitutionally valid.

. Article 64 of the Constitution provides that a member of Parliament may by writing under his hand addressed to the Speaker or as the case may be, to the Chairman, resign his scat and thereupon his seat shall become vacant. Article 64 of the Constitution is to be read with Rule 25 of the Rules ‘of Procedure, and Conduct of Business in the National Assembly, 19( )2.

The resignation of a member of National Assembly according to the provision contained in Article 64 and Rule 215 Of the Rules of Procedure and provisions contained Conduct of Business Rules, 1992 must be addressed, to the speaker and written under the hand of the member concerned. resignation may be handed over personally by the member concerned to the speaker and at that time he may inform the Speaker that it is voluntary and genuine and if the Speaker has no information or knowledge to the contrary, his scat becomes vacant immediately. In case, the Speaker receives the letter of resignation by any,

other means he may either hold enquiry himself or through -the National Assembly Secretariat or through any other agency regarding genuineness and voluntary nature of the resignation and as soon as the Speaker is satisfied that the resignation is genuine and voluntary, it becomes effective. According to sub-rule (4) of Rule 25, the date of resignation shall be the date mentioned in the resignation letter and if no date is specified therein, the date of resignation will be the date on which the resignation is received by the Speaker. As soon as the, resignation becomes effective a notification is to be issued of the Secretariat of the ,Speaker in the Gazette and a .copy thereof is to be sent to .the Chief Election’ Commissioner for taking steps to, fill up the vacancy. Therefore, for a, resignation to be, constitutionally. valid, the above procedure has to be followed. In the proceeding case, majority of the resignation, ,did not bear an

date. These resignations, though addressed to the Speaker of National Assembly were received by the President who had no authority under the Constitution to receive them. These resignations received-by the President in spite of passage of considerable time were not forwarded to the Speaker of National Assembly.

These resignations had no Constitutional validity or value and as such it was not possible on the basis of these documents to arrive at the conclusion that the National Assembly had lost its representative character.

(bbbbbb) Precedent.

---- Mere similarity in the words .or phraseology can neither be a determinative' factor nor a test for identity of the substance of the grounds in the two cases.

(cccece) Constitution of Pakistan (1973)-

---- Art.. 56.-:-Rulcs of Procedure and Conduct of Business in National Asscmbly,.!992','Rr'.46 t 47--Address of the President to the joint session of duty under, Art.56(3) of the Constitution --- President, in his such address is not bound by the policy or view *of the* Government in power --- President is free to express his own views and assessment in respect of any matter concerning the functioning of the Government in power in his address to the Joint 'session of Parliament.. . . . . .

There is nothing either in Article 56 of the Constitution or in Rules 40 to 47 of the Rules of Procedure and Conduct of Business in National Assembly, 1992, to suggest, that address of the President to the joint session of the two Houses at the commencement of the first session after each general election to the National Assembly and at the commencement of the first session year, would reflect the policies of the Government and not the views of the President. The address of the President to the joint session of Parliament on the occasion of first session of each year, is his Constitutional duty under Article 56(3) of the Constitution and in his address' the President is not bound by the policy, or views of the Government in power. The President is free to express his own views and assessment in respect of any matter concerning the functioning of the Government in power in his said address to the joint session of Parliament.

(dddddd) Constitution of Pakistan (1973)--

---- Art. 58(2)(b) --- Dissolution of National. Assembly and dismissal of Prime Minister and the Cabinet by the President --- Validity --- Main concern-of the Court is to discover whether there was such deliberate, pervasive and continued violation of various provisions of the Constitution by the Prime Minister's Government that it led to the impression that the Government of Federation was not run in accordance with the provisions of the Constitution but by extra-Constitutional methods.

(eeeeee) Constitution of Pakistan (1971)-

---- Art. 58(2)(b) --- Order of dissolution of Assembly by the President unless is found to he based on some relevant ground,,, such grounds will not be relevant --- Grounds which are vague and

unsupported by any material and bearing no nexus to the preconditions do not satisfy the requirements of Art.58(2)(b).

(fffff) Constitution of Pakistan (1973)--

---- Art. 91(4) --- Cabinet ca n act only through the Prime Minister --- Concept of .collective responsibility of Cabinet has made the role of Ministers individually of, no consequence under the Constitution.

On the Constitutional plane, Article 91 of the Constitution provides that there shall be a Cabinet of Ministers with Prime Minister at its head, to aid and advise the President in the exercise of his functions. Clause (4) of Article 91 provides that the Cabinet together with Ministers of State shall be collectively responsible to the National Assembly. These provisions in the Constitution make it abundantly clear that the Cabinet including the Ministers of State are collectively responsible to the National Assembly and in aiding and advising the President in discharge of his functions, the Cabinet can act only through the Prime Minister. The concept of collective responsibility of Cabinet has made the role of Ministers individually of no consequence under the Constitution.

(gggg) constitution of Pakistan (1973)-

---- Arts. 41 & 91 --- Positions of the President and the Prime Minister in the Constitutional Scheme.

The President is elected under Article 41 of the Constitution through an electoral college, consisting of members of the two Houses of Parliament and four Provincial Assemblies. Articles 48,90 and 91 of the Constitution spell out the extent of power to be exercised by the President under the Constitution.

On a careful examination of Articles 48, 90 and 91 of the Constitution it is quite clear that the President in discharge of his functions under the Constitution has to act on the advice of Prime Minister or the Cabinet, except in those cases where he is specifically authorised by the Constitution to act in his discretion. The discretionary powers of the President under the Constitution are limited to the extent of making a few appointments to the high Constitutional offices, besides his power to dissolve the National Assembly (Article 58(2)(a) and (b)), to refer a matter of national importance to

referendum (Article 48(6)) and to fix a date for election within 90 days on dissolution of National A.5sembly and to appoint a Caretaker Cabinet (Article 48(5)). Besides the above discretionary powers of the President under the Constitution, the Prime Minister is constitutionally bound to communicate to the President all decisions of the Cabinet relating to the administration of

the affairs of Federation and proposal for legislation (Article 46(a)). The President may also call for from the Prime Minister any information relating to the administration of the affairs of the - Federation and may also require for - submission to the Cabinet for consideration any matter on which a . decision has been taken by the Prime Minister or a Minister but not considered by the

Cabinet (Article 46(b) and (c~). The President also has the right to address either House or both the Houses of Parliament (Article 56(1)) besides his right to send messages to either House and the matter contained in such messages to be considered by the House (Article 56(2)). At the commencement of first session of National Assembly after general elections and at the commencement of first session of each year, the President has the right to address the joint

session of the two Houses of Majlis-e-Shoora (Parliament) Article 56(3)). It is quite significant that under Article 91.(4) of the Constitution, the Cabinet together with Ministers of State is collectively responsible to the National Assembly alone. It is also very important to note that although the Prime

Minister holds the office at he pleasure of the President but this pleasure cannot be exercised by the President so long as the Prime Minister commands the confidence of the majority of the members of the National Assembly and in order to ascertain whether the Prime Minister has lost the confidence of the majority of the members of the National Assembly, the President is obliged to summon a session of National Assembly and' ask the Prime Minister to seek a vote of confidence from the Assembly (Article 91(5)). From the above-stated Constitutional position, there remains no room for any doubt that the Prime Minister in running the affairs of the Government is nether answerable to President nor in that capacity he is subordinate to the President. In formulating the policies of his Government and running its affairs the Prime Minister under the Constitution is answerable only to the National Assembly and the President has no constitutional role in* this behalf. The President in all such matters is bound by the advice of Prime Minister or the Cabinet. No doubt, President may require the Cabinet or the Prime Minister, as the case may be, to reconsider any advice tendered to him but the President is bound to act on the advice tendered after re-consideration.

The President and the Prime Minister have defined roles under the Constitution which do not overlap. They exercise powers in their respective constitutional domain unhindered and uninterrupted by each other. No doubt, constitutionally it would be an ideal situation where both the President and the Prime Minister have identity of views on matters concerning the affairs of the Federation but ideals do not exist in reality as they are outcome of imagination. two top offices on any issue should not cause any stirring or -alarm as in spite of different perceptions, personal likes or dislikes 'the two can co-exist issue in discharge of their constitutional obligation, both the President and Prime Minister arc bound to act within the limitations Imposed on them by the Constitution and their personal feelings, likes or dislikes cannot override the constitutional mandate. One should have in mind that the method of election provided under the Constitution for

these two top offices, also foresees a possibility that the holders of these two top posts may not belong to the same political party. Therefore, possibility of a play in the relationship between the holders of these two top posts cannot be ruled out.

No doubt, the President as the symbol of the ‘ unity of Federation occupies a neutral position in the Constitution, and, in that capacity he is entitled to highest respect and regard by all the functionaries of the State. But it is equally important that in order to protect and preserve the dignity of this high office and this neutral image under the Constitution the President must keep aloof Quran all political imbroglio. If the President is unable to ward off the temptation -to keep away from, political game or he starts siding with one or the other political element in the Assembly, he is likely to lose his image as the neutral arbiter in national affairs and as a symbol of unity of Federation under the Constitution. In the latter event, his conduct may also come under criticism from those who may feel betrayed.

Z (hhhhhh) Constitution or Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of-Prime Minister and the Cabinet by the President under Art.58(2)(b), inter alia, on the ground of speech by the Prime Minister on 17th April, 1V)3 --- Held, Prime Minister’s speech first listed the achievements of his Government, then referred to the conspiracies to destabilise his Government by political elements hostile to him by using the high office of Presidency, and finally he expressed his determination and resolve not to give in to these pressures --- Reaction of Prime Minister’s shown by him in his speech in the circumstances prevailing at the relevant time was neither unnatural nor unjustified --- Speech of the Prime Minister, however, did not have the effect of creating any deadlock o stalemate in the working of the Government of Federation warranting action of the President under Art.58(2)(g).

(iiiiii) ConstitUtion of Pakistan (1973)

----Art. 58(2)(b) --- Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet under Art.58(2)(b) of the Constitution by the President of Pakistan vide Order dated 18th April, 1993 --- Said Order, held, neither collectively nor individually justified the inference that a situation had arisen in which the Government of Federation could not be carried on in accordance with the provisions of the Constitution and an a6eal to the electorate was necessary.

(UW) Constitution of Pakistan (1973)---

---- Art. 58(2)(b) --- Dissolution of National Assembly under Art.58(2)(b) by the President --- Held, Court in considering the grounds of dissolution is not concerned with the pace of progress, the shade of the quality or the degree of the performance or quantum of achievement but is only

concerned with the breakdown of. the Constitutional mechanism, a stalemate, a deadlock in ensuring the observance of the provisions of the Constitution.

Yahya Bakhtiar, Senior Advocate Supreme Court, Khalid Anwar Advocate Supreme Court, Khalid M. Ishaque, Zakiuddin Pal, Aftab Farrukh, Muhammad Farooq, Raja Muhammad Akrarn Senior Advocates Supreme Court, M. Akram Sheikh, Ashtar Ausaf Ali, Mian Saqib Nisar, Advocates Supreme Court and Ejaz Muhammad Khan, Advocate-on-Record for Petitioner.

Aziz A. Munshi, Attorncy-Gencral for Pakistan, Malik Akhtar Hussain Awan, Advocate Supreme Court, Maqbool Elahi Malik, A.-G. Punjab, Faqir Muhammad Khokhar, Dy. A.-G., Ch. Ijaz Ahmad, Dy. A.-G., M. Zahoorul Haq, Senior Advocate Supreme Court, Makhdoorn Ali Khan, Advocate Supreme Court and Ch. Fazic Hussain, Advocate-on-Record for Respondents Nos. 1 and 2.

S.M. Zafar, Senior Advocate Supreme Court, Syed Zahid Hussain, Advocate Supreme Court - and Ch. Fazle Hussain, Advocate-on-Record - for Respondent No.3.

Raja Muhammad Afsar, A.-G. Balochistan, A.G. Mangi, Addl. A.-G Sindh, M. Sardar Khan, A.-G., N.-W.F.P. and Maqbool Elahi Malik, A.-G Punjab on Court's Notice.

Dates of hearing: 26th April; 8th to 12th and 15th to 26th May, 1993

JUDGMENT

NASIM HASAN SHAH, CJ.---On the evening of 17th April, 1 1993, Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan addressed the Nation on the National Radio and Television Networks. It was an emotional address wherein he alleged, inter alia, that disgruntled political elements were working against his Government, hatching conspiracies to destabilise it and

trying to undo all the good work he was trying to do. All this, he alleged, was being done under the patronage of the President of Pakistan. He ended his speech with the following challenging words:-

"I will not resign will not dissolve the National Assembly; and will not be dictated."

On the evening of 18th April, 1993, barely 24 hours after this emotional and challenging address was delivered, the President of Pakistan called a Press conference at Aiwan-i-Sadar (President's House) and declared that the speech of the Prime Minister of the previous evening and other acts of his Government had convinced him that the Government of the Federation could not be carried on in accordance with the provisions of the Constitution. He had, accordingly, in exercise of the powers conferred on him under Article 58(2)(b) of the Constitution, ordered the dissolution of the National Assembly, dismissed the Prime Minister and his Cabinet and called for General Elections in the country. A Care-taker Cabinet was immediately sworn in the same evening, which was later expanded to include 62 Ministers.

A week later, the dismissed Prime Minister (Mian Muhammad Nawaz Sharif) moved this Court under its Original Constitutional Jurisdiction under Article 184(3) of the Constitution, on 25th April, 1993, praying that the order of dissolution dated 18-4-1993 be declared mala fide, without lawful authority, null and void and of no legal effect and all steps taken in implementation of or taken as result or the aforesaid order of dissolution including the appointment of the Care-taker Cabinet be also declared as null and void. It was further prayed that the respondents be restrained from interfering with the functions and duties of the elected Government headed by him and no impediments be placed in the functioning of the National Assembly.

The petition came up for preliminary hearing the next day viz. the 26th April, 1993 before a Full Bench of the eleven Permanent Judges of this Court. Herein, the Attorney-General of Pakistan raised a preliminary objection to the effect that the petition filed under Article 184 of the Constitution directly before the Supreme Court was not maintainable and was liable to be dismissed on this short ground.

The Court, after hearing the reply of the learned counsel for he petitioner on this point proceeded to join the preliminary objection (regarding A the maintainability of the petition) with the questions arising on merits and observed that both of these questions shall be heard and decided together. The matter was adjourned for full and final arguments to 8th May, 1993; the parties being directed to complete the records in the meanwhile.

Accordingly, the learned counsel of the parties have been fully heard. Two questions in the main arise for decision in this case, namely:--

(1) Is this petition under Article 184(3) of the Constitution maintainable?

and

(2) If so, has the President exceeded the powers conferred on him under clause (b) of Article 58(2) of the Constitution in ordering the dissolution of the National Assembly?

My learned brother Shaflur Rahman, J. in his well-considered judgment, which has already been circulated to all of us and which I have had the privilege to peruse, has answered both these questions in the affirmative. I respectfully and entirely agree with the answers returned by him. However, in view of the importance of the questions raised in this petition I consider it appropriate to also say a few words of my own.

The first question, which requires consideration, is as to whether this petition could be riled directly in this Court and it is maintainable before us? This question was, indeed, raised as a preliminary objection by the learned Attorney-General and must, therefore, necessarily be examined and answered in the first instance.

Article 184(3) of the Constitution, which has been invoked by the petitioner, lays down:

"184.--(l)……..

(2)……

(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part 11 is involved, have the power to make an order of the nature mentioned in the said Article."

In support of his preliminary objection, the learned Attorney-General, Mr. Aziz A. Munshi, submits that this Constitutional Petition purporting to seek the enforcement of Fundamental Right 17 under Article 184(3) of the Constitution is not maintainable because Fundamental Right 17 merely guarantees the right to form a political party and the right to be a member of a political party and no more. However, the petitioner in his petition is not complaining that he is being prevented from forming a political party or from being a member thereof. His grievance is that even though the tenure of his office has not expired he is being deprived of the right to continue as Prime Minister on account of the unlawful order of dismissal of his Government. The learned Attorney-General submits that redress for such a grievance is not through the enforcement of Fundamental Right 17 but by invoking other provisions of the Constitution. Elaborating this submission, it is submitted that Fundamental Right 17 is not attracted because the matter of the formation of a Government is provided for in Article 91; while the tenure of the National Assembly is provided for in Article 52 subject to the hazard of its premature curtailment, on account of its dissolution under Article 58 of the Constitution.

Learned counsel for respondent No.3, 'Mr.S.M. Zafar, has also supported this objection. According to him, although the question raised in this petition satisfies the first part of the condition laid down in Article 184(3) namely that it should involve a question of public importance but, according to this Article, the question should also have reference to the enforcement of some Fundamental Right. But the question raised herein has no reference to the enforcement of any Fundamental Right. In this connection, the submission is that Fundamental Right 17 is not attracted because its scope can, at best, extend to all acts culminating in the election of a member of a political party to the National Assembly'. Once having been so elected he becomes vested with certain legal and political rights which can undoubtedly be enforced under the law. However, Fundamental Right 17 is not available to protect them. According to Mr. S. M. Zafar, the right of a member of a political party elected to a legislative assembly and to continue as such has been conferred on him, by a specific provision of the Constitution and in case of any unlawful interference therewith it can be redressed by recourse to the High Court under Article 199 of the Constitution by seeking an appropriate writ. Accordingly, as in the present case, where the petitioner complains that he has been deprived of his right to continue as a member of the National Assembly, the violation complained of is not of any of his Fundamental Right but only of a political or a legal right. In short, the submission is that though political parties and their members can move the Supreme Court directly if any of their Fundamental Rights is infringed it is not possible in this case because Fundamental Right 17 is available only against actions preventing its members from forming a political party or from contesting elections to the Assemblies and not available to them after they have become., members of the elected body. Having once reached there all rights

inhering in them, as such members, like the right of tenure, are enforceable only by recourse to the provisions of Article 199 of the Constitution, namely, through a writ petition in the High Court.

Mr. Khalid Anwar, learned counsel for the petitioner and Dr. Farooq Hassan have been heard in reply.

The relevant part of Fundamental Right 17 reads as under:.

(2) Every citizen, not being in the Service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final."

I do not think that the preliminary objection that this petition is not maintainable can be sustained.

Fundamental Rights in essence are restraints on the arbitrary exercise of power by the State in relation to any activity that an individual can engage. Although Constitutional guarantees are often couched in permissive terminology, in essence they impose limitations on the power of the State to restrict such activities. Moreover, Basic or Fundamental Rights of individuals which presently stand formally incorporated in the modern Constitutional documents derive their lineage from and are traceable to the ancient Natural Law. With the passage of time and the evolution of civil society great changes occur in the political, social and economic conditions of society. There is, therefore, the corresponding need to re-evaluate the essence and soul of the fundamental rights as originally provided in the Constitution. They require to be construed in consonance with the changed conditions of the society and must be viewed and interpreted with a vision to the future. Indeed, this progressive approach has been adopted by the Courts in the United States and the reason given for doing so is that:--

"While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield a new and fuller import to its meaning: (Hurtade v. California -- 110 U.S. 516).

it is on this principle of interpretation that the import of the rights given in the U.S. Constitution such as the "right of Assembly and the "right of Association", has been so expanded and so enlarged by the U.S. Supreme Court that even peripheral rights (or rights of penumbra as described in some judgments i.e. rights so closely associated to the basic right which is specifically given in the Constitution) are now being also enforced as basic rights.

This progressive approach has also found favour with this Court and has been endorsed by it. Speaking for the Court, the learned Chief Justice (Muhammad Haleem, CJ.) observed in Benazir Bhutto's case (PLD 1988 SC 416 at page 490) as under:--

'The liberties, in this context if purposefully defined will serve to guarantee genuine freedom, freedom not only from arbitrary restraint of authority, but also freedom from want, from poverty and destitution and from ignorance and illiteracy --------- This approach is in tune with the era of progress and is meant to establish that the Constitution is not merely an imprisonment of the 12ast, but is also alive to the unfolding- of the future". (Emphasis supplied).

In consonance with this progressive approach, it was held in this case that the right conferred by Article 17 includes not merely the right to form a political party but comprised also other consequential rights.

This approach was again in evidence in the Symbol's case (PLD 1989 SC 66) wherein it was observed that the "Fundamental Right" conferred by Article 17(2) of the Constitution whereby every citizen has been given "the right" to form or to be a member of a political par-y comprises the right to participate in and contest an election" (see page 75 of the Report).

Indeed, even earlier this Court had observed in Maudoodi's case PLD 1964 SC 673 that "forming of associations necessarily implies carrying on the activities of an association for the mere forming of -association would be of no IG avail" (see page 764 of the Report). It was also observed in the same case, that I "the ordinary conception of a political party includes a right within the framework of the Constitution to exert itself through its following and Organization, and using all available channels of mass communication, to propagate its view in relation to the whole complex of the administrative machine, including the Legislatures, in respect of matters which appear to it to require attention. for the amelioration of conditions generally throughout the nation, for improvements particularly in administrative procedures and policies as well as in the legislative field, even to the extent of proposing and pressing for amendment of the Constitution itself" (see page 692 of the Report).

Actually, the objection being raised by the learned counsel for the respondents before us here stands practically answered already in Benazir Bhutto's case PLD 1988 SC 416. It was herein, inter 41;.a, also observed:--

"Reading Article 17(2) of the Constitution as a whole it not only guarantees the right to form or be a member of a political party but also to operate as political party ... ... Again, the forming of a political party necessarily implies the right of carrying on of all its activities as otherwise the formation itself would be of no consequence. In other words, the functioning is implicit in the formation of the party" (see page 511 of the Report).

In a -subsequent passage (at page 541) this aspect was commented upon as folilows:--

"it (Article 17(2)) provides a basic guarantee to the citizen against usurpation of his will to freely participate in the affairs and of Pakistan through political activity relating thereto." (Emphasis supplied).

Thus, in the scheme of our Constitution, !he guarantee to form political party must be deemed to comprise also the right by that political party to form the Government, wherever the said political party possesses the requisite majority in the Assembly. AS was explained by Chief Justice Muhammad Haleem in the same Judgment:-

"Our Constitution is of the pattern of parliamentary democracy with a Cabinet system based on party system as essentially it is composed of the representatives of a party which is in majority ..... It is a party system that converts the results of a Parliamentary election into a Government.'

Accordingly, the basic right "to form or be a member of a political party' conferred by Article 17(2) comprises the right of that political party not only to form' a political party, contest elections under its banner but also, after successfully contesting the elections, the right to form the Government if its members, elected to that body, are in possession of the requisite majority. The Government of the political party so formed must implement the programme of the political party which the electorate has mandated it to carry into effect. Any unlawful order which results in frustrating this activity, by removing it from office before the completion of its normal tenure would, 'therefore, constitute an infringement of this Fundamental Right.

In this connection, the interpretation of the word “Operating’ in Article 17(2) given by my learned brother Shafiur Rahman, J. further clarifies this aspect of the matter. He has rightly pointed out that the term “operating” includes both healthy and unhealthy operation of a political party. While Article 17 contains limitations and checks against unhealthy operation of the political party; no provision exists therein in relation to its healthy operation. However, the mere omission to make any specific provision in regard to this aspect does not imply that Fundamental Right 17 does not also comprise this aspect of the matter. Indeed, a positive right implies, as part of the same right, a negative right and vice a verse (see the views of Jeckson, J. for the majority and Murphy, J. concurring in West Virginia State Board of Education v. Barnette (1942) 319 U.S. 624. Hence, if the lawful functioning of a Government of political party is frustrated (by its dismissal) by an unlawful order, such an order is an impediment in the healthy functioning of the political party and would, therefore, constitute an ‘infringement of the fundamental right conferred by Article 17(2). A petition under Article 184(3) for its enforcement would, accordingly, be maintainable.

In this view of the matter, the submission of the learned Attorney-

General that rights guaranteed under Article 17(2) extend only to the right to 0 form a political party and the right to become a member of a political party or for that matter the submission of Mr. S. M. War that the right guaranteed under Article 17(2) extends only to all the political processes culminating in the election of its member to the National Assembly and no more cannot therefore be accepted. The preliminary objection, accordingly, fails and is rejected.

Coming now to the second question requiring adjudication, namely, whether the President in ordering the dissolution of the National Assembly exceeded the power conferred on him under clause (b) of Article 58 of the Constitution, it is appropriate that the terms of this provision be clearly comprehended.

Article 58(2)(b) provides:

“58.--(l) The President shall dissolve the National Assembly if so advised by the Prime Minister; and the National Assembly shall, unless sooner dissolved, stand dissolved at the expiration of forty-eight hours after the Prime Minister has so advised.

(2) Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion-

(a) …….

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary."

The order passed to dissolve the National Assembly was in the following terms:--

"Order of Dissolution

The President having considered the situation in the country, the events that have taken place and the circumstances, the contents and consequences of the Prime Minister's speech on 17th April, 1993 and among others for the reasons mentioned below is of the opinion that the Government of the Federation cannot be carried on in accordance with the provisions -of the Constitution and an appeal to the electorate is necessary"

The circumstances that were taken into consideration by the President for forming the opinion "that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate was necessary" were then recounted.

The operative part of the Order was expressed in these words:--

"Now, therefore, 1, Ghulam Ishaq Khan, President of the Islamic Republic of Pakistan in exercise of the powers conferred (in me by clause (2)(b) of Article 58 of the Constitution of the Islamic Republic of Pakistan and all other powers enabling me, hereby dissolve the National Assembly with immediate effect; and dismiss the Prime Minister and the Cabinet who shall cease to hold office forthwith.

(Sd.)

Ghularn Ishaq Khan,

President."

Islamabad 18th April, 1993.

My learned brother Shaflur Rahman, J. has examined each and every ground adduced in support of the impugned order and after carefully analysing the gravamen of each ground found that not one of them can validly be relied nexus upon to sustain the order of dissolution as none of them has any direct nexus with the conditions which are the prerequisite for the exercise of the powers under clause (b) of Article 58(2) of the Constitution. This Court in the case of Haji Muhammad Saifullah PLD 1989 SC 166 has held that the grounds and material which form the basis of the order of dissolution are open to scrutiny and judicially reviewable, observing in this connection:--

"The discretion conferred by Article 58(2)(b) of the Constitution on the President cannot, therefore, be regarded to be an absolute one, but is to be deemed to be a qualified one, in the sense that it is circumscribed by the object of the law that confers it.

it must further be noted that the reading of the provisions of Articles 48(2) and 58(2) shows that the President has to first form his opinion, objectively and then, it is open to him to exercise his discretion one way or the other i.e. either to dissolve the Assembly or to decline to dissolve it. Even if some immunity envisaged by Article 48(2) is available to the action taken under Article 58(2) that can possibly be only in relation to the exercise of his discretion but not in relation to his 'opinion'. An obligation is cast on the President by the aforesaid Constitutional provision that before exercising his discretion he has to form his 'opinion' that a situation of the kind envisaged in Article 58(2)(b) has arisen which necessitates the grave step of dissolving the National Assembly. In Abul A'la Maudoodi v. Government of West Pakistan PLD 1964 SC 673 Cornelius, CJ while interpreting certain provisions of the Criminal Law Amendment Act, 1908, construed the word 'opinion' as under:--

' it is a duty of Provincial Government to take into consideration all relevant facts and circumstances. That imports the exercise of an honest judgment as to the existence of conditions in which alone the opinion may be formed, consequent upon which the opinion must be formed honestly, that the restriction is necessary. In this process, the only element which I rind

to possess a subjective quality as against objective determination, is the final formation of opinion that the action proposed is necessary. Even this is determined, for the most part, by the existence of circumstances compelling the conclusion. The scope for exercise of personal discretion is extremely limited ... ...

--- - --- --- ---.... ... ... As I have pointed out, if the section be construed in a comprehensive manner, the requirement of an honest opinion based upon the ascertainment of certain matters which are entirely within the grasp and appreciation of the Governmental agency is clearly a prerequisite to the exercise of the power. In the period of foreign rule, such an argument, i.e. that the opinion of the person exercising authority is absolute may have at times prevailed, but under autonomous rule, where those who exercise power in the State are themselves citizens of the same State, it can hardly be tolerated.

Thus, though the President can make his own assessment of the situation as to the course of action to be followed but his opinion must be founded on some material. In the present case, the President himself chose to state the grounds on which he was basing his action. As the grounds have been disclosed their validity can be examined."

Coming to the present case, doubtless the main reason which induced the President to dissolve the National Assembly was the speech delivered on 17th April, 1993 by the Prime Minister. Indeed that this was so was practically conceded by the learned Attorney-General before us. But, according to him, the speech of the Prime Minister amounted to a subversion of the Constitution, that it was nothing short of a call for agitation against the Head of the State; that in any case no rapport.was possible between the President and the Prime Minister after such a speech and the relations between the two highest executive authorities in the State became so gravely strained that it was not possible for them to work in harmony thereafter. This stalemate, this deadlock between the two highest Constitutional functionaries in the State rendered the carrying on of the Federation ip accordance with the provisions of the Constitution impossible. Hence, the President had no alternative but to dissolve the National Assembly, dismiss the Prime Minister and his Cabinet and call for fresh general elections. This he was entitled to do under the powers conferred on him under Article 58(2)(b) and that he had exercised these powers legally and properly.

Although we can understand the point of view of the President, as presented before us by the learned Attorney-General, we cannot subscribe to it. In our opinion it proceeds on an incorrect appreciation of the role assigned to him in the Constitution and of the powers vested in him after the amendment made In the Constitution of 1073 by the Constitution (Eighth Amendment) Act, 1985 introduced in the Constitution of 1973 shortly before its revival on 30th December, 1985.

Under the 1973 Constitution, as originally enacted the President, in the performance of his functions, was to act in accordance with the advice of the Prime Minister and -his advice was binding on him. indeed, the orders of the President required the counter-signature of the Prime Minister for their validity (Article 48). The National Assembly could be dissolved only if so advised by the Prime Minister and the President himself had no power to order its dissolution under any circumstances (Article 58). The executive authority of the Federation was no doubt to be exercised in the name of the President but this was to be done by the Federal Government consisting of the Prime Minister and the Federal Ministers, through the Prime Minister who was to be

the Chief Executive of the federation.[Article 90(l)".

The powers of the Prime Minister under the 1973-Constitution were indeed transcendental and no check or control was provided over them. Undoubtedly, under the Constitution „the President was the Head of the State and represented the unity of the Republic (Article 41). But, in fact, he was no more than a Constitutional Head. All the responsibility of the administration was conferred on the, Prime Minister and in the discharge of his functions the President could only act in accordance with his advice. Indeed every order passed by him required his counter-signatures for its validity. This total concentration of powers in the hands of the Prime Minister ultimately proved to be a liability for the smooth running of the Constitution.

On. March 7, 1977, general elections were held in the country. However, as soon as the results of the elections were announced practically the whole country rose in protest against them, being, convinced that they were manipulated and the outcome of massive rigging. The working of the Government came to a standstill. The main demands of the opposition parties involved in the agitation were that the Prime Minister should go, the National Assembly should be dissolved and fair and free elections be held afresh. The Prime Minister was not, however, prepared to dissolve the National Assembly and under the Constitution it was be. and he alone who could get the National

Assembly dissolved. To overcome this impasse and to remedy the situation the army decided to interven6 and on 5th of July, 1977 imposed Martial Law. This intervention ostensibly was for a temporary period (for the limited purpose of arranging free and fair elections, so as to enable the country to return to a democratic way of life but, in point of fact, lasted for 8-1/2 years). This

tragedy, many people thought, could have been avoided if the President had also been vested, in exceptional circumstances, with the power of dissolving the National Assembly.

Accordingly, this deficiency, amongst others, was sought to be remedied when the 1973 Constitution (which was suspended on the imposition of Martial Law) was being revived in 1985 and to this end clause (2) added to Article 58 by the Constitution (Eighth Amendment) Act, 1985.

The full background of the terms in which Article 58(2) of the Constitution finally emerged is given in the judgment of this, Court in Haji Muhammad Saifullah's case PLD 1989 SC 166. it would be relevant to reproduce some part thereof thereunder-

"In the Revival of the Constitution of 1973 Order, 1985 (President's Order 14 of 1985) the provisions of Article 48 and Article 58 were radically modified in comparison to the earlier provision contained in the 1973 Constitution ... .

However, the National Assembly, before which the Revival of the Constitution Order, 1985 (President's Order 14 of 1985) Was placed for adoption. did not agree to accept the provisions of clause (2) of Article 48 without qualifications particularly in so far as the power of the President to dissolve the National Assembly was concerned. Thus, the Constitution (Eighth Amendment) Act, 1985 as it was finally adopted by the National Assembly curtailed the absolute discretion of the President in the matter of dissolution of the National Assembly. The provisions of clause (2) of Article 48 provided that:--

"Notwithstanding anything contained in clause (1) the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever."

The amplitude of this provision was significantly cut down be the non obstante clause contained in sub-Article (2) of Article 58 by introducing the words "Notwithstanding anything contained in clause (2) of Article 48" in the beginning of clause, before the words "the President may also dissolve the National Assembly in his discretion where in his opinion--

(a) .....

(b) a situation has arisen in which the Government cannot be carried on in accordance with the provisions of the Constitution and an appeal to electorate is necessary."

This Court, in Haji Muhammad Saifullah's case (PLD 1989 SC 166) after a close analysis of this provision, in the light of the relevant background, held that if it could be shown that no grounds existed on the basis of which an honest opinion could be formed "that a situation had arisen in which the Government of the Federation cannot be carried in accordance with the provisions of the Constitution and an appeal to the electorate is necessary' the exercise of the power would be unconstitutional and open to correction through judicial review. As the examination of the grounds of the order d dissolution passed by the President on 29th May, 1988 revealed that the pre-requisites prescribed for the exercise of the powers conferred by Article 58(2)(b) did not exist, the said action was found to be unlawful.

However, despite the above finding, the consequential relief of restoration of the National Assembly was not granted. It was observed that "the writ jurisdiction is discretionary in nature and even if the Court finds that a party has a good case, it may refrain from giving him the relief if greater harm is likely to be caused thereby than the one sought to be remedied. It is well settled that individual interest must be subordinated to the collective good. Therefore, we refrain from granting consequential reliefs, inter alia, the restoration of the National Assembly and the dissolved Federal Cabinet".

Other important reasons for not restoring the National Assembly were that the country was geared for fresh elections and that the dissolved National Assembly was elected on the basis of partyless, elections, which elections had been boycotted by some of the political parties, rendering its representative character doubtful for some extent. Faced with the choice whether to restore such an Assembly or not, in exercise of its discretionary writ jurisdiction, the Court exercised its discretion. in favour of not doing so.

Undoubtedly, two opinions can legitimately be entertained as to the correctness of the course which was followed here. On hindsight, I now think that after having found the action of dissolution of the National Assembly was not sustainable in law, the Court should not have denied the consequential relief and ought to have restored the National Assembly.

Be that as it may, it need to be clarified that in the case of Kh. Ahmad Tariq Rahim (PLD 1992 SC 646) the Court had no such choice. In that case, the majority had found the order of dissolution passed by the President under Article 58(2)(b) on 6th August, 1990 to be valid and upheld it. The

dissolution of the National Assembly was found to be lawful and proper. Hence the said instance is of no relevance here.

Coming back to the question of the role assigned to the President and the powers vested in him after the adoption of the Constitution (Eighth Amendment) Act, 1985, reference to the power to dissolve the National Assembly conferred on him by clause (2) of Article 58, which power was not earlier vested in him, has already been made. In addition he was empowered also to appoint, in his discretion, the Chief Election Commissioner V (Article 213), the Chairman of the Public Service Commission [Article 242 (1-A)l and the Chairman Joint Chiefs of Staff Committee [Article 243(2)(c)]. He was also empowered to appoint the Governors of the Province after consulting the Prime Minister [Article 1011. Powers were also conferred on him to, refer any matter of national importance to a referendum [Article 48(6)). Duty was cast on the Prime Minister vide the substituted Article 46 to keep the President fully cognisant of the doings of his Government in the following

words:

46. It shall be the duty of the Prime Minister---

(a) to communicate to the President all decisions of the Cabinet relating

to the administration of the affairs the Federation and proposals for

legislation;

(b) to furnish such information relating to the administration of the affairs of the Federation and proposals for legislation as the President may call for; and

(c) if the President so requires, to submit for the consideration of the Cabinet any matter on which a decision has been taken by the Prime Minister or a Minister but which has not been considered by the Cabinet.

In view of these newly-added provisions, it was argued that a preeminent role had been assigned to the President. He was not now merely the Constitutional Head of the State simply enjoying a

high ceremonial office but had, in fact, become a full partner in the governance of the country and indeed the more important partner. In view of this pre-eminent position as the Head of the State and in consonance with the spirit of the modified Constitution (after the amendments made therein during the Martial Law period and sanctified by the 8th Constitutional Amendment adopted in 1985) the Prime Minister was expected to accept the guidance of the President and to act in accordance with his advice and to mould his conduct accordingly. This perception of the President becomes manifest from the terms of the impugned order of dissolution itself. Herein reliance is placed not only on the specific powers conferred on him by clause (2)(b) of Article 58 but also on "all other powers enabling him" in that behalf. This is indicative of his belief that besides the powers specifically conferred upon him by the terms of the Constitution, some residual or implied powers also inhere in him.

Unfortunately, this belief that he enjoys some inherent or implied powers besides these specifically conferred on him under Articles 46, 48(6), 101, 242 (1A) and 243(2)(c) is a mistaken one. In a Constitution contained in a written document wherein the powers and duties of the various agencies established by it are formulated with precision, it is the wording of the Constitution itself that is enforced and applied and this wording can never be overriden or supplemented by extraneous principles or non-specified enabling powers not explicitly incorporated in the Constitution itself. In view of the express provisions of our written Constitution detailing with fullness, the powers and duties of the various agencies of the Government that it holds in balance there is no room of an y residual or enabling powers inhering in any authority established by it besides those conferred upon it by specific words.

Our Constitution, in fact, is designed to create a parliamentary democracy. The President in this set-up is bound to act, in the exercise of his functions, in accordance with the advice of the Cabinet or the Prime Minister [Article 48(l)] and the Cabinet in its turn is collectively responsible to the National Assembly [Article 91(4)] though the Prime Minister holds office at the pleasure of the President. However, the President cannot remove him from his office as long as he commands the confidence of the majority of the members of the National Assembly [Article 91(5)1. In view of these provisions, the system of Government envisaged by the Constitution of 1973 is of the Parliamentary type wherein the Prime Minister as Head of the Cabinet is responsible to the Parliament, which consists of the representatives of the nation.

It is manifest, therefore, that in the scheme of our Constitution the Prime Minister in administering the affairs of the Government is neither answerable to the President nor in any way subordinate to him. In formulation of the policies of his Government and in the running of its affairs, the Prime W Minister is answerable only to the National Assembly and not to the President. Indeed, it is the President who is bound by the advice of the Prime Minister or the Cabinet in all matters concerning formulation of policies and administration of the affairs of the Government and not the other way about, as appears to have been mistakenly understood. Undoubtedly, the President may require the

Cabinet or the Prime Minister, as the case may be, to reconsider any advice tendered to him but the President is bound to act on the advice tendered, even if it be the same, after consideration. Undoubtedly, both are expected to work in harmony and in close collaboration for the efficient running of the affairs of the State but as their roles in the Constitution are defined, which do not overlap, both can exercise their respective functions unhindered and without bringing the machinery of the Government to a standstill. Despite personal likes or dislikes, the two can co-exist Constitutionally. Their personal likes or dislikes are irrelevant so far as the discharge of their Constitutional obligations are concerned. Despite personal rancour, ill-will and incompatibility of temperament, no deadlock, no stalemate, no breakdown can arise if both act in accordance with the terms or the Oath taken -by them, while accepting their high office. They have sworn:

.not to allow their personal interest to influence their official conduct or their official decisions."

And taken Oath:

"to do right in all circumstances, to all manner of people, according to law, without fear or favour, affection or ill-will."

Coming now to the speech of the Prime Minister made on 17th of April, 1993, which brought about his fall and led to the dissolution of the National Assembly, my learned brother has set out its terms in sufficient detail. Suffice it to say, that in his speech the Prime Minister accused disreputable and opportunistic self-seekers of using the Presidency for destabilising his Government. He also alleged that dirty horse-trading was taking place and conspiracies were being hatched for ousting the elected Prime Minister. He also said that the place which should have been a source for strengthening the democracy appeared now to be yearning for establishing "one man's" rule. He, however, vowed that he would steadfastly oppose these machinations and not betray the people and defiantly declared "I shall not resign, I shall not dissolve the Assembly, I shall not take dictation".

According to the learned Attorney-General the said speech and conduct of the Prime Minister amounted, inter alia, to "subversion of the Constitution" and, therefore, was by itself a sufficient ground for dissolving the National Assembly under Article 58(2)(b).

The words “situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution, in which situation alone the President is empowered to dissolve the National Assembly also came up for interpretation by this Court in the case of Haji Muhammad Saifullah (PLD 1989 SC 166) and these words were explained by me to mean:--

“Thus, the intention of the law-makers, as evidenced from their speeches and the terms in which the law was enacted, shows that any order of dissolution by the President can be passed and an appeal to the electorate made only when the machinery of the Government has broken down completely, its authority eroded and the Government cannot be carried on in accordance with the provisions of the Constitution.”

And were explained by Shafiur Rahman, J. as follows:

“The expression ‘cannot be carried on’ sandwiched as it is between i ‘Federal Government’ and ‘in accordance with the provisions of the Constitution’, acquires a very potent, a very positive and very content. Nothing has been left to surmises, likes or dislikes, opinion or view. It does not concern itself with the pace of progress, the shade of the quality or the degree of the performance or the quantum of the achievement. It concerns itself with the breakdown of the Constitutional machanism, a stalemate, a deadlock in ensuring the observance of the provisions of the Constitution.”

In the present case, the breakdown of the machinery of the Government is said to have occurred because of the Prime Minister’s speech as it made it impossible thereafter for these two pillars of the State to co-exist.

Now, the President as the symbol of the unity of the Federation is z entitled to the highest respect and esteem by all the functionaries of the State. But it is equally true that this respect and esteem will be forthcoming if he conducts himself with utmost impartiality and neutrality, that he keep himself entirely aloof from party politics and does not give the impression to any one that he is siding with one faction or working against the other. If, on the other hand, - he gets drawn into the arena of party politics, he will become, in the words used by Prime Minister Asquith in his memorandum to 1Gng George V, “the football of contending factions”.

The material placed before us shows, unfortunately, that the opinion formed by the Prime Minister that the President had ceased to be a neutral figure and started to align himself with his opponents and was encouraging them in their efforts to destabilise his Government, was an opinion that could indeed be reasonably entertained. In these circumstances, the charge against the Prime Minister of subverting the Constitution by his speech of April 17, 1993 when he was only protesting at this situation is reminiscent of the saying (in Urdu):

(when the mighty strikes you are not permitted to protest).

The people of Pakistan have willed to establish an order wherein the State shall exercise its powers and authority through the chosen representatives of the people; wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed (Article 2A).

No one man howhighsoever can, therefore, destroy an organ consisting of, chosen representatives of the people unless cogent, proper and sufficient cause exists for taking such a grave action. Article 58(2)(b), no doubt, empowers the President to take this action but only where it is shown that 'a situation has arisen in which the Government. of the Federation cannot be carried on in accordance was the provisions of the Constitution".

Enough has been said above to indicate that no such situation had arisen here and that if any such situation could be said to have arisen it was not of the making of the Prime Minister.

In these circumstances, the dismissal of the Prime Minister alongwith his Cabinet and the dissolution of the National Assembly under the purported exercise of powers conferred on the President under Article 58(2)(b) cannot be B upheld. The action taken did not fall within the ambit of this provision. This unlawful action moreover was also violative of Fundamental Right 17. As this B Court is duty bound to enforce Fundamental Rights and will not hesitate to enforce them whenever it is established that they have been violated, the necessity for taking action under Article 184(3) of the Constitution arose in this case. Accordingly, on the. 26th May, 1993, on the conclusion of the arguments of the parties, the Court in furtherance, of its duty decided to take action and pass the following Order:

ORDER

"We hold by majority (of 10 to 1) that the petition is maintainable under Article 184(3) of the Constitution.

On merits, by majority (of 10 to 1) we hold that the order of the 18th April, 1993, passed by the President of Pakistan is not within the ambit of the powers conferred on the President under Article 58(2)(b) of the Constitution and other enabling powers available to him in that behalf and has, therefore, been passed without lawful authority and is of no legal effect.

As a consequence of our order, the National Assembly, Prime Minister and the Cabinet shall stand restored and entitled to function as immediately before the impugned order was passed.

All steps taken pursuant to the order, dated 18th April, 1993 passed under Article 58(2)(b) of the Constitution such as-the appointment of the Care-taker Cabinet etc. will, therefore, be of no legal' effect. However, all orders passed, acts done and measures taken in the meanwhile by the Care-taker Government, which have been done, taken and given effect to in accordance with the terms of the Constitution and were required to be done or taken for the ordinary orderly running of the. State shall all be deemed to have been validly and legally done."

The above are the 'reasons for the short order we passed that day.

In the end our grateful thanks are due to all the learned counsel for the great ability, knowledge and industry with which they assisted the Court in the resolution of the highly difficult and sensitive questions which were involved in this matter. We are all deeply obligated to them.

ABDUL QADEER CHAUDHRY, J.---l agree,

FAZAL ELAHI KHAN, J.---l agree.

SHAFIUR RAHMAN, J.---Mr. Muhammad Nawaz Sharif, the ousted Prime Minister of the Islamic Republic of Pakistan, has presented before us a petition under Article 184(3) of the

Constitution. He seeks thereunder the enforcement of Fundamental Right 17 which guarantees to him, like every other citizen of Pakistan, not being in the service of Pakistan, a right to form or

be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan. He feels that the President by invoking his . powers under Article 5,S(2)(1)) of the Constitution and dismissing him from the office of Prime Minister, and its Cabinet and by dissolving the National Assembly of which he was the majority party leader has violated this guaranteed Fundamental Right. There are two other such petitions coming up for hearing alongwith it.

The Federation of Pakistan, the President of Pakistan and the Care taker Prime Minister have raised a preliminary objection to the very commence of such a petition in this Court under Article 184(3) of the Const.1tw6on. Mr. Aziz A. Munshi, the learned Attorney-General for Pakistan has, in support of his preliminary objections with regard to the maintainability of the Constitution petition under Article 184(3) of the Constitution in the Supreme Court of Pakistan, stated that on the express words of the Fundamental Right 1.7 that right extends to---

(i) right to form a political party;

(ii) right to become a member of political party.

This right within the Constitutional framework does not extend to anything beyond these two. The rights claimed in these Constitution petitions are neither with reference to these rights nor do they directly arise out of it. None of these two questions is to be debated in this Court in these petitions.

According to him the crux of the petition is the right of the petitioner to continue in power, his right town Government politically, his-right to a tenure to do so etc. All these matters are governed by different provisions of the Constitution having no connection whatsoever with Fundamental Right 17. For example, Article 51 of the Constitution provides for election by direct and free vote to ‘ the National Assembly. The formation of the Government is provided in Article 91 of the Constitution. TW tenure of the National Assembly has been limited by Article 52 of the Constitution. The tenure of the Federal Government has been limited by three specified eventualities-- under clause (1) of Article 58, under clauses (a) and (b) of clause (2) of Article 58.

In View of these provisions of the Constitution and the invocation of such a power reserved for the President no question. of Fundamental Right arises at all. According to the learned

Attorney-General the formation of the party and of being a member of the Political Party, and nothing beyond this can be claimed tinder Fundamental Right 17.

Mr. S.M. Zafar, 5enior Advocate, in support of the preliminary objections admitted that the question raised in these petitions is undoubtedly of public importance. However, according to him, neither directly nor indirectly do these involve enforcement of any of the Fundamental Rights. According to him, the Fundamental Right guaranteed under Article 17 extends to all the political processes culminating in the election of a member to the National Assembly. Once he is so elected the political rights as defined and guaranteed in Fundamental Right 17 come to an end and an altogether different right referable to the other provisions of the Constitution comes into being. If it is only a right of functioning as a member after being elected as amember of the National Assembly, then necessarily the petitioner has to invoke Article 199 of the Constitution as no Fundamental Right as such is available for enforcement of tenure as a member of the National Assembly or as, a member of political party having been elected to it.

According ‘ to Mr. S.M. War, political parties have a bundle of rights, some are Fundamental Rights, some are Constitutional and legal rights and some are conventional. It is only Fundamental Rights that are enforceable by recourse to Article 184(3) of the Constitution and not the other rights howsoever strong their case may be and howsoever desirable it may appear to the onlooker. Political parties can be utilised under the Fundamental Right only for reaching the elected bodies and once they reach the elected body there is no fundamental right to continue for the normal tenure. They have no vested right in the tenure as such in spite of a life period having been provided for these elected bodies.

The Fundamental Rights guaranteed in any Constitution, an organic instrument, are not capable of precise or permanent definition. They cannot be charted on a piece of paper delineating their boundaries for all times to come. The treatment of this preliminary objection would be more comprehensive, conceptually more readily intelligible and complete once the substance of the impugned Constitutional order has been examined in the context of our political freedoms and Parliamentary system of Government, as brought out in a written Constitution of our own.

The President of Pakistan by an order dated 18-4-1993, in exercise of powers under clause 2(b) of Article 58 of the Constitution of the Islamic Republic of Pakistan, 1973 and all other powers enabling him, dissolved the National Assembly with immediate effect and dismissed the Prime Minister and the Cabinet who ceased to hold office forthwith. The text of the order is reproduced hereunder:--

‘THE PRESIDENT

DISSOLUT1ON ORDER

The President having considered the situation in the country, the events that have taken place and the circumstances, the contents and consequences of the Prime Minister’s speech on 17th April, 1993 and among others for the reasons mentioned below is of the opinion that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary:--

(a) The mass resignation of the members of the Opposition and of considerable numbers from ‘ the Treasury Benches, including several Ministers, inter alia, showing their desire to seek fresh mandate from the people have resulted in the Government of the federation and the

National Assembly losing the confidence of the people, and that the dissension therein, has nullified its mandate.

(b) The Prime Minister held meetings with the President in March and April and the last on 14th April, 1993 when the President urged him to take positive steps to resolve the grave internal and international problems confronting the country and the nation was anxiously looking forward to the announcement of concrete measures by the Government to improve the situation. Instead, the Prime Minister in his speech on 17th April, 1993 chose to divert the people’s attention by making false and malicious allegations against the President of Pakistan who is Head of State and represents the unity ‘of the Republic. The tenor of the speech was that the Government could not be carried on in accordance with the provisions of the Constitution and he advanced his own reasons and theory for the same which reasons and theory, in fact, are unwarranted and misleading. The Prime Minister tried to cover up the failures and defaults of the Government ‘although he was repeatedly apprised of the real reasons in this behalf, which he even accepted and agreed to rectify by specific measures on urgent basis. Further, the Prime - Minister’s speech is tantamount to a call for agitation and in any case the speech and his conduct amounts to subversion of the Constitution.

(c) Under the Constitution the Federation and the Provinces are required to exercise their executive and legislative authority as demarcated and defined and there are specific provisions and institutions to ensure its working in the interests of the integrity, sovereignty, solidarity and well-being of the Federation and to protect the autonomy granted to the Provinces by creating

specific Constitutional institutions consisting of Federal and Provincial representatives, but the Government of the Federation has failed to uphold and protect these, as required, in that, inter alia:

(i) The Council of Common Interests under Article 153 which is responsible only to Parliament has not discharged its Constitutional functions to exercise its powers as required by Articles 153 and 154, and in relation to Article 161, and particularly in the context of privatisation of industries in relation to item 3 of Part II of the Federal Legislative List and item 34 of the Concurrent Legislative List.

The National Economic Council under Article 156, and its Executive Committee, has been largely bypassed, inter,- alia, in the formulation of plans in respect of financial, commercial, social and economic policies.

Constitutional Powers, rights and functions of the Provinces have been usurped, frustrated and interfered with in violation of inter alia Article 97.

(d) Mala administration, corruption and nepotism have reached such proportions in the Federal Government, its various bodies, authorities and other corporations including banks supervised and controlled by the Federal Government, the lack of transparency in the process Of privatisation and in the disposal of public/Government properties, that they violate the requirements of the Oath(s) of the public representative together with the Prime Minister ,the Ministers and Ministers of State prescribed in the Constitution and prevent the Government fr6m functioning in accordance with the provisions of the Constitution.

(e) The functionaries, authorities and agencies of the Government under the direction, control, collaboration and patronage of the Prime Minister and Ministers have unleashed a reign of terror against the opponents of the Government including political and personal rivals/relatives, and mediamen, thus creating a situation wherein the Government cannot be carried on in accordance with the provisions of the Constitution and the law. -

(f) In violation of the provisions of the Constitution:---

(i) The Cabinet has not been taken into confidence or decided upon numerous Ordinances and matters of policy.

(ii) Federal Ministers have for a period even been called upon not to see the President.

(iii) Resources and agencies of the Government of the Federation, including statutory corporations, authorities and banks, have been misused for political ends and purposes and for personal gain.

(iv) There has been massive wastage and dissipation of public funds and assets at the cost of the national exchequer without legal or valid justification resulting in increased deficit financing and indebtedness, both domestic and international, and adversely affecting the national interest including defence.

(v) Articles 240 and 242 have been disregarded in respect of the Civil Services of Pakistan.

The serious allegations made by Begum Nuzhat Asif Nawaz as to the high-handed treatment meted out to her husband, the late Army Chief of Staff, and the further allegations as to the circumstances culminating in his death indicate that the highest functionaries of the Federal Government have been subverting the authority of the Armed Forces and the machinery of the Government and the Constitution itself.

(h) The Government of the Federation for the above reasons, inter alia, is not in a position to meet properly and positively the threat to the security and integrity of Pakistan and-'the grave economic situation confronting the country, necessitating the requirement of a fresh mandate from the people of Pakistan.

2. Now, therefore, 1, Ghulam Ishaq Khan, President of the Islamic Republic of. Pakistan in exercise of the powers conferred on me by clause (2)(b) of Article 58 of the Constitution of the Islamic Republic of Pakistan and all other powers enabling me, hereby dissolve the National Assembly with immediate effect; and dismiss the Prime Minister and the Cabinet who shall cease to hold office forthwith.

ISLAMABAD, 18th April, 1993.

(Sd.)

GHULAM ISHAQ KHAN, PRESIDENT."

This order of the President of Pakistan led to the filing of a number of Constitution Petitions. in various Courts of the Country and these are arranged chronologically as hereunder:--

Date of Institution	Court	Const. Petition No. and Parties name	Law under which filed
1.19/20-4-1993	Lahore High Court, Rawalpindi Bench	W.P. No. 386/93 Mr. Gohar Ayyub Khan, Speaker v. Federation of Pakistan etc.	Art. 199
2. 20-4-1993	Lahore High Court, Lahore.	W.P. No. 4066/93 Iftikhar Hussain v. Federation. Of Pakistan.	Art. 199
3. 21-4-1993	Lahore High Court, Lahore.	W.P. No. 4071/93 Mr.. Art. 199 M.D. Tahir, Advocate v. federation of Pakistan.	Art. 199
4. 24-4-1993	High Court of Balochistan, Quetta.	Const. P 203/93 Aurangzeb Mir Advocate, v. Federation of Pakistan.	Art. 199
5. 25-4-1993	Supreme Court of Pakistan, Rawalpindi.	Const. P. 8/93 Mian Muhammad Nawaz Sharif v. President of Pakistan, etc. -	Art. 184(3)
6. 26-4-1993	Supreme Court of Pakistan, Rawalpindi.	Const. P. 9/93 Ch. Shujaat Hussain and others v. Federation of Pakistan and others.	Art. 184(3)
7. 26-4-1993	Lahore High Court, Lahore.	W.P. 4325/93 Mr. Muhammad Ajmal Khan Khattak v. Federation of Pakistan.	Art. 199

8. 26-4-1993	Lahore High Court, Lahore.	W.P. 4326/93 Ch. Zafarullah v. Federation of Pakistan..	Art. 199
9. 27-4-1993	Lahore High Court, Lahore.	W.P. 4327/93 Muhammad Akbar Cheema, Advocate v. President of Pakistan etc.	Art. 199
10. 27-4-1993	Lahore High Court, Lahore.	W.P. 4328/93 Mian Abdul Waheed v. Pakistan	Art. 199
11. 2-5-1993	Lahore High Court, Lahore.	W.P. 4705/93 Tahir Hameed and 4 others v. Federation of Pakistan etc.	Art. 199
12. 5-5-1993	Supreme Court of Pakistan, Rawalpindi.	Const. P. 10/93 Malik Raees Ahmed v. Ghulam Ishaq Khan and others.	Art. 184(3)
13. 5-5-1993	Supreme Court of Pakistan, Lahore.	Const. P. 12/03 M. Ajmal Khattak v. President of Pakistan etc.	Art. 184(3)
14. 5-5-1993	Supreme Court of Pakistan, Lahore.	Const. P. 13/93 Ch. Nazir Ahmed v. Federation of Pakistan.	Art. 184(3)
15. 6-5-1993	Lahore High Court, Lahore.	W.P. 4706/93 Mian Muhammad Akrarn v. Federation of Pakistan.	Art. 199
16. 9-5-1993	Lahore High Court, Lahore.	W.P. 4707/93 M.P. Khan, Chairman, Pakistan Labour Party v. Federation of Pakistan etc.	Art. 199
17. 9-5-1993	Supreme Court of Pakistan, Rawalpindi.	Const. P.11/1993 SA. Hameed, MPA v. The Federation of Pakistan and others.	Art. 184(3)

18. 10-5-1993	Supreme Court of Pakistan, Rawalpindi.	Const. P. 14/93 Iftikhar Art. Hussain v. Federation of Pakistan etc.	Art. 184(3)

Mr. Khalid Anwar, Advocate, the learned counsel for the petitioner (in Constitution Petition No. 8/93) taking up the merits of the dissolution order observed that it has a totally extraneous hurtful content which cannot but be said to be a Freudian slip, a revelation of the mental state, reminiscent of the royal prerogative not recognised by any provision of our Constitution, not contained in any of the two previous dissolution orders. It is, according to him,

that while concluding the order of dissolution, the President of Pakistan has ordered and dismissed the Prime Minister and the Cabinet. 'Dismissal' is a word well-understood in Pakistan and not used in our Constitution for the Prime Minister or the Cabinet. The expression used therein and the other Articles of the Constitution is 'cease to hold office' both for the Prime

Minister, the Cabinet and the President (Article 47(8)). Even the order passed by the late General Ziaul Haq had shown consideration and restraint in language while passing the dissolution order. The stigma, the infamy and the rejection attributable to the expression 'dismissal' is all there for no obvious cause or reason, supportable neither from Constitution, nor law or propriety.

By referring to two sub-clauses of clause (2) of Article 58 of the Constitution the learned counsel for the petitioner attempted to argue that a situation provided for and taken care of under sub-clause (a) of Article 58(2) of the Constitution could not on account of its express mention and separate treatment be taken also to be part of and included in clause (b). For example, if the President felt that the Prime Minister was on account of defections or resignations not in a position to command the majority of the House then he should have allowed the formal process of getting a 'no-confidence motion' passed in the National Assembly and as required ensured that no other member of the National Assembly was likely to command the confidence of the majority of the members which had to be ascertained again on the express language of the sub-clause in a session of the National Assembly. Sub clause (b), according to the learned counsel, deals with an altogether different situation-and the expression "cannot" used therein implies not a political, not a transitory failure to observe the Constitutional provision but a permanent inability and a structural breakdown or the obstruction should be such as to

make an appeal to the electorate necessary for solving it. According to the learned counsel, the antecedent events clearly give the impression that events after 'the 22nd of December, 1992 and none of an earlier date were the basis of the dissolution order. President in his speech to

the joint session of Houses of Parliament had answered every possible -objection against the Government of the ousted Prime Minister and defended and endorsed his policies.

What happened after that will be clear from the Press Release dated 14-4-1993 which reads as hereunder:--

"Press Release

The Prime Minister called on the President today and they reviewed the grave and pressing national and international problems facing the country. The meeting lasted for about two hours.

The President urged the Prime Minister to undertake positive steps as early as possible to address effectively these problems to the satisfaction of the public representatives and the people. The Prime Minister undertook to do so on an urgent basis and to revert to the President with precise measures in this behalf."

This Press Release was prepared and released by the Aiwan-e-Sadar. According to it the Prime Minister was required to satisfy the public representatives and the people. The people could be satisfied on electronic media and the representatives by calling a meeting of the National Assembly. Both these devices were adopted in the sense that the Prime Minister appeared on the electronic media to make a speech to explain and satisfy the people on 17-4-1993. On 18-4-1993 the Speaker of the National Assembly requisitioned a session of the National Assembly on the next day and this was notified as required under the Rules of Procedure and Conduct of Business in the National Assembly, 1992 by hourly broadcasts in the news from 5-00 p.m. onwards as required by Rule 3(2) of National Assembly Rules of Procedure and Conduct of Business. Therefore, what the President desired was thwarted by the President himself and made a ground for taking the action against the ousted Prime Minister.

The learned counsel then referred to Article 91(4) of the Constitution to demonstrate that the Cabinet together with the Ministers of State were to be collectively responsible to the National Assembly. Again clause (5) of Article 91 of the Constitution provides that the Prime Minister shall hold office during the pleasure of the President but the President shall not exercise his powers under this clause unless he satisfies himself that the Prime Minister does not command the confidence of the majority of the members of the National Assembly in which case he shall summon the National Assembly and require the Prime Minister to obtain the vote of confidence from the Assembly. Clause (1) of Article 92 empowered the President to appoint Federal Ministers and Ministers of State only on the advice of the Prime Minister. Article 48 of the Constitution

empowers the President to refer back the executive acts of the Government for reconsideration if he is not satisfied with the correctness of the decision taken, order passed or proposal made. Article 75 of the Constitution provides a procedure for the President for expressing dissatisfaction with the legislative measures. The legislation on privatisation had gone to the President and was cleared by him without expressing dissatisfaction. That enterprise has been made a ground for dissolving the National Assembly. Similarly, Article 46 empowers the President to send to the Cabinet for reconsideration any proposal which required fresh Cabinet attention. None of these steps having been ever taken, the policies, performance and the pace of progress etc. could not be made a ground for dissolution.

Article 58(2)(b) of the Constitution empowers the executive head to destroy the legislature and to remove the chosen representatives. It is an exceptional power provided for an exceptional situation and must receive as it has in Federation of Pakistan and others v. Haji Muhammad Saifullah Khan and others PLD 1989 SC 166 the narrowest interpretation.

'The learned counsel for the petitioner distinguished a series of decisions rendered by the Indian Supreme Court by reference to Article 356 of the Indian Constitution. He pointed out how the scheme of that Constitution was different and how finally the Indian Supreme Court came round to restore a dissolved Assembly dealt with by the High Court in S.R. Bommai and others v. Union of India and others (AIR 1990 Karnataka 5).

Taking up the grounds of dissolution one by one, the learned counsel pointed out the rule 25 of the Rules of Procedure and Conduct of Business in the National Assembly, 1992 and Article 64 of the Constitution dealing with the resignations of the members of the National Assembly. The decisions of this Court on the subject of 'resignation by the elected representatives' in Mr. A.K. Fazalul Quader Chaudhury v. Syed Shah Nawaz and 2 others (PLD 1966 SC 105) and Mirza Tahir Beg v. Syed Kausar Ali Shah and others (PLD 1976 SC 478) were referred to. In view of these Constitutional provisions the President could not have received these resignations at all muchless have acted on them for any purpose before they reached the Speaker. It was a wholly misconceived ground. The act of the President of receiving, entertaining and acting on such resignations of dissatisfied Members of the National Assembly shifted the venue constitutionally provided for showing no confidence, in the Government from the National Assembly to the Presidency and as is evident from a fortnight's antecedent press reports continuously appearing uncontradicted by the Presidency a lot of political confusion and destabilisation of the established Government went with it. He has extensively referred to the performance of Council of Common interests and National Economic Council to show that no such Constitutional impediment came into existence which could not be readily and immediately solved by resort to Constitutional remedies provided. As regards -the grounds of maladministration and the political victimisation, these are not the type of Constitutional problems as held in the case of Haji Muhammad Saifullah Khan PLD 1989 SC 166 which could justify the dissolution or be made a ground for dissolution. The proper course' in

all these matters was and always is to go to the Constitutional and statutory bodies like the Parliament, the Courts and the Press for redress rather than obtain and justify dissolution of the established Government of the country. The allegations made in the Press which remain undecided in Court of law in accordance with the prescribed procedure could not have at all found mention but, it appears from the dissolution order that the President had been entertaining all sorts of information appearing in the press or otherwise received by him and unjustifiably those have been made the basis for forming an opinion giving the harsh Constitutional treatment to an established Government enjoying the support of the majority of the people.

Finally, the Prime Minister has been held guilty of subversion which is in fact high treason according to our law. Such an indictment and verdict given in a Constitutional document is a political career killer. Such a finding could F only be recorded after a judicial pronouncement and not in an executive and political instrument made out under Article 58(2)(b) of the Constitution.

The learned counsel for the petitioner has taken us to the Press reports continuously appearing in the press and remaining uncontradicted from any official quarter which destabilised the established Government of the petitioner and they were traceable directly or indirectly and made specific mention of the Presidency.

Dr. Farooq Hassan, Advocate, the learned counsel representing petitioner in Constitution Petition No. 12 of 1993 contended that once a session of the National Assembly was convened under Article 54(3) of the Constitution as was done in this case, the power of the President under Article 58(2)(b) of the Constitution became dormant and only the Speaker could prorogue the session. He pointed to a diagnostic test for invocation of Article 58(2)(b) of the Constitution, that is prior exhausting of all the Constitutional options open to the President so as to demonstrate that it was still necessary to approach the electorate for giving a fresh mandate. Where the breakdown of the Constitutional machinery had not taken place nor ‘an appeal to the electorate was necessary, the exercise of power under Article 58(2)(b) of the Constitution was unconstitutional.

The learned counsel further contended that in such an exercise of Constitutional power it was not for the petitioner to prove positive malice in the exercise of it. On the contrary, it is for the repository of power to satisfy the Court that it was an honest and fair exercise of the power and it was a Constitutional requirement. According to him the Fundamental Right contained in Article 17 is dynamic, evolving, growing concept and the Courts have a duty to give the fullest -effect to it and read the other provisions of the Constitution as protecting, advancing and strengthening that right rather than curtailing, negating or stopping it at any particular stage. The Constitutional provisions which allow a life of rive years to the National Assembly and entitle the leader of the majority party to claim installation as Prime Minister of the country as of right under the

Constitution should be read as an extended entrenchment of that Fundamental Right and not outside and beyond the pale of such Fundamental Right.

All conflicts between the Constitutional functionaries have to be resolved by reference to the Constitutional provisions. He has by reference to the various Articles of the Constitution pointed out that there is adequate provision in our Constitution f6r'rccohsideration of a matter where the functionaries differ. The reconsideration of the Prime Minister is provided for in Article 48(1), proviso, by the Cabinet in Article 40(c) and by the legislature in Article 75 of the Constitution. Besides there is provision for advisory opinion from the Court under Article 186. There is also provision, for a Referendum in Article 48(6) at the discretion of either of these functionaries. This mechanism of the Constitution ensures a smooth resolution of all the conflicts and in the process education to the people, the ultimate sovereign in politics, with a view to achieve the Constitutional goals.

The learned Attorney-General in 'reply contended that the President should have received at all hands a more dignified treatment and reference than was done in the speech of the Prime Minister on 17-4-1993, in the grounds taken up in the petition and in the arguments addressed and in the post dissolution public meetings. According to him, the President represents the unity of the State. He represents the State of Pakistan and every action under 'Article 99 of the Constitution has to be taken in his name. An exceptional power was exercised by the President ' in dissolving the National Assembly under Article 58(2)(b) of the Constitution. He had the necessary material and applied his mind to the fullest. The nexus between the grounds and the action taken existed. The adequacy or the sufficiency of the material is not justiciable in Courts. The President had formed his opinion objectively and all the attending circumstances clearly showed that the Government could not be carried on in accordance with the Constitution and such an order was necessary. The impugned. action was in accord with the oath of the President, his Constitutional obligation, and was a necessary requirement of 'the situation.

Before considering the merits of the arguments addressed before us, it is necessary to clear certain factual aspects of the case. For this, the version of the petitioner as put forth in the petition and the reply of the respondent to it has been placed hereunder in juxtaposition preferably in the words used by each:--

Petitioner's case:

(1) 1 "All the progress made ordinarily should have pleased the President. But this did not happen. 'Apparently this progress without direct participation of the President in policy-making and decision-making, displeased the President'. Notwithstanding the arrangement regarding the

administration of the affairs of the Federation as stated in Article 48(l) and the entitlement of the President mentioned as per Art.46 of the Constitution, 'the President started interfering in ordinary and routine affairs'. This was calculated to undermine the authority and credibility of the Federal Cabinet and to give the impression that what actually matters in the national affairs is the will of the President and not the people and their elected Government."

Reply of the respondent:

"Argument regarding any conflict of views regarding Article 48(l) and Article 40 of the Constitution between the petitioner and the President is denied. In view of the provisions of Article 48(4), the subject of advice cannot be inquired into by the Honorable Court. It is denied that the President interfered in any matter in violation of the Constitution as alleged. It is denied that there was any intent on the part of the President to undermine the authority and credibility of the Federal Government to give the impression that the will of the President was to prevail."

. Petitioner's case: '

(2) "In the circumstances an in depth discussion took place within the Ruling Party about the advisability of amending some Articles of the 8th Amendment of the Constitution. This fact it appears, to have further displeased the President and he apparently drew the conclusion that this was the first step covertly taken to remove him from office of the President. As such was not the intention of the Ruling Party, it met to allay the fears of the President and openly declared that it would back the President for a second term."

Reply of the respondent:

"The President is not aware of any views or discussion within the party of the petitioner about the 8th Amendment as alleged and therefore the averment about the same having displeased the President is also incorrect. It is denied that the President drew any conclusion about his own removal as alleged. The declaration of the petitioner's party backing the President for second term is its own unilateral and voluntary act and the President never made any request in this behalf, The petitioner has drawn his own unwarranted inferences about the President on the question of 8th Amendment. On the other hand, the President made a public statement that the Constitution could be amended in accordance with the provisions of the constitution."

Petitioner'. Case:

(3) "But much to the surprise of the Ruling Party this firm promise was construed as a total surrender and the President who in total deplane of the terms and spirit of Article 41(l) and of the oath of his office openly and vigorously started entertaining and supporting persons hostile to the present Government, who were scheming and working to destabilise the elected Government. That regular campaign based on baseless stories was launched in a very organised manner. The bits and pieces of disinformation to feed the propaganda campaign clearly pointed in the direction of the Presidency."

Reply of the respondent:

'.'It is denied that the President entertained or supported persons hostile to the Government who were allegedly scheming and working against the Government as 'alleged. The very existence of such persons is not within the knowledge of the President and is emphatically denied."

Petitioner's case:

(4) "All the newspapers were full of speculations about the imminent fall of petitioner's Government being engineered by the President."

Reply of the respondent:

"The allegations made in para. 6 are denied. The respondent is not responsible for speculations in the newspapers since the press is free."

Petitioner's case:

(5) "That the people and particularly those who opposed the elected Government were entertained in large numbers. Quite a few of them on coming out after their meetings with the President made public statements that President would shortly announce dismissal of the Federal Government headed by the petitioner. Such statements were never contradicted by the President or by anybody on his behalf. In fact, many a politician rejected by voters or discredited in public eye started a chorus about imminent dismissal of the petitioner's Government. The President had started telling even members of Cabinet that they should join hands with him to bring about fall of the petitioner and the current campaign Would cease." -

Reply of the respondent:

"The President is not responsible for the statements made by other persons nor is it the tradition of the President to issue contradictions from the Presidency. In conformity with his Oath of Office, the President is fully entitled to and grants interviews to all persons and public representatives and his action in meeting the people is his normal function as Head of the State and the same has been misconstrued by the petitioner-who is under an illusion that the President is not free to meet people. It is denied that the President asked any member of the Cabinet to act against-the petitioner."

Petitioner's case,

(6) "That on 14-4-1993 the petitioner met the President to once again clear the atmosphere of distrust and allay the hostilities which could jeopardize the democratic process in the country. Contrary to the discussion and apparent consensus, the Presidency issued a Press Release which was calculated to increase the tension and provide some justification for the final step taken, i.e. dismissal of the elected Government and the National Assembly."

The petitioner's perception of what transpired on 14-4-1993 is as hereunder as per draft prepared but not issued which draft was extensively utilised by the learned Attorney-General for Pakistan:--

"The Prime Minister, Mr. Muhammad Nawaz Sharif today called on the President, Mr. Ghulam Ishaq Khan at the Aiwan-e-Sadar. During the two-hour meeting, the President and the Prime Minister went into the causes of the prevalent political situation in the country and it was agreed that necessary measures would be taken to defuse it.

Referring to speculations, discussions and debate on the 8th Amendment, the Prime Minister informed the President that the issue was well behind us. He said the recent statement of three Federal Ministers in this behalf fully reflected his own views.

Discussing the various policies and programmes of the Government, the Prime Minister said he valued the President's guidance and counsel and looked forward to his continued advice at various stages of their formulation and implementation. It was agreed to bring about improvements in the functioning of Me Government, wherever necessary.

It was also agreed that such meetings and consultations will be held more frequently to ward off speculations and avoid misunderstanding,.

The two agreed that efforts should be made. to win back friends and colleagues who have IL , the Cabinet as a result of misunderstanding and differences They hoped that most of them will be back before long.

Federal Ministers, Lt.-Gen. (Retd.) Abdul Majeed Malik and Mr. Illahi Bakhsh Soomro the President and the Prime minister at a later stage of the meeting,"

Reply of the respondent

Adverse allegations and insinuations made in para. 8 are denied and the same have been commented upon hereinafter'

"The Prime Minister called on the President today and they reviewed the grave and pressing national and international problems facing the country. The meeting lasted for about two hours.

The President urged the Prime Minister to undertake positive steps as early as possible to address effectively these problems to the satisfaction of the public representatives and the people. The Prime Minister undertook to do so on an urgent basis and to revert to the President with precise measures in this behalf."

Petitioner case:

it became necessary for the petitioner to take the nation into confidence about the factors which had led to the tense political atmosphere which had brought national activities to a standstill. The petitioner addressed the nation on 17-4-1993."

Reply of the respondent

Adverse allegations and insinuations in para. 9 are denied. The -speech of the petitioner dated 17-4-199.3 was unjustified and has been replied to hereinafter."

Petitioner case:-

(8) "on 18-4-1993 the members of the National Assembly requisitioned a session of the National Assembly to, inter alia, consider the Press Release, of the President of 14-4-1993, the speech of the Prime Minister and the problems facing the Nation. The session was fixed by the Speaker for 19-4-IW3 at 5 p.m.

However on 18-4-1993 to forestall such a move and consideration by the questions by the National Assembly the President dismissed the National Assembly by the impugned order dated 18-4-1993 riled as Annexure. It is submitted that the said impugned order is mala ride, unlawful, arbitrary, mechanical, violative of the rules of natural justice and the provisions of the Constitution."

Reply of the respondent.-

"Adverse allegations and insinuations in para. 10 are denied. The President Was totally unaware of the requisitioning of the Session on 18-4-1993 and the purpose for which the same was called. In any cast, the contents of this para. have been replied to hereinafter.

Adverse allegations and insinuations in para. 11 are denied. It is submitted that the order dated 18-4-1993 was passed by the President after consideration of the facts/documents/records/information before him and after forming an objective opinion that the Government of the Federation could not and cannot be carried on in accordance with the provisions of the Constitution. The said order is wholly Constitutional."

Petitioner's case-

(9) "As the petition contains several allegations of malice in fact, the President has been joined as a respondent as, per rule laid down by the Supreme Court in PLD 19% SC I(Y)2 at p. 1150. No notice under Article 248(4) is necessary because the malice complained of is in the official capacity of the President."

Reply of the respondent

"Adverse allegations made in para. 12 are denied. There is Constitutional bar on impleading the President in the petition, in view of the provisions of Article 248 and any averment to the contrary is denied. No process can be issued to the President by the -Hon'ble Court."

The speech o ' f the Prime Minister flashed on electronic media -Television and Radio on 17-4-093 and that of the President on 18-4-1993, were addressed to the Nation and were both in Urdu. In order to keep their originality and thrust intact, the constitutionally important and relevant portions of it, repeatedly quoted during the course of the argument arc being reproduced- verbatim. No translation at this stage has been attempted.

The portions of the speech of the Prime Minister dated 17-4-1993 which received particular attention at the argument stage are listed hereunder:

Part I of the Const. P. 8 of 1993

(1) Address of the President to the Joint Session of Parliament on 22-12-1992 (pages 31 to 42);

(2) Address of the President to the Joint Session of parliament on 19-12-1992 (pages 43 to 55);

(3) Performance of Government of the petitioner (pages 78 to 82);,

Part 11 of the Const.-L8 of 1993

(1) Paper clippings of Newspapers from December, 1992 to the end of'

March, 1993 (pages I to 220).

Part II of the Rejoinder to the Written Statement:

(1) Judgment dated 16-11-1992 and order dated 8/10-3-1993 passed in Civil Appeal No. 131-K of 1987 and the documents submitted in the Civil Appeal reflecting on the Privatisation of Industries (Annexure IA and Annexure I to IV);

(2) Extract from the World Bank Report (Annexure V);

(3) Comparative statement of References and Sale Prices (Annexure VI);

(4) Reply to the President's letter sent to the Finance Division through Cabinet Secretariat, dated 10-2-1992 (Annexure VII);

(5) Revised Prices Chart (Annexure VIII);

(6) Note on fixation of Reference Prices (Annexure IX);

(7) Sample of 0ctober Bidding (Annexure X);

(8) Sample of Open Bidding (Annexure XI);

(9) List of Buyers (Annexure XII);

(10) List of Cement Plants sold alongwith Buyers' names (Annexure XIII);

(11) Analysis and evaluation of deficit Financing (pages 190 to 197);

(12) Impact of Nawaz Sliaril's Economic policies (pages 198 to 200);

(13) Comments on the remarks of President of Pakistan speech about Foreign Direct investment (pages 201 to 200);

(14) Press Clippings from March, 1993 to May, 1993 on economic progress and investment and on the basis of it foreign investment (pages 207 to 213);

15) A note of evaluation of Privatizatiran process (pages 214 to 219);

(16) Press Clippings showing the active role of the Presidency in obtaining resignations from the Ministers and the MPAs thereby politically destabilising the Government (pages 220 to 265).

The following material of antecedent date to the impugned action, made available by the respondent, deserves mention:--

Volume If of file containing Annexure A to A-12 (except A-6 and A-7) and Annexure B to T

(1) The Resignations of MNAs totaling 88 (pages 10 to 122);

(2) Press Release from the Aiwan-e-Sadar dated 14-4-1993 with regard to them meeting between the President and the Prime Minister (page 124);

The Draft prepared by the Prime Minister's Secretariat of the same meeting but not issued (page 125);

(4)- Press Clippings of the advice and the guidance afforded by the President to the Prime Minister in the matter of running the Government properly (pages 126 to 132);

(5) President Secretariat's letter dated 28-12-1992 to the Cabinet Division desiring that the Constitutional position as summarised in the Annexure to the letter may be brought to the notice of the Government (pages 133 to 137). The Annexure contained the following conclusion at page 137:--

"The setting up of the two Privatization Commissions and the whole process of privatization, unilaterally initiated by the Federal Government, bypassing the Council of Common Interests and the NEC, appear to be ultra vires of the Constitution and, can be challenged in superior Courts."

(6) Letter of the President Secretariat dated 19-12-1992 addressed to the Cabinet Secretary containing the remarks of the President that the notes on the Cabinet Committee on Energy should be brought to the notice of the concerned Authorities' alongwith minutes of the meeting (pages 138 to 140) containing the- following minutes:--

"The Provinces, which are directly concerned with such an important sector of the economy viz. energy,- and are directly affected by any policy change in it, have been completely excluded from participating in the process of approval of operational plans, proposals, schemes and projects relating to this sector. Even otherwise, the Constitution does not envisage such a situation inasmuch as the Council of Common Interests, where all the Provinces are represented has to formulate and regulate policies in relation to WAPDA, as per Article 153."

(7) List of total Ordinances issued and referred/not referred to Cabinet during December, 19W to 18-4-1993 (pages 141 to 145), the abstract showing the total Ordinances issued during this period was 78, Ordinances referred to Cabinet were 50 and not referred to the Cabinet Were 28. The detail shows that 50 Ordinances were approved by the Cabinet and 28 not approved by the Cabinet and not that they were not placed before the Cabinet;

(8) Harassment of Journalists and Sedition case against "The News", complaints and Press clippings relating thereto (pages 146 to 184);

(9) Reference filed by Mr. Abdul Rashid Qurcshi, Advocate with the Speaker, National Assembly under Article 63(2) of the Constitution directed against Ittefaq Group of Companies and through it against the petitioner (pages 185 to 191.);

(10) President's remarks conveyed to the Prime Minister on 17-11-1992 on the Corporate Restructuring, System Expansion and Future Plans of Sui Northern Gas Pipelines Ltd. (Disinvestment of Government Shares in SNGPL). The remarks of the President are "Monetary expansion and Inflation are the real problems. They must be addressed urgently before they and they are facets of the same coin -get out of hand" (pages 192 and 193);

(11) Irregular Appointments/Promotion cases listed on pages 194 to 220;

(12) Press Clippings reproducing the complaint of the widow of late General Asif Nawaz that her husband was poisoned (pages 227 to 229);

(13) Press Clippings showing how frequently between October, 1992 and March, 1993 the National Assembly could not function for want of quorum (pages 254 to 275);

(14) Press Clippings containing newspaper comments and comments of the Opposition Leaders with regard to the 12th Amendment and the victimisation of the Opposition - 31 pages (pages 276 to 306);

(15) List containing 12 cages of the President's Observations on Irregularities/Lapses on the part of Federal Government, Detail extending over 105 pages (pages 307 to 410).

(i) The First case is of 29-4-1992 and complains of Minister's jurisdiction over the Tribal Areas which was denied by saying that no political interference is expected in these areas and the Prime Minister was cautioned in the following words:--

It would be noticed that this act of the Minister is not only violative of policy but also amounts to undue interference in the tribal matters which is not acceptable. Such acts should not go unnoticed because they are likely to create misunderstanding and disaffection amongst the tribal elders on the one hand and the Governor and his political administration on the other. Distribution of patronage in this blatant manner is also likely to create a rift between various tribes and different parts of tribal areas. Matters relating to tribal areas and individuals have to be very carefully and responsibly handled for which the Constitutional and institutional arrangements

must be followed in letter and spirit.

The President requests that the Prime Minister may initiate appropriate measures to correct this situation."

(ii) Another note is dated 19-11-1992 in respect of FATA Administration of Balochistan, wherein the President observed as hereunder---

"P.M. orders the setting up, of a Committee (suggested composition attached) to enquire into the whole affair or pass other appropriate order in the case to rectify the wrong being done to FATA through a gross misuse of authority."

(iii) Islamabad Motorway Project-- Report called for from Secretary Communications on- the basis of complaints, appearing in two newspapers of. last week of January, 1992. Report was furnished.

(iv) On a reported delay in supply of electric water pumps to Zimbabwe and sewing machines to Zambia and Namibia under the Africa Fund Programme, the President passed in his own hand the following orders---

"We are not the monitors of such day to day executive routine. The suggested administration and instructions should issue from the Prime Minister's office who should also know -- and a copy of the foregoing note be sent to them -- how efficiently the system of administration is functioning and what attention is being paid to matters of daily routine involving hardly any (not legible) exercise."

(v) A caution was communicated to the Prime Minister by the President on 19-12-1992 on the subject of visit of Tribal Maliks to Kabul on 16th May, 1992, in the following words:--

"I hope that those who encourage and helped the "adventure" will be more careful and circumspect in future."

(vi) The question of deficit of Universities when placed before the President was ordered to be taken to the Cabinet for thorough discussion and appropriate decision on 13-9-1992;

by the President Secretariat on 13th April, 1993 enquiring under what provision of Constitution and law a notification shifting the Supreme Court's seat from Rawalpindi to Islamabad was issued without the President's prior approval;

(viii) The Prime Minister's summary on the administrative set-up of Islamabad Capital Territory submitted to the President on 24110-1991 which was returned by the President with the following remarks on 6th of May, 1992:--

"The changes, effected in the administrative set-up of the Islamabad Capital Territory in September 1991, carried serious legal and administrative implications some of which had been highlighted by the President's Secretariat through U.0. No. 3012/202/26/Coord-11, dated 22-10-1991 (Annex-V). In the meanwhile, the present proposal of the Ministry of Interior was received which aims at introducing major changes but without explaining the justification or necessity for doing so. On the initiative of the Prime Minister's Secretariat, a meeting was held between the Secretary to the President, Principal Secretary to the Prime Minister and Secretary Interior on 10-3-1992 in order to unanimously resolve the issues involved. A copy of the minutes of this meeting are at Annexure VI.

In the light of the views -expressed at the meeting, it is proposed that the original administrative arrangement for the Islamabad Capital Territory under Chief Commissioner may continue, as before."

(ix) On 22-12-1991, the Prime Minister's Secretariat was asked to explain . to the President's Secretariat the following:--

10(a) How was ICT declared as an Attached Department of Interior Division without prior approval of the President?

(b) Under what authority of law, is the administration of ICT being run in the absence of an officer authorised by the President?"

(16) President's observations on Privatisation of State-owned enterprises -the addresses are Finance Minister and the Cabinet Secretary;

(17) The Chief Minister of Sindh addresses a letter to the President on 21-3-1993 for proper representation of the Province in Energy, Highway and Telecommunications decision-making authorities in order to truly reflects.

(18) Letter of Chief Minister of'N.-W.F.P. dated 9-1-1993 on the same subject;

(19) Press clippings with regard to 8th Ameqdmznt, Privatisation and other complaints against the functioning of the Government (pages, 467 to 489);

(20) Salman Taaseer's Petition under Article 63(2) of the Constitution riled with the Speaker on 25-1- 1 W2 (pages 490 to 490);

(21) Another. petition under the same law by Mr. Farooq Ahmed akbari addressed to the Speaker dated 11-1-1992 (pages 497 to 500);

(22) Third Petition under the same law by Mr. Abdur Rashid Quresh Advocate, dated 11 - I - 1992 (pages 501 to 503);

(23) Favouritism shown to Mr. Gohar Ayyub Khan, Speaker -- prepared after the dissolution order (pages 504 to 516);

(24) Expenditure by the Ex-Prime Minister incurred in excess of his Discretionary grant by drawing upon budgetary allocation of other Ministries, Organizations etc.

(25) Press clippings of 18-4-1993 mostly by individuals opposed to the Prime Minister (pages 599 to 613);

(26) On 12th April, 1993, on the appointment of Judicial Commission of Inquiry on the allegations levelled by Begurn Nuzhat Asif Nawaz widow of late COAS General Asif Nawaz, the following communication was received from the Presidency in the Prime Minister's Secretariat:--

"Kindly refer to the 'attached press clipping from the daily "News", dated 12th April, 1993 regarding serious allegations levelled by Begum Nuzhat Nawaz widow of late General Asif Nawaz.

I am directed by the President to request you to please appoint a High Level Judicial Commission consisting of Judges of the Supreme Court and High Court to enquire into the allegations at priority and submit a report alongwith their recommendations.

16 the meanwhile immediate. interim measures may have to be taken in respect of the two persons named by the lady as regards the functions of their office."

(2:7) Reply to this letter by the Principal Secretary to the Prime Minister dated 13-4-1993 in the following words:--

"Kindly refer to President Secretariat (Public) U.0. No.5(7)/ PS/Legal/93, dated 12th April, 1993 on the subject noted above. The U.0. note was received by PSO to Principal Secretary at around 10 p.m. on 12th April, 1993 and the 9 p.m. News Bulletin had already announced the issue of notification by the Ministry of Law, Justice and Parliamentary Affairs regarding the appointment by the Prime Minister of a Commission of Inquiry comprising three Judges of Supreme Court. It would be seen that the Prime Minister has taken immediate suo motu cognizance of the allegations and appointed a Commission of Inquiry promptly. A copy of the notification is enclosed.

Regarding para. 3 of the U.0. note, it is not clear as to what action is envisaged to be taken by this Secretariat "in respect of the two persons named by the lady as regards the functions of their office" in anticipation of a judicial verdict on the authenticity or otherwise of the allegations. It will be seen that in accordance with clause (b) of para. 2 of the notification the Commission is required to

identify the person or persons responsible for the mischief if the cause of death was other than natural. The Government will take prompt action against the persons, if so named by the Commission, in accordance with the law."

Volume III of rile containing Annexure A-7

(1) Interview of the ousted Prime Minister appearing in monthly 'Herald in, May, 1993;

(2) Charge-sheet/References against Nawaz Sharif and the Government prepared by the Combined Opposition Parties;

(3) 'Allegations against the relatives of the Prime Minister;

(4) Complaints of harassment of journalists;

(5) Plan for the privatisation of WAPDA; Decision of the Cabinet Committee on Privatisation;

Decisions of. the Cabinet meeting held on 6th of April, 1991 in the Prime Minister's Secretariat;

(7) A working paper on Pakistan Telecommunication Corporation,_

(8) Privatisation of Muslim Commercial Bank;

(9) Development in and around Raiwind;

(10) Permission to new Commercial Banks;

(11) Levy of customs duty on shredded and bundled waste and scrap.

Volume IV of rile containing Annexure A-6

(1) Press clippings about performance of the petitioner's Government and the charges against it, during the period 1991- 1993 (193 pages).

Though at times documents and events of dates after 18-4-1993 have been mentioned or included in the list we have in considering the case totally excluded these because they raise no Constitutional question but rather deal with the matters political and administrative and on no principle of interpretation can be utilised for interpreting the events of earlier date which raise and deserve purely Constitutional and legal consideration on merits.

When the learned Attorney-General had concluded giving us the outline of his argument I asked him to also look up the following four Constitutional points because from the material brought on record it appeared that these questions may also require fuller consideration. These questions were disclosed to the parties in order to obtain proper assistance from them and to give authoritative pronouncement if at all necessary.

(i) I Whether the use of the expression dismissal for the Prime Minister and for the Cabinet and the expression of the conclusion "in any case the speech and his conduct amounts to subversion of the Constitution", in the dissolution order passed under Article 58(2)(b) of the Constitution did not amount to violation of the first part of Fundamental Right 14 which guarantees in Pakistan that the dignity of man shall be inviolable?

(ii) What was the design and object of the receiving, retaining and utilising such a large number of resignations collect-d in the Presidency? Was it, as required under Rule 25 of the Rules of

Procedure and Conduct of Business in the National Assembly, -1992, intended to be relinquishment of the office by elected representatives then or were intended to register a protest with the President for taking appropriate action against- the Leader of the House. In either case how was the partisanship of the Speaker at all relevant to non-tendering and nontransmission of such resignations to him.

(iii) Under the Constitutional provisions Article 243(2)(c) as it stands after 8th Amendment is it discretionary for the President to appoint only the Chairman of the Joint Chiefs of Staff Committee or is it equally in his discretion to appoint the other Chiefs of the Army-Staff, Naval Staff and of the Air Staff.

(,iv) Whether in the matter of the enforcement of Fundamental Rights under Article 184(3) of the Constitution, this Court has any discretion in the grant of relief or the relief follows as a matter of course ex debito justiiae.

These specific questions were put to the learned Attorney-General to satisfy the salutary principle underlying the statutory provision, contained in proviso to Rule 2 of Order XLI of the Code of Civil Procedure, 1%)8. Additionally, for the reason that the constraints of adversary litigation do not 6 inhibit the Court in the matter of enforcement of Fundamental Rights.
propose to preface the judgment with two observations of my own which are relevant in the context of our Constitutional history and these observations in fact control and pervade what follows in this judgment. These may appear to be didactic, ponderous and trite but being a part of the oath of all Constitutional functionaries should form a foundation of our thoughts, actions and attitude in all our exertions on Constitutional and political matters.

The first is the misfortune that our Constitutions have ,not evoked that commitment, respect, regard and attention even from the Constitutional authorities and statutory functionaries which they deserve, and which, in any other independent country, they receive. Our Constitutions have been abrogated, held in abeyance for periods longer than promised and have been massively deviated from. For the present our Constitution itself requires and commands that obedience to the Constitution and law is obligation-of every citizen wherever he may be and of every other person for the time being within Pakistan (Article 5(2)1:

Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force .or show of force or by other unconstitutional means shall be guilty of high treason (Article 6 of the Constitution). The Parliament is to provide by law

punishments of persons found guilty of high treason. While guaranteeing protection against retrospective punishment, the Constitution, - under Article 12, makes an exception of the laws making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty third day of March, one thousand nine hundred and fifty-six an offence. Act LXVIII of 1973 (High Treason (Punishment) Act, 1973) was enforced on 29-9-1973. It provides as hereunder:-

1. Punishment for high treason. etc .---A person who is found guilty-

(a) of having committed an act of abrogation or subversion of Constitution in force in Pakistan at any time since the twenty-third day of March, 1956; or

(b) of high treason as defined in Article 6 of the Constitution,

shall be punishable with death or imprisonment for life.

3. Procedure.---No Court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by a person authorised by the Federal Government in this behalf."

In Corpus Juris Secundum (Volume 87) on the subject of "Treason" the following observations occur with regard to the nature and elements of the offence:--

"Treason is regarded as the highest crime known to the law and is the most serious offence that may be committed against the United States. Our enquiries made from the Federal Government reveal that though the Constitution was framed in 1973 and the Parliament also discharged its

duty on 29-9-1973 by framing the requisite law on the subject, in terms of section 3 of the High Treason (Punishment) Act, 1973, the Federal Government has not so far designated the authorised person on whose complaint such an offence can be taken cognizance of by the Courts. The failure here is not of the Constitution, not of the Parliament but of the executive Government and that too since 1973 of not giving a salutary Constitutional provision a meaningful content and operational mechanism, thereby frustrating it altogether.

The other observation with which I want to preface what follows in the judgment are three rules of interpretation peculiar to the Constitution J distinguishing it from every other instrument. These principles stand recognised in all countries having written Constitutions. The first principle V1 interpretation was expressed tersely in Paul M. Swcezy v. State of New Hampshire by Louis C. Wyman, Attorney-General (354 US 234 = 1 L ed 2d 1311 = 77 S Ct 1203), in the following words:--

"While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning. See Hurtado v. California (110 US 516, 528, 529 = 28 L ed 2321 236 = 4 S Ct 111, 292; M'Culloch v. Maryland (US) 4 Wheat 316, 4 L ed 579)."

The second principle which need not be supported by any authority is that the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This Is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.

The third principle equally entrenched is that the words of the written Constitution prevail over all unwritten Conventions, Precedents and Practices.

What judgment and value has to be brought to bear on the Constitutional provisions has been well-expressed in the following words in Chapter 19 "Logic, Experience and Intuition", in "A New World of Law" by C. Wilfred Jenks (1961)), as hereunder:- (Underlining throughout the judgment is ours for emphasizing the portions underlined):

"in the evaluation of facts, logic, experience and intuitions of public policy play mutually complementary patios. Without logic the law would be wholly at large, at the mercy of every gust of chance and M favour; without experience, without clear intuitions of public policy, the consistency of concepts would exact too high a price of inconsistency with history, practical convenience and the welfare of society. The logic of law is the discipline which gives it such form and consistency as it may attain at successive stages of its development. Experience is the rich inheritance of its past development. Neither logic nor experience affords a sufficient, nor sometimes a relevant, IM answer to essentially new problems. To resolve such problems we must have recourse to the deeper recesses of the mind, The facts define the problem. Neither they nor logic can solve it, Imagination furnishes an answer. The answer must be reconcilable with the facts and defensible in logic. but the test of its relevance and adequacy, neither the facts nor logic but purposes and values,"

Coming to the merits of the dissolution order the first ground mentioned therein is as hereunder:--

"The mass resignation of the Members of the Opposition and of considerable numbers from the Treasury Benches, including several Ministers, inter alia, showing their desire to seek fresh mandate from the people have resulted in the Government of the Federation and the National Assembly losing the confidence of the people, and that the dissension therein, has nullified its mandate."

The questions for consideration are whether in a Constitution like ours the most resignations of the Members of the Opposition and of considerable number's from the Treasury Benches, including several Ministers showing their desire to seek fresh mandate from the people is indicative of loss of the confidence of the people of the Pakistan in the National Assembly, whether the differences within the party nullify the mandate of the majority party to run the Government, and finally whether these considerations are at all relevant, can be taken into consideration, outside the procedure prescribed in the Constitution for showing lack of confidence in the Government and in the Assembly, and for taking action under Article 58(2)(b) of the Constitution.

Resignation from a public office has a very definite connotation, In Black's Law Dictionary, it has been defined as "Formal renouncement or relinquishment of an office. It must be made with intention of relinquishing the office accompanied by act of relinquishment." In Article 64 of the constitution resignation has been provided for in the following words-.--

"64. Vacation of scats.--(l) A member of Majlis-e-Shoora (Parliament) may by writing under his hand addressed to the Speaker or, as the case may be, the Chairman, resign his seat, and thereupon his seat shall become vacant.

(2) A House may declare the scat of a member vacant if, without leave of the House, he remains absent for forty consecutive days of its sittings."

In two decisions of this Court the question of resignation by elected officeholders was considered.

In the case of Mr. A.K. Fazialul Quader Chaudhury v. Syed Shah Nawaz and 2 others (PLD 1966 SC 105), it was held that not only is the resignation required to be addressed to the Speaker but that it should be intended to be passed on to the Speaker of the Assembly. Pivotal role which the Speaker plays in such a matter and the sanctitv of the elected office was further made clear in the case of Mirza Tahir Beg v. Syed Kausar Ali Shah and others (PLD 1976 SC 504) in the following words:--

"Needless to say that the Speaker in a Parliamentary form of Government holds an office of highest distinction and has the sole responsibility cast on him of maintaining the prestige and the dignity of the House and each and every member composing the House. It is precisely for this reason that the Constitution has ordained that a resignation by a member is effective only when it is 'addressed' to the Speaker: it was not intended to be an idle formality. To relinquish a Parliamentary seat by resignation is a grave and a solemn act, By and large our political institutions are fashioned on the pattern of those obtaining in England and it is a settled principle of parliamentary law in England that a member of Parliament after he is duly chose, cannot relinquish his scat by unilaterally resigning his membership. In order to evade this restriction a member who wishes to relinquish his scat, accepts office under the Crown which legally vacates his seat. This is enough to underline the gravity of the matter. (See May's Parliamentary Practice, 18th Edn., p. 45)

On 5th August, 1992, National Assembly of Pakistan framed its own Rules of Procedure and Conduct of Business in the National Assembly under Article 67(1) of the Constitution. Rule 25 comprehensively deals with the matter of resignation, which read with Article 64 and the two decisions of this Court completely cover the law on the subject.

"25. Resignation of seat.--(1) A member may, by writing under his hand addressed to the Speaker resign his scat.

(2) If, --

(a) a member hands over the letter of resignation to the Speaker personally and informs him that the resignation is voluntary and genuine and the, Speaker has no information or knowledge to the contrary; or the Speaker receives the letter of resignation by any other means and

(b) he, after such inquiry as he thinks fit, either himself or through the National Assembly Secretariat or through any other agency is satisfied that the resignation is voluntary and genuine,

the Speaker shall inform the Assembly of the resignation:

Provided that if a member resigns his seat, when the Assembly is not in session, the Speaker shall direct that intimation of his resignation specifying the date of resignation be given to every member immediately.

(3) The Secretary -General shall, after the Speaker satisfies himself that the letter of resignation is voluntary and genuine, cause to be published in the Gazatte a notification to the effect that the member has resigned his seat and forward a copy of the notification to the Chief Election Commissioner for taking steps to fill the vacancy thus caused.

(4) The date of resignation of a member shall be the date specified in writing by which he has resigned or if no date is specified therein the date of receipt of such a writing by the Speaker."

Some of the features of the eighty-eight resignations, copies of which have been riled in Court, to be particularly noted and relevant for these proceedings are as hereunder:

(i) Most of the resignations are undated, even though some have date

(ii) All of them, except one, are addressed . to the Speaker of the National Assembly.

(iii) None of them expresses or shows, otherwise lack of confidence in the Speaker.

(iv) Majority of the resignations do not give specific reasons for the resignation.

(v) Quite a few resignations mention resignation by way of protest. The, exact nature of protest, the person against whom it is directed remained undisclosed,

Some of the resignations from the National Assembly (Not as a Minister/Advisor etc.) which are relevant for determining any one of the following questions are reproduced verbatim:

(i) approximately the time when they were submitted;

(ii) the specific reason for their submission, personal inability, political inability, failure of their own party, or failure of any opposing party or of the party running the Government;

(iii) the resignations were submitted for vacating parliamentary seat or to

achieve any other collateral object;

(iv), resignations were improperly drawn up.

REPRODUMON OF SOME OF THE RESIGNATIONS

(1) "Mr. Speaker,

National Assembly,

Islamabad.

As the new Government is going ahead, with undemocratic actions and disqualification of Pakistan People's Party Leadership and elected Members, I hereby tender my resignation as member of National Assembly as mark of protest.

(2) "The Speaker National Assembly.

Letter of resignation.

(Sd.)

Syed Zafar Ali Shah,

NA 159."

On account of ' discriminatory traeatment against the leader of opposition, I hereby tender my resignation from the NA.

(Sd.)

Ch. Muhammad Niwaz, NA 84 Gujrat."

(3) "The Speaker National Assembly.

Letter of resignation.

Sir, ,

I tender resignation from my NA Seat on account of discrimination and atrocious treatment of the Leader of the Opposition.

(Sd.)

(Ch. Altaf Hussain)

NA 45-Jhelum(l).”

(4) “The Speaker,

National Assembly of Pakistan,

Islamabad.

Dear Sir,

I hereby tender my resignation from MY seat NA-9 Kohat as a mark of protest against high-handed and mala fide actions of the

Government.

Yours faithfully, (Sd.) IffikhaT Gllani:’

(5) ‘The Speaker,

National Assembly of Pakistan.

This is to inform you that I have hereby tendered my resignation as a protest against the high-handed and mala fide action of the Care. taker regime.

(Sd.) Makhdum Syed Faisal S. Hayat, NA 69, Jhang IV."

(6) "To

The Speaker, National Assembly of Pakistan, Islamabad.

Dear Sir,

I do not think that I can serve any useful purpose by remaining a member under the present political situation prevailing in the country. Hence I have decided to resign from my seat in the National Assembly. Please accept my resignation and oblige.

Yours sincerely,

(Sd.)

Sardar Dildar Ahmad Checma."

(7) To

The Speaker, National Assembly of Pakistan, Islamabad.

Dear Sir,

Under the present circumstances I do not think that I am serving any useful purpose in the National Assembly, hence I have decided to vacate my seat. Please accept my resignation.

Yours sincerely,

Sd.

Mian Zahid Sarfraz,

NA.64."

(8) "To

The Speaker, National Assembly of Pakistan, Islamabad.

Resignation from the membership of National Assembly.

Dear Sir,

I Syed Tanvir-ul-Hassan Gilani, Member National Assembly from Constituency N.A. 116 desire to resign from the membership of the National Assembly. National Assembly has lost the confidence of the People of Pakistan because of the Corrupt Government and the way the disinvestment has been carried out. Interference of the Federal Government the Provincial Autonomy, I feel that to continue as member of the National Assembly shall not be beneficial to the Nation. Kindly accept my resignation from National Assembly.

Thanks.

(9) "To

The Speaker of the National Assembly of Pakistan, Islamabad.

Yours sincerely

Syed Tunvir-ul-Hosan Gilani

NA. 116.'

At, Subject: My resignation from the National Assembly of Pakistan.

Dear Sir,

I represent Constituency No. NA 158 (Naushchra Feroze 1) in the National Assembly of Pakistan.

I was elected on the U.I. Ticket. I have been carefully watching the performance of Nawaz Sharif Government for the last 2-1/2 years This Government cannot claim any success or achievement in any field. The ever-increasing prices of the essential commodities deteriorating law and order, utter failure of the foreign policy, unemployment, corruption at the highest level, inflation, political victimisation, violation of the Constitution, favouritism, nepotism, gross financial indiscipline and deviation from the I-I.I. manifesto and the break-up of the I.J.1. leave me with no other option but to withdraw from the National Assembly.

Hence I do hereby tender my resignation as a member of the National Assembly of Pakistan.

(Sd.)

Ghulam Mustafa Jatoi"

(10) “The Speaker, National Assembly of Pakistan Islamabad.

Dear Sir,

(11) “The Speaker, National Assembly of Pakistan, Islamabad.

This is to inform you that I hereby resign from my seat as member National Assembly N.A.-160 Pakistan.

I was elected on I.J.1. Ticket and I.J.1. subsequently has’ disintegrated, and the present political condition in the country indicates that the Prime Minister has not lived up to the expectation of the electorate and does not command majority in the House.

I feel I am not justified to represent my Constituency under the

present circumstances.

I request you to please approve my resignation immediately.

Yours sincerely, (Sd.)

Ghulam Murtava Khan Jatoi. M.N.A.”

I hereby resign from my seat in the National Assembly under rule 64(l) of the Constitution of the Islamic Republic of Pakistan.

(Sd.) Mir Ha7ar Khan Bijarani," M.N.A.

NA 157, Jacobabad If."

(12) "The Speaker/Deputy Speaker, National Assembly of Pakistan, Islamabad.

Dear Sir,

I write this to inform you that I am resigning from my membership of the National Assembly in which I was elected in 1990 from NA-106.

This resignation may be accepted under the Rules of Conduct and Business of the House and the Constitution.

Kind regards.

(13) "To

The Speaker, National Assembly

of Pakistan.

Respected Sir,

M.N.A. NA 106

I Jam Mashooq Ali, Member, National Assembly of Pakistan (NA-181 Sangher If) from Sindh Province, hereby resign from my seat due to my personal reasons.

Kindly accept my resignation.

Yours sincerely,

(Sol.)

Sardar Asif Ahmad Ali,

Yours sincerely,

(Sd.)

Jam Mashooof Ali.'

(14) "My dear Mr. Speaker,

Under Article 04(l) of the Constitution of the Islamic Republic o Pakistan, I hereby submit my resignation from my National Assembly Seat N.A.-134, Rajanpur. Kindly forward it to the Chief Election Commissioner for necessary action.

Yours faithfully, (Sol.) Mir Balakh Sher Mazari.'

(15) "The Speaker,

National Assembly of Pakistan

Subject: Resignation

Under Article 64(l) of the Constitution of the Islamic Republic of Pakistan, I hereby resign my scat (N.A.-74, Gujranwala. 1) in the National Assembly of Pakistan.

(Sd.)

Hamid Nasir Chaltha."

(16) "Speaker, National Assembly of Pakistan, Islamabad.

Subject: Resignation from M.N.A.ship of Constituency N.A. 195

Dated 15-4-1993

In discharge of my duties assigned to me by the masses of my constituency, I feel regret, but justified to submit my resignation from my scat of the National Assembly on the following reasons:

The Government of Prime Minister Mian Nawaz Sharif has failed to achieve the mandate given to him because of its poor economic and administrative policies.

There exists no hope from the present Government of solving the deteriorating law and order situation of the country in general and Sindh in particular.

The Prime Minister did not solve his earlier made promises of solving problem like Education, Health and Underpayment of Sindh Urban.

In the light of above I submit my resignation from NA-195 and strongly demand you to dissolve the National Assembly and order for fresh election to fulfil your Constitutional responsibilities.

(Sd.)

Rchan Umer Farooqui, NA-195."

(17) "Rel No. WA/Reg. PD. 01 /93 dated 14-4-93

The Speaker,

National Assembly of Pakistan, Islamabad.

Subject: Resignation from MNAship of Constituency NA-196.

In discharge, of my duties assigned to me by the masses of my Constituency I 'feel regretted but justified to submit my resignation from my seat of the National Assembly on the following reasons:

The Government of the Prime Minister Mian Nawaz Sharif has failed to achieve the mandate given to him because of its poor economic and administrative policies.

There exists no hope from the present Government of solving the deteriorating law and order situation (if the country in general and of the Sindh in particular.

The Prime Minister did not solve his earlier made promises of solving' problems like Waterlogging, Education, Health and Unemployment of Sindh Urban.

In the light of above I submit my resignation from NA,196 and strongly demand you to dissolve the National Assembly and order for fresh electorate to fulfil your Constitutional responsibilities.

(Sd.)

Wasim Ahmed, NA-196."

The explanation given for submission of these resignations and their reception by the President of Pakistan appears in the written statement as hereunder:--

"It is submitted that it is for the members of the National Assembly to select the mode of showing their protest and lack of confidence in the petitioner's Government, National Assembly and the Speaker whether in or outside the House. In the instant case they have addressed their resignations to the Speaker of the National Assembly, but sent them to the President to register with the Head of the State their protest and as an expression of lack of confidence in the National Assembly, the Speaker and the Federal Government. The further reason was that the Speaker had not in the past acted upon any motion directed against the Prime Minister or any other Minister or member of the National Assembly supporting the Government or the Government itself and, as widely known, the concerned members had shown lack of confidence in the Speaker, who according to the general perception was in collusion with the former Prime Minister and was not acting independently. Speaker was getting preferential and special treatment in special allocation of funds for his constituency. As the Speaker's conduct was objectionable and open to question, the concerned MNAs sent their resignations to the President, so that their protest etc., expression of lack of confidence be properly registered. The circumstances, background and the factors responsible for the handing over of the resignations by the Members to the President are as above. It demonstrated that the said Members had lost confidence in the National Assembly, the Federal Government and the Speaker, and that the mandate had been nullified. It is further submitted that the Speaker has to receive resignations only for the purpose. of creating a vacancy and consequent by-elections. The circumstances in which the resignations were handed over to the President, have been mentioned above and the President could form his opinion in that behalf. Rest of the contentions arc repelled."

In the middle of the arguments the learned Attorney-General gave a written explanation for their submission to the President as hereunder:.;-

"The resignations, were submitted by responsible members of the National Assembly including the Leader of the Opposition, the former Prime Minister and Mr. Ghulam Mustafa Jatoi and they were meant to be resignations as well as protests. The President in normal course could have forwarded them to the Speaker, and. under the Constitution and Rules of the National Assembly the vacancies would have inevitably occurred. could have formed an opinion by the result of the vacancies that would occur that 'the Government of the Federation could not be run in accordance with the Constitution'; and that the Assembly had lost the mandate."

At the conclusion of the argument, the learned Attorney-General submitted a statistical analysis of the effect of these resignations on the voting pattern of the electorate as hereunder-

"Original Position - 1990

(Percentage of valid Votes cast)

PDA	----------	37.37%
Haq Parast	----------	36.83%
JUI (F)		2.94%
Others		17.32%

Position on 18-4-1993

(Percentage of valid Votes cast)

lJI (minus JI) 28.15

JI 2.23

Care -taker

PDA.	36.83%
J L (F)	2.94%
PML (Q)	0.04%
iWP	0.61%
NPP	50.92%
JUP (N)	1.47%
PKMP	0.35%
ANP (H)	1.68%
PML (J)	7.00%
NDA	…….

others less Haq Parast	13.16%	13.16%
Grand total:		94.46%

Resignations are resignations. If they are not resignations they are not worth the paper on which they arc written. In view of the established Constitutional and legal position in this country and abroad with regard to resignation from office by elected representative none so elected can draft a resignation, address it to the proper authority and yet not transmit to the addressee so as to use it, or permit its use by others as a negotiable instrument or as a weapon of offence directed against the opponents. Any one engaging in such an activity and associating himself with it is not only grossly violating the Constitution but also indulging in a highly politically unethical conduct. That it happened on such a large scale in this case, at such a high level, and outside the Parliament is deplorable. Before any one rejects parliamentary democracy as unsuited to our condition, let him see the mutilation of it, the level and by persons at whose hands it has taken place.

In Khawaja Ahmad Tariq Rahim v. Federation of Pakistan through Secretary, Ministry of Law and Parliamentary Affairs and another (PLD 1992 SC 646), the Constitutional foundations for deprecating such an offensive conduct were indicated in the following words:--

"The preamble to our Constitution prescribes that 'the State shall exercise its powers and authority through the chosen representatives of the people.' Defection of elected members has many vices. In the first place, if the member has been elected on the basis of a manifesto, or on account of his affiliation with a political party or on account of his particular stand on a question of public importance, his defection amounts to a clear breach of confidence reposed in him by the electorate. If his conscience dictates to him so, or he considers it expedient, the only course open to him is to resign, to shed off his representative character which he no longer represents and to right a re-election. This will make him honourable, politics clean, and emergence of principled leadership possible. The second and more important, the political sovereign is rendered helpless by such betrayal of its own representative. In the normal course, the elector has, to wait for years, till new elections take place, to repudiate such a person. In the meantime, the defector flourishes and continues to enjoy all the wordly gains. The third is that it destroys the normative moorings of the Constitution of an Islamic State. The normative moorings of the Constitution prescribe that 'sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust' and the State is enjoined to 'exercise its powers and authority through the chosen representatives of the people'. An elected representative who defects his professed cause, his electorate, his party, his

mandate, destroys his own representative character. He cannot on the mandated Constitutional prescription participate in the exercise of State power and authority- Even by' purely' secular standards carrying on of the Government in the face of such defections, and on the basis of such defections, is considered to be nothing but 'mockery of the democratic Constituti6nal process'."

The President of Pakistan too in speech delivered on 6th August, 1990, expressed the following opinion on the subject:--

"Everyone of you is, to some degree, a witness to things I am referring to. Who of you has not heard about the highly disgraceful violation of people's mandate and of its treatment as a commodity of trade? Political stock exchanges were opened and political horse-trading was

indulged in unabashedly. At the time of No-confidence Motion against the Prime Minister, such lawful and unethical methods were employed to muster support for or against it that, our National Assembly became a laughing stock throughout the world. Members of the Assembly remained, in a way, in confinement like hostages and were kept" from voting according to their conscience through inducements or threats. As somebody put it, some sold their conscience for ministries and some for plots of land, some mortgaged their loyalties in return for- loans and some for promised gains. Those who apparently professed consistency of loyalty also claimed and received their price by threatening to cross over. And thus all those, who regarded politics as trade, cash on every turn of events. None of them bothered to realise that he was committing a violation of oath taken in the name of Allah, or that without the voters' consent, he had no right to abandon the party on whose ticket he had been elected in party-based polls. To do so was to betray the people's trust, which is an act of sin in the, eyes of God. As a result of such a conduct of the elected representatives, our adversaries got a chance to remark that a take-over bid can be made for Pakistan's National Assembly in a sum of two to two-and-a-half billion rupees." I I

In the Constitution there is 'clause (5) of Article 01 which comprehensively deals With the subject-matter 'of confidence and lack of confidence:--

"(5) The Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his powers under this clause unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly, in which case he shall summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly." -

The only way open to the President under the Constitution for coming to e conclusion whether the Prime-Minister does or does not command in confidence of the majority of the National Assembly

is by summoning the National Assembly and requiring the Prime Minister to obtain vote of confidence from the Assembly. Any other method adopted for achieving the object, for forming an opinion, for giving effect to it is impermissible.

There are three positive compulsive indicators in this clause. Firstly, there is the use of negative imperative "the President shall not exercise his power". It operates as a mandatory prohibition. The second is the statement of the jurisdictional requirement and coupling it to the exercise of power by the use of the word "unless". The jurisdictional requirement is satisfaction of the President that the Prime Minister does not command the-confidence of the majority of the members of the National Assembly. Thirdly, the only course. left Constitutionally open for the President for arriving at his satisfaction in this matter is. to "summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly'. Such a comprehensiveness, such a clarity and such attention to the details is all in strict conformity with the , established conventions of Parliamentary democracy, as practised in countrics4 having no written Constitution.

The word "shall", according to Black's Law Dictionary, is general imperative or mandatory. it is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. It has a peremptory meaning and is generally imperative or mandatory. Balicntine',,; Law Dictionary defines this word as a mandate where appearing in a Constitutional provision. It further observes the word "shall" be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or to any individual, by giving it that construction. In 16 American Jurisprudence 2d Ed. at page 507 the following comments have been made on the basis of Court decisions with regard to prohibitory language:--

Prohibitory language stated in a Constitution is nearly always construed as mandatory."

The general rule has been laid down that if directions are given should be respecting that time: and mode of, proceeding in which a power exercised, there is at least a strong: presumption that,, the people -designed it to be exercised in that time and mode only. And.. Constitutional provisions consider the policy of a provision whose language seems plain and positive. Although it has been stated that even in the absence of a declaration that its provisions are mandatory and prohibitory, the Courts would not treat the provisions of a Constitution as merely directory or unessential, it has also been V suggested that the reason for the insertion of a specific statement on the matter in the Constitution of one State was that certain decisions had previously held that the provisions of the State's earlier Constitution regarding the titles of legislative acts were directory and not mandatory."

In Corpus Juris Secundum (Volume 16) at page 175 a very lucid expression of the rule of construction of such following words:--

"The word 'shall' or 'ought, as used in a Constitutional provision, is usually imperative or mandatory Mandatory Constitutional provisions are, binding on all departments of the Government. Long usage can neither repeal, nor justify the violation of, such provisions, and disobedience or evasion is not permissible, even though the best interests of the public might apparently be promoted in some respects ..... Restrictions and prohibitions in Constitutional provisions are mandatory and must be obeyed. Generally, Constitutional provisions that designate in express terms the time or manner of doing particular acts and that are silent as to performance in any other is manner arc mandatory and must be followed. Such provision. arc, in general , exclusive in respect of the manner of performance impliedly forbid performance in a substantially different manner."

In the Constitutional provision the word "not" following "shall" makes the requirement of the provision negative imperative leaving no scope for a departure therefrom. The word "unless" also limits and identifies the jurisdictional requirement and the prescription of the method by which that jurisdictional requirement is to be satisfied. The use of the word "unless" according to BBC English Dictionary is as follows:--

"You use unless to introduce the only circumstances in which the event you are mentioning will not take place."

All this attracts the application of well-known maxim 'Expression unius est exclusio alterius'. This maxim has been explained in the 'Construction of Statutes by Earl T. Crawford in section 195 as hereunder:.-

195. Express mention and implied exclusions (Expressio unius est exclusio alterius)As a general rule in the interpretation of statutes, the mention of one thing implies the exclusion' of another thing. it therefore logically follows that if a statute enumerates the things upon which it is to operate, everything else must necessarily, and by implication, be excluded from its operation and effect. For instance if the statute in question enumerates the matters over which a Court has jurisdiction, no other matters may be included. Similarly, where a statute forbids the performance Of certain things, only those things

expressly mentioned arc forbidden. So also, if the statute directs that certain acts shall be done in a specified manner, or by certain person, their performance in any other manner than that specified, or by any other person than one of those named, is impliedly prohibited."

The decision of the Privy Council in Alhaji D.S. Adegbenro's case (1963) Appeal Cases 614) is very instructive on the subject and has some resemblance on facts to the case in hand. That case concerned the right of the Governor of the Western Region of Nigeria to remove a Premier from office on the ground that it appeared to him that the Premier no longer commanded support of a majority of the members of the House of Assembly, although there had been no adverse vote in the House. In removing the Premier from office the Governor acted upon receipt of a letter, dated May 21, 1%2, signed by 66 members of the House of Assembly in which it was stated that they no longer supported Chief Akintola. The House of Assembly was composed of 124 members. Nigeria had a written Constitution, relevant clauses of its Article 31 being as hereunder:--

"33. (1) There shall be a Premier of the Region, who shall be appointed by the Governor.

(2) Whenever the Governor has occasion to appoint a Premier he shall appoint a member of the House of Assembly who appears to him likely to command the support of the majority of the members of the House.

(3) There shall be, in addition to the office of Premier, such other offices of Minister of the Government of the Region as maybe established by the Legislature of the Region or, subject to the provisions of any Regional law, by the Governor, acting in accordance with the advice of the Premier.

(4) Appointments to the office of Minister of the Government of the Region other than the office of Premier shall be made by the Governor, acting in accordance with the advice-of the Premier:

Provided that at least two Ministers shall be appointed from among the members of the House of Chiefs . .....

(8)' The office of the Premier shall become vacant--'

(a) when, after any dissolution of the Legislative Houses of the Region, . the Premier is informed by the Governor that the Governor is about to reappoint him as Premier or to appoint another person as Premier; or

(b) if he ceases to be a member of the House of Assembly otherwise than by reason of a dissolution of the Legislative Houses.

(9) The office of a Minister of the Government of the Region other than the Premier shall become vacant if the office of Premier becomes vacant.

(10) Subject to the provisions of subsections (8) and (9) of this section, the Ministers of the Government of the Region shall hold office during the Governor's pleasure:

Provided that--

.(a)The Governor shall not remove the Premier from office unless it appears to him that the Premier longer commands the support of a majority of the members of the House of Assembly; and

(b)the Governor shall not remove a Minister other than the Premier from office except in accordance with the advice of the Premier."

Following propositions of law were laid down by the Privy Council while reversing the decision of Nigerian Federal Supreme Court:--

(1) Words of the written Constitution govern rather governed by British Parliamentary Convention. The Court observing As hereunder:--

"Lord Bryce once said, the British Constitution 'works by-a body of understandings which no writer can formulate;' whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, while it may well be useful 'on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the Constitutions of Australia or the United States where federal issues are involved, it is in the end the wording of the Constitutions itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution."

(2)Pleasure in appointment and holding of office unless -qualified also includes power of dismissal.

The Court observing as hereunder:--

"It is clear, to begin with, that the Governor is invested with some power to dismiss the Premier. Logically, that power is a consequent of the enactment that Ministers shall hold office during the Governor's pleasure, for, subject to the saving conditions of provisos (a) and (b) that follow, the Governor has only to withdraw his pleasure for a Minister's tenure of office to be brought to an

end. Where the Premier's office is concerned it is proviso (a) that limits the Governor's power to withdraw his pleasure constitutionally, for by that proviso he is precluded from removing the Premier from office 'unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly'. By these words, therefore, the power of removal is at once recognised and conditioned: and, since the condition of Constitutional action has been reduced to the formula of these words for the purpose of the written Constitution, it is their construction and nothing else that must determine the issue."

(3) Limitation cannot be read in general words used in the Constitutional provisions conferring power.

The Privy Council observing as hereunder:--

"The difficulty of limiting the statutory power of the Governor in this way is that the limitation is not to be found in the words in which the makers of the Constitution have decided to record their description of his powers. By the words they have employed in their formula, 'it appears to him,' the judgment as to the support enjoyed by a Premier is left to the Governor's own assessment and there is no limitation as to the material on which he is to base his judgment or the contacts to which he may resort for the purpose. There would have been no difficulty at all in so limiting him if it had been intended to do so. For instance, he might have been given power to act only after the passing of a resolution of the House 'that, it has no confidence in the Government of the Region', the very phrase employed in an adjoining section of the Constitution (see section 31(4), proviso (b) to delimit the Governor's power of dissolving the House even without the Premier's advice. According to any ordinary rule of construction weight must be given to the fact that the Governor's power of removal is not limited in such precise terms as would confine his Judgment t((lie actual proceedings of the House unless there arc compulsive reasons, to be found in the context of the Constitution or to be deduced from obvious general principles, that would impose the mote limited meaning for which the respondent contends."

(4) Court should not be swayed by considerations by Policy a d Propriety while interpreting provisions of a written Constitution.

The Privy Council observed as hereunder:-

"But, while there may be formidable arguments in favour of the Governor confining his conclusion on such a point to the recorded voting in the House, if the impartiality of the constitutional sovereign is not to be in danger of compromise, the arguments are considerations of policy and propriety which it is for him to weigh on each particular occasion: they arc not legal restrictions which a Court of law, interpreting the relevant provisions of the Constitution, can import into the written document and make it his legal duty to observe. To sum up, there arc many good arguments

to discourage a Governor from exercising his power of removal except upon indisputable evidence of actual voting in the House, but it is nonetheless impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford to the Governor the evidence he is to look for, even without the testimony of recorded votes."

5) British Constitutional history offers a negative guide:

The Privy Council made the following observations on this subject-.-

"The first is that British Constitutional history does not offer any but a general negative guide as to the circumstances in which a sovereign can dismiss a Prime Minister. Since the principles which are accepted today began to take shape with the passing of the Reform Bill of 1832 no British Sovereign has in fact dismissed or -removed a Prime Minister, even allowing for the ambiguous exchanges which took place between William IV and Lord Melbourne in 1834. Discussion of Constitutional doctrine bearing upon a Prime Minister's loss of support in tile House of Commons concentrates therefore upon a Prime Minister's duty to ask for liberty to resign or for a dissolution, rather than upon the Sovereign's right of removal, an exercise of which is not treated as being within the scope of practical politics. In the state of affairs it is vain to look to British Precedent for Prudence upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed where dismissal is an actual possibility-, and the right of removal which is explicitly recognised in the Nigerian Constitutions must be interpreted according to the wording of its own limitations and not to limitations which that wording does not import ... . It recognises also one other principle that has come to be accepted in the United Kingdom that, subject to questions as to the right of dissolution and appeal to the electorate, a Prime Minister ought not to remain in office as such once it has been established that he has ceased to command the support of a majority of the House. But, when that is said, the practical application of these principles to a given situation, if it arose in the United Kingdom, would depend less upon any simple statement of principle than upon the actual facts of that situation and the good sense and political sensitivity of the main actors called upon to take part."

This judgment of the Privy Council was undone by a retroactive amendment.

Resignations submitted by the Ministers from the Cabinet fall in a category quite different from those of the members of the National Assembly. If they were addressed to the President and were presented directly to the President, and were given effect to by the President, then it was indeed in full I D compliance with requirements of Article 92(3) of the Constitution. There is an extensive

article on "Collective Ministerial Responsibility and Collective Solidarity" by David L. Ellis, published in Public Law (1980) appearing at pages 367 to 390. It comments on collective responsibility as hereunder:--

"Lord Salisbury in 1878 set out a formulation of the doctrine which has come to be accepted as tile locus classicus:

'For all that passes in Cabinet every member of it who does not resign is absolutely and irretrievably responsible and has no right afterwards to say that he agreed in one case to a compromise, while in another he was persuaded by his colleagues ... ... It is only on the principle that absolute responsibility is undertaken by every member of the Cabinet, who, after a decision is arrived at, remains a member of it, that the joint responsibility of Ministers to Parliament can be upheld and one of the most essential principles of Parliamentary" responsibility established The following observations were made with regard to the benefits of such a collective responsibility:--

"It might be argued that unanimity creates the impression had a Ministers are working together which promotes greater electoral In party confidence, as well as enhancing the Government image in the eyes of foreign politicians, investors and others."

In another article published in Public Law (1982) on choosing a Prime Minister by Rodney Brazier, the following observations occur:--

"No Prime Minister has enjoyed his tenure of office without criticism from his own parliamentary party from time to time; some have faced revolts within their own party on particular issues; a few have, in effect, been forced from office by their Own party."

In a book "Modern Foreign Governments" by Frederic A. Ogg, the Prime Minister's Heavy Load has been described as hereunder:--

"The Prime Minister's Heavy Load.-It goes without saying that the Prime Minister is hard-worked and always pressed for time. He must scan multitude of papers, carry on or supervise heavy correspondence, receive persons seeking interviews on matters of public or private concern, hold Cabinet meetings, confer with individual ministers, visit and submit reports to the sovereign, and – as if that were not enough -- spend much of almost every day when Parliament is in session either on the Treasury Bench or in his private room behind the speaker's chair, holding himself in

constant readiness o answer questions, to decide points of tactical procedure put up to him by his lieutenants, and to plunge into debate in defence of some Government proposal or policy. As leader of his party, too, he must' devote steady attention to its affairs. All in all, it is small wonder that the shoulders of many a Prime Minister have drooped under the burden."

How this heavy burden is handled has been explained at page 90 in the following words:

"For, within Ministry and Cabinet alike, the Prime Minister is the key, man even if not always the outstanding personality. He has put the other ministers where they are. He exercises a general watchfulness and coordinating influence over their activities. He presides at Cabinet meetings, and counsels as continuously as time permits with individual members, encouraging, admonishing, advising, and instructing. He irons out difficulties arising between ministers or departments. If necessary, he can require of his colleagues that they accept his - views. with the alternative of his resignation or theirs, for it is strategically essential that the Cabinet, however, divided in its opinions behind closed doors, present a solid front to Parliament and the world. Indeed, he can, and as we have seen occasionally does, request and secure from the sovereign the removal of a minister for insubordination or indiscretion. He is expected to be the leader of the ministerial group; as its chief spokesman, he will have to bear the brunt of attacks made upon it; and it is logical that his authority shall be disciplinary as well as merely moral. It goes without saying, however, that in all this he must not be overbearing, or harsh, or unfair, or tactless. His Government will at best have enough obstacles to overcome, its solidarity must not be jeopardized or its morale impaired by grudges or injured feelings within its ranks."

In another article published in Public Law (1986), on Prime Ministerial Power by A. H. Brown, the following developments in the classic parliamentary democracy have been noted:-

" For Ramsay Muir the Prime Minister was a potentate who appoints and can dismiss his colleagues. He is in fact, though not in law, the working head of the State, ended with such a plenitude of power as no other constitutional ruler in the world possesses, not even the President of the United States.' But, in Muir's view, the Prime Minister holds this power 'so long as he controls a majority in the House of Commons' and "it is necessary that he should carry his colleagues in the Cabinet, or a large majority of them, alongwith him . ... One of the difficulties in discussing 'prime ministerial government' is to know exactly what the notion entails, for it' appears to mean different things to different people. It seems, however, to include the following propositions. 1. A Prime Minister has the effective power to give office only to those of whom he personally approves, and his ministers have been 'reduced to the rank of lieutenants that he can dismiss as he wishes'. 2. Control of the machinery of Government ensures the Prime Minister's preponderant influence over his colleagues. Through his 'control' of the Cabinet Office and of Cabinet Committees he can manipulate the Cabinet collectively and prevent ministers from putting items on the Cabinet agenda. 3. More generally (and most basic to a

meaningful definition of Prime Ministerial Government), major policy decisions are taken or dominated by the Prime Minister. He dominates Cabinet deliberations to such an extent that he can rarely, if ever, be defeated in Cabinet. Formal meetings apart, he may also intervene at will to dominate the policies of any department he chooses to take an interest in. 4. These points constitute a great increase in the Prime Minister's power within the Government, and are developments that date from the First World War (or, as some believe, from the Second).

They are changes sufficiently important to warrant the use of new term, 'prime ministerial government', to describe the British political system."

In the commentary on the Indian Constitution by Jain (1987 Edition), the question of collective responsibility and consultation with the Ministers have been discussed at pages 102 and 103 in the following words:--

"A Minister who disagrees with a Cabinet decision on a policy matter, and is not prepared to support and defend it, should no longer remain in the Council of Ministers and should better resign. There have been a number of resignations in the past because of differences with the Cabinet. Dr. Mathai resigned as a Finance Minister because he disagreed with the Cabinet on the question of scope and powers of the Planning Commission which was proposed to be set up then. C.D. Deshmukh resigned because he differed from the Cabinet on the issue of re-organisation of States, especially on the question of Bombay. On September 5, 1967, Foreign Minister Chagla resigned because of his differences with the Government's language policy, especially the place of English. Several other Ministers have resigned from the Cabinet.

The principle of collective responsibility does not mean that every Minister must take an active part in the formulation of policy, or he should be present in the committee room whenever a policy decision is taken. This is not possible because of the large size of the present day Council of Ministers. The effective decision-making body is the Cabinet and not the entire Council of Ministers and, therefore, K the obligations of a Minister may be passive rather than active when K the decision does not relate to matters falling within his own sphere of responsibility. Collective responsibility ensures that the Council of Ministers presents a united front to Parliament. In the words of Laski, 'Cabinet is by nature a unity: and collective responsibility is the method by which this unity is secured'. The principle of collective responsibility is both salutary and necessary. On no other condition can a Council of Ministers work as a team and carry on the Government of the country. It is the Prime Minister who enforces collective responsibility amongst the Ministers through his ultimate power to dismiss a Minister."

Resignations from the Cabinet are not at all a sure indication of lack of confidence in the Government nor do they affect or impair the smooth functioning of parliamentary democracy. In a book "Cabinet Government in L India" by R.J. Venkateswaran, the following observations lions have been made with regard to resignations by the Ministers in Chapter VI under the heading "Remarkable Resignations":---

"Ministerial resignations are a normal feature in a Parliamentary democracy. Ministers may leave the Cabinet for many reasons – ill health, old age, or for taking up diplomatic or other assignments. They may also retire voluntarily owing to serious differences in policy, or may be compelled to go by pressure of adverse public opinion, or asked by the Prime Minister to quit for incompetence or for any other reason. In India there were many resignations from the Cabinet during the seventeen years of Nehru's regime, but here we are concerned only with those cases that involved important political and constitutional implications."

The resignations of the Ministers should not have found place at all in the dissolution order, nor could they have been taken in the consider formed ground for taking action under Article 58(2)(b) of the Constitution. They are wholly irrelevant.

The first ground of the dissolution order was sought to be finally on the basis of a residual implied power of the President ordinarily IN conventionally available to the Crown in parliamentary democracy. In view of the express provisions of our written Constitution detailing in fullness both the procedure and power recourse to any residual power cannot be had. This is the rule of interpretation already discussed while examining the Nigerian case. Besides, the Crown has four conventional protect ions in the Parliamentary system which in our written Constitution the President does not enjoy.

Firstly, on a purely theoretical plane, it is indeed the plenary power of the Crown to dissolve the Parliament at his will. Secondly. the Crown is not controlled by any jurisdictional requirements in the matter of taking such a decision, Thirdly, Crown is irremovable. Fourthly, the Crown can do no wrong. All these four features are totally lacking in our Constitution. Besides, as pointed out by Mr. S. M. Zafar in an altogether different context, if the express provisions provide otherwise, the residual power derivable therefrom cannot on any principle of interpretation overreach them just as the stream cannot rise above its source. The first ground was, therefore, wholly misconceived, not available and cannot stand the test of our Constitutional requirements. The making of such a ground, the adoption of it, the giving recognition and effect to it, are all fraught with serious threat to our political morality, to our body politics and to our Constitution.

The second ground gets vitiated for the simple reason that in a formal Constitutional instrument made out in exercise of powers under Article 58(2)(b) of the Constitution, the President has, whatever be the tenor of the speech and its contents, come to the conclusion and conveyed to the world that in any case the speech and the conduct of -the Prime Minister amount to subversion of the Constitution. Subversion in our law is High Treason which is regarded as the highest crime known to law and the most serious offence that may be committed against one's own country. The President had no authority under the Constitution to pronounce such a finding and to make a declaration against a citizen of Pakistan, a leader of the majority Parliamentary party, the Prime Minister of the country, for sustaining such an order. It is clearly violative of first part of Fundamental Right 14.

We have examined the contents of the speech of the Prime Minister both with regard to its form and substance and also whether or not it provided justification for the dissolution order. The President in his speech made it clear that he took no exception to Prime Minister criticizing him as a person. If that be so we too will not go into that aspect of the case. As regards the office of the President, the Constitutional validity of. the criticism will have to be examined. We have dealt with all the areas of conflict, the nature of conflict and the Constitutional provisions governing such conflicts and have found that there was substantial basis for such criticism. In a Constitutional set-up restraint in language, exhibition of dignity and decorum from both sides should have been of a much higher. level. This should have been particularly so in this case because the two functionaries had cooperated for sufficiently long time, had praised each other publicly too often and had never brought their legal and Constitutional differences before appropriate forums. Such criticism by itself does not lead to the inference that the Constitution cannot work. It is the conduct of the office-holders and not the content of the Constitution which is proving, if at all, an impediment in smooth functioning of the Constitutional Government. The answer lies not in ouster out of the one by the other but in abiding by the Constitution and Constitution alone. The oaths of the two functionaries are identical, word for word and letter for letter. It is only the difference in offices which lends a different scope to each one of them. Therefore, the test for exercise of power is not the oath but the exact Constitutional provision under which the power is exercised. The first duty cast by oath of office is to identify one's own jurisdiction and power and next to faithfully remain within the confines of it. The second ground too was not available to the President for the exercise of power under Article 58(2)(b) of the Constitution.

The third ground of dissolution concerns the improper functioning of various Constitutional bodies provided for securing integration, cohesion and understanding between the Provinces. Articles 153 and 154 of the Constitution make provision for the establishment and functioning of the Council of Common Interests. The Council is required to formulate and regulate policies in relation to matters in Part 11 of the Federal Legislative List and in the matter of electricity in the Concurrent Legislative List. If any one of the Governments is dissatisfied with a decision of the Council, it can refer the matter to Parliament in a joint sitting whose decision in this behalf shall be final. The letters of the two Chief Ministers produced to show non-compliance with the provisions do not demand the summoning of the Council of Common Interests for resolution of dispute nor do they

call upon the Prime Minister or the President to refer the matter to t ‘ he Parliament in the joint sitting. They certainly. make a grievance of not receiving due representation in the privatisation proposals with regard to WAPDA, Electricity etc. None of the grievances relates to any industry which has been privatized. They all relate to matters which are still under consideration of the appropriate authority and only preliminary examination is being undertaken. Even if omissions have taken place while the matter is under active consideration, the scope for appropriate rectification, consensus and resolution is still there. It is normal feature of the functioning of the Government that a preliminary .exercise is undertaken by experts before a matter is taken up for final decision to the Constitutional body established for the purpose. Wherever rectifications are possible and the action is not yet finalized, the more appropriate course is to proceed about it constitutionally, to associate in the on-going exercise and assist in final decision making. It is not the grievance made which is decisive of the constitutionality of the action but the final decision yet to follow.

During the course of the hearing certain other matters not made the basis and not the subject-matter of the impugned order before us about which in grievance was made by any of the Provinces have been put in to condemn the governance of the country. This relates to disposal of surplus land by the Railways, the leasing out of the ticketing on the Railways and the disposal of certain nationalized and State industries. These actions were taken by the Government and did not directly concern the Council of Common Interests nor did any Provincial Government ever make a grievance of it.

The privatization of nationalized units had the requisite statutory cover under the following statutes none of which had been objected to by the President or sent for reconsideration by the Cabinet-.--

(1) President’s Order 12 of 1978 -- Transfer of Managed Establishments Order, 1978.

(2) Ordinance X1 of 1989 __ Transfer of Managed Establishments (Amendment) Ordinance, 1989.

(3)Ordinance XXXIII of 1991 -- Transfer of Managed Establishments (2nd Amendment) Ordinance, 1991.

(4)Act V of 1992 - Transfer of Managed Establishments (Amendment) Act, 1992.

(5) Act LXV of 1.973 Hydrogenated Vegetable Oil Industry (Control and Development) Act, 1973.

(6) Ordinance XXXV of 1991 -- Hydrogenated Vegetable Industry (Control and Development) (Amendment) Ordinance, 1991.

(7) Act XX of 1992 -- Hydrogenated V edible Oil Industry (Control and Development) (Amendment) Act, 19

(8) Ordinance VII of 1992 -- Hydrogenated Vegetable Oil Industry (Control and Development) (Amendment) Ordinance, 1992.

(9) Act XI of 1992 -- Hydrogenated Vegetable Oil Industry (Control and Development) (2nd Amendment) Act, 1992.

(10) Act XII of 1992 -- Protection of Economic Reforms Act, 1992.

One of the ways of smooth integration of the country is when the same political party is in power at the Federal level as well as in the Provinces. It is happened to be so in the case of the petitioner. Therefore, unless there be specific and serious constitutional objection raised by the Provinces, the conduct of policy in these matters should have been better left to the Prime!, Minister himself.

The word “transparency” in administration or privatization is a word very pleasing to the ear and very impressive to rind established in a society. Where freedom to obtain information does not exist, where secrecy of all financial transactions including the declaration of assets by the public office holders is the order of the ,day to expect transparency and make it a ground for taking action under Article 58(2)(~) of the Constitution would be far-fetched, a’ matter of degree and quite unjustified. It is a vague criteria, not referable to any statutory provision and will make the satisfaction of the empowered authority subjective and not objective. This Court has already held

that the requirements of Article 58(2)(b) of the Constitution arc all objective and relatable to the various Constitutional provisions.

The allegations of corruption, of maladministration, of incorrect policies being pursued in matters financial, administrative and international are independently neither decisive nor within the domain of President for action under Article 58(2)(b) of the Constitution. These are wholly extraneous and cannot sustain the impugned order.

The impugned order has too many subjective elements not recognized by the Constitution for exercise of Presidential power of dissolution of National Assembly. For example, the anticipatory action that the Government of the Federation is not in a position to meet properly and positively the threat to the I security and integrity of Pakistan and the grave economic situation confronting the country are no considerations, nor can the President make an assessment of it independent of the Federal Government headed by the Prime Minister, as the Parliament is established for that purpose.

We rind that none of the grounds made the basis of the impugned action has been established that they bear no nexus to the order passed and grounds totally extraneous and irrelevant and in clear departure of the Constitutional provisions have been invoked for taking action.

The question that was proposed to the learned Attorney-General by me was -whether tile President could constitutionally dismiss the Prime Minister and his cabinet while exercising his powers under Article 58(2)(b). He has relied on the use of expression “The Prime Minister shall hold office during the pleasure of the President” in Article 91(5) of the Constitution read with the practice in India and United Kingdom to justify such use. What he failed to notice is that this pleasure of the Crown in United Kingdom and of the President in India is unqualified. Ours is qualified in two ways. First the very Article in which pleasure of the President is provided the stri6t modalities of the exercise of it have been expressly provided as hereunder:--

“91(5) The Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his powers under this clause unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly, in which case he shall summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly.”

The second difference is that unlike any other Constitution of the world ours expressly provides for the inviolability of the dignity of man as a Fundamental Right available to all citizens of Pakistan. For an order under Article 58(2)(b) of the Constitution the only power available is of dissolution of National Assembly. The question arises why add to it something unnecessary, Something hurtful, something that would look out of place and uncalled for in retrospect, create an impression of master and servant. I would not at this stage and in these proceedings go to the extent of holding that use of these expressions itself amounts to violation of Fundamental Right 14. All that I can say is it would have been constitutionally more graceful to avoid their use.

The question as to who, the President or the Prime Minister, is the final authority to appoint Chief of the Army Staff, does not directly arise out of the grounds of Dissolution Order. However, the pivotal role that this question played in souring the Constitutional relationship of the two is apparent from the following statement of fact by President in his speech:--

The reply of the Prime Minister to this in his rejoinder to the written statement was as hereunder:--

"It is denied that there was any disagreement between the President and the petitioner on the appointment of the COAS."

Believing the statement of both to be correct the only conclusion permissible is that they had no difference of opinion over the person to be appointed. Their differences, if any, on this subject remained confined to the power to make that appointment. Not surprising that such a conflict should arise on President's perception of the power, as one in his discretionary field.

Article 243 of the Constitution before suffering any of the amendments read as hereunder:--

"243.--(l) The Federal Government shall have control and command of the Armed Forces.

(2) The President shall subject to law, have power--

(a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces;

(b) to grant Commissions in such Forces; and

(c) to appoint the Chief of the Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff, and determine their salaries and allowances."

In the President's Order 14 of 1985 (Revival of the Constitution of 1973 Order, 1985), enforced on 2-3-1985, it was provided that the Constitution of the Islamic Republic of Pakistan, 1973, is hereby amended to the extent and in the manner specified in the third column of the Schedule. Article 4 of this President's Order 14 of 1985, provided that the provisions of the Constitution, as amended by this Order, shall stand revived on such day as President may, by Notification in the Official Gazette, appoint and different days may be so appointed in respect of different provisions. The entry No.50 in the Schedule in respect of Article 243 reads as hereunder:--

1. After clause (1), the following new clause shall be inserted, namely:--

(1-A) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President.

2. In' clause (3), in paragraph (c), after the word "appoint", the words and commas "in his discretion the Chairman, Joint Chiefs of Staff Committee," shall be inserted."

On 30-12-1985, the proclamation of withdrawal of Martial-Law took over and the Constitution as amended by the Revival of the Constitution Order, 1985, and further amended by 8th Amendment (not this Article) was thereafter enforced.

It is clear that prior to the amendment of Article 243 the appointment of all the Chiefs of the Army, Air Force and the Navy had to take place on the advice of the Prime Minister. The

content of the amendment introduced by the Revival of the Constitution Order was confined to one new post that was created, that was of the Chairman, Joint Chiefs of Staff Committee and in respect of that newly-created post the appointing authority was made the President and in making that appointment he was to act in his discretion. Throughout the world interpreting and understanding the Constitution and legislative instruments the punctuations are not allowed to play any decisive role. Even if they do here the authorisation or empowering by the Parliament and the provisions of the Revival of the Constitution Order being confined to the post of Joint Chiefs of Staff Committee it could not on any interpretation be extended to the other Chiefs.

Mr. Yahya Bakhtiar, in making a submission on the point indicated that this view is consistent with the scheme (if the Constitution as modified by the Revival of the Constitution Order, 1.985. The power to appoint the Chief Election Commissioner, the Chairman of the Federal Public -Service Commission and the Chairman of the Joint Chiefs of Staff Committee reserved for being exercised in the discretion by the President. So far as the others constituting these bodies are concerned, namely, the Members of the Election Commission, the Members ‘ of the Public Service Commission and the Chiefs-of the Army Staff, Navy and Air Force are ‘ concerned, they were left unaffected so far as the appointment to them on the advice of the Prime Minister was concerned. While examining this question another quite startling fact came to our notice and it was Schedule VI referable to Rule 15-A (2) of the Ruler, of Business framed by. the Federal Government under Articles 90 and 99 of the Constitution. Schedule VI under Rule 15aA(2) has three portions as hereunder:--

SCHEDULE V1

Rule 15-A(2)

List of cases to be submitted to

the President for his orders in his

discretion.

S. No.	Reference to Constitutional provisions

CABINET DIVISION

1.	xxxxx	xxxxxxx	xxxxxx
2.	Appointment of acting Governor during the absence of Governor.		Article 101
3.	Appointment of the Provincial Chief Ministers		Article 105 1(a)&(4)

DEFENCE DIVISION

4. 1 Appointment of Chairman, Joint Chiefs of Staff Amended Committee, Chiefs of Army Staff, Naval Staff and provisions of Air Staff and determination of their salaries Article 243 Article 243 and allowances.

xxxx xxxxxxx xxxxxx xxxxxx It Schedule VI contains three entries which appear to be against –the Constitutional provisions reproduced above.

It is not Article 101 but Article 104 which deals with the appointment of Acting Governor and is in the following words:

"104. Acting, Governor.---When the Governor is absent from Pakistan or is unable to perform the functions of his office due to any cause, such other person as the President may direct shall act as Governor." This provision has not suffered any amendment since 1973 Constitution was framed.

Mr. S. M. Zafar in his analysis of the provisions has included this power as one to be exercised by the President on the advice of the Prime Minister. This appears to be correct view also. As regards entry No.3 of the Cabinet Division, Article 105(l) has no longer a sub-clause (1). In the Revival of the Constitution Order, indeed there was a sub-clause (a) relating to the appointment of the Chief Ministers which was deleted or not approved when the 8th Amendment was passed.

In respect of the Defence Division a wrong entry with regard to the appointment of the Chiefs, other than the Chairman, Joint Chiefs of Staff Committee was included as within the discretionary field of powers of the President. Such an incorrect unconstitutional Rules of Business for the functioning of the Federal Secretariat continued over such a long period reflects the apathy, the inattention and unawareness of the Constitutional mandates. Such mistakes are liable to breed avoidable controversies resulting in grave consequences as we have witnessed in the present case. The Attorney General has only said that these issues are not involved in the present case and should not be decided. In any society seriously striving to establish rule of law and to protect its Constitution from invasion, a duty to educate, a duty to inform, and a duty to exhibit at all times awareness of the Constitutional parameters is necessarily cast on all functionaries of the State. No occasion should be lost to understand them, to expound them, to clear the cobwebs of misunderstanding and likely areas of conflict and confusion with regard to them.

The learned Attorney-General, instead of attending to the question No. (iv), mentioned at page 55 of the judgment, with regard to discretion of the Court in the matter of grant of relief cx debito justitiae attended to the discretion of the Court in entertaining a petition complaining breach of Fundamental Right. He cited M/s. Tilokchand Motichand and others v. H.B. Munshi, Commissioner of Sales Tax, Bombay and -another (AIR 1970 SC 898 at page 908, paragraph 36), Raj Kumar v. Union of India and others (AIR 1975 SC 530 at page 540, paragraph 16) and commentaries on the Constitution of India by Scervai and Kagzi establishing that acquiescence, estoppel, laches, inordinate delay etc. can and do stand in the way of entertainment of petition seeking enforcement of Fundamental Rights. The question did not concern itself with the threshold bar, as none was pleaded, raised or arose in this case. The question related to ultimate grant of relief, limitation if any, on it.

According to Mr. S. M. War, Senior Advocate, Political Justice has been expressed and ensured by the Constitution in two separate and distinct forms. The first of these forms is through the various Fundamental Rights. The second form is through the other provisions of the Constitution. According to him Political Justice is expressed and ensured through Fundamental Rights by--

Article 9 Security of person

Article 10 Safeguards as to arrest and detention

Article 12 Protection against retrospective punishment.

Article 13 Protection against double punishment and self-incrimination.

Article 14 Inviolability of dignity of man, etc.

Article 15 freedom of movement etc

Article 16 freedom of assembly

Article 17 freedom of association

Article 19 freedom of speech

Article 25 equality of citizens

Social Justice by--

Article 9 ---------- Security of person

Article 11 ---------- Slavery, forced labour, etc., prohibited.

Article 1.3---------- Protection against double punishment and self-incrimination.

Article 14(l)---------- Inviolability of dignity of man, etc.

Article 26 ---------- Non-discrimination in respect of access to public places.

Article 27 ---------- Safeguard against discrimination in services.

Article 28 ---------- Preservation of language, script and culture.

Economic Justice by-

Article 18 ---------- Freedom of trade, business or profession.

Article 21---------- Safeguard against taxation for purposes of any particular religion.

Article 23 ---------- Provision as to property.

Article 24 ---------- Protection of property rights.

and unclassified Justice by--

Article 20 Freedom to profess religion and to manage religious institutions.

Article 21 Safeguard against taxation for purposes of any particular religion.

Article 22 Safeguard as to educational institutions in respect of religion, etc.

The second category is of the other provisions of the Constitution which ensure majoritarian rule. This is ensured by--

Article 50 ---------- Majlis-e-Shoora (Parliament)

Article 51 ---------- National Assembly

Article 52 ---------- Duration of National Assembly

Article 91 The Cabinet.

The later content of Political Justice that is majoritarian rule, was, according to Mr. S. M. Zafar violated thrice in this country. Once, when a majority Province was kept at par with the rest of the three provinces which formed a minority. Next, when one province was kept at par with three other Provinces. The third occasion arose when in the matter of No-Confidence Motion against Prime Minister in the National Assembly proviso to clause (5) of Article 96 of 1973 Constitution as originally framed had the following content:--

"Provided, that for a period of ten years from the commencing day or the holding of the second general election to the National Assembly whichever occurs later, the vote of a member elected to the National Assembly as a candidate -or nominee of a political party, cast ' in support of a resolution for a vote of no-confidence shall be disregarded if the majority of the members of that political party in the National Assembly has cast its votes against the passing of such resolution."

Mr. S. M. Zafar contends that clause . (2) of Article 17 is restrictive, an exception to clause (1), is negative in content, denying to civil servant right to joint Political Party and controlling under judicial cover. unhealthy political activity. This clause (2) cannot, therefore, go beyond clause (1) on the analogy that the stream cannot rise above its source.

By examining each provision of the Constitution Mr. S. M. Zafar was in a position to state that he following Articles of the Constitution keep intact the Parliamentary form of Government in Pakistan:--

Article 41 ---------- The President

Article 46 ---------- Duties of Prime Minister in relation to President,

Article 48 ---------- President to act on advice, etc.

Article 91 ---------- The Cabinet.

Article 99 ---------- Conduct of business of Federal Government.

The learned counsel also pointed out that there are provisions in the Constitution, very peculiar to our Constitution, and these are discretionary powers of the President under--

Article 48(2) ---------- When the discretion relates to dissolution of the National Assembly under Article 58(2) read with Article 48(5).

Article 46(6) ---------- Referendum

Article 213 ---------- Appointment of Chief Election Commissioner.

Article 242(1-A) ------ Appointment of Chairman, Joint Chiefs of Staff Committee.

Another "category of powers of the President which can be called extraordinary powers are contained in--

Article 177 ---------- Appointment of Chief Justice and Judges of Supreme Court in consultation.

Article 193 ---------- Appointment of High Court Judges in consultation.

Article 101 ---------- Appointment of Governors in consultation.

Article 218 ---------- Appointment of Members of Election Commission .in consultation.

The object of such a detailed, and lucid analysis of the provisions of the Constitution was to demonstrate and establish the following, facts:-

(i) The President's high office enjoyed independently of everyone else certain very important functions of the State for which purpose he had to remain Vigilant, concerned and alive to the issues..

(ii) President had also another duty to perform, namely of guiding, controlling and counseling the executive Government with regard to its policies and performance.

(iii) The President in yet another domain was required to act on the advice of the Prime Minister irrespective of his own notions and views.

(iv) All these responsibilities coupled with the amalgam of our Constitution and accepted conventions of the Parliamentary democracy authorized him to act on the resignations which were meant to be resignations and on other material which has been made (lie grounds of dissolution.

(v) A petition is not directly competent under Article 184(3) howsoever extended a meaning be given to Fundamental Right 17 and to concept of political justice.

So far as the first three conclusions arc concerned it is indeed so but these are mere aids to identification of powers and jurisdictions and for confining the actions within those identified limit. They cannot in a written Constitution be utilized for establishing the ascendency of one over the other for all purposes nor for claiming a residual power overreaching the source itself. So far as the fourth conclusion is concerned, the over elaborate discussion of the Nigerian case establishes the points that do not go outside the written Constitution for claiming more powers for anyone of the established authorities.

Now coming to the competence of the petition, the grounds of objections have already been noted. During the hearing of the arguments -I used an unusual expression "flowering of the Fundamental Rights in other provisions of the Constitution". Learned Advocate-General Punjab noted it and elicited the meaning and scope of it. In explaining this I hope to meet all the other objections taken to the competence of the petition.

'Political" has been defined in Black's Law Dictionary as "pertaining or clothing to the Policy or the administration of Government, State or National; pertaining to, or incidental to, the exercise of the functions vested in those charged with the conduct of Government; relating to management of the affairs of the State." In the same dictionary 'Political rights" have been defined as "those which may be exercised in the formation or administration of the Government, Rights of citizens established or recognized by Constitutions whic1i give them the power to participate directly or indirectly in the establishment or administration of Government."

The expression "flowering of an idea, artistic style, or political movement is its successful development" (BBC English Dictionary, page 44-2).

In Miss Benazir Bhutto v. Federation of Pakistan and another PLD 1988 SC 416 at page 544, the following question and answer is recorded:-

Question

"What is the remedy if a fully entrenched political party itself in power through Government constituted by it, has to account for what is provided in Article 17(2) relating to its accountability?"

Answer

"Theoretically the Government could make reference against its own party but practically it might never happen. For such eventuality it might be possible for the Supreme Court to act suo motu, if it holds so."

The provisions of the Constitution which enable Political parties to reach the Government and after reaching the Government to continue their political purpose unimpeded are all directed towards ensuring fruition of this Fundamental Right.

It is difficult to agree with the contention that clause (2) of Article 17 of the Constitution has a restricted field. If the Constitution-makers chose to treat it separately, compendiously and expressly, unlike any other known Constitution of the world, why should we restrict and limit it. For an extensive interpretation of it there is a positive indicator in the word "operating". There is healthy operating, there is unhealthy operating. By taking care of unhealthy operating, healthy operation has been kept free of all limitations to flourish and flower inside the Government as well as outside it.

I I hold that petition is Competent not only because Fundamental Right 17 is directly involved but also because the first part of Article 14 of the Constitution stands violated by attributing subversion to the ousted Prime Minister. Further, the two documents described at page 45 of this judgment -- item 15(i) and (ii) reveal that the Prime Minister was being prevented by the President from extending the Political activity of the Executive Government of the Federation to the Federally Administered Tribal Areas. This too amounted to violation of Fundamental Right 17(2).

This petition is allowed. The impugned order is declared to ' be without lawful authority and of no legal effect. As a consequence, the National Assembly, Prime Minister and the Cabinet shall stand restored and entitled to function as immediately before the impugned order was passed. All stops taken pursuant to the order, dated 18th April, 1W3 passed under Article 58(2)(b) of V the Constitution such as the appointment of the Care-taker Cabinet etc. will, V therefore, be of no legal effect. However, all orders passed, acts done and measures taken in the meanwhile by the Care-taker Government, which have been done, taken and given effect to in accordance with the terms of the Constitution and were required to be done or 'taken for the ordinary orderly running of the State shall all be deemed to have been validly and legally done.

SAAD SAOOD JAN, J.---l have had the privilege of reading the opinions of the learned Chief Justice and some of my learned brothers. In view of the importance of the controversy before the Court and the fact that I was unable to share the conclusion of my learned brothers on the question of the maintainability of this petition I am recording my opinion separately.

. 1-A. This is a petition under Article 184(3) of -the Constitution, inter alia, calling in' question the legality of the order, dated 18-4-1993 of the President of Pakistan whereby in exercise of his discretionary power under Article 58(2)(b) of the Constitution he dissolved the National Assembly and dismissed the Federal Cabinet of which the petitioner was the head as Prime Minister.

-2. The petitioner was the Leader of the Islami Jamhoori Ittehad, an alliance of a number of political parties, In the General Election to the National -Assembly held in October 1990 the alliance was able to secure an, absolute majority. Accordingly, he formed the Government with ' himself as the Prime Minister. Under Article 52 of the Constitution the National Assembly was to enjoy a term of five years from the date of its first meeting. However, by t he order, dated 18-4-lV)3, the President dissolved the National Assembly,

dismissed him and his Cabinet and instead appointed a Care-taker Cabinet

headed by respondent No.3.

.3. To challcng1c the legality of the order of the President, hereinafter called the Dissolution Order, a number of Constitution petitions were filed in the Lahore High Court and perhaps in some other High Courts also. One of the petitioners before the Lahore High Court was the Speaker of the National Assembly. However that may be, the petitioner and a number of other persons including Chaudhry Shujaat Hussain (Minister for Interior in the petitioner's Cabinet) chose to rile petitions for the same reliefs directly in this Court under Article 184(3) of the Constitution. Except in the case of the petition filed by the petitioner no written statements * were asked for from the respondents and Mr. Farooq Hassan who appeared on behalf of Chaudhry Shujaat Hussain was advised to confine his address to the legal questions arising in his petition. However, so far as the petitioner's petition was concerned the respondents were called upon not only to rile written statements but also indicate the mat6rialwhich had persuaded the President to make the Dissolution Order.

4. The learned Attorney-General opposed the petition both on legal and factual grounds. To begin with, he argued that a petition calling in question the legality of the Dissolution Order could not be entertained by this Court as it did not fall within the restricted jurisdiction vested in this Court under Article 18A(3), ibid. On merits his contention was that all the grounds stated in the

Dissolution Order were well-founded and these had a direct nexus with exercise of the power under Article, 58(2)(b), ibid.

5. The petition came up before the Court for preliminary hearing on 26-4-1993. After hearing counsel for the parties it was decided that the objection with regard to the maintainability of the petition and the issues arising on merits should be joined and that these should be heard and decided together.

6. To examine the objection taken up by the learned Attorney-General with regard to the competency of this Court to entertain this petition two provisions of the Constitution may immediately be noticed. The first is contained in Article 175(2): it states that no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. The expression 'jurisdiction' has been defined to be the power of the Court to hear and determine a cause and exercise judicial power in relation to it. (See Chief Secretary v. Sikandar Hayat Khan PLD 1982 SC (AJ&K) 112). Apart from Article 184 of the Constitution there is no other law which confers original jurisdiction on this Court in any matter requiring judicial determination of the rights of the parties. As regards Article 184, it contains two separate provisions. These are to be found in clauses (1) and (3) of the Article. Clause (1) relates to disputes between and among various governments of the Federation and it is therefore not relevant so far as this petition is concerned. Clause (3) reads as follows:

"Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any. of the Fundamental Rights conferred by Chapter 1 of Part 11 is involved, have the power to make an order of the nature mentioned in the said Article."

According to the petitioner his case falls under clause (3) ibid, as he is seeking enforcement of his Fundamental Right as incorporated in clause (2) of Article 17. It need hardly be added that Article 17 ibid falls in Chapter 1 of Part 11 of the Constitution. Thus, if the petitioner can show that his petition is in substance one with reference to the enforcement of the Fundamental Right enshrined in clause (2) of Article 17 the objection of the learned Attorney General with regard to the competency of this petition will have to be repelled.

7.- It is contended by Mr. Farooq Hassan that the addition of the expression 'with reference to' before the words 'the enforcement or in clause (3) of Article 184 is of great significance as it has the effect of enlarging the jurisdiction of the Court, for, with this addition the clause now not only

encompasses matters which relate to the enforcement of the Fundamental Rights directly but embraces within its ambit such cases as well which have reference to the enforcement of these Rights. In this context, he also referred to the case of Griswold v. Connecticut 381 US 479 wherein the scope of the right of freedom of association was held to extend to those matters also which fell within its penumbra. It was observed in this case:

"We protected the 'freedom to associate and privacy is one's association,' noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a Constitutionally valid association, we held, was invalid 'as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association! In other words, the First Amendment has a penumbra where privacy is protected from Governmental intrusion..."

He has also contended that the Fundamental Rights are open ended' and that there can never be any limit on the field in which they operate. Although, I am not prepared to accept this proposition without some reservation, but so far the original jurisdiction of this Court is concerned the position, to my mind is clear, that is, to invoke the jurisdiction of this Court under clause (3) of Article 184 it must be shown that the action complained against violates a Fundamental Right as set out in Chapter 1 of Part If either directly or transgresses the field in which the said right can reasonably be taken to be operative.

8. The case of the petitioner is that the Dissolution Order violates his Fundamental Right as enshrined in Article 17(2), ibid. It reads as follows:

"Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final."

Having been actively associated with the preparation of the draft of 1973 Constitution, as originally enacted in April 1973, it seems appropriate that I may say a few words about the background of this provision. It was a new addition to the list of Fundamental Rights inasmuch as it did not occur in the Constitutions of 1956 and 1962. The Constitution Committee of the National Assembly which was entrusted with the task of preparing the draft was of the opinion that the right of freedom of association as guaranteed in the earlier Constitutions of 1956 *and 1962, qualified as it was with a number of restrictions, did not give sufficient protection to the political parties against the

Executive which in the, past had no hesitation in limiting or stifling their ordinary activities, particularly if these were directed against the party in the Government. It was felt that for the democracy to flourish in the country, it was essential that the political parties should be entirely, unfettered except when they worked against the sovereignty and integrity of Pakistan. The experience of 1962 Constitution was before the Committee for despite the fact that it guaranteed freedom of association severest possible checks were placed on the otherwise legitimate functions of political parties. Some of the parties were election could hold himself inter alia, that he was a member of a particular party. This was tantamount to denying to the political parties a place in the political processes in the country. In order to free the political parties from the strangle-hold of the Executive and permit the citizens freedom of thought and action in political matters it was decided by the Constitution Committee to make a separate and independent provision so far as the political parties were concerned.

9. A perusal of Article 17(2) will show that the Fundamental Right contained therein has a somewhat limited scope inasmuch as it relates to the formation and membership of political parties. Thus, it no doubt gives freedom to the citizens to form political parties, enjoy the membership of the parties of their choice and by extension of the said right to take part in all political activities; but then this Article was never intended to be a complete charter of all political rights. The content of the right which it guarantees is clearly delineated by the terms in which it is expressed and I am not sure even if by the rule of progressive interpretation its scope can be extended to guaranteeing the right to the membership of legislative bodies or to the formation of the Government of the day.

. 10. On two earlier occasions this Court had the opportunity to examine the effect of Article 17(2) on certain existing laws. The judgments in both cases bear the same title, namely, Benazir Bhutto v. Federation of Pakistan. These are to be found in PLD 1988 SC 416 and PLD 1989 SC 66. In the first case the Court declared certain provisions of the Political Parties Act to-be void as they clogged the proper and effective functioning of political parties. In the other case, the Court struck down section 21, Representation of the People Act, 1976, on account of its being violative of Article 17(2) to the extent it failed to recognize the existence and paticipation of the political parties in an election through allocation of common symbols for their candidates. In both these cases certain observations were made with regard to the role of political parties in a democracy, particularly of parliamentary type, but these observations have to be construed in the context of the controversies which arose in these cases; in one case the Court was considering the stifling effect of some of the provisions of the political Parties Act on the formation and functioning of political parties and in the second one it was faced with a situation where the members of political parties were being prevented from,, contesting election under a common colour.

11. But in the petition before us, the petitioner does not allege that he has been prevented from forming or being a member of a political party or that the political party of which he is the leader has in any manner been obstructed from carrying on its legitimate political activities or operations;

on the other hand, what he says in substance is that the National Assembly where his party enjoys an absolute majority has been illegally dissolved. Now, Article 17(2) is not a check against all violations of the Constitution; as already stated, the terms in which it is expressed set out the content of the right guaranteed by it; it relates to the formation, membership and legitimate functioning of the political parties. It does not concern itself with the rights of the citizens when they sit as members of a legislative body. The term of the National Assembly, its constitution and the manner of its dissolution are regulated by other Articles of the Constitution; Article 17(2) has nothing to do with these matters. If the National Assembly is dissolved illegally it will be a violation of Articles 52 and 58. 1 do not see how anyone can complain that by the dissolution of the Assembly his right under Article 17(2) has been impinged upon. He will no doubt have a remedy under Article ‘ 199 of the Constitution before the High Court; the jurisdiction conferred on this Court by Article 184(3) is by the language in which it is, couched for too restricted to cover his petition.

13. Learned counsel for the petitioner drew our attention to one of the clauses of the Objectives Resolution which, with the insertion of Article 2A in the Constitution, is now a substantive part thereof. The said clause reads as follows:

“Wherein shall be guaranteed Fundamental Rights including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality.”

The learned Counsel placed stress on the expression ‘political justice’ and went on to argue that the petitioner was seeking political justice from this Court when he directly filed the petition here. In this context, he also referred to a passage from the judgment of Zaffar Hussain Mir7a, J., in, the case of Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416. While commenting upon the above mentioned clause of the Objectives Resolution the learned Judge had observed:

“The expression ‘political justice’ is very significant and it has been placed in the category of Fundamental Rights. Political parties have become subject-matter of Fundamental Right in consonance with the said provision in the Objectives Resolution. Even otherwise, speaking

broadly, our Constitution is a Federal Constitution based, on the model of Parliamentary form of representative Government prevalent in the United Kingdom. It is also clear from the Objectives Resolution that principles of democracy as indicate by Islam are I to be fully

observed. True, and far elections and the existence of political parties, is an essential adjunct of a functional democratic system of Government.”

The learned counsel for, the petitioner also referred to the meanings of the expressions 'political justice' and 'political rights' as given in certain dictionaries and drew our attention to a chapter on 'political justice' written by a distinguished author.

14. The expression 'political justice' represents an idea with myriad of facets and for that very reason it does not admit of a precise definition. Broadly speaking, every time a group or a class or even an individual is deprived of a right or a privilege which is available to the majority of others similarly placed or is discriminated against, one immediately starts thinking in terms of political E justice. So far as the Objectives Resolution is concerned it does not by itself add any new independent fundamental right in Chapter I of Part 11 of the Constitution so as to bring its violation within the compass of the jurisdiction conferred on this Court by Article 184(3), ibid. Its position vis-a-vis the other provisions of the Constitution was considered by this Court in the case of Hakam Khan v. Government of Pakistan PLD 1W2 SC 595. Speaking for the majority Nasim Hasan Shah, J. (now C.J.) observed:

"The role of the Objectives Resolution, accordingly in my humble view, notwithstanding the insertion of Article 2A in the Constitution (whereby the said Objectives Resolution has been made a substantive part thereof) has not been fundamentally transformed from the role envisaged for it at the outset; namely that it should serve as beacon light for the Constitution-makers and guide them to formulate such provisions for the Constitution which reflect ideals and the objectives set forth therein. Thus, whereas after the adoption of the Objectives Resolution on 12th March, 1949, the Constitution-makers were expected to draft such provisions for the Constitution which were to conform to its directives and the ideals enunciated by them in the Objectives Resolution and in case of any deviation from these directives, while drafting the proposed provisions for the Constitution the Constituent Assembly, before whom these draft provisions were to be placed, would .take the necessary remedial steps itself to ensure compliance with the principles laid down in the Objectives Resolution. However, when a Constitution already stands framed (in 1973) by the National Assembly of Pakistan exercising plenary powers in this behalf wherein detailed provisions in respect of all matters referred to in the Objectives Resolution have already been made and Article 2A was made a mandatory part thereof much later i.e. after 1985 accordingly now when a question arises whether any of the provisions of the 1973 Constitution exceeds in any particular respect the limits prescribed by Allah Almighty (within which His people alone can act) and some inconsistency is shown to exist between the existing provision of the Constitution and the limits to which the man-made law can extend; this inconstancy will be resolved in the same manner as was originally envisaged by the authors and movers of the' Objectives Resolution namely by the National Assembly itself. In practical terms, this implies in the changed context, that the impugned provision of the Constitution shall be corrected by suitably amending it through the amendment process laid down in the Constitution itself."

As already mentioned, political justice has innumerable dimensions. Its theme runs throughout our Constitution. it is not confided to any particular portion thereof, in fact, the various Articles of the Constitution receive inspiration from or reflect one or the other aspect of political justice. There seems little doubt that the paramount consideration before the Constitution-makers was that no section of the citizenry no matter how small it might be, should be deprived of equal participation in the national life and no one should feel that he has not had a fair deal. But then, the question before us is whether. this Court has the jurisdiction to entertain this petition directly; for that he has to show that there has been a violation of his right as included in Chapter 1 of Part 11 of the Constitution. The mere assertion that the petitioner is seeking political justice is not sufficient in this regard. On the other hand, in my opinion the dissolution of the National Assembly or the dismissal of his Cabinet are not matters which fall within the field in which Article 17(2) operates. As already noticed the action of the President emanates from the provisions of Article 58(2j(b). Whether this action is legal or not has to be examined on the basis of the language of this clause and the relevancy of the material upon which it was stated to have been based. It has nothing to do with the violation of Article 17(2) for, as already noticed, the Fundamental Right incorporated in this clause does not extend to guaranteeing the duration of the membership of the National Assembly. I am therefore of the opinion that this petition is not covered by clause (3) of Article 184 of the Constitution and as such it ought not to have been riled directly in this-Court. However, as all my learned brothers, with, now, the exception of Sajjad Ali Shah, J., are of a different view I stand overruled.- Being thus placed I now proceed to record my views on the other question raised in the petition, that is, whether the preconditions for the exercise of the power under Article 58(2)(b) were satisfied in this case.

15. As already stated, the Dissolution order has been made by the President under Article 58(2)(b) of the Constitution. Although, the expression used in the Order is .... in exercise of the powers conferred on me by clause (2)(b) of Article 58 of the Constitution of the Islamic Republic of Pakistan and all other powers enabling me the learned Attorney-General

made it clear that so far as the dissolution of the National Assembly was concerned the President had acted entirely under clause (2)(b), ibid. It reads as follows:

"Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where in his opinion,---

(a)……

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary."

This clause has already been examined by this Court in great depth in two earlier cases reported as Federation of Pakistan v. Muhammad Saifullah Khan PLD 1989 SC 106 and Ahmad Tariq Rahim v. Federation of Pakistan PLD 1992 SC 046. In Muhammad Saifullah Khan's case, it was held after a threadbare analysis of the clause that an order of dissolution could be made by the President only when the machinery of the Government had broken down completely, its authority eroded and the Government could not be carried on in accordance with the provisions of the Constitution; it was further observed that the discretion given by the clause to the President was not absolute but was a qualified one in the sense that it was circumscribed by the objects of the law that conferred it and that before exercising it he had to form an opinion objectively with regard to the existence of the circumstances necessitating its exercise; it was also held that it was open to the Courts to examine the order of dissolution in order to see if it fell within the four corners of the clause. In Ahmad Tariq Rahim's case, the Court stated:

"It is an extreme power to be exercised where there is an actual or imminent breakdown of the Constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution. There may be occasion for the exercise of this power where there takes place extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but by methods extra-Constitutional."

In view of such extensive exposition of the nature -and extent of the power vesting in the President under the clause in question there is very little that I can add apart from merely reiterating that the most important precondition laid down for its exercise is that circumstances must exist which clearly indicate that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. The word 'cannot' as occurring in the clause H brings in not only an element of impossibility but also that of permanence in its construction and thus the President can exercise his power thereunder only if there is material before him showing that the affairs of the State have come to such a stage that it is no longer possible for the Government to function except by violating the Constitution.

16. Mr. Farooq Hassan argued that before dissolving the National Assembly the President must also specifically come to the conclusion, apart from the consideration that the Government of the Federation cannot function in accordance with the Constitution, that an appeal to the electorate is necessary. It is difficult to subscribe to this contention without qualification. Once the President forms an opinion that the Government of the Federation cannot be carried on in accordance with the Constitution he has just no option but to place the matter before the electorate, who are the political sovereign under our Constitution, to re-exercise their choice with regard to the composition of the Government. The constitution does not provide any other. way out to the President for ours is a Parliamentary system of Government and except in some specified matters the President has to act on the advice of the Prime Minister in the performance of his functions

irrespective of whether the latter is an elected one or merely his own nominee under Article 48(5)(b) of the Constitution. This feature of the Constitution was noticed by the Court in Muhammad Saifullah Khan's case when it commented adversely upon the absence of the Prime Minister from the then Care-taker cabinet. I should therefore think that once the President is satisfied that the Government of the Federation cannot function in accordance with the Constitution he has no option but to place the matter before the political sovereign of our country.

17. It was also contended by Mr. Farooq Hassan that the mere fact that the Government 'of the Federation could not be carried on in accordance with the Constitution ought not to lead to the punishment of the members of the National Assembly through a dissolution order for it was against the rule of natural justice that the tenure of the members should be prematurely curtailed without giving them an opportunity of correcting the situation. This contention is also without substance. Under our system the Government of the Federation represents the majority of the members of the National Assembly and it cannot survive without their support. The Constitutional crisis or an impasse does not ordinarily develop overnight. If the majority of the members do not take remedial steps in time till the Constitutional stalemate actually occurs, the members can only blame themselves in the event the President intervenes to save the situation. Apart from that, dissolution of the Parliament is a normal incident of parliamentary democracy and no member can claim that he must be heard before dissolution.

18. Mr. Farooq Hassan also canvassed the view that the power of dissolution under Article 58(2)(b) could not be exercised by the President when the National Assembly was in session in pursuance of the requisition of the members under Article 54(3). In support of his argument he relied upon the provisions of the said clause (3) which states that when the Speaker summons the Assembly he alone can prorogue it. This contention is clearly without any merit as the summoning and prorogation of the Assembly and the dissolution of the Assembly are entirely different matters. In fact, if the argument of Mr. Farooq Hassan is accepted it will create a Constitutional I impasse inasmuch as to preclude the President from exercising his power of dissolution even when he has overwhelming evidence that the Government of the Federation cannot be carried on without violating the Constitution the members may requisition and hold an interminable session of the Assembly; this will clearly be an unwarranted clog on the power of the President under Article 58(2)(b), ibid.

18-A. As already stated, the President made the Dissolution Order on ~ 18-4-1993. Shortly thereafter, he made a speech on the television and radio in which he elaborated some of the grounds on which the Order was based. The Order has been reproduced in extenso in some of the opinions recorded by my learned brothers. I need not therefore recite it here in full. It contains eight grounds. My learned brothers have made extensive comments on these grounds and have, with the exception of Sajjad Ali Shah, J. held that these do not furnish an acceptable basis for the exercise of the discretionary power vested in the President under Article 58(2)(b), ibid. As I agree with their

conclusion I would content myself by making only some brief comments. J need hardly add that in exercising the jurisdiction of judicial review this Court is neither competent nor aims at to substitute its own opinion for that of the President.

19 ‘he first ground mentioned in the Dissolution Order is as follows:

‘The mass resignation of the members of the Opposition and of considerable numbers from the Treasury Benches, including several Ministers, inter alia, showing their desire to seek fresh mandate from the people have resulted in the Government of the Federation and the National Assembly losing the confidence of the people, and that the dissension therein, has nullified its mandate.”

In his speech the President referred to this ground and stated:

During the course of the arguments the learned Attorney-General pointed out that the total strength of the National Assembly was 217. At the time of the dissolution 13 seats were already vacant on account of death and resignations of members. Of the remaining members 88 had handed over their letters of resignation to the President. Thus, if these resignations too had become effective there would have been 101 vacancies in the National Assembly which represented 50 per cent. of its total strength. He also pointed out that in the General Election held in October, 1990 the political alliance of which the petitioner was the leader had secured 37.3 per cent. of the total votes cast. Consequent upon shifting of political alliances in the National Assembly the petitioner now only represented 28.15 per cent. of the votes cast in the General Election. In the circumstances, the opinion of the President that the present National Assembly and the petitioner’s Government, had ceased to possess a representative character was well-founded.

It will be noticed that in this ground reference has been made to the resignations of the members of the Opposition as well as of the treasury benches including some Ministers. It is also stated that those who had resigned were desirous of seeking fresh mandate from the people. It was not disputed by the learned Attorney-General that despite these resignations the petitioner still had the support of members who constituted more than half of the total membership of the National Assembly. Further, the learned Attorney-General was not clear that the resignation letters delivered to the President were intended to be acted upon. To begin with, his stand was that these resignation letters were handed over to the President only by way of protest and that these were

not meant to be acted upon; later, he changed his position and stated that the resignation letters delivered to the President were also intended to be acted upon. However that may be, the position first adopted by him seems to be correct, 'for, if those who had signed these letters were serious about leaving the National Assembly and seeking a fresh mandate from the people they would have sent them to the Speaker of the National Assembly who is the authority designated by the Constitution for the purpose. See Article 64(l) of the Constitution. The suggestion that the members had no faith in the Speaker and for that reason did not send the letters of resignation to him is entirely unconvincing for in none of the letters any such allegation has been made by the member concerned. In the circumstances, the recital in the Dissolution Order that those who had given their resignations to the President were desirous of seeking fresh mandate from the people is based on a mere surmise. As regards the percentage of the electorate which the petitioner now represents the statement prepared by the learned Attorney-General is misleading for despite the shifting of the political alliances in the National Assembly the petitioner continues to have the support of more than 50 per cent. of the total membership of the National Assembly. The learned Attorney-General did not care to work out the percentage of the electors which the members now supporting the petitioner represent.

21. During the course of the arguments Mr. S. M. Zafar, who appeared on behalf of the Care-taker Prime Minister brought to our notice a case which came up for consideration from Western Nigeria before the Judicial Committee of the Private Council. It is reported as Adegbenro v. Akintola and another (1963) 3 All ER 544). In this case the Governor of Western Nigeria had removed the Premier from his office on receipt of a letter signed by a majority of the members of the House of the Assembly. This case has hardly any relevance to the petition before us for here it is not being alleged that the petitioner had lost the support of the majority of the members of the National Assembly.

22. As repeatedly stated above, ours is a parliamentary democracy. Ordinarily it is the Prime Minister who has the right to ask for the dissolution of the National Assembly. The Prime Minister can only be removed from office if he loses the support of the majority of the members of the Assembly. If the en mass resignation of the members of the Opposition is accepted as a valid test for determining if the Assembly has lost its representative character it will ' lead to a situation where a democratically elected Government can be blackmailed; in that case the majority in the Assembly will be at the mercy of the minority, for, though unable to defeat the Government in the House the latter will be able to use the device of en mass resignation in order to get the Government dismissed or have the Assembly dissolved.

23. 1 am therefore of the opinion that the material placed before the Court does not show that the National Assembly had lost the confidence of the people or the dissension therein had nullified its mandate. Accordingly, the first ground mentioned in the Dissolution Order was not available to the President for the exercise of his discretion under Article 58(2)(b), ibid.

24. It is the second ground which has elicited the most elaborate arguments from both sides. At one stage the learned Attorney-General described it as the most important one from his point of view. It reads as follows:

"The Prime Minister held meetings with the President in March and April and the last on 14th April, 1993 when the President 'urged him to take positive steps to resolve the grave internal and international problems confronting the country and the nation was anxiously looking forward to the announcement of concrete measures by the Government to improve the situation.' Instead, the Prime Minister in his speech on 17th April, 1993 chose to divert the people's attention by making false and malicious allegations against the President of Pakistan who is Head of State and represents the unity of the Republic. The tenor of the speech was that the Government could not be carried on in accordance with the provisions of the Constitution and he advanced his own reasons and theory for the same which reasons and theory, in fact, are unwarranted and misleading. The Prime Minister tried to cover up the failures and defaults of the Government although he was repeatedly apprised of the real reasons in this behalf, which he even accepted and agreed to rectify by specific measures on urgent basis. Further, the Prime Minister's speech is tantamount to a call for agitation and in any case the speech and his conduct amounts to subversion of the Constitution."

From the speech of the President, too, it is evident that he regarded this ground as one of the main considerations for making the Dissolution Order.

25. As will appear from its perusal, the President has in this ground referred to the several meetings which he had with the petitioner in the months of March and April, 1993, wherein he had been urging the latter to take positive steps to resolve the grave internal and international problems confronting the country as the people were anxiously looking forward to the announcement of concrete measures by his Government to improve the situation. In these meetings the petitioner had agreed to rectify the situation by taking remedial steps on an urgent basis. But then, without any justification he chose to deliver a speech on the electronic media on 17-4-1993 wherein he made false and malicious allegations against the President who was not only Head of the State but also represented the unity of the Republic. One of the objects of the speech of the petitioner was to divert the people's attention from the real issues and he had attempted to do so by making unwarranted and misleading attacks on the President. The speech was a call to agitation and amounted to subversion of the Constitution.

26. The text of the speech made by-the petitioner on 17-4-1993 has been placed before us. It is indeed strongly-worded. There are clear references in-it to the President and the Presidency, and

allegations have been made that the office and place which were intended to represent the symbol of the unity of the Republic were being used to sow seeds of discord and destabilise an elected Government by subverting the loyalties of its supporters. It is indeed a harsh speech and constitutes a strong denunciation of the President.

27. It was ‘contended by Mr. Khalid Anwar who appeared for the petitioner that on the basis of the speech the petitioner and his cabinet ought not to have been condemned. He pointed out that it was made in the backdrop of extraordinary circumstances unheard of in a parliamentary democracy where the Head of the State had taken upon himself to weaken an elected Government. All that the petitioner did was to inform the people about the forces that were actively engaged in destabilising his Government. There was an atmosphere of uncertainty in the country and the people were in a state of bewilderance as all sorts of speculations were rife. They had the right to know what was transpiring in the corridors of powers. By making the speech the petitioner merely performed a duty which he owed to the people.

28. Although it may be debatable whether the petitioner should have made such a strongly-worded speech or not but it cannot be denied that there are some extenuating circumstances in his favour which cannot be overlooked while assessing the propriety of his delivering such a speech. A large volume of clippings from the national Press has been placed on the record by both parties. It will appear from these clippings that for a few months preceding the dissolution of the Assembly the entire Press was persistently carrying reports of an irreconcilable rift between the President and the petitioner. The President Was being associated (whether rightly or wrongly) with a lobby which was actively advocating the dissolution of the National Assembly and the dismissal of the petitioner’s cabinet. There were also reports that the said lobby was weaning away. the loyalties of the members of the National Assembly supporting the petitioner’s Government with the threat of dissolution. In this context, the name of the Governor of a Province was also being taken, and it was alleged that while staying in the President House he was obtaining resignations of the members of the Assembly to strengthen the hands of the President for dissolving the National Assembly. The President must have been aware of what was being reported in the national press about him and the activities of the lobby which allegedly had his patronage. However, he did not take any steps to clarify his position. The learned Attorney-General stated that the office that the President occupied was too exalted to permit him to take notice of the enamors and gossips that were being spread by irresponsible persons. I am afraid I cannot countenance such an explanation. No doubt the office of the President is a very high one but then he could not have ignored what the entire Press was reporting about his relations with the Prime Minister and the activities of the persons who were described to be close to him. He also could not afford to keep silent when the funnier-makers and gossipmongers were having a field day, creating an aura of uncertainty and insecurity in the country. In the prevailing circumstances it was but natural for the petitioner to feel threatened and alarmed that some forces outside the Constitution were out to destroy his Government through intrigues. His speech can hardly be treated as one aimed at subverting the Constitution.

29. The learned Attorney-General described the speech of the petitioner as full of distortions and incorrect statements. In this context, he referred to the minutes of the meeting which the petitioner had with the President oil 14-4-1993. He placed before us a copy of the minutes of the meeting prepared by the petitioner's secretariat. He pointed out that these minutes clearly indicate that the relations between the President and the Prime Minister were normal; the petitioner was looking forward to the President for guidance and counselling and bad even agreed that his meetings and consultations with the President should be more frequent to ward off speculations and avoid misunderstanding. He argued that this being the state of relations between the President and the petitioner on 14-4-1993 nothing had happened till 17-4-1993 when the petitioner came out with a speech extremely defamatory of the President.

30. It is difficult to treat the minutes as a true reflection of the relations between the President and the petitioner. To begin with, it may be mentioned that there was nothing on the record to show that the President had accepted these minutes as a correct record of what transpired between him and the petitioner; instead in respect of the meeting his secretariat chose to issue its own handout which reads as follows:--

The Prime Minister called on the President today and they reviewed the grave and pressing national and international problems facing the country. The meeting lasted for above two hours.

The President urged the Prime Minister to undertake positive steps as early as possible to address effectively these problems to the satisfaction of the public representatives and the people. The Prime Minister undertook to do so on an urgent basis and to revert to the President which precise measures in this behalf.

The clippings from the national press do indicate that for sometime before the meeting the petitioner had been making efforts to improve his relations with the President. He had already altered his stand on the Eighth Amendment and had gone to the extent of nominating the President as his party's candidate for the next Presidential Election. These were the two matters which according to the Press had soured his relations with the President. The manner in which the minutes have been worded too seems to be an effort on the para of the petitioner in that direction. In this regard, it should be noticed that these minutes were taken by two Federal Ministers to the President and were not forwarded to the latter's Secretariat through the usual official channel. Admittedly, these Ministers were making serious efforts to resolve the differences between the President and the petitioner and to bring them close to each-other. The tone of these minutes is very friendly and comes in sharp contrast with the language of the handout issued by the President's Secretariat.

31. It is contended by the learned Attorney-General that for the successful functioning of the Federal Government it was necessary that the President and the Prime Minister should have a working relationship. These were many matters relating to the affairs of the State, requiring these two high functionaries to get together for discussion across the table. After the petitioner had condemned the President as an intriguer, as a person who was destroying the Constitution and as one who had desecrated the office of the President there could not be any hope of the two meeting together face to face without acrimony. In the circumstances there could hardly be any doubt that with the petitioner as head of the Federal Cabinet the Government of the Federation could not be carried on in accordance with the provisions of the Constitution.

32. It seems difficult to support this contention. To begin with, personal feelings of the President and the Prime Minister towards each other do not enter into and are in fact irrelevant so far as the conduct 'of the affairs of the Federation is concerned. Our Constitution clearly demarcates the spheres of activity of the President and the Prime Minister. Except in matters where the Constitution clearly expresses an intention to the contrary, the President has no option but to act on the advice of the Cabinet or the Prime Minister. This is exactly what Article 48 (1) of the Constitution states. If he does not approve of the advice given to him all that he can ask is that the advice should be reconsidered by the cabinet. But if the same advice is re-tendered to him he is under a duty to act in accordance therewith. I therefore do not see how the President can invoke his powers under Article 58(2)(b), ibid, to dissolve the National Assembly if his relations with the Prime Minister are on an edge.

33. The learned Advocate-General of the Punjab was of the opinion that the Prime Minister was subordinate to the President. This opinion rinds no support whatsoever from the Constitution and the learned Advocate-General did not even care to elaborate his contention. It has already been noticed that the Prime Minister represents the majority party of the members of the National Assembly which is a sovereign body. He is only responsible to the National Assembly. Except in certain specified matters the President to act upon this advice. The President cannot tell the Prime Minister how he should perform his functions which fall in the latter's sphere except by way of advice which is not binding on him. The President cannot remove him from office unless he also chooses to dissolve the National Assembly whose representative he is. Thus, the element of subordination so far as the office of the Prime Minister vis-a-vis that of the President is concerned does not exist.

34. For the reasons just stated I am of the opinion that the second ground mentioned in the Dissolution Order does not furnish a legal basis for dissolving the National Assembly.

35. In the third ground mentioned in the Dissolution Order the petitioner's Government has been accused of failing to uphold and protect the provisions of the Constitution which demarcate and define the respective spheres of activity, both executive and legislative, of the Federation and the Provinces and certain Constitutional institutions and in this context particular reference has been made to the Council of Common Interests and National Economic Council. It is further alleged that the Constitutional powers, rights and functions of the Provinces have been usurped, frustrated and interfered with in violation of the Constitution, in particular, Article 97, which sets down the extent of the executive authority of the Federation.

36. Consequent upon the General Elections to the Provincial Assemblies in October 1990 the Governments that were formed in the Provinces were very close to that of the petitioner. In fact, in the Punjab the Alliance of which the petitioner was the head, assumed power. Consequently, there was greater cooperation among all the rive Governments than what had been witnessed in the immediate past. Now, it does not appear that any of the Provincial Governments ever charged the petitioner's Government with trespassing into its field. The four letters of the Chief Ministers of the Provinces of Sindh, Balochistan and N.W.F.P. which were placed on the record on behalf of the respondents to substantiate the accusation were of hardly any assistance to the learned Attorney-General. Two of these letters were written by the Chief Minister of N.-W.F.P. One was addressed to the petitioner and the other to the Minister for Provincial Coordination in his cabinet. The remaining two letters were written by the Chief Minister of Sindh to the President and the Chief Minister of Balochistan to the petitioner. As regards the letter of the Chief Minister, Sindh, it was written only on 21-3-1993, that is, when allegedly the President had started collecting material for dissolving the National Assembly. However that may be, it does not contain any assertion that the petitioner's Government was flouting the Provincial autonomy as envisaged by the Constitution. it is also to be noticed that prior to this any complaint of the nature mentioned in this letter he had not made against the petitioner's Government. In his letter the Chief Minister, Balochistan, has merely complained against the reduction of his Province's share in the development surcharge. In the two letters written by Chief Minister of N.-W.F.P., certain grievances of the Province with regard to non-payment of net profits payable on hyderal generation in accordance with the decision of the Council of Common Interests, privatisation of WAPDA, Railways and Sid Northern Gas, concessions given to an industrial complex in the Port Qasim area and setting up of the National Highway authority were agitated. These letters furnish too tenuous a basis to hold that the petitioner's Government was not respecting the Constitutional limits in the exercise of the executive authority of the Federation or was .trespassing into the Provincial field.

37. As regards the Constitutional institutions like the Council of Common Interests and National Economic Council it was not the case of the Attorney-General that no meetings of these Councils were ever held by the petitioner's Government. On the other hand, he contended that the two Councils were not consulted by the petitioner's Government in matters of vital importance even though these fell within their spheres. In this regard, he made particular reference to the policy of privatisation adopted by the petitioner's Government. He pointed out that under Article 154 (1) of the Constitution it was the function of the Council of Common Interests to formulate and regulate policies in relation to matters included in Part 11 of the Federal Legislative List. According to him this List included the Railawys, WAPDA, nationalised banks and a large number of industrial units

such as cement factories etc. Without asking the Council of Common Interests to first frame policies with regard to the functioning of these bodies the petitioner's Government had started selling off their properties and had transferred the nationalised banks and industrial units to the private sector. This was, he argued, clearly a violation of the provisions of Article 154 (1), ibid.

38. There is substance in the assertion of the learned Attorney-General that the Government ought not to have transferred any units included in Part II of the Federal Legislative List to the private sector in the absence of a policy or policies framed by the Council of Common Interests. But, then, perhaps this was a case of unintentional lapse on the part of the petitioner's Government and not an instance of flagrant violation of the Constitution. It was for the first time in December 1992 that the Privatisation Commission which had been constituted to examine certain aspects of privatisation drew the

Government to this omission. It stated in its report:

…….the whole process of privatisation, unilaterally initiated by the Federal Government, bypassing the Council of Common Interests and the NEC, appears to be ultra vires of the Constitution."

Immediately thereafter the petitioner's Government called a pre-Council of Common Interests Meeting. It was held on 11-4-1993 and was attended by the representatives of the Provinces. It prepared agenda for the Council. However, before the Council could meet the Dissolution Order was made. In any case, the failure of the Government in asking the Council of Common Interests to frame a policy for privatisation can hardly lead to the conclusion that a stage had come where the Government of the Federation could not be carried on in accordance with the Constitution. The Council in any of its meetings could have regularised the steps already taken in ignorance of the Constitutional V position and even the joint session of the Parliament where the petitioner's Government enjoyed the majority could have validated the past acts of the Governement in this regard. I am therefore of the opinion that ground (c) could also not form the basis for the exercise of power by the President under Article 58 (2) (b), ibid.

39. Ground (d) contains allegations of mal-administration, corruption and nepotism in the petitioner's Government and ground (e) accuses the petitioner's Government of unleashing a reign of terror against its opponents and mediamen. In support of these allegations the learned Attorney-General relied entirely upon Press clippings. No doubt, these allegations if true would raise a serious question for consideration whether a Government which has stooped so low can be said to be functioning in accordance with the Constitution and if there would not be a sufficient justification for the President to invoke his powers under Article 58 (2)(b), ibid, to end the misery

of the people. But then Press clippings can hardly form a basis for holding that the accusations made therein stand proved. It was not the case of the respondent that the allegations contained in the Press clippings were subjected to any inquiry of any sort or consequent upon an inquiry the petitioner's Government was found guilty. An order of dissolution of the National Assembly on the basis of unsubstantiated allegations can hardly be sustained.

40. Ground (f) accuses the petitioner's Government of violating the Constitution under rive separate sub-heads. To begin with, it is alleged that the Cabinet w8 not taken into confidence when decisions on matters of policy were being taken and that numerous Ordinances had been issued without consulting it. Ordinarily in the Parliamentary form of Government the Cabinet is consulted when important decisions, (including issuance of Ordinances) are taken because of the collective responsibility of the members thereof. However, there is no such strict requirement that its non-compliance would lay the Prime Minister open to the charge of violating the Constitution. It is then X stated that the Federal Ministers had at one time been asked not to see the President. Mr. Khalid Anwar denied that any such direction was given by the petitioner to any of his Cabinet colleagues and, if the Press reports are ' any indication, the members of the petitioner's cabinet had been frequently seeing the President. However that may be, even if the petitioner had given any such direction that would be a case of extreme discourtesy and not one of violation of the Constitution, for, in respect of matters which do not fall within his exclusive sphere the President had only the right of information and that too only through the Prime Minister. See Article 46 of the Constitution.

Sub-head (iii) refers to the misuse of the resources and agencies of the Government, including statutory corporations, authorities and banks, for political ends and purposes and for personal gains. The learned Attorney-General was unable to refer to any case where the petitioner had used the said resources of agencies for his own enrichment of to secure political goals. Another sub-head accused him for being responsible for massive wastage and dissipation of public funds and assets at the cost of the national exchequer without legal or valid justification resulting in increased deficit financing and indebtedness and ' thus adversely affecting the national interests including defence. In this context, the learned Attorney-General has referred to an agreement which the petitioner's Government was negotiating with ,a foreign firm for improving telecommunication facilities in Pakistan. According to him this agreement will not only compromise the defence of the country but also hand over an organization in which Pakistan had vital interest to a foreign company. It does not appear that the agreement has yet been finalised and there can be little doubt that the matter will come before the Parliament for enacting the requisite law to give effect to the provisions thereof. However that may be, it cannot reasonably be said on the basis of the agreement which has yet to be finalised that the petitioner's Government cannot function in accordance with the Constitution. The last sub-head relates to the treatment meted out by the petitioner's Government to the Civil Services and in that context induction of certain officers of the armed forces in civil services and promotion of officers of Income tax Department have been referred.

41-A. At this stage it may be noticed that the President has the right to address the National Assembly and to send messages to it. It does not appear that before exercising his extraordinary power of dissolution he sent any message to the National Assembly pointing out the shortcomings of the Government as detailed in sub-heads (iii), (iv) and (v). On the other hand, it is quite clear from the address which he made to the joint session of the Parliament only four months before making the Dissolution Order that he was satisfied with the performance of both the petitioner's Government and the National Assembly. In the circumstances, I am of the view that ground (1) was also not available to the President for dissolving the National Assembly.

42. Ground (g) takes into account the serious allegations which were made by Begum Nuzhat Asif Nawaz about the highhanded treatment meted out to her late husband by the petitioner's Government and the circumstances culminating in his death. On the basis of these allegations a conclusion had been drawn that the highest functionaries of the petitioner's Government had been subverting the authority of the Armed Forces and the machinery of the Government and the Constitution itself. It may be mentioned that General Asif Nawaz, Army Chief of Staff, suddenly died in January, 1W3. Three months later his widow held a Press conference wherein she alleged that her husband had not died a natural death and that some members of petitioner's cabinet had been threatening and maltreatment him during his lifetime. As regards the allegation of maltreatment and issuance of threats is concerned there is no evidence before this Court apart from the assertion of the Begum Sahiba A herself. As regards the circumstances surrounding the death of the General Commission consisting of three Judges of this Court was constituted. According to the finding of the Commission the General had died on natural causes. In the circumstances, it is surprising that the allegation made by the begum Sahiba has been made a ground for dissolving the National Assembly.

(43)Ground (h) reads as follows:-

"The Government of the Federation for the above reasons, inter alia, is not in a position to meet properly and positively the threat to the security and integrity of Pakistan and the grave economic situation confronting the country, necessitating the requirement of a fresh mandate from the people of Pakistan."

So far as the grounds 'a' to 'g' are concerned I have already examined them. I am of the view that none of these either by itself or in conjunction with others fulfils the precondition for the exercise of the power under Article 58 (2) (b). As regards the allegation that the petitioner's Government was not in a position to meet properly and positively the threat to the security and integrity of Pakistan or deal with the grave economic situation confronting the country it is-too vague to require any comment. As already stated, only four months prior to the making of the Dissolution

order the President had addressed the joint session of the Parliament. He did not in his address refer to the inability of petitioner's Government to 'deal -with the threats' mentioned in ground (h). It is incredible that within a space of four months its performance had degenerated to the extent that it-could no longer look after the affairs of the State and that it became imperative that it should seek a fresh mandate from the people of Pakistan. It was clearly an inadmissible ground for dissolving the National Assembly.

44. For the reasons stated above, I am in agreement with the view expressed by the majority of my learned brothers that the grounds given by the President in support of the Dissolution Order could not at all lead to the conclusion that the Government of the Federation could not be carried on in accordance with the Constitution. Accordingly, the precondition for the exercise of the power by the President under Article 58(2)(b) was not satisfied and as such the said Order was not sustainable.

45. The above are -my reasons in support of the Short Order already announced.

AJMAL MIAN, J.---I have had the advantage of reading the proposed opinion of my learned brother Shaflur Rahman, J. Though I agree with the conclusion recorded by his Lordship, but I would like to record my own reasons.

The petitioner, who was the Prime Minister, through this petition under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan 1973 (hereinafter referred to as 'the Constitution') has impugned the President's Order dated 18-4-1993 dissolving the National Assembly and dismissing the Cabinet and the petitioner as the Prime Minister, passed pursuant to the power conferred on him under Article 58- (2) (b) of the Constitution.

2. The learned Attorney-General, Mr. Aziz A. Munshi, appearing for the Federation and Mr. S.M. War, learned Senior ASC appearing for the Care taker Prime Minister, have raised a preliminary objection as to the maintainability of above constitutional petition directly in this Court besides opposing the same on merits. It would be appropriate first to deal with the above preliminary objection before dilating upon the merits of the case. The precise objection raised by them was that the impugned order has not violated any of the Fundamental Rights contained in Chapter 1 of Part II of the Constitution and, therefore, clause (3) of Article 184 of the Constitution could not be pressed into service by the petitioner.

On the other hand, Mr. Khalid Anwar, learned ASC appearing for the petitioner, has contended that in order to invoke above clause (3) of Article 184 of the Constitution, it is necessary to show that a question of public importance with reference to the enforcement of any of the

Fundamental Rights conferred by Chapter I of Part 11 of the Constitution is involved. According to him, the above requirement is met in the present case. Dr. Farooq Hassan, learned ASC appearing for another petitioner, namely, Mr. Ajmal Khattak, joined him in his above contention.

3. . In order to appreciate the above controversy, it may be advantageous to quote above clause (3) of Article 184 of the Constitution, which reads as follows.--

"184(3).--Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part 11 is involved, have the power to make an order of the nature mentioned in the said Article."

A perusal of the above-quoted clause indicates that without prejudice The provisions of Article, 199 of the Constitution, which confers A constitutional jurisdiction on the High Courts, the Supreme Court has been empowered to make an order of the nature mentioned in the above Article 199 provided the following two conditions are fulfilled:--

a question of public importance is involved;

(ii) with reference to the enforcement of any of the Fundamental Rights guaranteed by Chapter 1, Part 11 of the Constitution, i.e. Articles 8 to 28.

4. The parties are not at issue on the above first requirement. It is a common ground that the above case involves- questions of public importance. But according to the learned Attorney-General and Mr. S.M. War, the above second requirement is not present in the case in hand. The thrust of their arguments was that in the instant case the question involved is, whether the impugned order falls within the ambit of Article 58(2)(b) of the Constitution and not, whether the above order is violative of any of the Fundamental Rights. According to them, there is no vested right in the petitioner or any other person to continue to be a member of the National Assembly for a period of five years nor there is any such right to continue to be the Prime Minister or a Minister for the above period. To reinforce the above submissions, they have further contended that there is a distinction between a Fundamental Right and a Political or Legal Right. According to Mr. S.M. Zafar, all political activities outside the Parliament fall under the category of Fundamental Rights guaranteed under Article 17 of the Constitution but once a political party gets inside the Parliament,

the right becomes political or legal. Mr. Aziz A. Munshi, learned Attorney-General, has put the above submission, somewhat differently by urging that the political process begins with the formation of a political party under Article 17 of the Constitution but it is carried forward or is taken over by other Articles of the Constitution and laws.

Whereas, Mr. Khalid Anwar in furtherance of his above submission besides relying on Article 17, has heavily relied upon the following portion of the Objectives Resolution, which was incorporated as a Preamble in original Constitution, and which has now been incorporated as a substantive part of the Constitution by Article 2A thereof-

"Wherein shall be guaranteed Fundamental Rights, including equality of status, Of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;"

According to him the term "political justice" employed in above quoted portion of the Objectives Resolution encompasses the right to participate in election, to form the Government, and if one has majority, to run the Government so long as it is not lawfully terminated. His further submission was that by virtue of the above para. of the Objectives Resolution, three additional Fundamental Rights relating to Political, Social and Economic Justice are to be read into the Constitution. He also submitted that besides the violation of Article 17 of the Constitution, Article 19 relating to freedom of speech has also been violated as the impugned order was passed because of the speech made by the petitioner on 17th April, 1993, on the electric media.

5. It may be pertinent to observe that Article 2A, which has been incorporated by P.O. 14 of 1985, in order to make the Objectives Resolution as a substantive part of the Constitution, has been subject-matter of a recent judgment of this Court in the case of Hakim Khan and 3 others v. Government of Pakistan (PLD 1992 SC 595), wherein Nasim Hasan Shah, J. (as his Lordship then was) and Shariur Rahman, J. have dealt with the effect of the incorporation of Article 2A as a part of the Constitution as under:--

"Nasim Hasan Shah, J.---The role of the Objectives Resolution, accordingly in my humble view, notwithstanding the insertion of Article 2A in the Constitution (whereby the said Objectives Resolution, has been made a substantive part thereof) has not been fundamentally transformed from the role envisaged for it at the outset; namely that it should serve as beacon light for the Constitution makers and guide them to formulate such provisions for the Constitution which reflect ideals and the objectives set forth therein. Thus, whereas after the adoption of the Objectives

Resolution on 12th March, 1949, the Constitution-makers were expected to draft such provisions for the Constitution which were to conform to its directives and the ideals enunciated by them in the Objectives Resolution and in case of any deviation from these directives, while drafting the proposed provisions for the Constitution the Constituent Assembly, before whom these draft provisions were to be placed, would take the necessary remedial steps itself to ensure compliance With the principles laid down in the objectives Resolution. However, when a Constitution already stands framed (in 1973) by the National Assembly of Pakistan exercising plenary -powers in this behalf wherein detailed provisions in respect of all matters referred to in the Objectives Resolution have already been made and Article 2A was made a mandatory part thereof much later i.e. after 1985 accordingly now when a question arises whether any of the provisions of the 1973' Constitution exceeds in any particular respect, the limits prescribed by Allah Almighty (within which His people alone can act) and some inconsistency is shown to exist between the existing provision of the Constitution, and the limits to which the man-made law can extend; this inconsistency will be resolved in the same manner as was originally envisaged by the authors and movers of the Objectives Resolution namely by the National Assembly itself. In practical terms, this implies in the changed context that the impugned provision of the Constitution shall be corrected by suitably amending it through the amendment process laid down in the Constitution itself."

"Shafiur Rahman, J.---18. The Court's primary duty is to adjudicate by reference to positive law in a manner to lend certainty,, clarity and precision to the application of law to concrete questions of law and fact necessarily required to be decided. The Court should not undertake examination of theoretical academic questions nor should ordinarily look for anomalies in the Constitution with a view to suggest to Parliament amendment or improvement in the Constitution. If the introduction of Article 2A of the Constitution as a substantive provision of the Constitution does not by itself authorise the Court to adopt it as a test of repugnancy with regard to the other Constitutional provisions it would be better for the superior Courts not to undertake this exercise or to record opinions on merits with regard to such repugnancy. That would be a commitment not conducive to the purely judicial functions that the Courts are required to perform under the Constitution."

6. 1 am inclined to take the view that the factum that the Objectives Resolution has been incorporated as a substantive part of the Constitution by virtue of Article 2A, does not justify reading into any additional Fundamental Rights in the Chapter pertaining to Fundamental Rights contained in the Constitution. The object of adopting the Objectives Resolution in 1949 has been thoroughly discussed in the case of Hakim Khan (supra), namely, to provide guideline and to serve as a beacon light to the framers of Constitution but it was never intended or designed to be enforced as Fundamental Rights. The framers of the Constitution have in fact acted upon, on the Objectives Resolution by incorporating the various Fundamental Rights contained in Articles 8 to 27, which cover Political Social and Economic Justice, to add to the above list any other Fundamental Right on the basis of the Objectives Resolution is the function of the Parliament and not of the Court. Flow ever, the Courts while construing Fundamental Rights should keep in view the Objectives

Resolution and should place widest possible construction as to advance the goals targeted/envisaged therein.

Mr. S.M. Zafar has pointed Gut that pursuant to the Objectives Resolution, Articles 9, 10, 12, 13, 14, 15, 16, 17, 19 and 25 inter alia pertaining to Political Justice have been incorporated. He has categorized the Fundamental Rights into following categories:--

(i) Fundamental Rights relating to Political Justice, namely, Articles 9 (Security of person), 10.(Safeguards as to arrest and detention), 12 (Protection against retrospective punishment), 13 (Protection against double punishment and self-incrimination), 14 (Inviolability of dignity of man, etc.), 15 (Freedom of movement, etc.), 16 (Freedom of movement)

(ii) Fundamental Rights pertaining to Social Justice, i.e. Articles 9 (Security of person), 11 (Slavery, forced labour, etc., prohibited), 13 (Protection against double punishment and self-incrimination), 14 (1) (Inviolability of dignity of man, etc.), 26 (Non-discrimination in respect of access to public), 27 (Safeguard against discrimination in services) and 28 (Preservation of language, script and culture).

(iii) Fundamental Rights relating to Economic Justice, namely, Articles 18 (Freedom of Trade, business or profession), 21 (Safeguard against taxation for purposes of any particular religion), 23 (Provision as to property) and 24 (Protection of property rights); and assembly), 17 (Freedom of association), 19 (Freedom of speech etc) and 25 (Equality of citizens).

Fundamental Rights pertaining to Religious Rights, namely, Articles 20 (Freedom to profess religion and to manage religious institutions), 21 (Safeguard against taxation for purposes of any particular religion) and 22 (Safeguards as to educational institutions in respect of religion, etc.).

The above categorisation indicates that the framers of the Constitution were not oblivious of the mandate given to them by the Objectives Resolution.

7.---(a) Both the parties have referred to the treatises and dictionaries on the term ‘Political Justice” in order to show, what it implies. Mr. Khalid Anwar has relied upon the following extracts from

the book "Justice and Natural Social and Political" by Dr. Chatervedi, wherein the above term has been dilated upon as follows:--

"Political justice would, therefore proceed much farther than mere right to adult suffrage or equal franchise and would embrace within its fold the ability and the liberty of the individual to share directly or indirectly in the administration of each body, institution or establishment serving his needs.

4. Rights enforceable against State.--Political justice in the sense in which it was conceived by Marcus Aurelius in his Mediations, is mere idea of a polity in which there is the same law for all, a polity administered with regard to equal rights and equal freedom of speech, and the idea of a Government which respects most of all the freedoms of the governed; and in that sense, it is mere overlapping of the other values ensured in the name of equality of status and of opportunity or liberty of thought, expression, belief, faith and worship. Political justice, in this sense stands for the guaranteed Fundamental Rights." He has also referred to the meaning in 'Black's Law Dictionary' (5th Edition) and in the 'Words and Phrases, (Permanent Edition--West Publishing Co.), Volume 32A:

Black's Law Dictionary :

"Political rights, '--Those which may be exercised in the formation or administration of the government. Rights of citizens established or recognized by Constitutions which give them the power to participate directly or indirectly in the establishment or administration of government."

'Political rights' consist in the power to participate directly or indirectly in the establishment or administration of government such as the right of citizenship, suffrage, etc. Friendly v. Olcott, .123 P.53, 56, 61 Or. 580"

'Political rights' consist in the power to participate, directly or indirectly, in the establishment and management of the government. State ex rel. McGoveren v. Gilkison, 196 N.E. 231, 208 Ind. 416."

'Political rights' are fixed by the Constitution and consist in the power to participate, directly or indirectly, in establishment or management of government, examples being right of voting for public officers, and of being elected. Caven v. Clark., D.C. Ark. 78 F. Supp. 295, 298, 303.

'Political rights' consist in the power to participate, directly or indirectly, in the establishment or management of the government These political rights are fixed by the Constitution. Every citizen ha the right of voting for public officers and of being elected. These are the political rights which the humblest citizen possesses. Winnett v Adams, 99 N.W. 681, 684, 71 Neb, 817, quoting 2 Bouv. Law Dict."

(b) On the other hand, Mr. S.M. Zafar has quoted the following passages from the book titled, "A Theory of Justice" by John Rawals:

"I now wish to consider political justice, that is, the justice of the constitution, and to sketch the meaning of equal liberty for this part of the basic structure. Political justice has two aspects arising from the fact that a just constitution is a case of imperfect procedural justice. First, the constitution is to be a just procedure satisfying 'the requirements of equal liberty; and second, it is to be framed so that of all the just arrangements which are feasible, it is more likely than any other to result in a just and effective system of legislation. The justice of the constitution is to be assessed under both headings in the light of what circumstances permit, these assessments being made from the standpoint of the Constitutional convention.

What is essential is that the Constitution should establish equal rights to engage in public affairs and that measures be taken to maintain the fair value of these liberties. In a well-governed State only a small fraction of persons may devote much of their time to politics. There are many other forms of human good. But this fraction, whatever its size, will most likely be drawn more or less equally from all sectors of society. The many communities of interests and centres of political fife will have their active members who look after their concerns.

(c) Reference has also been made by the learned counsel for the parties to the following observations of Zaffar Hussain Mirza, J. in the case of Miss Bcnazir Bhutto v. Federation of Pakistan and others (PLD 1988 SC 416), relevant at page 616:--

"The expression "political justice" is very significant and it has been placed in the category of fundamental rights. Political parties have become a subject-matter of a fundamental right in consonance with the said provision in the Objectives Resolution. Even otherwise, speaking broadly on the model of Parliamentary form of representative Government prevalent in United Kingdom. It is also clear from the Objectives Resolution that principles of democracy as enunciated by Islam are to be fully observed."

8. In my view, the political rights and the political justice are inter linked with each other. The former encompasses the right to participate directly or indirectly in the establishment or management of the Government. These rights ate delineated and demarcated in the Constitution of every country-, whereas the latter caters for providing in the Constitution equal -rights to engage and participate in the public affairs. It envisages that the Constitution should guarantee equal liberty and provide an efficient and honest machinery/mechanism through which people can elect their representatives in a manner which should ensure that--

(i) each vote has approximately the same weight in determining the

outcome of the election;

(ii) people similarly endowed and motivated should have roughly the same chance of attaining political authority irrespective of their economic and social class;

the majority should get into power.

The Fundamental Rights contained in ' our Constitution referred to hereinabove provided to some extent for the Political Rights and the Political Justice. However, there is a lot of scope for improving upon and expanding the same through legislation and the judicial creativity.

9. 1 am inclined to hold that the question whether this Court can entertain the above petition under Article 184 (3) can be decided in favour of the petitioner, if I were to hold that the order of dissolution of the Assembly and the dismissal of the petitioner as the Prime Minister and his Cabinet in any way is violative of Article 17 of the Constitution or any other Fundamental Rights contained therein. It may be pertinent to refer to Article 17 of the Constitution, which reads as follows:--

“17.--(1.) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of ,Pakistan, the Federal Government shall, within fifteen days of suit declaration, refer the matter to the Supreme Court whose decision on such reference shall be final.

(3) Every political party shall account for the source of its funds in accordance with law.”

A perusal of the above Article indicates that clause (1) thereof confers on every citizen the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality. Whereas, clause (2) confers on every citizen, not being in the service of Pakistan, the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan. It also empowers the Federal Government to declare that a political party has been formed, or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, subject to a reference to be made within 15 days from such declaration to the Supreme Court whose decision on such reference is to be, final.

10. The question in issue is, as to whether the right to form a political party or to be a member of such a party conferred under above clause (2) of Article 17 terminates upon the formation of a political party or upon becoming a member of such a party or does it continue up to the stage of contesting election on the basis of a political party, formation of a Government, if such a party has acquired majority in the House and to remain in power till the termination of the Constitutional duration by afflux of time or earlier in terms of the provisions of the Constitution.

,In this regard, reference may be made to the case of M iss Benazir Bhutto (supra), Wherein a direct petition was riled challenging certain provisions of the Political Parties Act, 1962, which did not permit participation in elections on party basis. In the above case, the Federation raised an

objection as to the maintainability of the above petitioner directly before this Court on two grounds. Firstly, that the petitioner was not an aggrieved party and secondly, for the reason of pendency of three petitions in the High Courts of Lahore and Sindh, claiming identical relief. On the above first ground, Muhammad Haleem, CJ. held that:

"If the framers of the Constitution had intended the proceedings for the enforcement of the Fundamental Rights to be in a strait-jacket, then they would have said so, but not having done that, I would not read any constraint in it. Article 184 (3) therefore, provides abundant' scope for the enforcement of the Fundamental Rights of an individual or a group or class of persons in the event of their infraction. It would be for the Supreme Court to Jay down the contours generally in order to regulate the proceedings of group or class of actions from case to case."

Whereas, on the above second ground, the then learned Chief Justice concluded, as under:-.

"As to the choice of the forum, it is no doubt correct that ordinarily the forum of the Court in the lower hierarchy should be invoked but that principle is not inviolable and genuine exceptions can exist to take it out from that practice such, as in the present case where there was a denial of justice as a result of the proceedings being dilatory.

As the human right norm is higher than the law then any violation and its consequent enforcement can only be controlled by an inbuilt limitation in the provision itself. A rule of practice which has received recognition as a principle of law is not higher than the norm and the machinery for its enforcement, and, therefore, it cannot control judicial power so as to stultify it until, of course, the petitioner has herself, in the strict sense, elected to seek her remedy from a Court of lower hierarchy exercising concurrent jurisdiction which is not the case here."

The learned Chief Justice and his companion Judges, who recorded their separate opinions had highlighted the importance of political parties in a Parliamentary form of Government. Suffice it to quote the following passage from Muhammad 'Haleem, CJ.'s opinion:--

"Our Constitution is of the pattern of Parliamentary' democracy with a Cabinet system based on party system as essentially it is composed of the representatives of a party which is in majority .... it is a party system that converts the results of a Parliamentary election into a Government."

Act, 1962, which did not ‘ permit the participation in the elections on party basis were declared as null and void being violative of Article 17(2) of the Constitution.

11. The judgment, which is more aptly applicable is the case of Mrs. Banazir Bhutto and another v. Federation -of Pakistan and another (PLD 1989 SC 66), which was also a direct petition filed in this Court under Article 184(3) of the Constitution, challenging section 21(l)(b) of the Representation of the People Act, 1976, which allowed the allocation of symbol to each individual candidate and not to a party. In the above report, the Federation had raised an objection to the effect that the Constitutional petition was not maintainable because no Fundamental Right of an individual citizen, as such, was in jeopardy and that the freedom to join any political party remained unaffected. The above objection was overruled on the basis of the above earlier judgment in the case of Miss Benazir Bhutto v. Federation of Pakistan and others (PLD

1988 SC 416) (supra), wherein, inter alia, it has been held that “the forming of a political party necessarily implies the carrying on of all its activities as F otherwise the formation itself would be of no consequence.” The above provision of the presentation of the People Act, namely, section 21 was declared as violative of Fundamental Rights contained in Article 17(2) of the Constitution inter alia for the following reasons recorded by Shaflur Ralunan, J. in his opinion:--

“Our conclusion therefore, is that section 21 of the Act as amended by Ordinances Nos. 11 -and VIII of 1985, is violative of Fundamental Rights contained in Article 17 (2) of the Constitution in so far as it’ fails to recognise the ‘existence and participation of the Political Parties in the process of elections, particularly in the matter of allocation of symbols and is for that reason void to that extent. Every Political Party is eligible to participate in the Elections to every seat in the National and the Provincial Assemblies scheduled to be held on the 16th of November, 1988. The political parties shall be entitled to avail of the provisions of sub-rule (2) of rule 9 of the Rules to seek allotment of any of the prescribed symbols. Both the petitions are allowed in these terms leaving the parties to bear their own costs. Federal Government shall pay a fee of Rs.5,000 each to two amicus curiae Mr. Ali Ahmed Fazeel and Mr. S.M. Zafar.”

It may be pertinent to point out that in the above case, it was also contended that Article 17 of the Constitution does not confer any right on a political party to seek allocation of a symbol-in the party name and that the question of allocation of the symbol was covered by the Statutory provision in the form of section 21 of the Representation of the People Act, 1976, or the rules framed thereunder. The above contention was repelled. The above argument was in fact in line with what has been now urged by the learned Attorney-General, Mr. Aziz A. Munshi and by Mr. S.M. Zafar in the present case, namely, that the petitioner had no vested right either to remain as a member of the National Assembly for a period of five years or to remain as the Prime Minister for the above

period as'no such right can be spelt out from any of the Fundamental Rights, as the same are subject-matters of other Constitutional provisions,

12. Learned Attorney-General and Mr. S.M. Zafar have referred to the following cases in order to contend that the petitioner did not have any vested right to remain as a member of the National Assembly for a period of five years and that the termination of the life of the Assembly prior to the expiry of the period provided under Article 52 does not involve infringement of any Fundamental Right:

(i) Kh. Ahmad Tariq Rahim v. Federation of Pakistan (PLD 1991 Lahore 78 (relevant at page 116);

wherein Muhammad Rafiq Tarar, C.J. (as his Lordship then was) has held that the members of the dissolved National Assembly could claim no vested right to enjoy full term of five years when ostensibly they lost confidence of the people on account of their performance and conduct in the National Assembly.

(ii) Reference by his Excellency the Governor-General (PLD 1955 FC 435 (at page 471);.

In the above case, the Federal Court while answering a reference made by the Governor-General observed as follows:--

"It should not be overlooked that dissolution does not in any way adversely affect the rights of the members of the Assembly. If their claim that they are in the Assembly by the consent of the people and as their representative and not merely because of a statutory provision is good, they can seek re-election to the, new Constituent Assembly, there being no disqualification attaching to them from being chosen as members of that Assembly. If they receive a fresh electoral mandate, they can return to the Assembly with greater popular acclamation and thus disprove the allegation that they represent nobody except themselves.

(iii) State of Rajasthan v. Union of India (AIR 1977 SC 1361, relevant at page 1402);

in which Bhagwati, J. speaking for himself and for A.C. Gupta, J. observed that they were of the view that the threatened dissolution of the Legislative Assembly did not involve any infraction of the Fundamental Right guaranteed to the petitioners under Articles 19(l)(0 and 31 and because of that Writ was not maintainable under Article 32.

(iv)Capt. KanwaIjit Singh v. Union of India (AIR 1991 Punjab 54, relevant at page 82);

In the above case, a Full Bench of the Punjab High Court while following the above Indian Supreme Court's case held that:

"To be a member of the Assembly and the mechanism constituting the same is a statutory right vested by the statute. It cannot be stretched beyond the four corners of the statute on any equitable ground."

It was also held that no provision of the Constitution had been pointed on under which the life of the Assembly could be extended.

(v) All India Bank Employees' Association v. The National Industrial Tribunal,(Bank Disputes) and others (AIR 1962 SC 171, relevant at page 179); in which the Indian Supreme Court while dealing with Article 19 (1) (c) of the Indian Constitution held that the same does not extend to concomitant right to effective bargaining or to strike. Ayyangar, J. while speaking on behalf of the Court also observed that "stream cannot rise higher than its source".

13. Whereas, Mr. Khalid Anwar has referred to the following cases:--

(i) Olga Tellis and others v. Bombay Municipal Corporation and others (AIR 1986 SC 180); in which the Indian Supreme Court while construing Article 21 of the Indian Constitution pertaining to the right of life held that the above Article was to be viewed in conjunction with Articles 39 (a) and 41 relating to State policy requiring the State to secure to the citizens an adequate means of livelihood and the right to work, and that eviction of pavement dwellers and slums will lead to deprivation of their livelihood and consequently to the deprivation of life or personal liberty in terms of the above Article.- It was further held that though under section 314 of the Bombay Municipal Corporation Act, 1886, the Commissioner had the discretion to cause an encroachment to be removed with or without notice, that discretion is to be exercised in a reasonable manner so

as to comply with the Constitutional mandate. It was also held that the pavement dwellers were entitled to be heard before they could be removed.

(ii) State of Himachal Pradesh and another v. Umed Ram Sharma and others (AIR 1986 SC 847);

In the above case the judgment of a Division Bench of the High Court was impugned, whereby the State Government was directed to construct road for providing access to certain village situated in hilly areas. The Indian Supreme Court while maintaining the above order with certain clarifications and while construing Articles 19(l)(d), 21 and 38 (2) has held that every person is entitled to life as enjoined in Article 21 of the Constitution and every personhas right under Article 19(l)(d) to move freely throughout the territory of India. It has been further held that the right to life under Article 21 embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself and that, accordingly, there should be road for communication in reasonable conditions in view of the above Constitutional imperatives.

A. Sharwani and others v. Government of Pakistan (1991 SCMR 1041).

In this matter, several direct petitions under Article 184 (3) of the Constitution were riled by certain retired civil servants/pensioners and their Association impugning discriminatory treatment meted out to them in respect of certain benefits granted to the pensioners on the ground of violation of inter alia Article 25 of the Constitution. The Federation raised an objection as to the maintainability of above Constitutional petitions directly in this Court. I in my opinion (which was adopted as the judgment of the Court), while overruling the above objection observed as follows:--

"13. Even otherwise, the above proceedings are in the nature of public interest litigation and, therefore, in order to advance the cause of justice and public good, the power conferred on this Court under clause (3) of Article 184 of the Constitution is to be exercised liberally unfettered with technicalities."

14. Reference may also be made to the following cases:--

(i) Muhammad Nur Hussain v. The Province of East Pakistan and others

(PLD 1959 SC (Pak.) 470);

In which this Court while dealing with the matter relating to the land acquisition under the East , Bengal (Emergency) Requisition of Property Act, 1948, and while construing Item 9 in the Provincial Legislative List of the Constitution relating to compulsory acquisition of land, observed as Wows as to the rule of interpretation of a provision of Constitution:---

"It is well recognised that in interpreting a provision of a Constitution the widest construction on possible in its context should be given according to the ordinary meaning of the words used, and that each general word should be held to extend to all ancillary and subsidiary matters."

(ii) Dwarkadas Shrinivas v. The Sholapur Spinning & Weaving Co. Ltd.

and other's (AIR 1954 SC 119).

In the above case, the Indian Supreme Court while examining vires of an Ordinance which authorised the deprivation of the property of the company held that the provisions in the Constitution touching Fundamental Rights must be construed broadly and liberally in favour of those on whom the rights have been conferred.

15. The above cases relied upon by the learned Attorney-General and Mr. S.M. War are distinguishable inasmuch as in the above Lahore case (Ahmad Tariq Rahim), it was held that the Assembly lost the confidence of the people, whereas in the present case, the position is otherwise. The above Federal Court judgment upon the Governor-General's reference has also. no application as the judgment was rendered when there was no fundamental right in the field. The above cases of Indian jurisdiction referred to by the learned Attorney-General and Mr. S.M. War are also distinguishable as the case of the Indian Supreme Court (1977) (State of Rajasthan) and of the Punjab High Court (1991) Capt. Kanwaijit Singh), pertained to the dissolution of the States Assemblies under Article 356 of the Indian Constitution which envisages vesting of the State legislative power in the Parliament and the, executive power in the President, the case of Indian Supreme Court 1962 (All India Bank Employees' Association) relates to the right to be a collective bargaining agent though there is general observation that stream cannot rise higher than its source" which may have some bearing on the controversy in issue.

Whereas the above cases cited by Mr. Khalid Anwar referred to hereinabove show that Indian Supreme Court while construing Article 21 of the Indian Constitution pertaining to the right to life has held that it embraces not only physical existence of life but the quality of life and for residents of hilly areas, access to road is access to life itself. Even the pavement dwellers were considered to have some right. The efforts were to construe the above provision liberally as to extend its scope. The same approach seems to have been adopted by this Court in IA. Sharwani and others and Muhammad Nur Hussain (supra) inasmuch as in the former case, Article 184 (3) of the Constitution was given liberal construction unfettered with technicalities, whereas in the latter 'case, it has been held that while interpreting -a provision of the Constitution the widest construction possible in the context be given and that each general word should be construed in such a way that it should extend to all ancillary and subsidiary matters.

16. 1 am inclined to hold that the right to form a political party and to be a member of a political party enshrined in clause (2) of Article 17 does not culminate upon winning of the elections as was contended by the learned Attorney-General and Mr. S.M. Zafar but it is a continuous political process which includes the right of the petitioner to remain as a member of the National Assembly or as a Prime Minister till the time the life of the Assembly S or the tenure of *the Prime Ministership is terminated lawfully in accordance with the provisions of the Constitution. It is true that nobody can claim any vested right to remain a member of. the National Assembly or to be a Prime Minister for the period of five years but an MNA or a Prime Minister can claim that he should be allowed to function so long as the life of the Assembly or his tenure is not terminated in accordance with the provisions of the Constitution. Any infraction of the above right without legal basis will inter alia attract Article 17 (2) of the Constitution besides being violative of the, relevant Constitutional or statutory provision. Since the majority, including me, has held that the impugned order of 18th April, 1993, does not fall within the ambits or Article 58 (2) (b) of the Constitution, the termination of the life of the %7 Assembly and the tenure of the petitioner as the Prime Minister besides being violative of the above provision of the Constitution will . also attract I Article 17(2) of the Constitution, as admittedly the petitioner was the leader of a political party which commanded the majority in the National Assembly.

17. . I may also observe that there is a. 'Marked distinction between interpreting a Constitutional provision containing a Fundamental Right and a provision of an ordinary statute. A Constitutional provision containing Fundamental Right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision the approach of the Court should be dynamic, progressive and liberal keeping in view ideals of the people, socio-economic and politico-cultural values (which in Pakistan are enshrined in the Objectives Resolution) so as to extend the benefit of the same to the maximum possible. This is also called judicial activism or judicial creativity. In other words, the role of the Courts is to expand the scope of such a provision and not to extenuate the same. The construction placed by me on Article 17 of the Constitution hereinabove in para. 16, seems to be in consonance with the above rules of construction.

18. Before concluding the above discussion on the above controversy, I may also observe that Mr. Maqbool Elahi Malik, learned Advocate-General, Punjab, has invited our attention to the following observation made by me in the case of Federation of Pakistan through Secretary, Ministry of Law, Justice and Parliamentary Affairs, Islamabad and others v. Aftab Ahmad Khan Sherpao and others (PLD 1992 SC 723) and contended that the tenor of the said observation seems to be that a petition under Article 184 (3) of the Constitution directly to this Court is not competent:--

"The above contention is not without force, but at the same time, I cannot overlook the fact that the electorates who are the real sovereigns in a democratic set-up, have expressed their will. The newly-elected Assembly and the new Cabinet have been functioning for the last about a year. Neither the M.P.As. of the new Assembly nor the Ministers and Advisors of the new Provincial Ministry are before us. Neither they have been impleaded as parties nor any notice has been issued to them. It would, therefore, be not just and fait to condemn them unheard. It is true that in terms of clause (5) of Article 48 of the Constitution, election of a dissolved Assembly is to take place within 90 days and by the time the controversy as to the legality of an order of dissolving an Assembly can be finally adjudicated upon by this Court, quite considerable period may elapse in the meantime the' elections may take place and a new Minis ' try may be inducted. In my humble view, the above difficulty is to be resolved by the law-makers by providing an appropriate provision in the Constitution. Since this Court has held that an order of dissolving an Assembly is justiciable, the question, whether a particular order of dissolving an Assembly is legal or illegal, should be adjudicated upon before holding fresh elections. If a criminal case by virtue of a Constitutional amendment is required to be decided within 30 days by a trial Court or appeal arising therefore a provision can be incorporated in the Constitution providing a direct Petition to the Supreme Court against an order of dissolving an Assembly, with the mandate that the same should be decided within 30 days from the date of its presentation, which should be presented within 7 days from the date of dissolution.

The above contention is devoid of any force, as the question, whether a direct petition under Article 184 (3) of the Constitution before this Court was competent or not, was not in issue in the above report but an appeal with –the leave of the Court was riled against the judgment of the Peshawar High Court, whereby the Governor's order of dissolving of the Provincial Assembly of N.-W.F.P. and dismissing the Cabinet including the Chief Minister was set aside and both were restored. Since I was maintaining the above High Court judgment with the modification relating to the relief of restoration of the Assembly and the Cabinet for the reasons recorded in the above-quoted extract of my 'opinion, I had suggested that a direct petition to this Court against an order of dissolving am Assembly be provided in the Constitution with the mandate to decide the same within 30 days but the above suggestion does not imply that I had held that a direct petition under Article 184 (3) of the Constitution could not be riled if a petitioner could demonstrate any infraction of any of the Fundamental Rights.

In this view of the matter, the above preliminary objection fails.

19. At this juncture before touching upon the grounds of dissolution order on merits, it may be pertinent to take up two legal points raised by Dr. Farooq Hasan, namely:--

since the Speaker ha d summoned the National Assembly for 19-4-1993 a requisition under Article 54- (3) if the Constitution, the same upon could have been prorogued by the Speaker only in view of the language employed in the above clause (3) of Article 54 and therefore, the President was not competent to press into service Article 58(2)(b) of the Constitution and, hence, the impugned order is illegal' and without jurisdiction;

(ii) that Article 58(2)(b) of the Constitution lays down two preconditions before the National Assembly can be dissolved--

(a) - a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution; and

(b) an appeal to the electorate is necessary.

According to Dr. Farooq Hasan, the President has not addressed to himself to the, above second requirement before the passing of the impugned order nor this Court attended to the above aspect in the earlier judgments in the case of Haji Saifullah (PLD 1989 SC 166) and in the case of Ahmad Tariq Rahim (PLD 1992 SC 646).

20. As regards the above first contention, it may be-pertinent to observe that the power to prorogue is entirely distinct from the power to dissolve and, therefore, the factum' that under clause (3) of Article 54 once the Speaker summons the National Assembly upon requisition signed by not less than one fourth of the total membership of the National Assembly, he can only prorogue and not any other authority, does not, in any way, control or curtail the power conferred on the President under clause (2)(b) of Article 58 of the Constitution. If the -National Assembly can be dissolved while in session, there seems to be no legal basis as to why it cannot be dissolved when it is not in session but is summoned upon requisition under clause (3) of Article 54 of the Constitution.

Mr. S. M. Zafar has invited our attention to the following observation from the treatise on the 'Theory and Practice of Dissolution of Parliament' compiled by Cambridge Studies in International and Comparative Law, edited

by CJ. Hamson and R.Y. Jennings:--

“Once Parliament has been formally opened, if can be dissolved whether it is in session or not.”

The above observation seems to be in consonance with the view which am inclined to take. I

21. Adverting to the above second legal submission, it may be pertinent to quote Article 58 of the Constitution, which reads as follows:--

“58.--(l) The President shall dissolve the National Assembly if so advised by the Prime Minister; and the National Assembly shall, unless sooner dissolved, stand dissolved at the expiration of forty-eight hours after the Prime Minister has so advised.

Explanation .--Reference in this Article to “Prime Minister” shall not be construed to include reference to a Prime Minister against whom a notice of a resolution for a vote of non-confidence has been given in the National Assembly but has not been voted upon or against whom such a resolution has been passed or who is continuing in office after his resignation or. after the dissolution of the National Assembly.

(2) Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion,--

(a) a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution, as ascertained in a session of the National Assembly summoned for the purpose; or

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary."

A perusal of the above-quoted Article shows that under clause (1), it is mandatory on the part of the President to dissolve the National Assembly if so advised by the Prime Minister and unless sooner dissolved, it shall stand dissolved automatically at the expiration of forty-eight hours after the Prime Minister has so advised. However, explanation to the above clause puts clog on the above right of the Prime Minister by providing that he cannot tender above advice if notice of a resolution for a vote of no-confidence has been given against him.

It may further be noticed that clause (2) provides that notwithstanding anything contained in clause (2) of Article 48 of the Constitution, the President may dissolve the National Assembly in his discretion where in his opinion--

(a) a vote of no-confidence has been passed against the Prime Minister and in the opinion of the President no other member of the National. Assembly is likely to command the confidence of the majority of the members;

(b) the President may also dissolve in his discretion when in his opinion a situation has arisen in which the Government of the. Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

22. The above sub-clause (b) of clause (2) of Article 58 of the Constitution is pertinent to the point in issue. In my opinion, once the President forms the opinion objectively on the question that a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution on the -basis of the material having nexus with the above, reason, he enters into the domain of discretion and it is for him to decide, as to whether the proper action would be the' dissolution of the Assembly or some other action warranted by some other provisions of the Constitution or law. This question had come up for consideration before this Court in the case of Ahmad Tariq Rahim (supra), wherein Shaflur Rahman, J. speaking on behalf of the majority concluded as follows:--

"There are three general arguments advanced by the learned counsel for petitioner which need attention at this stage before taking up the specifics. The first was that there were available to the

President other alternative Constitutional remedies before resorting to this or such a drastic step. In advancing this argument a misconception with regard to the Constitutional powers enjoyed by the President in his discretion and by the Prime Minister has been exhibited. All the alternative powers referred to are exercisable by the President only on the advice of the Prime Minister and not in his discretion. It is not for the President to seek advice 'of the Prime Minister and to obtain one. Nor is it open to the Courts to examine what advice, if any, was given and how it was received: None of the powers, be it under Article 186 (1), or Article 233(l) or Article 184(l) of the Constitution or even section 131-A of the Criminal Procedure Code is exercisable by the President in his discretion. So there are no alternative remedies available to -the President but these alternative remedies. are available to the Prime Minister."

Even otherwise the object of dissolving the Assembly in its essence is an appeal from the-legal to the political sovereign as highlighted by Dicey *in his. celebrated book "Introduction to the Study of the Law of the Constitution", Tenth Edition, wherein he commented upon the above aspect as under:--

"But the' reason why the House can in accordance with the Constitution be deprived of power and of existence is that an occasion has arisen on which there is fair reason to suppose that the opinion of the House is not the opinion of the electors. A dissolution is in its essence an appeal from the legal to the, political sovereign. A dissolution is allowable., or necessary, whenever the wishes of the legislature are, or may fairly be presumed to be, different from the wishes of the nation.

This is the doctrine established by the celebrated contests of 1784 and of 1834. In each instance the King dismissed a Ministry which commanded the confidence of the House of Commons. In each case there was an appeal to the country by means of a dissolution. In 1784 the appeal resulted in a decisive verdict in favour of Pitt and his colleagues, who had been brought into office by the King against the will of the House of Commons. In 1834 the appeal led to a verdict equally decisive, against Pitt and Wellington, who also had been called to office by the Crown against the wishes of the House. The essential point to notice is that these contests each in effect admit the principle that it is the verdict of the political sovereign which ultimately determines the right of (what in politics is much the same thing) the 'power of a Cabinet to retain office, namely, the nation."

In my opinion, the dissolution of an Assembly is inter linked with an appeal to the electorate. If an Assembly is to be dissolved as a corollary, an appeal to the electorate is to be made. I am inclined to hold that we will be entering into the domain of speculations, surmises and conjectures if we were to examine the question, whether an appeal to the electorate will achieve the desired result which is not warranted by the language employed in the above provision of the Constitution. -One cannot predict with certainty, what would be the outcome of an appeal to the electorate.

23. 1 may now deal with the merits of the grounds. Both the parties were in agreement that the law as enunciated as to the scope of sub-clause (b) of. clause (2) of Article 58 of the Constitution by this Court in its judgment in the case of Haji Muhammad Saifullah Khan (supra), Ahmad Tariq Rahim (supra) and the case Federation of Pakistan v. Aftab Ahmad Khan Sherpao (supra) is the correct law, which will govern the present case as well. In this connection, it may be pertinent to quote the relevant passages on the interpretation of the expression "situation has arisen in which the Government cannot be carried on in accordance with the provisions of the Constitution" employed in above subclause (b) of clause (2) of Article 58 of the Constitution, given in the first case of Haji Muhammad Saifullah:--

Nasim Hasan Shah, J. (as his Lordship then was).---Thus the intention of the law-makers, as evidenced from their speeches and the terms in which the law was enacted, shows that any order of dissolution by he President can be passed and an appeal to the electorate made only I when the machinery of the Government has broken down its authority eroded and the Government cannot be carried on in accordance with the provisions of the Constitution.

Shaflur Rahman, J.--The expression 'cannot be carried on' sandwiched as it is between 'Federal Government' and 'in accordance with the provisions of the Constitution', acquires a very potent, a very positive and a very concrete content. Nothing has been left to surmises, likes or dislikes, opinion or view. It does not concern itself with the pace of progress, the shade of the quality or the degree of the performance or the quantum of the achievement. it concerns itself with the breakdown of the Constitutional mechanism, a stalemate, a deadlock in ensuring the observance of the provisions of the Constitution."

I may also refer to the following construction placed by me on the above expression in the case of Federation of Pakistan v. Aftab Amaani Sherpao (supra):--

"The words 'that a situation has arisen in which the Government of the Province cannot be carried on in accordance with the provisions of Constitution' are of wide import. If a Government, in order to remain in power, has to purchase the loyalties of the M.P.As. by allotting plots or granting other benefits in cash or kind at the cost of the public exchequer and/or is to induct them as Ministers and Advisors for the above purpose, in my humble view, it cannot be said that the Government is being carried on in accordance with the provisions of the Constitution."

24. The line of arguments adopted by Mr. S.M. War was that the dissolution of an Assembly in a democratic s ' et-up-,is a normal incident which in fact advances the cause of

democracy by getting fresh mandate from the political sovereign. In this regard, he has referred to the book under the caption "Inter-Parliamentary Union" Parliaments of the World (A Reference Compendium) by Valentine Herman with the collaboration of Francoise Mendal and the Theory and Practice of Dissolution of Parliaments, a comparative study with special reference to the United Kingdom and Greeks by B.S. Markesinis. In the former book, the author has given the following

table indicating the dissolution of the Parliament through various modes which

includes 12 at the initiates of the Head of the State:--

"Circumstances	Number of Countries."
At initiative of Head of State	12
When Government loses its majority through changes in the Political composition of Parliament.	3
When vote of censure or no confidence passed against the Government	9
When two Houses disagree	4
At request of Prime Minister	14
Automatic dissolution associated with Constitutional changes,	4

Whereas the tables given in the latter book, reflect dissolution of Parliaments in United Kingdom (during the period commencing from 1867 to 1970) in Greek (during the period from 1844 to 1970) and in Belgium (from 1850 to 1970). The statistics given therein indicate that during 11-11-1985 to 27-6-1986 and 10-1-1910 to 28-11-1910, the British Parliament was dissolved twice; whereas between 24-10-1922 to 9-10-1924, it was dissolved thrice and then from 7-1-1950 to 5-10-1951 twice. The tables relating to Greek and Belgium are also on the. above pattern. Though the above tables show that dissolution of Assemblies is not a new phenomenon, but the same cannot furnish any assistance for the purpose of construing above sub-clause (b) of clause (2) of Article 58 of the Constitution. It may be pertinent to point out that though the King/the Queen of England possessed the power to dissolve the Parliament as the Royal Prerogative but the above power has not been exercised by the King or the Queen since 1834 due to a convention and the dissolution of the Parliament had been effected on the advice of the Prime Minister. In this behalf, reference may be made to the following passage from the treatise on the Introduction to the Study of the Law of the Constitution by AN. Dicey, Tenth Edition:--

"The constitutionality therefore of the dissolution in 1834 turns at bottom upon the still disputable question of fact, whether the King and his advisors had reasonable ground for supposing that the reformed House of Commons had lost the confidence of the nation. Whatever may be the answer given by historians to this inquiry, the precedents of 1784 and 1834 are decisive; they determine the principle on which the prerogative of dissolution ought to be exercised, and show that in modern times the rules as to the dissolution of Parliament are, like other conventions of the Constitution, intended to secure the ultimate supremacy of the electorate as the true political sovereign of the State; that, in short, the validity of Constitutional maxims is subordinate and subservient to the fundamental principle of popular sovereignty.

The necessity for dissolution stands in close connection with the existence of Parliamentary sovereignty."

Indeed holding of a general election regularly in a democratic setup/polity is an essential element. It inculcates political maturity among the masses, brings political stability in the democratic institutions and gives the masses sense of participation, in the affairs of the State and generates in them sense of responsibility and patriotism. But frequent dissolution of an Assembly without

justifiable reason affects adversely the above democratic process, which results into instability in the country adversely affecting growth.

25. Mr. Yahya Bakhtiar who also appeared for the petitioner adopted somewhat different line of arguments than Mr. Khalid Anwar by urging that under the Preamble of the original Constitution. which has now become substantive part of the Constitution by incorporating Article 2A, the sovereignty over the entire Universe belongs to Almighty Allah alone and the authority to be exercised within the limits prescribed by Him is a sacred trust. According to him sub-clause (b) of clause (2) of Article 58 of the Constitution is repugnant to the above basic Islamic concept Of sovereignty and that no person how so high he may be Placed can be vested with the power to destroy the chosen representatives of the people through an executive order, as under the above Preamble, the State is to exercise its power and authority through the chosen representatives of the people. To reinforce his above submission, he has invited our attention to the speech made by the Founder of the Nation Ouaid-i-Azam Muhammad Ali Jinnah in 1948 at Quetta' He has particularly invited our attention to the following concluding para. of the speech:--

"in proposing this scheme, I have had one underlying principle in mind, the principle of Muslim democracy. It is my belief that our salvation lies in following the golden rules of conduct set for us by our great law-giver, the Prophet of Islam. Let us lay the foundation of our democracy on the basis of truly Islamic ideals and principles. God Almighty has taught us that 'our decisions in the affairs of the State shall be guided by discussions and consultations'. I wish you, my brethren of Balochistan, God speed and all success in the opening of this new era. May your future be as bright as I have always prayed for and wished it to be. May you all prosper!"

He has also invited our attention to a passage from the treatise under the caption "Islamic Jurisprudence and International Perspective by C.G. Weeramantry, where the author has following observations:--

"The Islamic position of subornation of the sovereign to God and his law comes through strongly in the following Qur'anic passage: 'Say: 0 God, Lord of Sovereignty! Thou gavest sovereignty to whom Thou pleasest. Thou exaltest whom Thou pleasest and absest whom Thou pleascst. In Thy hand is all good for Thou has power over all things. (Qur'an, 111:26). For a discussion of sovereignty, see Asad (1980b), pp. 37 ff.

A ruler invested with sovereignty in the Hobbesian or Austinian sense was unthinkable at any stage in the history of Islamic law. Locke did indeed place limitations upon the ruler but this was in

consequences of a man-made social power……
……..

The governance of the Unimah (the Muslim community) thus depended upon the principle of consultation (Shura) and no ruler was free of this obligation (see Qur'an XLII: 38)."

On the above basis, his submission was that not only the impugned order but also the above provision of Article 58 (2) (b) of the Constitution is violative of the above Islamic concept of sovereignty. There seems to be marked distinction between the Islamic concept of sovereignty and the modern concept of sovereignty enunciated by the various celebrated authors/scholars. However, it will suffice to observe that the effect of incorporation of the preamble as a substantive part of the Constitution has been considered by a Full Bench of this Court in the case of Hakim Khan and 3 others (supra) referred to hereinabove in para. 4. The above broader proposition of law now urged by Mr. Yahya Bakhtiar can be examined in an appropriate case at the appropriate time.

26. 1 may now deal with the grounds of the impugned order. It may be advantageous to reproduce the opening para. and sub-para. (a) of the same, which read as follows:--

"The President having considered the situation in the country, the events that have taken place and the circumstances, the contents and consequences of the Prime Minister's speech on 17th April, 1993 and among others for the reasons mentioned below is of the opinion that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary:--

(a) The mass resignation of the members of the Opposition and of considerable numbers from the Treasury Benches, including several Ministers, inter alia, showing their desire to seek fresh mandate from the people have resulted in the Government of the Federation and the National Assembly losing the confidence of the people, and that the dissension therein, has-nullified its mandate."

In the above opening para. inter alia reference to the Prime Minister's speech of 17-4-1993 has been made, which I intend to deal with alongwith ground 'b'. The above ground 'a'- speaks of mass resignation of the members of the Opposition and of considerable numbers from the Treasury Benches including several Ministers showing their desire to seek fresh mandate. On the basis of the above, it has been concluded that the National Assembly has lost the confidence of the people

and that the dissension therein had nullified its mandate. From the record, it seems that the President received 88 resignations addressed to the Speaker from the M.N.As./Ministers out of the House of 217. 12 MQM members had resigned earlier about more than a year back. One of the members, namely, Mr'. Muhammad Khan Junejo expired; thus the total comes to 101. It may be observed that most of the resignations out of 88 received by the President are undated. Some are in identical language in the same handwriting. It is also not indicated as to when they were handed over and by whom. However, the newspaper clippings pertaining to the period preceding to the date of dissolution order indicate that some of the leaders of the Opposition were collecting resignations from MNAs besides one of the Governors of the Province. The daily English newspaper "Nation" in its publication of 3-4-1993 published a statement of Mr. Mir Balakh Sher Mazari, M.NA. who had allegedly stated that more than 80 members of the National Assembly including those of the P.DA. were ready to resign whenever President Ghulam Ishaq Khan asks them to do so. Incidentally, it may be stated that Mr. Mir Balakh Sher Mazari was appointed as the Care-taker Prime Minister after the passing of the impugned dissolution order. Be that as it may, the question which requires consideration is, whether the submission of the above resignations to the President for the purpose of ousting a Government which commanded the majority in the National Assembly could be a ground for invoking sub-clause (b) of clause (2) of Article 58 of the Constitution. In this behalf, it may be pertinent to refer to clause (1) of Article 64 of the Constitution, which provides that a member of Majlis-eShoora (Parliament) may by writing under his hand addressed to the Speaker or, as the case may be, the Chairman, resign his seat and thereupon his seat shall become vacant. In the case of Mr. AX Fazlul Quader Chaudhry v. Shahnawaz and others (PLD 1966 SC 105), this Court while construing Article 107 (a) of the late Constitution of Pakistan, 1962, containing more or less identical provisions held that communication of resignation to the Speaker is an essential ingredient of the application of above Article 107 of the late Constitution and in the absence of any such communication, the resignation is of no effect.

The same view was taken in a- subsequent judgment of this Court in the case of Mirza Tahir Beg v. Syed Kausar Ali Shah and others (PLD 1976 SC 504), in which this Court while dilating upon Article 64 read with Article 127 of the Constitution relating to resignation of an M.P.A. held that:

"If on the other hand the resignation is not presented personally, but is sent through a messenger, as in the instant case, then Speaker will have to further satisfy himself that the transmission is by an authorized person. The resignation could not have taken effect unless it was voluntary and intended to reach the Speaker in a manner chosen by the appellant himself. There is nothing whatever, to show that the Speaker had satisfied himself about either of two conditions, and therefore failed to do what he was required by law and the Constitution."

27. In para. 3 (iii) of the written statement dated 2-5-1993 riled on behalf of the Federation of Pakistan, the following averments as to the submission of resignations 'to the President instead of to the Speaker were made:--

"3(iii). Contents of para. 3 (iii) are misleading and incorrect.

It is submitted that it is for the members of the National Assembly to select the mode of showing their protest and lack of confidence in the petitioner's Government, National Assembly and the Speaker whether in or outside the House. In the instant case they have addressed their resignations (Annex A-1) to the Speaker of the National Assembly, but sent them to the President to register with the Head of the State their protest and as an expression of lack of confidence in the National Assembly, the Speaker and the Federal Government. The further reason was that the Speaker had not in the past acted upon any motion directed against the Prime. Minister/or any other Minister or member of the National Assembly supporting the Government or the

Government itself and, as widely known the concerned members had shown lack of confidence in the Speaker, who according to the general perception was in collusion with the former Prime Minister and was not acting independently (Annex-N). Speaker was getting preferential and special treatment in special allocation of funds for his

Constituency (Annexes. -1, N-2, N-3). As the Speaker conduct was objectionable and open to question, the concerned MNAs. sent their resignations to the President so that their protest etc. expression of lack of confidence be properly registered. The circumstances, background and the factors responsible for the handing over of the

resignations by the Members to the President arc as above. It demonstrated that the said Members had lost confidence in the National Assembly, the Federal Government and the Speaker, and that the mandate had been nullified. It is further submitted that the

Speaker has to receive resignations only for the purpose of creating a vacancy and consequent by-elections. The circumstances in which the resignations were handed over to the President, have been mentioned above and the President could form his opinion in that behalf. Rest of the contentions are repelled."

Mr. Aziz A. Munshi, learned Attorncy-Gencral, while arguing the above point on 15-5-1993 in the morning session adhered to the pleas contained in the above-quoted para. of the written statement and contended that the above resignations were intended as protest and were not to be acted upon as resignations. However, after tea break, he deviated from the above pleading and his earlier submission and urged that factually the resignations were intended to the resignations and they were also meant as protests. He

also filed a written statement on the above point on the following day. Alongwith it he also enclosed statistics indicating the percentage of valid votes cast originally in 1990 General Election and the position on 18-5-1993 after the submission of the resignations by the M.Q.M. members and above 88 M.N.As, which read as follows:--

"Statement

The resignations were submitted by responsible members of the National Assembly including the Leader of the Opposition, the former Prime Minister and Mr. Ghulani Mustafa Jatoi and they were meant to be resignations as well as protests. The President in normal course could have forwarded them to the -Speaker, and under the Constitution and Rules of the National Assembly the vacancies would have inevitably occurred.

The President was not bound to wait as under Article 58 (2) (b) the words used are "cannot" which is different than "is not". The President could have formed an opinion by the result of the vacancies that would occur that "the Government of the Federation could not be run in accordance with the Constitution"; and that the Assembly had lost the mandate.

Original Position

(Percentage or valid votes cast.)

IJI	37.37%
PDA	36.83%
Haq Prasat	5.54%

JUI(f)	2.94%
Others	17.32%

Position on 18-5-1993

(Percentage of valid votes cast)

IJI(minus JI)	28.15%
JI	2.23%
PDA	36.92%
JUI(F)	2.94%
PML(Q)	.04%
JWP	0.61%
JUP(N)	1.47%
PKMP	0.35%

ANP(H)	1.68%
PML (J)	7.00%
TI	---
NDA	----
Others less Haq Parast	13.16%
Grand Total:	94.46%

28. According to the learned Attorney-General, on 18-5-1993 M.N.As. of IJI minus JI were representing only 28.15% of the total valid votes cast in 1990 election. On the above basis his submission was that the National Assembly lost its representative character warranting action under sub-clause (b) Pf clause (2) of Article 58 of the Constitution.

Even if I were to ignore the above pleading of the Federation and allow the learned Attorney-General to deviate from it, the fact remains that the submission of above 88 resignations to the President had no legal effect as they 0 were not handed over to the Speaker in terms of Clause (1) of Article 64 of the Constitution, in view of the above two judgments of this Court. The object of submission of the above resignations to the President was to get the petitioner's Government ousted and in order to achieve the above object, the Assembly was to be dissolved. In my view, the above object is foreign to the ground mentioned in sub-clause (b) of clause (2) of Article 58 of the Constitution as the factum that 88 MNAs had submitted resignations to the President instead of the Speaker, would not show that the Assembly lost the mandate of the people

or that a situation had arisen in which the 'Federation could not be carried on in accordance with the provisions *of the Constitution. In Ahmad Tariq Rahim's case (supra), it was held that the Assembly had lost its representative character because of defections, which ground was not factually contested (see PLD 1962 SC 666). There is no allegation of defections or horse-trading in the impugned order. I am also not impressed by the learned Attorney-General's submission that on 18-5-1993, IJI MNAs minus JI represented only 28.15% of the total valid votes cast in 1990 General Elections. The above calculation is highly speculative and cannot 'be made basis for pressing into service the above provision of sub-clause (b) of clause (2) of Article 58 of the Constitution. In our country, we do not have two parties system but there is no limit as to the number of political parties which may participate in a General Election. In such a situation, a party having majority may not have secured even 30% of votes cast but as the Constitution stands, this does not, in any way, affect the right of such a party to form the Government and to run the same for a full period of rive years.

I am inclined to hold that what cannot be achieved directly cannot be achieved indirectly by pressing into service sub-clause (b) of clause (2) of Article 58 of -the Constitution. In this regard, it may be pertinent to mention Lhat Under clause (5) of Article 91 of the Constitution. it has been provided that the Prime Minister shall hold the office during the pleasure of the President but this pleasure is controlled by providing therein that the President shall not withdraw his pleasure under this clause unless he is satisfied that the Prime Minister does not command the confidence of majority of the members of the National Assembly, in which case he shall summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly. If the Prime Minister fails to obtain a vote of confidence, the President is entitled to withdraw his pleasure by dismissing the Cabinet and the Prime Minister. Reference may also be made to clause (1) of Article 95 of the Constitution which provides that a resolution for. a vote of no-confidence moved by not less than 20 per centurn of the total membership of the National Assembly may be passed against the Prime Minister by the National Assembly. Whereas sub-clause (a) of clause (2) of Article 58 of the Constitution empowers the President to dissolve the Assembly in his discretion if a vote of no-confidence having been passed against the Prime Minister, and no other member of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly. This is to be read with clause (5) of Article 48 which empowers the President upon dissolving the National Assembly either under sub-clause (a) or sub-clause (b) of Clause (2) of Article 58 of the Constitution to--

(a) appoint a date not less than 90 days from the date of dissolution for

holding of General Elections to the Assembly; and

(b) appoint a Care-taker Cabinet which includes Prime Minister.

There seems to be no other provision under the Constitution, whereby a Prime Minister commanding majority of the House can be removed or dismissed. I am, therefore, of the view that the facturn that 88 MNAs had submitted resignations with the above object had no nexus with the ground mentioned in sub-clause (b) of clause (2) of Article 58 of the Constitution. Even if the above 88 resignations would have been submitted to the Speaker, that would not have been sufficient to conclude that the situation had arisen in which the Government of the Federation could not be carried on in accordance with the provisions of the Constitution as the law provides the requisite provision for bye-elections for filling in such vacancies.

29. The persons desirous to achieve the ouster of a Government commanding majority in the National Assembly cannot be allowed to achieve the above object by adopting the above mechanism instead of defeating the Government through no-confidence votes. The intention of the above MNAs to submit their resignations was to oust the Government which commanded majority and to get into power through this indirect means, which fact stands established from the facturn that Mr. Mir Balakh Sher Mazari was inducted as the Care-taker Prime Minister and the Ministers who had resigned from the petitioner's Cabinet were taken as the Care-taker Ministers besides taking majority of the MNAs who submitted their resignations as Care-taker Ministers in the Care-taker cabinet. In this view, of the above ground is not sustainable;,

Both the parties have referred to the case of Adegb*o v. Akintolame and another (1963) 5 All ER 544) in which the Premier of W stern Nigeria (respondent No.1) was dismissed by the Governor pursuant to the power contained under section 33 (10) of the Constitution of the Federation of Nigeria after receiving a representation from 66 members of the House of Assembly out of total 124 members stating therein that they Were no longer supporting respondent No.i. After the above removal, of respondent No.1 the appellant was appointed as the Care-taker Premier' The Federal Supreme Court upon respondent No.1's petition declared the above Governor's order as illegal and ordered his reinstatement. Thereupon, an appeal was riled before the Privy Council, which was allowed, It may be pertinent to reproduce subsection (10) of section 37 of the Nigerian Constitution, which reads as follows:--

"(10). Subject to the provisions of subsections (8) and (9) of this section, the Ministers of the Government of the Region shall hold office during the Governor's pleasure: Provided that--(a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly; and, (b) the Governor shall not remove a Minister other than the Premier from office except in 'accordance with those advice of the Premier."

The Privy Council, while dealing upon the above controversy, repelled respondent No. Ys, contention that the Governor can not have exercised the above power without getting the votes cast in the and held as follows:--

"The difficulty of limiting the statutory power of the Governor in this that the limitation is not to be found in the words in which the way decided to record the description of makers of the. Constitution have his powers. By the words they have empowered in their formula 'it appears to him', the judgment as to the support enjoyed by a Premier is left to the Governor's own assessment, and, there is no limitation as to the material on which he -is to base his judgment or the contacts to which he may resort for the purpose. There would have been no difficulty at all in so limiting him, if it had been intended to do so. For instance, he might have been given power to list only after the assigning of a resolution of the House 'that it has no-confidence in the Government of the Region', the very please employed in an adjoining section of the Constitution (see section 31(4), proviso (b) to delimit the Governor's power of dissolving the House even without the Premier's advice. According to any ordinary rule of construction weight must be given to the fact that the Governor's power of removal is not limited in such,.-precise terms as would confine his judgment to the actual proceedings of the House, unless there are compulsive reasons, to be found in the' context of the Constitution or to be reduce from. obvious general principles, that would impose the more limited meaning for which the respondent contends."

The above judgment is distinguishable from the facts of the present case as the language employed in sub-clause (4) of clause (2) of Article 58 of the 'Constitution is different :from the language used in, above-quoted section 37(10) of the Constitution of Western Nigeria inasmuch' as -the prescribed conditions therein for exercising the power are different. In the former provisions, it is the breakdown of the Constitutional machinery which is the determining factor and not the factum, whether the Prime Minister lost the confidence of the House for which there are separate provisions as pointed out hereinabove, namely, clause (5) of Article 91 of the Constitution and clause (1) of Article 95 of the Constitution; whereas under the latter provision, the criterion is, whether the Prime Minister lost the confidence of the majority in the House.

However, the observation of the Privy Council that in presence of a written Constitution, the British Constitutional history as to the power of the sovereign to dismiss a Prime Minister or other parliamentary practices cannot be pressed into service, is equally applicable to the present case. The above relevant observation reads as follows:-- 1

"The first is that British constitutional history does not offer any but a general negative guide as to the circumstances in which a sovereign can dismiss a Prime Minister. Since the principles which are accepted today began to take shape with the passing of the Reform Bill of 1832, no British Sovereign has in fact dismissed or removed a Prime Minister, even allowing for the ambiguous exchanges which took place between William IV and. Lords Melbourne in 1834. Discussion of

constitutional doctrine bearing on a Prime Minister's loss -of support in the House of Consigns concentrates therefore on a Prime Minister's duty to ask for liberty to resign or for a dissolution, rather than on the Sovereign's right of removal, an exercise of which is not treated a s being within the scope of practical politics. In this state of affairs it is vain to look to British precedent for guidance on the circumstances in which or the evidential material on which a Prime Minister can be dismissed, where dismissal is an actual possibility and the right of removal which is explicitly recognised in the Nigerian Constitution must be interpreted according to the wording of its down limitations which that wording does not import."

30. I may refer to the ground 'b' of the dissolution order, which reads as follows:-

(b)The Prim(Minister held meetings with the President in March and April and the last on 14th April, 1993 when the President urged him to take positive steps to resolve the grave internal and. international problems confronting the country and the nation was anxiously looking forward to the announcement of concrete measures by the Government to improve the situation. Instead, the Prime Minister in his speech on 17th April, 1993 chose to divert the people's attention by making false and malicious allegations against the President of Pakistan who it Head of State and represents the unity of the Republic. The tenor of the speech was that the Government could not be carried on in accordance with the provisions of the Constitution and he advanced his own reasons and theory for the same which reasons and theory, in fact, are unwarranted and misleading. The ' Prime Minister tried to cover up the failures and defaults of the Government although he was repeatedly apprised of the real reasons in this behalf, which he even accepted and agreed to rectify by specific measures on urgent

basis. Further, the Prime Minister's speech is tantamount to a call for agitation and in any case the speech and his conduct. Amounts to subversion of the Constitution."

The above ground is to be read with the above quoted opening para. of

the impugned order. It refers to the meetings held between the President and the Prime Minister in March-April, 1993; the last being on 14-4-1993, wherein the President impressed upon the Prime Minister t.6 '.take positive steps to resolve the grave internal and international problems confronting the country and the nation. It. has been further stated that the President was anxiously looking forward to the, announcement of, concrete measures by the Government to improve the situation but the Prime Minister instead of that, made speech on 17-4-1993 in order to divert the people's attention by making false and religious allegations against the President of Pakistan who is Head

of the State and represents unity of, the Republic. It has been also averred that the tenor of the speech was such that the -Government could not be carried on in accordance with the provisions of the Constitution and that the above speech is tantamount to call for agitation and, in any case, the speech and the above conduct of the Prime Minister amounts to subversion of the Constitution.

Mr. Khalid Anwar, learned counsel for the petitioner, has urged that

the above speech is to be viewed with the background what had taken place in the Presidency during last several months preceding to the making of the above speech, which prompted the, petitioner to take into confidence the nation.

On the other hand, Mr. Aziz A. Munshi, learned Attorney-General, was at pains to highlight the objected portions of the speech and. submitted that because of the above speech the working relationship between the President and the Prime Minister ceased to exist resulting into a complete Constitutional deadlock and stalemate warranting pressing into service above sub-clause (b) of clause (2) of Article 58 of the Constitution in order to resolve the deadlock and stalemate. He also invited our attention to the speeches made by the petitioner subsequent to the passing of the impugned order, to reinforce his above submission. Both, the parties have riled a large number of newspaper clippings to indicate, what had happened prior and subsequent to the passing of the impugned order.

31. It seems that the President in his address to the Joint Session of the Parliament made on 22-12-1992 though cautioned the Government on certain matters like having mod transparency in the matter of privatization, adoption of democratic norms, praised the performance of the Government over all. However, from the record it seems that in December, 1992, the President had made observation about the privatization and pointed out certain discrepancies/anomalies, for example, Secretary to the President in his letter dated 6-12-1992 addressed to the Finance Minister with reference to the meeting between the Finance _Minister and the President on 1-12-1992 conveyed the following ‘minutes recorded by the President regarding the reference prices:--

“I have not been able to discover any constant methodology for the fixation of the revised reference prices.”

Then there is a letter dated 28-12-1992 from the Secretary to the President addressed to the Cabinet Division with reference to the minutes/decision of the meeting of the Cabinet Committee o ii privatization held on 12-11-1992. In the annexures enclosed to ‘the above letter, the question that under the Constitution, Council of Common Interests was to formulate and regulate the policies in relation to institutions, ‘establishments, ‘bodies, corporations, projects, schemes, industries, owned wholly or partly by the Federation or by a corporation set ,, up by the Federation including WAPDA and P.I.D.C. was raised. The concluding para. 8 of I he above annexures reads as follows:--

"The kt-up of the two privatisation commissions and the whole process of privatisation, unilaterally initiated by the Federal Goverlithtnt, bypassing the Council of Common Interests and the N.E.C., appearW to be ultra vires of Constitution and can be challenged in superior Courts."

The above letters were replied to. It is not necessary at this stage to refer to the stand taken by the petitioner.

After the expiry of some time from the above Presidential address to the Joint Session of the House, two important developments had taken place, firstly, the Government Party started negotiations with the Opposition for undoing the Eighth Amendment and secondly, the petitioner was authorised by the Muslim League ' Parliamentary Party to nominate Presidential candidate for the coming elections in November, 1993, and the indications were that the ruling . party had some other persons in mind for having 1 Presidential candidate. After the above developments, the Opposition leaders and the MNAs adversely disposed towards the petitioner, became more activated, started frequently visiting the President. Statements were issued for formation of a national Government, change of Government and for dissolving the Assembly etc. In this behalf, reference may be made to the newspapers clippings inter alia contained at pages 150 to 218 of the petition File 11.

It may be pertinent to mention that on 28-3-1993 Mr. Hamid Nasir Chatha, Minister for Planning and Development, Mr. Anwar Saifullah khan, Minister for Environment and Urban Affairs, and Mr. Muhammad Asad 'Ali Khan Junejo, Advisor to the, Primer Minister addressed the resignations to the 1. President from the above Cabinet posts. They were followed by other' Ministers/Ministers of State, Advisors and Parliamentary Secretaries. In all three Ministers, three Ministers of State, two Advisors and three Parliamentary Secretaries resigned. From the record produced by the Federation, it appears that the resignations of Mr. Muhammad Asad Ali Khan Jonejo bears the date of 28-3-19.93 and of Mr. Roedad Khan, Advisor to the Prime Minister of 12-4-1993, but none of the other resignations bears any date.

32. The above development created misunderstanding between the President and the petitioner. The petitioner saw the President on , or about 5-4-EW and informed him that he would be the Presidential candidate of the Ruling Party. The President was also conveyed that so long as he was President, the idea of undoing the Eighth Amendment would not be pressed The President reportedly remarked that he had not made up his mind to contest the election and, therefore, when the occasion would arise, he would consider the above proposal. It was also reported that he also remarked that the Eighth Amendment and the election of President were two different matters.

The petitioner's above steps did not case the situation and a number of Opposition leaders continued to call on the President and to make press statements to the effect that there was no possibility of patch-up between the President and the petitioner, for example, Senator Tariq Cliaudhry in his press statement published in daily English newspaper "Pakistan Observer" of 7-4-1993 alleged that the Government had launched a well thought campaign against the President by nominating him as the Presidential candidate of Pakistan Muslim League which had in fact insulted him. He emphasised that, the dismissal of the petitioner was the only solution.

In-thc daily newspaper "The News" of Lahore dated 8-4-1993, a news item appeared to the effect that Governor Mahmood Haroon was seeking MNAs' resignations on Ishaq's behalf.

It may be pertinent to point out that as late as 'on 10-3-1993 the ruled out dissolution of the Assembly while talking to the newsmen- at the Lady-Reading Hospital, Peshawar, where he went to see Mr. Wali Khan as reported in the daily English newspapers "Pakistan Observer", Islamabad, "Pakistan Times", Lahore, "Frontier Post", Lahore, "The News", Lahore, an dated, 10-3-1993 (the relevant newspaper clippings are at pages 61 to 65 of Part 11 of the Petition rile).

In the daily "The News", Islamabed of 15-4-1993, it was reported that in the above meeting of 14-4-1993 the President demanded removal of certain Ministers/officials. It may be appropriate to refer to the Press clippings of the period from 14-4-1993 to 17-4-1993 i.e. the 3 days, 'which lapsed between the above meeting and the impugned speech.

The daily "Dawn" dated 15-4- , f993 under the caption "Ishaq-Nawaz meeting- makes' no headway" reported about 'the above meeting between the President and the petitioner and reported that they had 90 minutes talk with each other, during which the petitioner was assisted by two Federal Ministers, namely, Lt.-General (Retd.) Abdul Majid Malik and Mr. Ilahi Bux Soomro, but later the petitioner-had a 40 minutes exclusive one to one meeting with the President. The former Minister for Planing, Hamid Nasir Chatha, when contacted, told 'Dawn "that the above meeting did not pave the way for their reconciliation. The reaction of the President's son-in-law and former Minister

for Environment and Urban Affairs, Mr. Anwar Saifullah Khan, was also the same as he reportedly told the correspondent of "Dawn" that situation remained the same as there was no solution. He further allegedly remarked "How can there be any reconciliation?" The daily "Nawa-i-Waqt" of Lahore dated 15-4-1993 reported with reference to B.B.C. under the caption:.

It gives the details what transpired in the above meeting. It may further be stated that the daily "Jang", Lahore of 15-4-1993 published a news item under the caption:

(Above newspaper clippings arc at pages 129, 263 -and 264 of the File 11 of Rejoiner to the Written Statement File).

33. Another development which had taken place was that upon receipt of requisition on 18-4-1993 in terms of clause (3) of Article 54 of the Constitution, the Speaker summoned the session of the National Assembly for 19-4-1993 at 5-00 p.m. for discussing the current political situation in the country. The above development was reported in the Press widely and the daily "Dawn", Karachi of 20-4-1993 published an article under the caption "LOOSE ENDS

NEED TO,BE TIED UP.STATES". The relevant portion of the same reads as under:--

"According to an inside story of what happened on the fateful day on April 18 the President and his Advisors were still prepared to condone the atrocious language used by the Prime Minister in his address to the Nation, if he would explain his position and implement the promises he had made to the President.. But the decision to requisition the session and the Speaker's decision to call the Session on Monday afternoon created panic in the Presidential camp.

The President was told if had to survive an impeachment motion ' he had to dissolve the House within hour,. a frequent visitor to the Presidency revealed. He agreed, but the justification for the dissolution was not complete until, the resignations of the MNAs were given to President. All the opposition parties had done the exercise except PDA whose leader was in session of her party's central executive. So a call from the Presidency to Mg. Bhutto to immediately rush and see the President. She' was-pleasantly shocked and dashed leaving her party leaders in the middle of the discussion, the story went on. The meeting of the President and the Opposition leader, hitherto adversaries of the First order, went on very well as Benazir presented the 41 resignations. "Baba was now happy and satisfied that Bibi stood by him at a difficult moment, despite the good and bad things done by him to her. in the recent months".

When, Benazir emerged from the meeting, she was met by NPP Leader Ghulam Mustafa Jatoi and JUP leader Gen. (Retd.) K.M. Azhar. She asked them whether it was true that the President was about to dissolve the Assemblies. She was told by an ever present Mr. Sharifuddin Pirzada that he was."

It may be stated that the Prime Minister had earlier sent a summary for summoning of the National Assembly for 22-4-1993, which summary according to Mr. Aziz A. Munshi was cleared by the President on 17-4-1993 but it was not sent back to the Prime Minister Secretariat in view of what had happened in the evening of 18-4-1993. The National Assembly could not meet on 19-4-1993 as the impugned dissolution order was passed in the evening of 18-4-1993.

The resume of the events which culminated in the making of the above speech by the petitioner on 17-4-1993 on electronic media indicates that there was some background. It cannot be denied that the political elements hostile to the petitioner made all efforts to oust him from the Government. In their above efforts they also sought the help of the President and impressed upon him to press into service above Article 59 (2) (b) of the Constitution and with that object they collected and handed over 88 resignations from the MNAs. Keeping in view the above background, we may now refer to the objected portions of the petitioner's speech in order to decide, whether the above objected portions, warranted the dissolution of the National Assembly and the dismissal of the Cabinet and the petitioner as the Prime Minister.

34. Mr. Aziz A. Munshi has furnished an English translation of the petitioner's above speech and underlined the portions which, according to him, are objectionable and which indicate that there was' a total deadlock and stalemate between the two pillars of the Federation. It may be advantageous to reproduce the relevant parts of the same; which reads as follows:--

"The adverse effects of the atmosphere of uncertainty created by the

vested interests in the country during the last one month are now

beginning surface ... ...

..The people are restless and. comprehensive as to what will happen in the next few days, It is regrettable that the conspirators who have create(] such an atmosphere of uncertainty are using, a place for their nefarious activities which should have been a symbol of Pakistan's integrity federation and stability.

Unfortunately, these people seem to be totally oblivious of the senctity which is attached to that place and they are using it for creating instability and chaos which is a Constitutional symbol o

Pakistan's stability ... ... crisis further seems to be connected to that place where the sanctity of the , Constitution should have been respected.

But alas! the -kind of politics which I have to confront contained less decency and more filth, Let me tell you today about the nature of the people I have to deal with. I have learnt to respect the elders right from my home and I maintained this tradition even after coming over to Islamabad. However. it does not mean that I am working under an Body or dependent on any body of frightened of any body. I was given threats and asked to compromise on principles for the sake of protecting the business interest of my family. You would see that efforts would be made for my character assassination as a revenge for not compromising. My "well-wishers" know well the art of finding faults for the sake of character assassination of any person. I have invariably subordinated my personal desires and interest to the national interest. Insha'Allah, my future conduct will also prove to be an ample testimony to the fact that I am an elected Prime Minister of the country supported by the majority of members of the Assembly. If any body has any doubt, he can test it within and outside the Assembly. Such attempts have been continuing with full force for the last few weeks and such dirty horse-trading has taken place which cannot be explained to you. Conspiracies were hatched to oust the elected Prime Minister at a place which should have been respected by every one in the country as a Centre of the greatness of the Federation of Pakistan. A Governor o a province is staying at this place which is the symbol of Federation-, and conspiring against the Federal Government. A political orphan who could not rind a place anywhere was encouraged in this Centre of Federation.

A place from where I should have been given guidelines for the stability, unity and solidarity of the country, I was directed not to out in trouble Sardar Asif Ahmed Ali who declared Pakistan a terrorist State. I took a strong stand on it and told clearly that he tried to cause more harm to the country than an enemy and his arrest orders have been issued by me. My heart is burning with hot secrets but national interest and honour do not allow me to disclose them. But why should I keep secret from you which can be revealed. How shameful it is that whenever I proceeded abroad on State visits, a storm of conspiracies was raised in my absence. Attempts were made to belittle me before the foreign hosts. Is this disgraceful for me or for-Pakistan? Pakistan I branded as a terrorist State amidst the clippings of Indian diplomats. Is it politics or treason?

The place which should have been a symbol of stability, progress and prosperity .

The place which should have been a source for strength democracy and for the welfare of people started showing signs of one man's rule.

The outside attempts to destabilise the democratic process had their roots inside that place.

The tragedy is that the conspiracies to fragment the Muslim League, the mother party of Pakistan. were also hatched there.

My dear countrymen!

As Prime Minister I can only say that there arc many things to be narrated but I will say those in my political position. I 'can say at this juncture that whatever had been done from there. should have been done. Every pressure tactic was used to 'force me- to leave the arena and I kept for the completion of those projects which I had started for the progress and prosperity of the people ... ...

... ... Today I am narrating all these things t you. The story does not end here. Conspiracies were hatched against me for committing the crime of loving the country and the people which touched such a high dimension that every third person among my companions was asked to' change the loyal of all the MNAs and become the Prime Minister. At present, ten to fifteen Prime Ministers are wandering in Islamabad in search of Ministers. So much so that my real brother Shahbaz Sharif was offered the premiership. The bait for power was thrown everywhere. The ministries were offered to them besides other benefits.

My dear countrymen!

I have come to you Just to remove the uncertainties, created by certain conspirators and opportunists.- having been disappointed by their future, and they have created this situation by turning a respected place into a Centre of their unholy activities.

The nation is aware that my personal interest is not involved in these programmes of agricultural and industrial development. That is why the nation has trust in me and I will not betray this trust. I am aware of the difficulties which I may confront on the path I have chosen; but I won't leave my mission unaccomplished. Insha' Allah, I will take the

nation to its cherished destination for which I had promised during the 1990 election campaign and for which I have to face the most difficult situation, but these momentary hurdles

cannot deter me from my aim. Political expediencies and considerations cannot disappoint me, rather they would further strengthen my determination. Recent crises have further strengthened my commitment and it is my resolve that I would perform all those duties which are in the interest of the country and the people and no hurdles in my way can stop me from achieving these goals, I will do all that is the need of my country, desire of my people and is in accordance with my official position.' Therefore I shall not resign, I shall not dissolve the Assembly, I shall not take dictation. It will be, my majority in the Assembly, Insha' Allah. But the question arises that why did threats were created for the country's security and economy in the presence of a table Government, commanding absolute majority in the Assembly? Why a crisis was created in the country? Who is responsible for this? I leave the decision to you." (The underlined are the portions objected to by the learned Attorney-General).

35. If the contents of the petitioner's speech as a whole are to be examined in juxtaposition with what had happened during 2/3 months preceding to the above speech, one can appreciate in what context it was made I may observe that under Article 41 of the Constitution, the President is the Head of the State and represents the unity of the Republic. His position is of a non-partisan person. As pointed out hereinabove that Article 58(2)(b) of the ,Constitution was not intended and designed to be pressed into service at the behest of the elements hostile to the Government in power to oust it though it may command majority in the National Assembly. The power under the above provision though discretionary, is to be exercised sparingly, independently, honestly, fairly and reasonably without any bias and ill-will. If the exercise of the above power is tainted with personal likes or dislikes, the same shall stand Vitiated . Furthermore, it may again be pointed out that in the case of Muhammad Saifullah Khan, it has been held that the above provision can be pressed into service when the machinery of Government is broken down completely and its authority is eroded and that it does not concern with the pace of the progress, the shade of the quality or the degree of the performance or the quantum of achievement.

I

The elements hostile to the petitioner sought the help of the President and in that connection and . made the above Press statements. Though the President on 10-3-11Y)3 while speaking to the Press at Lady Reading Hospital, Peshawar., remarked that he had, no intention to dissolve the Assembly but the fact remained that the elements hostile to the petitioner continued to call on the President and continued to make Press statements to the effect that the petitioner's days were numbered and that the dissolution of the Assembly was imminent.

There is no doubt that some of the remarks made by the petitioner in his above speech are couched in very strong words and they should not have been made as any public split between the two high functionaries of the State may not be conducive for maintaining good relations between them and in the interest of good government.

Mr. S.M. Zafar has invited our attention t I o the following passages from the well-known treatises, namely, de Smith and Brazier "Constitutional and Administrative Law", Sixth Edition by Rodney Brazier, and the "Constitutional and Administrative Law", Text and Materials by David Pollard and David Hughes:--

"Passage from the _,Constitutional and Administrative Law. ---Any public disclosure of disagreement between the Queen and the Prime Minister of the day could be damaging. In 1986 a senior source within Buckingham Palace confirmed in a response to a newspaper's inquiries that the Queen was dismayed by an uncaring Mrs. Thatcher and that the Queen disapproved of several major Government policies. The Queen's Private Secretary intervened, however, in a rare letter to the Press to deny the published account."

Passage from the Constitution and Administrative Law by David Pollard and avid HL1ghes.--

"Any public revelation of disagreement could be damaging to the existing and future relationship between head of Government and head of State, for obviously if it became known that the Queen has criticized Government policy, she might be taken to be biased against that Government and to be in favour of another."

36. There cannot be any cavil with the above proposition that any public revelation of disagreement between head of State and, head of Government as observed hereinabove will be damaging. However, the question remains, whether the above speech could furnish a ground for dissolution of the Assembly and dismissal of the Cabinet and the petitioner as the Prime Minister. Mr. Aziz A. Munshi was at pains to lay emphasis that in order to have working relations between the President and the Prime Minister, they should be on good terms. He has furnished a chart to indicate in what different capacities President acts, namely:

(i) Under discretionary power: Under Articles 48 (2) (5) (6), 58'(2), 101

(1), 105 (3) (4) (5), 112 (2), 213 (1), 241 (1-A) and 243 (2) (c).

(ii) Upon the advice of the Prime Minister under Articles 48 (1) (4), 58

(1), 91 (1), 93 (1), 105(l), 112 (1), 130 (1), 132 (1), 156(l), 183 (2) and 198(4).

(iii) In consultation: Under Articles 72 (1), 101(l), 160(l), 177 (1), 193(l), 200(l)(3), 203(c)(4), 235(l).

(iv) Accords approval, under Articles 87 (3), 170, 182, 183(2), 200(3), 221 and 231.

Mr. Aziz A. Munshi, learned Attorney-General has also invited our attention to the petitioner's subsequent Press interviews and Press statements after the passing of the above dissolution order to indicate that it was not possible for the two to work together, particularly, he invited our attention to a Press interview given by the petitioner to the magazine "Herald" which was published in May, 1993, Issue, wherein the petitioner has allegedly used the following strong language:--

"Because in my view he is too old to take correct decisions. I sincerely believe that the time for him to step down has come and if he refuses to do so, the people of Pakistan should lynch him so that no President dares to dissolve any assemblies in future. He has, in fact, challenged the wisdom of the people. So, he must not ,remain in power."

He has also invited our attention to a number of newspaper clippings subsequent to the above dissolution order, *which* are at pages 599 to 613 of the Federation's documents File No.11.

On the other hand, Mr. Khalid Anwar, has invited our attention to the factum that the President in his dissolution order had alleged that the petitioner was guilty of subversion of the Constitution which according to his amounts to high treason under Article 6 of the Constitution. He also invited our attention to certain portions of the President's speech made on the night of 18-4-1993 in

connection with the dissolution order, wherein according to him, strong language was used by the President.

He ,has further invited our attention to some newspaper clippings of the year 1992 to point out that Mohtarma Benazir Bhutto had used much stronger language than what was used by the petitioner in his above speech of 17-4-1993, particularly, he invited our attention to the daily newspaper 'Muslim' Islamabad, of 25-2-1992, wherein the Reporter attributed the following statement to Mohtarma Bcnazir Bhutto:--

"She said the Aiwan-e'-Sardr had been converted into a den of conspiracies and sounded a warning that if efforts would be. made to crush people's politics, they would be foiled."

According to Mr. Khalid Anwar if the President' can work with Mohtarma Benazir Bhutto or her nominees, why it will not be possible for the Preside and the petitioner to have working relationship in terms of the Constitution. In my view, there is a marked distinction between a statement made by a person holding a high public office, who is expected to be discreet and careful and a statement made by a politician while he or she is out of power. In the game of politics, politicians particularly in our region some times make statements for public consumption. The petitioner after the passing of the impugned order started public comparing for enlisting support of the public inter alia for election of the National Assembly which was then due on 14-7-1993. Thus we

will have to view the petitioner's post-dissolution statements differently and the same cannot be equated with the statements, which be made while in power. This will be equally applicable to the statements made by Mohtarma Benazir Bhutto. However, there is no doubt that strong language was used by the petitioner after his dismissal and so also by Mohtarma Benazir Bhutto in her Press statements made by her in early 1992. But at the same time, it is evident that persons having different point of views and having strained relations can work together, if the situation and dictates of time so demand. After the dismissal of the petitioner's Government, Mohtarma Benazir Bhutto's

nominees were 'inducted into the Care-taker Government which included her

husband.

It may also be stated that a distinction is to be drawn between personal relationship and the relationship' of that of the President and the Prime Minister. The two persons may not have good personal relationship but they are supposed to have Constitutional relationship in terms of the Constitution. It may be stated that the oath of offices of both the above high functionaries enjoin them to do right to all manner of people, according to law, without fear or favour, affection or

ill-will. Our Constitution demarcates and delineates the powers of the President and the Prime Minister clearly. In case of any doubt, a reference can be made to the Supreme Court in terms of clause (6) of Article 48 of the Constitution for resolving the controversy.

In my view though the launching of personal attack by the petitioner on the President in his above speech of 17th April, 1993, was not warranted T' and desirable but simpliciter same could not have furnished a ground to press into service Article 58

hereinabove.

I

We also heard the learned Attorney-General with the assistance of the then Foreign Minister, Mr. Sharifuddin Pirzada, and the Foreign Secretary, Mr. Sheharyar M. Khan, in presence of the counsel for the petitioner about the internal and international problems referred to in above ground V. It will suffice to observe that I am unable to subscribe to the view that there was any inaction on the part of the petitioner of the nature which warranted the dissolution of the Assembly and the dismissal of the Cabinet particularly keeping in view that hardly two days had expired. I am, therefore, inclined to hold that the above ground 'b' is also not sustainable as it has no nexus, to the

(2) (b) inter alia for the reasons referred to

reasons contained in sub-clause (b) of clause (2) of Article 58 of the

Constitution.

37. Before taking up any other ground of the impugned order, it may be pertinent to dilate upon the status of the President and the Prime Minister under our Constitution. It is wrong to assume that the President is merely a symbolic head. The provisions of the Constitution highlighted above indicate that he has to perform his Constitutional functions and duties in different capacities. Rustom S. Sidhwa, J. in the case of Ahmed Taiiq Rahim (supra) has after referring to the various provisions of the Constitution described the President as under-

"8. A few words may be stated about the position of the President. The President, as the Head of the State, represents the unity of the Republic. He is thus placed above the party. He is the benign moderator and the symbol of the impartial dignity of the State. He is entitled to certain communications and information, which is the duty of the Prime Minister to furnish, with power to submit for the consideration of the Cabinet any matter on which a decision may have been taken but which has not been considered by the Cabinet. He can call upon the Cabinet to reconsider any

advice tendered or consider such advice. He has power to act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so, with entitlement to decide whether he is so empowered. He has power to refer any matter of national importance to a referendum. He has power to send messages to either House for their consideration. He has the right to address both Houses assembled together at the

commencement of the each Session of Parliament. He has the power to dissolve the National Assembly if, in his opinion, a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. He has the power inter alia to appoint the Chairman of the Joint Chiefs of Staff Committee and the three Chiefs of the Army Staff, Naval Staff and Air Force Staff. He is at the apex, as the executive authority of the Federation, which is vested in him, is exercised by him directly or through officers subordinate to him. He is to be aided and advised in the exercise of his functions by the Cabinet of Ministers, with the

Prime Minister at its head. In the exercise of his functions, he has to act in accordance with the advice of the Cabinet or the Prime Minister; except in cases where he is obliged to act in his discretion. The President is therefore no less powerful than the Prime Minister."

In the book under the caption "Constitution of India' by Mangal Chandra Jain Kagzi, 1987 Edition, Vol. 1, the author has summed up the position of the Indian President as under though he does not have many powers which have been conferred by our Constitution on our President inter alia by the Eighth Amendment as discretionary power:---

"The Indian President, on the other hand, is a popular uniting symbol. Elected on the basis broader than the Prime Minister, although indirectly by the people, he has the privileges of the king and duties of a modern head of a democratic republican State. He is given the full ceremonial status of a monarch without any dynastic or hereditary claim for it. When outside India he has all the privileges and immunities accorded to the head of an independent sovereign State. At home he drives in the State-coach when he goes to inaugurate a session of Parliament and addresses the Members of both Houses assembled together in the Central Hall of the Parliament House with all grandeur and regality very much like the British Queen, but he is not the means of executive decision. His is a privilege to b ' c consulted, and to be informed of all the affairs of the Union. He has the right to encourage and warn the Prime Minister and other Members of the Council of Ministers. However, he is not a mere figure-head, and is in a position to bring considerable influence on the decisions of the Council of Ministers. On any particular issue he may require the Council to reconsider the implications of any decision taken by a Minister which he thinks is not correct. He may ask for such information as he may deem necessary with regard to administrative matters and proposals for legislation. His Constitutional position does not in any way affect his status. He is elected by the Members of the State Assemblies and Members of Parliament, and thus he cannot be looked upon as a mere dummy of the Central Government of the day. The provision for his indirect election seems to be deliberate, and remove the basis for any development on the lines of a presidential system of Government. This is, because of the desire to ensure the growth of a responsible system of Government in the country within the frame of a Parliamentary system.

The President can be an imperceptible force in the capacity of the formal head of the executive Government, although he might have a few powers which might be exercisable by him in his discretion. He can decide questions as to qualifications of Members after obtaining the opinion of the Election Commission, the disputed question of a High Court Judge's age, and can act similarly in certain other matters without depending on the advice of a Minister. Such discretionary powers might also include under certain conditions powers to dissolve the House of the people, power to prorogue the Houses of Parliament, the power to dismiss a Ministry. It cannot be denied that normally he is bound by the "aid and advice" of the Council of Ministers, although the possibility of exercise of his individual discretion under certain conditions cannot be altogether denied."

De Smith and Brazier in their book "Constitutional and Administrative Law", Sixth Edition by Rodney Brazier (supra) have described the status of the Queen in England in relation to the executive powers as under:---

"This is not to say that the, monarch must be mere cypher. As Bagehot wrote, she has 'the right to be consulted, the right to encourage, the right to warn'. He could have added that she also has the right to offer, on her own initiative, suggestions and advice to her Ministers even where she is obliged in the last resort to accept the formal advice tendered to her.

To be more explicit, she has the conventional rights to receive Cabinet papers and minutes to be kept adequately informed by the Prime Minister (with whom she has regular weekly audiences) on matters of national policy, to receive Foreign Office dispatches and telegrams and other State papers, and to be notified proposed appointments and awards to be made in her name so that she can express her views informally. She can make such private comments as she thinks fit: she can remonstrate and offer strong objections to a proposed course of action."

I may -point out that the Indian President enjoys certain. discretionary powers, which according to the above Indian Author might also include under certain conditions powers to dissolve the House of the people and power to dismiss a Ministry. The Queen in England enjoys the above power under Royal Prerogative though subject to certain conventions. But in our Constitution powers to dissolve the Assembly and to remove the Government by withdrawing the President's pleasure are governed by the Constitutional provisions and they are controlled by the conditions contained therein.

It may be pertinent to point out that Article 46 of the Constitution imposes the following Constitutional duties on the Prime Minister:--

(a) to communicate to the President all decisions of the Cabinet relating to the administration of the affairs of the Federation and proposals for legislation;

(b) to furnish such information relating to the administration of the affairs of the Federation and proposals for legislation as the' President may call for; and

(c) if the President so requires, to submit for the consideration of the Cabinet any matter on which a decision has been taken by the Prime Minister or a Minister but which has not been considered by the Cabinet.

The above Article is to be read with the other provisions of the Constitution particularly with clause (2) of Article 58 of the Constitution, which empowers the President to dissolve the National Assembly and -as a result of which the Cabinet is to cease to function The *above, powers cannot be exercised by* the President unless he keeps him-self abreast of the day to day working of the Government. In my view, Lilt: cumulative- effect of the various provisions of the Constitution relating to the President is *that the, President enjoys* the right to be consulted, the right to encourage and the *right to warn as rem*arked by Bagehot about the British Crown. In order to discharge his above Constitutional duties, he is expected to be vigilant and to keep his eyes and ears open. The documents produced by the Federation demonstrate that the President has attended to the above Constitutional duties by highlighting the various deficiencies and the need of improvement in the working of 'the Government.

But at the same time the Prime Minister's status is neither inferior nor., is less important to that of the President. Except in the matters which are in the sole domain of the President, the President cannot act without the advice of the Prime Minister, whose advice is binding on him by virtue of Article 48(l) of the Constitution. The Prime Minister, in fact, runs the Government and formulates its policies in terms of the Constitution and is accountable to the Parliament. He represents the will of the- people. Prior to the Eighth Amendment the Prime Minister was all in all, but after the above amendment, the position has changed considerably.

38. After the above deviation, I may refer to ground 'c', which has three sub-paras. and which reads as follows:--- -

Cc' Under the Constitution the Federation and the Provinces are required to exercise their executive and legislative authority as demarcated and defined and there are specific provisions and institutions to ensure its working in the interests of the integrity, sovereignty, solidarity and well-being of the Federation and to protect the autonomy granted to the Provinces by creating specific Constitutional institutions consisting of Federal and Provincial representatives, but the Government of the Federation has failed to uphold and protect these, as required, in that, inter alia:

The Council of Common Interests under Article 153 which is responsible only to Parliament has not discharged its Constitutional functions to exercise its powers as required by Articles 153 and 154, and in relation to Article 161, and particularly in the context of privatisation of industries in relation to item 3 of Part 11 of the Federal Legislative List and item 34 of the Concurrent Legislative List.

(II) The National Economic Council under Article 156, and its Executive Committee, has been largely bypassed, inter alia, in the forumlation of plans in respect of financial, commercial, social and economic policies.

(iii) Constitutional powers, rights and functions of the Provinces have been usurped, frustrated and interfered with in violation of inter alia Article 97."

In order to appreciate the above ground, it may be pertinent to refer to the relevant Articles of the Constitution, pertinent pleadings and the documents on record.

39. Article 153 of the Constitution envisages establishment of a Council of Common Interests, hereinafter referred to as the Council. It further contemplates that the members of the Council shall be--

(a) Chief Ministers of the Provinces; and

(b) an equal number of members from the Federal Government to be nominated by the Prime Minister from time to time.

It also provides that the Prime Minister if he is a member of the Council, shall be the Chairman of the Council but if at any time he is not a member, the President may nominate a Federal Minister who is a member of the Council to be its Chairman. It also envisages that the Council shall be responsible to the Mailis-e-Shoora.

It may also be pertinent to observe that clause (1) of Article 154 of the Constitution defines the functions of the Council by providing that it shall formulate and regulate policies in relation to matters in Part 11 of the Federal Legislative List and in so far as it is in relation to the affairs of the Federation, and the matter in entry 34 (electricity) in the Concurrent Legislative List. It further provides that the Council shall exercise supervision and control over the related institutions. At this juncture, it may be appropriate to refer to Part 11 of the Federal Legislative List referred to in the above clause, which has eight items. It will suffice to reproduce items 1 to 4, which read as follows:---

(1) Railways.

(2) Mineral oil and natural gas; liquids and substances declared by Federal Law to be dangerously inflammable.

(3) Development of industries, where development under Federal Control is declared by Federal law to be expedient in the public interest; institutions, establishments, bodies and corporations administered of managed by the Federal Government immediately before the commencing day, including the Pakistan Water and Power Development Authority and the Pakistan Industrial Development Corporation; all undertakings, projects and schemes of such institutions, establishments, bodies and corporations, industries, projects and undertakings owned wholly or partially by the Federation or by a corporation set up by the Federation.

(4) Council of Common Interests."

Whereas item 34.in the Concurrent Legislative List relates to electricity.

It may also be pertinent to state that clause (2) of Article 154 lays down that the decision of the Council shall be expressed in terms of. the opinion of the majority, whereas clause (3) provides that until Majlis-e-Shoora makes provision by law in this behalf, the Council may make its rules of procedure. It may further be pointed out that under clause (4) Majlis-e-Shoora in joint sitting may from time to time by resolution issue directions through the Federal Government to the Council generally or in a particular matter to take action as Majlis-e-Shoora may deem just and

proper and such directions are binding on the Council. It may further be pointed out that under clause (5), it has been provided that if the Federal Government or a Provincial Government is dissatisfied with the decision of the Council, it may refer the matter to the Majlis-e-Shoora in a joint sitting, whose decision in this behalf shall be final.

40. It may also be stated that Article 1 55 provides for the resolution of any dispute in respect of water from any natural source, arising out of any executive act on account of failure of the authority to exercise any of its powers with respect to the use and' distribution or control of water from the source. It provides that the Federal or Provincial Government concerned may make a complaint in writing to the Council. The other clauses of the above Article deal with the procedural and other matters. However, it will suffice to observe that under clause (5) of the above Article 155, it has been provided that notwithstanding any law to the contrary but subject to the provision of clause (5) of Article 154, it shall be the duty of the Federal Government and the Provincial Government concerned in the matter in issue to give effect to the decision of the Council faithfully according to its terms and tenor.

It may also be stated that clause (1) of Article 156 envisages the constitution of a National Economic Council, hereinafter referred to as N.E.C. by the President consisting of the Prime Minister, who shall be its Chairman and such other members as the President may determine. However, the proviso to the above clause provides that the President shall nominate one member from each Province on the recommendation of the Governor of that Province. Whereas clause (2) thereof defines the functions of N.E.C. by providing that it shall review the overall economic conditions of the country and shall for advising the Federal Government and the Provincial Governments formulate plans in respect of financial, commercial, social and economic policies and in formulating such plans, it shall be guided by the principles of policy set out in Chapter 2 of Part 11 of the Constitution.

It may further be stated that Article 160 envisages the constitution of a National Finance Commission within six months of the commencing day and thereafter at intervals not exceeding rive years by 'the President consisting of the Minister of Finance of the Federal Government, the Ministers of Finance of the Provincial Governments and such other persons as may be appointed by the President after consultation with the Governors of the Provinces. It may also be stated that clause (b) thereof provides that it shall be the duty of the National Finance Co m-mission to make recommendation to the President as to--

(a) the distribution between the Federation and the Provinces of the net proceeds of the taxes mentioned in clause (3);

(b) the making of grants-in-aid by the Federal Government to the Provincial Governments;

(c) the exercise by the Federal Government and the Provincial Governments of the borrowing powers conferred by the Constitution; and

(d) any other matter relating to finance referred to the Commission by the President.

it may further be stated that clause (3) thereof lays down that the taxes referred to in paragraph (a) of clause (2) are the following taxes raised under the authority of Majlis-e-Shoora:-

(i) taxes on income, including corporation tax but not including taxes on income consisting of remuneration paid out of the Federal Consolidated Fund;

(ii) taxes on the sales and purchases of goods imported, exported, produced, manufactured or consumed;

(iii) export duties on cotton, and such other export duties as may be specified by the President; -

(iv) such duties of excise as may be specified by the President; and

(v) such other taxes as may be specified. by the President.

Whereas clause (4) of the above Article,-- empowers the President to pass an order on the recommendation of the N.F.C. about the share of the Provinces. It may also be observed that clause (5) thereof envisages that the recommendations of the National Finance Commission together with

an explanatory memorandum as to the action taken thereof shall be placed before the Houses and the Provincial Assemblies.

It may also be pointed out that clause (6) empowers the President to make such amendment and modification in the law relating to the distribution of revenues between the Federal Government and the Provincial Governments as he may deem necessary or expedient at any time before an order under clause (4) is made. Whereas, clause (7) thereof provides that the President, by Order, may grant in aid of the revenues of the Provinces in need of assistance and such grant shall be upon the Federal Consolidated Fund.

it may further be stated that Article 161 of the Constitution provides that the Provinces are to receive net profits of the Federal duty of the excise on natural gas levied at well-head and collected by the Federal Government and of the royalty collected by the Federal Government and that the same shall not form part of the Federal Consolidated Fund. The other provisions of the above Article need not be dealt with for the purpose of present controversy.

41. The petitioner in para. 5 of their petition which runs into six pages, has dealt with the above grounds exhaustively and has pointed out that since November, 1990, the petitioner Government has fully respected the Constitutional power, rights and functions of the Provinces inasmuch as under Article 161(2) for the first time since 1978 Rs.6,000 million were paid to N.-W.F.P. Government for the year 1991-92 as the net profit earned by the Federal Government from a Hydro Electric Station located in that Province and a similar amount was paid in 1992-93, whereas under Article 161(l) the excise duty on natural gas recovered on the well-head situated in Balochistan for the year 1991-92 to the tune of about Rs.4,000 million (in addition to Rs.700 million excise duty on natural gas) were paid to Balochistan Province. It has also been averred that the institutions contemplated under the above Articles have been operating. As regards privatisation, the following averments have been made:--

"(a/1) Privatization policy was effectively implemented for the first time. It has been continuously under consideration and implementation. Since 1977, some units were privatised between 1977 and in 1985 a dis investment committee was set up. In 1989, the then Government had identified 14 specific units for privatisation. Many new laws were enacted to implement the dis investment policy since 1978. None of the successive Governments had consulted the CCI.

(b/1) The Federal Government had Constitutional, legislative and executive authority under Articles 70 and 97 of the Constitution in respect of all matters in respect of which Parliament has

powers to make law (i.e. the Fourth Schedule including its Part It which comes under the purview of CCI under Article 154). It had also the executive power to grant, sell or dispose of any property vested in the Federal Government under Article 173 of the Constitution. The Federal Government had accordingly continued to perform these functions in the absence of any clear directions from the- CCI under Article 154.

(c/1) The CCI had held three meetings in 1991, when the privatisation policy was under full implementation but no member raised any issue with regard to privatization, nor has the council so far defined, since its creation, the manner in which it will carry out the functions entrusted to it under Article 154.

Thus, after taking into consideration the several positive steps taken by the Government since November 1990 of strengthening the role of CCI the charge of lack of consultation with CCI and the policy of privatization which has been in operation since 1977 ;s baseless. It even otherwise does riot amount to a constitutional violation since Government's actions in this respect are in line with and within the bounds of Constitution."

As regards the meetings of CCI, NFC the following averments have been made:-

"(d/1) (i) The Council of Common Interests which had remained a dormant organization since its creation was activated and three meetings were held on 12th January, 1991, 21st March, 1991 and 16th September, 1991. The Council reached decision on the apportionment of Indus Waters at its meeting held on 21st March and approved the setting up of the Indus Water Authority. It also approved for the first time its Rules of Procedures. In preparation for the next meeting of the Council in May, 1993 a pre-CCI meeting was held with the Chief Ministers.

(ii) The National Finance Commission, which under Article 160(l) of the Constitution, is to be constituted every 5 years, had not given its award since 1975. A new Commission was constituted in January, 1991, and submitted a unanimous award in April, 1991. This has provided additional resources of Rs.25/30 billion each year to the Provinces and thus met one of the essential prerequisites for enabling the provinces to discharge the functions entrusted to them under the Constitution.

(iii) A separate Ministry of Inter-Provincial Coordination was set up. An inter-Provincial Coordination Council was created consisting of several Ministers and the four Chief Ministers and Prime Minister AJK Government. The Council has met twice in a very cordial atmosphere and resolved many Inter-Provincial issues. The first meeting was held on 13th January, 1993 and the second on 11th April, 1993."

42. The Federation in para. 5 of the written statement has dealt with the question of privatization and holding of meetings of CCI and NEC as follows:--

"5(l)(v) Averments made in para. 5(l)(v) are misleading and incorrect. The petitioner has accepted that these are two specific examples of the role of Constitutional bodies like CCI and NEC and its Executive Committee having been bypassed. The explanation about Council of Common Interests not being allowed to discharge its Constitutional functions with regard to privatisation of industries and power units is wholly unacceptable. This is not the issue where the Ministers concerned are authorised to bypass Constitutional bodies like CCI and NEC and its Executive Committee. This has prejudicially affected the rights of the Provinces and violated the Constitutional mandate and eroded the role of Parliament.

5(a)(l)-Thc averments made in para. 5(a)(1) are incorrect and misleading. It is denied that privatisation policy was effectively implemented as alleged. The petitioner and his Government unilaterally formulated the Privatization policies in disregard of Constitutional provisions, in that CCI was not ' allowed to formulate and regulate policies in relation to matters mentioned in Article 154. In any event the process of privatization lacked transparency and was vitiated by various illegalities and irregularities e.g.;

(a) The reference prices were frequently changed. (b) The methodology for fixation of net worth of units was not consistent. (c) Bidding system was not consistent and the units were transferred to favourites of the petitioner ignoring the highest bids, on various pretexts. (d) Recovery of sale price was not made in specified time frame and manner. This resulted in wastage of public assets at the cost of national exchequer. (c) The mode of sale/transfer enabled the transferees to manipulate prices of products of sold units and make fortunes overnight to the detriment of the consumer. (1) In fact by these devices the Transferees paid the Transfer price out of the windfall proceeds. Even the units which were making profits were sold without realising the loss to the National Exchequer. Eight Cement Factories were sold to one Group of Industrialists and the manner in which the Muslim Commercial Bank was sold to the favourites of tile petitioner namely Mansha Group is well-known. Relevant record will be produced at the relevant time and if required, to show favouritism and misuse of power by the petitioner. In consequence of the sale of eight cement factories to his favourites Mansha Group the petitioner managed to have the major

production of cement in tile country to be concentrated and monopolized. This was a clear misuse of power and has become public scandal throughout the country. Details of other questionable sales by and at the instance of the petitioner and his Government will be produced before the Honourable Court if necessary.

Privatization:

(a) It is denied that there was any enthusiastic public response of petitioner's policies as alleged. The real facts relating to the policies in regard to privatization and other matters are being brought to the notice of the Honourable Court. It is submitted that the petitioner's policy of privatization and sale of properties owned by the Federal Government including Corporations was unconstitutional, illegal and suffered from many deficiencies and was not transparent at all. The specific provisions of the Constitution contained in Articles 153, 154,156 read with Article 161 were violated by the petitioner and his Government. Documents/records and information in this behalf are being placed on record of this Honourable Court (Annexure 'A-4, 5, 7 and E-3). For example, the petitioner and his Government in violation of Constitutional provisions besides illegal selling of corporations, banks, industries decided to sell even to foreign investors and privatise national institutions/industrial units like WAPDA, Railway and Pakistan Telecommunication Corporation, PNSC. Port facilities without consulting the Provinces or the public representatives and the people whose interests were adversely affected thereby thus

endangering the structure and integrity or the Federation."

43. Both the parties have produced a number of documents besides the President Secretary's above letters dated 6-12-1SN2 and 28-12-1992 referred to in para. 31. The Federation has produced documents at pages 61 to 118 relating to proposed privatization of WAPDA, at pages 119 to 126 pertaining to proposed privatization of Railways, at pages 251 to 253 relating to privatization of Muslim Commercial Bank (all in File Vol.111) besides certain newspaper clippings, in which allegations about mal practices in the privatization have been made. In addition to that the respondent Federation has produced two letters of the Chief Minister of N.-W.F.P., one letter each of Sindh and Balochistan Chief Ministers and also copies of the references made by Mr. M. Salman Taaseer, Information Secretary, P.P.P. Punjab, Mr. Farooq Leghari, Deputy Leader of the Opposition in the Assembly and Mr. Abdur Rashid Qureshi, all addressed to the Speaker besides the charge-sheet of the combined Opposition.

On the other hand, the petitioner has produced a number of documents including privatization policy and its implementation published in November, 1991, by the Ministry of Finance, Government of Pakistan (at pages 50 to 71), privatization policy and its implementation published

in January, 1992, by the Minister of Finance, Government of Pakistan (at pages 72 to 96), the booklet under the caption "Privatization and Economic Policy" by Mr. Saced Ahmed Qureshi , Secretary- General, Government of Pakistan (at pages 97 to 121), the booklet under the caption "Privatization and Pakistan Structure and Statistics" (at pages 122 to 140) relating to Power Sector at pages 141, 142 and pertaining to Telecommunication Sector (at pages 143 to 146) including revised prices chart, note on fixation of reference prices, sample of October bidding, sample of open bidding, list of buyers (Annexure XII), list of cement plants alongwith the buyer's name (Annexure X111) all contained in Constitution petition Part 11.

In the case of Ahmed Turiq Rallint (supra), in tile majority view on ground (2) which was somewhat identical to above ground V, the following finding was recorded:--

"As regards the second ground, we rind sufficient correspondence on record to indicate that persistent requests were made by the Provinces for making functional the Constitutional institutions like Council of Common Interests, National Finance Commission with a view to sort out disputes over claims and policy matters concerning the Federation and the Federating Units. as such. In spite of the intercession of the President, no heed was paid, Constitutional obligations were not discharged thereby jeopardizing the very existence and sustenance of the Federation."

44. In Ahmad Tariq Rahim's case (supra), in spite of the insistence of the two Provinces and riling of legal proceedings by them and intercession of the President, neither CCI nor NFC were operating. Whereas in the present case, CCI, NFC and NEC have been established. They have been functioning. Thus only point which needs consideration is that the matters covered by Part 11 of the Federal Legislative List have not been brought for formulating and regulating the policies. The plea taken by the petitioner in the present case is that it was not necessary to have placed the above matters before the CCI. Further plea raised during the arguments Was that neither WAPDA nor Telecommunication nor Railways have been privatized and that the item of the Government Privatization Policy was included as an item in Pre-CCI meeting held on 11-4-1W3.

It may be pertinent to point out that the Chief Minister N.-W.F.P. addressed his first letter dated 8-1U-1992 to Mr. Muhammad Aslam Khan Khattak, Minister for Inter-Provincial Coordination, complaining about certain matters including bypassing of NEC. It was also pointed out that the policy matters affecting the Provinces referred to therein were decided without taking the Provinces into confidence. It was also stated that the Provinces felt that decisions to privatise Railways, Sui Northern Gas or WAPDA, which were national assets were to be taken after taking the provinces into confidence. He addressed his second letter dated 9-1-1993 to the petitioner inviting attention to the provisions of Article 154 of the Constitution and pointing out that the

matters relating to privatization of WAPDA could only be considered by the CCI and its decision could only be amended by the joint session of the Parliament.

it may further be observed that there is a letter dated 6-12-1992 addressed by the Chief Minister, Baluchistan, to petitioner complaining about the non-payment of the full amount awarded by NFC. The Chief Minister of Sindh addressed his letter dated 21-3-1993 to the President protesting against taking out the schemes pertaining to Highway and Telecommunication out of the purview of CWD/EC in violation of the Constitution of Pakistan and without getting matter of policy relating to development of industries, water and power (WAPDA), Railways and National Highway formulated and regulated by the forum, namely, CCI.

The President's Secretary raised the above questions first time in the aforesaid letter dated 28-12-1992. The Chief Minister, N.-W .F .P.'s letter about NEC is of 8-10-1993 (sic) and about CCI of 9-1-1993 and of the Sindh Chief Minister is of 21-3-1993. The Balochistan Chief Minister's letter of 6-12-1992 does not refer to CC[, but asked for the payment of balance amount. In my view, the Federal Government should have' brought the matter of privatization X in respect of the items covered by the above Constitutional provisions before the CCI. The petitioner's plea that, it was not mandatory is not sustainable. However, before the impugned order of dissolution was passed, the item of Government Privatization Policy was included as art item for consideration by CCI for the meeting which was scheduled after Pre-Council of Common Interests fixed on 11-4-1993. It may be pertinent to reproduce Mr. Mansoor Ellahl, Joint Secretary to the Cabinet's notice of the meeting dated 27-3-1993, which reads as under:--

"A pro-Council of Common Interests meeting to identify and discuss some of the main issues that may be raised before the CCI will be held immediately after the meeting of Inter Provincial Coordination Committee scheduled to be held at 9.30 a.m. on Sunday, the 11th April, 1993 in the Committee. Room of the Punjab Civil Secretariat, Lahore.

2 The following will be the agenda for the meeting:

AGENDA

(1) Progress Report on the *Indus (Ministry of Water and Power).

Water Authority.

(2) Proposed Development Programme (Ministry of Railways)

of Pakistan Railways.

(3) Demand and supply of Natural Gas. (Ministry of Petroleum and Natural Resources

(4) Privatization policy of the(Ministry of Finance

Government

(5) Any other matter with permission

of the Chairman.

3. Summaries for items Nos.1 and 4 were circulated vide Cabinet Division memo. No-CCI-1/M/93, dated the 21st March, 1993.

4 Kindly make it convenient to attend."

It may be pointed that the petitioner's averment made in the petition quoted here in above that since privatization started in 1977, the above item has never been brought before CCI has not been denied, but identification of the units to be privatized was done by the Government in power. It may be mentioned that the process of privatization has the backing of the statutes. in this regard, it may be stated that the Transfer of Managed Establishment Order (P.O. 12 of 1978) was issued on 16-9-1978. This has been amended by Ordinance XT of 1989, Ordianncc XXXIII of 1991 and Act V of 1992. We have also Hydro generated Vegetable Oil Industry (Central and Development) Act, 1973 (LXV of 1973) which has been amended by Ordinances XXXV and VII of 1991 and 1992 respectively and Acts XX and XI of 1991 and 1992, respectively. Besides that the Parliament has passed Protection of Economic Reforms Act, 1992 (Act X11 of 1992), which was assented to by the President on 23rd July, 1992 (hereinafter referred to as the Act), providing cover inter alia to privatization. Clause (b) of section 2 of the Act defines term "economic reforms" as under:--

(b) 'economic reforms' means economic policies and programmes, laws and regulations announced, promulgated or implemented by the Government on and after the seventh day of November, 1990, relating to privatization of public sector enterprises, and nationalised banks, promotion of savings and investments, introduction of fiscal incentives for industrialization and deregulation of investment, banking, finance, exchange and payments systems, holding and transfer of currencies;"

Section 3 overrides other law by providing that:--

"The provisions of this Act shall have effect notwithstanding anything contained in the Foreign Exchange Regulation Act, 1947 (VII of 1947), the Customs Act, 1969 (IV of 1969), the Income Tax Ordinance, 1979 (XXXI of 1979), or any other law for the time being in force."

It may further be observed that section 7 provides protection against acquisition of privatised units by laying down that:--

"The ownership, management and control of any banking, commercial, manufacturing or other company, establishment or enterprise transferred by the Government to any person under any law shall not again be compulsorily acquired or taken over by the Government for any reason whatsoever."

Whereas section 10 guarantees protection of financial obligations by providing that:--

"All financial obligations incurred including those under any instrument, or any financial and contractual commitment made by or on behalf of the Government shall continue to remain in force, and shall not be altered to the disadvantage of the beneficiaries.

The other provisions of the Act dealing with foreign exchange acounts etc. need not be dealt with for the purpose of the above controversy. The above provisions of the Act indicate that the Parliament affirmed the privatization transactions, which had taken place up to 23-7-1993. In other

words, privatization has the backing of law. There is no doubt that it should have been done through CCI. The WAPDA, Sui Gas and Telecommunication units, referred to by the Chief Minister, N.-W.F.P. in his above letters, have not yet been privatized. The item of the Government Privatization Policy was included in the Pre-Council of Common Interests meeting notified on 27-3-1993 for 11-4-1993 by the above-quoted letter of the Joint Secretary to the Cabinet. referred to above. In view of the above factual background, it cannot be said that the above lapse on the part of the Federal Government was of the nature, which had jeopardized the very existence and subsistence of the Federation as was held in Ahmed Tariq Rahim's case warranting to press into service Article 58(2)(b) of the Constitution.

45. 1 may refer to ground 'd' of the impugned order, which reads as follows:--

"(d) Maladministration, corruption and nepotism have reached such proportions in the Federal Government, its various bodies, authorities and other corporations including banks supervised and controlled by the Federal Government, the lack of transparency in the process of privatisation and in the disposal of public/Government properties, that they violate the requirements of the Oath(s) of the public representatives together with the Prime Minister, the Ministers and Ministers of State prescribed in the Constitution and prevent the Government from functioning in accordance with the provisions of the Constitution."

It may be observed that ground 'd' is more or less identical to ground cc' and ground T(iii) and T(v) to that of ground 'e'(ii) and 'c'(iii) of the grounds in the case of Ahmed Tariq Rahim (supra), wherein it has been held that the above grounds themselves are not sufficient independently to warrant taking of action under Article 58(2)(b) of the Constitution but they can however be invoked, referred to and made use of alongwith grounds more relevant like grounds 'a' and 'b' which corresponded to grounds 'a' and 'c' in the present case (reference may be made to para. marked M at page 666 PLD 1992 SC in the above case).

Mr. Khalid Anwar has pointed out that there is no concrete material on record to support the above ground. I asked the learned Attorney-General to pin-point the transactions of privatization in which irregularities/ mismanagement had taken place. Thereupon he submitted that in the case of Muslim Commercial Bank the highest bid of Tawwakal Group was not accepted but the third lowest bidder, namely Mansha Group, who is very close, to the petitioner was asked to match the above highest bid and upon such matching their bid was accepted. However, he conceded that there was no monetary loss to the public exchequer. The second incident which he pointed out was that eight cement factories were sold to above Mansha Group.

On the other hand, Mr. Khalid Anwar has invited our attention to the fact that as many as 29 legal proceedings inter alia in the form of Constitutional petitions were riled against the privatization transactions but in none of the above proceedings the respondents could establish any irregularity .or illegality warranting interference by the Court. According to him, Mansha Group's bid for M.C.B. was accepted on account of their financial standing

vis-a-vis to that of Tawwakal Group. He further pointed out that the latter had riled a Constitutional petition in the Sindh High Court but withdrew the same without getting the matter adjudicated upon.

As regards the cement factories, his submission was that the petitioner had riled samples of biddings alongwith their rejoinder and it is open to the federation to point out any irregularity. He has also pointed out that the, World Bank in its report of 23-3-1993 had praised the privatization and the economic performance of the petitioner's Government in -the' following terms:--

'(ii) Main Achievements.-- -As noted above, progress has been very strong in the private sector agenda, in particular since the current Government came to power in late 1990. An ambitious privatization programme was launched with the aim to reduce the role of the public sector in manufacturing and services, thereby alleviating the Government's financial and administrative burden and creating new opportunities for the private sector. So far about 67 industrial sector units and two of the four nationalized commercial banks have been privatized. Successful measures were taken to deregulate the economy. Investment sanctioning was virtually abolished, and the exchange system was substantially liberalized. Areas of investment previously reserved for the public sector were opened to the private sector. The ' financial sector was drastically reformed. In particular, an auction system for Government securities was instituted in early 1991, which 'will make the cost of public borrowing more transparent and deepen and widen the securities market. as a preclude to open market operations; it has already reduced financial dis intermediation. Trade policy measures were also taken to promote efficiency and strengthen the export sector. Since FY 88, the maximum tariff has been reduced from 225% to 90%, the import licensing generally abolished, lists of banned and restricted imports pruned, and the import surcharge integrated into the trariff schedule. The authorities have complemented these structural reforms with a flexible exchange rate policy, allowing the real effective exchange rate to depreciate by 14.3% between FY88 and FY92. In n)any respects,, these reforms went significantly beyond what was originally envisaged. (ifi) Encouraged, by these wide-ranging reforms, private sector activity has strengthened, as evidenced by strong GDP and export growth and rising private savings and investment. Since FY88, GDP growth (at factor cost) has averaged some 5.5% p.a. and real per capita GDP has risen by over 10%. Exports have expanded by an average of 14% p.a. in volume terms (12'% in US dollars), facilitating the liberalization of the trade and payments system. Private gross fixed capital formation and gross domestic savings have gown from 7.7% to 9.4% of GDP and from 10.5% to 12.2% of GDP between FY88 and FY92, respectively. Foreign investment, both direct and portfolio, has also responded very favourably. These are encouraging trends, indicating a gradual strengthening of the underlying productive and savings base of the economy."

Indeed there are certain newspaper clippings riled by the Federation and six letters from the President's Secretariat addressed to the Cabinet Secretary, Finance Minister, referred to: in Annexure 'E-3' at page 411 of the documents rile of the Federation 11 to point out certain irregularities/anomalies in the privatization but there is no reliable material on the basis of which the above ground can be sustained, nor the learned Attorney-General was able to demonstrate the same before us though we invited him to do so. Additionally, the above irregularities are not of the nature .which can have nexus to the reasons mentioned in sub-clause (b) of clause (2) of Article 58 of the Constitution.

The questions of maladministration, corruption, nepotism referred to' in the above ground are also the subject-matter of ground f(iii) and have been dealt with herein below.

46. 1 may now take up ground 'c' which reads as follows:--

The functionaries, authorities and agencies of the Government under the direction, control, collaboration and patronage of the Prime Minister and Ministers have unleashed a reign of terror against the opponents of the Government including political and personal rivals/relatives, and mediamen, thus creating a situation wherein the Government cannot be carried on in accordance with the provisions of the Constitution and the law."

In support of the above ground, certain documents have been riled which are contained in the federation's documents rile 111, which include photostat copies of telegrams addressed to the President (at pages 5 to 7 of the above file) from Mr. Naveed Malik, alleging therein that at the behest of Messrs Nawaz Sharif and Shahbaz Sharif, he was harassed/victimised; whereas at pages 8 to 11 there is a letter from one Mian Bashir' Ahmad, dated 5-5-1992 addressed to the President on the letter head of Brothers Sugar Mills limited, alleging therein that they were denied their due share in the joint business by manoeuvring and by misusing the official position by the petitioner's family. Then we have at page 18 a newspaper clipping of daily "Dawn" of March, 1993, containing the statement of Mr. lqbal Haider, the Information Secretary of the P.D.A., accusing the petitioner violating the Constitution by ordering withdrawal of the cases. Then we have a complaint from Mr. Ahmed Saeed Awan dated 11-4-1993 addressed to Mr. Fazalur Rahman Khan, Secretary to the President, alleging victimisation by the Federal and Provincial Governments. There is also a complaint from Mr. Rohail Asghar at page 52, Senior Political Correspondent, 'Jang', Lahore, alleging harassment by the Government. There is yet another photostat copy of a letter of one Rao Rashid of Lahore, dated 3-11-1991 at pages 55 to 57, which is not legible but it seems that it contains allegation as to involvement in the financial and other scandals of the Federal Government.

The above allegations/complaints have not been investigated into by any competent agency/forum in order to determine the truthfulness of the allegations contained therein. If we were to accept such allegations and accusations without ascertainment of truthfulness thereof for the purpose of dissolving the National Assembly and dismissing the Cabinet, no Assembly or Government will be able to stay in power for more than few months as the. making of such allegations for mala fide reasons are not uncommon. These documents were not even referred to by Mr. Aziz A. Munshi. I am, therefore of the view that the above ground besides being not founded on any material worth consideration has also no nexus with the reason mentioned in sub-clause (b) of clause (2) of Article 58 of the Constitution.

47. 1 may now refer to para. ‘17 of the impugned order which has rive grounds, which read as follows:--

In violation of the provisions of the Constitution:

(i)The Cabinet has not been taken into confidence or decided upon numerous Ordinances and matters of policy.

(ii) Federal Ministers have for a period even been called upon not to see

the President.

(iii) Resources and agencies of the Government of the Federation, including statutory corporations, authorities and banks, have been misused for political ends and purposes and for personal gain.

(iv) There has been massive wastage and dissipation of public funds and assets at the cost of the national exchequer without legal or valid justification resulting in increased deficit financing and indebtedness, both domestic and international, and adversely affecting the national interest including defence.

(V) Articles 240 and 242 have been disregarded in respect of the Civil

Services of Pakistan.

48. As regards ground f(i), it may be stated that the above ground does not contain the particulars of the Ordinances and matters of policy about which the Cabinet was not taken into confidence. The President in his address of 22-12-1992 to the joint session of the Parliament was satisfied with the legislative work of the Parliament. The relevant portion of the English

translation reads as follows:-- I

"Take the Parliament for example. The facts show that during the last twelve months, each of the two Houses has discharged its legislative and other responsibilities reasonably well. During this period, 95 Bills were presented of which 35 were passed and the rest are at various stages of consideration. Parliamentary Committees have been set up and are functioning satisfactorily."

However, Annexure 'R' at page 628 of the Federation's Documents File II contains the list of Ordinances issued more than once (i.e. 2 to 8 times each) which are 20 in number and were issued in 1991-92. The Supreme Court has recently in the case of Government of Punjab through Secretary, Home Department v. Zia Ullah Khan and 2 others 1992 S C M R 602 has clarified the legal position to the effect that an Ordinance cannot be repeated. Though an Ordinance is to be issued on the advice of the Prime Minister but the President could have sent back the same to the Prime Minister inter alia in exercise of his power contained under Article 46 of the Constitution. Photostat copies of the letters of resignations of the Federal Ministers/Ministers of State, Advisors and Parliamentary Secretaries in the Federation Documents File 11 at pages 101 to 123 do not contain any allegation that the Cabinet had not taken them into confidence about certain Ordinances and matters of policy but from the newspapers clippings, it appears that one or two Ministers who had resigned, had raised a grievance to the effect that there was a kitchen Cabinet for attending the important matters and they were not consulted. It may be stated that in a parliamentary form of Government even in England, there is a team of few Ministers, who are more close to the Prime Ministers than the other Ministers and who are consulted more in the discharge of day to day functions. Even if the above allegation of the above Ministers is true, they may have individual grievance but the same cannot be made a ground for the purpose of sub-clause ~b) of clause (2) of Article 58 of the Constitution as it has no nexus with the reason mentioned therein.

49. As regards para. f(ii), it may be mentioned that Sardar Asif Ahmed Ali, ex-Minister of State for Economic Affairs, in his resignation letter undated addressed to the President, has alleged at page 140 of the above File 11 that "Both Mr. Shahbaz Sharif and Mr. Chaudhry Nisar made it abundantly clear to me that they had made it a matter of their pride to confront the President, The

other Minsters were once again instructed not to call on the President". This allegation has been denied in the pleadings by the petitioner and his counsel before the Court during the arguments. There were heated at arguments on the' question, whether the President can seek any information directly from a

Minister instead of obtaining the same from the Prime Minister in terms of Article 46 of the Constitution. The submission of Mr. Khalid Anwar was that under clause (1) of Article 48 of the Constitution the President is to act in accordance With the advice, of the Cabinet or the Prime Minister and, therefore, a Minister has no Constitutional basis to furnish any advice/information to the President. On the other hand, Mr. Aziz A. Munshi, learned Attorney General has contended that under Article 91(l) of the Constitution, a Cabinet of Ministers with the Prime Minister at its head is

constituted to aid and advise the President in exercise of his functions as the executive authority of the Federation and, therefore, he is entitled to seek information from a Minister without asking the Prime Minister. To reinforce the above submission, he has invited our attention to clause (4) of Article 48 6f the Constitution, which reads as follows:--

"(4) The question whether any, and if so what, advice was tendered to the President by the Cabinet, the Prime Minister, a Minister or Minister of State shall not be inquired into in, or by, any Court, tribunal or other authority."

It is true that in the above-quoted clause (4) it has been provided that the question, whether any, and if so what, advice was tendered to the President by the Cabinet, the Prime Minister, a Minister or Minister of State shall not be inquired into in, or by, any Court,. Tribunal or other authority and, therefore, one can urge that the' advice' can also be tendered by a Minister. However, the Constitutional advice referred to in clause (1) of Article 48 can only be tendered by the Cabinet or the Prime Minister: But, there is nothing wrong if a Minister calls on the President socially or with the object to furnish certain information to him which the President may need in connection with some official matter. It is for the Minister concerned to bring this fact to the notice of the Prime Minister, who being the Head of the Cabinet, is entitled to be taken into confidence by Ministers while discussing or talking about any official matter with the Head of the State.

I am of the view that the above ground mentioned in the above sub para. has no nexus to the reason mentioned in sub-clause (b) of clause (2) of Article 58 of the Constitution.

50. Adverting to the ground mentioned in sub-para. (iii) of para. 'f' it may be observed that this was not highlighted by the learned Attorney-General during the arguments but except the factum

that Rupees thirty crores were taken as a loan by the companies in which the petitioner's family has interest from Messrs. M.C.B. after its privatization. ,This fact has been averred by Mr. Farooq Leghari, Deputy Leader of the Opposition, in his reference, dated ~11-1-1992 addressed to the Speaker (Federation's documents File No.II at page 497 relevant at page 498), in which he alleged that two Sugar Mills belonging to Ittefaq Group obtained in an illegal manner a sum of Rupees 300 million as loan on 20-8-1991 from the above bank through Cheques Nos.0306126 afid 0306151 in violation of the order passed by a Division Bench of the Lahore High Court in Constitution Petition No. 1121 of 1991. The charge-sheet submitted by the combined Opposition against the petitioner and the IJI Government referred to herein below at page 310 of, the Federation's documents File III contains allegation that the petitioner's family's borrowing from the Financial Institutions was Rupees 2.5 billion and that during two years of his incumbency, this has shot up 1000%. We have also on record another reference (at pages 490 to 496) addressed to the Speaker of the National Assembly by Mr. Salman Taaseer, Central Information Secretary, P. P P. containing allegations that the bid of the lowest. bidder for the construction of Motorway between Lahore-Islamabad was not accepted but the higher bid of Messrs. Daewoo of South Korea has been accepted besides making payment of some, additional' amounts for designing etc. There is yet another reference addressed to the Speaker by Mr. Abdul Rashid Qureshi, Advocate, dated 11-1-1992 at pages 521 to 523 alleging therein that two members of Ittefaq Group of Companies, namely, Mian Tariq Shari and Mian Rashid Rahirn obtained a sum of Dirharn 4 million each from B.C.C.I., Dera Branch, Dubai, on 21-2-1989 when the petitioner was the Chief Minister of Punjab, who allegedly allotted 343 Kanals forestry land at Bhoorban at a given away price to'Mr. Zafar Iqbal, who was running affairs of B.C.C.I. We have also a copy of the aforesaid charge-sheet submitted by the combined Opposition against the petitioner and IN Government (at pages 304 to 442.of Federation's documents File III) under the captions:

"Section (a) Fraud and corruption.

Section (b) Incompetence of Nawaz Sharif Government.

Section (c) Disruption of National Fabric.

Section (d) Failure of foreign policy.

There are,- a, number' of newspaper clippings in the Federation documents File No.IV containing news items about irregular grant of contracts, exorbitant expenses 0n foreign trips etc. There are also photostat copies of documents on the Federation's Documents File No.111 (at pages 254 to

284) relating to the construction of road in' Raiwind area. The allegation, is that the above road was not constructed as claimed for the benefit of persons coming to Raiwind for attending congregations for religious purposes but in fact it was intended to provide benefit to Ittqfaq., Grqpp, who have their factories near; Raiwind. It may further be observed that there are photostat copies of documents at pages 443 to 472 of the above Federation, documents File No.111 allegedly indicating that with mala fide object. to facilitate profit making by Ittefaq Group, the rates of customs duty etc. were reduced on the import of re-rollable scrap.

Mr. Aziz A. Munshi, learned Attorney-General, while arguing on the question of submission of 88 resignations by the M.N.As. to the President instead of to the Speaker had invited our attention to documents marked N-1 and N-2 at pages 504 to 517 of the Federation's documents File II. N-1 indicates that in the year 1991-92 Mr. Gohar Ayub, Speaker as M.N.A. for Constituency NA-13, for electrification of villages was given additional quota of 46 villages from the Prime Minister quota and of others besides his normal quota of 5 villages and in the year 1992-93, additional quota of 11 villages. Whereas N-2 shows that the Prime Minister in his discretionary fund of Tameer-e-Watan out of total amount allocated for N.-W-.F.P. Rs.14 million allowed Rs.10 million for Mr. Gohar Ayub's, schemes.

However, the basic question remains, whether mere allegations in the form of complaints or news items without ascertainment of their truthfulness are sufficient or above alleged special favours to Mr. Gohar Ayub to furnish a ground in the order under Article 58(2)(b) of the Constitution. In other words, the precise question for consideration is,. whether such irregularities can have nexus to the reason mentioned in the above provision of the Constitution or can they be subject-matter of investigation in appropriate proceedings under the relevant laws. In my view, the alleged irregularities/favours may be subject matters of appropriate legal proceedings under the relevant laws, if they constitute breach of such laws and are true, but such individual instances cannot have nexus with the ground mentioned in the above provision of the Constitution. However, if the corruption, nepotism and favouritism are on such a large scale, that it resulted in the breakdown of Constitutional machinery completely it may have nexus with the above provision.

51. As regards sub-para. (iv) of ground 'f, it may be stated that the learned Attorney-General has not specifically pointed out any particular item except upon query from the Court, he submitted that' donations were made in crores of rupees by the petitioner for various project's outside the budgeted amounts though he was authorised to make grant out of his discretionary amount of Rs.8,00,000 under the Privileges Act, 1975. This does not seem to be the correct position. The above Act relates to the Prime Minister's Personal Privileges and has nothing to do with the Government's' schemes/projects. There are photostat copies of documents on record at pages 545 to 575 of the Federation's documents File 11, indicating that a programme of socio-economic development under the name of "Tameer-e-Watan Programme" was initiated. The Prime Minister's discretionary fund to. the extent of 10% out of the total budgeted amount was created which .is .evident from the photostat copy of Joint Secretary (TWP)'s memorandum dated 12-11-1992 addressed to Mr. Mukhtar Ahmed, Financial Advisor (LG and RD), whereby advice

was sought for regularisation of the excess amount of Rs.6.724 million spent under the discretionary grant of the Prime Minister, the total of which at 10% was Rs.29.6 million of the budgeted amount of Rs.2916 million. There are newspaper clippings already referred to hereinabove containing news items about the expensive trips of the Prime Minister and the expenses incurred' in holding Seminars in the capitals of the foreign -countries for attracting foreign investment.

it may be pertinent to refer to the President's Secretary's letter dated 22-3-1993 addressed to Mr. Sartaj Aziz, Minister for Finance, Islamabad, alongwith a confidential note, in which it has been alleged that the Federation is defrauded and denied billions of rupees by smuggling racket run under the patronage of. senior officials of the Central Board of Revenue and Intelligence Bureau '.through the cover of Afghan transit trade (at pages 408, 409, 410 of the Federation documents File No.11).

There are also certain photostat copies of the articles appeared in daily newspapers like an article under the caption "Adverse developments on Economic front raised threat of hyperinflation" appeared in daily "Dawn" of 30-1-1993 contributed by one Mr. M. Ziauddin from Islamabad (at page .620 of Federation documents File No.11). Then we have another article contributed by the, same author in the daily "Dawn" of 17-4-1993 under the caption "Deficit fears abound; gap estimated at 9.33 p.c. of GDR" (at pages 622 and 623 of the above file). There is yet another article contributed by Dr. Ishfaq Oadri published in the daily "The News", Islamabad of 10-4-1993 under the caption "Persistent . negative trend in trade and payment balance raises serious economic implication" (at pages 624 and 625 of the above rile). There is another photostat copy of a news item published in daily "Dawn" of 5-4-15K)3 on the basis of Bureau Report from Lahore under the caption "Punjab may face deficit by next year, warns Minister" (at page 626 of the above file). Then we have a photostat copy of daily "Dawn" of 29-1-1993 containing a news item relating to the statement of Mt. Sartaj Aziz under the caption "Budget deficit being trimmed, says Sartaj" (at page 627 of the above files. There are some ,other newspaper clippings in other files.

It may be stated that if the petitioner bad made grants from his discretionary quota of Tameer-e-Watan Programme, it does not in any way show that he has, wasted the above money in the absence of any finding by any competent forum to the effect that the grants made, by him were not in fact utilized for the public purposes, for which they were made. The allegations about. the extravagant expenses incurred on foreign trips and in organising seminars. in foreign countries for attracting foreign investments are no mote than Allegations contained in the newspapers without any facts and figures as to the excess amount wasted and, therefore, not worth reliable. Besides as stated' above, while. dealing with ground (iii) of para. T hereinabove in para. 50 that such irregularities may form the basis for. some other appropriate proceedings under the appropriate laws, if they constitute breach of such laws and are true, but they cannot furnish foundation for passing the impugned order. ,

Adverting to the deficit financing and indebtedness both domestic and international, it may be stated that the articles or the news items referred to hereinabove are the personal opinions of the authors. The Additional Secretary, President Secretariat's letter dated 27-11-1992 (Annexure 'A-10 at page 192 of the Federation's documents File 11) indicates that a summary was put up before the President in respect of the meeting of the Economic Coordination Committee of the Cabinet held on 20th October, 1992, about corporate restructuring, he recorded following minutes:--,

"Monetary expansion arid inflation are the real problems. They must be addressed urgently before they -- and, they are facets of the same ,coin -- get out of hand."

It may again be observed that the World Bank in its report of 23-3-1993 appreciated the performance of Pakistan in the economic field, which is inter alia reflected in the above quoted sub-paras. on the World Bank's report. The petitioner has also filed Schedules with the petition containing comparative figures for the Exports, Aggregate Market Capitalization, Aggregate Market Capitalization of Stock Market Investment, Unemployment/ Under' Employment, Direct Foreign Investment, Private Investment for a number of years (at pages 80 and 81 of the petition File, Part 1). This has not been specifically denied by the Federation in their written statement or in any other document. I pointedly asked Mr. Aziz A. Munshi, learned, 'Attorney- General, to point out mistakes or incorrect assertions contained in the above comparative figures but he was unable to do so, on the plea that it was a highly technical matter. According to the above comparative figures, the economic performance of the Federal Government has not been bad keeping in view the prevalent recession throughout the World including in the developed countries like U.S.A. etc.

In the above factual background, the ground under discussion could not have been pressed into service. Besides that I am of the view that the above ground has no nexus with the. reason mentioned in above sub-clause (b) of ,clause (2) of Article 58.

52. Refefrin to the . ground contained in para. f(vi), it may be observed that Article 240 of the Constitution provides the method of appointments in the service of Pakistan b' providing that subject to the Constitution the appointments to and the conditions of service of persons I in the service of Pakistan shall be determined--

(a)in the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under Act of Majlis-e-Shoora (Parliament); and

(b) in the case of the services of a Province and posts. in connection with the affairs of a Province, by or under Act of the Provincial Assembly.

Whereas Article 241 lays down that until Legislature makes a law under Article 240, all rules and orders in force immediately before the commencing day shall, so far as consistent with the provisions of the Constitution, continue in force and may be amended from time to time by the Federal Government or as the case may be by the Provincial Government.

The law relating to the method of selection 'has been provided for inter alia through the Federal Public Service Commission Ordinance (XLV of 1977), whereas for regulating the terms of service, Civil Servants Act, 1973 has ,been enacted. Under the former statute, a procedure of $election through competitive examination has been evolved. However, there are certain rules providing lateral induction into the civil service inter alia from the Armed Forces.

The Federation's documents File ,V contains photostat copies of a number of newspaper clippings, wherein the reporters referred to the various irregularities in the service matters. It may be stated that at page 9 'is a clipping of "The News", Islamabad of 2-3-1993 under the caption "Junior VIP in civil service", published the following news item:--

"The civil bureaucracy has been enriched by four prominent sons of the military and political leaders.

Though their induction in the district management group and the foreign service was more or less carried out according to the rules. It is the privileged background of these newly-recruited officers that has raised many eyebrows in the capital.

The first is the induction of Capt. Ali Nasir', the son of Director General, Inter-Services Intelligence Directorate, Lt.-Gen. Javid Nasir. Capt. Nasir was inducted in the foreign service With a back date of two months and hence he joined the foreign service academy when his batch-mates had finished two-month training.

The other entrant is Capt. Murad Ashraf, the son of Corps Commander, Lahore, Lt.-Gen. Muhammad Ashraf.

The Corps Commander was one of the nominees of the Prime Minister for the post of COAS when the post fell vacant early this year.

Of the two who have been inducted into the District Management Group one is the, son of a retired Corps Commander of Lahore, Lt.Gen. (Retd.) Alam Jan Masud for whom the former Prime Minister Benzazir Bhutto had recommended an extension but that was not acceptable to Gen. (Retd.) Aslam Beg.

The fourth prominent gentleman to be. inducted into the DMG is Capt. Safdar, formerly the ADC t(Prime Minister Nawaz Sharif and now his son-in-law.

Sources indicate that there appears to be a slight delay as Capt. Safdar ,is yet to join the services though he is no longer the Prime Minister's ADC. His is another case of joining the services with back date."

The above news item appeared repeatedly in the other newspapers under different headings i.e. "The Muslim", Islamabad of 20-2-1~03 (at page 10) and the daily "The News", Islamabad of 16-2-1993 (at page 71). News clipping of the "Nation", Islamabad of 10-8-1992 relates to news item under the caption "Yousuf Gul case P.M.'s order causes resentment". (The above documents are in Federation's documents File IV).

Besides the above newspaper clippings the official record relating to the induction of the above, incumbents into the superior service including the orders of the competent authorities are contained in the Federation's documents File 11 at pages 194 to 226 (excluding the document at page 211).

The above Federation's documents File 11 also contains a number of photostat copies of other newspaper clippings, for example, at page 17 there is a news item which appeared in "The News", Islamabad of 18-3-1993 under the caption "Confusion over removal of 37 Taxation Officers by P.M." Then there is a news item appearing in the "Frontier Post", Lahore of 20-3-1993 under the

caption “C.B.R. Officers were probing Ittefaq Tax evasion”. The latter news item was attributed to the Secretary- General of Pakistan People’s Party (at In support of the above ground, the Federation has filed photostat copies of page 37), Mr. Salman Taaseer. Then there is a clipping of “The Nation”, certain newspapers clippings and certain correspondence between the Islamabad of 19-3-1993 which carried a news item under the banner “Nawaz orders suspension, arrest of 16 GCP officers” (at page 18). The news item I gives the names and the reason to the effect that the above order was passed on account of their involvement in the misappropriation of about Rupees 116 million.

There are other newspaper clippings carrying various news items about the service matters like at page 27 relating to plum post, at page 30 under the caption “CBR OSDs questions Chairman’s credibility’, at page 31 under the caption “Connections outweigh merit in services”, at pages 51, 54 and 55 about the transfer of the Director-General, Health, Ministry of Health, at page 94 about ‘ 18 D.I.Gs. promotion for favouring some one, at page 94 “expenses incurred on civil servants on foreign medical treatment”, at page 118 under the caption “PQA Chairman quits in disgust, over corruption in organisation”, then at page 150 about increasing posts in foreign Services, at page 179 “The News”, Lahore of 4-3-1991 carried the news under the caption “P.M. orders probe in the alleged nepotism in PNSC”.

Barring the induction of the above rive incumbents in the civil service to some extent in deviation and relaxation of the normal recruitment rules/practices which allegation is supported by the official documents referred to hereinabove, the other news items about the other alleged irregularities, are not supported by any official record. Two of the. above items indicate that the petitioner had ordered taking of action against corrupt officers. In the case of Khalid Malik relating to the Dissolution Order of 1990, the High Court of Sindh P L D 1991 Kar. I at p.48 found that as many as 26,000 persons were inducted in service through the Placement Bureau in deviation of the recruitment law/rules. The above deviation in respect of the five incumbents cannot be equated with the above induction of 26,000 incumbents. Such deviation may not be desirable for running an efficient civil service, but it cannot cause breakdown Of the Constitutional machinery and, therefore, it has no nexus with sub-clause (b) of clause (2) of Article 58 of the Constitution.

,53. I may now refer to ground ‘g’ of the impugned order, which reads as follows,

“(g) The serious allegations made by Beguni Nuzhat Asif Nawaz as to the high-handed treatment meted out to her husband, the late Army Chief of Staff, and the further allegations as to the circumstances culminating in his death indicate that the highest functionaries of the Federal Government have been subverting the authority of the Armed Forces and the machinery of the Government and the Constitution itself.”

In support of the above ground the federation has filed photostat copies of certain newspaper clipping and certain correspondence between the Secretary to the President and the Secretary to the Prime Minister, which are contained at pages 227 to 229 and at pages 614, 617 and 618 in the Federation's 16 documents File II. It may be observed that at page 227 there is a clipping of the daily "News" of 12-4-1993 (marked as Annexure "A-12") which contains the reporting of Mrs. Asif Nawaz, widow of the late General's Press Conference held on Sunday on 11-4-1993 at the Pearl Continental, Rawalpindi, in which she alleged that her husband was poisoned and had not died natural death. She also alleged that her late husband was threatened by Chaudhry Nisar and Brig. lintiaz, ISPR Chief. She had also referred to certain incidents which had taken place during the lifetime of the late General. Then at page 228 there is a news item under the caption "No comments, says ISPR's chief". Then at page 229 there is a clipping of "The Muslim", Islamabad of 28-3-1993 under the caption "Asif Nawaz did not die natural death.

It may be stated that at page 614 there is a photostat copy of Mr Fazalur Rehman Khan, Secretary to the President's letter dated 12-4-1993 addressed to Prime Minister's Secretariat (Qazi M. Alimullah, Principal Secretary) stating therein that he was directed by the President to request the Prime Minister to appoint a high level Judicial Commission consisting of the Judges of the Supreme Court and High Court to inquire into the allegations at priority basis and submit a report alongwith their recommendations. Enclosed with the above letter is a photostat copy of the clipping of "The News" of 12-4-1993. The above letter was responded to by Mr. Qazi M. Alimullah, Principal Secretary to the Prime Minister through his letter dated 13-4-1993, in

which it has been stated that the Prime Minister had taken immediate suo motu cognizance of the allegations and appointed the Commission of Enquiry promptly. This letter was responded to by Mr. Fazalur Rehman Khan, Secretary to the President by his letter, dated 15-4-1993. It is a matter of public knowledge that the Commission comprising three Judges of the Supreme Court headed by Shaflur Rahman, J. was constituted, which has already submitted its report. The contents of the above report have not been made public. However, the statements of the Army Medical Personnel recorded by the Commission and reported in the Press in verbatim indicate that as per their version the late General died his natural death (God may bestow His choicest

blessing on the departed soul! Amin).

There appears to be no lapse on the part of the Federal Government in this regard, as the Commission was constituted on 12-4-1993 on the publication of the news in the press about the above Press Conference of the widow of late Asif Nawaz and receipt of Mr. Fazalur Rehman Khan, Secretary to the President, above letter without any delay. The above ground has no basis nor it has any nexus with Article 58(2)(b) of the Constitution.

54. This leads us to the last ground contained in para. h which reads as follows:--

(h)The Government of the Federation for the above reasons, inter alia, is not in a position to meet properly and positively the threat to the security and integrity of Pakistan and the grave economic situation confronting the country, necessitating the requirement of a fresh mandate from the people of Pakistan."

It may be observed that while dealing with ground V, I have pointed out hereinabove in para. 35 that Mr. Sharifuddin Pirzada alongwith the Foreign Secretary, Mr. Shaheryar Khan, in presence of the learned Attorney-General and the learned counsel for the petitioner had invited our attention to the sensitive informations which the Foreign Office had received inter alia from its

Embassies, which were allegedly not attended to by the petitioner as per impugned order. I have allready observed hereinabove that I am unable to subscribe to the view that there was any lapse on the part of the petitioner in this regard. The above ground' h' containing -averment that the Government of Federation for the reasons contained in the preceding paragraphs inter alia is

not in a position to meet properly and positively the threat to the security and integrity of Pakistan and the grave economic situation confronting the country necessitating the requirement of fresh mandate from the people of Pakistan is not founded on any tangible material. The economic performance of the petitioner Government as pointed out hereinabove was not only complimented by the President in his above address of 22-12-1992 to the joint session of the Parliament but has been praised as late as on 23-3-1993 by the World Bank in its report, extract of which has already been quoted hereinabove.

55. Before concluding the above discussion, I may observe that the learned Advocates-General, Punjab, N.-W.F.P. and Balochistan, Messrs Malik Maqbool Elahi, Sardar Khan and Raja Muhammad Afsar and the learned Additional Advocate-General of Sindh, Mr. Abdul Ghafoor Mangi, were also heard by the Court though the applications riled by the Provinces of Punjab, Sindh and N.-W.F.P. to be impleaded as parties to the petition were declined.

Besides supporting the arguments of the learned Attorney-General, their submission was that, it would not be-possible for the Provincial Governments to get on with the petitioner on account of strained relations between the Federation and the Provinces, if the National Assembly and the Cabinet would be restored by the Court. The above contention seems to be untenable. In case of. any dispute between the Federation and a Provincial Government, the Constitution provides mechanism in the form of Articles 184(l), 154 and 155. It may be stated that under the- above Article 184(l) a suit can be filed in this Court in respect of any dispute between any two or more Governments, whereas under Articles 154 and 155 the disputes of the matters referred to therein can be brought before the Council of Common Interests.

If I were to accept the above contention of the learned Advocates General and Additional Advocate-General of Sindh, it will lead to absurdity as it is not uncommon that in a general election a particular party may win most of the seats of the National Assembly and another political party having a different political philosophy may secure majority in the four Provincial Assemblies. Will it be. legal or fair and proper to say that the Political Party which succeeded in obtaining mandate of the people for forming the Federal Government should not be allowed to form the Government as the Political Party which secured majority in the four Provincial Assemblies cannot get on with the former.

56. This leads us to the last submission of Mr. Aziz A. Munshi, learned Attorney-General that the grant of relief in exercise of Constitutional jurisdiction is a discretionary matter even 'where infringement of any of the Fundamental Rights is involved and, therefore, this Court should not grant the same as the controversy is going. to be resolved by the political sovereign i.e. the people of Pakistan in the election of the National Assembly scheduled to be held ~h 14-7-1993. He has pointed out that in the case of Capt. Kanwaljit Singh v. Union of India A I R 1 , 991 Punjab and Haryana 54, the case, of S.R. Bommai and others v. Union of India and others A I R 1990 Karnataka 5 and in the case of State of Rajasthan A I R 1977 SC 1361 the Courts declined to restore the Provincial ~ Assemblies. The above cases are distinguishable as in none of the above cases the impugned order was, found to be without jurisdiction or not covered within the ambit of Article 356 of the Indian Constitution. Even in India, Madhya Pradesh High Court recently restored the dissolved Provincial Assembly and the dismissed Ministry, while rendering judgment on 2-4-1993 in the case of Sunderlal Patwa v. The Union of India and others) Misc. Petition No..237 of 1993).

As regards the question, whether the superior Courts have Any discretion to decline relief in exercise of Constitutional jurisdiction in case they rind infringement of a fundamental right, it may be observed that in the case of Nawab Syed Raunaq Ali etc. v. Chief Settlement Commissioner and others PLD 1973 SC 236, Hamoodur Rahman, CJ. made the following weighty observations:--

"An order in the nature of a writ of certiorari or mandamus is a discretionary order. Its object is to foster justice and right a wrong. Therefore, before a person can be permitted to invoke this discretionary power of a Court, it must be shown that the order sought to be set aside has occasioned some injustice to the parties. If it does not work any injustice to any party, rather it cures a manifest illegality, then the extraordinary jurisdiction ought not to be allowed to be invoked."

The above observations related to an order in the nature of a writ of certiorari or mandamus. The above principle that the object to grant discretionary relief of writ petition is to foster justice and

right a wrong has been consistently followed by the superior Courts and above discretionary relief has been denied when the Courts found that the grant of the same would perpetuate injustice instead of advancing the cause of justice. The above principle has been pressed

into service by this Court in the case of Wali Muhammad and others v. Sakhi Muhammad and others P L D 1974 SC 106, the case of the Chief Settlement Commissioner, Lahore v. Raja Muhammad Fazil Khan and others PLD 1975 SC 331, the case of Syed Nazim Ali etc. v. Syed Mustafa Ali etc. 1981 SCMR 231, the case of Muhammad Umar v. Member, Board of Revenue and 9 others 1985 SCMR 1591, the case of Messrs Norwich Union Fire Insurance., Society

Limited v. Muhammad Javed lqbal and another 1986 SCMR 1071, the -case of Zameer Ahmad and another v. Bashir Ahmad and others 1988 SCMR 5 ‘ 16 and the case of Syed Ali Shah v. Abdul Saghir Khan Sherwani and others PLD 1990 SC 504.

. However, the question arises, whether the above principle which was originally enunciated in relation to an order in the nature of a writ of certiorari or mandamus can be pressed into service in a. case where infringement of any of the Fundamental Rights is involved.

57. Mr. Khalid Anwar has referred to the case of Inamur Rehinan v. Federation of Pakistan and others 1992 S C M R 563, the case of Daryao and others v. The State of U.P. and others AIR 1961 SC 1457, the case of the Government of East Pakistan v. Mrs. Rowshan Bijaya Shaukat Ali Khan PLD 1966 SC 286, and the case of Ram Singh and others v. The State of Delhi and another AIR 1951 SC 270, wherein the importance of the Fundamental Rights has been highlighted and it has been emphasized that relief should not be withheld.

On the other hand, Mr. Aziz A. Munshi, learned Attorney-General, has cited the case of Messrs Tilokchand Motichand and others v. H.B. Munshi, Commissioner of Sales Tax, Bombay and another A I R 1970 SC 898 and the case of Amrit Lal Berry and others v. Collector of Central Excise, Central Revenue and others AIR 1975 SC 538.

The ratio of the above Indian Supreme Court cases seems to be that a writ under Article 32 of the Indian Constitution is issued as a matter of course if a breach of any fundamental right is established and that the Courts would overlook technicalities, which are the hallmark of civil proceedings. But at the same time the Court must not ignore and trample under foot all laws, and, therefore, principles of res judicata and laches would be applicable and, hence, inequality in the equitable balance brought into being by a petitioner’s own laches and acquiescence cannot be overlooked. So also when the petitioner is guilty of making misleading and inaccurate statement in ,the memo. of petition, relief is to be denied.

58. 1 am inclined to hold that if a petitioner succeeds in establishing breach of a fundamental right, he ~s entitled to the relief in exercise of Constitutional jurisdiction as a matter ‘of course. However, the Court may decline relief if the grant of the same, instead of advancing/fostering the cause of justice, would perpetuate injustice’ or where the Court feels that it would not be just and proper, for example, if the President dissolves the National Assembly under Article 58(2)(b) of the Constitution and before the Court decides the legality of such an order, elections take place which may show that 70% voters have cast their votes against the political party which was commanding the majority in the House before its dissolution and that it could secure 2% or 3% only of the total votes cast, In such an event, it will not be just and proper on the par(of the Court to defeat the will of the political sovereign by reinstating the dissolved Assembly in spite of the above verdict of the political sovereign against it overwhelmingly. I am prompted to take the above view for the reason that the Courts are established for dispensing justice. So if the grant of a relief for the enforcement of a fundamental right or any other legal right instead fostering/ advancing cause of justice, will perpetuate injustice, the Court will decline the same, In this regard, there seems to be no distinction between the enforcement of a fundamental right and a legal, right under a general law.

In the present case, I have found that the impugned order does not fall within the ambit of Article 58(2)(b) of the Constitution. There is no justifiable reason to deny the restoration of the National Assembly and the Cabinet with thc Prime Minister. I would, accordingly, allow the above petition in terms of the short order announced on 26-5-1993.

MUHAMMAD AFZAL LONE, J. ---The last few months have been a period of great political turmoil in the country. An atmosphere changed with intrigue and confusion prevailed which led to speculations that the elected Government headed by Mian Muhammad Nawaz Sharif would be dismissed and the National Assembly dissolved. These speculations materialised when the speech made by the Prime Minister addressing the nation on 17th April, 1993, on electronic news media was on the following day, late in the evening followed by the Presidential address and in a short span of 5 years, for the third time Article 58(2)(b) of the Constitution was put into operation, the National Assembly dissolved with immediate effect, the Prime Minister dismissed and a direction given that the Cabinet would cease to hold office forthwith. Simultaneously in exercise of the powers vesting in him under clause (5)(b) of Article 58 of the Constitution the President appointed a Caretaker Cabinet headed by Mir Balakh Sher Mazari.

2. In this petition, under Article 183(3) read with Articles 187 and 190 of the Constitution of the Islamic Republic of Pakistan, riled by Mian Muhammad Nawaz Sharif, to which the President, the Federal Government, and Mir Balakh Shcr Mazari have been impleaded as respondents, the dissolution order is brought under challenge and the steps taken in implementation thereof

including the appointment of Care-taker Cabinet are sought to be declared as null void and of no legal effect. Two major issues falling for determination in the petition are:---

(1) Whether a question of public importance with reference to enforcement of Fundamental Right No.17 has arisen; and consequently the instant petition is maintainable?

(2) Whether the dissolution order conforms to the requirements of Article 58(2)(b) which empowers the President to dissolve the National Assembly in his discretion, where in his opinion:---

I

..a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary."

Both the questions have been very ably examined in depth and answered in favour of the petitioner, in the main judgment proposed to be delivered by my brother Shaflur Rahman, J. I have availed of the benefit to go through it and entirely agree with him. However, in view of the importance of the Constitution and legal issues raised in this case; without much dilating upon the facts, I deem it appropriate, to add my own note thereto.

3. Article 184(3) pertains to original jurisdiction of the Supreme Court and its object is to ensure the enforcement of fundamental rights referred to therein. This provision is an edifice of democratic way of life and manifestation of responsibility casts on this Court as a protector and guardian of the Constitution. The jurisdiction conferred by it is fairly wide and the Court can make an order of the nature envisaged by Article 199, in a case where a question of public importance, with reference to enforcement of any fundamental right conferred by Chapter 1 of Part II of the Constitution is involved. Article 184(3) is remedial in character and is conditioned by there pre-requisites, namely:---

(i) There is a question of public importance.

(ii) Such a question involves enforcement of fundamental right, and

(iii) The fundamental right sought to be enforced is conferred by Chapter 1, Part 11 of the Constitution.

The petitioner's case is that under the impugned order fundamental right guaranteed by Article 17 of the Constitution has been infringed. Besides being violative of Fundamental Right No.17, the impugned order has also been dubbed as mala fide, arbitrary, against the provision of natural justice and Constitution. It is not disputed that the petition presents a very substantial element of public importance and that Article 17 is listed among the fundamental rights included in Chapter 1, Part Il of the Constitution. This Article which bears the heading "Freedom of Association" is reproduced below:---

"Freedom of association.-(1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any Political Party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration refer the matter to the Supreme Court whose decision on

such reference shall be final.

(3) Every political party shall account for the source of its funds in accordance with law."

4. Mr. Khalid Anwar argued that the right t9 form an association form a political party under Article 17 includes the right to continue its activity, propagate its programme and take part in the election. In his submissions the political process does not stop with the end of the election; in case a political party enjoys the support of the majority in the House, it can form the Government and if it continues to maintain majority, it has the riot to rule for full term of 5 years provided by the Constitution and implement the mandate given to it by the electorate. It was argued that formation of the Government is not the climax of the political process started with the participation in the election, but the political party succeeding at the polls has to carry out its policies put in its manifesto, endorsed by the voters resulting in achieving majority in the House.

Mr. Khalid Anwar further relied on the Objectives Resolution made substantive part of the Constitution and submitted that it guaranteed fundamental rights including "political justice".

5. On the other hand the learned Attorney-General endeavoured to canvass that dissolution of the Assembly was not violative of the fundamental rights guaranteed by Article 17. He contended that the petitioner's right to form a political party and to continue to remain its member was not affected by the dissolution order and reiterated that the petitioner could not claim the right to form Government or to remain member of the National Assembly as a fundamental right. He further urged that right to run Government for a period of 5 years in accordance with the duration of the National Assembly fixed under Article 52 is merely a Constitutional right, which cannot in any manner, be characterized as a fundamental right. Mr. S.M. Zafar endorsed the argument that the duration of the Assembly does not involve the fundamental right guaranteed by Article 17 which he pointed out, can be curtailed on the recommendation of the Prime Minister and also by the President on dissolving an Assembly, under Article 58. If any such right is violated, according to Mr. S' * M. Zafar, the remedy lies in invoking the jurisdiction of the High Court under Article 199 of the Constitution. To explain the concept of "Political Justice" Mr. Zafar invited our attention to "A Theory of Justice" by John Rawals and equated Ws doctrine with "equal liberty", discussed at page 223, photostat whereof has been provided to us and invited our attention to the following passage:---

"Three points concerning the equal liberty defined by the principle of participation call for discussion: its meaning, its extent, and the measures that enhance its worth. Starting with the question of meaning, the precept of one elector one vote implies, when strictly adhered to, that each vote has approximately the same weight in determining the outcome of elections. And this in turn requires assuming single member territorial constituencies, that members of the legislature (with one vote each) represent the same number of electors."

6. While construing Article 17 which guarantees fundamental right, -our .approach should not be narrow and pedantic but elastic enough to march with the changing times and guided by the object for which it was embodied in the Constitution as a fundamental right. Its full import and meaning must be gathered from other provisions such as preamble of the Constitution,, principles of policy and the Objectives Resolution, which shed luster on the whole Constitution. Reference in this connection may be made to the observations made by Muhammad Haleem, C.J. (as he then was) in Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 at 489:---

..while construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usages of interpretation, but regard should be had to the object and the purpose for which this Article is enacted, that is, this interpretative approach must receive

inspiration from the triad of provisions which saturate and invigorate the entire Constitution, namely, the Objectives Resolution (Article 2A), the Fundamental Rights and the directive principles of State policy so as to achieve democracy, tolerance; equality and social justice according to Islam."

7. In every democratic set-up, in the world, the political parties compete for the right to form a Government. It is the basic assumption of Parliamentary democracy that the party winning a majority of seats in the House ~ should have complete control of Government. Fl or democracy gives the majority the right to rule. Constitutionally, this power, admits of no impediment. in British politics the "doctrine of mandate" signifies that the party which wins the general election has the right to implement its programme. In fact it is true of every country following Parliamentary democracy. If a party attaining power fails to give effect to its manifesto it may be accused of deluding the electorate in catching the votes. It may be observed that for an effective, functioning of a political system, the dominant institutions catered thereby though geared by the idea of contemporary I social attitudes must not be oblivious of moral and historical aspirations of the nation. The reasons being that neither Constitutional principles nor political attitudes can properly be appreciated without understanding their roots in the historical experiences of the society. In this behalf the Objectives Resolution (Art. 2A) represents such attitudes, ethos, and values behind our Constitution, which in so far as relevant for the purposes of this case is reproduced below:---

"Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality."

it may be observed that the term "political justice" is flanked by other rights enumerated in this clause. These are all fundamental rights, analysed below:---

Equality of citizens ----------Articles 14 and 25

Equality of opportunity ----------Article 18

Equality before law ----------Article 4

Social justice ----------Articles 11 and 14

economic justice ----------Article 18

Political justice----------Article 17

freedom of thought ,freedom of speech-------Article 19

Freedom of liberty, faith and worship--------Article 20

freedom of Association----------Article 17

In construing this clause Zafar Hussain Mirza, J. in Benazir Bhutto's case at page 616 of the report took the view, with which I respectfully agree:---

"The expression 'political justice' is very significant and it has been placed in the category of fundamental rights. Political parties have become a subject-matter of a fundamental right in consonance with the said provision in the Objectives Resolution. Even otherwise, speaking broadly our Constitution is a Federal Constitution based on the model of Parliamentary form of representative Government prevalent in United Kingdom. It is also clear from the Objectives Resolution that principles of democracy as enunciated by Islam are to be fully observed. True and fair elections and the existence of political parties, is an essential adjunct of a functional democratic system of Government."

8. In the Black's Law Dictionary (1979 Edn.)the expression 'political rights' is defined as under:--- '

"Those which may be exercised in the formation or administration of the Government. Rights of citizens established or recognized by constitutions which give them the power to participate directly or indirectly in the establishment or administration of Government."

We may add that the concept of political justice will also include the right to participate in political decision-making. Thus illegal and unconstitutional denial to the petitioner to run the Government as long as he enjoyed the support of the majority in the House -, will be the denial of political justice guaranteed by Article 17.

9. Mr S-M Zafar' reliance on John Rawals political philosophy concerning the concept of political justice the necessary corollary that "cash vote has approximately the same weight in determining the outcome of elections" seems to have been overworked. Justice as fairness is the key note of the political philosophy of American Professor John Rawals, who in no small measures was

influenced by the work of the German thinker Immanull Kant and himself maintained that his concept of justice had historical roots. For grasping the criterion of justice offered by Rawals, the Political ideology prevailing in Europe during middle ages nay, till early 20th century needs to be kept in view:---

"In a, medieval barony, for instance, the lord and his knights, the yeomen, and the serfs belonged to a single political system, but had very different rights and duties. The knights and yeomen owned obedience to the lord and were pledged to fight for him-the knights on horseback, the yeomen on foot. The serfs, who performed manual labour, were bound to the soil and forbidden to bear arms ... . In England and Germany, universal manhood suffrage was not achieved until the second half of the nineteenth century. The Prussian Landtag retained its three-class voting system until 1918. Voters were ranked by amounts of tax paid, and divided into three groups, each paying one-third of the taxes. The first group consisted of a few large landholders and industrial proprietors, the second embraced the relatively small upper middle class, and the third included the majority of petty bourgeois, small farmers and workers. (Article 71 of Prussian Constitution of 1850 Dennewitz, 1948, p. 81). This device assured a permanent majority representing the landlords and the upper middle class." (See Victims of Politics by Kurt Glaser Stefan T. Possony, page 349, 1979 Edn., published by Columbia University Press, New York).

Philip Pattit, Professor of Philosophy in University of Bradford, in his work 'Judging Justice' on detailed analysis of the charter given by Rawals for organising the society, did not endorse the same and termed it as somewhat sketchy. The theory propounded by Rawals has also been criticised by David Lyons in his work "Ethics and the Rule of Law". It is, therefore, difficult to agree with the concept of political justice advocated by Mr. S.M. Zafar. Such being the position in law, there is no valid basis to sustain the objection to the maintainability of the instant petition which on account of infringement of Fundamental Right No.17 lies before the Court.

10. We may now move to the second issue. The First ground reflected by the dissolution order is that m inisters , Members of the Opposition as well as the treasury bench red their resignations in mass scale demonstrating their desire to A fresh mandate from the people. That this dissension as well nullified the mandate

11. Under article 64 of the constitution, a Member may by writing under his hand addressed to the speaker or as the case may be, the Chairman resigns his seat, and thereupon his seat shall become vacant. Rule 25 of the Rules of Procedure and Conduct of Business in the National Assembly, 1992, provides that such a letter of resignation is to be handed over by the Member to the Speaker personally and also to convey him that the resignation is voluntary and genuine and the Speaker has no knowledge and information to the contrary. If the letter of resignation is received by the

Speaker by any other means, he after such inquiry as deemed fit that the resignation is voluntary and genuine, is bound to inform the Assembly of the resignation. Thereupon the Secretary -General shall get it to be published in the Official Gazette in the Notification to the effect that the Member has resigned the seat and forward a copy thereof to the Chief Election Commissioner. Rule 25 further enjoins that date of resignation shall be the date specified in such writing and if no date is specified therein, the date of its receipt by the Speaker.

12. We have noticed that the resignations are 88 in number, all addressed to the Speaker of the National Assembly, but were handed over to the President. The reason for delivering the resignations to the President, instead of the Speaker, as spelt out from para. 3(iii) of the written statement, is that the Members wanted to register their protest with the Head of the State, as there was lack of confidence in the National Assembly, the Speaker and the Federal Government. That the Speaker did not, in the past, take action upon any motion directed' against the Prime Minister or Minister or Member of the National Assembly, supporting the Government. According to the general perception he was in collusion with the Prime Minister, was not acting independently and had ceased to be impartial.

13. According I to . para. 3(1) of the written statement, the President received total number of 88 resignations from the Members of the National Assembly; that there were 12 existing vacancies caused by previous resignations and another by the death of a member; the total number thus arose to 101, leaving 106 members out of the House of 217. From this, in the written statement, an inference was drawn that the Members had lost confidence in the Federal Government headed by the petitioner. It is discernible from the record before us that out of 88 resignations, 73 are undated and only 15 bear the dates. The resignation of Mir Altaf Khan Bhayo, M.N.A. from Shikarpur (Sr.No.21) is dated 3rd November, 1990. It has not been refuted before us that despite sending a letter of resignation, this Member has been attending the Sessions of the National Assembly over a period of 2-1/4 years. These 73 letters of resignations do not give any indication as to when the Members concerned put their signatures thereon.

14. In the course of his submissions, Mr. Khalid Awnar pointed out that the resignations appearing at pages 76 to 83 of the file pertain to the Members from FATA administered by the President. He asserted that all these resignations are in the same hand and scribed by the same pen and expressed curiosity that all the Membem of FATA tendered their resignations en bloc on the same date. In the submission of Mr. Khalid Anwar, Mrs. Benazir Bhutto called on the President on 18-4-1993; in the course of meeting she wrote her resignation on a plain paper and passed on the same to the President alongwith that of other Members of the Assembly belonging to PPP. On perusal of the letters of resignations at Serial Nos. 2, 4, 5, 9, 16 and 18 we have noticed that these are couched in the same language and scribed by the same person. There are some other letters of resignations which bear the same attributes. The learned counsel expressed the grievance that the respondent is a symbol of unity of the Federation and supposed to be above party politics, but the

manner in which he collected the resignations, is indicative of his collaboration with the leader of the opposition and other dissentient groups in the National Assembly; and that such exercise of power is highly unconstitutional. In order to establish that a conspiracy was hatched against the Federal Government and the respondent's blessings were extensively extended to the disgruntled elements both inside and outside the House, the learned counsel drew our attention to several Press clippings contained in Part II of the Paper Book,

forming part of the petition. Some of these clippings are: The Daily News dated 14-4-1993 (page 98), The Daily News, dated 7-4-1993 (page 101), The Frontier Post, dated 7-4-1993 (page 106), The Daily News dated 8-4-1993 (page 115), The Dawn dated 6-4-1993 (page 139), The Nation, dated 3-4-1993 (page 145), The Times dated 16-2-1993 (page 163), The News dated 16-2-1993 (page 165), The Nation, dated 6-3-1993 (pp. 194 and 195), The Nation, dated 7-3-1993 (page 197), The Dawn dated 25-3-19913 (page 205), The News, dated 25-3-1993 (page 206), The Nation, dated 29-3-1993 (page 210), The Nation, dated 30-3-1993 (page 213), The News dated 31-3-1993 (page 214). From these Press clippings an inference was justifiably sought to be drawn the learned counsel that the respondent did not act impartially and extended an active cooperation to the opposition and other dissatisfied, t. elements, which was highly objectionable and against the spirit of the Constitution. It was specifically urged that the Pakistan Muslim Legal Parliamentary Party, which has majority in the House, passed a Resolution to do away with certain parts of the Constitutional Eighth Amendment. The moment this decision was taken, the President thought of. the device of collecting resignations to muster political power and even indulged in horse trading to act as a counter blast.

15. The learned Attorney-General was confronted with Article 64 and the Rule 25 under which resignation in writing under the hand of the Member concerned addressed and delivered to the Speaker, if genuine and tendered[voluntarily, is sine qua non for its effectiveness. It was pointed out to him that, these letters of resignations were addressed to the Speaker, but never passed on to him and, thus, the Constitutional requirements were not fulfilled. The learned Attorney-General in his submissions made on 15th May, 1993, categorically asserted that these resignations were given to the President by the Members concerned, to record their protest and not beyond that and thus their seats did not fall vacant. It was argued that upon these letters of resignations, the President could well formulate -his opinion for the purpose of Article 58(2)(b). He, however, conceded that in the normal course these resignations should have been handed over to the Speaker, but the President had no control over the Members, and when the resignations were placed before him he kept the same with him. It was put to the learned Attorney-General that by handing over the letters of resignation to the President, without losing their seats the Members of the opposition and other Members intended to blackmail the Government, to which no plausible reply forth came from him. In a reply to the question, as to why the resignations were not handed over to the Speaker, the Attorney-General submitted that the Speaker had lost the confidence of the Members and became partisan and pointed out that at least three petitions for a reference against the Prime Minister were not forwarded by him to the Chief Election Commissioner in pursuance of Article 63(2) of the Constitution. On 23-5-1993, when the case was taken up for hearing the learned Attorney General carne forth with an altogether different stand that the resignations were tendered by the Members not merely as a protest, but even to vacate the seats held by them. The attention of the learned

Attorney-General was drawn to para. 15(3)(iii) of the written statement, which clearly depicted that the resignations were submitted to the President merely as a mark of protest. These resignations speak volumes about. the public representatives' conduct shorn of political morality. It is our misfortune that after the expiry of vanguard of the freedom movement, politics became a means of somehow or other entering into power and retaining the same by fair or foul means. The desire of sharing fruit of the power keeps people together in the party but disappoint and disgust may result in change of party affiliation.. Floor-crossing, repeated marches and counter -marches for political gains to which our attention was drawn by the learned counsel for the petitioner, have become the order of the day. It seems to us that motivational force behind these defections and redefections is the prospects of political power, promise of the award of the office and other official patronage. These factors have directly led to political corruption and indiscipline in the political parties. It is unfortunate that there is a wide gap between the practical politics and the model of democratic processes, which the chosen representatives of the people required to exercise authority within the limits prescribed by Almighty Allah, need to project.

16. Upon evaluation of the respective arguments of the parties, we feel that the contentions of the learned Attorney-General seemingly, do not outweigh the arguments advanced on behalf of the petitioner. As already observed, the letters of resignations were addressed to the Speaker, except those tendered by the Ministers, which is the essential requirement of Article 64. Conceivably, there was no legal or Constitutional justification for receipt and then retention thereof by the respondent. If at all these were presented to the respondent in all fairness in adherence to the provision of the Constitution and the law laid down by this Court in Mirza Tabir Beg v. Syed Kausar Ali Shah (PLD 1976 SC 504) he should have forwarded the same to the Speaker. Such a mode of tendering the resignations and then retention there or by the President is a sheer perversion of the Constitution and no concomitant of the legitimate "pressure politics" known to the Parliamentary system of Government. Encouraging of such tactics may become an effective vehicle of blackmailing the party in power, resulting in subversion of the Parliamentary democracy in the country. We hold that within the ambit of Article 58(2)(b) this ground was not at all available.

17. On 14-4-1993 the Prime Minister met the President. The meeting lasted for about two hours. However, what transpired in the meeting, the version given by the two is not identical. The President's House issued a Press Release on the same date to the effect:--

"The President urged the Prime Minister to undertake positive steps as early as possible to address effectively these problems to the satisfaction of the public representatives and the people. The Prime Minister undertook to do so on an urgent basis and to revert to the President with precise measures in this behalf."

The draft of the minutes of the meeting prepared by the Prime Minister's House, but not issued as the President's House did not approve it, is reproduced below:--

"During the two-hour meeting the President and the Prime Minister went into the causes of the prevalent political situation in the country and it was agreed that necessary measures would be taken to defuse it.

Referring to speculations, discussions and debate on the 8th Amendment, the Prime Minister informed the President that the issue was well behind us. He said the recent statement of three Federal Ministers in his behalf fully reflected his own views.

Discussing the various policies and programmes of the Government, the Prime Minister said he valued the President's guidance and counsel and looked forward to his continued advice at various stages of their formulation and implementation. It was agreed to bring about improvements in the functioning of the Government, wherever necessary.

It was also agreed that such meetings and consultations will be held more frequently to ward off speculations and avoid misunderstandings,

The two agreed that efforts should be made to win back friends and colleagues who have left the Cabinet as a result of misunderstandings and differences. They hoped that most of them will be bark before long,"

Three days later on 17-4-1993, as already observed, the Prime Minister addressed the nation on the television. His speech was simultaneously relayed on Radio. The relevant portions of the speech are quoted in the proposed judgment of my learned brother Shafiur Rahman, J. The second ground of the dissolution order is founded on this speech and runs as under:--

"... the Prime Minister in his speech on 17th April, 1993, chose to divert the people's attention by making false and malicious allegations against the President of Pakistan who is Head of State and represents the unity of the Republic. The tenor of the speech was that the Government could not be carried on in accordance with the provisions of the Constitution and he advanced his own

reasons and theory for the same which reasons and theory, in fact, are unwarranted and misleading. The Prime Minister tried to cover up the failures and defaults of the Government although he was repeatedly apprised of the real reasons in this behalf, which he even .accepted and agreed to rectify by specific measures on urgent basis. Further, the Prime Minister's speech is tantamount to a call for agitation and in any case the speech and his conduct amounts to subversion of the Constitution.

It appears, that all was not well in the meeting of 14th April, 1993. This is substantiated by the divergence in the Press Note released by the President's House and minutes of the meeting prepared on behalf of the Prime Minister. The matter was simmering and culminated in the speech dated 17-4-1993., Mr. Khalid Anwar read out to us several portions of the speech and urged that it made reference to disgruntled elements which gathered around the President,

conspired against the Prime Minister, indulged in horse-trading and even acclaimed replacement of the Prime Minister. In his endeavour to analyse the speech, he emphasised that its object was to enlighten public opinion and not the vengeance against those who changed party affiliation or otherwise joined hands against the petitioner. In the estimation of Mr. Khalid Anwar, the

speech demonstrated a reconciliatory tone though reflective of a determination when the Prime Minister uttered that "I shall not resign, I shall not dissolve the Assembly, I shall not take dictation", and then asked the nation that Konsa Rasta lkhtiar Karna Hey". He remarked that the Prime Minister's position was like that of a person forced to fight with his back to the wall. The learned counsel regretted that tile Prime Minister of the Country was accused of subversion of the Constitution amounting to high treason under Article 6 of the Constitution, for which there was absolutely no warrant. When asked that the Prime Minister himself having adopted the reconciliatory attitude, what was the need for delivering the speech which generated lot of controversy, the learned counsel stated that the Muslim League Parliamentary Party passed a

vote of confidence, in favour of the Prime Minister authorising him to take steps for repeal of the Constitution 8th Amendment, which annoyed the President and ignited the whole trouble. He further submitted that under the Press Release of 14th April ' 1993 the Prime Minister was required to take positive steps to address the problems of the public representatives. In this respect the meeting of the National Assembly, in pursuance of Article 54(3), was requisitioned for 19th April, 1§93, to which wide publicity was given on the public media, but the President designedly frustrated the meeting and dissolved the Assembly on 18th April. The learned counsel contended that the President had a wrong perception that the steps were being initiated- before the house for his impeachment.

18. The learned Attorney-General took a strong exception to the contents of the Prime Minister's speech and termed it as highly provocative and insulting to the President, who was also accused of hatching conspiracy, and indulging in blackmailing and horse-trading. According to the learned Attorney-General the President was virtually impeached; that the right course for the Prime Minister was to have addressed the National Assembly as in that case, the scandalous remarks

could have been expunged by the Speaker. He submitted that the things were not in such a bad shape and in fact on the Prime Minister's move to call a meeting of the' National Assembly, the President signed the order for requisitioning the meeting for 22nd April, 1993 (but not issued). That in the evening on the 17th April the Prime Minister delivered the speech levelling all sorts of wild allegations against the President, leaving no option for him, but to dissolve the Assembly. The learned Attorney-General then highlighted the relationship between the President and the Prime Minister and read out Articles 41, 46, 48 and also made a passing reference to Articles 177 and 193, to state that if for any reason the processes of advice and consultation, between the Prime Minister and the President were rendered impossible, the national affairs would not be carried on, in accordance with the provisions of the Constitution. In his opinion, the cordial relationship, so essential for smooth running of the Country, between the two pillars of the State power was clearly missing, resulting in a deadlock, for the resolution whereof resort to Article 58(2)(b) became inevitable.

19. The learned Attorney-General made a good deal of effort to persuade us that the grounds mentioned in the dissolution order subsisted which necessitated invocation of Article 58(2)(b) by the President. But his lengthy arguments conveyed an unequivocal impression that the Prime Minister's speech if not the sole at least was the major cause' of dissolution of the Assembly. In fact at one stage, as noticed earlier, he himself attributed the dissolution order wholly to the firy nature of the speech of 17th April, 1993. question arises was there any justification for such a speech? Our answer is in the affirmative. The reason being that an atmosphere of mistrust, confusion and political uncertainty loomed larger in the Country which not only jeopardized the democratic processes, destabilized the economic activities but also tended to make the country a laughing stock at the international level. It was not only necessary but obligatory for the Prime Minister to have taken the nation into confidence and kept it abreast of the regrettable developments taking place on the political scene which in his estimation were destructive of democratic processes in the Country. Even otherwise, the Government is the major source of information, which in the democratic set-up, it is duty bound to dissiminate, for public awareness, to enable them to adjudge the conduct of those who are in office and the wisdom and folly of their policies. Reference at this stage be made to the remarks made by Churchill, in 1932 reproduced at page 17 of "Party Politics" (Vol.11) by Sir Ivon Jennings:--

"... tell the truth to the British people. They are a tough people and a robust people. They may be a bit offended at the moment, but if you have told them exactly what is going on, you have insured yourself against complaints and reproaches which are very unpleasant when they come home on the morrow of some disillusionment."

The right of the citizenry to receive information can well be spelt out even from the "freedom of expression" guaranteed by Article 19 of the Constitution, of course, subject to inhibitions specified therein. Such right must be preserved. Thus, as head of the Government it was the essential

responsibility of the Prime Minister to cultivate knowledge in the populace and to enlighten them about the burning issues. We may start here with advantage the words of Whig leader, Lord Hartington quoted at page 6 of the book "The People and the Party System" by Vernon Bogadanor on the subject of electoral reforms in British policies. During the debate on first Home Rule Bill in 1886, he insisted that the electorate must be consulted in the matters involving Constitutional changes and complained of the Glandstone's failure to do so:--

"Although no principle of a 'mandate' may exist, I maintain that there are certain limits which Parliament is morally bound to observe, and beyond which Parliament has morally not the right to go in its relations with the constituents. The constituencies of Great Britain are the source of the power, at all events, of this branch of Parliament and I maintain that in the absence of an emergency that could not be foreseen, the House of Commons has no more right to initiate legislation -- of which the constituencies were not informed, and,, as to till which if they had been so informed, there is, at all events, the very greatest doubt as to what their decision might be."

20. The learned Attorney-General's argument that the Prime Minister could have delivered the speech in the House is much off the tangent. The speech was meant for the polity and carried a message for the nation. It, therefore, could not have been confined to the four walls of the Parliament House. This issue may also be examined from another angle. Supposing a President is to be removed from office or impeached on a charge of violating the Constitution or gross misconduct, in contemplation of Article 47 of the Constitution. Under clause 5 of this Article the Speaker is bound to summon the two Houses to meet in a joint session not earlier than seven days and later than fourteen days after the receipt of the notice of removal or impeachment,

as the case may be. Such an issue being of great importance, the Members of the Parliament may have to visit their constituencies in far flung areas to consult the electorates. Evidently this exercise cannot be accomplished within the lime limit specified in this Article. The campaign shall have to be started both inside and outside the Parliament, much earlier than the delivery of such notice to the Speaker.

21. Much has been said before us by the learned Attorney-General, on the lack of working relationship and consequential deadlock between the President and the Prime Minister. We may observe that this deadlock is not due to any Constitutional inadequacy. Our Constitution is a comprehensive document and the remedy for this so-called deadlock is not to be looked elsewhere but in the Constitution itself. It cannot be said that the Constitutional prescription does not measure up to the political reality in the country. The Constitution is not at all at fault. Perhaps the fault lies with those who are entrusted with its faithful implementation and have taken the oath to protect, defend and preserve the Constitution. The Prime Minister claimed majority in the House and he said so even in his speech. Conversely, the President held in hand 88 resignations which in his opinion sufficiently suggested that the National Assembly ceased to reflect the will of the electorate. In such a situation the catastrophe would have been avoided by resort to Article 91(5) and the Prime Minister asked to establish his majority and obtain a vote of confidence from the Assembly but L the President was ill-advised to dissolve it. The speech could not be made a

lawful basis for dissolution of the Assembly.

22. If politics is indispensable, the politicians too are unavoidable. If they do not talk to one another, someone else must talk to all of them. In fact reconciliation and articulation of differences is not uncommon in politics. Those who in the past publicly expressed animosity against the President, are now, as argued at the Bar, frequent visitors to the President's House. Not only this, even those against whom the President had himself chosen to file References in the Courts on a variety of charges, were inducted by him in the Care-taker Cabinet. In his public address of 18th April, 1993, the President himself gave out that he was above his personal criticism. Before us Mr. Khalid Anwar clearly affirmed that the Prime Minister did not nourish grudge against the President and in the interest of the country the two would work together. We entertain no doubt that inculcation of working relationship between them is not an impossibility. Suppose fresh election is held and the petitioner again comes into power, what will then happen to the relations between the two? Will the President again dissolve the Assembly, for the reason that the Prime Minister cannot pull on with him? Evidently, this is not the solution of the problem. Its solution lies in exercising tolerance and operating faith fully within the parameter of the Constitution. We can do no more here than to refer to Lord Hailsham's unabashed advice to the conservatives to readily adopt the policies of opponents when this is tactically desirable:-

"There is nothing immoral or even eccentric in catching the Whigs bathing and walking away with their clothes. There is no copyright in truth, and what is controversial politics at one moment may after experience and reflection easily become common ground." (See "Do Parties Make a Difference" by Richard Rose - page 13).

It is sad that the Prime Minister of the country was accused of subversion of the Constitution. In this respect I respectfully agree with the view expressed by my borther Shariur Rahman, J. in his proposed judgment. Under Article 5, obedience to Constitution and the law is the inviolable duty of every citizen. Article 2A enjoins full observance of principles of democracy and tolerance as enunciated- by Islam. It is lamentable that there is much to be desired in adhering to these provisions, even at high level, which are so essential for growth of democratic values and our national, solidarity.

23. The President in his speech dated 18th April, 1993 has given the reasons supplementing the grounds on which the dissolution order is rested, adversely commented upon the speech of the Prime Minister, bitterly criticised the economic and foreign policies of the Federal Government and the manner in which 'privatization' has been conducted; referred to the lack of social justice and the problems of dearness facing the sections of the society financially not well off and the Government's failure to comply with the requirements of Articles 154 and 160 6f the Constitution

relating to the Council of Common Interests and National Finance Commission. Mr. Khalid Anwar drew a comparison between the speech and the two earlier addresses of the President dated 22nd December, 1992 and 19th December, 1991 delivered in the joint session of the two Houses of the Parliament. He submitted that the speech lacks generosity and vision and is diametrically opposed to the assessments previously made by the President, of the achievements of the Government. Analysing the speech he further urged that it is not* at all symbolic of the unity of the Federation and rather demonstrates President's animosity and ill-will against the elected Prime Minister of the country. The portions of the speech and of the two Presidential addresses are juxtaposition placed below:--

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It is noteworthy that the time-lag between the President's speech and his address dated 22nd December, 1993 is about four months only. In the address it has been maintained that despite internal and external differences with which the Federal Government was confronted, its performance in the economic field was praiseworthy but conversely in the speech the President depricated the economic and financial policies of the Government. It is difficult to reconcile the views expressed in the speech with those embodied in the address dated 22nd December, 1993.

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Seemingly, there is a lack of harmony in the appreciation of the foreign policy made under the address dated 22nd December, 1992 and its assessment demonstrated by the speech of 18th April, 1993.

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The privatization policy was discussed on both the occasions; on 22nd December, 1992 its operation was considered as encouraging but after four months it has been subjected to criticism.

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Previously the dearness was found to be a worldwide phenomena with which not only Pakistan but various other countries of the world were faced. it was observed that solid steps would be required, to resolve the problem. in this respect introduction of the Food Stamp Scheme was regarded as laudable and the need for making the monetary policy more effective, for achieving long time results, was emphasised. However, in the subsequent speech the dearness is considered as an outcome of unwise policy of the Government.

We feel, that there is a marked difference in the previous and present appraisal of the approach of the Government towards Council of Common Interests and National Economic Commission. In defending the fiscal, foreign and other policies of the outgoing Government, Mr. Khalid Anwar categorically asserted that the Care-taker Government made a clear cut public announcement that the policies of Mian Muhammad Nawaz Sharif's Government would continue to be followed. We may observe, that this contention has remained unrefuted by the learned Attorney-General and Mr.

S.M. Zafar. It being so, according to Mr. Khalid Anwar, the hollowness of the criticism launched against the policies of the former Government was fully exposed. It is clear ground to us, that the 3rd is also not established.

24. In the course of hearing of this petition, the nature of the Constitution and the provisions relating to the powers and duties of the President and Prime Minister were extensively debated before us. Mr. S.M. Zafar argued that before the Constitution (Eighth Amendment) Act, 1985, the Constitution presented a Parliamentary form of Government but after the amendment, the balance of power is heavily shifted in favour of the President and referred to Articles 48(5), 48(6), 58(2), 213(l), 242(1-A), 243(2-C) empowering the President to act in his discretion. When the National Assembly is dissolved by the President, under Article 48(5) he is vested with the discretionary power to fix a date for the holding of general election to the Assembly, not later than 90 days from the date of the dissolution and also appoint a Care-taker Cabinet. Under Sub-Article (6) of Article 48 he can on his discretion or on the advice of the Prime Minister, cause any matter of national importance, referred to a referendum. Article 58(2) contemplates two situations for dissolution of' National Assembly at the discretion of the President; firstly when a vote of noconfidence has been passed against the Prime Minister and no other member of the National Assembly is likely to command majority of its members and secondly when the Government of the Federation cannot be carried on in accordance with provisions of the Constitution and an appeal to the electorate is necessary. Under Article 213(l) the appointment of the Chief Election Commissioner is within his discretionary powers. Similarly, Chairman of the Public Service Commission is appointed by the President in his discretion. It is so stated in Article 242(1-A). We may observe that Article 243(2-C) deals with the appointments of the Chairman, Joint Chiefs of Staff Committee, the Chief of the Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff. In the President's speech of 19th April, 1993, the appointment of the Chief of Army Staff is mentioned as one of the controversial issues between him and the Prime Minister. The expression "in his discretion the Chairman, Joint Chiefs of Staff Committee" appearing in this clause was inserted by Presidential Order No.14 of 1985. According to Mr. Yahya Bakhtiar, under this amendment only the appointment of Chairman, Joint Chiefs of Staff Committee was brought under the discretion of the. President and the appointments of other Chiefs i.e. the Chief of Army Staff, the Chief of the Naval Staff, the Chief of the Air Staff did were not rendered within his discretion. He referred to Articles 213 and 218 to urge that though under P.O. 14 the appointment of the Chief Election Commissioner was made to fall within the discretion of the President, yet such discretion was not extended to the appointment of the members of the Election Commission. In this behalf, I am inclined to agree with the conclusion reached by my brother Shaflur Rahman, J. in his proposed judgment.

25. With reference to other category of powers of the President, Mr. S.M Zafar dilated upon provisions under which the President acts in consultation with other Constitutional functionaries. Such provisions listed by him are Articles 72(l), 101, 177,.181, 193(l) and 218(l)(b). Article 72(l) relates to the making of the rules by the President in consultation with the Speaker of the National Assembly, concerning the joint sitting, and communication between two Houses of the Parliament.

The other Articles relate to appointments Of Judges of the Superior Court except Article 218(l)(b) which covers the appointment of the members of the Election Commission. In the submission of Mr. Yahya Bakhtiar 'consultation' does not exclude applicability of Article 48(l) under which the President has to act on the advice of the Cabinet or the Prime Minister, as the case may be. While in the High Court in M.D. Tahir v. Federal Government 1988 CLC 1369 in hearing a writ petition dismissed in limine, I had the occasion to construe Article. 193(l) and did not consider the Prime Minister's advice as sine qua non for the validity Of appointment of Judges of the High Court. After hearing Mr. Yahya Bakhtiar, I feel that what he asserts can be another way of looking at Article 193(1) andl this matter requires serious research.

26. On the rectitude of these Articles, particularly those conferring discretionary powers on the President to dissolve the National Assembly and make appointments of dignatories holding high Constitutional offices, Mr. S.M. Zafar strenuously argued that the amended provisions of the Constitution are an exhibition of a departure from the parliamentary system of Government, as the President is obliged to keep an eye on the working of Federal Government, to ascertain as to whether or not it is being carried on in accordance with the provisions of the Constitution. The learned counsel went on to contend that the power to make the' appointments in question, made a tremendous difference and lended an upper hand to the President, he is not merely a figure head but rested with sufficient authority. It is discernible from the record before us, that from time to time directives have been issued by the President's House to the Prime Minister's Secretariat, which fully march with the idea of Presidential supremacy. -In his speech dated 8-4-1993 as well the President has claimed:---

27. After carefully examining the relevant provisions of the Constitution, we do not feel persuaded to denude it of its basic character of presenting a parliamentary form of Government, which originated in the United Kingdom and developed through an evolutionary process, extending over centuries, based on conventions and precedents, and is the outcome of political struggle as a result whereof the absolute powers of the King were substituted by the supremacy of the Parliament. The salient features of the Parliamentary form Of Government are that real executive power is exercised by the Cabinet of the p Ministers, with the Prime Minister at its head. The Crown acts on the advice of the Cabinet, which is collectively responsible to the elected popular House- In the words of Dr. Herman Finer:---

"Ministers are Ministers of 'the Crown, that is they are formally appointed and dismissable by the Crown. But this action is hardly more than formal and symbolic The Crown appoints, but it does not choose; it dismisses, but it does not control; nor does it determine the occasion for dismissal.

..... It is the authority of the people to which Government has been made responsible. The people exhaust their authority in the choice of Parliament, and this body to which a large sphere

of sovereignty is still ascribed by Constitutional lawyers, appries the test of responsibility to Ministers". (Theory and Practice of Modern Government, pp.953-954).

28. Our Constitution ordains a Parliamentary system of Government with collective ministerial responsibility to the Parliament. Article 91(1) provides:---

1191. The Cabinet.----(1) There shall be a Cabinet of Ministers, with the Prime Minister at its head, to aid and advise the President in the exercise of his functions."

Under Article 91(4) the Cabinet ' together with the Ministers Of State is collectively responsible to the National Assembly. On behalf of the petitioner R reference has been made to.Article 91(2) which apparently confers discretion on the President to appoint from amongst the Members of the National Assembly, a Prime Minister, who in his opinion is most likely to command the confidence of the majority of the Members of the National Assembly. It is submitted, that the President has no substantial say in the matter of appointment of the Prime Minister; whosoever amongst the members commands the confidence of the majority, has got to be invited by him to form the Government. Under Article 91(5) the Prime Minister holds office during the pleasure of the President, but it is submitted that his pleasure is not unqualified. The Constitution directs that such discretion shall not be exercised as long as the Prime Minister commands the confidence of the majority of the members of the National Assembly. If the Prime Minister ceases to enjoy the confidence of the majority, the President has to summon the National Assembly and require him to obtain vote of confidence from the Assembly. These submissions of the learned counsel for the petitioner are not without merit. In the context of the controversy before us Article 48(l) occupies the pivotal position. It provides--

"48. President to act on advice, etc.---(I) In the exercise of his functions, tlw President shall act in accordance with the advice of the Cabinet, or the Prime Minister:

Provided that the President may require the Cabinet or as the case may be, the Prime Minister to reconsider, such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration."

The compulsory nature of the principle of advice is quite obviously. The President is bound to act on the advice of Prime Minister/Cabinet, commanding majority in the House, except where he has

discretion or exercises prerogative such as under Article 94 and his satisfaction is secured (Articles 232, 234, 235); if such satisfaction is borne out from the advice tendered to him by the Prime Minister or. the Cabinet. Compliance with Article 48(l) by the President is ensured by Articles 42 and 47. Under Article 42 he takes the oath to perform his functions faithfully in accordance with the Constitution and further to preserve, protect and defend the same. If he misconducts or refuses to accept the advice, he can be impeached under Article 47 for violation of the Constitution.

29. The concept of responsible Government visualises that the Head of State himself can do no wrong; he acts on the advice of his Ministers on whom the resporisibility for such act lies; they arc answerable to the House. Under our Constitution the executive authority of the Federation, like other democratic Constitutions vests in the Head of the State. This principle has received recognition in Article 90, -which requires that the executive authority vesting in the President "shall be exercised by him either directly or through officers subordinate to him, in accordance with the Constitution". Since constitutionally the President is bound to follow* die advice of the Prime Minister and Cabinet, the result is that practically the executive authority is placed in the hands of the Cabinet headed by the Prime Minister. The President is thus not responsible to any one for the acts done in his name. The responsibility lies on the Cabinet alone. In this respect we may usefully quote here a passage from page 308 of the "Constitution and Administrative Law" by 0. Hood Phillips (4th Edn.):---

"Since the Sovereign acts on the advice of the Cabinet, tendered through the Prime Minister, and the Government is carried on in the name of the Sovereign, the Cabinet is expected to keep the Sovereign informed of any departures in policy, of the general march of political events, and in particular of the deliberations of the Cabinet."

This principle is embodied in Article 46, which casts an obligation on the Prime Minister to communicate to the President all decisions of the Cabinet relating to the affairs of the State, including proposals of legislation. The President is also empowered to call for such information. Since the Cabinet is collectively responsible to the National Assembly, where a decision is taken by the Prime Minister or a Minister, but which has not been considered by the Cabinet, under Article 46(c) if the President so requires, it is the duty of the Prime Minister to submit such matter to the Cabinet for its consideration. In England there is unitary form of Government. Our Constitution is federal in structure but the aforesaid provisions fairly indicate that it is fundamentally modelled on the pattern of British Parliamentary system.

30. In order to signify the effectiveness of the role of the President under our Constitution, the learned Attorney-General. has placed before us the Constitution of India (Vol. 1) by Kagzi, at its page 182, the President of India is described as a popular uniting symbol; has the privilege to be

consulted and the right to encourage and warn the Prime Minister and Members of the Council of Ministers. It may be pointed out that Article 74 of the Indian Constitution originally did not provide that the advice of the Council of Ministers was binding on the President. This Article was amended by the Constitution (FortySecond) Amendment Act, 1976 to ensure that the advice was accepted by the President without question. Thus, on what the learned Attorney-General relied upon, related to the position obtaining prior to the amendment of Article 74.

31. In earlier part of this note we have referred to the observation made by the President in his speech dated 18-4-1993 that tendering of advice to the Government was his Constitutional obligation. Such a claim is not countenanced by the Constitution or the law-, rather the dictates of the Constitution or otherwise. As already noticed the Constitution confcri such a right on the Prime Minister and the Cabinet; the advice tendered by them is imperativc and binding on the President. In view of the over-reaching claim of the President, the learned Attorney General helplessly endeavoured to whittle down the asperity.of the expression and urged that by the word 'advice' the President intended to convey .counseling" and not as the term "advice" with its compulsive feature, is understood in the Constitutional parlance. But, the President has quite unambiguously founded his claim on the Constitution and not on anything else. We may cite here the remarks of Sri K. Santhanam, who was an eminent member of the Constituent Assembly of India:---

"I have often wondered what would have happened if Jawahar Lal Nehru had become President and Dr. Rajcndra Prasad the Prime Minister., I have no doubt that the words 'aid and advice' would have .been interpreted, at least to mean that 'the Council of Ministers' would have to accommodate themselves to the views of the President in matters in which he felt strongly."

(K. Santhanam, the President of India, 1969, JCP (July), p-1).

To be fair to the Dissolution Order, it may be stated that it has been issued by the President under Article 58(2)(b) and all other enabling powers. But our Constitution is a written one. The powers and duties of the President are to be gathered from the Constitution itself. There is no question of enjoyment of any enabling or implied power. It may be pointed out that Article 58(2)(b) was X introduced in the Constitution in preventing a wrong rather than securing a right for the President. This provision exists for wise and careful employment in grave situation within the parameter specified by this Court in Federation of

Pakistan v. Haji Muhammad Saifullah Khan PLD 1989 SC 166, but thely impugned order does not withstand the test laid down therein.

32. In the context of the powers and Constitutional position of the President, Article 41 also came under discussion, which represents the President as a symbol of unity of Pakistan. He is elected by the Provincial Assemblies as well as the National Assembly and is a binding force between' the Federation and the federating units. In a plurist society rent with political polarization, ethnic, racial, provincialism and other diversities, for strengthening the process of social harmony, democracy and creative national enthusiasm, the role of the President becomes all the more important. These objects can meaningfully be achieved if the President shuns politics and remains a non-controversial figure. Deplorably, the record before us creates a I different impression. Article 33 included in Chapter 2 of the Constitution'

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under the "Principles of Policy" casts an obligation on the State to discourage parochial, racial, tribal, sectarian and provincial prejudices among the citizens. Under Article 29 it is the responsibility of each organ and authority of the State to act in accordance with these principles. Regulation of relations between the President and the Prime Minister is a paramount national requirement. Both' are expected to exercise tolerance, exhibit endurance and act within the limits;, of Constitutional propriety. The President is Constitutionally required to act on the advice of the Prime Minister/Cabinet, but such advice ought'not to be loadcd with a perception of dominance and veto power. If the President counsels the Prime Minister or the Cabinet, his counseling is entitled to weight. These are some of the norms of Constitutional jurisprudence for successful operation of the Constitutional prescription.

33. Having availed of the privilege of going !through the proposed judgment of the learned Chief Justice and those bf my other learned brother Judges, including the one proposed to be handed down by my brother Shaflur Rahman, J. comprising the majority view, with which respectfully I do not differ. I feet that the expressions employed, the views expressed and inferences' drawn therein, sufficiently indicate that the President not only acted against the spirit of the Constitution but also violated it and there were no reasonable basis either in law or on facts to act in the manner as the President chose to proceed. Further, technical expressions well known to the. judicial parlance have been avoided and rightly so, because of the high esteem, that the office of the President demands. If it had been the case of the holder of lesser office, may be the caution in not using the words like "mala ride" would not have been taken. In the light of the aforesaid analysis, the dissolution order being unconstitutional and otherwise than bona fide is unsustainable. Only some of the reasons given in the dissolution order have been dealt with in detail in this note; for these as well as the other grounds of the impugned order, I have relied upon the supporting findings recorded by my brother Shaflur Rahman, J. and other brother Judges. The question arising would be, that if such finding has annulled one or more reasons specified in the dissolution order, can the rest of the reasons mentioned therein, stand independently, despite the fact that the person giving the reasons remains the same. Our answer is in the negative. Such finding goes much deeper than it looks at the surface, as the taint thus found attached to the person and his acts would continue.

The aforesaid are the reasons for the short order passed by the Court

SAJJAD ALI SHAH, J.---I have gone through very carefully, elaborate leading judgment proposed to be delivered by my learned brother Shafiur Rahman, J. for whom I have great regard and whose' profound learning I always keenly admire but with optimum respect I say that I rind myself unable to agree with his views and resultantly I venture to write dissenting judgment. Facts in great detail arc described in the main judgment but for the purpose of brief recapitulation it is necessary and proper to state that on account of differences, which arose between petitioner as Prime Minister and respondent No.1 as President of Pakistan, erosion crept in the working relationship of the two and in that context and on that subject, in order to avert complete breakdown, meeting took place between the two at Presidency on 14-4-1993, which later turned out to be the last meeting. For the sake of brevity petitioner and respondent No.1 would be referred hereafter as the Prime Minister and the President respectively.

2. It is stated in paragraph 8 of the petition that the Prime Minister met the President to once again clear the atmosphere of distrust and allay the hostilities which could jeopardize the democratic process in the country. There is some controversy on the point as to what transpired in the abovementioned meeting and what was agreed upon between the President and the Prime Minister. According to,the press release from the Presidency, copy of which is on the record at page 124 of Volume 11 of Annexurcs in which it is stated that meeting lasted for about two hours in which grave and pressing national and international problems facing country were reviewed. The President urged the Prime Minister to undertake positive steps as early as possible to address effectively the problems to the satisfaction of the public representatives and the people. The Prime Minister undertook to do so on an urgent basis and to revert to the President with precise measures in that behalf. This press release is challenged on behalf the Prime Minister to the extent that it does not depict correct factual position. On the other hand it is stated on behalf of the Prime Minister that in the said meeting causes of prevalent political situation in the country were considered, and it was agreed that necessary measures would be taken to diffuse it. The Prime Minister assured the President that issue of 8th Amendment was well behind them. The Prime Minister acknowledged that he valued the President's guidance and counsel and looked forward to his continued advice at various stages of formulation and implementation of policies. Both agreed that efforts should be made to win back friends and colleagues, who have left the Cabinet as a result of misunderstandings and differences. According to this version at a later stage, two Federal Ministers Lt.-General (Rtd.) Abdul Majeed Malik and Mr. Ellahi Bakhsh Soomro joined the President and the Prime Minister in the meeting. Copy of the minutes of the meeting prepared by the Prime Minister's Secretariat is produced and is on the record at page 125 of Volume II containing annexures. Questions as to which version is correct and who is right are questions of facts which cannot be answered in Constitutional petition without recording of evidence. In any case it can be deduced from the abovcmentioned documents and the pleadings of the parties that effort was made in the meeting to reduce the tension and remove irritants in the way of working relationship between two pillars of the Government of Federation.

3. Two days later i.e. 17-4-i-993, the Prime Minister addressed the nation on television and the need for doing so is described in the memorandum of petition in paragraph 9 which is reproduced as under:---

"In the circumstances it became necessary for the petitioner to take the nation into confidence about the factors which had led to the tense political atmosphere which had brought the national activities to a standstill."

4. The Prime Minister addressed the nation on television in Urdu and copy of the speech in Urdu is available in Part 11 of rejoinder to the written statement. At this stage it is not necessary to reproduce the whole speech but tenor and purport of the speech depicts criticism of person and office of the President, alleging that he allowed the Presidency to be used for conspiracies to destabilise the Government. It was asserted in the speech that Presidency was being frequented by persons who talked of entering Pakistan on the tanks of enemies and were determined to destabilise the Government and in that connection steps were taken for blackmailing the Assembly, horse-trading and doing dirty politics and with the intention of dislodging the Prime Minister. After enumerating the reforms introduced for the good of the people speech ended with declaration by the Prime Minister as under:---

"I shall not resign, shall not dismiss Assembly and I shall not take the dictation."

5. On the following day of the speech of the Prime Minister, Speaker o the National Assembly summoned the session for the next day as requisitioned by the required number of members of the National Assembly. On the same day i.e. 18-4-1993 leader of the Opposition in the National Assembly Ms Benazir Bhutto met the President in the Presidency and handed over to him resignations of the members of the Opposition in the National Assembly..On that day in the late evening the President addressed the nation on television and dissolved the National Assembly and in consequence dismissed the Prime Miniser and the Cabinet as contemplated under Article 58(2)(b) of the Constitution. In the same speech the President announced that he had appointed Mr. Balkh Sher Mazari as Caretaker Prime Minister and two other Federal Ministers as members of the Caretaker Cabinet which was expanded later to give it shape of National Government. The text of speech of President in Urdu is available at page 56 of paper book Part 1.

6. Grounds mentioned in support of order of dissolution briefly stated are; mass resignations of members of National Assembly, speech of the Prime Minister on television making false and malicious allegations against the President, failure of the Government to protect autonomy of Provinces by bypassing Council of Common Interests and National Economic Council, mal-administration, corruption and nepotism in bodies, authorities and banks and lack of transparency in the process of privatisation and disposal of properties, unleashing reign of terror against opponents, violation of Constitution, not responding to the complaint of Begum Nuzhat Asif Nawaz about death of her husband and finally threat to the security and integrity of the country and grave economic situation necessitating fresh mandate from the people.

7. During the hearing preliminary objection was raised on behalf: of respondents that Constitution petition directly filed in the Supreme Court is not maintainable and competent as contemplated under Article 184(3) of the Constitution. Both Mr. Aziz A. Munshi, learned Attorney-General of Pakistan for the President as respondent No.1 and Mr. S.M. Zafar learned counsel for Care-taker Prime Minister as respondent No.3, stoutly contended against the maintainability of the petition on the ground that order of dissolution did not violate Fundamental Right contained in Article 17 of the Constitution pertaining to the freedom of association. According to them Article 17 gives right to form and to be a member of political party but does not give Fundamental Right to continue the Government which is covered and governed by other provisions of the Constitution. In this connection claim raised on behalf of the petitioner is denied and seriously disputed. Article 199 of the Constitution confers upon High Court writ jurisdiction. Article 184(3) of the Constitution empowers the Supreme Court to exercise the same jurisdiction as conferred upon High Court under Article 1W, when Supreme Court considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part Il is involved. It is submitted on behalf of the petitioner that his political party has fundamental right to continue the Government till its tenure comes to an end.

8. Perusal of the Constitution shows that there are several other provisions which govern the continuation of the Government. Article 91(2A) envisages that the President shall invite the member of the National Assembly to be the Prime Minister who commands the confidence of the majority of the members and such person is to be given oath as is provided in clause (3) of the same Article. Clause (5) of Article 91 provides that the Prime Minister, who does not command confidence of the majority shall be required to obtain, vote of confidence from the Assembly. Article 58(l) of the Constitution provides

that the President shall dissolve the National Assembly if so advised by the Prime Minister. Clause (2) of this Article empowers the President to dissolve the National Assembly in his discretion. If provisions of the Constitution mentioned above, are read conjointly, it would appear that Article 17 gives right to form or be a member of political party subject to any reasonable restrictions imposed by law but does not give any further Fundamental Right to that political party to continue the Government till its tenure has come to an end. In the case of Ms. Benazir Bhutto v. Federation of Pakistan and another PLD 1988 SC 416 amendments in the Political Parties Act, 1962 were

challenged as inconsistent with Article 17(2) of the Constitution providing automatic penalty of political extermination in case, of -non-registration of political party with Election Commission of Pakistan. With regard to concept of political party it has been held at page 520 of the report as under:---

"Thus while the right to form political party is guaranteed under subArticle (2) of Article 17, the right of the members to meet is guaranteed by Article 16, the right to move from place to place is guaranteed by Article 15, the right to freedom of speech and expression is guaranteed by Article 19 and so on. This is so because the Fundamental Rights are guaranteed to the citizens as such and the' association can lay claim to the Fundamental Rights guaranteed by the different Articles solely on the basis of their-being an aggregate of citizens composing the party. However, by forming a political party its members do not acquire any higher footing as regards other Fundamental Rights which as individuals they could not claim. Further the political party while exercising its freedom under different Articles is subject to reasonable restrictions imposed thereunder."

9. It was further held in that case that provisions of sections 3(l), 3-A, 3-B, 3-C and 6 of the Political Parties Act, 1962 on account of being inconsistent with Fundamental Right were declared to be void to that extent. -

10. In the case of Ms. Benazir Bhutto and another v. federation of Pakistan and another PLD 1989 SC 66, after examination of section 21 of Representation of the People Act, 1976 in the light of Article 17(2) of the Constitution it was held that section 21 of the said Act was violative of the fundamental right contained in Article 17(2) of the Constitution in so far as it fails to recognize the existence and participation of political parties in the process of elections particularly in the matter of allocation of symbols and was for' that reason void-to that extent. Every political party is eligible to participate in the Elections to every seat in th; National and the Provincial Assemblies.. The political parties shall be entitled to avail of the provisions of sub-rule (2) of Rule 9 of the Rules to seek allotment of any of the prescribed symbols.

11. During the hearing on the question of, maintainability I felt greatly inclined in favour of maintainability of the petition for two seemingly convincing reasons. Firstly, prompted by modern trend of judicial activism was inclined to give liberal interpretation to Article 184(3) of the Constitution to carve out and assert jurisdiction in respect of public interest litigation. After giving this case benefit of analogy as stated above, I kept in view two precedent cases in which Constitutional petitions were entertained directly by the Supreme Court. After making deep and ver~ careful study of Article 184(3) and Article 17 alongwith other provisions of the Constitution and'the two decided cases to be mentioned later and a host of other authorities in aid of the subject I am now inclined to the opinion that in the instant case a petition under Article 184(3) of the

Constitution directly filed in the Supreme Court is not maintainable and for that purpose resort should have been made to the

High Court.

12. In the case of Begum Nusrat Bhutto v. Chief of Army Staff etc. PLD 1977 SC 657, Constitutional petition was filed directly in the Supreme Court without going to the High Court. First objection taken was that petition was directed against Chief of the Army Staff whereas the orders of detention had been passed by the Chief Martial Law Administrator. This objection was disposed of summarily on the ground that Chief of the Army Staff was also Chief Martial Law Administrator and the objection was technical in nature and could be met by adding words of Chief Martial Law Administrator to the description of the respondent. Second objection taken was that petitioner Begum Nusrat Bhutto was not an aggrieved person in terms of Article 184(3) read with Article 199 of the Constitution as she did not allege any violation of her own Fundamental Right but only those of the detenus. It was held that clause (3) of Article 184 gives concurrent power to the Supreme Court to make order for the enforcement of Fundamental Rights in the same terms as could be made by the High Court under the provisions of Article 199. Clause (1) (c) of Article 199 contemplated that an application for enforcement of fundamental rights should be made by an aggrieved person but in that case petitioner had filed petition in two capacities, namely; as wife of one of the detenus and secondly, as Acting Chairperson of Pakistan People's Party to which all the detenus belonged. For such reasons objection that petitioner had no locus standi was rejected.

13. In the second case of Ms. Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416, which is mentioned above, in slightly different context it is held that exercise of power of Supreme Court under Article 184(3) is not dependent ofily at the instance of the "aggrieved party' in the context of adversary proceedings and traditional rule of locus standi can be dispensed with and procedure available in public interest litigation can be made use of, if it is brought to the Court by the person acting bona ride. The provisions of Article 184(3), therefore, have provided abundant scope for the enforcement of the Fundamental Rights of an individual or a group or class of persons in the event of their infraction and it would be for the Supreme Court to lay down the contours generally in order to regulate the proceedings of group or class actions from case to case. It is only when the element of "public importance" is involved that the Supreme Court can exercise its power to issue the writ while sub-Article (1)(c) of Article 199 has a wider scope as there is no such limitation therein.

14. In the instant case Article 184(3) cannot be invoked for the reason that impugned action of dissolution of the Assembly is not in conflict with Article 17(2) as there is no Fundamental Right available to the petitioner to continue the Government till the tenure comes to an end because that subject is covered by other provisions of the Constitution which are mentioned above. Article 17(2) which guarantees Fundamental Right mentions such right to the extent of being a member of

political party subject to any reasonable restrictions imposed by law and nothing more than that. To continue in power for five years till the end of tenure is a political wish and to be able to participate in political process, is governed by other Articles of the Constitution and not by Article 17(2). Article 17(2) mentions political party,: which has bundle of rights including political rights which are different from Fundamental Rights which are enumerated in the Constitution.

15. Mr. Khalid Anwar learned counsel for the petitioner has pointed out that in Article 2A of the Constitution in the Objectives Resolution "political justice" is mentioned giving it same status as that of Fundamental Right which is reproduced as under:---

"2A. The principles and provisions set out in the Objectives Resolution reproduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly."

16. On this premise second argument is built that before entry in the National Assembly, a political party has Fundamental Right and after entry to continue Government for five years is a political right arising from "political justice" as enshrined in Article 2A which is also as good as implied fundamental right. Learned counsel further stated that in the case of Benazir Bhutto v. Federation of Pakistan and another PLD 1988 SC 419 Zafar Hussain Mirza, J. (as he then was) has touched upon this aspect of "political justice" favourably at page 460 of the report. I am not inclined to accept the contention of the learned counsel for the following reasons. Fundamental rights are specifically mentioned in the Constitution and no such fundamental right can be deemed to be there by implication if not mentioned specifically. If legislature wants to add any fundamental right it can do so expressly. There is E no dispute about the fact that Article 2A containing Objectives Resolution now is substantial part of the Constitution and this Article is now as good as any other Article of the Constitution and at par with it. In the case of Benazir Bhutto, mentioned above, Article 17(2) of the Constitution was examined in the light of right to form or be a member of political party subject to any restrictions imposed by law and in that context several provisions which were added in the Political Parties Act were considered and found to be inconsistent with fundamental right to form or be a member of political party. Exactly in that context of right to form or be -a member of political party and in connection with fair i elections and existence of political parties, Zafar Hussain Mirza, J. observed at page 460 of the report as under:---

"The expression 'political justice' is very significant and it has been placed in the category of Fundamental Rights. Political parties have become a subject-matter of a Fundamental Right in consonance with the said provisions in the Objectives Resolution. Even otherwise, speaking broadly, our Constitution is a Federal Constitution based on the model of Parliamentary form of representative Government prevalent in United Kingdom. It is also clear from the Objectives Resolution that principles of democracy as enunciated by Islam are to be fully observed. True and

fair elections and the existence of political parties, is an essential adjunct of a functional democratic system of Government."

17. It is quite obvious from the above quote that reference to "political justice" is academic in nature because Fundamental Right is already mentioned G in Article 17(2) which is right to form or be a member of political party. Since some provisions of Political Parties Act offended against the fundamental right mentioned above, they were struck down. In my opinion contention does not advance the case of Mr. Khalid Anwar to the effect that after entry into National Assembly continuation in the Government for rive years is based upon political right which is akin to and related with Fundamental Right.

-18. For the facts and reasons mentioned above, I am of the view, that petition cannot be filed straightaway in the Supreme Court as Article 184(3) can be invoked only when question of public importance is involved with reference to the enforcement of any of Fundamental Rights and in the instant case petitioner cannot claim Fundamental Right under Article 17(2) to continue Government till its tenure, comes to an end. Proper remedy for the petitioner was to rile the petition before the High Court under Article 199 of the Constitution and seek relief as contemplated therein challenging the validity of order of dissolution passed by the President.

19. Coming back to the merits I would like to say that order impugned in this petition is passed by the President under Article 58(2)(b) of the Constitution. In order to appreciate the purpose and scope of this provision in proper perspective it would be necessary to recall very briefly historical background. We 'got independence in 1947 and produced Constitution for the first time in 1956, which contemplated Parliamentary form of Government. In 1958 Martial Law was imposed in the country and the Constitution was abrogated. Chief Martial Law Administrator, who became the President, gave to the country Constitution in 1962 which contemplated Presidential form of Government. Towards the end, of the role of President Ayub Khan people became disenchanted and as protest came out in the streets. There was no other alternative for President Ayub Khan but to resign and while doing so instead of handing over the powers to the Speaker of the National Assembly, he invited Commander-in-Chief of Army to take over the country and perform his Constitutional role. Commander-in-Chief of Army proclaimed Martial Law and held General Elections. There were some other political developments as well in the wake of which there was war between India and Pakistan and in consequence East Pakistan proclaimed independence and became Bangladesh.

20. In West Pakistan result of elections was accepted and in consequence Government was formed and a new Constitution was produced which is called Constitution of 1973. This Constitution also contemplates Parliamentary form of Government with concentration of powers in favour of the

Prime Minister. In 1977 again Martial Law Was proclaimed and Constitution was held in abeyance. This country has seen several Martial Laws and whenever there is Martial Law, Military rulers for that Parliamentary form of Government does not suit the people of the country and they feel inclined in favour of Presidential form of Government to ensure stability and long duration of the Government. With same view in mind Gen. Ziaul Haq, who was C.M.LA. and President of Pakistan endeavoured hard to evolve a system in which the President had more powers than Prime Minister in the system of the Government. He did not mind retaining Parliamentary form of Government because Presidential form of Government introduced by late Ayub Khan was rejected by the people, who had come out in the streets-He wanted to retain Parliamentary form of Government with more powers to the President who should be -able to have a last say in the matter and dismiss the Government of the Prime Minister if such situation arose. He also thought on the line of Turkish Constitution with supervisory role to the army to be made in the Constitution.

1 21. It is noteworthy that C.M.LA. and President Gen. Ziaul Haq did, not abrogate 1973 Constitution but held some of its provisions in abeyance. When time came for removal of Martial Law and revival of Constitution of 1973, Order, 1985 (President's) 14 of 1985 was promulgated on 2nd March, 1985, reviving the Constitution after making substantial amendments therein as wanted by the President to suit his needs. In this context Article 58 of the Constitution is worthmentioning for the reason that clause (2) was added in Article 58 empowering the President to dissolve National Assembly in his discretion where, in his opinion, an appeal to the electorate is necessary. Before this amendment, Article 58 provided that President shall dissolve National Assembly if so advised by the Prime Minister. It so appeared that clause (2) gave President unbridled authority to dissolve the National Assembly in his discretion whenever he thought that appeal to the electorate was necessary. This opened controversy with regard to the unlimited powers of the President and changing the shape of the Constitution from Parliamentary to Presidential which ultimately resulted into Constitution (8th Amendment) Act, 1985 by which clause (2) of Article 58 was suitably amended and power of the President to dissolve the National Assembly in his discretion was qualified.

22. The Constitution (8th Amendment) Act, 1985 was in fact compromise for striking balance between the powers of the President and Prime Minister as desired by the President and forces demanding lifting of Martial Law and revival of the Constitution in the shape of Parliamentary form of Government. The President agreed to lift the Martial Law and revive the Constitution on condition that his points of view were accommodated including more powers to the President so that situation did not arise necessitating imposition of Martial Law. In such circumstances efforts were made to arrive at a compromise in order to break the deadlock and give Constitution a chance to prove to be workable. Interpretation and scope of authority and powers contemplated under Article 58(2)(b) came up for detailed examination in the case of Federation of Pakistan and others v. Haji Muhammad Saifullah Khan and others PLD 1989 SC 166. The question presented two view points as to whether the said discretion is uncontrolled and cannot be called in question on any ground whatsoever as provided for in clause ~(2) of Article 48 or is it a discretionary power which must be exercised reasonably and fairly and can be scrutinised through judicial review. In

that context this Court referred to the debates in the National Assembly on Constitution (8th Amendment) Act, 1985 and came to the following conclusion:---

"Thus the intention of the law-makers, as evidenced from their speeches and the terms in which the law was enacted, shows that an order of dissolution by the President can be passed and an appeal to the electorate made only when the machinery of the Government has broken down completely, its authority eroded and the Government, cannot be carried on in accordance with the provisions of the Constitution.

It is within the discretion of the President to determine whether these conditions are met or not but this discretion has to be exercised in terms of the words and spirit of the Constitutional provision.

The discretion conferred by Article 58(2)(b) of the Constitution on the President cannot, therefore, be regarded to be an absolute one, but is to be deemed to be a qualified one, in the sense that it is circumscribed by the object of the law that confers it.

Reading of the provisions of Article 48(2) shows that the President has to first form his opinion, objectively and then, it is open to him to exercise his discretion one way or the other, i.e. either to dissolve the Assembly or to decline to dissolve it. Even if some immunity envisaged by Article 48(2) is available to the action taken under Article 58(2) that can possibly be only in relation to the exercise of his 'discretion' but not in relation to his 'opinion'. An obligation is cast on the President by the aforesaid Constitutional provision that before exercising his discretion he has to form his 'opinion' that a situation of the kind envisaged in Article 58(2)(b) has arisen which necessitates the grave step of dissolving the National Assembly.

Thus, though the President can make his own assessment of the situation as to the course of action to be followed but his opinion must be founded on some material."

23. The salient feature of Saifullah's case is that President Ziaul Haq passed order of dissolution containing three grounds to the effect that firstly law and order in the country had broken down resulting in tragic loss of innumerable valuable lives and secondly that life, property, honour and security of citizens of Pakistan had been rendered totally unsafe and thirdly, that situation had arisen in which Government of Federation could not be carried on in accordance with provisions of the Constitution. Judgment was announced by the High Court after the death of President Ziaul

Haq. This Court held that order df dissolution was invalid on three grounds; firsty that there was no material in support of grounds, secondly, Care-taker Prime Minister was not appointed and thirdly, oath of Ministers was altered. Relief claimed in the petition of restoration of Assembly and Government was not granted for the following reasons. Firstly Mr. Muhammad Khan Junejo (deposed Prime Minister hailing from Sindh) decided to seek mandate of people. Secondly, Pakistan Muslim League (Ruling Party in the Assembly) broke into two parts and the other part was headed by Mr. Fida Muhammad Khan. Thirdly, whole administrative machinery was geared up for election. Fourthly, after lifting of ban all political parties could participate in the election. Fifthly, writ jurisdiction being discretionary relief was rightly refused as greater harm could have been caused if relief of restoration had been granted. In that context it was held that concept of national interest had to take precedence over rights of individual. On the question of exercise of discretion vis-a-vis right of appeal to political sovereign, pertinent paragraph from the said judgment is reproduced as under:

"it should not be overlooked that dissolution does not in any way adversely affect the rights of the members of the Assembly. If their claim that they are in the Assembly by the consent of the people and as their representatives and not merely because of a statutory provision, is good, they can seek re-election to the new Constituent Assembly, there being no disqualification attaching to them from being chosen as members of that Assembly. If they receive a fresh electoral mandate, they can return to the Assembly with greater popular acclamation and thus disprove the allegation that they represent nobody except themselves."

24. For the second time order of dissolution of National Assembly under Article 58(2)(b) of the Constitution was passed by the President and Federal Government of Ms. Benazir Bhutto (hailing from Sindh) was dismissed and the Constitution Petition was riled by a Federal Minister in that Government in Lahore High Court which was dismissed. Scope and authority under Article 58(2)(b) was again re-examined by this Court in the case of Khawaja Ahmad Tariq Rahim. v. The Federation of Pakistan and another PLD 1992 SC 646. In support of order of dissolution President had assigned five main grounds and produced material in support of the grounds. Those five grounds were; firstly, that there was scandalous 'horse-trading' for political gain and thereby mandate of National Assembly was defeated. Secondly, the Federal Government undermined and impaired the working of the Constitutional arrangements and bypassed Council of Common Interests and National Finance Commission. Thirdly, there was corruption and nepotism in the Federal Government, its functionaries, authorities and other corporations including banks. Fourthly, the Federal Government failed to protect Province of Sindh from internal disturbances. Fifthly, the Government of Federation violated provisions of the Constitution by ridiculing superior judiciary, misusing resources and agencies of Government like statutory corporations, authorities and banks for political ends and personal gains and undermined Civil Service of Pakistan. Full Bench of 12 Judges of this Court heard this case and by majority opinion 10 to 2 upheld the order of dissolution after consideration of material produced in support of the order. In respect of Article 58(2)(b) it was held as under:---

"President of Pakistan has the power to dissolve National Assembly at his discretion and specific power and the judicial requirement have been provided in the Constitution. Once the evil is identified, remedial and corrective measures within the Constitutional framework must follow. Public functionaries, holding public power in trust, under oath to discharge the'same impartially and to the best of their ability must react as they cannot remain silent spectators. Legal and moral basis for reserving or reposing such a power and the occasional exercise of its illustratively described."

25. On the question of defection of elected members, although the same was not caught by the mischief of relevant law, it was held that defection amounts to a clear breach of confidence reposed in such members in the electorate and dissolution on this ground was justified on moral reasons. It was also held that President was justified in dissolving the National Assembly on the ground that Constitutional institutions like Council of Common Interests and National Finance Commission were not allowed to function, hence Constitutional obligations were not discharged. In short whatever material was produced in support of the grounds of dissolution was accepted by this Court to be adequate and order of dissolution passed by the President was upheld to be valid and justified. I would like to make comparison between the case of Khawaja Ahmed Tariq Rahim and the present case in order to show that material produced in the present case is more quantity as well as qualitywise than material produced in Khawaja Ahmad Tariq Rahim's case and same yard-stick for evaluation of material and interpretation of Article 58(2)(b) should be followed and no departure should -be made from following the guidelines laid down in the cases of Haji Saifullah Khan and Tariq Rahim by this Court.

26. In the present case the order of dissolution is supported by eight grounds, two I of which are further sub-divide7d into other grounds as well. In Tariq Rahim's case there were rive grounds enumerated in support of order of dissolution and from them two were further sub-divided into other grounds as well. In the present case first ground is mass resignations of members of Opposition and some members of Treasury Bench including Ministers, showing their desire to seek fresh mandate from the people on account of which National Assembly had lost confidence of the people. During the hearing in this Court much time was consumed on the question of competence and validity of resignations which were handed over to the President instead of Speaker, who was supposed to accept them or not. The question here is not of intrinsic value of resignations in the hands of the President, which are in transit and have not reached the Speaker, but these resignations are to be considered as material in support of the ground that members of the National Assembly had lost confidence in the Federal Government headed by the petitioner as Prime Minister and in such circumstances need was felt with justification by the President for exercise of his power and discretion under Article 58(2)(b) to dissolve the Assembly after objective assessment of the situation.

27. In the written statement it is mentioned that the President had received total of 88 resignations apart from which there were already 12 vacancies of previous resignations plus vacancy of one member who had died. in such circumstances out of total membership of 217 there could be 101 vacancies. Without going' into the question as to when in point of time the

resignations would be deemed as valid causing vacancies stricto senso it can be said that this material as such in the hands of the President could be considered by him to form an opinion that 88 members who resigned could turn the scales in conjunction with other concomitant circumstances stated above, showing that Federal Government headed by the Prime Minister and National Assembly had lost its mandate in the sense that its representative character was not same as it was before when people voted for it. The fact cannot be lost sight of that I.J.1. as amalgam of several parties jointly contested elections and people voted for it. In the result 111. formed Government but afterwards several other parties disassociated from LJX. Even Muslim League (Junejo Group) was split into two parts, the second part is Nawaz Sharif group. Hence at the time of dissolution Ul. was not same group of political parties which were voted into power.

28. It is explained on behalf of respondents in the written statement that the resignations were not sent to the Speaker for the reason that he was partisan and had not acted in the past upon motions directed against the Prime

Minister and other Ministers of the Federal Government. Speaker was getting preferential treatment in special allocation of funds for his constituency. In such circumstances resignations were handed over to the President as mark of protest. As said earlier I am of the view that resignations with the President can be considered as material in support of the ground of dissolution that K National Assembly has lost representative character and mandate. In the majority judgment in this case view is taken that President could not entertain the resignations, hence it was not a good ground for dissolution. I beg to differ with the view of majority on this point for the reasons firstly, that in Tariq Rahim's case by analogy horse-trading was considered as ground for dissolution in spite of the fact that it was not caught within the mischief of relevant law and secondly, horse-trading took place on both sides in the House but horse-trading in favour of Opposition was officially ignored. Thirdly, defection of elected members was accepted on moral grounds. In this context I reproduce relevant paragraph from the majority judgment of Tariq Rahim's case:---

"In the first place, if the member has' been elected on the basis of a manifesto, or on account of his affiliation with 4 political party, or on account of his particular stand on a question of public importance, his defection amounts to a clear breach of confidence reposed in him by the electorate. If his conscience dictates to him so, or he considers it expedient, the only course open to him is to resign to shed off his representative character which he no longer represents and to fight a re-election. This will make him honourable, politics clean, and emergence of principled leadership possible. The second and more important, the political. sovereign is rendered helpless by such betrayal of its own representative. In the normal course, the elector has to wait for years, till new elections take place, to repudiate such a person. In the meantime, the defector flourishes and continues to enjoy all the wordly gains. The third is that it destroys the normative moorings of the Constitution of an Islamic State. The normative moorings of the Constitution prescribe that "sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised-by the people of Pakistan within the limits prescribed by Him is a sacred trust and the State is enjoined to 'exercise its powers and authority through the chosen representatives of the people'. An elected representative-who defects his professed cause, his electorate, his party, his mandate, destroys his own representative character. He cannot on the mandated Constitutional prescription participate in the exercise of State power and authority. Even by purely secular standards carrying on of the Government in the face. of such defections, and on the. basis of such defections, is considered to be nothing but 'mockery of the democratic Constitutional process'."

29. Why such incisive reasoning on moral grounds in respect of defections' as mentioned in the quote, is not being made applicable to mass resignations in the, instant case without objection of validity.

30. The second ground marked in the order of dissolution as (b) is that in the meetings between the President and the Prime Minister and particularly in the last such meeting which took place on 14-4-1993, the President urged upon Prime Minister to take positive steps to resolve grave internal and international problems but instead of doing that on 17-4-1993 the Prime Minister made a speech on television and made false and malicious allegations against the President of Pakistan who is Head of the State and represents the unity of the Republic. The tenor of the speech was that the Government could not be carried on in accordance with the provisions of the Constitution and the Prime Minister advanced his own reasons and theory for the same, which was done to cover up the failures qnd defaults of the Government and in such circumstances speech of the Prime Minister was tantamount to a call for agitation and in any case the speech and his conduct amounted to subversion of the Constitution. The speech as such is neither denied nor disputed.

31. In the petition which is filed in this Court from paragraph 4 onwards achievements of the Federal Government are enumerated and the background. is explained. According to the petitioner IJ.l. Government brought about a negotiated scttlement/peace Agreement in Afghanistan. Massive progress was made in the new Highway Project which widely increased the prospects for new

foreign and internal investment. The petitioner as Prime Minister visited several foreign countries for investment. In Sindh Katcha lands were allotted to landless Haris. According to the petitioner all such progress was made without participation of the President in policy-making and decision-making, which displeased him and he started interfering in ordinary. and routine matters. This was calculated to undermine the authority and credibility of the Federal Government And to give the impression that what actually matters in the national affairs is the will of the President and not the people and their elected Government. It is also stated in the petition that the ruling party considered advisability of amending some Articles of 8th Amendment of the Constitution and this further displeased the President.

32. It is also stated in the petition that the ruling party did not want the President to be removed, hence declared openly to back him up for a second term. In order to totally re-assure him, the ruling party also dropped the question of 8th Amendment. In spite of such steps having been taken by the ruling party, the President misconstrued the attitude of the petitioner as total surrender and he openly started entertaining and supporting persons hostile to the Government, who were scheming and working to destablise the elected Government. It is fruther stated in the petition that persons opposed to the elected Government kept on meeting the President and making public statements that the President would shortly announce the dismissal of the Government and the President did not deny such statements. Ultimately on 14-4-1993 the Prime Minister met the President and after the meeting Presidency issued Press Release which did not correctly depict minutes of the meeting and in such Circumstances on 17-4-1993 the petitioner felt compe1led to take the nation into confidence and made that speech. It is mentioned in the, petition that on 18-4-1993 meeting was requisitioned by members of the National Assembly to consider whether I.J.1. Government has lost its mandate or not, the speech of the Prime Minister on 17-4-1993 and the press statement issued by the Presidency on 14-4-1993. Both President and the Prime Minister were planned to be invited. In a mala fide manner the move was prevented by order of dissolution. How far this assertion is believable remains to be seen.

33. In the written statement stand is taken by ,the President that the Prime Minister was acting in important policy matters in total disregard of the Constitutional provisions and had placed himself in the hands of few individuals who did not guide him properly and this action was disapproved by some important members of the Cabinet. Such lapses were pointed out to him in the meetings between them in the months of March and April 1993 and the Prime Minister considered the weaknesses and irregularities and agreed to take remedial measures. The last such meeting took place on 14th April, 199.3, at the end of which the Prime Minister recognized an urgent need for rectification and promised to return to the President after initiating certain corrective measures. Instead of doing that on 14-4-1993, the Prime Minister made a speech on electronic media which was described as ‘unprecedented’ by people of all walks of life. In that speech the Prime Minister chose the most unusual course to demonstrate that the Government of Federation could not be carried on in accordance with the Constitution. At the end of the speech the Prime Minister defiantly declared that he would not resign, would not dismiss the Assembly and would not take the dictation.

34. It is mentioned in the written statement that after the speech of Prime Minister on electronic media on 17-4-1993, on the following day session of National Assembly was summoned by the Speaker for 19-4-1993 on the requisition of members and for that purpose the Speaker of the National Assembly hurried his return from New Delhi prematurely which demonstrated collusion. During the hearing before us several arguments were put forward on behalf of the Prime Minister in support of his speech and summoning of the session of the National Assembly for 19-4-1993. It was submitted that in our Constitution which contemplates Parliamentary form of Government the Prime Minister is to advise the President and not vice versa. After the last meeting on 14-4-1993, although the Prime Minister undertook to take remedial measures but the time was too short and he felt constrained to take public into confidence and for that reason he made speech on television on 17-4-1993. No material has been produced nor any assertion was made to show that any request was made for extension of time which was refused by the President.

35. Another argument is that if there was misunderstanding with regard to the minutes of the meeting about which the Presidency issued Press Release which was considered by the Prime Minister as not correctly depicting factual ~ position, then this was such a trivial matter that it could have been sorted out between the President and the Prime Minister in another meeting. What really appears from the annexures produced by both the parties in this case and newspaper clippings which covered the events of that time that the President suggested to the Prime Minister to get rid of some Ministers and some important functionaries of the Government and the Prime Minister took time to do the needful but then changed his mind and adopted tone and tenor of defiance. After making the speech on T.V. on 17-4-1993 in which person and office of the President was criticised with uncalled for imputations in a state of frustration, steps were taken to summon the session of the National Assembly on requisition of members for the following day, which did not appear to be a bona fide move for obvious reason that there was already a request for summoning the session of National Assembly and such summary was signed and approved by the President, as the Court was informed by the learned Attorney-General.

36. This move of suddenly summoning the session of the National Assembly for the following day is open to many presumptions in the back-ground of strained relations between the President and the Prime Minister and the speech of the Prime Minister on T.V.,in which he had addressed the nation. It could be presumed that it was to take action of impeachment against the President or to create a ground disabling the President from passing the order of dissolution under Article 58(2)(b) on the assumption that session summoned under the provision of the Constitution could be terminated only when prorogued by the Speaker. On the other hand it was argued on behalf of the respondents that power under Article 58(2)(b) is independent and under it order of dissolution can be made by the President even if the Assembly was in session. It was contended very forcefully by Mr. Khalid Anwar that the speech of the Prime Minister, in any case did not amount to subversion of the Constitution because as Prime Minister he could always address the nation and take people into confidence on very important matters. Another argument was raised on behalf of the Prime Minister that in the order of dissolution in the last paragraph it is mentioned that the Prime Minister is dismissed and the word ‘dismissal’ should not have been used and by doing so

Article 14 of the Constitution is contravened which provides that dignity of man and subject to law the privacy of home shall be inviolable.

37. In my humble opinion in this regard the most important and pivotal point is the making of speech by the Prime Minister and its tenor and purport which is not disputed but on the contrary is being defended vociferously on the ground that the Prime Minister acted within his powers in the Constitution and the President had no business to advise the Prime Minister in the Parliamentary form of Government. The tenor of the speech of the Prime Minister shows clearly that he endeavoured to take into confidence the nation on the point that the situation had arisen in which the Government of Federation could not be carried on in accordance with the provisions of the Constitution and for such situation he was not to be blamed and the blame in its entirety lay on the door of the Presidency and the person of the President who colluded with elements inside the ruling party and outside, who were hellbent to destabilise the Government.

38. In my opinion the question of apportionment of blame for creating! such a situation is relegated in the background and the fact that such a situation is created bringing about deadlock and stalemate in the working relationship of two pillars of the Government of Federation has become a fait! accompli *which enables* the President to exercise his discretionary power under Article 58(2)(b). There is no dispute about the fact that after the speech of the Prime Minister to the nation on T.V. on *17-4-1993* tone of defiance and confrontation was set by the Prime Minister and not reconciliation and this in fact is more than sufficient to say that situation is created spelling out in clear and unambiguous terms breakdown of working relationship between the President and the Prime Minister, hence Government of Federation could not be carried on in accordance with the provisions of the Constitution and appeal to the electorate was necessary. There is no gainsaying that problem would be solved by the unilateral offer made by the Court to the Prime Minister for assurance that if the Government was restored he would work hand in hand with 'the President. Such offer was not made to the President. Action and reaction are equal and opposite. By the tenor of the speech the President could feel hurt and humiliated. No such compromise took place between the two to say that they had patched up the differences and were reconciled with all sincerity considering bygones as bygones.

39. Scheme of the Constitution is such that both Prime Minister and the President are King-pins in the machinery of Government of Federation and have to work hand in hand in atmosphere of congeniality to carry out day to day government and executive acts which are to be taken in the name of the President on the advice of the Prime' Minister and in that connection the summaries have to go for approval of the President. What would happen if the President does not cooperate.

40. 1 would like to point out here that in the case of Tariq Rahim the situation was not so bad and Prime Minister Ms. Benazir Bhutto had not made any speech to the nation criticising openly and in public the person and office of the President. In the absence of such speech apparently situation of open confrontation had not arisen as in the present case, which means that grounds for dissolution in that case were to be considered on their merits. Although the grounds were fewer in number than grounds in the present case and material in support of grounds quantity and qualitywise was far inferior but even then order of dissolution passed in that case was upheld and not in the present case.

41. In this case ground *(3)* in the order of dissolution marked as (c) is that institutions set up under the Constitution have been bypassed and in that context Government of Federation failed to protect autonomy granted to the Provinces. In that connection examples quoted are Council of Common Interests and National Economic Council and its Executive Committee having been bypassed in the formulation of plans in respect of financial, commercial and economic policies. It is stated that In the context of privatisation of industries in relation to Item No.3 of Part 11 of the Federal Legislative List and Item No.34 of Concurrent Legislative List, session of Council of Common Interests was not called to discharge its Constitutional functions as required by Articles 153 and 154 of the Constitution. Article 153 describes composition of Council of Common Interests which includes Chief Ministers of the Provinces and equal number of members from the Federal Government to be nominated by the Prime Minister. It is provided in clause (3) of this Article that if Prime Minister is a member of the Council, he shall be the Chairman of the Council but if at any time he is not a member, the President may nominate a Federal Minister, who is a member of the Council to be its Chairman. It is stated that in the instant case the Prime Minister is the Chairman of the Council and failed to summon the session of the.Council to formulate and regulate policies in respect of priviitisation of industries-which is a matter of great importance to the Provinces.

42. It was stated by the learned Attorney-General that according to Article 154, it is mandatory that Council shall formulate and regulate policies but this was not done and therefore the Provinces felt aggrieved because they were not taken into confidence. Had such meeting been called, the Provinces would have voiced their grievances. In the petition there *is* a general denial *of* this allegation and assertion is made that Rs. 6,000 million were paid to N.-W.F.P. Government in 1991-92 from net profit earned by the Federal Government from a hydro-electric station located in that Province. This assertion is disputed by the Federal Government in the written.statement and claim was made that full share of Government of Balochistan for 1991-92 and 1992-93 was not paid about which the 5aid Provincial Government had also complained. Respondents have filed Annexures in support of the claim. In the petition stand is taken that only two specific examples of lack of consultation with Constitutional bodies like C.C.I. and N.E.C. and its Executive Committee have been given. This issue was examined in depth by the Minister concerned in response to comments received from the President. A comprehensive report was sent to the President by the Cabinet Secretary on 15-4-1993.

43. About'. privatisation policy it is stated in the petition that it -was effectively implemented for the first time. Some units were privatised between 1977 and 1985 and a disinvestment committee was set up. In 1989 the then Government had identified 14 specific units for privatisation. Many new laws were enacted to implement the disinvestment policy since 1978 and none of the successive Governments had consulted the C.C.I. Claim is made on behalf of the petitioner that under Article 70 legislative procedure is given for introduction and passing of Bills and in that connection relevant laws were passed by the Parliament which were assented by the President without any objection. Our attention is also drawn to Article 97 which relates to the extent of executive authority of Federation in respect of making laws to be made applicable in the Provinces. In this context it is submitted by the learned Attorney-General that Articles 70 and 97 as well as 154 and 173 have been misconstrued on behalf of the petitioner. The question of executive authority of Federation could be invoked only after preconditions of Articles 160 and 161 were satisfied. From all what is stated above, it is clear that mandatory requirement of Article 154 was not followed and C.C.I. was not called for to formulate and regulate policy giving opportunity to the Provinces to participate in the proceedings at such important stage.

44. Next ground in the order of dissolution is (d) which relates to mal administration, corruption and nepotism by the Federal Government showing lack of transparency in the process of privatisation. It is asserted by the . respondents that process of privatisation lacked transparency and was vitiated by various illegalities and irregularities. Units were transferred to favourites without following proper procedure and methodology for fixation of net worth of units were not consistent. Recovery of sale price was not made in specified time-frame and manner which resulted in wastage of public assets at the cost of national exchequer. The mode of sale/transfer enabled the transferees to manipulate prices of products of sold units and made fortunes overnight to the detriment of the consumer. Eight Cement factories were sold to one group of Industrialists and the manner in which the Muslim Commercial Bank was sold to the favourites of the petitioner namely Mansha Group is well-known. Sale of properties owned by the Federal Government including Corporations was unconstitutional and in doing so Articles 153, 154 and 156 read with Article 161 were violated by the petitioner and his Government.

45. In relation to Pakistan Telecommunication Corporation, the petitioner and his Government went to the extent of hiring services of foreign consultants and got legislation prepared abroad in advance for privatisation in such a manner that only foreign investors could buy it. In this connection. Ministry of Law and Justice. was not consulted. The foreign investor was to purchase only 26% of the share holding in the proposed Corporation while Government of Pakistan though holding 74% were not given any right of vote. Tax-Holiday was proposed to be given to foreign purchaser. Buyer was to be a Government within a Government. There was reason to believe that. petitioner and his Government had similarly decided to sell WAPDA, the Railways, PNSC, the Ports to foreign investors thus allowing foreign intervention in vital sectors of Pakistan and endangering and exposing the Federating Units and the people of Pakistan to the control of foreign companies. The Government of Federation was not authorised under the Constitution or law to sell in the aforesaid manner.

46. It is claimed by the respondents that important decisions were taken by the petitioner and his nominees bypassing and in total disregard of Constitutuional requirements and rules of business. Proposed privatisation of WAPDA, PTC, portion of Pakistan Railways or other Corporations owned by the Federal Government, PIA and nationalised banks whether sold and/or under consideration of being sold were never brought by the petitioner before CCI and NEC. What is stated above clearly shows that in respect of policy of privatisation, Constitutional requirements of provisions regarding CCI and NEC were not followed and Provinces were not given opportunity to participate in the formulation of such policies. It also appears that on the ground of maladministration, corruption and nepotism of the Federal Government there was sufficient material before the President which has been produced in the Court as Annexures 'A' to 'A-12' and 'B' to 'R' which were considered in support of the ground of dissolution.

47. Ground (e) in the order of dissolution is that a reign of terror was unleashed by the functionaries and agencies under the control of Government of the Prime Minister against the opponents of the Government including political and personal rivals/relatives and mediamen. In the petition it is stated that allegation is not supported by any concrete facts. In the written statement filed on behalf of respondents it is stated that some documents/information is supplied and additional documents would be produced later. It appears that alongwith written statement no annexures were produced. In the rejoinder allegation is denied and it appears that no specific instances are quoted and no documents have been supplied in support of this ground of dissolution, hence this ground has failed.

48. Next ground in the order of dissolution is (f) which is divided further into five parts. (f)(i) is that the Cabinet has not been taken into confidence or decided upon numerous Ordinances and matters of policy. In the petition it is stated that the first two parts of ground (f) in the order of dissolution refer to internal management of the Cabinet. The third, fourth and fifth sub-grounds are vague and no particular facts have been referred to. Service laws have been in existence for almost two decades and also Public Service Commission under the Constitution of 1973. Respondents claim that in matters of legislation and policy the Cabinet was not taken into confidence and a number of draft Ordinances were not placed before the -Ciaf~inct for approval. Such complaint was made by Mr. Hamid Nasir Chatha in public statement which had been annexed. His main grievance was that Cabinet was composed of 48 Ministers and yet decisions were made by the kitchen Cabinet consisting of only five persons including the petitioner and other Ministers were ignored. In the rejoinder to the written statement, denial of allegation was reiterated with assertion that all decisions have been taken by the Cabinet including Ordinances and matters of policy. In support of assertion no proof is produced to show that Ordinances and other matters of policy were approved by the full Cabinet. In the circumstances it can be said that there is weight in the statement of Mr. Hamid Nasir Chatha who was at the relevant time Member of the Cabinet. If he had participated in the Cabinet meetings in the approval of Ordinances and other policy matters, he would not have raised this objection and subsequently tendered his resignation.

49. Ground taken is that petitioner as Prime Minister prohibited the Federal Ministers from calling upon the President. About this ground in the petition stand is taken that it was incorrect that Federal Ministers were called upon not to see the President although it was not at all necessary for them to do so. Learned Attorney-General has drawn our attention to Article 46 under *which* it is the duty of the Prime Minister to communicate to the President all decisions of the Cabinet relating to the administration of the affairs of the Federation and proposals for legislation. Under this provision the President can require to submit for consideration of Cabinet matter on which decision had been taken by the Prime Minister or a Minister but which had not been considered by the Cabinet. Under Article 48 the President is to act on the advice of the Cabinet or the Prime Minister. Clause (4) of this Article provides that the question whether any, and if so what, advice was tendered to the President by the Cabinet, the Prime Minister, a Minister or Minister of State shall not be inquired into in, or by, any Court, Tribunal or other Authority. This shows that the President can see the Ministers as permitted by the Constitution.

50. Ground f(iii) covers allegation that resources and agencies of the Government of Federation including statutory Corporations, authorities and banks were misused for political ends and purposes and for personal gain. No specific instances have been -quoted in the written statement. Likewise ground f(iv) also contains vague allegations of massive wastage and dissipation of public funds and assets at the cost of national exchequer. No specific instances have been quoted. Allegations are vague and not supported by documents. Ground f(v) is that Articles 240 and 242 have been disregarded in respect of Civil Services of Pakistan. No proof is produced in support of this ground.

51.. Ground (g) in the order of dissolution is that serious allegations were made by Begum Nuzhat Asif Nawaz as to the highhanded treatment meted out to her husband, the late Army Chief of Staff and further allegations as to the circumstances culminating in his death indicated that the highest functionaries of the Federal Government had been subverting the authority of the Armed Forces and the machinery of the Government and the Constitution itself an the petition allegation is denied as factually incorrect. It is admitted that Begum Nuzhat Asif Nawaz made a statement to the Press without filing F.I.R. On coming to know of the allegation, the Federal Government promptly appointed a high-powered Commission of three Judges of the Supreme Court to look into the case even before such request was received from the Presidency. In the written statement assertion is made that the Commission of Enquiry was appointed at the instance of the President. Copy of letter from the President was received in' the Secretariat of Prime Minister at 5-50 p.m. and not at 10 p.m. as claimed by the petitioner. Copy of the receipt Exh.P/3 has been produced. No further comment on this point is called for as it is understood that the, Commission of Enquiry has submitted the report to the Government. The learned Attorney-General submitted that on such important matter no action was taken by the Prime Minister and Enquiry Commission was appointed after the President intervened.

52. The last ground in the order of dissolution is (h) which is to the effect that the Government of the Federation was not in a position to meet properly and positively the threat to the security and integrity of Pakistan and grave economic situation confronting the country, necessitating the requirement of a fresh mandate from the people of Pakistan. In the petition allegittion contained in this ground is denied relating to grave economic situation as factually incorrect. On the contrary reliance was placed on the statement of Finance Minister in the Care-taker Cabinet, who made a public statement that reforms of the petitioner's Government would continue. It would be pertinent to state here that Foreign Minister in the Care-taker Cabinet alongwith Foreign Secretary brought some confidential documents for perusal of the Court. Proceedings were held in camera in presence of learned counsel for both sides. Documents were of sensitive nature and I do not propose to make any comment on them. All what I feel inclined to say right now is that such lapses on the part of the Federal Government could have caused very strained relations between our country and the, neighbouring country.

54. In the case of Tariq Rahim (PLD 1992 SC 646) the Federal Government of Ms. Benazir Bhutto was dismissed and National Assembly dissolved under Article 58(2)(b), which again became subject-matter of very detailed analysis and the concluding paragraph is as under:---

"This much for the background of the Constitutional power, its scope and meaning in the past and in the contemporary decisions outside Pakistan. In Haji Muhammad Saifullah Khan's case PLD 1989 SC 166 our Constitutional provision has received full attention and its meaning and scope authoritatively explained and determined. It is an extreme power to be exercised where there is an actual or imminent breakdown of the Constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution. There may be occasion for the exercise of this power where there takes place extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but by methods extra-Constitutional."

55. In that reported case in all rive grounds were mentioned in support of order of dissolution. The first ground was that utility and efficacy of National Assembly as a representative institution and its mandate were defeated by internal dissensions, scandalous 'horse-trading' and failure to discharge substantive legislative functions by the National Assembly. Comment has been made already in the above paragraphs of this judgment about the main charge of horse-trading, which was accepted as carrying the day in spite of the fact that no offence under the relevant law was made out but it was accepted on moral grounds ignoring its existence when it was being practised by the Opposition against the Government of the day. Reasons given in respect of defection in that case by this Court could be adopted by way of analogy in respect of mass resignations of the members of the National Assembly, but this has not been done. In any case this ground was sustained in favour of dissolution for the reason that material was produced and was available with the President in support of the ground.

56. In the reported case of Tariq Rahim, the second ground was that sessions of Council of Common Interests and National Finance Commission were not summoned and in that connection observation was made by this Court in the judgment that there was sufficient correspondence on the record to indicate that persistent requests were made by the Provinces for sessions of these Constitutional institutions and instead of intercession of the President no heed was paid and Constitutional obligations were not discharged. In the instant case there is voluminous material on the record in support of similar allegation to the effect that privatisation policy has been taken in hand by the Federal Government without formulation and regulation of policies in the meeting of Council of Common Interests and thereby Provinces have been deprived of participation and voicing their grievances but material on this ground is rejected. Even applications of the Provinces to join the proceedings as necessary and affected parties in this case have been rejected.

57. In Tariq Rahim's case grounds of corruption and nepotism in the Federal Government and misuse of authorities, resources and agencies of the Government including Corporations and Banks and undermining of Civil Services of Pakistan, were held to be independently insufficient to warrant action of dissolution but coupled with other grounds of horse-trading and not allowing functioning of Council of Common Interests and National Finance Commission, were declared to be sufficient to justify action of dissolution. As against rive grounds enumerated in the case of Tariq Rahim in the instant case, there are eight grounds and heavy load of material produced in support of such grounds including speech of the Prime Minister on 17-4-1993 on television in which confrontation and deadlock with the President is admitted for which the President is held liable with allegations of partisanship and helping conspirators to destabilise the Govcrnment.

58. In my humble opinion when Constitutional petition was entertained in this case in this Court straightaway without allowing it to be heard in the High Court and since there is no other forum of appeal after this Court, it was the bounden duty of this Court to have scrutinised the material produced in support of grounds of dissolution with more care and caution in conformity with guidelines laid down in the cases of Haji Saifullah Khan and Khawaja Ahmed Tariq Rahim decided by this Court earlier in point of time.

59. In Haji Saifullah Khan's case PLD 1989 SC 116 order of dissolution was held to be invalid and even then importance was attached to the appeal to the political sovereign. It has been held in that case that right of dissolution is the right of appeal to the people and all the Constitutional conventions are intended to produce harmony between the legal and political sovereign. In a democratic system the dissolution of a representative body like the National Assembly has always been taken in Parliamentary form of Government to be in essence an appeal from legal to the political sovereign. It is ultimately the verdict of the political sovereign which determines the rights

or the power of a Cabinet to retain office. All what has been said above are the observations of this Court in connection with interpretation of Article 58(2)(b).

60. in my humble opinion Article 58(2)(b) of the Constitution has come to stay in the Constitution whether it is liked or abhorred. Constitutions of two countries are not alike because Constitution of each country is framed keeping in view the objective conditions, historical and cultural background with pronounced customs and religious ethos. If Article 58(2)(b) has come into existence and forms part of the Constitution on account of some compromise and it is disapproved now it can be removed or diluted or amended in the manner prescribed in the Constitution. It is the function of the legislature to legislate and of the Court to interpret the law. The Court cannot and should not take upon itself the duty of entering into the field of legislature but should confine itself to its original function of interpreting the provisions of the Constitution as they are and other laws. While interpreting the provisions of the Constitution, it becomes the duty of the Court to see that interpretation is done in such a manner which advances the noble object of workability of the Constitution. The provisions of the Constitution cannot be interpreted by the Court in such narrow form to make that provision almost redundant and meaningless.

61. By rejecting the material in support of grounds of dissolution in the instant case, interpretation of Article 58(2)(b) is rendered by this Court narrowing down its scope to almost zero point which amounts to declaring that no President would be able to ever dissolve the National Assembly and dismiss the Government of the Prime Minister in spite of the fact that he has substantial material in his possession, because the Court is not satisfied with intrinsic value of the material. In other words Article 58(2)(b) is rendered almost redundant which can be done by the legislature only.

62. 1 see no reason to justify departure from the guidelines laid down in the cases ‘of Haji Saifullah Khan and Khawaja Ahmad Tariq Rahim for consideration of material in support of grounds of dissolution. I see no difference in the material produced in support of grounds of dissolution in the case of Tariq Rahim and in the, present cast. The present fine of reasoning in the majority judgment can be accepted only when positive assertion is made that case of Khawaja Ahmed Tariq Rahim was wrongly decided.

63. In so far legal aspect is concerned, there is no dispute about the fact that the Court can examine the reasons and material in support of grounds of T dissolution in order to find out whether it has any rational nexus with the .satisfaction of the President. It is so held in the case of S.R. Bommai and others v. The Union of India and others (AIR 1990 Karnataka 5). In the reported case under Article 356 of the Indian Constitution the President can issue proclamation if he is satisfied from the report of the Governor that a situation has arisen in which Government of State cannot be carried on in accordance with the provisions of the Constitution.

64. In the case of Mrs. Sajida Begum and others v. Union of India and others AIR 1977 SC 1361, it is held that the Court has power to question the satisfaction of President under Article 356 and such satisfaction can be based on material other than the Governor's report. In the case of A.K. Roy v. Union of India and another AIR 1982 SC 710, it is held that satisfaction of the President mentioned in Articles 123 and 356 of the Constitution of India is under justiciability and observation in AIR 1977 SC 1361 was no longer good law in view of the 44th Constitutional amendment.

65. In the case of Capt. Kanwaijit Singh v. Union of India (AIR 1991 Punjab and Haryana 54), on Governor's report on facts disclosing failure of Constitutional governance in State of Punjab President's Rule was imposed. It was held that Governor's report was to be read as a whole and on such reading it appeared that satisfaction of the President was neither arbitrary nor for any extraneous consideration. In view of the case-law from Indian jurisdiction it appears that in the Indian Constitution satisfaction of the President mentioned in Articles 123 and 356 has been made justiciable but these provisions are somewhat different from Article 58(2)(b) in our Constitution which gives higher status to the President to exercise his discretion. In any case the scope of the power under Article 58(2)(b) has been examined by this Court in great detail.

66. In the case of The State v. Zia-ur-Rahman and others PLD 1973 SC 49, question of trichotomy of powers between different organs under the Constitution came up for detailed consideration and it was held that Supreme Court has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution that it derives its powers and jurisdiction from the Constitution and that it will even confine itself within the limits set by the Constitution which it had taken oath to protect and preserve but it does claim and has always claimed that it has the right to interpret the Constitution and to say as to what a particular provision of the Constitution means or does not mean, even if that particular provision is a provision 'seeking to oust the jurisdictionof this Court.

67. In the case of Fauji Foundation and another v. Shamimur Rehman PtD 1983 SC 457 it is held that in the Constitutional system of Pakistan though there is trichotomy of powers between executive, legislative and judiciary yet each organ or branch of it operates in defined field of course with inherent limitations that one organ or sub-organ may not encroach upon legitimate field of other.

68. it is held in the case of Dilip Kumar Sharma and others v. State of Madhya Pradesh AIR 1976 SC 133 that if two constructions are possible upon the language of the statute,.the Court must

choose the one which is consistent with good sense and fairness, and eschew the other which makes its operation unduly oppressive, unjust or unreasonable, or which would lead to strange, inconsistent results or otherwise introduce an element of bewUdering uncertainty and practical inconvenience in the working of the statute.

69. 1 am of the opinion that in view of the relevant case-law mentioned above, this Court as highest Court of the country has to act within the limitations prescribed by the law while in the process of interpretation of the Constitution and the law. This Court can interpret but not legislate and while interpreting can narrow down the scope but not so much that the provision under the comment is rendered almost redundant. So far Article 58(2)(b) of the Constitution is concerned, it is already interpreted and construed very ably in the cases of Haji Saifullah Khan and Khawaja Ahmed Tariq Rahim as mentioned above. Power under Article 58(2)(b) can be exercised by the President when there is actually an imminent breakdown of the Constitutional machinery and there is failure of not one but many provisions of the Constitution giving impression that country is being run by methods extra Constitutional. The President must form his opinion on the basis of material before him. From the FuIl Bench of 11 Judges, which has heard the present case, 7 Judges are same, who heard the previous case of Ahmad Tariq Rahim in the Full Bench of 12 Judges of this Court. From those 7 Judges, six upheld

the order of . dissolution passed by the same President dismissing Government of the Prime Minister Ms. Benazir Bhutto dissolving National Assembly. Three more Judges of the present Bench maintained order of dismissal of the Government and dissolution of the National Assembly while hearing Constitutional petitions in the High Courts at Lahore and Karachi. So from the present Bench of 11 Judges, 9 Judges having upheld order of dissolution in the previous case of Tariq Rahim are now of the view that in the present case material in support of grounds of dissolution is not sufficient and order of dissolution is without lawful authority and of no legal effect.

70. With respect I say that I do not feel inclined to agree with the majority view. I am of the opinion that Article 17(2) of the Constitution does not give Fundamental Right to the political party to conclude its tenure of office.

Further I do not agree that by mentioning subversion of the Constitution in the ,order of dissolution, Fundamental Right of the Prime Minister under Article 14 of the Constitution is violated nor there is any justification to conclude that the Prime Minister was being prevented by the President forn V, extending political activity of the executive Government of Federation to the Federally Administered Tribal areas.

71. Somehow or the other I regret to say that I have not been able to reconcile myself to agree with the reasoning advanced for taking the different view now in -this case than from the view

previously taken in the case of Khawaja Ahmed Tariq Rahim when in both the cases the allegations were more or less the same and material produced in support of grounds of dissolution is much more in the present case than in the previous case. One extraordinary feature - of the present case is that the Prime Minister made public address on television criticising the President openly declaring confrontation resulting in situation in which Government of Federation cannot be carried on in accordance with the provisions of the Constitution justifying fully well appeal to the electorate. It could have been left to the political sovereign to decide the matter. I am also of the view that Article 58(2)(b) it an independent provision under which the President is empowered to dissolve the National Assembly in his discretion if he is satisfied that a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. Opinion of the President cannot be substituted by the Court. If he has formed such opinion and the grounds of dissolution are supported by material which was available before him at the time of formation of such opinion, the Court should allow order to stand and political sovereign to give final decision.

72. It is understandable that in the case of Haji Saifullah Khan even if order of dissolution was found to be invalid, restoration of the National Assembly and the Government was not allowed for the reasons that administrative machinery was fully geared up for election which could provide opportunity to all political parties to participate as previous elections were held on non-party basis. Another reason was that writ jurisdiction was discretionary and that discretion could be validly refused because greater harm could have been caused, if relief had been allowed and national interest had to be given precedence over right of individuals. In Tariq Rahim's case the Federal Government of Ms. Benazir Bhutto was dismissed and National Assembly was dissolved. There was material in support of grounds of dissolution and the same was considered to be * sufficient to justify action of dissolution. In the instant case there is complete ' deviation from the guidelines laid down in the case of Tariq Rahim. So far consideration and availability of material in support of grounds of dissolution is concerned although more grounds exist in the present case as alleged in the order of dissolution for which voluminous material is produced but the -same is rejected for reasons, which to me, appear to be insufficient.

73. May be I am wrong and am imagining the things unnecessarily and I hope that I am wrong but from what it appears to me that there is no difference in the case of Khawaja Ahmed Tariq Rahim and in the present case, so far allegations, grounds for dissolution and material produced in support thereof are concerned. In the present case departure is made and same yardstick of evaluation of material is not applied. Seemingly it so appears that two Prime Ministers from Sindh were sacrificed at the altar of Article 58(2)(b) of the Constitution but when turn of Prime Minister from Punjab came the tables were turned. Indisputably right at the very outset of the proceedings indications were given that decision of the Court would be such which would please the nation. It remains to be seen whether what would please the nation, would be strictly according to law or not. In, my humble opinion decision of the Court. should be strictly in accordance with law and not to please the nation.

What may please the nation may turn out to be against the letter and spirit of the law and the Constitution.

74. In my opinion for the present crisis in the country the solution is not restoration of the Government and the National Assembly but appeal to the

political sovereign which is a Constitutional remedy. At the time when order of dissolution was passed, two pillars of the Government of Federation had already reached point of no return and reconciliation between them does not

appear to be likely. In such circumstances it would be futile to hope that chapter of bitterness in the past would be forgotten and, they would work hand in hand for smooth sailing and success. In such circumstances restoration would do more harm than good and political situation would deteriorate

further giving open licence to horse-trading to both sides for winning support -of the members of the Assemblies by fair means or foul, which would most certainly be inconsistent with running of the Government and flourishing of the democratic institution in accordance with the provisions of the Constitution. I have written this dissenting judgment just to keep the record straight and to say that in my humble .opinion it was a fit case in which same result should have been announced as in the previous case of Tariq Rahim. I would, therefore, dismiss this petition.

MUHAMMAD RAFIQ TARAR, J.-I have carefully gone through the very learned judgments of the Honourable. Chief Justice and my illustrious brothers Shariur Rahman, Ajmal Mian, Saleem Akhtar and Saeeduzzaman Siddiqui, JJ. They have exhaustively dealt with all the issues arising in the case. However in view of the importance,of the questions involved I consider it appropriate to apend a note of my own so as to highlight certain features arising in the, case.,

2. Brie-fly stated, the facts of the case, are that President ~Ghulam Ishaq Khan, vide his order, dated 18th April, 1993, dissolved the National Assembly of ‘Pakistan, in exercise of Wis power, under causc (2)(b) of Article 58 of the Constitution of Pakistan, 1973, with immediate effect and dismissed the Prime Minister and the Cabinet, who ceased to hold office forthwith. Mr. Nawaz Sharif, the dismissed Prime Minister has challenged, directly in this Court, the order, -through these proceedings, for various reasons, alleging that they have no nexus or

connection with the ground mentioned in Article 58(2)(b) and therefore, the order of dissolution merits to be set aside.

3. The respondents objected to the maintainability of the petition on the ground that there being no enforceability of the fundamental rights involved, the petitioners ought to have initiated their proceedings, in the High Court, under Article 199, and not directly in this Court. 1, however, do not agree and adopt the reasoning of the learned Chief Justice and my brother Shafiur Rahman, J., in this regard and hold that the petition is maintainable.

4. The Article 58(2)(b), under which the above action had been taken, was inducted for the first time, in the 1973 Constitution, by P.O. 14 of A85, with effect from 2nd March, 1985. It was a part of the package by which General Zia-ul-Haq wanted to change a figurehead President into a potent one. Earlier, under Article 48, the performance of his functions by the President were couched in the phrases like 'the President may' (Art.54), 'the President shall' (Arts. 99r and 100), 'the President may direct' (Arts. 104, 145), 'the President shall have power' (Art. 45), 'the President after consultation with' (Arts. 72, 177, 193), 'the President is satisfied' (Arts. 232, 234), 'the President may by Order' (Art. 268(3)), (the list is indicative but not exhaustive) but in all those matters he was bound by the advice of the Prime Minister.

,5. Not only that the clause (3) of Article 48 further provided that:

"Save as otherwise provided in any rules made under Article 99, the orders of the President shall require for their validity the countersignature of the Prime Minister."

The Articles 48 was substituted by the P.O. 14 of 1985. It was then amended in the present form by the 8th Amendment, to divide the functions of the President into two air-tight compartments. The President was to be bound by the advice of the Cabinet or the Prime Minister in all the matters except those in respect of which he was empowered by the Constitution to act 'in his discretion'.

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6. The Article 58(2) when amended by P.O. 14 of 1985 had also a similar new phrase added, which reads as follows:

"The President may also dissolve the National Assembly in his discretion, where in his opinion, an appeal to the electorate is necessary."

However, when Article 58(2) was further amended by the 8th Amendment, it started with the prefix notwithstanding anything contained in' clause (2) of Article 48 1. This clause came up for interpretation in Haji Saifullah case (infra) where the Supreme Court held as under:

"Thus, notwithstanding the addition of words 'and the validity of anything done by the President in his discretion shall not be called in question on any -ground whatsoever' after the words "Notwithstanding anything contained in clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution, to do so" in clause (2) of Article 48 of the Constitution, the provisions of Article 58(2), as finally adopted by the Parliament in the Constitution (Eighth Amendment) Act, 1985, had the effect of placing some limits on the otherwise absolute powers of the President. Article 48(3) which made the President the sole judge of the validity of his discretion, was omitted...."

7. The result was that though the President had made an inroad, in the all supremacy of the Prime Minister, under Article 48, with the phrase, 'in his discretion' and avoided in certain matters his binding advice, yet he did not succeed in his attempt in respect of Article 58(2). Thus notwithstanding the words 'in his discretion', an action by the President, even under Article 58(2), lost exclusiveness and immunity and became justiciable.

8. General Muhammad Zia-ul-Haq, its architect, made the first use of clause (2)(b) of Article 58, on 29th May, 1988, when he dissolved the National Assembly and the Cabinet of Mr. Muhammad Khan Junejo. The order of General Muhammad Zia-ul-Haq was challenged in the Lahore High Court, where it was held that the impugned ordir bore no nexus or connection with the Constitutional power and was, therefore, unconstitutional. The High Court, however, refused to restore the National Assembly for the reason that:

"The entire administrative machinery of the Federation and the Provinces is geared up to hold the general elections on the 16th November, 1988, and the people, who were previously not in a position to vote for the candidates belonging to certain political parties which had been banned, are now ready and impatient to exercise their vote freely and voluntarily without any restriction". (See Khawaja Muhammad Sharif v. Federation of Pakistan PLD 1988 Lah. 725).

9. An appeal was taken to the Supreme Court and it may be useful to reproduce the rule laid down by it, in that case reported as Federation of Pakistan v. Saifullah Khan PLD 1989 SC 166:

"The expression 'cannot be carried on' sandwiched, as it is, between 'Federal Government' and 'in accordance with the provisions of the Constitution', acquires a very potent, a very positive and a very concrete content. Nothing has been left to surmises, likes or dislikes, opinion or view. It does not concern itself with the pace of the progress, the shade of quality or the degree of performance or the quantum of achievement. It concerns itself with the breakdown of the Constitutional mechanism, a stalemate, a deadlock in ensuring the observance of the Constitution."

10. The Court also quoted with approval, the following observation of the I Law Minister, made in the Parliament, at the time of introducing the a amendment to the Constitution, in order to explain its object. He stated that it v was meant to place a check on the President and to meet with the conditions as developed in 1977, attracting suspension of the Constitution and imposition of P Martial Law. He said:

"In that case, when the machinery of the Federation is totally blocked and it becomes absolutely impossible for the Federal Government to function in that case, the President will dissolve the Assembly."

11. Thereafter, the Court scrutinised each ground of the Order separately t to see if it had any nexus or connection with the object of clause (2)(b) of the 4 Article 58 and found that none existed. It, however, refused the relief, after I holding the impugned order as unconstitutional, on the ground that---

"the whole nation is geared up for elections and we do not propose to do anything which makes confusion worse confounded and create a greater state of chaos which would be the result if the vital process of elections is interrupted at this juncture."

it may be mentioned here that the proceedings in that case had been taken up after about three months of the passing of the impugned order and when the election process bad reached the crucial stages.

12. /On 6th August, 1990, Mr. Ghulam Ishaq Khan, the present President of Pakistan, under the same provision of the Constitution and by,a reasoned' order, dissolved the National Assembly and the Cabinet of Mohtarama Benazir Bhutto as the Prime Minister of Pakistan. The order was challenged in various High Courts. Five of the petitions came up before the Lahore High Court for consideration. In reply to the allegations made therein, the federation of Pakistan riled a written statement controverting the allegations to the following effect and annexed therewith several documents:

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"Reference was made in detail to the existence of facts, like corruption and horse-trading among the members of the National Assembly, misuse of D.I.B. Secrets Service Funds and PAY. and P.I.A. aircraft during No-confidence Motion against the former Prime Minister, nonconvening of meetings of Council of Common Interests and National Finance Commission, ridiculing the Senate and Judiciary, undermining the Civil Service structure and service of statutory corporations tapping <31 telephones of dignitaries and political personalities, non-giving of powers under Article 245 of the Constitution to the Army already deployed to control internal disturbances in Sindh and existence of unabating confrontation between the Federal Government and two of the Provincial Governments to show that the President had rightly exercised his jurisdiction to dissolve the National Assembly, to appoint Care-taker Cabinet and fix the 24th of October for fresh elections.-

13. The High Court, following the case of Saifullah Khan (supra), unanimously held that "The grounds which weighed with the President for passing the impugned order had direct nexus with the preconditions prescribed by Article 58(2)(b) of the Constitution" and so the Government of the Federation could not be carried on in accordance with the provisions of the Constitution, and an appeal to the electorate was necessary. See Ahmad Tariq Rahim v. Federation of Pakistan PLD 1991 Lah. 78.

In appeal, the Supreme Court, by majority, in the case reported as Ahmad Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646 at 664-5, laid down the following rule:---

"It is an extreme power to be exercised where there is an actual or imminent breakdown of the Constitutional m achinery, as distinguished from a failure to observe a particular provision of the

Constitution There may be an occasion for the exercise of this power where there takes place extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but by methods extra-Constitutional."

14. Rustam S. Sidhwa, J. expressed his view at pages 687-8 of the above report as under:---

"The word 'cannot' (in Articles 58(2)(b) and 112(2)(b)) presupposes a Constitutional inability in the nature of a breakdown or dislocation .... The words 'and an appeal to the electorate is necessary' highlight the breakdown to be of such a magnitude that an appeal to the electorate is perhaps the only remedy to the situation .... The wording of the two provisions are sufficient to admit of a flexible approach either way and, without being dogmatic in interpreting these provisions, the facts of the case, in the background of overall situation and political climate then prevailing and the reasons leading to the breakdown, would, all taken together, determine what the correct approach should be."

Then referring to an Indian case from Rajasthan AIR 1977 SC 1361, para. 40 the learned Judge further observed as under:---

..The same position, obtains for these two provisions in our jonstitution. Preventive, so as to prevent failure of the Constitutional machinery taking place by nipping in the bud a breakdown that is imminent. Curative, so as to mend the ill-effects of a breakdown that has occurred

The words 'cannot be carried on in accordance with the provisions of the Constitution', could also cover non-compliance of almost every provision of the Constitution with this background one

would have to act carefully when appraising a case under Article 58(2)(b) which relates to dissolution of Assembly .....

.... these provisions, i.e. Articles 58(2)(b) and 112(2)(b), in keeping with the spirit of balance and restraint, would have to be construed in their circumscribed sense to cover only cases of failure or breakdown of Constitutional machinery, or else it would lead to Constitutional dictatorship. To hold that a particular provision of the Constitution was not complied with, the National Assembly could be dissolved under Article 58(2)(b) of the* Constitution, would amount to an abuse of power. Unless such a violation independently was so grave that a Court could come to no other conclusion

but that it alone directly led to the breakdown of the functional working of the Government, it would not constitute a valid ground."

15. According to A.S. Salam, J., the power of the dissolution of the National Assembly had vested exclusively in General Muhammad Zia-ul-Haq by virtue of Article 41(7) and it died with him in the air crash. So, in his view, it was not available to his successor. No other member of the Court shared his views. Even Sajjad Ali Shah, J, who concurred with him in the following observation expressly disagreed with the above. The view shared by the two learned Judges is as follows:---

"Further, the provision is that the Government of the Federation cannot be carried on 'in accordance with the Constitution'. Where was the breakdown of the Constitution? The provision may come into play only when the Constitutional machinery has completely broken down. Where had it broken down or come to standstill? All Constitutional authorities were there and functioning."

16. The net result arrived at after the entire discussion, in the above two cases is, that the Court accepted the proposition that the President can dissolve the National Assembly for the acts of commission and omission of the Prime Minister or the Cabinet, and that it has to test each and every ground of the President for dissolving the National Assembly, on the following touchstones,

and see that they satisfy the prescribed requirements, in order to condone the action taken:

(a) Was there an actual or imminent breakdown of the Constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution?

(b) Has there taken place any extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution, creating the impression that the country is governed not so much -by the Constitution but by methods extra-Constitutional?

(c) is there an imminent danger of breakdown of the Constitutional machinery so as to take an immediate action for nipping it in the bud?

(d) Is it imperative to mend the ill-effects of a breakdown that has occurred ?

17. It is pertinent to note that in both the cases discussed above, the Article 58(2)(b) was looked at from a different perspective, resulting in the observations reproduced above. There, the acts of omission and commission of the Cabinet and the Prime Minister were made the basis for dissolution though they are responsible not to the President but to the National i Assembly. However, in my humble view the right direction to appreciate its real and intrinsic worth and to perceive its natural and correct import is different and, therefore, a different view of the matter may emerge, if it is beheld from that angle. Article 58(2)(b) mentions in its text, three organs of the State:

(i) The President;

(ii) The National Assembly; and

(iii) The Government of the Federation

All those three organs are very important constituents of the State and the Constitution makes independent and distinct provisions for their creation and demise. It may be pertinent to note that the Cabinet and the Prime Minister do not figure there as such.

18. The National Assembly consists of the chosen representatives of the people, as mentioned in the Objectives Resolution. They are elected through adult franchise and they form/create the National Assembly under Article 51. Its normal term of office is 5 years. The members can individually resign under Article 44, so that if all the members resign, it will result in the dissolution of the entire National Assembly. However, Article 58 * also empowers both the President and the Prime Minister, separately, to dissolve the National Assembly, only for the specific reasons given there.

19. Article 41 provides for the election of the President by the members of the National Assembly, alongwith others. Vide Article 90 of the Constitution, the executive authority of the Federation vests in him, to be exercised by him either directly or through officers subordinate to him, in accordance with the Constitution. Article 99 further provides that all executive actions of Federal Government shall be expressed to be taken in the name of the President and the manner of doing

that is to be provided by rules. His tenure of office is given in Article 44. The normal period is 5 years. The President can, however, be removed from office even earlier than five years, on account of physical or mental incapacity or by impeachment on a charge of violating the Constitution or gross misconduct, by a two-third majority of the members, in a joint sitting of the Senate and National Assembly, after investigation and giving the President an opportunity of defence. His removal for subverting the Constitution is not there and has to be located somewhere else, as discussed later in para. 30.

20. The Government of the Federation comprises of the President and the Cabinet. The President has already been discussed above. The Cabinet of Ministers comes into being under Article 91 and its duty under Article 91(l) is to aid and advise the President in the exercise of his functions. It is constituted of a Prime Minister and Ministers to be appointed by the president, on the advice of the Prime Minister, under Article 92. The Prime Minister must command the confidence of majority of the Members of the National Assembly. Under clause (4) of Article 91, the Cabinet together with Ministers and-the Ministers of State is collectively responsible to the National Assembly.

21. The Prime Minister is also obliged under Article 46 to communicate to the President all decisions of the administration of the affairs of the Federation and proposals for legislation and to supply such information as may be called for by the President. Again under clause (c) of Article 46 the President may require the Prime Minister to submit for consideration of the Cabinet any matter on which a decision has been taken by the Prime Minister or a Minister but which has not been considered by the Cabinet. Under the proviso to Article 48(l) the President may require the Cabinet or the Prime Minister to reconsider the advice sent to him either generally or otherwise before he is obliged to act on it. The President thus is part of the administration and has the power to influence the decisions of the Cabinet, the Prime Minister and the Ministers, which are to be made and enforced in his name.

22. Thus, the President is the ‘ executive head of the Federation (Government of the Federation) and all actions are taken in his name. He also participates to some extent in the executive decision-making. Being a part of the Government of the Federation, he cannot blame the Prime Minister and the Cabinet alone for any unwise, illegal or even unconstitutional acts, what to speak of punishing them. If the President thinks that the Cabinet was aiding and advising him illegally, unconstitutionally or against public interest, despite his caution and warning, the only way open to him, under the Constitution, is to inform the National Assembly under Article 56 to which the -Prime Minister/Cabinet is responsible or dissociate himself by resigning his office under Article 44(3) of the Constitution informing the ‘nation about his doing SO. However, he cannot blame the Prime Minister or the Cabinet in case the National Assembly raises no objection or endorses the objected to action or policy decision.

23. Again the President has no power to dismiss the Cabinet of his ownThe sub-Article (5) of Article 91 provides that the Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his power unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly, in which case, he shall summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly. Thus, the President has no power to remove the Prime Minister or dismiss the Cabinet as long as the National Assembly offers its confidence to him and protects him.

24. it is a well-established principle of law that what is not permitted to be .in done directly cannot be done I directly. It has been noticed above that the Prime Minister who enjoys the confidence of the National Assembly cannot be removed or dismissed by the President. The reason may be that only the chosen representatives of the people are the repository of the sovereign power. they, therefore, know best that is good for the people and what is not. So if they approve the policies and the actions of the Government,. the President has no power of his own of interference, in any way.. Be that as it may, the President could not get rid of the Prime Minister or the Cabinet indirectly, for the alleged faults of theirs, by dissolving the National Assembly.

25. The National Assembly is not subordinate to the President. T*he* President is, in fact, a part of the Parliament (National ~ Assembly and the Senate) but he can neither participate in the discussion nor vote. He can address them (Article 56), and is only to grant his assent to a Bill passed by the 'Mailis-e-Shoora (Article 75). When a Bill is presented to the President for his assent, he can only once return it to the Majlis-e-Shoora, for reconsideration, in case he has any objection to it. However, if it is presented to him again after reconsideration, he cannot refuse to give his assent, even if he personally dislikes, or besides every word of it. Further, as regards a money Bill, he cannot even require it, howsoever obnoxious it may be in his opinion. The reason is that an assembly of the chosen representatives of the people is considered much wiser and is supposed to know more than -any single individual, howsoever prudent and intelligent he might think and claim he is.

26. It is thus quite clear from the above discussion that the President has neither a power to dismiss the Cabinet nor is he a controller or a supervisor of the National Assembly. Rather, he is compelled to accept and give his assent to whatever is done by the Cabinet on the one hand and the National Assembly alongwith the Senate on the other. He, according to the various provisions of the Constitution discussed above can, at the most, participate, individually, as a counsel or a warner. Like any other member of the Cabinet, he can influence but cannot veto. Rather he has an edge over others as he can once veto the decision of the Prime Minister, the Cabinet or a Minister.

However, if his counsel or warning is not heeded -to, he has, like any other member of the Cabinet, either to accept the things as presented to him, by the majority decision or quit if he so desires.

27. With the above backdrop, I would revert to the question in hand. The President is empowered to dissolve the National Assembly but only in the situation mentioned in Article 58. 1 may, therefore, reproduce Article 58(2)(b), for consideration. It says--

"Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion:--

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the 'provisions of the Constitution and an appeal to the electorate is necessary."

28. It must be appreciated that the Government of the Federation comprises the President as the head of the executive (Article 90), and the Cabinet of Ministers, with the Prime Minister at its head (Article 91). They collectively are responsible for running the Government of the Federation, in accordance with the provisions of the Constitution. The Cabinet is collectively

responsible to the National Assembly under Article 91(4), while the President is under the control of the Parliament, i.e. the National Assembly and the Senate, under. Article 47. The term 'collective responsibility' has been ably discussed by my learned brother Shafiur Rahman, J., in his luminous judgment with which I respectfully agree. Therefore, after a decision is made, no

constituent of that decision-making body can absolve himself of it, whether he participated in the decision-making or not; whether he opposed the motion or proposed any amendment; or was even absent at that time. In that view of the matter, the scrutiny of the governmental actions would then lie with the Parliament, though even they cannot annul them as such, without formally legislating against them, or by passing a resolution disapproving a particular act of commission or omission of the Prime Minister or the Cabinet.

29. It has also been noticed in Article 91(5) that the President cannot, straightaway, dissolve the National Assembly even if the Prime Minister fails to get a vote of confidence from the National Assembly. He. h ' as to first ascertain practically, under Art. 58(2)(a), that no other member enjoys the confidence of. the National Assembly, before he acts to dissolve. Thus the President has neither any control over the Cabinet nor has the National Assembly been placed at his mercy, in his discretion or at his bald pleasure. It is thus only the National Assembly which can decide the

removal of one Prime Minister and his Cabinet, by withdrawing its support and electing another Prime Minister before the President may act under Article 58,. for Constitutional reasons, justiciable before the superior Courts of Pakistan.

30. The upshot of the whole discussion is that the President has no power to dismiss a Prime - Minister, directly or indirectly, howsoever illegal unconstitutional or against public interest his actions might look to him. But if the person holding the office of the President pleases to remove a Prime Minister, who enjoys the confidence of the National Assembly, under the cloak of the powers contained in Article 58(2)(b) by dissolving the National Assembly, he may be accused of subverting the Constitution within, the meaning of Article 6 of the Constitution. It is pertinent to note that the protection provided in Article 248 from accountability and the remedy provided in Article 47 of impeachment, do not cover the acts of subversion or abrogation of the Constitution or even attempting or conspiring to do so. The dissolution of the National Assembly, therefore, must be strictly covered by Article 58(2)(b), in order to be condoned by the Courts and to avoid an ‘action under Article 6 of the Constitution.

31. Article 58(2)(b) foresees one and only one situation, for dissolution of the National Assembly and that is where in the opinion of the President, the ‘Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. It is thus not a mere omission to act, on or in violation of, one or more Articles of the Constitution but a state of checkmake or a deadlock, which may be brought about by violation of one or more provisions of the Constitution separately or collectively,, as extracted from the two previous judgments of the Supreme Court and’-given in para. 16 above.

Further, the words “cannot be carried on” show the helplessness of the Cabinet, in a situation, unchecked or brought about by the National Assembly or some outside force against which even the National Assembly cannot afford a protection or cure, so that the Cabinet cannot be helped to carry on the Government of the Federation and it will have to go, with the National Assembly.

32. It must be appreciated that premature dissolution of an Assembly is a very severe punishment to members and moreso. to the people and the national exchequer. The members lose their remaining term of office, provided by the Constitution and they have to spend millions on fresh elections, with no guarantee of success. The nation is deprived of the continuance of the policies and projects, is exposed to instability and uncertainty, loses the confidence of the Governments and investors at home and abroad, faces economic and administrative chaos and is required to spend crores of rupees on the new election. So, in the case of dissolution of Assembly, for the misdeeds of the Cabinet, the punishment is awarded; not only to those few members who are in the Cabinet but also to the other majority of the members of the National Assembly whether they

are in the opposition, the Independents or with the. Treasury and also the people, for no fault of theirs.

33. A further question to be answered is, does the Constitution permit P to pnnish N for the offence of G? The answer is an emphatic no. The import of the Fundamental Rights 9. 10 and 12 to 15 supports the view. No system of law anywhere in the world permits that. The Holy Qur'an announces emphatically that "Each man shall reap the fruits of his own deeds: no soul shall bear another's burden." (Q.6:165). In that view of the matter it will be wrong to say that the President has the power, to dissolve the National Assembly, for the reason that the Government of the Federation, in his view, is acting in illegal or unconstitutional manner or it cannot be run in accordance with the Constitution, because of its acts of commission or omission.

34. The fault has thus to be found, not in the working of the Prime Minister or the Cabinet but in the working of the National Assembly. Again, it is not every fault but only that fault which has rendered the working of the Government of the Federation impossible and has also made in appeal to the electorate necessary. What such faults can be? As the form of Government being practised in Pakistan is derived from the parliamentary form of the United Kingdom, one may wc~ help from where this system is prevalent, Dicey, In his illustrious work (The, Law of the Constitution), 1%0 Edition, 4t page 420, quotes from Freeman to say as follows:

"A Ministry which is outvoted in the House of Commons is in many cases bound to retire from office.

A Cabinet when outvoted on any vital question, may appeal once to the country by means of a dissolution.

The, party who for the time being command majority in the House of Commons, have (in general) right to have their leaders placed in office."

35. Dicey-himself at pages 426-427 says: 'Thus, to say that a Cabinet when outvoted on any vital question are in general bound to retire from office, is equivalent to the assertion, that the prerogative of the Crown to dismiss its

servants at the will of the Queen must be exercised in accordance with the, wish of the Houses of Parliament .....

36. Wade in his Constitutional Law, 7th Edition, at page i18 says that "A Prime Minister, whose Government is defeated in the House of Commons on a major issue, is expected either to resign or to request a dissolution". At page 82, he states: "There can never be any justification for the dismissal against the advice of. the Primp Minister of a Ministry which commands a majority in the House of Common's Only if a break in the main political parties took place could the personal discretion of the Sovereign become the paramount consideration .... If the Sovereign 'can be satisfied that (1) that an existing Parliament is still vital and capable of doing its job, (2) a general election would be detrimental to the national economy, more particularly if it is followed closely on the -last election, and (3) he could rely on finding another Prime Minister who was willing to carry on his Government for a reasonable

(Muhammad Rafla Tarar Period with a working majority, the Sovereign could refuse to grant a dissolution to the Prime Minister in office".

37. Mr. Strong in his 'Modern Political Constitutions' at Page 241 states that: "The Cabinet in Britain is, therefore, dependent on the good opinion of Parliament, which, under modern conditions, means the confidence of the House of Commons. This implies that the ultimate the electorate. As Walter Bagehot acutely pointed out, the Cabinet is a creature, but unlike all other creatures, it has the power of destroying the creator, i.e., the House of Commons. For if the Cabinet is defeated in the Commons it can, instead of resigning, advise the Queen to dissolve the Assembly upon which it depends.

38. It will be seen that the deadlocks emerge from the working of the legislative bodies and jam the wheel of the Government. So, no action in the nature of dissolution of the National Assembly or dismissal of the Cabinet by the President will be justified where the Prime Minister enjoys the Confidence of the House and no deadlock has appeared because of the working of the National Assembly. The result is that if the National Assembly is working smoothly and there, exists no deadlock for the Government to carry on its functions; the President neither has the power to dismiss the Prime Minister and his Cabinet nor can he dissolve the National Assembly.

39. Another important consideration to be closely looked at is about the phrase and an appeal to the electorate is necessary, as stipulated in

Article 58(2)(b). The circumstances relied on by the President should not only show the situation in which 'the Government of the Federation cannot be carried an in accordance with the provisions of the Constitution' but that nothing else in the Constitution can provide a remedy and therefore, 'an appeal to the elebtorate is necessary., It means that the extreme measure of dissolution must not be resorted to if another alternative is available. An illustration of this is found in Article 58(2)(b). It provided that:

"....the President may dissolve the where, in his opinion---

National Assembly in his discretion

(a) a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly, - in accordance with the provisions of the

Constitution, as ascertained in a session of the National Assembly summoned, for the purpose .....

40. It will be seen that unlike the order of dissolution of the former National Assembly in 1990 (Khawaia Tariq Rahim's, case) the grounds whereof, on judicial scrutiny, were held to have a direct nexus with -the conditions prescribed by Article 58(2)(b) of the Constitution and the material forming basis of the President's opinion found sufficient, the facts and circumstances of this case as given in the judgments of the learned Chief Justice and my brother Shafiur Rahman, J. and which persuaded the President to form his opinion to dissolve the National Assembly and dismiss the Cabinet go to show, without any doubt that they had no nexus or connection with the constitutional power and so the President was punishing the National Assembly for not withdrawing their support to an 'insolent' and 'rude' Prime Minister and the Cabinet.

It appears from the satisfaction, 'as expressed by the President, with regard to the previous conduct of the Prime Minister and his Cabinet, in governance of the country, in his annual address to the joint session of the Parliament, and the other material on the record of the case, from December, 1992, till the speech, dated 17th April, 1993 of the Prime Minister, that the President had no.other grievance and by his impugned action wanted to punish the Prime Minister, for his insolent speech made on the television on the 17th April. Further, the contents of the impugned order neither answer the requirements laid down by the Supreme Court, in its Iwo previous orders, referred to above, as also by the learned Chief Justice and my learned brothers in their judgments referred to in the opening para. nor the view that I have taken'above. The view that the order was passed in a

fit of anger and vengeance is confirmed even by the address and the arguments of the learned R Attorney-General before us in the Court, the tenor whereof was that but for the speech of 17th April the President may not. have dissolved the National Assembly on the next day. The impugned order thus reflects the mind of a person.

41. it is further clear that the President, unfortunately assumed to himself the position of a Judge sitting on the performance of the Government and thought that he had the power to punish the Cabinet for the acts of omission and commission as ascertained by him. He, therefore, taking himself as the Authority and the Cabinet 4s civil servants, inflicted on them the major penalty, as under the Efficiency and Discipline Rules. He. was, however, totally mistaken that the Constitution conferred any such power on him. As said above, the exclusive power in respect of all the charges levelled by him vested in the National Assembly, to whom the Prime Minister and the Cabinet were accountable. The National Assembly, however, did not find any fault with the performance of the Cabinet and consequently took no action. Obviously, the National Assembly seems to have been punished by the President for that omission. His order, therefore, cannot be condoned.

42. The order of the President is not maintainable yet on another ground also. The provisions and the principles as contained in the objectives Resolution are now the substantive and effective part of the Constitution, view of its Article 2A. According to the opening part of the Objectives Resolution the sovereignty over the entire Universe belongs to Allah Almighty alone. The law of Allah is thus supreme, immutable,, unsurmountable and unalterable and every other man-made law repugnant to it must be removed by Parliament or Courts or by other organs of the State -in the mode contemplatedin the Constitution. Almighty Allah has delegated His authority to be exercised by the people of Pakistan, within the limits prescribed by Him, as a sacred trust. Acting against it will thus be breach of trust also.

43. The impugned order is, therefore, declared to be unconstitutional and void and shall be, deemed to have never been passed and promulgated. Therefore, the National Assembly and the Cabinet shall be placed in the same position in which they were before the impugned order of the President was promulgated.

SALEEM AKHTAR,. J.--l have had the privilege and benefit of reading the exhaustive judgment proposed by my learned brother Shaflur Rahman, J., but considering the obivious importance of the Constitutional and the legal questions involved in this case without giving detailed facts which are so copiously narrated in the judgment of my learned borthcr, I feel it appropriate to express my opinion on those issues separately.

2. The petitioner, the former Prime Minister of Pakistan, was elected as a member of the National Assembly in the year 1WO and being the leader of the IJI party commanding majority became the Prime Minister. The National Assembly by an order of the President dated 18-4-1993 was dissolved and the Prime Minister was "dismissed". The order reads as follows:--

"The President having considered the situation in the country, the events that have taken place and the circumstances, the contents and consequences of the Prime Minister's speech on 17th April, 1993 and among others for the reasons mentioned below is of the opinion that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary:--

(a) The mass resignation of the members of the Opposition and of considerable numbers from the Treasury Benches, including several Ministers, inter alia, showing their desire to seek fresh mandate from the people have resulted in the Government of the Federation and the National Assembly losing the confidence of the people, and that the dissension therein, has nullificd its mandate.

(b), The Prime Minister held meetings with the President in March and April and the last on 14th April, 1993 when the President urged him to take positive steps to resolve the grave internal and international problems confronting the country and the nation was anxiously looking forward to the announcement of concrete measures by the Government to improve the situation. Instead, the Prime Minister in his speech on 17th April, 1993 chose to divert the people's attention by making false and malicious allegations against the President of Pakistan who is Head of State and represents the unity of the Republic. The tenor of the speech was that the Government could not be carried on in accordance with the provisions of the Constitution and he advanced his own reasons and theory for the same which reasons and theory, in fact, are unwarranted and miileading. The Prime Minister tried to cover up the failures and defaults of the Government although he was repeatedly apprised of the real reasons in this behalf, which he even accepted and agreed to rectify by specific measures on urgent basis. Further, the Prime Minister's speech is tantamount to a call for agitation and in any case the speech and his conduct amounts to subversion of the Constitution.

(c) Under the Constitution the Federation and the Provinces are required to exercise their executive and legislative authority as demaracated and defined and the re are specific provisions and institutions to ensure its working in the interests of the integrity, sovereignty, solidarity and well-being of the Federation and to protect the autonomy granted to the Provincqs by creating

specific Constitutional institutions consisting of Federal and Provincial representatives, but the Government of the Federation has failed to uphold and protect these, as required, in that, inter alia:

(i) The Council of Common Interests under Article 153 which is responsible only to Parliament has not discharged its Constitutional functions to exercise its powers as required by Articles 153 and 154, and in relation to Article 161, and particularly in the context of privatisatio n of industries in relation to item 5 of Part II of the Federal Legislative List and item 34 ‘of the Concurrent Legislative List.

The National Economic Council under Article 156,and its Executive Committee, has been largely bypassed, inter alia, in the formulation of plans in respect of financial, commercial, social and economic policies.

(iii) Constitutional powers, rights and functions of the Provinces have been usurped, frustrated and interfered with in violation of inter alia Article 97.

(d) Maladministration, corruption and nepotism have reached such proportions in the Federal Government, its various bodies, authorities and other corporations including banks supervised and controlled by the Federal Government, the lack of transparency ‘in the process of privatisation and in the disposal of public/Government properties, that they violate the requirements of the Oath(s) of the public representatives together with the Prime Minister, the Ministers and

Ministers of State prescribed in the Constitution and prevent the Government from functioning in accordance with the provisions of the Constitution.

(e) The functionaries, authorities and agencies of the Government under the direction, control, collaboration and patronage of the Prime Minister and Ministers have unleashed a reign of terror against the opponents of the Government including political and personal rivals/relatives, and mediamen, thus creating a situation wherein the Government cannot be carried on in accordance with the provisions of the Constitution and the law.

(f) In violation of the provisions of the Constitution:---

(i) The Cabinet has not been taken into confidence or decided upon numerous Ordinances and matters of policy.

(ii) Federal Ministers have for a period even been called upon not to see the President.

(iii) Resources and agencies of the Government of the Federation, including statutory corporations, authorities and banks, have been misused for political ends and purposes and for personal gain.

(iv) T here has been massive wastage and dissipation of public funds and assets at the cost of the national exchequer without legal or valid justification resulting in increased deficit financing and indebtedness, both domestic and international, and adversely affecting the national interest including defence.

v) Articles 240 and 242 have been disregarded in respect of the Civil Services of Pakistan. -

(g) The Government of the Federation for the above reasons, inter alia, is not in a position to meet properly and positively the threat to the security and integrity of Pakistan and the grave economic situation confronting the country, necessitating the requirement of a fresh mandate from the people of Pakistan.

Now therefore 1, Ghulam Ishaq Khan, President of the Islamic Republic of Pakistan in exercise of the powers conferred on me by clause (2)(b) of Article 58 of the Constitution of the Islamic Republic of Pakistan and all other powers enabling me, hereby dissolve the National Assembly with immediate effect; and dismiss the Prime Minister and the Cabinet who shall cease to hold office forthwith."

The petitioner challenged this order by filing Constitution petition under Article 184(3) of the Constitution directly in this Court. The petitioner has claimed that fundamental right enshrined in Article 17 of the Constitution has been violated. It has also been alleged that the impugned -order is mala fide in law and fact, unlawful, arbitrary, mechanical, violative of the rules of natural justice and the provisions of the Constitution. A large number of press, clippings have been filed with the

petition to justify the grievance, and the grounds stated in the petition to challenge the validity of the, order of dissolution. The respondents have also filed their counter-alffidavit and produced files containing more than a thousand pages to show that the material for each and every ground stated in the order of dissolution was available to the President, who had honestly, properly and in legal manner bona fide formed an opinion that the Government cannot be run in accordance with the Constitution and therefore the order of dissolution passed by the President is valid and legal and cannot be questioned in this Court. The respondents also raised a preliminary objection that the petition is not maintainable mainly on the ground that no fundamental right of the petitioner has been violated. As the petitioner has relied on Article 17 of the Constitution, it is reproduced as follows:---

"17.---(l) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

(2) Every citizen, not being in the service of Pakistan, shall have the right to. form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or, integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final.

(3) Every political party shall account for , the source of its funds in

accordance with law."

It will however be also convenient to reproduce below Article 184 by -virtue of which the Supreme Court has been conferred jurisdiction to entertain petitions directly involving enforcement of Fundamcntal:Rights:--

184.---(1) The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.

EVIanation.-In this clause, "Governments" means the Federal Government and the Provincial Governments.

(2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratoty judgments only.

(3) Without prejudice'to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part 11 is involved, have the power to make an order of the nature mentioned in the said Article.

3. First, we may understand the nature of Article 184(3). This provision confers power on the Supreme Court to consider questions of public importance which are referable to the enforcement of any Fundamental Rights guaranteed by the Constitution and enumerated in Chapter 1 of Part 11. This power is without prejudice to the provisions of Article 199 which confer similar power with certain restrictions on the High Court. The power conferred depends upon two questions; one, that the case sought to be heard involves question of public importance and two, the question of public importance relates to the enforcement of Fundamental Rights. It is not every question of public importance which can be entertained by this Court, but such question should relate to the enforcement of Fundamental Rights. This provision confers a further safety and security to the fundamental rights conferred and guaranteed by the Constitution. This shows the importance which Fundamental Rights have in the scheme of the Constitution. They cannot be curtailed or abridged and any provision of law or action taken which violates Fundamental Rights conferred by the Constitution shall be void. The nature of jurisdiction and the relief which can -be granted under this Article is much wider than Article 199. It confers a power to make an order of the nature mentioned in Article 199. The word 'nature' is not ' restrictive in meaning but extends the 1A jurisdiction to pass an order which may not be strictly in conformity with Article 199 but it may have the same colour and the same scheme without any restrictions imposed under it. Article 184 is an effective weapon provided to secure and guarantee the fundamental rights. It can be exercised where the Fundamental Right exists and a breach has been committed or is threatened. The attributes of Article 199 of being an aggrieved person or of having an alternate remedy and depending upon the facts and circumstances even laches cannot restrain the power or non-suit a petitioner from filing a petition under Article 184 and seeking relief under it. The. relief being in the nature mentioned in Article 199 can be modified and also consequential reliefs can be I granted which may ensure effective protection and implementation o t e! ,Fundamental Rights. Even disputed questions of facts which do not require voluminous evidence can be looked into where Fundamental Right has been breached. However, in case where intricate disputed questions of facts involving voluminous evidence are involved the Court will desist from entering into such controversies. Primarily, the questions involved are decided on admitted or prima facie established facts which can be determined by filing affidavits. Evidence in support of allegations can be taken

orally in very exceptional cases where the breach is of a very serious nature affecting large section of the country and is of great general importance.

4. Mr. Aziz A. MunsK learned Attorney-General, has contended that a political party has no Fundamental Right to form a Government and further that after the elections, if a person is elected to the assembly, all other rights are governed by provisions of the Constitution and law framed to regulate them. According to the learned Attorney-General Fundamental Right exists only to the extent a person or a political party participates in the election and the following steps for formation of a with that ends Fundamental Right 17 an Government are to be governed by Articles 52, 91, 92 and other provisions of law. Mr. S.M. Zafar, learned counsel for respondent No.3 further contended that there is no Fundamental Right in the duration for which an Assembly may function and no one has a right to continue and function in the Government for a period of five years. According to the learned counsel life of the National Assembly is not relatable to the Fundamental Rights. A person is entitled to participate in the political process but prohibition of participation in political process violates Fundamental Rights. According to him life of National Assembly is a Constitutional mechanism. National Assembly exists under the Constitution, not by virtue of Fundamental Rights. According to him dissolution of National Assembly does not involve Fundamental Right of any member, and it is not relatable to Fundamental Rights. He further contended that the political activity with a view to get power is not for exercising such a Fundamental Right. According to him political parties have bundle of rights including political rights, fundamental rights, conventional rights and the present case falls under the category of political rights and not the fundamental rights. According to him whatever a political party has to do before entering the National Assembly is called Fundamental Right, but the moment election is over and it enters the Assembly, Fundamental Right ceases and whatever is done in the Assembly is in exercise of political rights. Mr. Khalid Anwar, learned counsel- for the petitioner contended that Article 17(2) recognises existence and operation of political parties. The Objectives Resolution, paragraph 8, guarantees political justice which is missing in all other Constitutions. According to the learned counsel it is a Fundamental Right of every citizen or a political party to enter into political activity, form, organise and operate in the Assembly and exercise its power according to law. If any infringement of such rights occurs, it will amount to violation of fundamental rights. In this regard all the, learned counsel have referred to the judgments in Sycd Abul A'ala Moudoodi's case P L D 1964 SC 673, Benazir Bhutto's case PLD 1988 SC 416 and Haji Saifullah's case P L D 1989 SC 166. In the first case it was observed that if a political party has been formed, it has the right to exist subject to restrictions imposed by law. However, in the judgment rendered in Benazir Bhutto's case Article 17 with reference to the parliamentary form of government has been extensively dilated and discussed upon. It lays down that the right to form or to be a member of a political party is not an absolute right, but is subject to reasonable restrictions imposed by law ' in the interest of sovereignty or integrity of Pakistan. Article 17 is a declaration of the right and the restriction in its exercise as authorised by the Constitution. Thus, it is not an absolute or uncontrolled liberty and is accordingly limited in order to be effectively processed. It was observed that the restrictive clause is exhaustive and has to be strictly construed. The significant observations which are directly attracted in the case are: "The words 'right to form' in this sub-Article are not only confined to the commencement of association, but the right includes

the right of continuation of the association as well." A fuller discussion is found at page 531 which reads as follows:--

"Reading Article 17(2) of the Constitution as a whole it not only guarantees the right to form or be a member of a political party but also to operate as a political party. As earlier held, the words 'right to form' are not only confined to its formation but also to its function as a political party. The political party, according to its texture, of being an aggregate of citizens composing the party can exercise the other rights guaranteed under the Constitution like an individual citizen. Again the forming of a political party necessarily implies the carrying on of -all its activities as otherwise the formation itself would be of no consequence. In other words the functioning is implicit in the formation of the party. (See the opinions of B.Z. Kaikaus, J. and Cornelius, C.H., in Abul A'la Maudoodi's case). This being so, the Political Parties Act not being a higher law than the Fundamental Right itself, cannot override or prevail over or be superimposed to make the right operational. The functioning is also explicit from the limitation itself which makes prejudicial activities against sovereignty and integrity of Pakistan actionable. This being so, I fail to comprehend as to how the Political Parties Act which not being a higher law than the Fundamental Right itself can override or prevail upon or be superimposed to make the right operational. It is the guarantee of the right itself which gives it the authority to exercise it. In formulating this argument the learned Attorney-General omitted to notice that the Political Parties Act was enacted on 16th July, 1962, under Article 173 of the 1962 Constitution before the insertion of the Chapter relating to the Fundamental Rights and there was no such provision like Article 17(2) even when these Fundamental Rights were incorporated in that Constitution. It was, therefore, that this Act provided for the definition of political party, the constraints, the remedial provision and the scope of the activities of a political party. Article 17(2) was . inserted for the first time in the 1973 Constitution and came in its present form by the Constitution (First Amendment)

Act, 1974. This sub-Article now authorises the formation of a political party , or any person to be its member and provides constraints to control its activities. In this context, it cannot be argued that it is the -Political Parties Act which makes the exercise of this right operational."

The same view has been reiterated again in Haji Saifullah's cast The law is thus well-settled that'Article 17(2) guarantees the right to form, or to be a member of a political party and to operate as the formation and operation of a political party are two such spheres which by a process of legal path as provided. by the Constitution and law the party attains its goal inside and outside the Assembly. The political functioning and activities of a political party do not end once its members are elected to any Assembly. It has multifarious activities within the Assembly and outside the Assembly. Election is merely a process to choose its representatives bythe political sovereign, i.e., the electorate to authorise them to continue their political activity inside the Assembly. Election is merely a road leading a successful member to enter the Assembly but it does not end there. The process continues transforming into formation of the Ministry or becoming a Minister or to be a leader of the Opposition or member of the Opposition Party, to participate in the debates and discharge all such Constitutional and legal duties which are enshrined in the Constitution,

responsibility of which is cast on the members. The elected members have far more responsibility than the members of the political parties working outside the Assembly as an unelected representative. The Minister is not only collectively responsible to the National Assembly, but he is also accountable to the people. Thus, if the political right as conferred by Article 17 is violated in breach of the provisions of the Constitution, Article 184(3) can be invoked for violation of Fundamental Rights.

5. The infringement of Fundamental Rights can be in many ways. At times even a law made by the legislature may offend a Fundamental Right and to that extent it may be void, but in certain cases the law may not be void, but the machinery adopted and the orders passed under it may be such which violate the Fundamental Rights, they are thus challengeable. The same principle will apply where the Constitution imposes any restriction on exercise of a Fundamental Right and provides parameters and conditions for exercise of such power. Any authority or person exceeding that jurisdiction passes an order which is not within the framework of the restrictions imposed, then such order violates the Fundamental Rights and can be scrutinised by this Court as provided by the Constitution. Therefore, I do not agree with the learned Attorney-General that the order passed does not affect the right conferred under Article 17(2). It is only to be seen that although the President of Pakistan is empowered to pass an order for dissolution of National Assembly in certain given circumstances, have they been observed without infringing the, Fundamental Right.' Because Fundamental Right can be restricted or controlled in terms of the provisions of the Constitution and no authority can' derive. power from any other source to restrict, abridge, offend or violate Fundamental Right.

6. The question whether political justice as enshrined in the Objectives Resolution after its being made a substantive part of the Constitution can C provide rights equivalent to Fundamental Rights. In view of the observations

made in Hakim Khan's case PLD 1992 SC 595 Article 2A is not a supra- .Constitutional provision but it is a part of the Constitution and, does not override any other provision of the Constitution. The Objectives Resolution inter alia provides as follows:-

"Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice and freedom of thought, expression, belief, faith, worship ana association subject to law and public morality."

The Constitution recognises political justice and guarantees it. In order to see that political justice is done, we have to examine the Fundamental Rights 1C. which guarantee rights based on political justice. Mr. S.M. Zafar, learned counsel has referred to Articles 9, 10 and 24 of the Constitution.

Article 24 relates to economic justice. According to John Rawls' book "A Theory of Justice" relied upon by Mr. S.M. Zafar, political justice is the justice of the Constitution.... "First, the Constitution is to be just a procedure satisfying the requirement of equal liberty, and second, it is to be framed so that all the just arrangements which are feasible, it is more likely than any other to result in a just and effective system of legislation." It was further observed:--

"The principle of equal liberty, when applied to the political procedure defined by the Constitution, I shall refer it to as the principle of (equal participation)."

"It requires that all the citizens are to have an equal right to take part and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply." The learned author thus concludes that "a Constitution democracy can be arranged so as to satisfy the principle of participation".. He further observes that "thus the most extensive political liberty is established by a Constitution that uses the procedure so called bare majority rule. (The procedure in which a minority can neither override nor check a majority) for all significant political decisions unimpeded by any Constitutional constraints". Mr. S.M. Zafar also referred to "The Foundations of Freedom" by Durward v. Sandifer and L. Ronald Scheman in which the purpose and the object of democracy has been illustrated in the following manner:--

"Democracy, as we have defined it, is a complex interaction of forces, all of which must be enabled to operate with reasonable freedom from arbitrary restraint. To secure that freedom we consider that the citizens of a State must be fully confident that the following rights will be operative: the right to life, liberty, and security, under which are included freedom of movement, the right to due process of law, freedom from arbitrary arrest, and the right, to privacy-, equal protection of the laws; the right to free assembly and association; the right to peaceful petition; freedom of thought and expression; the right to the protection of impartial Courts, which includes the right to a fair trial, and freedom from ex post facto laws; and, finally, the right to an education. Many might want to add to this list; it is virtually impossible to subtract from it and leave any meaning to the word democracy.

Life, liberty, and security need no explanation. They are the fundamental precepts of any system of human rights. It is to secure them that 'Governments are instituted among men'. All universal declarations of human rights incorporate them; all the American States recognize their essential nature and guarantee their protection. The reports of the United Nations characterize life as the 'minimum human right" which 'no Government has the right to deny arbitrarily'. Immanuel Kant described liberty as the 'one sole original inborn right belonging to every man in virtue of his humanity. Security is not an

abstract concept, but refers directly to the principles of life and liberty, and to the atmosphere of the society which engenders confidence in their safe enjoyment. As Montesquieu affirmed, 'Political liberty consists in security, or at least in the opinion that we enjoy security."

Article 21 of the Universal Declaration of Human Rights provides: "everyone has the right to take part in the Government of his country directly or through freely chosen representatives. From these observations it is clear that democracy is a method of life which provides and paves way for achieving political, economic and social rights which a human being is entitlted to and almost all of them have been guaranteed- by the Constitution as Fundamental Rights. The political right or political justice does not end with the election to the Assemblies. It is an on-going process which starts with the formation of the political parties, participation in the elections and thereafter to operate and participate in governance of the country by the majority rule. How can in these circumstances be it contended successfully that immediately after the election the political rights cease to exist. It is true that such Fundamental Rights which emanate from Article 17(2) travel to the Assemblies with the process of election and may be regulated by other provisions of the Constitution, namely, Articles 50, 51, 52, 91 and 92, but it will be a far cry to state that these provisions of the Constitution put an end to the fundamental Rights which had started with the formation of political parties. The learned Attorney-General and Mr. S.M. Zafar have both referred to Kh. Ahmad Tariq Rahim V. Federation of Pakistan PID 1991 Lah. 78 at page 116 and relied on the observation that no vested right is conferred to remain in office for three years and similar observation made in the Reference by His Excellency the Governor-General PLD 1955 Federal Court 435. This observation of the Federal Court has been quoted in Haji Saifullah's case at page 290. However, it is to be noted that those observations of the Federal.Court were made at a time when Fundamental Rights were not Conferred and the Constitutional provisions as today did not exist. After the conferment of Fundamental Rights as provided by Article 17(2) and also as envisaged in the Objectives Resolution as quoted above, which gives a supporting foundation to its interpretation and elucidation, it cannot be contended that the political rights end on the doorsteps of the Assemblies.

7. In a democratic just order every citizen has right to equal participation in the political process as required by the Constitution. Every citizen without any discrimination within the frontiers of the Constitution can profev% practise. exercise and operate his right to participate in the governance of the country. He is entitled to form or join a -political party, contest for an elective position and to hold and exercise authority of politically elected office which by virtue oi such political process he is entitled under the Constitution. If the objects of democracy have to be achieved, if economic, social and political justice as enshrined in the Constitution and proclaimed by a political democratic Government have to be attained, then the parties and the members of the Assemblies have to play their role inside the Assembly as well for governance of the country. So long they are not disqualified by Constitution or by law to remain as a member of the National Assemblytheir political right to operate in the Assembly cannot be curtailed, abridged or violated. I am, therefore, of the confirmed view that the petition under Article 184(3) is maintainable

provided the petitioner is able to show that the impugned order has transgressed, impinged and infracted the Fundamental Rights of the petitioner or members of the Assembly or citizens at large. .

8. This aspect brings us to the merits of the case. Before entering into merits of the case it would be proper to first clearly understand the import and meaning of Article 58(2)(b) under which power has been exercised to strike down the National Assembly. This is not for the fist time that Article 58(2)(b) has come up for interpretation and application on the given facts and circumstances. Earlier also it has found dw attention by the Supreme, Court in many cases. Therefore, the meaning and import of Article 58(2)(b) is not obscure; it is now crystal clear and the principles governing the exercise of power under it are also well-settled. The President is empowered to dissolve I the National Assembly if he forms an opinion that the Government cannot be run in accordance with the* Constitution. This power is not absolute or unfettered. The President has first to form an opinion, an objective opinion on the basis of the material before him to come to the conclusion that the Government cannot be carried on in accordance with the Constitution. The formation of opinion being objective in nature can be judicially examined and reviewed by the Courts. While interpreting the Constitution one has to keep in mind the nature of this seared document which is the supreme lax and the law of the laws. While dealing with this aspect of the case in Khalid Malik's case PLD 1991 Karachi 1, 1 had observed as follows:--

"The Constitution is a living organism and has to be interpreted to keep alive the traditions of the past blended in the happening of the present and keeping an eye on the future. Constitution is the symbol of statehood keeping united people of different races, diverse cultural, social, economic and historical traditions. It provides a method of legitimacy to the Government. It is the power behind the organs and institutions created by it. Constitution must be interpreted keeping in view the entire canvass of national fabric be it political, social, economic or religious."

Herein I reproduce certain observations from the judgments of this Court to illustrate the meaning of Article 58(2)(b):--

Federation of Pakistan v. Haii Muhammad Saifullah Khan P L D 1989 SC 166:

"Thus, notwithstanding the addition of the words 'and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever' after the words 'Notwithstanding anything contained in clause (1), the President shall 'act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so' in clause (2) of Article 48 of the Constitution, the provisions of Article 58(2), as finally adopted by the Parliament in the Constitution (Eighth Amendment) Act, 1985, had the effect of placing some limits on the otherwise absolute powers of the President. Article 48(3), which made the President

the sole judge of the validity of his discretion, was omitted. Article 58 was simultaneously altered and besides providing for the non obstante clause, the substantive part of clause (2) of Article 58 was also modified and the substituted clause now provided that the National Assembly could be dissolved only when a situation arose in which the Government of the Federation could not be carried on in accordance with the Constitution and an appeal to the electorate was necessary.

While explaining these changes on the floor of the National Assembly the Prime Minister and the Justice Minister, as already noted, stated in categorical terms that these changes, were intended to curtail the powers of the President. He (the President), they explained, would still be vested with the powers to diss9lve the National Assembly but this would be a limited power exercisable only when the conditions set out in the amended clause were met.

Thus, the intention of the law-makers, as evidenced from their speeches and the terms in which the law was enacted, shows that any order of dissolution by the President can be passed and an appeal to the electorate made only when the machinery of the Government has broken down completely, its authority eroded and the Government cannot be carried on in accordance with the provisions of the Constitution:

True enough, it is within the discretion of the President to determine whether these conditions are met or not but this discretion has to be exercised in terms of the words and spirit of the Constitutional provision. 'According to his discretion', as explained, relying on Maxwell, in M. Abdul Majid v. The West Pakistan Province and 2 other's PLD 1956 Lah. 615, means:

'According to the rules of reason and justice, not private opinion ,according to law and not humour, it is to be not arbitrary, vague and fanciful, but legal and regular, to be and for substantial reasons and must be exercised within the limits to which an honest man competent in the discharge of his office ought to confine himself i.e. within the limits and for the objects intended by the Legislature.'

The discretion conferred by Article 58(2)(b) of the Constitution on the President cannot, therefore, be regarded to be an absolute one,, but is to be -deemed to be a qualified one, in the sense that it is circumscribed by the object of the law that confers it.

It must further be noted that the reading of the provisions of Articles 48(2) and 58(2) shows that the President has to first form his opinion, objectively and then, it is open to him to exercise his discretion one way or the other, i.e. either to dissolve the Assembly or to decline to dissolve it . Even if some immunity envisaged by Article 48(2) is available to the action taken under Article 58(2) that can possibly be only in relation to the exercise of his 'discretion' but not in relation to his 'opinion'. An obligation is cast on the President by the aforesaid Constitutional provision that

before exercising his discretion he has to form his 'opinion' that a situation of the kind envisaged in Article 58(2)(b) has arisen which necessitates the grave step of dissolving the National Assembly!

Thus, though the President can make his own assessment of the situation as to the course of action to be followed but his opinion must be founded on some material. In the present case the President himself chose to state the grounds on which he was basing his action As the grounds have been disclosed their validity can be examined."

While referring to Article 58(2)(b) Shafiur Rahman, J. observed:--

"There is no express ouster clause in the Constitution with regard to the exercise of this power by the President. Whatever ouster could be implied by the use of the expression 'in his discretion' and 'in his opinion' stands removed by the use of non obstante clause 'notwithstanding', thereby excluding the application of ouster clause contained in Article 48(2) excluding Courts' jurisdiction generally where the powers reserved for the President to be exercised in his discretion are concerned. Additionally the existence of jurisdictional facts capable of judicial ascertainment and adjudication was made a precondition for the exercise of this power. Not to test the exercise of this power by reference to these constitutionally prescribed jurisdictional facts namely-

(i) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution; and

(ii) an appeal to the electorate is necessary,

would in fact amount to a failure to discharge a I duty ordained by the

Constitution itself.

The expression 'cannot be carried on' sandwiched as it is between 'Federal Government' and 'in accordance with the provisions of the Constitution', acquires a very potent, a very positive and a very concrete content. Nothing has been left to surmises, likes or dislikes, opinion or view. It does

not concern itself with the pace of the progress, the shade of the quality or the degree of the performance or the quantum of the achievement, It concerns itself with the breakdown of the Constitutional mechanism,.a stalemate, a deadlock in ensuring the observance of the provisions of the Constitution. The historical perspective in which such a provision found a place in our Constitution reinforces this interpretation."

In Khawaja Ahmad Tariq Rahim's case P L D 1992 SC 646 Shafiur Rahman, i., after recounting historical background and referring to the dissolution of the House of Commons by the King, the dismissal of the Ministry by the Governor-General of Australia and power of the President of India to dismiss the Prime Minister even if he commanded the majority, observed as follows:--

"The specific power,. the jurisdictional requirement all being provided in our Constitution, it is not necessary to either go back deep into history or to infer a residual but necessary power of the President in the matter.

In Haji Muhammad Saifullah Khan's case P L D 1989 SC 166 our Constitutional provision has received full attention and its meaning and scope authoritatively explained and determined. It is an extreme power to be exercised where there is an actual or imminent breakdown of the Constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution. There may be occasion for the exercise of this power where there takes place extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but by methods extra-Constitutional."

9. In interpreting Article 58(2)(b) the Constitutional background is to be taken into, consideration. The Constitution envisages parliamentary form Of Government. Therefore, if any provision has been inserted in the Constitution afterwards infringing, or impinging on the democratic and parliamentary system, it is to be construed in a manner that spirit and form of parliamentary system is not distorted. The sum and substance of the authorities is that the conditions as laid down in Article 58(2)(b) should be strictly construed. Article 58(2)(b) conferring a power to dissolve the National Assembly in certain circumstances cannot be given a liberal or wide meaning. It has to be given a restricted meaning in the facts and circumstances of the case. At this stage I may also refer to the arguments of the learned counsel for the respondents whereby they have sought to support and justify the dissolution by referring to the conventions and the prerogatives of the King in the United Kingdom and also certain judgments of the Indian Supreme Court and High Courts where the State Ministries and Houses were dissolved and dismissed. I agree with the observation of my learned brother Shaflur Rahman, J. that in the presence of clear and specific provisions in our Constitution, conventions and prerogatives of the United Kingdom can be of no avail and

cannot be applied in this country. So far the Indian judgments are concerned, they have been dealt with by my learned brother and I need not again repeat the same. The observations of this Court in several cases and also the observations of the High Court as confirmed by this Court are large and many in number to give guidance, support and to solve the controversy between the parties. The observations have been so exhaustive, so complete in all sense that we perhaps need not look beyond our frontiers.

10. The dissolution order is based on several reasons, amongst which the first it the mass resignation of the members of the Opposition and of a considerable number from the Treasury Benches including Ministers, inter alia, showing a desire to seek fresh mandate from the people have resulted in the Government of the Federation and the National Assembly losing confidence of the people and that the dissension therein has nullified its mandate. It seems that the resignations given by several members of the National Assembly belonging to Opposition and Treasury Benches and also the Ministers led the President to form an opinion that due to dissensions and resignations the National Assembly has lost the confidence of the people and has nullified its mandate. The learned counsel for the petitioner has contended that the resignations relied upon which have been filed alongwith written statement of respondent No.1, are not a resignation in law. This brings us to consider the nature of the resignation -letters. The striking feature is that none of the resignation has been submitt to the Speaker. They are mostly addressed to the Speaker, but were delivered directly or through some other members to the President. According to Mr. Khalid Anwar unless the procedure and law governing and regulating the resignation are complied with it shall not be treated as a resignation. According to the learned AttorneyGeneral the resignations were relied upon for the purpose of forming an opinion by the President, but the reasons given for resigning should be explained by its author. Accordi ng to the learned Attorney-Genera resignations were voluntary act of the members and were delivered not for the purpose of causing vacancy, but to protest against the Prime Minister and the Cabinet and also to show lack of confidence. Mr. S.M. War, however, put it that the resignations were in protest. According to the Attorney-General 88 resignations were delivered to the President out of which 41 resignations delivered by Mrs. Benazir Bhutto were from the members of PDA while 47 resignations belonged to members of the Government party. Twelve resignations were tendered earlier in June, 1992 by the Members of MOM and one seat was declared vacant due to death of Muhammad Khan Junejo. Thus, in all there was a vacancy of only 101 members out of which only 88 had resigned according to the respondents in protest and to show their lack of confidence in the Prime Minister. The stand taken by respondent No.1 is that the resignations were submitted by the members showing their protest and lack of confidence in the petitioner's Government, National Asgembly and the Speaker. The reason for submitting the resignations to the President though addressed to the Speaker was that they had no confidence in the Speaker who according to the general perception was in collusion with the former Prime Minister and was not acting independently. It was alleged that the Speakei was getting preferential and special treatment in allocation of funds for his constituency. As the- Speaker's conduct was objectionable and open to question, the concerned M.N.As. sent their resignations to the President so that their protest and expression of lack of confidence be properly registered. It was further stated that on the basis of these resignations the President could form his opinion in that behalf. However, this stand seems to have been modified by the learned Attorney-General when in the midst of arguments he submitted a. written explanation. The stand

now taken is that "the resignations were meant to be resignations as well as the protests". The tender and acceptance of resignation, the mode in which it is to be given and accepted have been provided by Article 64 of the Constitution and Rule 25 of the Rules of Procedure and Conduct of Business in the National Assembly which read as follows:--

"Article 64.---(l) A member of Majlis-e-Shoora (Parliament) may, by writing under his hand addressed to the Speaker or, as the case may be, the Chairman resign his seat', and thereupon his seat shall become vacant.

(2) A House may declare the seat of a member vacant if, without leave of the House, he remains absent for forty consecutive days of its sittings.

Rule 25. Resignation of seat.--- (1) A member may, by writing under his hand addressed to the Speaker, resign his seat.

(2) If, --

(a) a member hands over the letter of resignation to the Speaker personally and informs him that the resignation is voluntary and genuine and the Speaker has no information or knowledge to the contrary; or

(b) the Speaker receives the letter of resignation by any other means and he, after such inquiry as he thinks fit, either himself or through the National Assembly Secretariat or through any other agency, is satisfied that the resignation is voluntary and genuine, the Speaker shall inform the Assembly of the resignation:

Provided that if a member resigns his seat, when the Assembly is not in session, the Speaker shall direct that intimation of his resignation specifying the date of resignation be given to every member immediately.

The Secretary-General shall, after the Speaker statisfies himself that the letter of resignation is voluntary and genuine, cause to be published in the Gazette a notification to the effect that the member has resigned his seat and forward a copy of the notification to the Chief Election Commissioner for taking steps to fill the vacancy thus caused.

(4) The date of resignation of a member shall be the date specified in writing by which he has resigned or if no date is specified therein the date of receipt of such writing by the Speaker.

(iii) If the letter of resignation is delivered personally, then the Member should inform the Speaker that the resignation is voluntary and genuine.

(iv) If the resignation is delivered by any other means, then the Speaker shall make inquiry into the genuineness of the resignation and ascertain whether it is voluntary or not.

11. From these provisions the procedure for submitting a resignation by a member of the National Assembly emerges as follows:--

(i) The resignation should be in writing under his hand and should be addressed to the Speaker.

(ii) The resignation may be delivered by the member personally or through any other means.

I(v) The Speaker after satisfaction that the resignation is genuine and voluntary, shall inform the National Assembly and then the seat shall be declared vacant.

(vi) The date of resignation of a member shall be the same as specified the letter of resignation or if no date has been ‘given, then the date of receipt by the Speaker.

It is an admitted fact that majority of the resignations were obtained by some persons of authority and power in political life and delivered to the President. Some may have been directly delivered to the President. The resignations mostly do not carry any date. They give different reasons, most of them give their own personal reasons. Some of them have shown and expressed their dissatisfaction with the Government policy. Mr. Khalid Anwar has pointed out that few hours before the order of dissolution was passed by the President Mrs. Benazir Bhutto had met him and delivered resignation letters of 41 members belonging to PDA. According to the learned counsel, they were collected by the leaders of the parties beforehand, some of them much earlier for the purpose of keeping control over them and to utilise them whenever required by such leaders. It has come to light that there is an on-going practice among the political parties to obtain resignation of the members. In the absence of any effective and proper law for controlling horse-trading and floor-crossing, the political parties have adopted a method of controlling them by obtaining resignation from each member which may be utilised at their own convenience. It may be a step to bring discipline among the members but in most cases it may be 4 tool of blackmailing and also to punish such members who differ or revolt against the policies and discipline of the party. To that extent there may be some disciplinary justification for obtaining and holding such resignation, but in order to make it valid and effective besides complying with the procedure laid down, it should be voluntary, genuine and should be intended to vacate the seat. Resignation is a voluntary act of a member or person submitted with the intention to relinquish, relieve or quit that particular post or position and to vacate the same. It cannot be a two-way traffic or an act to use it for any purpose liked by any third person. The resignations obtained by any person politically or officially in authority or not from the members and delivery to a third party other than the person authorised to receive them, with the intention to achieve political gains and create a ground for dissolution of the Assembly can neither form basis for such action nor be justified by any principle of law, morality and ethics.

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12. The learned counsel for the petitioner has referred to various press clippings filed with the petition to show that there was an organised campaign to obtain resignations with the intention to destabilise the Government. At the moment we are not considering the press clippings, which in certain circumstances sometimes exaggerate the situation or describe it according to their own assumptions and inferences. However, the admitted position in this regard is that the resignations were obtained and hardly any resignation was submitted to the Speaker by the members. Those who personally submitted to the President are few in number. In this regard reference can be made to A.K. Fazlul Quader Chaudhry v. Syed Shah Nawaz and 2 othes P L D 1966 SC 105 where it was held that the resignations should not only be addressed to the Speaker, but they should be intended to be delivered to the Speaker. In Mirza Tahir Beg v. Syed Kausar Ali Shah P L D 1976 SC 504 while describing the high office of distinction a Speaker holds in the Assembly, it was held that the Constitution has ordained that the resignation by a member.is effective onlvl when it is “addressed” to the Speaker: it was not intended to be an idle

formality. To relinquish the parliamentary seat by resignation is a grave and a N solemn act". The letter of resignation should be signed by the member voluntarily and submitted personally to the Speaker or transmitted through duly authorised person for delivery to the Speaker. In A.K. Fazlul Quader Chaudhry's case the resignation of Shah Nawaz was rendered ineffective as it was transmitted by the President to the Speaker without any authority from him (Shah Nawaz). The Constitution has thus cast onerous duty on the, Speaker to make inquiry into the genuineness and voluntary nature of the" resignation and also that it has come through an authorised person, if not submitted personally. The Speaker can neither refuse to discharge this duty nor can any authority bypass him. The solemnity and sanctity attached to the resignation by a member of the National Assembly shall be eroded if it is made in contravention of the provisions of the Constitution and the rules and furthermore if they are intended not to vacate the seat, but for any other purpose, ulterior, oblivious or clandestine. Such letters of resignation which do not have any validity or sanction under law can hardly be accepted muchless by a person of high position like the President to assess the confidence the members have in the Assembly and also to assess a situation whether the Government can be run in accordance with the Constitution. Even after tendering resignations of 88 persons the majority members were still in the Assembly. Reference has been made to a decision of the Privy Council in Adegbenro v. Akintola and another (1963) a All ER 544. It has some similarity on facts, but is completely distinguishable. In this case the Governor received a letter dated 21-5-1962 signed by 66 members of the House of Assembly in which it was stated that they no longer supported the Premier. There were 124 members in the Assembly and the Governor on the receipt of this letter removed the Premier as he did not command the support of the majority of the members of the House of Assembly. The respondent challenged the action of the Governor but with the consent of the parties the Chief Justice of Western Region referred the following two issues to the Federal Supreme Court:--

"(I) Can the Governor validly exercise power to remove the Premier from office under section 33(10) of the Constitution of Western Nigeria without prior decision or resolution on the floor of the House of Assembly showing that the Premier no longer commands the support of a majority of the House?

Can the Governor validly exercise power to remove the Premier from officer under section 33'10) of the Constitution of Western Nigeria on the basis of any materials or information extraneous to the proceedings of the House of Assembly?"

The Court answered the first question in favour of the respondent and did not find it necessary to answer the second question. The appellant with the leave of the Supreme Court -filed appeal before the Privy Council which set aside the impugned judgment. The controversy revolved round the interpretation of section 33(10) which provided that the Ministers of the Government of the Region shall "hold office during the Governor's pleasure: Provided that the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of

majority of the members of the House of Assembly." (Emphasis supplied). The respondent's contention *was that 'the Governor cannot Constitutionally take account of anything in matter of 'support' except the record of votes actually given at the floor of the House'. Repelling this contention it was observed:--

"The difficulty of limiting the statutory power of the Governor in this way is that the limitation is not to be found in the words in which the makers of the Constitution have decided. to record their description of his powers. By the words they have employed in their formulae, 'it appears to him', the judgment as to the support enjoyed by a Premier is left to the Governor's own assessment, and there is no limitation as to the material on which he is to base his judgment or the contacts to which he may resort for the purpose. There would have been no difficulty at all in so limiting him, if it had been intended to do so. For instance, he might have been given power to act only after the passing of a resolution, of the House 'that it has no confidence in the Government of the Region', the very phrase employed in an adjoining section of the Constitution (see 'section 31(4), proviso (b)) to delimit the Governor's power of dissolving the House even without the Premier's advice. According to any ordinary rule of construction weight must be given to the fact that the Governor's power of removal is not limited in such precise terms as would confine his judgment to the actual proceedings of the House, unless there are compulsive reasons, to be found in the context of the Constitution or to be deduced from obvious general principles, that would impose the more limited meaning for which the respondent contends.

To sum up, there are many good arguments to discourage a Governor from exercising his power of removal except on indisputable evidence of actual voting in the House, but it is nonetheless impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford to the Governor the evidence he is to look for, even without the testimony of recorded votes."

13. The Constitutional dispensation did not limit the power of the Governor to remove the Premier only after ascertaining the opinion of the majority on the floor of the House. The decision has turned on the interpretation of section 33(10), but the Constitutional Principles enunciated support the petitioner's contention. In our Constitution Article 91(5) governs such a situation which reads as follows:--

„91._--(5) The Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his powers under this clause unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly, in which case he shall summon the National Assembly and require the Prime Minister to obtain 'a vote of confidence from the Assembly."

The exercise of pleasure by the President is conditional and not absolute. An embargo has been imposed on its exercise and the President is precluded from forming his opinion and satisfaction on the basis of anything but the votes given on the floor of the House. As our Constitution contains specific provisions for governing such a situation, and provides a procedure and manner for ascertaining the fact whether the Prime Minister has lost confidence of the House, no other mode of ascertainment can be adopted. It is a well-settled principle that if a statute provides anything to be done in a particular manner, no deviation from the given course is permissible. Any ascertainment of such fact in an unconstitutional manner or extraneous consideration cannot be made basis for removing the Prime Minister. It is thus clear that most of the resignations collected and delivered to the President could not be made basis for reaching the conclusion or satisfying himself that the petitioner did not command confidence of the majority of the. National Assembly. The only course open for the President is to summon the National Assembly and require the Prime Minister to obtain the vote of confidence from the Assembly. The determination of such fact is not left to the President or any authority except the National Assembly. Such resignations could hardly be made a ground for dissolving the National Assembly.

14. It would be appropriate to mention that respondent No.1 has pleaded that the resignations were not delivered to the Speaker as he was not impartial and had obtained favour from the petitioner inasmuch as funds many times higher than given to any other member were allocated for development of his constituency and further that the reference riled by Salman Taaseeer against the petitioner has not been forwarded to the Chief Election Commissioner. The members submitting their resignations had never intended to vacate the seats therefore they could have hardly thought of approaching the Speaker. As resignations were not intended to be resignation in law by the members, it is not necessary to dilate on the excuse offered by them. It may however be pointed out that Speaker enjoys a unique position in the Constitutional structure of the country. He has to preside over the House and is required to maintain decorum and discipline. He should be impartial, just and disinterested and discharge his duties without fear or favour, ill-will or affection. His most important duty is to maintain discipline amongst the members of the Assembly in the House and also control their conduct and utterances even outside the House made in violation of the Constitution. In this regard reference can be made to Article 63 of the Constitution which provides disqualification for membership of the Majlis-e-Shoora. It enumerates several conditions when a person shall be disqualified from being elected or chosen and from being a member of the Parliament. It not only specifies the disqualifications attaching before the elections, but even the disqualifications i which may occur or may be carried unnoticed after the election to the House. Once such disqualifications or misconduct as enumerated therein are noticed and a question arises whether he has become disqualified from being a member, the Speaker shall refer the question to the Chief Election Commissioner and if he declares him to be disqualified, he shall cease to be a member and his seat shall become vacant. Therefore, heavy responsibility has been cast on the Speaker to be watchful and to maintain discipline with strict observance of the provisions of the Constitution. Pointed reference can be made to Article 63(i)(g) which though in existence has never found its importance by any authority or the Speaker concerned. Under sub-clause (2) of Article 63 the Speaker should not wait for the question to be raised, but once it is brought to his

notice or he suo motu notices any breach of anyl' provision of Article 63, it is his duty to refer the matter to the Chief Election Commissioner. The word 'shall' in Article 63(5) indicates that a mandatory duty has been cast on the Speaker to refer the question to the Election Commissioner. If any breach has been brought to his notice, it is not for him to decide it, but he is merely to refer it to the Chief Election Commissioner. Any unreasonable delay in sending such matter to the Chief Election Commissioner is bound to cloud the high status of the Speaker.

15. The next ground for dissolution of the National Assembly is the speech of the Prime Minister Nawaz Sharif made on 17-4-1993 on TV and Radio. It has been stated in the order that during March and April and lastly on 14-4-1993 when the President urged the Prime Minister Nawaz Sharif to take positive steps to resolve the grave internal and international problems confronting the country and the nation was looking anxiously forward to the announcement of concrete measures by the Government to meet the situation, the Prime Minister made a speech on 17-4-1993 to divert the people's attention by making false and fictitious allegations against the President. The tenor of speech was such that the Government could not be carried on in accordance with the provisions of the Constitution. According to the order, the Prime Minister tried to divert the attention of the public and made false accusations and allegations against the President which amounted to "calling for agitation" and that in any case the speech and his conduct amounted to "subversion of the Constitution". According to the learned counsel for the petitioner the speech was made in an explosive background created by the President and the politicians who were visiting the President House in an attempt to destabilise the Government. According to the learned counsel till 14-4-1993 there was no complaint and grievance and no ground existed for dissolution but after the meeting held on 14-4-1993 a press-note was issued by the President House, which was not the agreed one and the draft provided by the petitioner was not accepted. The period of three days could not be sufficient to take remedial steps or to satisfy the public as alleged by the dissolution order and before taking any step, the National Assembly was to be taken into confidence, which was summoned on a requisition dated 18-4-19,93 for 19-4-1993, but the Assembly was dissolved. According to the learned counsel the speech was an expression of regret and frustration and the petitioner had adopted a policy of silence and patience which was taken as cowardice and, therefore, the speech was made. It was a speech for conciliation between the two pillars of the State and not a rebellion or subversion of the Constitution. According to the learned Attorney-General the salient point of the speech was that the very office which should have been the custodian of the Constitution was being used for disintergration. The high office which is supposed to be the symbol of Pakistan's integrity is used by those who are out on the loose to destroy its institution. Mr. Nawaz Sharif stated that he was always taught to respect elders, but unfortunately it was considered his weakness. They have tried to impose compromises on him though he was an elected Prime Minister. There was worst kind of horse-trading ever since in the history of this country in order to throw him out of the office. He was asked from the office of that supposedly respected place not to put in trouble Sardar Asif Ahmad Ali as he had ordered for his arrest himself. It was stated in the speech that his brother Shahbaz Sharif was attempted to be bribed by offering the Premiership and, therefore, he had decided to come to the people of the country. It was also stated that Governor of a Province was also involved in the conspiracy against the mandated Constitutional Government while sitting in Islamabad in the corridors of Aiwan-e-Sadar. The uncer tainty which has been triggered by the political orphans and their

patrons from Aiwan-e-Sadar has taken the whole of the economy in its grip and caused heavy loss to the national economy. These parts of the speech of the Prime Minister were particularly referred by the learned Attorney-General to show that in the existing circumstances the suspicion and the strained relations which have been expressed by the petitioner, there cannot be any reconciliation between them and they cannot work in harmony and thus the Government cannot be run in accordance with the provisions of the Constitution. The learned Attorney-General by referring to these portions of the speech contended that the tone, tenor and conduct of the speech amounts to violation of oath of office by the Prime Minister inasmuch as the office of President was publicly attacked and ridiculed. The institution of protector and defender of the Constitution was reduced to a nullity in violation of law by the Prime Minister; and defamation* and subsequent repeated statement of physical intimidation and threat were also in contravention of law. It was further contended that the speech not only amounted to destroy the institution of Presidency and Prime Minister because it contained charges of conspiracy, intimidation and blackmailing by the President but rendered the State machinery to a standstill. There was a structural breakdown of the two pillars of the State and, therefore, these facts have direct nexus with the dissolution of the National Assembly.

16. Both the parties ‘ have filed a large number of press clippings and respondent No.1 has also riled voluminous files containing documents relating to these charges and also the letters which the President had been writing to the Prime Minister from time to time. The speech of the Prime Minister has a background. In fact the entire episode has a background which started early from the month of March. It seems correct that after the address of the President in the Parliament in December, 1992 there seemed to be no doubt that the relationship of both the parties was cordial. The President had praised

the policies of the Prime Minister. The legislative, economic and other progress in the field were shown to be satisfactory. Although some scepticism was shown in the field of privatisation, yet it was not an offensive one, but in the line of giving guidance or counsel which a President is entitled to give to the Prime Minister and the Cabinet. The month of March had become a hot b.A of rumo6rs and as the learned counsel for the petitioner has put it, of conspiracies, horse-trading and blackmailing. The persons visiting the President had been making speeches and statements giving the impression that they were making all atttempts under the umbrella of the President House to destabilise the Government of the petitioner. The collection of resignations from the members of the National Assembly by few persons and presenting the same to the President was a link in the entire episode. It seems that the Prime Minister had met the President and had offered for conciliation and thereafter a meeting was held on 14-4-1993 in respect of which the following press note was issued by the President House:--

“The Prime Minister called on the President and they reviewed the grave and pressing national and international problems facing the country. The meeting lasted for about two hours.

The President urged the Prime Minister to undertake positive steps as early as possible to address effectively these problems to the satisfaction of the public representatives and the people. The Prime Minister undertook to do so on an urgent basis and to revert to the President with precise measures in this behalf."

According to the petitioner, this press note did not reflect consensus nor the agreement which had been reached in the meeting between the President and the Prime Minister. In that regard reference has been made to a draft memorandum prepared by Prime Minister Secretariat and taken by Mr. Illahi Bakhsh-Soomro and Lt.-Gen. (Rtd.) Abdul Majeed Malik to the President, which reads as follows:--

"The Prime Minister, Mr. Muhammad Nawaz Sharif today called on the President, Mr. Ghulam Ishaq Khan at the Aiwan-e-Sadar. During the two-hour meeting, the President and the Prime Minister went into the causes of the prevalent political situation in the country and it was agreed that necessary measures would be taken to defuse it.

Referring to speculations, discussions and debate on the 8th Amendment, the Prime Minister informed the President that the issue was well behind us. He said the recent statement of three Federal Ministers in this behalf fully reflected his own views.

Discussing the various policies and programmes of the Government, the Prime Minister said he valued the President's guidance and counsel and looked forward to his continued advice at various stages of their formulation and implementation. It was agreed to bring about improvements in the functioning of the Government, wherever necessary.

It was also agreed that such meetings and consultations will be held more frequently to ward off speculations and avoid misunderstandings.

The two agreed that efforts should be made to win back friends and colleagues who have left the Cabinet as a result of misunderstandings and differences. They hoped that most of them will be back before long.

Federal Ministers, Lt.-Gen. (Rtd.) Abdul Majid Malik and Mr. Illahi Bakhsh Soomro joined the President and the Prime Minister at a later stage of the meeting."

This document has been riled by the learned Attorney-General who has relied on it. In this connection, there are two more letters which require attention to understand the purpose and meaning behind the press note and the draft proposed by the Prime Minister. On 12-4-1993 the President's Secretariat issued a letter to the Prime Minister's Secretariat referrip.g to the press clippings of the same date regarding serious allegations levelled by Begum Nuzhat Nawaz widow of late General Asif Nawa7_ While requiring the Prime Minister to appoint a judicial commission it was further stated that "in the meantime immediate necessary measures may have to be taken in respect of the two persons named by the lady as regards the functions of their office". This letter is at page 614 of file 3-A. This letter was replied by the Prime Minister's Secretariat on 13-4-1993 informing that before the receipt of the letter the inquiry commission had been appointed. It further stated that the Government will take prompt action against the persons if so named by the commission in accordance with law. A reply was sent from the President's Secretariat on 15-4-1993, which reads as follows:--

"Subject: Appointmert of judicial commission

Kindly refer to P.M. Seat. u.o. No.8ffl/JS(LAW)/93, dated 13th April, 1993.

(2) Our communication of 12th April was in fact delivered on a most immediate basis by a special messenger and received at 17-50 hours as per attachment. In any case, the matter was mentioned that morning by the President to Mr. Shahbaz Sharif, MNA.

(3) Important, however, is what is stated in para. 2 of your letter. We are indeed surprised that you should say'it is not clear as to what action is envisaged'when this should be routine at the time of any investigation let alone when grave and serious allegations are made by the widow of a very respected COAS against a senior officer controlling the facts. The President repeated this to the Prime Minister yesterday."

These letters indicate that on 14-4-1993 the President and Prime Minister did meet. It can be inferred that in the meeting between the President and the Prime Minister besides other problems action to be taken against two persons named by the widow of Gen. Asif Nawaz must have been subject-matter of the discussion. According to the learned Attorney-General as the press note shows the Prime Minister had undertaken to take positive steps to the satisfaction of public representatives and the people and then revert to the President with precise measures, but instead

of taking such steps as promised by him, he straightaway went to the electronic media and rendered speech derogatory, defamatory and hostile to the President. According to Mr. Khalid Anwar the press release was without the consensus of the Prime Minister and in fact the proposed press release prepared by the Prime Minister's Scretariat which was not issued reflected true consensus and was intended to ward off speculation and avoid misunderstanding. According to the learned counsel even on the basis of the press release issued, the Prime Minister was required to satisfy the public representatives i.e. the members of the National Assembly and the people and accordingly he made a speech to address the people and on requisition a meeting of the National Assembly was summoned by the Speaker for 19-5-1993, but the said meeting in which the Prime Minister would have satisfied the public representatives about the problems facing the country was not allowed to be convened. Be that as it may, the fact remains that the Prime Minister was required to do some act and take some action against the two persons mentioned in the letter referred to above. Obviously. it seems that as desired by the President's Secretariat, those two persons were to be transferred, removed, sacked or suspended. Perhaps the Prime Minister did not see eye to eye on that issue as is obvious from the letter issued in reply to the President's Secretariat's letter. This became the culminating point and the immediate cause for rushing to the electronic media and also summoning the National Assembly on requisition of the partymen of the Prime Minister. These acts seem to accelerate the explosive situation already simmering in the political arena of the country. The speech and summoning of the National Assembly, bona ride of which was doubted, became an immediate cause for issuing the dissolution order.

17. In this background and the scenario one is led to think whether it is normal and usual that press release is issued by the President's Secretariat in respect of meetings held with the Prime Minister. If it is a practice, then in the past no such press release had been issued and included in the paper book which runs into more than thousand pages. But if this was not the practice to issue the press release which has not been clarified by anyone, then it becomes enigmatic why the press release had been issued? Was it intended to warn the Prime Minister, or to just inform the public that tension between the two high officials is sought to be reconciled? During this period the news media was rife with speculations, analysis of the news and some of them had indulged in sensationalism as well. However, the events following these incidents proved that their speculation was not incorrect. It is true that in his speech the Prime Minister had used strong language against the President and made certain allegations which he endeavoured to justify with reference to the events, incidents and the news published in the press media. Likewise the speech made by the President after the dissolution of the National Assembly also reflects the sentiments and the harsh language used though in a guarded manner against the petitioner. The speech, its tenor, language and the conduct in making it is relevant only from Constitutional point of view to determine, whether after making such a speech there may be a complete stalemate and deadlock in the relationship between the Prime Minister and the President and due to this deadlock the Government cannot be run in accordance with the provisions of the Constitution. The learned Attorney-General has vehemently stressed that in the face of this speech and derogatory words used against the President which amount to calling for agitation and subvesion of the Constitution leaves no room for cooperation between the two and the stalemate and deadlock will be so great that the Constitutional machinery will break down. In fact, according to him, it has broken down. The speech was more on a personal level and political in nature to save himself from 'an impending

danger of which the petitioner was apprehensive and in respect of which big rumours were in the air. Rumours were so great and coherent that they had assumed the proportion of truth. The misunderstanding was so great and the tension between the parties was so high that they looked at each other with jaundiced eye and coloured glasses. But this atmosphere of suspicion was not of such a nature that it could not be ironed out and was not humanly possible to clear the differences. The high offices require high standards, high status, high morality and large heartedness as well. Mere speech in which innuendos have been R made, person at the highest office has been attacked, does not necessarily mean that the relationship has completely broken down and both ends cannot meet together. The high office demands a sagacious, thoughtful, gracious and benevolent attitude from the people at the high position and status. They should have the depth of the sea and the vastness of the horizon to absorb all sorts of follies, mistakes and even indecent conduct and attitude. There are instances in history that people at such high elected offices have been at variance, even belonging to different views and different parties, but in spite of that they have run the Government well and according to the Constitution. The best policy to run smoothly is to be above personalities and personal pride and I

prejudice. In my view the tenor of the speech, in the background which would have subsided with the passage of time, though offensive in nature prima facie had some basis, but did not amount to subversion of the Constitution nor could it create a complete deadlock or stalemate resulting in collapse of the Constitutional machinery. Subversion of the Constitution is high treason punishable with death. It cannot be determined by referring to the speech alone and by an authority not competent to decide it.

18. Our Constitution maintains the foundation and spirit of the democratic principles enshrined in it. Although it may have a different look than Westminster democratic principles, the spirit and the form is democratic. The Constitution provides for specific powers of the President and the duties of the Prime Minister with a view to keep them within their own boundaries and the limits provided by it. In this regard I would refer to the relevant provisions of the Constitution to illustrate what is the power and position of the President and how the provisions govern the relations between the President and the Prime Minister. The President is the Head of State and represents the unity of the republic --- Article 41. Article 46 enumerates duties of the Prime Minister in relation to the President. Under Article 48 the President is to act on advice of the Prime Minister and the Cabinet. The President is authorised to send back the opinion for reconsideration, but after reconsideration if the opinion is rendered, the President shall act according to it. Article 48(2) provides that notwithstanding anything contained in clause (1) the President, shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so. The President in his discretion or on the advice of the Prime Minister can refer any matter of national importance to the referendum. The President may summon or prorogue either House or both the Houses or the Majlis-e-Shoora --- Article 54. Under Article 56 the President may address either House or both the Houses assembled together and for that purpose require the members to attend. The President is empowered to send messages to either House whether with respect to a Bill pending in Majlis-e-Shoora (Parliament) or otherwise and a House to which any message is sent, shall at convenient despatch consider any matter required by the message to be taken into consideration. The President shall also address the first session after each general election to the National Assembly and on the commencement of the first session of each year of the Parliament. Under Article 58 the President is empowered to dissolve the National Assembly in the

manner provided therein. The President may make rules in consultation with the Speaker of the National Assembly and the Chairman of the Senate as to the procedure with respect to the joint sitting of and communication between the two Houses --- Article 72. If a Bill is presented to the President for assent, he may within 30 days give the assent or return it with his own recommendation and advice for amendment. If after reconsideration the joint sitting of the Majlis-e-Shoora passes the Bill in original form or in amended form, then the President shall not withhold his assent. The President is also, empowered to promulgate Ordinances when the National Assembly is not in, session --- Article 89. The executive authority of the Federation vests in the President and he exercises the power either directly or through officers subordinate to him in accordance with the Constitution --- Article 90. There shall be a Cabinet of Ministers with the Prime Minister at its head to aid and advise the President in exercise of his functions. The President in his discretion shall appoint from amongst the members of the National Assembly a Prime Minister, who in his opinion is most likely to command the majority of the

House. The Prime Minister shall hold office during the pleasure of the President, but this power will not be exercised by the President unless he is satisfied that the Prime Minister does not command the majority of the House which should be ascertained by the National Assembly in respect of which the President may call its session and ask the Prime Minister to obtain vote of confidence. The Cabinet together with Ministers of State shall be collectively responsible to the National Assembly. The Federal Ministers and the Ministers of State are appointed by the President on the advice of the Prime Minister--Article 91. Under Article 99 all executive actions of the Federal Government shall be expressed to be taken in the name of the President. Under Article 46 it shall be the duty of the Prime Minister to communicate to the President all decisions of the Cabinet relating to the administration of the affairs of the Federation and proposals for legislation, to furnish such information relating to the administration of the affairs of the Federation and proposals as the President may call for and if the President so requires to submit for the consideration of the Cabinet any matter on which a decision has been taken by the Prime Minister or the Ministers, but which has not been considered by the Cabinet. Thus, it is clear that the President in his functions and duties as provided by the Constitution has to act on the advice of the Prime Minister, the Cabinet and the Ministers. The President is empowered to advise the Cabinet and send messages to the Prime Minister, the Cabinet as well as to the Houses. These basic structures of the Constitution govern the relations between the President and the Prime Minister. They have to work in cooperation with each other irrespective of personal prejudices and difference of opinion. No doubt difference of opinion is a part of democratic set-up which if exercised in a healthy manner improves and develops the constitutional functioning of the Government and to the benefit of the country. The relationship between the two is so sacred and so intimate in nature that it should not be allowed to be disrupted, collapsed or obstructed by anyone of them on personal grounds. The supreme interest is the governance of the country and also the progress and prosperity of the nation. With this aim the Constitution has provided for a working relationship between the President and the Prime Minister and Cabinet and all functionaries and institutions provided in the Constitution. The basic concept introduced is based on trichotomy of power --- the executive, legislature and the judiciary. The moment the Constitutional authorities transgress from these three pillars and seek aid of outside agencies which are merely to help the executive, the legislature and the judiciary whenever called upon, the trouble

starts. None of the functionaries constitutionally vested with power and defined functions should be allowed to take help in their functioning and operation of such organisations and institutions which have no say in the working of the three pillars and institutions under the Constitution. So long these three pillars are made basis for governing the country, I do not think that there can be any defect, any remorse, remonstrance or trouble in the working relationship. The personal likes and dislikes have no place in the Constitution. and the governance of the country. The Constitution does not say that if the President does not like or hates a particular Minister or Prime Minister he must quit or vice versa. Personal likes and dislikes, must give way to the Constitutional provisions. The power under the Constitution cannot be exercised on the basis of prejudice, pride, hatred or friendship. It has to be straight, clean and honest obedience and performance of the duties provided by the Constitution. The relationship between the President and the Prime Minister is subtle and sensitive. It is tender and firm. It should be gentle and strong. The observations of Sidhwa, J., in Khawaja Ahmad Tariq Rahim's case PLD 1992 Supreme Court 646, particularly paragraphs 10 and 11 fully illustrate the duties and relationship of the.President and Prime Minister as provided by the Constitution.

19. The learned Attorney-General made great stress on the fact that the speech rendered was of such a nature that there could be no possibility of cooperation between the two. The learned counsel for the petitioner referred to the speech of the President after the dissolution which, according to him, is in no less harsh tone than that of Nawaz Sharif. He further filed a rile containing press reports on the speeches rendered by Mrs. Benazir Bhutto and SardaT Farooq Leghari and other leaders of the People's Party containing and making harsh remarks against the President. The object of presenting this file was that in the past the leaders of the People's Party and of opposition have lashed, abused and even used harsher words than Nawaz Sharif. Two wrongs cannot make a thing right. If one has committed a mistake, the others should not repeat the same. He should correct it. Therefore, I am not inclined to look into those documents to come to the conclusion that even after such harsh speeches if the President can cooperate with Mrs. Benazir Bhutto and PDA, why he cannot work alongwith Nawaz Sharif. This factual aspect will not interfere in our decision at this stage because we are more concerned with the Constitutional rather than the personal aspect of the leaders. Mr. S.M. Zafar as referred to Constitutional Law and Administrative Law, Text and Material by David Pollard and David Hugles in which the principles and conventions regarding exercise of monarchical power by the Queen vis-a-vis the advice rendered by the Prime Minister has been set out in the following manner:-

"Rodney Brazier Constitutional Practice ((1988), pp. 145-58):-

The Queen's usual powers.---The Queen normally exercises her formal legal powers on ministerial advice. Asquith admirably summarized matters in a minute to George V in December, 1910

The part to be played by the Crown has happily been settled by the accumulated traditions and the unbroken practice of more than seventy years. It is to act upon the advice of the Ministers who for the time being possess the confidence of the House of Commons, whether that advice does or does not conform to the private and personal judgment of the Sovereign. Ministers will always pay the utmost deference, and give the most serious consideration to any criticism or objection that the Monarch may offer to their policy, but the ultimate decision rests with them, for they, and not the Crown, are responsible to Parliament." (Quoted originally in Turpin British Government and the Constitution Text Cases and Materials ((1985), pp.76-77)

A Constitutional monarch will remember, before voicing either advice or warning, that however long may be her experience she does not have to preside over what may be a far from complainant Cabinet, she does not have to defend herself to the public through the media, she does not have to manage the House of Commons, or eventually face the electorate. What may be seen as an ideal policy from Buckingham Palace may simply not be practical politics in the view from Downing Street. The Sovereign will understand, too, that some of the obligations owed to her may also be minor irritants or inconveniences from time to time a hard-pressed Prime Minister may wish that ideally his weekly thirty-minute or hour long audience could be missed deference to other pressures on him (but it is nevertheless rare for that audience not to take place while Parliament is sitting).

The existence of the rights to advise and to warn must mean that the Queen will have personal views about some political issues which will not coincide with those of the Prime Minister and the Cabinet. Indeed, the opinions of the Queen and of her Government could not always be the same unless she were to undergo a very odd change of heart and mind on the main issues of the day with every change of party Government. The Sovereign may urge her view on the Prime Minister especially at the weekly audience (at which the two are alone and no formal record is kept) --- but in strict confidence, and in the end normally deferring to any contrary view presisted in by the Prime Minister. Any public revelation of disagreement could be damaging to the existing and future relationship between Head of Government and Head of State, for obviously if it became known that the Queen*has criticized Government policy, she might be taken to be biased against that Government and to be in favour of another.-

This passage gives an enlightened description of the conventions in the British Parliament. We in our Constitution have provided basic principles in writing Although conventions cannot play a governing part in exercising the power by the President and Prime Minister, yet in the light and experience which has transformed into conventions we can seek their aid in interpreting the provisions of the Constitution. It confirms that personal pleasure, dislike and hatred have no place in the Constitutional set-up. The monarch has to respect the advice of the Prime Minister and the Prime Minister and Cabinet have likewise to show their respect and regard. One striking feature pointed out is that a regular meeting between the Queen and Prime Minister is held. The President

has a right to counsel, advise and send messages and in exercise of that right he can even ask the Prime Minister and the Ministers to consult him. The Constitution provides basic structure, but the edifice is built by practices and conventions. We do not seem to have developed any such conventions for practising and making the Constitutional provisions workable. The provisions regarding consultation are very important and far-reaching. If regular consultations between the President and the Prime Minister be made a continuing feature of their working relationship, much of the misunderstanding, differences and difficulties can be sorted out. From the passage quoted above it seems that in UK there is a convention of regular meetings between the Queen and the Prime Minister. We do not know how many meetings the President and Prime Minister have held in a regular manner except whenever they desire to meet each other according to the needs and exigencies. The letters written by the President's Secretariat show that there have been various queries on many subjects and in many ways, but if the President and the Prime Minister would have developed the convention of meeting each other regularly, perhaps this exercise could have been avoided. It is a healthy tradition and convention which not only has Constitutional backing but creates a working relationship ironing out differences and personal animosities. Frequent meetings do create grounds for harmony and understanding. In future it should be made a practice that the President and the Prime Minister should regularly meet at fixed intervals which if not rigidly be properly observed. If this procedure would have been adopted perhaps the country would not have seen this crisis.

20. Right of expression and speech is conferred by the Constitution an regulated by law. Every restriction on free speech must pass the test of reasonableness and overriding public interest. Restriction can be imposed and freedom of expression may be curtailed provided it is justified by the "clear and present danger" test enunciated in Saia v. N.Y. (1948) 334 U.S. 558 that the substantive evil must be extremely seirous and the degree of imminence extremely high. The danger should "imminently threaten immediate interference with the lawful and pressing purposes of the law' requiring immediate step to ensure security of the country. Speech would be unlawful if it is directed to inciting or producing imminent lawless action and is likely to produce such action. Speech and conduct are two different concepts. Speech relates to expression and conduct to action. Speech ends where conduct begins but if both are combined the Court has to draw the dividing line. As held in American Communications Association v. Douds (1950) 339 US 382 the freedom of expression of views is curtailed or restricted when they "threaten clearly and imminently to ripen into conduct against which the public has a right to protect itself'. The concept of "clear and present danger" in USA was liberalised by making "imminence" as a basic test. The following observation made in Whitney v. California 274 US 357 (1927) as quoted in Freedom and the Court by Henry, J. Abraham at page 204 will illustrate the point:--

"Fear of serious injury cannot alone justify suppression of free speech and assembly ... there must be reasonable ground to fear that serious evil will result if free speech is practised. There must be reasonable ground to believe that the danger apprehended is imminent. Therej must be reasonable ground to believe that the evil to be prevented is a serious one ... In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be

expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular Government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

The effect, weight and impact of speech is to be judged from an overall appreciation by looking to its background, the truthful statement made in it and object with which it has been made. If such a speech makes allegation or defames anyone without any justification, but does not create lawlessness, disorder, or threat to security or disruption, it will hardly amount to subversion of the Constitution. In my view the contention that the speech had created the gulf between the parties and had ignited the situation to a point of no return creating deadlock and stalemate does not have any force.

21. The Council of Common Interests is an important Constitutional institution which irons out differences, problems and irritants between the Provinces inter se and the Provinces and the Federation in respect of matters specified in Article 154. The Council is responsible to Majlis-e-Shoora, which in joint sitting may from time to time by resolution issue directions through the, Federal Government generally or in particular matters to take action as the Parliament may deem just and proper and such directions shall be binding on the Council. Ground C(i) of the dissolution order specifies that the Council of Common Interests has not discharged its Constitutional functions to exercise its powers particularly in the context of privatisation of industries in relation to the subject-matter mentioned in Article 154. The petitioner has stated that the Council of Common Interests which had remained a dormant organisation since its creation was activated and three meetings were held on 12-1-1991, 21-3-1991 and 16-9-1991. The Council reached decisions on the apportionment of Indus water at its meeting held on 31-3-1991 and approved setting up of Indus Water Authority. It also approved for the first time its rules of procedure. It also prepared for the next meeting of the Council in May, 1993 and pre-CCI meeting was held with the Chief Ministers. Under this ground reference has been made to privatisation which relates to WAPDA, Electricity and Railways. It was pointed out that WAPDA has not so far been privatised and only an exercise is being carried on to see the feasibility of privatisation. So, is the case with electricity and so far Railways is concerned, there has been no scheme for pirvatisation except that ticketing in certain areas has been privatised. From the correspondence filed by both the parties and the documents brought on record it seems that the Chief Minister of Sindh as late as March, 1993, made a grievance--about the privatisation of WAPDA. Such a

complaint was also made by the Chief Minister of N.-W.F.P. The grievances set out do not relate to any other items of conflict in that area. The objections raised were in respect of matters which were yet to be considered and could have been sorted out in future. However, the working, the performance, the actions taken by the Council of Common Interests during the past two years was not commented upon or objected to. In these circumstances, the allegation that the performance was not in accordance with the Constitution or it was not perfect and proper cannot be made a ground for dissolution of the National Assembly. The learned Attorney-General referring to the observations in Khalid Malik's case P L D 1991 Kar. I and Khawaja Ahmad Tariq Rahim's case P L D 1992 SC 646 made in respect of the Council of Common Interests, contended that similar ground mentioned in the Dissolution Order made in 1990 was held to form a basis for dissolution of the Assembly. It may be pointed out that the grounds regarding CCI in the case of 1990 and in the case of 1993 were completely different. While dismissing the National Assembly in 1990 it was stated that the Federal Government had not allowed to convene or to hold the meeting of CCI. There had been protests by three Provinces, but no heed was paid. In fact two Provinces had even filed petitions in Court for convening the meeting of the CCI. In this way the charge was that the Federal Government intentionally obstructed the working of the institution created by the Constitution. In this regard Shaflur Rahman, J. in Khawaja Ahmad Tariq Rahim's case at page 666 observed as follows:--

"As regards the second ground, we find sufficient correspondence on record to indicate that persistent requests were made by the Provinces for making functional the Constitutional institutions like Council of Common Interests, National Finance Commission with a view to sort out disputes over claims and policy matters concerning the Federation and the Federating Units as such. In spite of the intercession of the President, no heed was paid, Constitutional obligations were not discharged thereby jeopardizing the very existence and sustenance of the Federation."

In Khalid Malik's case while dealing with this ground it was observed as follows:--

"The aforesaid correspondence and statements clearly demonstrate that the former Federal Government was not prepared to hold meeting of the CCI although if not all some demands made by the provinces fell within its ambit. This attitude led to confrontation between two provinces and the Federation and there seemed no way out to settle the outstanding demands and issues."

on the same point Sidhwa, J. in Khawaja Ahmad Tariq Rahim's case at page 701 observed as follows:--

"Nevertheless, * the extreme polarisation and political confronation existing between both the parties on almost every issue, could not totally. relieve the Coalition Government from complying with the provisions of the Constitution. In this background, I would hold that there were strong compulsions on the Coalition Government to call the meetings. The failure of the Coalition Government, therefore, to allow the Council of Common Interests to discharge its functions and exercise its powers and to call a meeting of the National Finance Commission, created extreme bitterness and political deadlock between the Federation and the Provinces, contributing to a breakdown in the functional working of the Federal Government. In these circumstances, I would hold that the said matters did constitute proper grounds which the President could have taken into consideration when forming his opinion and that they had a nexus with the breakdown of the Constitutional machinery."

22 Grounds c(ii) and c(iii) are sufficiently vague. However, so far the working of the National Economic Council and its executive committee is concerned, the petitioner has brought material on record to show that meetings were regularly held and problems were sorted out. The National Economic Council which is an advisory body met regularly every year (20-5-1991 and 5-5-1SK)2) in accordance with the practice in vogue since 1973 to approve the next year development plan and policies on the basis of comprehensive papers prepared by the Planning Commission and other Ministries concerned. The next meeting was scheduled to be held in May, 1993. Similarly the executive committee of the National Economic Council held meetings regularly at least four times a year with the participation of Provincial Finance and Planning Ministers and other officials. The last three meetings were held on 17-10-1992, 11-2-1993 and 6-3-1993 to approve a large number of projects in all sectors. These grounds, however, do not satisfy the test laid down by this Court for passing an order of dissolution of the National Assembly. Under ground c(iii) of the dissolution order it was stated that the Constitutional powers, rights and functions of the Provinces have been usurped, frustrated and interfered with in violation o! inter alia Article 97. This has been denied by the petitioner and in fact the description is so vast, wide and vague that it can hardly justify the order of dissolution.

23. Clause (d) of the order speaks of maladministration, corruption and nepotism which according to it had reached such proportions in the Federal Government, its various bodies, authorities and other corporations including banks supervised and controlled by the Federal Government, the lack of transparency in the process of privatisation and in the disposal of public/Government properties, that they violate the requirements of the oath(s) of the public representatives together with the Prime Minister, the Ministers and Ministers of State prescribed in the Constitution and prevent the Government from functioning in accordance with the provisions of the Constitution. In the petition while referring to these grounds it has been stated that it does not refer to any fact whatsoever which is a requirement of law for exercise of power under Article 58(2)(b). It was further pleaded that the wholesale condemnation of entire Cabinet indicates that the alleged facts have not been individually considered at all. In the written statement riled by respondent No.1 these allegations were denied and it was stated that the instances of maladministration, corruption, nepotism and various other allegations contained in that para. are numerous and well-known and based on facts,

records, documents and informations which were before the President before passing the order and some of which have been annexed with the written statement as Annexures 'A'-A-12 and B-R'. The learned Attorney General contended that the corruption, nepotism, lack of transparency in the process of privatisation, the sale of Muslim Commercial Bank and cement factories, grant of permission to various banks and misuse of resources of the Government have direct nexus with the order of dissolution. The learned Attorney-General has referred to these documents which have been annexed to establish the contention raised by him.

24. The word 'corruption' has not been defined by any law, but it has diverse meaning and far-reaching effects on society, Government and the. people. It covers a wide field and can apply to any colour of influence, to any office, any institution, any forum or public. A person working corruptly acts inconsistent with the official duty, the rights of others and the law governing it with intention to obtain an improbable advantage for himself or someone else. Dealing with corruption in Khalid Malik's case I had observed as follows:--

"This bribe culture has plagued the society to this extent that it has become a way of life. In Anatulay VIII (1988) 2 SCC 602 where Abdul Rehman Antulay, Chief Minister of Maharashtra was prosecuted for corruption Sabyasachi Mukharji, J. laments as follows:--

'Values in public life and perspective of values in public life, have undergone serious changes and erosion during the last few decades. What was unheard before is common place today. A new value Prientation is being undergone in our life and culture. We are at threshold of the cross-roads of values. It is, for the sovereign people of this country to settle these conflicts yet the Courts have a vital role to play in these matters.'

The degeneration in all walks of life emanates, from corruption of power and corruption of liberty. Corruption breeds corruption. 'Corruption of liberty' leads to 'liberty of corruption'."

Corruption and bribery adversely affect the social, moral and political life of the nation. In society rampant with corruption peoples lose faith in the integrity of public administration. In India in 1964 Committee on the Prevention of Corruption known as Sanathanam Committee observed as follows:-

‘It was represented to us corruption has increased to such an extent that people have started losing faith in the integrity of public administration. We had heard from all sides that corruption, in recent years, spread even to those levels of administration from which it was conspicuously absent in the past. We wish we could confindently and without reservation assert that at the political level Ministers, legislators, party officials were free from the malady. The gcnQral impressions arc unfair and exaggerated. But the very fact that such impressions are there causes damage to social fabric.’

The Committee also observed that there is a popular belief of corruption among all classes and strata which ‘testifies not merely to the fact of corruption but its spread’. Such belief has a social impact causing damage to social fabric.’

The anti-corruption and penal laws have remained ineffective due to their inherent defect in adequately meeting the fast multitudinous growth of corruption and bribery. Corruption in high places has remained unearthed leading to a popular belief that immunity is attached to them. To combat corruption the whole process and procedure will have to be made effective and institutionalised.”

However, the Supreme Court in Ahmad Tariq Rahim’s case at page 6 observed that the grounds like corruption, nepotism, misuse of banks and violation of Articles 240 and 242 relating to the services may not be independently insufficient to warrant such an action (order of dissolution). They can, however, be invoked, referred to and made use of with grounds more relevant like ground (a) (failure of legislative functions of the National Assembly) and (b) --- wilful undermining and impairing the working of the C Constitutional arrangements and usurping the authority of the Provinces and such institutions resulting in discord, confrontation and deadlock adversely affecting the integrity, solidarity and well-being of Pakistan. This view is binding on me. In the present case the learned Attorney-General has pointed! out about the corruption, nepotism and lack of transparency in the process of privatisation of Muslim Commercial Bank and sale of cement factories, but on examination of those documents and the explanation offered by the petitioner the same cannot form an independent ground for dissolution. They, however, i may be taken into consideration provided some substantial, effective and wellrecognised grounds as set out in the judgments of this Court are proved and made out against the petitioner.

25. Ground (c) refers to unleashing a reign of terror against the opponents of the Government including political and personal rivals/relatives and mediamen , under the direction, control, collaboration and patronage Of D the petitioner and Ministers leading to a situation where the Government cannot be carried on in accordance with the provisions of the Constitution and law. This charge is too vague to be taken into consideration.

26. Ground (f) is likewise sufficiently vague and cannot give an independent cause for dissolution of the Assembly. In ground (f)(i) it has been stated that the Cabinet has not been taken into confidence or decided upon numerous Ordinances and matters of policy and ground (f)(ii) states that the Federal Ministers have even been called upon not to see the President. In a democratic pattern of Constitution the theory of collective responsibility will be applicable to the working of the Cabinet and the Government. In a parliamentary form of Government the leader of the majority party becomes the Prime Minister and forms the Government. The Cabinet Ministers are appointed by the President on the advice of the Prime Minister. The principle of collective responsibility applies to the Ministers. They may differ inside on an issue, but if the Cabinet has taken a decision, the dissenting Minister in all propriety avoids expressing disagreement in public. The Cabinet decision is binding on all the Ministers whether they agreed or 'not and whether they were E1_ present or not* in the meeting. In Parliament, Functions, Practice and, Procedures by JA.G. Griffith and Michael Ryle at page 23 the principle of I collective responsibility has been explained as follows:--

"The principle of collective responsibility, as applied to Cabinet Ministers, means that each Minister accepts responsibility for the decisions of the whole Cabinet. Inside the Cabinet, a Minister may argue for a different course of action but he is expected not to express, public disagreement with the course decided on though dispensation

may be given to a Minister on ' a matter particularly affecting his constituency. If he feels very strongly on a matter he may resign in which case he will have an opportunity to make a statement in Parliament. This version of the doctrine applies in the simplest case where Ministers are present at the Cabinet meeting where the decision is taken. But it also applies to Cabinet Ministers who are not present and so could not be said to participate in the making of the) decision; and to those decisions of Cabinet Committees which are not required to be endorsed by the full Cabinet and the existence of which, some Ministers may be unaware. The Chairman of each Cabinet Committee decides, after consultation with the Prime Minister (where? the Chairman is not the Prime Minister), whether decisions of the committee may be taken by a dissident Minister to the full Cabinet."

27. The question that Cabinet has not been taken into confidence seems to be based on certain complaints made by certain Ministers, but if the principle of collective responsibility is applied, such complaints have no substance. The President can seek advice from the Cabinet, Prime Minister and the Ministers, but merely if a Prime Minister calls upon his Ministers not to see the President, a Minister is not bound to obey that desire or order. More instructions, orders or desire of the Prime Minister asking the Ministers not to see the President can hardly be a ground for dissolution of the Assembly. It becomes more of personal in nature than Constitutional. Nobody can stop meeting any person legally, constitutionally or socially unless the law provides for such prohibition. But if any person indulges in such activity, it cannot affect the functioning of the

Government. From the documents riled it seems that in spite of the asking of the Prime Minister, the Ministers have frequently been visiting the President and had not cared for such a direction.

28. Grounds (f)(iii) and (iv) relate to financial discipline of the Cabinet and the Government. In this regard several documents have been referred to by the learned Attorney-General, but the learned counsel for the petitioner has referred to the address of the President in December, 1991 and December, 1992, and the report of the World Bank in which financial discipline has not received any adverse comments. In fact it has been appreciated and praised. It was pointed out that the President's address to the National Assembly is based on the information received by the President's Secretariat from the Prime Minister's Secretariat. It is true that it has been a practice or convention in England that the Prime Minster's office prepares the speech of the Queen. But this convention does not seem to have been followed in Pakistan as the address of the President is prepared in the President's Secretariat perhaps based on the information received from the Government and the Cabinet. The comments and the suggestions mentioned in the address justify this view. In this regard Mr. Yahya Bakhtiar has riled and referred to the address of the President prior to 1991 from which it is clear that comments and cirticism have been made by the President on the policies of the Government, and surely the same would not have been provided by the Government or the Prime Minister. Considering the practice adopted in our country the President's address assumes greater importance in the facts and circumstances of this case and that is why the learned counsel for the petitioner has laid great emphasis and placed reliance on this address. Having considered all these 1H aspects of the case, in my view, the financial irregularities could not be an 1H independent ground for dissolving the Assembly.

29. Ground (g) relates to the allegations made by the Begum Nuzhat Asif Nawaz, widow of late Army Chief of Staff. According to it, highlianded treatment was meted out to her husband and the circumstances culminating in his death indicate that the highest functionaries of the Federal Government have been subverting the authority of the Armed Forces and the machinery of the Government and the Constitution itself. The allegations made in it are highly sensitive and security-orictited. On the face of it they seem to be merely based on suspicion and imaginations. The petitioner while challenging this ground has termed it as a concocted one. The allegation is based on press statement of Begum Nuzhat Asif Nawaz in which she had alleged that her husband was killed by a conspiracy and was poisoned. According to the petitioner the statement was arranged by respondent No.1 in order to discredit the petitioner. A high powered Inquiry Commission consisting of three Judges of the Supreme Court was appointed immediately and although there is quite a lot of dispute between the parties, as to who and at what time it was appointed, but without going into that controversy the fact remains that the Inquiry Commission was appointed and it has submitted its report as well. From para.6 of the written statement dealing with this ground and averment of the petitioner it seems that entire reliance has been placed on the statement of Begum Nuzhat Asif Nawaz and it has been reiterated that the order refers inter alia to the highhanded treatment meted out to the late Chief of Army Staff. This allegation is based merely on the statement of Begum Nuzhat Asif Nawaz which was made three months after the death of her husband. One wonders how this particular ground can have any nexus with the order of

dissolution. From the press clippings and statements which have been referred to by both the learned counsel and for that reason I am referring them, it seems that two persons, one a Cabinet Minister and the other a high-ranking Government official in the Secret Service were accused of planning and committing murder. From the letters exchanged between the petitioner and the President's Secretariat it seems that those two persons were asked to be removed by the President, but no positive reply was received from the petitioner and instead he made the speech of 17-4-1993. The statement and allegation made by Begum Nuzhat Asif Nawaz should not have been given that much importance or even made a ground for dissolution, and it seems that everything which was found on the ground was picked up to justify the action. on query made, the learned Attorney-General explained that the statement had created a lot of agitation and dissatisfaction amongst the Army and it was therefore, necessary that serious notice of the fact may have been taken. True

that the statement was unfortunately published and publicised and there must have been some reaction or whispering in the Armed Forces as would have been in general public because the allegation itself was very sensational, but to say that this had created dissatisfaction and uneasiness among the Army is without any justification. Not a single instance of such dissatisfaction, agitation or apprehension that if immediate step is not taken some unconstitutional incident may happen or the security of the State will be jeopardised has been brought on the record. Undue importance has been given and undue

exploitation has been made of the situation which has only spoiled the atmosphere at the political and governmental level. Such matters are not to be brought to the public and exhibited in the manner it has been done. The immediate action taken by constituting a Commission was sufficient to subside this uneasiness which had disturbed the mind of respondent No.1 Many important issues and crises do arise and even more serious allegations are made and once a Commission is appointed, it comes under control or cools down. In such circumstances, in my view, this was completely irrelevant ground i and seems to have been made merely to overcharge an already charged atmospere by introducing Army interference arid dissatisfaction.

30. Ground (g) is merely a summing up and residuary ground depending upon the aforesaid grounds which have been dealt with. It also alleges that due to aforestated grounds the Government of the Federation is not in a position to meet properly and positively the threat to security and integrity of Pakistan and further due to economic crisis fresh mandate from the people of Pakistan is required. Two questions arise whether in the situation enumerated above the Government cannot be carried on in accordance with the provisions of the Constitution and secondly, does this situation require a fresh public mandate, These are the requirements of Article 58(2)(b). The learned counsel for the petitioner has argued that these are two independent conditions and unless both are satisfied no order of dissolution can be passed. In my humble view both the conditions are inter-related and inter-dependent. They are inseparable and indivisible. The second condition viz., "an appeal to the electorate is necessary" limits and circumscribes the dimension and scope of the first condition. The facts attracting the first condition should be so dangerous and explosive that they call for a fresh mandate. The opinion to be formed whether fresh mandate is required will be subjective in nature which can be judicially reviewed. In the present case as the first condition was not satisfied, the second condition could not be invoked.

31. The learned Attorney-General has contended that the order of dissolution is similar to the order of dissolution passed in 1990 and, therefore, it should be upheld in the light of the observations made in Khawaja Ahmad Tariq Rahim's case. This contention is misconceived. Some of the grounds may have similarity in description but the grounds on which the order of dissolution of 1990 was upheld are not available in the present case. In Khawaja Ahmad Tariq Rahim's case this Court had observed that "grounds like "C" (Corruption and nepotism), "e(ii)" (misuse of authority, resources of Government including statutory corporations and banks for 'political end and personal gains) and "e(iii)" (undermining civil services and disregarding Articles 240 and 242) may not. have been independently sufficient to warrant such action. They can, however, be invoked, referred to and made use alongwith grounds more relevant like "a" (scandalous horse-trading for political gains and furtherance of personal interest and failure to discharge legislative business othei than Finance Bill) and "b". (Council of Common Interests and National Finance Commission was not allowed to function) "which by themselves are sufficient to justify the action taken". Ground "a" reproduced above is not available in the present case. The difference in charge "b" relating to CCI in both the orders has been explained earlier.

32. Dr. Farooq Hasan, the learned counsel for the petitioner in Petition No. 12 of 1993 contended that as the Speaker had summoned the requisitioned K meeting of the Assembly under Article 54(3), the President could not have dissolved it. Under this provision Speaker can summon the meeting of the National Assembly and prorogue it. Article 54(3) does not limit the power of the President to dissolve the Assembly.

33. 'For the aforesaid reasons as the case does not fall within the ambit of Article 58(2)(b) and there being no valid reason to refuse restoration of the Assembly, the petition is allowed in terms of the short order, dated 26-5-1993. The impugned order is declared to have been passed without lawful authority and of no legal effect. As a consequence, the National Assembly, Prime Minister and the Cabinet shall stand restored and entitled to function as immediately before the impugned order was passed. All steps taken pursuant to the order, dated 18-4-1993 passed under Article 58(2)(b) of the Constitution such as the appointment of the Care-taker Cabinet etc. will, therefore, be of no legal effect. However, all orders passed, acts done and measures taken in the meanwhile by the Care-taker Government, which have been done, taken and given effect to in accordance with the terms of the Constitution and were required to be done or taken for the ordinary orderly running of the State shall all be deemed to have been validly and legally done.

SAEEDUZZAMAN SIDDIQUI, J.---The abovementioned petitions under Article 184(3) of the Constitution of Islamic Republic of Pakistan (hereinafter to be referred as "the Constitution" only) are filed by the petitioners to challenge the dissolution of National Assembly of Pakistan, by the President, in exercise of his powers under Article 58(2)(b) of the Constitution on 18-4-1993. The

first mentioned petition is filed by the deposed Prime Minister, the second and third by two former members of dissolved National Assembly and the last one by an advocate.

The learned Attorney-General and Mr. S.M. War, the learned counsel for the Care-taker Prime Minister have jointly challenged the maintainability of these petitions under Article 184(3) of the Constitution. The learned Attorney-General contended that by dismissal of the Federal Cabinet and dissolution of National Assembly no fundamental right of any of the petitioners guaranteed under Chapter 1 of Part 11 of the Constitution has been violated, so as to attract the jurisdiction of this Court under Article 184(3) of the Constitution. It is also contended by the learned Attorney-General that the freedom of Association guaranteed under Article 17 of the Constitution is restricted in its application to the formation of a political party and its membership which does not include the right to get elected to Parliament or to continue as member thereof. It is, accordingly, contended by the learned Attorney-General that dismissal of the Federal Cabinet and the dissolution of the National Assembly did not give rise to the infringement of any of the fundamental rights of the petitioners so as to entitle them to invoke the jurisdiction of this Court under Article 184(3) of the Constitution. Supplementing the above contentions of learned Attorney-General Mr. S. M. War, the learned counsel for Care-taker Prime Minister, argued that in order to attract the jurisdiction of this Court under Article 184(3) of the Constitution, two essential conditions must be shown to exist in the case. Firstly, that the case involves a question of public importance and, secondly, the impugned order/action has violated any of the Fundamental Rights guaranteed under Chapter I of Part 11 of the Constitution. Mr. S.M. Zafar while conceding that the questions involved in the present petitions, may fall in the category of issues of public importance, very vehemently contended that this fact alone would not make these petitions maintainable under Article 184(3) of the Constitution, as the second important jurisdictional requirement of the case, namely, the infringement of the Fundamental Rights guaranteed in Chapter I of Part II of the Constitution is non-existent in the case. The learned counsel went on to argue that under the stress of issue of public importance, this Court would not get involved in a case which did not relate to the enforcement of any of the Fundamental Rights. According to Mr. S.M. War, the order of dissolution of National Assembly passed by the President is',-bot referable to any of the Fundamental Rights mentioned in Chapter 1, Part 11 of the Constitution so as to make out a case of infringement of Fundamental Rights. The learned counsel relied on the provisions of the Constitution relating to the dissolution of National Assembly on the advice of Prime Minister, and contended that it could not be disputed that in the event of dissolution of National Assembly on the advice of Prime Minister, no petition either under Article 199 or 184(3) of the Constitution could be filed to challenge such dissolution. This fact, according to Mr. S.M. Zafar, supports the contention of respondents that no vested right could be claimed by the members of the National Assembly in respect of the tenure of National Assembly prescribed under the Constitution. With reference to rights guaranteed under Article, 17 of the Constitution to form a Political Party and to be a member thereof, Mr. S.M. Zafar, contended that so long a Political Party is not obstructed in taking part in the political process, which, according to learned counsel, terminates with the holding of election and induction of elected persons into Assemblies as members thereof, there cannot conceivably be any complaint regarding violation of the right of freedom of Association guaranteed under Article 17 of the Constitution. The learned counsel further contended that if the Court finds that the impugned action of President violated some provisions of the Constitution

other than those relating to Fundamental Rights then the proper course for the petitioner will be to challenge the same in a properly constituted proceeding before the High Court under Article 199 of the Constitution and not under Article 184(3), before this Court.

Replying to the above preliminary objections of the respondents, Mr. Khalid Anwar, the learned counsel for former Prime Minister contended that sub-clause (2) of Article 17 of the Constitution which guarantees the right to form and to become a member of a Political Party is a peculiarity of our Constitution, as no other Constitution of the world guaranteed such a right specifically under the Fundamental Right of freedom of Association. The learned counsel contended that specific mention of the right to form and to become a member of a Political Party in Article 17 of the Constitution, therefore, has to be given a special treatment in the scheme of our Constitution. , On the above premises, Mr. Khalid Anwar contended that it would not be correct to equate this specific right with the ordinary right of freedom of Association guaranteed under Article 17 (supra). The learned counsel further contended that in addition to the right to form and become a member of a Political Party, our Constitution also guaranteed Political Justice as a fundamental right, as would appear from the Objectives Resolution, which, now forms part of our Constitution in the shape of Article 2A. According to learned counsel the political activity of a Political Party does not terminate with the election of its members to the Assembly as election to Assembly is only a means and not the end for the objects of a Political Party. The learned counsel in support of his above contentions relied on the two decisions of this Court reported as Miss Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and Miss Benazir Bhutto v. Federation of Pakistan PLD 1989 SC

66. The contentions of the learned counsel for the petitioners are not without force.

The right to form a Political Party and to become its member has been specifically conferred by Article 17 of our Constitution. Our attention has not been drawn to any other contemporary Constitutional document in which a right to form a ‘Political Party’ and to become its member has been specifically guaranteed as a fundamental right under the concept of freedom of Association. It is a well-established principle of interpretation that no surplusage or redundancy is to be attributed to the legislature, muchless to the framers of the Constitution. The Constitution is the basic and an organic document and therefore, every word used therein has to be assigned some meaning. Again the Courts while interperting a provision of the Constitution relating to enforcement of Fundamental Right, will lean towards its more liberal and beneficial construction. Since the right to form a Political Party and to become its member has been specifically guaranteed under Article 17 of the Constitution, it has to be given specific meaning apart from the general right of freedom of Association mentioned in Article 17 (supra). The expression ‘Political Party’ is not defined in the Constitution. However, this expression has been defined in section 2(c) of the Political Parties Act of 1962, as follows:--

(c "Political Party' includes a group or combination of persons who are operating for the purpose of propagating any political opinion or indulging in any other political activity."

The word 'Political' is defined in Concise Oxford Dictionary, as follows:

"(1) of or affecting the State or its Government; of public affairs; of politics;

(2) (of person) engaged in civil administration;

(3) having an organized form of society or Government;

(4) belonging to, or taking, a side in politics; relating to person's or organization's status or influence (a political decision).

(5) ……..

The words 'Political' and 'Political Party' are terms of Political Science. Therefore, it will be advantageous to ascertain as to how these terms are understood by a student of Political Science. In Corpus Juris Secundum Volume 72, page 222, the word 'Political' is explained as follows:--

"POLITICAL.---A word of broad meaning, said to have many shades of meaning. In its higher and true sense 'Political' means that which pertains to the Government of a nation. So used, 'political' is defined to mean belonging to the science of Government; treating of polity or politics; as political theories; of or pertaining to the conduct of Government; of or pertaining to, or incidental to the exercise of, functions vested in those charged with the conduct of the Government; pertaining to policy or the administration of Government; relating to the management of affairs of State.

‘Politican is also defined to mean having or conforming to, a polity, or settled system of administration, as a political body or Government; having an organized system of Government, administering a polity, as a fully developed political community.

In a generic sense, ‘political’ means of or pertaining to the exercise of the rights and privileges or the influence by which individuals of a State seek to determine or control its public policy-, having to do with the organization or action of individuals, parties, or interests which seek to control the appointment or action of those who manage the affairs of a State.

The term ‘political’ in its broadest sense includes the entire system of laws, Constitutional and statutory, of a Government, and should not be narrowed so as to be exclusively applied to groups and parties advocating political views or policies.

In its ordinary meaning the term is not limited to something pertaining merely to the actual management of a Government by individuals for the time holding office thereunder, but the essential significance in proper and ordinary use of the word includes anything pertaining to the establishment of a form of Government.”

Similarly, the expression “Political Party” is defined in Corpus Juris Secundum, in Volume 29 at page 107 as follows:--

“in ascertaining the meaning of the words ‘political party, in the absence of a statutory definition, resort must be had to the generally accepted meaning of the term, which has been defined as an unincorporated vpluntary association of persons sponsoring certain ideas of Government; a body of individuals banded together for the propagation of the political principles or beliefs that they desire to have incorporated into the public policies of the Government; a body of people contending for antagonistic or rival opinions or policies in a community or society, especially one of the opposing political organisations striving for supremacy in a State; a company or number of persons ranged on one side or united in opinion or des gn in opposition to others in the community-, a number of persons united in opinion or action, as distinguished from, or opposite to, the rest of a community or association, especially one of the parts into which a people is divided on questions of public policy-, those who favour, or are united to promote certain views or opinions. A political party has also been defined as an association of voters believing in certain principles of

Government, formed to urge the adoption and execution of such principles in Governmental affairs through officers of like belief-, a body of men associated for the purpose of furnishing and

maintaining the prevalence of certain political principles or beliefs in the public policies of the Government; a body of men united for promoting, by their joint endeavour, a national interest on some particular principle in which they are all agreed; a voluntary association for political purposes; a voluntary association of electors, having an organization and committee, and having distinctive opinions on some or all of the leading political questions of controversy in the State, and attempting through its organization to elect officers of its own party faith, and make its political principles the policy of the Government."

This Court in the case of Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 while considering the scope of the expression "Political Party" in the context of rights guaranteed under Article 17(2) of the Constitution and the restriction imposed by the Political Parties Act, observed as follows:--

"Reading Article 17(2) of the Constitution as a whole it not only guarantees the right to form or be a member, of a political party but also to operate as a political party. As earlier held, the words "right to form" is not only confined to its formation but to its function as a political party. The political party, according to its texture, of being an aggregate of citizens composing the party can exercise the other rights guaranteed under the Constitution like an individual citizen. Again the forming of a political party necessarily implies the carrying on of all its activities as otherwise the formation itself would be of no consequence. In other words the functioning is implicit in the formation of the party."

In a later case reported as Benazir Bhutto v. Federation of Pakistan PLD 1989 SC 66, this Court while examining the effect of amended section 21 of the Political Parties Act, 1962 on the rights of a Political Party guaranteed under Article 17(2) of the Constitution, held as follows:--

"Our conclusion therefore, is that section 21 of the Act as amended by Ordinances Nos. 11 and VIII of 1985, is violative of Fundamental Right 'contained in Article 17(2) of the Constitution in so far it fails to recognize the existence and participation of the Political Parties in the process of elections, particularly in the matter of allocation of symbols and is for that reason void to that extent. Every Political Party is eligible to participate in the Elections to every seat in the National and the Provincial Assemblies scheduled to be held on the 16th of November, 1988. The Political Parties shall be entitled to avail of the provisions of sub-rule (2) of rule 9 of the Rules to seek allotment of any of the prescribed symbols."

From the preceding discussion, it clearly emerges that a Political Party is a voluntary association of persons, formed with the object of propagating a definite political opinion/view on a matter of public importance, having an ultimate aim to get into the power seat of a Government, through the process of election, in order to give effect to its programme. At this stage it will be beneficial to reproduce here the provisions of Article 17(2) of the Constitution which is as follows:-

"(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final."

From the language of Article 17(2) (supra) it is quite clear that not only the formation and membership of a Political Party is within the contemplation of this Article but its operation and functioning is also within its purview. This is quite evident from the latter part of Article 17(2) which provides that when the Federal Government declares that a Political Party has been formed or is operating in a manner prejudicial to the soveriegnty or integrity of Pakistan, it shall refer the matter to this Court for decision. The word "operation" is defined in Concise Oxford Dictionary as follows:--

.operate;

(1) be in action, produce an effect, exercise influence....

(2) perform surgical or other operation (on); (try to) execute purpose; (Mil) carry on strategic movements; (of stockbroker etc.) buy and sell esp. with a view to influencing prices.

(3) bring about, accomplish; manage, work, conduct .....

In Black's Law Dictionary, the word "operation" is defined as under:--

.operate. To perform a function, or operation, or produce an effect.

Operation.

Exertion of power; the process of operating or mode of action; an effect brought about in accordance with a definite plan; action; activity."

There is nothing in the language of Article 17(2) (supra) to suggest F that the word "'operation" is to be given any restricted meaning. I am, therefore, of the View that the operation of a political party in its ambit includes the entire political process beginning from the formation of the party, propagation of its views on matters of public importance, taking part in elections and when voted to power by a popular vote to form the Government of its choice and to complete its terms in the office in accordance with the provisions of the Constitution. It needs no mention here that a long, vigorous and sustained effort is needed by a Political Party to win public support to its programme and sometimes it may require a lifetime effort by a Political Party to educate public opinion on issues of public importance propagated by it. Therefore, to get elected to Assemblies and to form the Government of its choice, in the even of success, is not only the paramount and cherished goal of every Political Q. Party but it is inherent in its operation and functioning.

Considering in the above context, the right to form a Political Party guaranteed under Article 17(2) of the Constitution necessarily includes in it, the right to continue in power, if directly elected by the people, for the full tenure, subject to other provisions of the Constitution. It, therefore, necessarily follows that a duly elected political Government if ousted or interrupted from continuing in power through unconstitutional means, can legitimately make a grievance that its Fundamental Right under Article 17(2) of the Constitution has been violated. If the contention of learned Attorney-General and the counsel for respondent No.3 is accepted, the role of Political Parties will be reduced to a mere debating societies engaged in academic discussions on political issues of public importance, which in my humble opinion was not in the contemplation of the framers of the Constitution while specifically guaranteeing the right to form a Political Party under Article 17(2) of the Constitution.

Mr. S.M. War also contended that the fact that Assembly could be dissolved, at any time during its tenure at the advice of Prime Minister, shows that the members of National Assembly cannot claim any vested right in respect of rive years' tenure of the Assembly prescribed under the Constitution. The argument of the learned counsel is not of much relevance. The right to continue as member of National Assembly for a period of five years is subject to other provisions of the

Constitution including those relating to its dissolution. Therefore, if the Assembly is dissolved validly in accordance with the provisions of the Constitution, no vested right could be claimed against such an action. The right to continue as member of the Assembly would only arise when the dissolution takes place contrary to the provisions of the constitution. The dissolution of Assembly on the advice of Prime Minister is specifically provided for in the Constitution, and as such no question of Fundamental Right of any member of the Assembly being infringed by such dissolution arises. Secondly, the Prime Minister as leader of the House and as head of the Government, represents the will of the majority of the members of

the National Assembly. When the Prime Minister advises dissolution of Assembly, he in fact reflects the will of the majority of the members of the H Assembly. Therefore, in such a situation the minority cannot prevent dissolution on the ground of violation of their rights as the National Assembly without majority of its members will otherwise become unrepresentative.

Mr. Khalid Anwar, the learned counsel for the petitioner has also contended that the 'political justice' as enshrined in Article 2A of the Constitution is declared as a fundamental right, therefore, on this score too the petitioner, whose political rights have been infringed by the impugned action, is entitled to maintain the petition under Article 184(3) of the Constitution. It is not necessary to decide here this contention of Mr. Khalid Anwar, in view of my above findings that the right to form a Political Party mentioned under Article 17(2) of the Constitution necessarily implies the right of a I it Party duly voted to power in an election, to continue as such, in accordance with the provisions of the Constitution.

. I am, therefore, of the view that if the petitioner, who was heading the Government of the Federation, formed by a Political Party, on the. basis of its majority in the National Assembly, succeeds in showing that his right to continue in the Government was disrupted or discontinued illegally and through unconstitutional means, he can legitimately make a grievance about violation of his fundamental rights guaranteed under Article 17(2) (supra) and can also maintain the petition under Article 184(3) of the Constitution before this Court to challenge the impugned action. It may be stated here that both, the learned Attorney-General and the counsel for respondent No .3, conceded before us that the issues involved in the above petition are certainly of great public importance. The petitioner has specifically alleged, in his petition, that his majority Government was dismissed and the National Assembly was dissolved by the President on 18-4-1993 illegally and unconstitutionally. If these allegations are established, the petition will be maintainable under Article 184(3) of the Constitution in view of the preceding discussion.

I now proceed to examine the validity of the Order of the President, dated 18-4-1993, dissolving the National Assembly and dismissing the Prime Minister and the Federal Cabinet. It reads as follows:---

"The President having considered the situation in the country, the events that have taken place and the circumstances, the contents and consequences of the Prime Minister's speech on 17th April, 1993 and among others for the reasons mentioned below is of the opinion that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary:---

(a) The mass resignation of the members of the Opposition and of considerable numbers from the Treasury Benches, including several Ministers, inter alia, showing their desire to seek fresh mandate from the people have resulted in the Government of the Federation and the National Assembly losing the confidence of the people, and that the dissension therein, has nullified its mandate.

(b) The Prime Minister held meetings with the President in March and April and the last on 14th April, 1993 when the President urged him to take positive steps to resolve the grave internal and international problems confronting the country and the nation was anxiously looking forward to the announcement of concrete measures by the Government to improve the situation. Instead, the Prime Minister in his speech on 17th April, 1993 chose to divert the people's attention by making false * and malicious allegations against the President of Pakistan who is Head of State and represents the unity of the Republic. The tenor of the speech was that the Government could not be carried on in accordance with the provisions of the Constitution and he advanced his own reasons and theory for the same which reasons and theory, in fact, are unwarranted and misleading. The Prime Minister tried to cover up the failures and defaults of the Government *although he* was repeatedly apprised of the real reasons in this behalf, which he even accepted and agreed to rectify by specific measures on urgent basis. Further, the Prime Minister's speech is tantamount to a call for agitation and in any case the speech and his conduct amounts to subversion of the Constitution.

(c) Under the Constitution the Federation and the Provinces are required to exercise their executive and legislative authority as demarcated and defined and there are specific provisions and institutions to ensure its working in the interests of the integrity, sovereignty, solidarity and well-being of the Federation and to protect the autonomy granted to the Provinces by creating specific Constitutional institutions consisting of Federal and Provincial representatives, but the Government of the Federation has failed to uphold and protect these, as required, in that, inter alia:

(i) The Council of Common Interests under Article 153 'which is responsible only to Parliament has not discharged its Constitutional functions to exercise its powers as required by Articles 153 and 154, and in relation to Article 161, and particularly in the context of privatisation

of industries in relation to item 3 of Part 11 of the Federal Legislative List and item 34,of the Concurrent Legislative List.

(ii) The National Economic Council under Article 156, and its Executive Committee, has been largely bypassed, inter alia, in the formulation of plans in respect of financial, commercial, social and economic policies.

(iii) Constitutional powers, rights and functions of the Provinces have been usurped, frustrated and interfered with in violation of inter alia Article 97.,

(d) Mal-administration, corruption and nepotism have reached such proportions in the Federal Government, its various bodies, authorities and other corporations including banks supervised and controlled by the Federal Government, the lack of transparency in the process of privatisation and in the disposal of public/Government properties, that they violate the requirements of the Oath(s) of the public representatives together with the Prime Minister, the Ministers and Ministers of State prescribed in the Constitution and prevent the Government from functioning in accordance with the provisions of the Constitution.

(e) The functionaries, authorities and agencies of the Government under the direction, control, collaboration and patronage of the Prime Minister and Ministers have unleashed a reign of terror against the opponents of the Government including political and personal rivals/relatives, and media men, thus creating a situation wherein the Government cannot be carried on in accordance with the provisions of the Constitution and the law.

(f) In violation of the provisions of-the Constitution:---

(i) The Cabinet has not been taken into confidence or decided upon

numerous Ordinances and matters of policy.

(ii) Federal Ministers have for a period even been called upon not to see

the President.

(iii) Resources and agencies of the Government of the Federation, including statutory corporations, authorities and banks, have been misused for political ends and purposes and for personal gain.

(iv) There has been massive wastage and dissipation of public funds and assets at the cost of the national exchequer without legal or valid justification resulting in increased deficit financing and indebtedness, both domestic and international, and adversely affecting the national interest including defence.

(v) Articles 240 and 242 have been disregarded in respect of the Civil Services of Pakistan.

(g) The serious allegations made by Beguin Nuzhat Asif Nawaz as to the highhanded treatment meted out to her husband, the late Army Chief of Staff, and the further allegations as to the circumstances culminating in his death indicate that the highest functionaries of the Federal Government have been subverting the authority of the Armed Forces and the machinery of the Government and the Constitution itself.

(h) The Government of the Federation for the above reasons, inter alia, is not in a position to meet properly and positively the threat to the security and integrity of Pakistan and the grave economic situation confronting the country, necessitating the requirement of a fresh mandate from the people of Pakistan.

2. Now therefore 1, Ghulam Ishaq Khan, President of Islamic Republic of Pakistan in exercise of the powers conferred on me by clause (2)(b) of Article 58 of the Constitution of the Islamic Republic of Pakistan and all other powers enabling me, hereby dissolve the National Assembly with immediate effect; and dismiss the Prime Minister and the Cabinet who shall cease to hold office forthwith."

Mr. Khalid Anwar, the learned counsel for the petitioner, contended before us that none of the grounds mentioned in the above order of the President bears any nexus to the preconditions mentioned in Article 58(2)(b) of the Constitution, for exercise of the power by the President to dissolve the National Assembly. The learned counsel argued that the petitioner throughout the

tenure of the office of Prime Minister enjoyed full confidence and support of the majority of the members of the National Assembly, and the conditions prevailing on 18-4-1993 when the Assembly was dissolved by the President, were not such that it could be said by any process of reasoning that the Government of Federation could not be carried on in accordance with the Constitution and an appeal to the electorate was necessary. Mr. Khalid Anwar contended that the two objective conditions mentioned in Article 58(2)(b) of the Constitution which were sine qua non for exercise of power by the President under Article 58(2)(b) (supra), were totally wanting in the present case and as such the dissolution order cannot be justified on Constitutional plane. The learned counsel further contended that the Constitution envisages a system of Government based on the concept of Parliamentary democracy in which the Prime Minister is answerable to the Parliament alone, and as such, the President while exercising his powers under Article 58(2)(b) of the Constitution could not rely on any shortcomings in the working of the Government of the petitioner, as a ground for dissolving the National Assembly. Mr. Khalid Anwar contended that in discharge of all his executive functions under the Constitution, except those in respect whereof the Constitution specifically authorises him to act in his discretion, the President' is bound to act on the advice of Prime Minister or the Cabinet. This fact according to Mr. Khalid Anwar, fully demonstrates that in matters of policymaking and day to day administration of the Government, the Prime Minister is neither answerable to President nor he acts as a subordinate of the President. Mr. Khalid Anwar further contended that the order passed by the President, on 18-4-1993, is unconstitutional and mala ride on its face, as the President had no power to dissolve the Assembly when its session was summoned by the. Speaker. Relying on Article 54(3) of the Constitution, the learned counsel contended that when a session of National Assembly is summoned by the Speaker on the requisition of 1/4th of its members, he alone under the Constitution is competent to prorogue such a session of the Assembly. The learned counsel, accordingly, contended that the President by its pre-emptive order of dissolution of National Assembly in fact usurped the exclusive power of Speaker under Article 54(3) (supra). According to Mr. Khalid Anwar, the power to dissolve the National Assembly under Article 58(2)(b) (supra) became dormant as soon as the Session of the National Assembly was summoned by the Speaker and this power could only be exercised by the President after the requisitioned session of the Assembly was prorogued by the Speaker. Mr. Khalid Anwar further contended that even otherwise the grounds mentioned in the order of dissolution were untenable and an afterthought as the President as late as 22-12-1992, in his speech delivered on the occasion of the first session of the year of the Parliament had praised the performance of the Government of the petitioner in all the fields. Mr. Khalid Anwar referred in detail to the events and development in the country during the three months period prior to the dissolution of Assembly both with the help of Newspaper reports and other material on record before us, and contended that in the back drop of these events when the petitioner met with the President on 14-4-1993, the irritants were removed. In this connection the learned counsel referred to the Press Release issued by the President's Secretariat on the same day as well as the draft communique prepared by the Prime Minister's 'Secretariat, produced in Court by respondents, and contended that there is no indication in these documents that any deadlock or stalemate had arisen which rendered the working of the Federal Government in accordance with the Constitution impossible. On the contrary, according to Mr. Khalid Anwar, these documents clearly show that the outstanding issues were satisfactorily resolved and the petitioner had assured the President to implement the decision taken in the meeting held on 14-4-1993 in due course of time. Mr. Khalid Anwar further contended that even otherwise, the extreme action of dissolution of Assembly was totally uncalled for, As the shortcomings pointed out in the dissolution order could be remedied

by resort to various Constitutional options available to President under the Scheme of the Constitution. On the above premises, Mr. Khalid Anwar contended that the order of dissolution of -Assembly was wholly uncalled for, unconstitutional, arbitrary and based on extraneous reasons.

Mr. Yahya Bakhtiar, the senior counsel of the petitioner, supporting the arguments of Mr. Khalid Anwar, contended that the President of Pakistan, not being a directly elected person, is neither answerable to the Parliament nor to the people, under the Constitution. Such a Constitutional figure head, according to him, cannot claim supremacy over the Prime Minister, who is directly elected by the people and is answerable to Parliament for all his acts. The learned counsel also made a collateral attack on the constitutionality of 8th Amendment in the Constitution as well as the appointment of the President, who according to learned counsel, having been elected as President for the un expired period of the term of the office of President mentioned in clause 7 of Article 41 of the Constitution, has ceased to be the President on the expiry of that period.

Dr. Farooq Hassan, another learned counsel for one of the petitioners in the above cases, contended that President of Pakistan under the Constitution has a very limited role to play. According to Dr. Hassan, the President, in the scheme of Constitution, cannot impose his will on the Prime Minister, in so far the working of the Government is concerned. By reference to various provisions of the Constitution, the learned counsel contended that in all matters of administration of State, the President is bound by the advice of the Prime Minister and not the vice versa. The learned counsel also referred to the grounds of dissolution mentioned in the order dated 18-4-1993, and contended that there is nothing in the above order to indicate that the Assembly had lost its mandate or that the working of the National Assembly was such that it no more represented the will of the electorate.

In reply to the above contentions of the petitioners, Mr. Aziz A. Munshi, the learned Attorney-General, contended that President dissolved the National Assembly on 18-4-1993, in exercise of his discretion under Article 58(2)(b) of the Constitution and this discretion vesting in the President under the Constitution is not subject to any supervisory control of the Courts.

The Courts, according to the learned Attorney-General in exercise of their power of judicial review, as laid down in the cases of Federation of Pakistan v. Haji Saifullah PLD 1989 SC 166 which was reiterated, with approval, in the case of Khawaja Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646, are only entitled to examine that the grounds of dissolution mentioned by the President in his order bear some nexus to the conditions prescribed under Article 58(2)(b) (supra) and that there was some material available before the President in support of the grounds mentioned in the dissolution order. The learned Attorney-General went on to argue that when once the President had formed the opinion on the basis- of the material before him, that a situation had arisen, in which the Federal Government could not be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary, he entered the domain of his discretion

under Article 58(2)(b) (supra) which could not be controlled or circumscribed by the existence of any other alternative course or remedy under the Constitution. The learned Attorney-General referred to the voluminous file ' s produced before us, containing mostly the press reports and some letters and correspondence exchanged between the President's Secretariat and Prime Minister's Secretariat, in an attempt to show that the grounds mentioned in the dissolution order not only bore nexus to the conditions prescribed under Article 58(2)(b) (supra) but that there was enough material before the President in support of the grounds mentioned in the dissolution order. Replying to the contention of the petitioner that in every case where the President exercises his power under Article 58(2)(b) of the Constitution, the existence of two distinct and separate conditions, namely, (i) that a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution, and that (a) an appeal to electorate is necessary, are sine qua non for exercise of such power by the President, the learned Attorney-General contended, that both these conditions in effect are one and the same and in other words one is the corollary of the other. In the alternative, the learned Attorney-General contended that even if the Court considers that both these conditions must be satisfied as distinct and separate jurisdictional requirement, before power was exercised by the President under Article 58(2)(b) of the Constitution, they were fully complied with in the present case, as besides the deadlock and stalemate created in the functioning of the Government on account of acts of commission and omission of the petitioner, the Assembly had also lost its representative character as an elected body on account of mass resignations of members of the National Assembly. The learned Attorney-General very vehemently argued that apart from the facts stated in the dissolution order, the speech of Prime Minister delivered on the electronic media on 17-4-1993, itself amounted to a complete deadlock and a stalemate, as after the above speech in which the petitioner described the President as a conspirator and a person responsible for destabilising his Government, it could not be expected that the President would be able to discharge his Constitutional role qua the Government of the petitioner. This fact alone, according to learned Attorney-General, was sufficient for the President to conclude that a situation has arisen is which the Federal Government could not be carried on in accordance with the provisions of the Constitution. Elaborating his above submission, the learned Attorney General contended that the President, in his capacity as the Head of the State and representing the unity of Federation, has the Constitutional right to advise, warn and be consulted in the running and management of the affairs of the Federal Government. According to learned Attorney-General, this advisory and consultative role of the President under the Constitution could not be performed effectively after the speech of Prime Minister, dated 17-4-1993. The learned Attorney-General repeatedly argued that the speech of Prime Minister on 17-4-1993, amounted to an act of defamation against the President, which besides being actionable under ordinary law amounted to subversion of the Constitution. These circumstances, according to learned Attorney-General, presented a state of Constitutional impasse leading to a complete deadlock and stalemate in the working of the Government of Federation, leaving no other option with the President except to dissolve the National Assembly and make a fresh appeal to the electorate in accordance with Article 58(2)(b) (supra).

Mr. S.M. Zafar, the learned counsel for the Care-taker Prime Minister while supporting the above stand of learned Attorney-General in the case, contended that the dissolution of an elected Assembly is. part of a democratic process in a parliamentary system of Government. The learned

counsel quoted from the Book 'The Theory of Practice of Dissolution of Parliament" by B.S. 'Markesinis, a Cambridge University Publication (1972. Edition), a tabulated statement showing dissolution of Assemblies during the past over 100 years in the United Kingdom and other countries of the Continent, in a bid to demonstrate that frequent dissolution of elected Assemblies is not an unusual phenomena but a normal feature and a part of Parliamentary democratic polity. Referring to the contention of the petitioner that once a session of the National Assembly was called by the Speaker on the requisition of its members, the power of President became dormant and could not be exercised until the session was prorogued by the Speaker, Mr. S.M. Zafar contended that no such limitation could be read on the power of President under Article 58(2)(b) of the Constitution on account of summoning of the session of National Assembly by the Speaker under Article 54(3) of the Constitution. The learned counsel contended that the power to summon and prorogue the Assembly is distinct and separate from the power of the President to dissolve the Assembly and the latter power is not controlled by the former. Dealing with the concept of power of President and Prime Minister, in a strict parliamentary democracy, Mr. S.M. Zafar contended that though the concept of Government in our Constitutional scheme may be nearer in spirit to the West minister's Parliamentary form but in a stricter sense it is not a parliamentary democracy out and out, as in a parliamentary democracy, the President is only a ceremonial head and all powers of the Government are exercised by the Prime Minister who is answerable to Parliament alone. The learned counsel contended that the President, under our Constitutional scheme is authorised to exercise power over a substantially large executive domain. According to learned counsel the powers exercised by the President under the Constitution in executive field can be divided in four categories, namely:-- (i) President acting on the advice of Prime Minister; '(ii) President acting in his discretion; (iii) President acting in consultation with Prime Minister and (iv) President acting as a head of State in his representative capacity. According to the learned counsel the exercise of such large number of powers by the President in executive riled, makes him a potent force under the Constitution in contradistinction to a mere ceremonial Head of State in a parliamentary system of Government. Taking further this argument, Mr. S.M. Zafar contended that in a Constitutional arrangement where the President is entitled to exercise power in such a large executive domain alongside the Prime Minister, it is necessary. that the holders of these two top offices in the Federation must work in harmony and cohesion. Otherwise, a deadlock or a stalemate in the working of the Government would be inevitable. In the above context of division of power between President and Prime Minister under the Constitution the learn counsel contended that the speech of Prime Minister on television on 17-4-1993 did create a climate of deadlock and stalemate justifying dissolution of National Assembly. Referring to various grounds of dissolution mentioned in the order of President, dated 18-4-1993, Mr. S.M. Zafar contended that the fact that the entire Opposition alongwith some members of the ruling party, had tendered their resignations en bloc from the membership of the Assembly did support the conclusion that the Assembly had lost its representative character and as such the dissolution of National Assembly by the President was fully justified under Article 58(2)(b)'of the Constitution.

The learned Advocates- ' General of Punjab, Sindh, Frontier and Balochistan adopted the arguments of learned Attorney-General and further contended that the Federal Government under the petitioner continued to ignore the rights of the Provincial Governments which led to a sense of

deprivation amongst the Federating Units. In this connection, they referred to the protests lodged by respective Provincial Governments, from time to time, with the Prime Minister and the President in order to show that the Federal Government bypassed the Constitutional provisions in dealing with the rights of the Provinces.

Before I take up each ground of the Dissolution Order, dated 18th April, 1993, separately for consideration, it will be appropriate to first answer some of the Constitutional issues raised at the Bar in the above petitions. The first and the most vital question argued in these cases relates to the parameters within which power to dissolve the National Assembly can be exercised by the President under Article 58(2)(b) of the Constitution. This question has been. directly answered in two reported decisions of this Court in the cases of Federation of Pakistan v. Haji Saifullah Khan P L D 1989 SC 166 and Khawaja Ahmed Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646. The broad I principles laid down in the above two cases governing exercise of power by the President under Article 58(2)(b) of the Constitution, may be summed up as follows:---

(I) The President, before exercising the power under Article 58 (2)(b) of the Constitution must form an opinion objectively that a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to! the electorate is necessary;

(ii) that although the exercise of discretion vesting in the President under Article 58 (2)(b) of the Constitution is not subject to control by the Courts, the opinion of the President must satisfy an objective test as' nothing has been left to surmises, likes or -dislikes in the process of opinion forming;

(iii) that the grounds of dissolution must bear nexus to the preconditions mentioned in Article 58(2)(b) of the Constitution;

(iv) that the opinion formed by the President must be based on some material;,

(v) that sufficiency or otherwise of the material before the President cannot be adjudicated upon by the Court while considering the validity of dissolution order passed under Article 58(2)(b) of the Constitution;

(vi) That the Courts while commenting upon the Dissolution Order cannot substitute their own opinion for that of the President; and

(vii) That the President having once validly formed the opinion that conditions prescribed in Article 58(2)(b) of the Constitution exist, is free to exercise the discretion one way or the other and existence of other alternate remedy in the Constitution could not control exercise of such discretion by the President.

On the scope of Article 58(2)(b) of the Constitution, Mr. Khalid Anwar, however, contended that the President can exercise power under this Article, only when he forms the opinion objectively that the two distinct and separate conditions mentioned in Article 58(2)(b) (supra), namely, (i) that a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution and that; (ii) an appeal to the electorate is necessary, exist side by side. The learned counsel argued that the existence of circumstances in a case, justifying an inference that, a situation has arisen in which the Government of Federation cannot be run in accordance with the Constitution does not necessarily lead to the conclusion that the second condition mentioned in Article 58(2)(b) (supra), that an appeal to the electorate is necessary, also stands satisfied in the case. The learned counsel argued that existence of different facts and circumstances may be necessary to establish these two distinct and separate conditions. The learned counsel further contended that apart from it, an appeal to electorate may not always provide an effective solution to the situation which gives rise to an inference that the Government of Federation cannot be carried on in accordance with the provisions of the Constitution. The learned counsel specifically referred to the contention of learned Attorney-General in the present case and argued that according to learned Attorney-General the alleged deadlock and stalemate in running the Government of Federation has arisen on account of the speech of Prime Minister delivered on 17th April, 1993 and posed a question whether an appeal to electorate (fresh election to National Assembly) will provide a solution to this stalemate when admittedly the contest in the election will be confined between the political parties taking part in the election and there being no possibility of this alleged stalemate between the petitioner and the President forming part of the election issue before the electorate?

Mr. Aziz A. Munshi, the learned Attorney-General, in reply to the above arguments of Mr. Khalid Anwar contended that the second condition mentioned in Article 58(2)(b) (supra), that an appeal to the electorate is necessary, is merely a corollary of the first condition, that a situation has arisen in which the Government of Federation cannot be run in accordance with the provisions of the Constitution. According to learned Attorney-General as soon as it is shown that the first condition mentioned in Article 58(2)(b) has arisen, the second will automatically follow. Alternatively, the learned Attorney General contended that in so far the present case is concerned this argument does

not arise as both the conditions mentioned in Article 5b(2)(b) (supra) were fully satisfied. According to learned Attorney-General, the inference by the President that the Government of Federation could not be carried on in accordance with the provisions of the Constitution was based on various acts of commission and omission of the petitioner mentioned in the Dissolution Order and the National Assembly having lost its representative character on account of mass resignations of its members, an appeal to electorate was necessary. I may mention here that the argument regarding the scope of Article 58(2)(b) (supra) was not presented in this manner before this Court in the cases of Haji Saifullah and Khawaja Tariq Raheem (supra) and, therefore, the decision in those cases may not provide a complete answer to the contentions raised above at the Bar in the present case. I, therefore, feel it necessary to deal with the above contention in the manner it is raised before us in this case. Article 58(2)(b) of the Constitution reads as under:---

"58 .....

(2) Notwithstanding anything 'contained ,in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion,--

(a) a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly is likely t6~ command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution. ascertained in a session of the National Assembly summoned for the purpose; or

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary."

The use of conjunction "and" in between the expressions "a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution" and "an appeal to electorate is necessary" in. Article 58(2)(b) of the Constitution, clearly indicates that the latter condition is to be added to or taken alongwith the first condition. It has not been argued before us in the case that 'and' is to be read as 'or' in Article 58(2) (b) or that 'and' is used iii any other sense. To me it appears that land' is used in Article 58(2) (b) (supra) in its ordinary grammatical meaning. I am, therefore, of the view that the above-referred two conditions in Article 58(2)(b) of the Constitution are distinct and separate conditions and their existence as such in a case is a sine qua non for exercise of power by the President to dissolve the National Assembly. What are those facts and circumstances which justify an inference that these two objective conditions mentioned in Article 58(2)(b) (supra) have been satisfied, must be

answered with reference to the facts and circumstances of each case, and no hard and fast rule in this regard can be laid down by the Courts? This Court in the case of Federation of Pakistan v. Muhammad Saifullah Khan PLD 1989 SC 166 interpreted the expression, "the Government of Federation cannot be run in accordance with the provisions of the Constitution", as follows:---

"The expression 'cannot be carried on' sandwiched as it is between 'Federal Government' and "in accordance with the provisions of the Constitution H , acquires, a very potent, 'a very positive and a very concrete content. Nothing has been left to surmises, likes or dislikes, opinion or view. It does not concern itself with the pace of the progress, the shade of the quality or the degree of the performance or the quantum of the achievement. It concerns itself with the breakdown of the Constitutional mechanism, a stalemate, a deadlock in ensuring the observance -of the provisions of the Constitution. The historical perspective in which such a provision found a place in our Constitution reinforces this interpretation."

In the case of Khawaja Ahmed Tariq Rahim, v. Federation of Pakistan PLD 1992 SC 646, this Court while re-affirming the view expressed in Haji Saifullah's case, observed as follows:---

"This much for the background of the Constitutional power, its scope and meaning in the past and in the contemporary decisions outside Pakistan. In Haji Muhammad Saifullah Khan's case PLD 1989 SC 166 our Constitutional provision has received full attention and its meaning and scope authoritatively explained and determined. It is an extreme power to be exercised where there is an actual or imminent breakdown of the Constitutional machinery, as distinguished from a failure to observe a particular provision of the Constitution. There may be occasion for the exercise of this power where there takes place extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution, creating the impression that the country is governed not so much by the Constitution but by methods extra-Constitutional."

From the above discussion it would appear that the expression, "the Government of Federation cannot be carried on in accordance with the provisions of the Constitution" in Article 58(2)(b) (supra) contemplates a situation where the affairs of the Government are not capable of being run in accordance with the provisions of the Constitution either on account oil persistent, deliberate and continued violation of various provisions of the Constitution by the Government in power, or on account of some defect in the structure of the Government, its functioning in accordance with the provisions of the Constitution is -rendered impossible. The use of expression "Cannot be carried on" necessarily imports an element of impossibility and disability and refers to a irretrievable and irreversible situation. An unintentional and bona fide omission to follow a particular provision of the Constitution, not resulting in the breakdown of Government machine-y

or creating a situation of a stalemate or deadlock in the working of the Government, will not be covered in the situations contemplated under Article 58(2)(b) of the Constitution.

Similarly, the use of expression in Article 58(2)(b) (supra) that "an appeal to electorate is necessary', implies that the Assembly has lost its representative character. This may happen where either majority of its members have resigned or where floor-crossing and 'horse-trading' by the members of the Assembly has become the order of the day, or there are other very strong circumstances suggesting that the electorate no more reposed confidence in the policies of the Government. The examples, referred by me above are, however, by no means exhaustive and there may be other facts and circumstances which may justify inference 'that a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

1, therefore, do not agree with the contention of learned Attorney General that the two objective conditions mentioned in Article 58(2)(b) of the Constitution are in effect one and the same, and where it is shown that the first N condition, that a situation has arisen in which the Government of Federation' cannot be run in accordance with the provisions of the Constitution, exists in a case, the second condition, that an appeal to the electorate is necessary, will follow as a corollary of the first condition.

The second Constitutional argument raised in the case by Mr. Khalid Anwar is, that once the session of National Assembly is summoned by the Speaker on the requisition of its members then such a session could only be prorogued by the Speaker. The learned counsel further contended that the preemptive dissolution of National Assembly by the President to prevent the holding of such a session of the Assembly was illegal and unconstitutional as the power to dissolve the Assembly under Article 58(2)(b) (supra) by the President could not be exercised unless the Speaker prorogued the session of National Assembly summoned by him. The contention of the learned counsel for the petitioner does not appear to be correct. Mr. S.M. Zafar, the learned counsel for the Care-taker Prime Minister rightly pointed out that the power to prorogue the session of Assembly is distinct from the power to dissolve the Assembly. The power to summon and prorogue the session of the Assembly and power to dissolve the Assembly are conferred by Articles 54 and 58 of the Constitution, respectively. Articles 54 and 58 of the Constitution read as follows:---

"54.--(1) The President may, from time to time, summon either House or both Houses of Majlis-e-Shoora (Parliament) in joint sitting to meet at such time and place as he thinks fit and may also prorogue the same.

(2) There shall be at least. (three) sessions of the National Assembly every year, and not more than one hundred and twenty days shall intervene between the last sitting of the Assembly in one session and the date appointed for its first sitting in the next session:

Provided that the National Assembly shall meet for not less than one hundred and (thirty) working days in each year.

Explanation. ---In this clause, 'working days' includes any day on which there is a joint sitting and any period, not exceeding two days for which the National Assembly is adjourned.)

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(3) On a requisition signed by not less than one-fourth of the total membership of the National Assembly, the Speaker shall summon the National Assembly to meet, at such time and place as he thinks fit, within fourteen days of the receipt of the requisition; and when the Speaker has summoned the Assembly only he may prorogue it."

58.--(l) The President shall dissolve the National Assembly if so advised by the Prime Minister; and the National Assembly shall, unless sooner dissolved, stand dissolved at the expiration of forty-eight hours after the Prime Minister has so advised.

Explanation. ---Reference in this Article to 'Prime Minister' shall not be construed to include reference to a Prime Minister against whom a (notice of a resolution for a vote of no-confidence has been given) in the National Assembly but has not been voted upon or against whom such a resolution has been passed or who is continuing in office after his resignation or after the dissolution of the National Assembly .....

(2) Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion,---

(a) a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of the majority of the members of the

National Assembly in accordance with the provisions of the Constitution ascertained in a session of the National Assembly summoned for the purpose; or

‘(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to. the electorate is necessary.”

From the language of the above mentioned Articles of Constitution, it is quite clear that they operate in different fields and cater for different and distinct situations. Article 54 pro ‘ vides for summoning of the sessions of National Assembly and power to prorogue its session. Under clause (1) of Article 54, the President is vested with the power to summon the session of National Assembly from time to time and to prorogue the same, on the advice of Prime Minister. The Speaker is’ also distinctly conferred the power under clause (3) of Article 54 to call for the session of National Assembly when requested through a requisition signed by one-fourth of the total number of the members of National Assembly. The session summoned by the Speaker under

Article 54(3) cannot be prorogued by any person other than the Speaker. Article 58(l) on the other hand provides for dissolution. of Assembly by the President, on the advice of Prime Minister. The President under Article 58(2)(a) can also dissolve the National Assembly in his discretion, if a vote of no-confidence is passed against the Prime Minister and President ascertains in the session of National ‘ Assembly called for that purpose, that no other member of the National Assembly is likely to command the confidence of the majority of the members of National Assembly. The President is also empowered to dissolve the National Assembly in his discretion, under Article 58(2)(b) (supra) if he objectively forms the opinion, that a situation has arisen in which the Government of Federation cannot be run in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. The scope of power enjoyed by the Speaker of National Assembly to prorogue the session of National Assembly summoned by him under Article 54(3) of the Constitution is, therefore, to be examined and understood in the context of powers enjoyed by the President and the Speaker respectively, to prorogue the sessions of National Assembly under Article 54 of the Constitution, and nothing beyond that. The exclusive power enjoyed by the Speaker to prorogue the session of National Assembly summoned by him under Article 54 (3) is not at all determinative of the power of the President to dissolve the Assembly under Article 58 of the Constitution. The power to dissolve the National Assembly under Article 58(2)(b) is undoubtedly a distinct and separate Constitutional power which is neither subordinate to nor controlled by the provisions of Article 54 of the Constitution. There is nothing in the language of Article 54 or Article 58 or in any other provision of the Constitution to suggest or indicate that when a session of the National Assembly in summoned either by the President himself.(Article 54(1)) or by the Speaker (Article 54(3)), the power to dissolve the National Assembly will not be exercised by the President under Article 58 of the Constitution or that the power of President to dissolve the National Assembly will remain suspended or dormant until the session of the National Assembly summoned under Article 54 is prorogued. The power to dissolve the Assembly under Article 58 of the Constitution is an independent and distinct power which can be exercised at any

time after the Assembly is formally opened. The fact that Assembly I is in session or that its session has been called or that it is not in session has no bearing on the exercise of the power of dissolution under Article S8 of the Constitution.

I have dealt with various Constitutional issues raised at the Bar in the above case and now revert to the Presidential Order, dated 18-4-1993, to consider on merit, the grounds mentioned therein individually. The first ground in the Dissolution Order relates to the alleged mass resignation of the members of Opposition. in National Assembly and some members of the Treasury Benches. Copies of these resignations have been filed before. us by the respondents. The contention of the petitioner with regard to these resignations is that these resignations have no value in the eye of law as they were not tendered as required by the Constitution. It is further contended by the petitioner that these so-called resignations were obtained by the President in an attempt to destabilise the Government of petitioner by encouraging and supporting' the elements hostile to' the petitioner's Government. The respondents in their written statement riled in the case have taken the following stand with regard to these resignations:---

"3(iii) Contents of para. 3 (iii are misleading and incorrect.

it is submitted that it is for the members of the National Assembly to select the mode of showing their protest and lack of confidence in the petitioner's Government, National Assembly and the Speaker whether in or outside the House. In the instant case they have addressed their resignations (Annex. *A-1) to the Speaker of the National Assembly, but sent them to the President to register with the Head of the State their protest and as an expression of lack of confidence in the National Assembly, the Speaker and the Federal Government. The further reason was that the Speaker had not in the past acted upon any motion directed against the Prime Minister/or any other Minister or member of the National Assembly supporting the Government or the Government itself and,. as widely known, the concerned members had shown lack of confidence in the Speaker, who according to the general perception was in collusion with the former Prime Minister and was not acting independently.

The resignations produced before us are to be considered in the wake of events which preceded the dissolution of National Assembly on 18-4-1993. Both sides have filed large number of press cuttings and relied on them to show the prevailing political climate in the country during pre-dissolution period. It is true that press reports are not to be accepted as proof of facts stated therein but where such reports were not contradicted by the concerned authority or person at the relevant time and are subsequently relied by either side in a case, these may be taken into consideration for forming an opinion generally as to-the prevailing state of affairs at the relevant time. The pr reports for the period immediately preceding the dissolution of National Assembly do show, that elements hostile to petitioner's Government were being entertained regularly at the President's House and after their meeting at the Presidency these elements gave the impression

that the petitioner's Government was going to be dissolved very soon. In this background, receipt of these resignations, addressed to the Speaker of National Assembly, by the President and not forwarding them to the Speaker, even after passage of considerable time appears not only an unusual course but also lends support to the contentions of the petitioner that these resignations were not given to the President by the members of National Assembly with a genuine desire to vacate their seats in the National Assembly but only to provide a leverage for bargaining with the petitioner and for destabilising; the Government of petitioner. This conclusion is further supported by the above-quoted passage from the written statement of respondents in the case and the fact that a good number out of these persons -.who allegedly handed over their so-called resignations to the President, found their way in the Care-taker Cabinet appointed by the President immediately after the dissolution of National Assembly. Apart from it, the value of these resignations has to be examined first under the Constitution. Article 64 of the Constitution provides that a member of Parliament may by writing under his hand addressed to the Speaker or as the case may be, to the Chairman ,resign his seat and thereupon his seat shall become vacant. Article 64 of the Constitution is to be read with Rule 25 of the Rules of Procedure and Conduct of Business in the National Assembly, 11

1.992 which is as follows:---

"25. Resignation of seat.--(1) A member may, by writing under his hand addressed to the Speaker, resign his seat.

(2) If,----

(a) a member hands over the letter of resignation to the Speaker personally and informs him that the resignation is voluntary and genuine and the Speaker has no information or knowledge to the contrary-, or

(b) the Speaker receives the letter of designation by any other means and he, after such inquiry as he thinks fit, either himself or through the National Assembly Secretariat or through any other agency, is satisfied that the resignation is voluntary and genuine, the Speaker shall inform the Assembly of the resignation:

Provided that if a member resigns his seat, when the Assembly is not in session, the Speaker shall direct that intimation of his resignation specifying the date of resignation be given to every member immediately.

(3) The Secretary- General shall, after the Speaker satisfies himself that the letter of resignation is voluntary and genuine, cause to be published in the Gazette a notification for the effect that the member has resigned his seat and forward a copy of. the notification to the Chief Election Commissioner for taking steps to fill the vacancy thus caused.

(4) The date of resignation of a member shall be the date specified in writing by which he has resigned or if no date is specified therein the date of receipt of such writing by the Speaker."

The resignation of-member of National Assembly, according. To above provisions, must be addressed to the Speaker and written under the hand of the member concerned. The resignation may be handed over personally by the member concerned to the Speaker and at that time he. May inform the Speaker that it is voluntary and genuine and if the Speaker has no information or knowledge to the contrary, his seat becomes vacant immediately. In case, the Speaker receives the letter of resignation by any other means he may either hold enquiry himself. or through the National Assembly Secretariat or through any other agency regarding- genuineness and voluntary nature of the resignation and as soon as the Speaker is satisfied that the resignation is genuine and voluntary, it becomes effective. According to sub-rule (4) of Rule 25, the date of resignation shall be the date mentioned in the resignation letter and if no date is. specified therein, the date of resignation will be the date on which the resignation is received by the Speaker. As soon as the resignation becomes effective a notification is - to be issued by the Secretariat of the Speaker in the Gazette and a copy thereof is to be sent to the Chief Election Commissioner for taking steps to fill up the vacancy. Therefore,. for a resignation to be Constitution valid, the above procedure has to be followed. In the present case, majority of the resignations produced before us do not bear any date. These resignations, though addressed to the Speaker of National Assembly were received by the President. who had no authority under the Constitution to receive them. These resignations received by the President in spite of passage of considerable time were not forwarded to the Speaker of National Assembly. The categorical stand taken by the learned Attorney General on the first date of hearing of the above case before us was, that these resignations were not meant for creating vacancies in the National Assembly but were only to register their protest and express their no-confidence, against the Government of petitioner. The learned Attorney-General no doubt modified his above stand by stating. in Court before us at a later stage of this case that these resignations were also resignations as such but in view of the statement contained in the written statement of respondents and the Constitutional position of these resignations discussed above, I am inclined to hold that these resignations have no Constitutional validity or value and as such it was not possible on the basis of these documents to arrive at the conclusion that the National Assembly had lost its representative character. Even otherwise, out of these resignations, 12 were tendered about a year ago, in the wake of operation clean up in Sindh Aid were thus irrelevant for the purposes of present Dissolution Order while the rest did not represent the majority of the members of the National Assembly. Mr. S.M. War, the learned counsel for the Care-taker Prime Minister, however, contended before us that the existence of an opposition party in the. Assembly, in a parliamentary

form of Government is a necessary part of the system and if the entire Opposition elects to resign from the Assembly, it would render the Assembly unrepresentative. The contention of learned counsel has not impressed me at all.* The argument, if accepted, is not only likely to give rise to unhealthy parliamentary practices but would also negate the very spirit of a parliamentary. system. In a parliamentary democracy, the right to form a Government Is always of the party which is in majority in the Assembly and the party in minority sits in the Opposition. If it is once accepted that the opposition party in the Assembly (which is always a minority) by reason of its on bloc resignations can bring about a dissolution of Assembly, and consequently an end to the majority rule, it will virtually make the majority party in the Assembly a hostage at the hands of minority. It will also open new avenues of political blackmail by the minority in the Assembly of the majority, as the Opposition party in the Assembly, however, small in number it may be, can always threaten the existence of the Assembly by resorting to en bloc resignations of its members and thus imposing its will on the majority, against the very concept of parliamentary democracy. I also not oblivious of the

record of our parliamentary history which is 'in no way a very commendable one. It is a hard fact of our parliamentary history that the main aim of a party in opposition in the Assembly, has always been touring down the Government in power. By accepting the principle that once the opposition party in the Assembly resigns en bloc the Assembly loses its representatives character and thus has to be dissolved, we will be adding new dimensions to the already prevailing unhealthy parliamentary practices in our polity, as the Opposition party in the Assembly though may be in absolute minority can always set at naught the majority rule in the Assembly by resorting to en bloc resignations of its members. This will be a total negation of a parliamentary system of Government. Mr. S.M. Zafar relied on the case of Adegbenro v. Akintola 1963 AC 614 in support of his contention that on account of resignations of 102 members out of the House of 217, the National Assembly became unrepresentative, and therefore, it was rightly dissolved by the President. The case is hardly of any assistance to the learned counsel. In the above-cited Privy Council's case, the Governor of Western Nigeria removed the respondent from the office of Premier and appointed the petitioner in his place, acting upon a letter, dated 21-5-1962, addressed to Governor signed by 66 members of the House of 'Assembly out of 124 members, in which it was stated that they no more supported the respondent. A writ petition was filed in the concerned Nigerian High Court to challenge the decision of the Governor. As the question involved in the petition was a substantial question of, law and interpretation of Constitution, the Nigerian High Court referred the case to the Federal Supreme Court of Nigeria in accordance with section 108 of the Constitution of Federation of Nigeria for opinion on the following two questions-.---

"(I) Can the Governor validly exercise power to remove the Premier from office under section 33, subsection (1), of the Constitution of Western Nigeria without prior decision or resolution on the fl(;or of the House of Assembly showing that the Premier no longer commands the support of a majority of the House?

(2) Can the Governor validly exercise power to remove the Premier from office under section 33(10) ... on the basis of any materials or information extraneous to the proceedings of the House of Assembly?*

The Federal Supreme Court of Nigeria answered the first question in the negative, thus holding that respondent had not been validly removed from office and found it unnecessary to answer the second question in view of its answer on the first question. On appeal by the petitioner; the House of Lords in Privy Council reversed the decision of Nigerian Federal Supreme Court. Their Lordships of Privy Council while interpreting section 33(10) of Nigerian -Constitution which reads as:

"(10) Subject to the provisions of subsections (8) and (9) of this section, the Ministers of the Government of the Region shall hold office during the Governor's pleasure:

Provided that --- (a) the Governor shall not remove the' Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly-, and (b) the Governor shall not remove a Minister other than the Premier from office except in accordance with the advice of the Premier."

made the following two observations in the above case

"The question to which an answer has to be found is of obvious importance, but it lies, nevertheless, within a very s mall compass. Its decision turns upon the meaning to be attached to the wording of section 33(10) of the Constitution of Western Nigeria, read, as it should be, in the context of any other provisions of the Constitution that may legitimately influence its meaning.

It is clear, to begin with, that the Governor is invested with some power to dismiss the Premier. Logically, that power is a consequence of the enactment that Ministers shall hold office during the Governor's pleasure, for, subject to the saving conditions of provisions (a) and (b) that follow, the Governor has only to withdraw- his pleasure for a Minister's tenure of office to be brought to an end. -Where the Premier's office is concerned it is proviso (a) that limits the' Governor's power to, ,withdraw his pleasure Constitutionally, for by that proviso he is precluded from removing the Premier from office ,unless it appears to him that the. Premier no longer commands the support of a majority of the members of the House of Assembly! By these words, therefore, the power of removal is at once recognised and conditioned: and, since the condition of Constitutional action has been reduced to the formula of these words for the purpose of the written Constitution, it is

their construction and nothing else that must determine the issue . : . ...

I will take up the next ground (b) of the Dissolution Order in the end for consideration as this appears to be the main ground in the case and a sheet anchor of the arguments of learned Attorney-- General. This ground, which is a new one, otherwise needs a detailed examination as it did not 'come up for consideration in the two earlier cases of dissolution Of National Assembly, Federation of Pakistan v. Muhammad Saifullah Khan and Ahmed Tariq Rahim v. Federation of Pakistan (supra) decided by this Court.

The third ground (c) of the Dissolution Order, besides its main clause is divided in 3 sub-heads. These relate to non-functioning of the Council Of Common Interests and bypassing of the National Economic Council, by the Federal Government, in formulation of plans . in respect of financial, commercial, social and economic policies and specially the process of privatisation of Industries in relation to item 3 of Part 11 of the Federal Legislative List, and transgression by the Federal Government in the affairs 'of Provincial Government in violation of Article 97 of the Constitution.. The contention of* learned Attorney-General before us is that ground (c) and its three sub-clauses are similar to grounds Nos. (iii), . (iv) and (v) of the Dissolution Order in Khawaja Ahmed Tariq Rahim's case, and this Court -having upheld these grounds as valid reasons* for dissolution of National Assembly in that case cannot now take a different view in the present case. The argument of learned Attorney-General appears to be very attractive and formidable on its face but it cannot stand the test of an objective scrutiny. No doubt there appears to be a similarity in the phraseology used in the grounds ,of Dissolution Orders in 'the case of Khawaja Ahmed Tariq Rahim and in the present case but mere –similarity ,in the words or phraseology can neither be T determinative factor nor a test for identity of the substance of the grounds in the two cases. In Khawaja Ahmed Tariq Rahim's case the Court found that the Federal Government had refused to convene the meeting of Council of Common Interests and National Finance Commission, the two most important Constitutional institutions for safeguarding the interest of federating units and securing and providing an equitable distribution of resources of the country between the Federal and Provincial Governments, in spite of persistent demands by the Provinces and a unanimous resolution of the Senate, with the result the two Federating units, namely, Punjab 'and Balochistan approached this Court. for issuing a direction to the Federal Government to convene the meeting of these Constitutional Institutions. No such situation existed in the present case on 18-4-1993 when the National Assembly was dissolved. The situation obtaining at the time of dissolution of National Assembly in Ahmed Tariq Rahim's case (supra), therefore, is in no Way comparable with the situation in the present case. The Council of Common Interests and the National Finance ' Commission, in the present case, were very much functioning. The petitioner has listed in his petition in paragraph (d/1) under the heading 'Relation with Provinces' the following facts:---

"(d/1) <u>Relation with Provinces.</u>

The Constitutional provision governing the relations between the Federal Government and the Provinces have been observed and strengthened to greater extent in the period since November 1990, than in the preceding 17 years: This is evident from the following facts-

(i) The Council of Common Interests *which* had remained a dormant organization since its creation was activated and three meetings were held on 12th January, 1991, 21st March, 1991, and 16th September, -1991. The Council reached decisions on the apportionment of Indus Waters at its meeting held on 21st March and approved the setting up of the Indus Waters Authority. It also approved for first time its Rules of Procedures. In preparation for the next meeting of the Council in May 1993 a pre-CCI meeting was held with the Chief Ministers.

(ii) The National Finance Commission, which under Article 160(l) of the Constitution, is to be constituted every 5 years, had not given its award since 1975. A new Commission was constituted in January 1991, and submitted a unanimous award in April 1991. This, has provided additional resources of Rs. 25/30 billion each year to the Provinces and thus met one of the essential prerequisites for enabling the provinces to discharge the functions entrusted to them under the Constitution.

(iii) A separate Ministry of Inter-Provincial Coordination was set up. An Inter-Provincial Coordination Council was created consisting of several Ministers and the four Chief Ministers and Prime Minister of AJK Government. The Council has met twice in a very cordial atmosphere and resolved many Inter .;Provincial issues. The first meeting - was held on 13th January, 1993- and the second on 11th April, 1993.

(iv) While totally ignoring these positive steps towards strengthening the Federal System only two instances of lack of consultation with the Constitutional bodies like CCI, NEC and its Executive Committees have been given. One is that the Council of Common Interests was not allowed to discharge its Constitutional function with regard to privatisation of industries and power units. This issue was examined in depth by the Ministers concerned in response to comments received from the President and a comprehensive report was sent to the President by the Cabinet Secretary on 15th April, 1993. Contents of this report have been summarized earlier."

The substance of the above averments by the petitioner could not be controverted by the respondents. The President in his annual address to the joint session of Parliament on 19-12-1991 also commented upon the functioning and performance of these Constitutional Bodies, as follows:---

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Once again the President had the opportunity of reviewing the performance of petitioner's Government in his second annual address to the joint sitting of Majlis-e-Shoora (Parliament) on 23-12-1992, when he commended as follows:

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Did these admitted facts paint a picture of dismal performance by these Constitutional Bodies under the Government of petitioner or presented a state of deadlock, stalemate or transgression of the limits set forth in the Constitution, by the Government of petitioner? Answer to these questions can only be the negative. The learned Attorney-General, however, made a somewhat novel argument in the case to nullify the effects of the two annual addresses of the Parliament to the joint sessions of Parliament in 1991 and 1992, with regard to the performance of the Government of petitioner. The learned Attorney-General contended that the contents of the above speeches did not represent the views of President on the working of the Government of petitioner as these speeches were based mainly on the information supplied by the petitioner's Secretariat and reflected the policies of petitioner's Government. In paragraph 3 of the petition, the petitioner referred to the address of the Parliament to the joint session of the Parliament on 23-12-1992, as follows:---

"3. That in ' his yearly address to the joint session of Parliament, boycotted as usual by PPP, on 23-12-1992, the President of Pakistan praised the performance of the Government of Pakistan under the leadership of Mian Nawaz Sharif and had nothing adverse to say. He, in fact, praised the legislative of the legislature, working parliamentary norms, and handling of damages caused by the unprecedented floods in the country. He praised the performance of the Government in the economic field and particularly in regard to privatization (copy of the Presidential

Address is annexed as Annexure A)."

The above statement of petitioner was replied to in the written statement filed on behalf of respondents in the case, as under:---

"Averments made in para. 3 relate to the President's Address to Joint Session of the Parliament and have been misconstrued by the petitioner as set out in the para. under reply. It has been the President's endeavour to support the Government to give the Nation a sense of security and stability within the country and abroad. In any event the order of the Dissolution speaks for itself."

The respondents never took the plea in the written statement that the addresses by the President to the joint sessions of Parliament did not represent his views on the subject and reflected only the policies of the petitioner's Government. If the address of the President to the joint session of Parliament on 23-12-1992, was only a prototype of the policies of the petitioner's Government, the following observations of the President in his above address could not be justified:----

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Surveys

In the earlier case of dissolution of National Assembly by the President in 1990 reported as Khalid Malik v. Federation of Pakistan PLD 1991 Karachi 1 the following passages from the speech of the President delivered in the joint session of Parliament on 2nd December, 1989, were relied by the learned Attorney-General as the objective assessment of the working of the then National Assembly and the Government in power:---

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Trading

If the annual address of the President to the joint session of Parliament in 1990 represented his views on the policies and working of the then Government in power, on what basis it could be argued now that the annual addresses of President to joint session of Parliament in 1991 and 1992 was a prototype of the policies and views of the Government in power? There is nothing either in Article 56 of the Constitution or in Rules 40 to 47 of the Rules of Procedure and Conduct of Business in National Assembly, 1992, to suggest, that address of the President to the joint session of the two Houses at the commencement of the first session after each general election to the National Assembly and at. the commencement of the first session year, would reflect the policies of the Government and not the views of the President. I am. therefore, of the view that the address of the President to the joint session of Parliament on the occasion of first session of each year, is his Constitutional duty under Article 56(3) of the Constitution and in his address the President is not bound by the policy or views of the Government in power. The President is free to express his own views and assessment in respect of any matter concerning the functioning of the Government in power in his said address to the joint session of Parliament. 1, therefore, find no merit in the contention of learned Attorney-General that the address of the President to the joint session of Parliament in 1991 and .1992 did not reflect his views on the working of the Government of the petitioner. -

The learned Attorney-General also contended that privatisation of WAPDA and Electricity, item 3 of Part II of Federal Legislative List and item 34 of the Concurrent Legislative List respectively, by the Government of petitioner, without approval of a policy in that behalf by the Council of, Common Interests amounted to a flagrant violation of the Constitutional

requirement. The petitioner specifically denied privatisation of WAPDA and, generation of Electricity. The learned Attorney-General was unable to place any material on record before us to substantiate his contention that these two services were privatised by the petitioner's Government. Similarly, the petitioner also denied privatisation of Railways and contended that the sale of

landed properties by Railways authorities were not at all connected with the process of privatisation but it was part of their routine process under the normal rules. The learned 'Attorney-General was also unable to contradict this contention.

The learned Attorney-General also made a separate and detailed submission on the entire policy of the Government of petitioner and contended that the whole process besides lacking transparency was carried on in utter disregard of the Constitution and the protest by the Federating Units.- The learned Attorney-General specially referred to the case of sale of shares of Muslim Commercial Bank and contended that the shares of Muslim Commercial Bank were sold by petitioner's Government ignoring the highest bid in the case. The learned Attorney-General admitted before us that the sale of the shares of Muslim Commercial Bank was challenged in a Constitution petition before the Sindh High Court by the highest bidder but the matter finally ended in a compromise. The learned Attorney-General also admitted that the shares of Muslim Commercial Bank were sold to the successful bidder only after he had matched his bid with the highest bid in the case. It is also an admitted fact that the learned attorney-General, who appeared on Court notice in Muslim Commercial Bank's case defended the action of Government before the Court. In any case, according to the admitted facts, the shares were sold at the highest bid received in the case. Similarly, the learned Attorney General was unable to contradict the contention of the petitioner in the case that large number of Constitutional petitions filed in the High Courts challenging the sales of Industries and other undertakings under the privatisation scheme, were decided in favour of the Government on merit, 'as all these sales were effected under laws passed by the Senate to implement the privatisation scheme of the petitioner's Government. The President had also commented on the privatisation policy of the petitioner's Government in his address to the joint session of Parliament on 19-12-1991, as follows:-

The comments of the President with regard to the privatisation and economic policies of the petitioner's Government contained in his address to the first annual joint session of Parliament on 22-12-1992, have already been reproduced by me earlier in this judgment. The above-referred comments by the President, in 1991 and 1992 do show that the process of privatisation and the economic policies initiated by the petitioner's Government had gone well for two years and yielded positive results.

The learned Attorney-General, however, contended that the whole process of privatisation was conducted by the petitioner's Government contrary to the provisions of the Constitution and bypassing the protests of the Provinces of Sindh, N.-W.F.P. and Balochistan. The learned Attorney-General invited our attention to the letters written by the three Chief Ministers of the Provinces of Sindh, N.-W. F. P. and Balochistan to the President and the Prime Minister as well as the observations of the President's Secretariat conveyed to Prime Minister's Secretariat in this behalf.

The letter addressed to President by the Sindh Chief Minister is dated 21st March, 1993. In his above letter to the President, the Chief Minister of Sindh has complained about the action of Federal Government, taking away the schemes pertaining to sectors like Highways, Energy and Telecommunication out of the purview of the CDWD/ECNEC. He also complained about

non-formulation of policies relating to Development of Industries, WAPDA and Railways through CCI. Similarly, the Chief Minister of N.-W.F.P. in his letter, dated 9th January, 1993, addressed to Prime Minister while complaining about the inadequate implemantation of the decision of CCI in respect of net profit payable to N.-W.F.P.'on hydel generation had opposed the proposal for privatisation of WAPDA. The letter dated 6th December, 1992, addressed by the Chief Minister of Balochistan to the Prime Minister, also complained about less Budgetary provision for 1992-93, in terms of NFC Awards of 1990 with the request to increase the share of Balochistan Province to sustain the pace of development program in the province.

The petitioner has denied privatisation of WAPDA, Railways and Energy sectors and nothing has been brought before us to contradict this stand of petitioner. The other matters referred to in the letters of the three Chief Ministers of the Provinces of Sindh, N.-W.F.P. and Balochistan are not Constitutional issues but relate to implementation of decision already taken in the Constitutional Bodies like CCI and NFC. The learned Attorney-General has referred to the legal opinion forwarded to the Cabinet Division through President's Secretariat letter, dated 28-12-1992, in an attempt to show that the entire process of privatisation initiated by the petitioner's Government was contrary to the provisions of the Constitution. The petitioner from the very beginning had taken the stand that the process of privatisation initiated by his Government was not subject to approval of the policies by the CCI. It was also the contention of the petitioner that the privatisation policy was implemented by the Government strictly in accordance with the laws passed by the Senate in this regard. The present case is no appropriate occasion for an in depth examination of the constitutionality of the process of privatisation initiated by the petitioner's Government. The main concern of the Court in the present case is to discover whether there was such deliberate, pervasive and continued violation of various provisions of the Constitution by the petitioner's Government that it led to the impression that the Government of Federation was not run in accordance with the provisions of the Constitution but by extra Constitutional methods. It is an admitted position that process of privatisation commenced by the Government of petitioner was going on for over two years. The Constitutional validity of this process was not questioned either on the floor of Parliament or in the Provincial Assemblies, or by any other method.

The President during this two years' period had the occasion to comment upon the privatisation policies of the petitioner's Government on 19-12-1991 and 23-12-1992, in his addresses to the joint sessions of the Parliament and he not only found this process initiated by the petitioner's Government satisfactory, but praised the positive results yielded by it. In these circumstances, it was not possible to draw an inference that the petitioner's Government carried on the process of privatisation by violating -the Constitutional provisions in a deliberate, persistent and pervasive manner.

Grounds (d) and (f) (iii), (iv) and (v) of the Dissolution Order, dated 18-4-1993, are similar to grounds (c) and (e) (ii) & (iii) of the Dissolution Order of National Assembly in the case of Ahmed Tariq Rahim v. Federation of Pakistan (supra). This Court while commenting on the validity of these grounds qua the Order of Dissolution of National Assembly in Ahmed Tariq

Rahim's case observed that these grounds by themselves are not sufficient to warrant dissolution of National Assembly by the President, but these may be taken into consideration alongwith other relevant grounds for dissolution of Assembly. Therefore, unless the dissolution order is found to be based on some relevant grounds, these grounds will be of no relevance.

Ground (e) is totally vague and unsupported by any material. The learned Attorney-General is unable to satisfy us, that this ground bears nexus to the preconditions of Article 58(2)(b) of the Constitution.

In ground (0 (i) of the Dissolution Order, it is stated that Cabinet was not taken into consideration in respect of numerous Ordinances and matters of policy. Firstly, the learned Attorney-General did not specify those matters which under the Constitution are required to be submitted to the decision of Cabinet but were not so submitted. Secondly, Article 46(3) of the Constitution clearly provides that if the President so requires, the Prime Minister shall submit for the consideration. of the Cabinet any matter on which a decision has been taken by the Prime Minister or a Minister but which has not been considered by the Cabinet. We have not been pointed out by the learned Attorney-General any such direction by the President which was not complied with by the Prime Minister. A statement riled by the learned Attorney-General during the course of hearing of the petition on the contrary shows that out of 78 Ordinances 50 were approved by the Cabinet.

Ground (f) (ii) relates to alleged prevention of federal Ministers from ,calling on the President. The petitioner has categorically denied this assertion and there is no material before us to arrive at the conclusion that any direction was issued . by the Prime Minister to the Ministers, not to see or call on the President. On the contrary, the press reports filed by both the sides in the case do show that quite a few Federal Ministers visited Presidency frequently and made statements after meeting the President. The fact that several federal Ministers tendered their resignations personally to the President also shows that there was no physical restraint on the Ministers to meet the President. On the Constitutional plane, Article 91 provides that there shall be a Cabinet of Ministers with Prime Minister at its head, to aid and advise the President in the exercise of his functions. Clause (4) of Article 91 (supra) provides that the Cabinet together with Ministers of State shall be collectively responsible to the National Assembly. These provisions in the Constitution make it abundantly clear that the Cabinet including the Ministers of State are collectively responsible to the National Assembly in aiding and advising the President in discharge of his functions, the Cabinet can act only through the Prime Minister. The concept of collective responsibility of Cabinet has made the role of Ministers individually of no consequence under the Constitution. In these circumstances, nothing substantial turns out from grounds 'f (i) and (ii).

Ground (g) of the Dissolution Order relates to the complaint of Begum Nuzhat Asif Nawaz regarding the alleged highhanded treatment meted out to the late General by the highest functionaries of the Federal Government and the circumstances resulting in the death of the !ate

General. The record produced before us by the respondents shows that on 124-1993, the Secretary to the President addressed a letter to Prime Minister's Secretariat, enclosing Press clippings regarding serious allegations levelled by Begum Nuzhat Nawaz widow of late General Asif Nawaz and requested for appointment of a High Level Commission, consisting of Judges of Supreme Court and High Court to enquire into the allegations on priority basis and submit a report alongwith their recommendations. It was also requested in that letter that immediate interim measures, in the meantime, may be taken in respect of the two persons named by the lady. The letter from the Principal Secretary to the Prime Minister, dated 12-4-1993, addressed to Mr. Fazalur Rehman Khan, Secretary to President shows that the Prime Minister had already announced appointment of a Commission consisting of 3 Judges of the Supreme Court before receipt of the letter from President Secretariat. However, with regard to the interim action suggested against the two persons named by Mrs. Nuzhat Asif Nawaz, in the letter of the President's Secretariat dated 12-4-1993, a query was raised as to what action could be taken against these persons when the matter was being enquired into by the Tribunal appointed b3 the Government. This letter was replied by the President's Secretariat on 15-4-1993, as follows:---

"Subject: APPOINTMENT OF A JUDICIAL COMMISSION

Kindly refer to P.M. Sectt. u.o. No.800/JS(Law)/93, dated 13th April 1993.

2-Our communication of 12th April was in fact delivered on a most immediate basis by a special messenger and received at 17-50r hours as per attachment. In any case, the matter was mentioned that morning by the President to Mr. Shahbaz Sharif, M.N.A.

3-Important, however, is what is stated in para. 2 of your letter. We are indeed surprised that you should say 'it is not clear as to what action is envisaged' when this should be routine at the time of any investigation let alone when grave and serious allegations are made by the widow of a very respected COAS against a senior officer controlling the facts. The President repeated this to the Prime Minister yesterday.

I (Sd/.)

(Fazalur Rahman Khan),

Secretary to the President."

From the above-stated facts, it is quite clear that there was no delay on the part of petitioner in appointing the Judicial Commission to enquire into the allegation of Mrs. Nuzhat Nawaz as desired by the President. It is admitted by the learned Attorney-General that the Commission constituted by the Government has since submitted his report. In these circumstances, there remains no significance of this ground.

I now revert to ground (b) of the Dissolution Order, dated 18-4-1993, which I had left for consideration in the 'end. The learned Attorney-General as well as Mr. S.M. Zafar, the learned counsel for Care-taker Prime Minister, jointly contended that on account of the speech of Prime Minister on Television on 17-4-1993, a situation of complete deadlock and stalemate developed which left no alternative with the President except to dissolve the National Assembly and make a fresh appeal to the electorate in accordance with Article M(2)(b) of the Constitution. According to respondents, the Prime Minister in his speech had described the President as a person who was involved in conspiracy to destabilise the petitioner's Government and after these serious allegations by the petitioner, it could not be expected that the President would be able to discharge his Constitutional duties in relation to the Government of petitioner. In order to appreciate the thrust of this ground it is necessary to first determine the positions of the President and the Prime Minister in the Constitutional scheme.

The President is elected under-Article 41 of the Constitution through an electoral college, consisting of members of the two Houses of Parliament and four Provincial Assemblies. Articles 48, 90 and 91 of the Constitution spell out the extent of power to be exercised by the President , under the Constitution. These Articles are as follows:---

"48. In the exercise of his functions, the President shall act in accordance with. the advice of the Cabinet (or the Prime Minister):

(Provided that the President may require the Cabinet or as the case may be, the Prime Minister to consider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration).

Notwithstanding anything contained in clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so (and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever)

(4) The question whether any, and if so what, advice was tendered to the President by the Cabinet, the Prime Minister, a Minister or Minister of State shall not be inquired into in, or by, any Court, Tribunal or other authority.

(5) Where the President dissolves the National Assembly, he shall, in his discretion---

(a) appoint a date, not later than 90 (ninety) days from the date of the dissolution, for the holding of a general election to the Assembly; and

(b) appoint a Care-taker Cabinet.

(6) If, at any time, the President, in his discretion, or on the advice of the Prime Minister, considers that it is desirable that any matter of national importance should be referred to a referendum, the President may cause the matter to be referred to a referendum in the form of a question that is capable of being answered either by 'Yes, or 'No'.

(7) An act of Majlis-e-Shoora (Parliament) may lay down the procedure for the holding of a referendum and the compiling' and consolidation of the result of a referendum.)

90. (1) The executive authority of the Federation shall vest. in the President and shall be exercised by him, either directly or through officers subordinate to him, in accordance with the Constitution.

(2) Nothing contained in clause (1) shall--

(a) be deemed to transfer to the President any functions conferred by and existing law on the Government of any Province or other authority; or

(b) prevent the Majlis-e-Shoora (Parliament) from conferring by law functions on authorities other than the President.

91 (1) There shall be a Cabinet of Ministers, with the Prime Minister at its head, to aid and advise the President in the exercise of his functions.

(2) The President shall in his discretion appoint from amongst the members of the National Assembly a Prime Minister who in his opinion, is most likely to command the confidence of the majority of the members of the National Assembly.

(2A) Notwithstanding anything contained in clause (2), after the twentieth day of March, one thousand nine hundred and ninety, the President shall invite the members of the National Assembly to be the Prime Minister who commands the confidence of the majority of the members of the National Assembly, as ascertained in a session of the Assembly, summoned for the purpose in accordance with the provisions of the Constitution.

(3) The Person appointed under clause (2) (or as the case may be), invited under clause (2A) shall, before entering upon the office, make before the President oath in the form set out in the Third Schedule and shall within a period of sixty days thereof obtain a vote of confidence from the National Assembly.

(4) The Cabinet, together with the Ministers of State, shall be collectively responsible to the National Assembly.

(5) The Prime Minister shall hold office during the pleasure of the President, but the President shall not exercise his powers under this clause unless he is satisfied that the Prime Minister does not command the confidence of the majority of the members of the National Assembly, in which

case he shall summon the National Assembly and require the Prime Minister to obtain a vote of confidence from the Assembly.

(6) The Prime Minister may, by writing under his hand addressed to the President, resign his office.

(7) A Minister who for any period of six consecutive months is not a member of the National Assembly shall, at the expiration of that period cease to be a Minister and shall not before the dissolution of that Assembly be again appointed a Minister unless he is elected a member of that Assembly:

Provided that nothing contained in this clause shall apply to a Minister who is a member of the Senate.

(8) Nothing contained in this Article shall be construed as disqualifying the Prime Minister or any other Minister or a Minister of State for continuing in office during any period during which the National Assembly stands dissolved, or as preventing the appointment of any person as Prime Minister or other Minister or as Minister of State during any such period."

On a careful examination of the above Articles of the Constitution it is quite clear that the President in discharge of his functions under - the Constitution has to act on the advice of Prime Minister or the Cabinet, except in those cases where he is specifically authorised by the Constitution to act in his discretion. The discretionary powers of the President under the Constitution are limited to the extent of making a few appointments to the high Constitutional offices, besides his power to dissolve the National Assembly (Article 58(2)(a) and (b)), to refer a matter of National importance to referendum (Article 48(6)) and to fix a date for election within 90 days on dissolution of National Assembly and to appoint a Care-taker Cabinet (Article 48(5)). Besides, the above discretionary powers of the President under the Constitution, the Prime Minister is constitutionally bound to communicate to the President all decisions of the Cabinet relating to the administration of the affairs of Federation and proposal for legislation (Article 46(a)). The President may also call for from the Prime Minister any information relating to the administration of the affairs of the Federation and may also require for submission to the Cabinet for consideration any matter on which a decision has been taken by the Prime Minister or a Minister but not considered by the Cabinet (Article 46(b) and (c)). The President also has the right to address either House or both the Houses of Parliament (Article 56(l)) besides his right! to send messages to either House and the matter contained in such messages I to be considered by the House (Article 56(2)). At the

commencement of first session of National Assembly after general elections and at the commencement of first session of each year, the President has the right to address the joint session of the two Houses of Majlis-e-Shoora (Parliament) Article 56(3)). It is quite significant that under Article 91(4) of the Constitution, the Cabinet together with Ministers of State is collectively responsible to the National Assembly alone. It is also very important to note that although the Prime Minister holds the office at the pleasure of the President but this pleasure cannot be exercised by the President so long as the Prime Minister commands the confidence of the majority of the members of the National Assembly and in order to ascertain whether the Prime Minister has lost the confidence of the majority of the members of the National Assembly, the President is obliged to summon a session of National Assembly and ask the Prime Minister to seek a vote of confidence from the Assembly (Article 91(5)). From the above-stated Constitutional position, there remains no room for any doubt that the Prime Minister in running the affairs of the Government is neither answerable to President nor in that capacity he is subordinate to the President. In formulating the policies of his Government and running its affairs the Prime Minister under the Constitution is answerable only to the National Assembly and the President has no Constitutional role in this behalf. The President in all such matters is bound by the advice of Prime Minister or the Cabinet. No doubt, President may require the Cabinet or the Prime Minister, as the case may be, to reconsider any advice tendered to him but the President is bound to act on the advice tendered after re-consideration.

The President and the Prime Minister have defined roles under the' Constitution which do not overlap. They exercise powers in their respective Constitutional domain unhindered and uninterrupted by each other. No doubt. Constitutionally it would be an ideal situation where both the President and the Prime Minister have identity of views on matters concerning the affairs of the Federation but ideals do not exist in reality as they are outcome of imagination. I Therefore, difference in perception on the part of holders of these two top offices on any issue should not cause any stirring or alarm as in spite of different perceptions, personal likes or dislikes the two can co-exist Constitutionally. It is important to note that while addressing an issue in discharge of their Constitutional obligation, both the President and Prime Minister are bound to act within the limitations imposed on them by the Constitution and their personal feelings, likes or dislikes cannot override the Constitutional mandate. We should also bear in mind that the method of election provided under the Constitution for these two top offices, also foresees a possibility that the holders of these two top posts may not belong to the same political party. Therefore, possibility of a play in the relationship between the holders of these two top posts cannot be ruled out.

No doubt, the President as the symbol of the unity of Federation occupies a neutral position in the Constitution, and in that capacity he is entitled to highest respect and regard by all the functionaries of the State. But it is equally important that in order to protect and preserve the dignity of this high office and this neutral image under the Constitution the President must keep aloof from all political imbroglio. If the President is unable to ward off the temptation to keep away from political game or he starts siding with one or the other political element in the Assembly, he is likely to lose his image as the neutral arbiter in national affairs and as a symbol of unity of Federation under the

Constitution. In the latter event, his conduct may also come under criticism from those who may feel betrayed.

The speech delivered by the Prime Minister on Television on 17-4-1993, therefore, has to be examined in the light of preceding discussion and the prevailing political situation at the relevant time. From the material placed on record before us it appears that the petitioner after the annual speech of the President before the joint session of Parliament on 23-12-1992, started a political campaign for repeal of the controversial 8th Amendment in the Constitution. The press report of the post-December 1992 period indicated that some sort of consensus had developed between the Government and the opposition party in -the National Assembly on this issue which created uneasiness in the relation between the President and the Prime Minister. However, some political elements in the Assembly opposed this move of the Government and there was also a split within the Ruling Party on this issue. The Press also blew up out of proportion the uneasy relation between President and the Prime Minister. This situation was further aggravated when some Ministers of Federal Cabinet who did not go alongwith the policies of petitioner called on the President and after their meeting with the President gave the impression to the press that dissolution of Federal Cabinet and the National Assembly was imminent. This was followed by spate of press statements by different political elements hostile to petitioner's Government hinting at the action by the President to dismiss the Government of petitioner very soon. In this charged atmosphere of political despondency the petitioner met with the President on 14-4-1993 at the Presidency at Islamabad. This meeting, however, did not produce any positive results as the draft communique of the meeting prepared by the Prime Minister's Secretariat, produced before us by the respondent, when sent to the Presidency through two Federal Ministers did not meet the approval of President, and the short press release issued by the President's Secretariat about the meeting of Prime Minister with President reflected the strains in the situation. The bitterness of relations between the two was also reflected in the letter addressed by Elm President's Secretariat to the Prime Minister's Secretariat on the next day of the meeting between the President and Prime Minister, in connection with the allegation of Mrs. Nuzhat Nawaz against two high functionar Government, which criticised the inaction of Prime Minister to process the persons named. by the lady in spite of mention of this fact by the President to the Prime -Minister in the meeting of 14th April, 1993. There were also continued press reports about the imminent dismissal of Petitioner's Government and dissolution of National Assembly by the President. The petitioner reacted in this scenario by going over to electronic media to address the nation on 17-4-1993. The petitioner in his speech first listed the achievements of his Government, then, referred to, the conspiracies to hostile to him by using the destabilise his Government by high office of Presidency and finally he expressed his determination and resolve not to give in to those. pressures. No doubt, the language used by the petitioner was very strong and at times -intemperate but we cannot overlook and ignore the stress of events which had driven the petitioner to launch a counter-attack. The unabated press statements of political elements hostile to . petitioner issued after their frequent visits to Presidency, attributing assurances by the President, to dismiss the Government of petitioner so on were never A contradicted by the concerned quarters. Even the name of Mr. Balakh Sher Mazari was mentioned as the future Care-taker Prime Minister by one of the politicians who is said to be hostile to petitioner,, after his meeting with the President, and the later events proved. it to be true when Mr Mazari was appointed as Care-taker Prime' Minister by the President on dissolution of

Assembly. These events possibly led the petitioner to believe that the high office of President was being used by the elements hostile to him to destabilise his Government. The reaction of petitioner in these circumstances was neither unnatural nor was justified. The learned Attorney-General contended that the. petitioner by publicly criticising or humiliating the President has contravened the Constitution and oath of his office. It is also contended by the learned Attorney-General that if the petitioner had any grievance against the President the issue could be debated before the National Assembly where it would have been under the control of Speaker and uncalled for remarks against the President would not have appeared in public. I have not been able to discover any provision in the Constitution which debarred the Prime Minister to address the nation on Radio and Television. The right of freedom of speech guaranteed under the Constitution to every citizen was available to the Prime Minister as well in equal degree. I have already pointed out earlier that in order to maintain the dignity of the office of President it is imperative that the President must keep aloof from political imbroglio. Unfortunately, the facts brought on record before us in the case, do support the contention of petitioner that the President in this political imbroglio failed to maintain his neutrality. In these circumstances, the criticism on his conduct could not be avoided. The address of the petitioner on television on 17-4-1993 was no doubt a hard hitting one and also contained political overtones but it cannot be judged divorced from the chain of, events preceding his speech. The speech of the petitioner considered as a whole reflected the sentiments of a person who was pushed against the wall and felt betrayed by those whom he trusted. The speech in the circumstances could not be termed as wholly unjustified.

It is true that on account of criticism of President's conduct by the petitioner in his speech a climate of mistrust may have developed between the two, but as pointed out earlier these two top functionaries of Federation have definite and defined roles under the Constitution which they could continue to discharge in accordance with their Constitutional obligations irrespective of their personal aversions to each other. I am, therefore, of the view that the speech of the petitioner delivered on 17-4-1993, did not have the effect of creating any deadlock or stalemate in the working of the Government of Federation.

As a result of above discussion, I have reached the conclusion that grounds mentioned in Dissolution Order dated 18-4-1993, neither Collectively 'y e nor individually justified the inference that a situation had arisen in which the e Government of Federation could not be carried on in accordance with the provisions of the Constitution and an appeal to electorate was necessary. I may dissolution once again state here that the Court in considering the grounds of dissolution of Assembly under Article 58 (2)(b) (supra) "is not concerned with these pace progress, the shade of the quality or the degree of performance or quantum achievement. It is only concerned with the breakdown of the Constitution mechanism, a stalemate, a deadlock in ensuring the observance of the provisions of the Constitution".

1, accordingly, allow the petition, declare the impugned order dissolution of National Assembly and dismissal of Federal Cabinet as without lawful authority and of no legal effect. As a consequence of above declaration, the National Assembly, Prime Minister and the Cabinet stand restored and shall be entitled to function as immediately before the impugned order was passed. All steps taken pursuant to the order, dated 18-4-1993, under Article 58(2)(b) of the Constitution including the appointment of Care-taker Cabinet and Care-taker Prime Minister are also declared of no legal effect. However, all orders passed, acts done and measures taken in the meanwhile by the Care-taker Government, which have been done, taken and given effect to in accordance with the terms of the Constitution and were required to be done or taken for the ordinary and orderly running of the State shall be deemed to have been validly and legally done. There will be no order as to costs.

M.BA./M-1777/S Petition accepted

Case 6
The Judges case

P L D 1996 Supreme Court 324

Present: Sajjad Ali Shah, C.J., Ajmal Mian, Fazal Ilahi Khan Manzoor Hussain Sial and Mir Hazar Khan Khoso, JJ

AL-JEHAD TRUST through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others-Petitioners

versus

FEDERATION OF PAKISTAN and others-Respondents

Constitutional Petition No.29 and Civil Appeal No.805 of 1995, decided on 24th March, 1996.

. (On appeal from the judgment dated 4-9-1994 of the Lahore Nigh Court, Lahore in Writ Petition No.875 of 1994).

Per Sajjad Ali Shah, C.J.; Ajmal Mian, Fazal Ilahi Khan and Manzoor Hussain Sial, JJ.--

(a) Constitution of Pakistan (1973).

- Arts. 177 & 193 --- Appointment of Supreme Court and High Court Judges-- Appointment of a Judge has to be transparent so that the litigant public and people at large have faith in the independence of Judiciary --- Appointment of a Judge and the mode and manner in which he is appointed has close nexus with the independence of Judiciary and cannot be separated from each

other --- Words “after consultation” employed in Arts. 177 & 193 of the Constitution of Pakistan connote that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play and involving participatory consultative process between the consultees and also with the executive --- Constitutional conventions can be pressed into service while construing a provision of the Constitution --- Acting Chief Justice, however, is not a consultee as envisaged by Arts. 177 & 193 of the Constitution and, therefore, mandatory Constitutional requirement of consultation is not fulfilled by consulting an Acting Chief Justice except in cases where the permanent Chief Justice concerned is unable to resume his functions within 90 days from the date of commencement of his sick leave because of his continuous sickness --- Opinion of the Chief Justice of Pakistan and the Chief Justice of High Court as to the fitness and suitability of a candidate for judgeship is ‘ entitled to be accepted in -the absence of very sound reasons to be recorded by the President/Executive --- Consultation for the appointment/ confirmation of a Judge of a Superior Court by the President/Executive with the consultees mentioned in Arts. 177 and 193 of the Constitution being mandatory, any appointment/confirmation made without consulting any of the consultees as interpreted herein, would be violative of the Constitution and, therefore, would be invalid --- If the President/Executive appoints a candidate found to be unfit and unsuitable for judgeship by the Chief Justice of Pakistan and the Chief Justice of the High Court concerned, that will not be a proper exercise of power under the relevant Article of the Constitution --- Supreme Court, therefore, directed that upon the appointment of the permanent Chief Justices in the High Courts where there is no permanent incumbent or where there are permanent incumbents already, they shall process the cases of the High Courts’ Judges accordingly within one month from 20th March, 1996 (date of the order of Supreme Court) or within one month from the date of assumption of office by a permanent incumbent, whichever is later in time and to take action for regularising the appointments/confirmations of Judges recently appointed confirmed accordingly --- Chief Justice of Pakistan will take appropriate action for recalling permanent Judges of the Supreme Court from the High Courts where they are performing functions as Acting ‘Chief Justices and also shall consider desirability of continuation or not of appointment in the Supreme Court of Ad hoc/Acting Judges.

Per Sajjad Ali Shah, C.J.---

In the Constitution of 1973, by which Pakistan is being governed, in the Chapter relating to the Judiciary and in the process of appointments, the word “consultation” is used.

The meaning of the word’ consultation” is very pivotal in nature because the independence of the Judiciary and the appointments of the Judges have close nexus with it or in other words deep-rooted in it.

The word “consultation “ used in the Constitutional provisions relating to the Judiciary is to be interpreted in the light of the exalted position of the Judiciary as envisaged in Islam and also in the light of the several provisions in the Constitution which relate to the Judiciary guaranteeing its independence.

The Legislature has to legislate, the Executive has to execute laws and the Judiciary has to interpret the Constitution and laws. The success of the system of governance can be guaranteed and achieved only when these pillars of the State exercise their powers and authority within their limits without transgressing into the field of the others by acting in the spirit of harmony, cooperation and coordination.

Since no debate took place on the subject of “consultation” in the proceedings when Constitution Bill was being processed, Court has to construe it in the light of other factors, such as, Islamic provisions in the Constitution and separation of Judiciary which has already taken place. Appointment of a Judge and the mode and manner in which he is appointed has close nexus with the independence of the Judiciary and cannot be separated from each other. This is not right that as soon as a judge takes oath, there is a sudden transformation and he forgets his past connections and turns a new leaf of life. The process of appointment of a Judge must be made transparent so that the litigant public and people at large should have faith in the independence of Judiciary.

Having no assistance on the pivotal point as to what was the intention and scope in the minds of the Constitution-makers when this word consultation” was used in Articles 177 and 193 of the Constitution, Judiciary should not shirk its duty of interpreting the Constitution to supply reasonably correct meaning to the word “consultation” in order to harmonise the provisions with other provisions and make the Constitution workable to resurrect the independence of the Judiciary as guaranteed in the Constitution and Islam.

The institution of Judiciary in Islam enjoys the highest respect.

Islam gives much importance and respect to consultation and binding force is given to the opinion of the Qazi or Judge and very wide powers are given to the Chief Justice including all appointments of subordinate Judges under him.

Word “consultation” has to be interpreted in the light of the Objectives Resolution, which is integral part of the Constitution providing in unequivocal terms that the independence of the Judiciary shall be fully secured.

The plain reading of Article 193, Constitution of Pakistan (1973) is that the appointment of a Judge of the High Court is to be made by the President “after consultation” with--

(a) Chief Justice of Pakistan,

(b) Governor concerned; and

(c) Chief Justice of the High Court except where the appointment is that of the Chief Justice).

Here the intention is that the appointment is to be made by the President, after consultation” with three consultees, who are mentioned there. ‘In the Constitution proper scheme is provided for the appointment, hence it can be called Constitutional appointment. For such appointment Constitution requires “consultation”, which cannot be treated lightly as a mere formality. To say that the President has sole power of appointment and opinion of the consultees can be ignored particularly of the Chief Justice of the High Court and the Chief Justice of Pakistan, who are supposed to be experts in the particular field of law in which the appointment is to be made, cannot be reasonable construction of the word “consultation”. It is understandable that the Governor can find out from intelligence sources about the candidate who is to be appointed as a Judge and his report or opinion is to be confined to that aspect of the matter. The President can refuse to appoint a candidate in whose favour Chief Justice of the High Court and Chief Justice of Pakistan have given their positive opinions, but Governor has given negative opinion for reasons of improper antecedents. The Chief Justice of the High Court and the Chief Justice of Pakistan normally know advocates who appear in their Courts regularly and would nominate or recommend names of such advocates who are capable and fit to be Judges of the High Court and their opinion, which is expert opinion in a way, cannot and should not be ignored, but must be given due weight. “Consultation” in the scheme as envisaged in the Constitution is supposed to be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded in writing by the President/Executive.

If the Chief Justice of the High Court and the Chief Justice of Pakistan are of the opinion that a particular candidate is not fit and capable to be appointed as Judge of the High Court, then acting against the expert opinion would not be proper exercise of power to appoint him as a Judge on the ground that the President/Executive has final say in the matter. It is not correct interpretation to say that because word "consultation" is used, which is different from 'consent', opinion of Chief Justice can be ignored. If the opinion of the Chief Justice is ignored, then the President/Executive should give masons which could be juxtaposed with reasons of the Chief Justices to find out as to which reasons are in public interest.

Wide and enlarged interpretation of the word "consultation" is made for the reasons, firstly, that the Constitution-makers have not debated this word I consultation' and fixed its parameters. Secondly, such meaning to the word has to be assigned which is consistent and commensurate with the exalted position of Judiciary as is envisaged in Islam. Thirdly, Court has to give positive interpretation to 'consultation' which promotes independence of judiciary. Executive may have the last word and may issue notification of appointment, but cannot give loose interpretation to the word 'consultation' to ignore or brush aside expert opinion of Chief Justice of the High Court and the Chief Justice of Pakistan. Fourthly, the President is administered oath by the Chief Justice of Pakistan as required under Article 42 of the Constitution and the Chief Justice of Pakistan administers oath to other Judges of the Supreme Court and Chief Justice of Province administers oath to Judges of his High Court as contemplated under Articles 178 and 194 respectively, which shows that both the Chief Justices are heads of their institutions and their opinion in their own field of expertise should not be treated lightly particularly when they are constitutional consultees and the appointments are also being made of the Judges within the constitutional scheme.

Appointment of an Acting Chief Justice is a stop-gap arrangement and is supposed to last for a short time and he is not authorised to deal with the policy matters including making "recommendations" in the appointment of the Judges.

The meaning and scope of "consultation" laid down herein and the powers of Acting Chief Justices in connection therewith would affect only such appointments which have been made by the present Government and this exercise would not go beyond that. It is left open that the appointments made with the "recommendations" of the Acting Chief Justices in the High Courts can be reviewed and steps to be taken by the permanent Chief Justices to regularise them if this can be done on the basis of merit within thirty days from the date when the permanent Chief Justices are ' appointed in the High Courts and take oath. Regularisation shall take place as contemplated under Article 193 of the Constitution.

Per Ajmal Mian, J.--

A perusal of clause (1) of Article 193 indicates that for appointment of a Chief Justice of a High Court, the President is required to consult:

(i) The Chief Justice of Pakistan;

(ii) Governor of the Province concerned.

Articles 177 and 193 envisage the appointment of the Supreme Court Judges by the President after consultation with the Chief Justice of Pakistan, whereas for the High Courts after consultation with the Chief Justice of Pakistan, with the Governor concerned and with the Chief Justice of the High Court concerned.

The object of providing consultation, inter alia, in Articles 177 and 193 of the Constitution of Pakistan (1973) for the appointment of Judges in the Supreme Court and in the High Courts was to accord constitutional recognition to the practice/convention of consulting the Chief Justice of the High Court concerned and the Chief Justice of the Federal Court, which was obtaining prior to the independence of India and post-independence period, in order to ensure that competent and capable people of known integrity should be inducted in the superior Judiciary which has been assigned very difficult and delicate task of acting as watch dogs for ensuring that all the functioneries of the State act within the limits delineated by the Constitution and also to eliminate political considerations. The power of appointment of Judges in the 'superior Courts had direct nexus with the independence of Judiciary. Since the Chief Justice of the High Court concerned and the 'Chief Justice of Pakistan have expertise knowledge about the ability and competency of a candidate for judgeship, their recommendations, have been consistently accepted during pre-partition days as well as post-partition period in India and Pakistan. The words "after consultation" referred to, inter alia, in Articles 177 and 193 of the Constitution involve participatory consultative process between the consultees and also with the Executive. It should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. The Chief Justice of a High Court and the Chief Justice of Pakistan are well equipped to assess as to the knowledge and suitability of a candidate for judgeship in the superior Courts, whereas the Governor of a Province and the Federal Government are better equipped to find out about the antecedents of a candidate and to acquire other information as to his character/conduct. No one of the above consultees/functionaries is less important or inferior to the other. All are important in their respective spheres. The Chief Justice of Pakistan, being Paterfamilias i.e. head of the judiciary, having expertise knowledge about the ability and suitability of a candidate, definitely, his views deserve due deference. The object of the above participatory

consultative process should be to arrive at a consensus to select best persons for the judgeship of a superior Court keeping in view the object enshrined in the Preamble of the Constitution, which is part of the Constitution by virtue of Article 2A thereof, and ordained by Islam to ensure independence of Judiciary.

The views of none of consultees can be rejected arbitrarily in a fanciful manner. The views of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan cannot be rejected arbitrarily for extraneous consideration and if the Executive wished to disagree with their views, it has to record strong reasons which will be justiciable. A person found to be unfit by the Chief Justice of the High Court concerned and the chief justice of Pakistan for appointment as a Judge of a High Court or by the Chief Justice of Pakistan for the judgeship of the Supreme Court cannot be appointed as it will not be a proper exercise of power to appoint under Articles 177 and 193 of the Constitution.

Consultative process is mandatory and without it no appointment/uunfirmation can be made, It must follow that in absence of consultation as contemplated and interpreted the appointment/confirmation of a Judge in the superior Court shall be invalid This view is in consonance with the well-established conventions, Islamic concept of 'Urf' and the proper exercise of power.

The independence of Judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the superior Judiciary. The relevant constitutional provisions are to be construed in a manner which were ensure the independence of Judiciary. A written Constitution is an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while ,interpreting a constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that it may be able to meet the requirement of ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which, they are employed. In other words, their colour and contents are derived from their context.

The above- principles will have to be kept in view while construing the provisions of the Constitution relating to the appointments-transfers of Judges of the superior Judiciary.

Courts, while construing a constitutional provision, can press into service an established constitutional convention in order to understand the import and the working of the same, if it is not contrary to the express provision of the Constitution.

The system of appointment of Judges obtaining in U.S.A. and U.K. has no direct bearing on the issue. The systems of appointment of Judges in the above two countries are different as compared to Pakistan. The relevant Articles in Constitution of Pakistan relating to appointments in Judiciary with minor variations have been lifted from the Indian Constitution, 1950, and, therefore, the facturn as to how they have been interpreted and acted upon in India is relevant.

The consultation referred to in the Verses from the Holy Qur'an and the Islamic books is different inasmuch as the same relates to the collective consultation from the people, whereas the present consultation is of an individual character. In this view of the matter, Court cannot press into service the principle of Ijma.

On the basis of various Islamic sources. the power to appoint, inter alia, Judges is a sacred trust, the same should be exercised in utmost good faith. Any extraneous consideration other than the merit is a great sin entailing severe punishment.

The office of the Chief Justice of Pakistan has been created by Article 176 of the Constitution. The above Article and the subsequent Articles do not confer any power on the Chief Justice to appoint other Judges. No Chief Justice has ever claimed any implied power to appoint Judges in the superior Judiciary. The role assigned by the Constitution to the Chief Justice is that, inter alia, he is to be consulted b-v the President before any appointment of a Judge in the Supreme Court or in a High Court is made.

Act of appointment of a Chief Justice or a Judge in the superior Court is an executive act. No doubt this power is vested in the Executive under the relevant Articles of the Constitution, but the question is, as to how this power is to be exercised. Conventions can be pressed into service while construing a provision of the Constitution and for channelising and regulating the exercise of power under the Constitution: whereas under the Islamic Jurisprudence, a convention. which is termed & Urf has a binding force on the basis of various Islamic sources, It has been a consistent practice which has acquired the status of convention during pre-partition days of India as well as post-partition period that the recommendations of the Chief Justice of a High Court and the Chief Justice of the Supreme Court in India as well as in Pakistan have been consistently accepted and acted upon except in very rare cases, The practice of consultation of the Chief Justice of a High

Court and the Indian Federal Court was obtaining even under the Indian High Courts. Act as well as under the Government of India Act 1915, though the appointment of Judges of superior Courts in India was a matter of pleasure vested in the Crown. The recommendations of the Chief Justices even in those day were accepted as a matter of course.

If it was to he assumed that the Executive has the discretion to appoint Judges in the superior Courts. it is a well-settled proposition of law that the discretion is to be exercised fairly and justly and not arbitrarily or in a fanciful manner.

It is true that in Article to of the Constitution which relates, inter alia to the appointment of a Chief Justice in a High Court. it has not been provided that most of the senior judges shall be made as the Chief Justice. The reason seems to be obvious, namely, it is possible that the senior most judge, at the relevant time, may not be physically capable to take over the burden of the office or that he may not be willing to take upon himself the above responsibility. The Chief Justice of Pakistan, who is one of the consultees under Article 193 will be having expertise knowledge about the senior most Judge of a High Court. If the senior most Judge is bypassed for any of the above reasons, he cannot have any grievance but if he is superseded for extraneous considerations, the exercise of power under Article 193 of the Constitution will not be in accordance therewith and will be questionable.

Keeping in view the concepts of independence of Judiciary, separation of Judiciary as enshrined in the Constitution and the guidelines provided therein as to the time of filling in of the public offices in conjunction with the Islamic Jurisprudence, an Acting Chief Justice is not a consultee for the purpose of Articles 177 and 193 of the Constitution as the appointment of Acting Chief Justices is a stop-gap arrangement for a short period not for more than 90 days. However, it is clarified that if a permanent incumbent has fallen sick seriously and he remains in the hospital or under treatment and is not in a position to perform his functions and because of that an Acting Chief Justice remains in office for more than 90 days, in such a case, the Acting Chief Justice may consult the permanent incumbent while acting as a consultee under the above Articles, but if it is not possible to consult the permanent incumbent, in that event, the Acting Chief Justice will be a consultee for the purpose of the above Articles because of the doctrine of necessity.

Per Manzoor Hussain Sial, J.--

The principles and provisions set out in the Objectives Resolution now form substantive part of the Constitution, wherein it is categorically provided that independence of Judiciary shall be “fully

secured" as also Article 227 of the Constitution mandates that all existing laws are required to be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. The Constitution contemplates trichotomy of power inter se the three pillars of the State, namely, Legislature, Executive and the Judiciary, each one of the organs of the State has to function within the limits provided in the Constitution. The constitutional provisions relating with the appointments and transfers of Judges of the superior Courts, therefore, need to be examined in the light of the Islamic concept of justice. Islam had always attached unparalleled importance to the concept of justice. The persons, who administered justice, had been men of deep insight, God-fearing, honest and men of integrity.

In the light of the Islamic background. where Judiciary had been highly respected and the verdict of the Qadis enjoyed great esteem, coupled with the role assigned to it in the framework of the Constitution, particularly after the introduction of Objectives Resolution a substantive constituent of the Constitution, it may be said that the Judiciary now occupies unique position and has to play a decisive role in ensuring that none of the functionaries of the Government act in violation of the provisions of the Constitution or the law. The nature of the role that the Judiciary has to play, demands that it should be independent. The independence of Judiciary is deeply connected with the constitutional process of the appointment and transfer of Judges of the superior Courts. It is, therefore, imperative that the constitutional provisions relating to Judiciary are interpreted in a manner, so as to secure the complete independence of Judiciary. 'Me approach to interpret , the provisions should be progressive, dynamic and meeting the ever changing requirements of the society.

The words "after consultation" occurring in Articles 177 and 193. of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play' The opinion of the Chief Justice of Pakistan and the Chief Justice High Court regarding fitness and suitability of the candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the appointing authority, and if. the President/Executive appoints a candidate found to be unfit by the Chief Justice of Pakistan and Chief Justice of High Court concerned, it will not be a proper exercise of power under the relevant Articles of the Constitution.

The word "after consultation" mentioned in Articles 177 and 193 of the Constitution 'envisage participatory consultative process 'between consultees and the appointing authority. The Chief Justice of Pakistan, as also the Chief Justice of High Court concerned have the best expert knowledge about the suitability of a person to be appointed as Judge of the High Court. The other consultee, namely, the Governor of the Province may provide adequate information about character of the candidate. All the consultees contemplated in the abovementioned provisions of the Constitution have vital role to play in the matter. T he opinion of the Chief Justice of Pakistan, however, would deserve significant importance to select best persons for securing the

independence of Judiciary. The opinion of the Chief Justice of High Court and the Chief Justice of Pakistan having direct knowledge about the suitability of the candidate can therefore be not ignored for any extraneous reason, and in case of disagreement, the appointing authority is required to record sound reasons which will be justiciable. It, therefore, follows that if a person is declared Unfit by the Chief Justice of the High Court, as also the Chief Justice of Pakistan, for appointment as Judge, he cannot be validly appointed, and if appointed it will not be a proper exercise of the jurisdiction vested in the appointing authority.

The perusal of Article 193 of the Constitution shows that the appointment of a Judge of High Court is made by the President after consultation with the Chief Justice of Pakistan, the Governor concerned and the Chief Justice of the High Court (except where the appointment is that of a Chief Justice). The President has to consult three persons when making appointment of a Judge. The appointment of a Judge is a constitutional appointment and a mode thereof is provided in the Constitution itself. The consultation required by the President from the consultees cannot be deemed to be a formality. Consultative process envisaged in the above-noted provision is mandatory and valid appointment of a Judge or his confirmation cannot be made without resorting to consultative process. The Chief Justice of the High Court and the Chief Justice of Pakistan if give a positive opinion about the suitability of a candidate, but the Governor on the basis of information received about his antecedents gives negative opinion, the President is empowered to decline the appointment of the candidate. On the other hand, if the Chief Justice of the High Court and the Chief Justice of Pakistan give a negative opinion about a candidate on the basis of their expert opinion that candidate cannot be appointed and in this way the opinion of the Chief Justice cannot be ignored and due weight is to be given to his opinion. The extended meaning given to the word ‘consultation’ is mainly for the reason that it secures the independence of Judiciary. The due deference is to be attached to the opinion of the Chief Justice of Pakistan and the Chief Justice of the High Court due to their exalted position as envisaged in Islam, so that the appointment of the Judges are made in a transparent manner on the basis of the merits alone.

Every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences, inducements or pressures direct or indirect, from any quarter or for any reason. The Judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review. over all issues of a judicial nature. This object can only be achieved if Judges of integrity having sound knowledge in law are appointed on the basis of the expert opinion given by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan. The word “consultation” used in the relevant Articles of the Constitution relating to Judiciary must be read in its context and being a mandatory requirement has to be effective meaningful, purposive and consensus-oriented, to have best persons appointed as Judges of the superior Court and to secure the independence of Judiciary.

The mandatory constitutional requirement of consultation is not fulfilled by consulting the Acting Chief Justice. The concept of appointment of the Acting Chief Justice is that it is for a stopgap arrangement only for a short period when the office of the Chief Justice is vacant or the Chief Justice of High Court is absent. or is unable to perform the functions of his office due to any other reason. The President, in that case, shall appoint one of the other Judges of the High Court to act as Chief Justice or may request one of the Judges of the Supreme Court to act as Chief Justice.

The Acting Chief Justice, therefore, cannot be a proper consultee within the meaning of the relevant provisions of the Constitution for appointment of the Judges, as this militates. against the concept of providing for an independent Judiciary. Resultantly, the mandatory constitutional requirement of consultation is not fulfilled for appointment/confirmation of the Judges by consulting the Acting Chief Justice. The interpretation of Article 196 of the Constitution that Acting Chief Justice is not a consultee within the ambit of the relevant provision of the Constitution advances the spirit of the Constitution qua fully securing the independence of Judiciary and suppresses the mischief of having the appointments of lasting nature manoeuvred through him.

The Judge of the Supreme Court when appointed as Acting Chief Justice of High Court, is not a consultee within the meaning of Article 193 of the Constitution, his appointment as such in a lower position for indefinite long period is not appreciable.

(b) Constitution of Pakistan (1973)---

---- Arts. 196, 177, 193, 180, 181, 182 & 197 --- Appointment of Judges of Supreme Court and High Courts --- Appointment of Acting Chief Justice, Acting Judges and ad hoc Judges --- Essentials --- Practice of appointing Acting Chief Justice for long period militates against the concept of independence of Judiciary --- Permanent vacancies occurring in the offices of Chief Justice and' Judges of the Courts normally should be filled in immediately not later than 30 days but a vacancy occurring before the due date on account of death or any other reasons, should be filled in within 90 days on permanent basis --- Supreme Court, therefore, directed that permanent Chief Justice should be appointed in the High Courts where there is no permanent incumbent of the office of the Chief Justice and appropriate action be initiated for filling in permanent vacancies of Judges accordingly.

Per Sajjad Ali Shah, C.J.---

The scheme of the appointments of the Judges as envisaged in the Constitution clearly indicates that they Are of permanent nature and if there are vacancies of temporary nature, then temporary appointments can also be made of Acting and Ad hoc Judges in the Supreme Court and Acting Chief Justices in the Supreme Court and the High Courts. If in the normal course, a permanent vacancy occurs, the same should be filled in within thirty days. But if such vacancy occurs before due date of retirement of a Judge on account of death or for any other reason, then the same should be, filled in within ninety days on permanent basis. Under Article 181 of the Constitution if there is a vacancy in the Supreme Court or a Judge of the Supreme Court is absent or unable to perform the functions of his office due to any cause, Acting Judge can be appointed from a High Court who is qualified for appointment in the Supreme Court. The explanation to this Article further provides that, a Judge of a High Court includes a person who has retired as a Judge of High Court, which means a retired Judge of a High Court can be appointed as Acting Judge before he attains the age of sixty-five which is the age of superannuation in the Supreme Court. Under Article 192, for want of quorum of the Judges in the Supreme Court or for any other reason, if it becomes necessary to increase temporarily the number of Judges, the Chief Justice may in writing have appointment of Ad hoc Judges with the approval of the President. The following persons are eligible for such appointment: A retired Judge of the Supreme Court can be appointed if three years have not elapsed from the date of his retirement. A serving Judge of a High Court can also be appointed provided he is qualified to be the Judge of the Supreme Court. It appears from the perusal of Article 182 that even these appointments cater for temporary situation in which the number of the Judges is to be increased after the sanctioned strength of the Court is filled with the permanent appointments.

Acting Chief Justices are appointed for a short time and for that reason, in the relevant Articles, automatic arrangement is provided particularly in the appointment of the Acting Chief Justice of Pakistan, but no criterion is laid down in the provision of appointment of Acting Chief Justice of the High Court. In all fairness, the period for such acting appointment should not be more than ninety days during which Acting Chief Justice may perform functions of routine nature excluding "recommendations" in respect of appointment of Judges. Reasons being that firstly, Article 180, which provides for appointment of the Acting Chief Justice of Pakistan and Article 196, which provides for appointment of the Acting Chief Justice of a High Court, do not specifically provide that they can participate in the consultative scheme of the appointment of the Judges as envisaged in the Constitution. Secondly, Acting Chief Justices are supposed to be functioning for a short time and, therefore, it would not be fair to allow them to interfere with policy-making matters and appointments in the Judiciary which should ‘ be left for permanent incumbents. Thirdly, Article 209 of the Constitution contemplates the composition of the Supreme Judicial Council which is supposed to be comprised of (a) the Chief Justice of Pakistan, (b) two next senior most Judges of the Supreme Court, and (c) two most senior Chief Justices of the High Courts. In the explanation appointment of Acting Chief Justices is expressly excluded which clearly shows that the intention of the Constitution-makers is that the Acting Chief Justices are allowed to function for a short time and more importance is to be attached to permanent Chief Justices and in the absence of permanent Chief Justices of the High Courts or, even for that matter, of the Supreme Court, the composition of the Supreme Judicial Council becomes imperfect and the Body as such becomes unfunctional.

Per Ajmal Mian, J.--

The concept of an Acting Chief Justice was introduced during perpetration days as the Chief Justices used to be Englishmen and they used to go on leave to United Kingdom. The provisions of Acting Chief Justices were retained by India in its Constitution and by Pakistan in its four Constitutions which Pakistan had up to 1973. The object of Acting Chief Justice is to have a stopgap arrangement. It is a matter of common knowledge that most of the Acting Chief Justices do not take any decision relating to important policy matters of the Court concerned without consulting the permanent Chief Justice. If the permanent incumbent concerned is not accessible, the acting incumbent waits for his return. However, during Martial Law days, the practice of appointing Acting Chief Justices for long periods was adopted apparently with the intention to keep the Judiciary under the control of executive, which was not a commendable object. It militated against the concept of independence of Judiciary and separation of Judiciary from the executive. Under Article 203C(4), the Chief Justice of Federal Shariat Court is to be appointed for a period not exceeding three years, but he may be appointed for further term or terms as the President may determine.

It is the constitutional obligation of the President/Executive to ensure that the constitutional offices do not remain vacant and the vacancies are filled in without any delay. The provisions relating to appointments of Acting Chief Justice of Pakistan, Acting Judge of the Supreme Court and Acting Chief Justice of a. High Court are intended and designed to cater for emergency. They cannot be used as a substitute for making permanent appointments under Articles 177 and 193 of the Constitution.

A normal permanent vacancy should be filled in advance and, in any cast, not later than 30 days, whereas vacancy occurring on account of death or for any unforeseen cause, at the most, should be filled in within 90 days, which is generally considered to be a reasonable period.

This view, is in consonance with the provisions of the Constitution, keeping in view the concept of the independence of Judiciary as enshrined therein. It is also' in accord with the speech of the Quaid-i-Azam, wherein he deprecated the practice of appointment of Additional Judges. It is further in line with the International Human Rights Commission's report.

Per Manzoor Hussain Sial, J.--

The permanent vacancies occurring in the offices of Chief Justice and Judges of the superior Courts are required to be filled in immediately not later than 30 days, but if the vacancy occurs before the due date on account of death or for any other reason, that should be filled in within 90 days on permanent basis. The constitutional 'offices like that of Chief Justice or the Judges should not remain vacant for indefinite period, which may tend to impair the independence of Judiciary. Under Article 41(5) of the Constitution, the vacancy of an office of the President is filled in by election not later than 30 days from the occurrence of the vacancy. The date of retirement of the Judges is known to the Federal Government, since the day they are appointed. The process of appointment of their successors, therefore, can be commenced in advance, so that the successors-Judges are appointed immediately after the vacancies occur. In case of a vacancy arising suddenly on account of death or for any other reason the appointment of the successor Judge can be made within reasonable time, The period of 30 days to fill in the vacancy of constitutional office of a Judge has been laid down by adopting the criterion given in the provision of Article 41(5) of the Constitution which prescribes the period for filling in the vacancy of another constitutional office.

The, law is that where the Constitution provides a criterion for doing a thing in one provision then that criterion can be utilised for doing another thing of similar nature provided in the Constitution.

The period of 90 days to fill in the vacancy having occurred suddenly on account of death or for any other reason is considered a reasonable period because it is important to fill in the vacancies of the constitutional offices of Judges speedily and by doing so the concept of independence of Judiciary will be strengthened.

(c) Constitution of Pakistan (1973)---

---- Arts. 181, 182 & 177 --- Appointment of acting/ad hoc Judges of Supreme Court --- Essentials --- Ad hoc Judge/Acting Judge cannot be appointed in the Supreme Court while permanent vacancies exist --- Supreme Court, therefore, directed that ad hoc Judges working at present in the Supreme Court either be confirmed against permanent vacancies in terms of Art. 177, Constitution of Pakistan within the sanctioned strength or they should be sent back to their respective High Courts accordingly.

Per Ajmal Mian, J.--

If the Chief Justice is of the view that it is not possible for want of quorum of Judges of Supreme Court to hold or continue any sitting of the Court, or for any other reason it is necessary to increase temporarily the number of Judges of the Supreme Court, he may in writing:--

(a) with the approval of the President, request any person who has held the office of a Judge of that Court and since whose ceasing to hold that office three years have not elapsed; or

(b) with the . approval of the President and with the consent of the Chief Justice of a High Court, require a Judge of that Court qualified for appointment as a Judge of the Supreme Court, to attend sittings of the Supreme Court as an ad hoc Judge for such period as may be necessary.

Such a request can only be made if "it is necessary to increase temporarily the number of Judges of the Supreme Court", for the two reasons given hereinabove. It implies that in presence of permanent vacancies in the Supreme Court, Article 182 of the Constitution cannot be invoked and an ad-hoc Judge cannot be appointed keeping in view the provision of Article 181 of the Constitution, under which an Acting Judge of the Supreme Court can be appointed against a permanent vacancy, Under Article 260 of the Constitution, which defines the various terms including "Judge", the definition of the Judge given therein does not Include an ad hoc Judge, In, other words, he is not a Supreme Court Judge for the purpose of various Articles of the Constitution except for the purpose of Article 182 thereof, The practice of appointing ad hoc Judges against the permanent vacancies seems to be violative of the above provisions of the Constitution. This also militates against the independence of Judiciary as highlighted by Quaid-e-Azarn Muhammad Ali Jinnah in his speech of 1931 before the Federal Structure Sub-Committee,' and the International Human Rights Commission at Geneva.

The upshot of the discussion is as under:--

(i) That no ad, hoc Judge can be appointed under Article 182 while permanent vacancies exist;

(ii) that an ad hoc Judge is to act for a short period for attending the sittings of the Supreme Court; and

(iii) that he is not a Judge of the Supreme Court except for the purpose of the cases in which he sits and participates.

Per Manzoor Hussain Sial, J.--

Article 181 of the Constitution relates to the appointment of Acting Judges. When office of a Judge ~i the Supreme Court is vacant or he is absent and is unable to perform the functions of his office due to any other reason the President may, in the manner provided in Clause (1) of Article 177, appoint a Judge of the High Court qualified for appointment as Judge of the Supreme Court to act temporarily as Judge of the Supreme Court. A retired Judge of the High Court is also eligible to be appointed as Judge of the Supreme Court and the appointment of Acting Judge of the Supreme Court shall continue until it is revoked by the President. This provision is not correctly applied or has been misused in as much as that since the appointment of the Acting Judge of the Supreme Court is revocable by the President at any time, the threat that his appointment can be revoked at any time, keeps on constantly hanging over him for the entire period he continues in office, which undermines his independence. The independence of the Judiciary is also thereby undermined, which, however, is necessary to be fully secured.

Article 182 of the Constitution relates to the appointment of ad hoc Judges in the Supreme Court. If at any time it is not possible for want of quorum of the Judges of the Supreme Court to hold or continue the sittings of the Court or for any other reason it is necessary to increase temporarily the number of the Judges of the Supreme Court, the Chief Justice of Pakistan may in writing, with the approval of the President request any person who has held the office of a Judge of the Supreme Court and three years have not elapsed since he ceased to hold that office or a Judge of the High Court qualified for appointment as Judge of the Supreme Court, with the approval of the President and with the consent of the Chief Justice of the High Court, may be asked to attend the sittings of the Supreme Court as ad hoc Judge for such period as may be necessary in the circumstances and while so sitting he shall have the same power and jurisdiction as Judge of the Supreme Court. The bare reading of the provision of this Article indicates that an ad hoc Judge in the Supreme Court cannot be appointed against existing permanent vacancy. Ad hoc Judge in the Supreme Court cannot be appointed against the permanent vacancy and is appointed only when it has become imperative to increase temporarily the existing strength of the Judges of the Supreme Court. The practice of appointing ad hoc Judges against permanent vacancies is therefore in contravention of the provision of Article 182 of the Constitution. Even otherwise the appointment of ad hoc Judges in the Supreme Court is for a specific purpose, namely, where at any time it is not possible for want of quorum of the Judges of the Supreme Court to hold or continue the sitting of the Court or for any other reason it is necessary to increase temporarily the number of Judges of the Supreme Court. The language of the provision clearly indicates that an ad hoc Judge is appointed temporarily to cater for a particular or special situation and not as a substitute for filling a permanent vacancy.

(d) Constitution of Pakistan (1973)---

---- Arts. 193 --- Appointment of Chief Justice of High Court --- Convention, of appointment of most Senior Judge --- Most Senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the Court concerned.

Per Ajmal Mian. J.--

Keeping in view the provisions of the Constitution as a whole and the well-established convention as to the appointment of the senior most Judge in the High Court as the Chief Justice which has been followed consistently in conjunction with the Islamic concept of 'Urf' the most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the Court concerned.

There seems to be wisdom in following the convention of seniority. If every Judge in a High Court aspires to become Chief Justice for the reason that he knows that seniority rule is not to be followed, it will adversely affect the independence of Judiciary. The junior most Judge may feel that by having good terms with the Government in power he can become the Chief Justice, This will destroy the institution and public confidence in it. The Chief Justices of the High Courts have the power to fix the roster i.e. to decide when a case is to be fixed and before whom it is to be fixed. In other words, they regulate the working of the Courts. It is, therefore, very important that the Chief Justices should not be pliable and they should act independently.

Per Manzoor Hussain Sial, J.--

Article 193 of the Constitution empowers the President of Pakistan to appoint the Chief Justice of -the High Court. Apparently there is no constitutional requirement to appoint senior most Judge as Chief Justice of the High Court whenever permanent vacancy occurs in the High Court, but to secure the independence of Judiciary from the Executive, it is necessary to advert to the

constitutional convention which has developed by the continuous usage and practice over a long period of time,. The constitutional convention to appoint most Senior Judge of the High Court as a Chief Justice, had been consistently, followed in the High Courts since before partition of the subcontinent. The senior most Judge has an edge over rest of the Judges of the High Court on the basis of his seniority and entertains a legitimate expectancy to be considered for appointment as Chief Justice against permanent vacancy of the office of the Chief Justice. Apparently there is wisdom in following the constitutional convention of appointing most senior Judge of the High Court as permanent Chief Justice, otherwise a Junior most Judge in the High Court may aspire to become Chief Justice of the High Court by passing his seniors and to, achieve this object resort to undesirable conduct by going out of his way to oblige the Government in power. If he succeeds in securing his appointment as Chief Justice by superseding his seniors, by resorting to such measures he will endanger the independence of Judiciary and destroy the public confidence in the Judiciary. If a departure from following the established convention of appointing the senior most Judge is - to be made, the appointing authority should record reasons for not appointing most senior Judge as Chief Justice of the High Court the complexion of the Institution is likely to be impaired by not so doing.

(e) Constitution of Pakistan (1973)---

---- Arts. 193 & 197 --- Appointment of Judges of High Court---Additional Judges --- Appointment of Additional Judges as permanent Judges or extension or period as Additional Judges --- Principles --- Additional Judges appointed in the High Court against permanent vacancies or if permanent vacancies occur while they are acting as Additional Judges, acquire legitimate expectancy and they are entitled to be considered for permanent appointment upon the expiry of their period of appointment as concerned and the Chief Justice of Pakistan in 'the absence of strong valid reason/reasons to be recorded by the President/Executive ... Supreme Court, therefore, directed that Additional Judges who were dropped shall be processed and considered for their permanent appointment by the permanent Chief Justice within one month from the date of assumption of office by him as such.

Per Sajjad All Shah, C,J,..

Under Article 197 of the Constitution there is a provision for appointment of Additional Judges and it appears that there is no requirement that they can be appointed only after the sanctioned strength of the Judges of the High Court is filled in with the permanent appointees. From this it appears that even against the vacancies within the sanctioned strength a person can be appointed as Additional Judge of the High Court for a period to be specified and then can be made permanent as contemplated under Article 193. Such Judges have legitimate expectancy to be

entitled and considered for appointment upon expiry of their period of appointment as Additional Judges if and when they are so recommended for the purpose by the Chief Justice of the High Court and the Chief Justice of Pakistan. If such appointments are refused to be made then there should be strong reasons recorded in writing. Extension to be made or not is not the sole discretion of the Federal Government unless such request is made by the Chief Justice of the High Court and the Chief Justice of Pakistan.

Per Ajmal Mian, J.--

Under Article 197 of the Constitution, an Additional Judge can be appointed against a permanent vacancy or when a High Court Judge is absent or is unable to perform the functions of his office due to any other cause or for any reason it is necessary to increase the number of Judges of a High Court. In other words though the appointment of an Additional Judge is to be made for a period not exceeding two years but an Additional Judge can be appointed against a permanent vacancy.

The parity of reasoning for not appointing an Acting Chief Justice or an Acting Judge in the Supreme Court against permanent vacancies for a long period is equally applicable to an appointment of an Additional Judge in the High Court against a permanent vacancy. A practice/convention has developed in Pakistan that in the High Courts, Judges are first appointed as Additional Judges; either for a period of one year initially and then this period is extended to two years or they are initially appointed for a period of two years (during 1977 Martial Law this period was extended to three years) and their they are appointed as permanent Judges.

Article 197, inter alia, postulates the appointment of ‘an Additional Judge against a permanent vacancy. It is also well-established practice/convention that if an Additional Judge performs his functions during the period for which he was appointed to the satisfaction of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan, he has always been appointed as a permanent Judge except in a rare case. In this view of the matter, a person who is appointed against a permanent vacancy as an Additional Judge in a High Court or if a permanent vacancy occurs during his period as an Additional Judge, he acquires a reasonable expectancy to be considered as a permanent Judge and in case he is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan, he is to be appointed as such in the absence of very strong reasons to be recorded by the President/Executive which may be justiciable. Additionally, the Executive, instead of accepting the recommendations of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan for permanent appointments, without further consulting them, cannot extend the period instead of appointing them on permanent basis as recommended by the two Chief Justices.

Per Manzoor Hussain Sial, J.--

Invariably, if Additional Judge of High Court performs his functions, during ~ the period for which he is appointed, to the satisfaction of the Chief Justice of the High Court as also the Chief Justice of Pakistan, he is appointed permanent Judge of the High Court. The Additional Judge, who is appointed against a permanent vacancy, or the vacancy having occurred during the period he was working as Additional Judge clearly acquires a reasonable expectancy to be considered for appointment as permanent Judge. In order to secure the independence of Judiciary if the Additional Judge is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan, be is normally to be appointed as a permanent Judge in the absence of strong reasons to the contrary, which must be recorded by the appointing authority. It is in accord with the spirit of the Constitution that the period of his initial appointment as Additional Judge can only be extended on the recommendation of the Chief Justice of the High Court concerned or Chief Justice of Pakistan and not otherwise by the appointing authority. Legitimate expectancy of an Additional Judge, who had performed his functions to the satisfaction of the Chief Justice of the High Court concerned and Chief Justice of Pakistan for the period he was initially appointed, is only with regard to his being considered for permanent appointment.

(f) Constitution of Pakistan (1973)---

---- Arts. 203C & 209 --- Appointment of Judges of High Court as Judges of Federal Shariat Court --- Principles---Appointment of a sitting Chief Justice of a High Court or a Judge thereof in the Federal Shariat Court under Art.203C of the Constitution without his consent is violative of Art.209, Constitution of Pakistan which guarantees the tenure of office---Article 203C of the Constitution having been incorporated by the Chief Martial Law Administrator and Art. 209 of the Constitution having been enacted by the framers of the Constitution and also being beneficial and promoting independence of Judiciary, in case of conflict between the two, Art.209 of the Constitution shall prevail over Art.203C which detracts from dominant intent and spirit of the Constitution namely independence of Judiciary and such an appointment will be void--Supreme Court, therefore, directed that the cases of the appointees of the Federal Shariat Court be processed and be brought in line accordingly.

Per Sajjad Ali Shah, C.J.--

Article 209 of the Constitution relates to the composition of the Supreme Judicial Council and its functions. It enables the Council to take action or remove a Judge from the office on the ground of his incapability. to perform the duties of his office for the reason of physical or mental incapability or misconduct. Sub-Article (7) of this Article provides that a Judge of the Supreme Court or of a High Court shall not be removed from the office except as provided by this Article. Sub-Article (8) of this Article provides that the Council shall issue the Code of Conduct to be observed by the Judges of the Supreme Court and the High Courts. It is clear from the above provisions that the security of tenure is provided under Article 209 and also the forum for removal from the office as Judge of the High Court or of the Supreme Court. This provision is incorporated in the Constitution by the Constitution-makers. Subsequently, Chapter 3A setting up the Federal Shariat Court was inserted in Pan VII of the Constitution vide P.O. No. 1 of 1980 providing in Article 203C(4) that a Judge or Chief Justice of the High Court can be appointed to the Federal Shariat Court without his consent for a period not exceeding two years. After such appointment it is open to the President to modify the terms of the appointment of such Judge in the Federal Shariat Court or assign him any other office or require him to perform such other functions as the President may deem fit. If a Judge or Chief Justice of a High Court refuses to accept the appointment to the Federal Shariat Court, then he stands retired. No doubt, Chapter 3A inserted in Part VII of the Constitution for the purpose of setting up of the Federal Shariat Court envisages that the provisions of this Chapter shall have effect notwithstanding anything contained in the Constitution, still the appointment of a Judge or a Chief Justice of a High Court to the Federal Shariat Court in such manner without his consent accompanying by such harsh conditions, in the final analysis, tantamounts to removal or forcible retirement which can and should be done only under Article 209 of the Constitution under which the Supreme Judicial Council is constituted and is authorised to take action of such punitive nature. If the Government finds a particular Judge or the Chief Justice of a High Court to be un-cooperative and if there is sufficient material to support the charge of misconduct, then in all fairness action should be taken against him and proceedings should- be initiated before the Supreme Judicial Council in the manner prescribed under Article 209. The object is not to strike down provisions (4), (4-B) and (5) of Article 203C as void being inconsistent with Article 209 but keeping in view the rules of interpretation, if there is choice between two forums or provisions, then the provision beneficial to the affected Judge should have been adopted or resorted to, and in such circumstances, the resultant action is to be considered as void in absence of cogent reasons without going into the constitutionality of Article 203C of the Constitution. The Constitution is to be read as a whole and if there is any inconsistency, the same can be removed or rectified by the Parliament.

Per Ajmal Mian, J.--

The Federal Shariat Court is a new Court created by the Martial Law regime. It does not fit in the hierarchy of the Courts originally provided under the Constitution. It may be pointed out, that Article 203GG lays down that subject to Articles 203D and 203F, any decision of the Court in exercise of its jurisdiction under this Chapter shall be binding on a High Court and on all Courts subordinate to a High Court, meaning thereby, that the Federal Shariat Court is not equated with a

High Court. The appointment of a permanent sitting Chief Justice of a High Court or a sitting permanent Judge thereof is in fact a fresh appointment in a different Court. Factually, it cannot be treated as a transfer from one High Court to another High Court or a Court equivalent to it. The above fresh appointment in fact impliedly involves removal from office of a Chief Justice or a Judge of a High Court, as the case may be, for the period for which he is appointed in the Federal Shariat Court. Once a sitting Chief Justice of a High Court or a permanent Judge thereof is appointed in the Federal Shariat Court without his consent, he becomes susceptible under clause (413) of Article 203C to actions detrimental to his security of tenure which is guaranteed by the above Article 209(7) of the Constitution, inasmuch as the President may at any time, by an order in writing, modify the terms of appointment of such a Judge or he may assign to such Judge any other office, i.e. any office other than of a Judge or require him to perform such other functions as the President may deem fit, which may not necessarily be judicial functions.

A Chief Justice of the High Court, who may be senior to the Chief Justice of the Federal Shariat Court, after appointment in the Federal Shariat Court, becomes the junior most Judge. This also adversely affects the terms of office of a Judge.

If a permanent incumbent of the office of a Chief Justice of a High Court is appointed in the Federal Shariat Court with the object to bring an Acting Chief Justice, inter alia, for obtaining his recommendations for appointment of Judges as per desire of the Government in power, this will be violative of the spirit of the Constitution and will be mala fide in fact and in law, which will vitiate the entire exercise.

In the present case the allegation of the petitioner in the petition was that the Chief Justice of Lahore and Sindh High Courts were appointed as the Judges of the Federal Shariat Court, inter alia, for the above object, which allegation is denied by the Federation. Supreme Court wanted, inter alia, to examine the record of the above two Chief Justices in respect of their appointments in the Federal Shariat Court to ascertain the reasons; which prompted the Federation to take above actions. But this was resisted by it. In this view of the matter an adverse inference can be drawn.

Any appointment of a sitting Chief Justice of a High Court or a permanent Judge thereof without obtaining his consent, would be violative of Article 209 of the Constitution and, therefore, would be void.

Since there is a conflict between the above two Articles, efforts are to be made to resolve the same by reconciling it. The Constitution is to be read as a whole as an organic document. A close scrutiny

of the various provisions of the Constitution highlights that it envisages that the independence of judiciary should be secured as provided by the founder fathers of the country by passing Objectives Resolution and by providing security of tenure. The Constitution also envisages separation of. Judiciary from the Executive. Keeping in view the various provisions of the Constitution, it is not possible to reconcile the above provisions of Article 203C and Article 209. In such a situation, the question arises, which of the Articles should prevail. One view can be that since Article 203C was incorporated subsequent to Article 209, the former should prevail. The other view can be that since Article 209 was incorporated by consensus by the framers of the Constitution and whereas Article 203C was incorporated by the then Chief Martial Law Administrator and as the same is detrimental to the basic concept of independence of Judiciary and the separation of Judiciary, the former should prevail. The latter interpretation is preferred as it will be more in consonance with the various provisions of the Constitution and in accord with justice and fair play. A person cannot be appointed on adverse terms in a new Court without his consent.

Even if it is to be treated as a transfer, which is in fact not, a Judge cannot be transferred as a punishment but for the public interest.

In any case, the consultation of the Chief Justices is required even if the transfer is for less than two years and secondly, a permanent Chief Justice cannot be transferred under the above provisions of the Constitution. The above consultation should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play.

Transfer of a High Court Judge to another High Court or to the Federal Shariat Court can only be made in the public interest and not for an object alien to the said object, and that the question, whether a transfer is for a public interest is justiciable even at the behest of a lawyer.

Transfer power cannot be invoked by the President/Executive for any purpose other than public interest and that too the transfer order can be made after consultation of the Chief Justice of Pakistan in the above terms. The power of transfer cannot be pressed into service for the purpose of inflicting punishment on a Judge or for any other extraneous consideration.

Per Manzoor Hussain Sial, J.--

Federal Shariat Court was established under the cover of the Martial Law and did not fit in the scheme of the existing Courts. It cannot possibly be equated with High Court. The appointment of a Judge or Chief Justice of High Court, as Judge of Federal Shariat Court, is therefore not a transfer from one High Court to another, rather operates as his removal from office in the High Court and is fresh appointment in another Court with lack of security of tenure and risk of the modification of his terms of appointment he enjoyed as Judge or Chief Justice of the High Court.

The close examination of Arts.203C and 209 of the Constitution reveals that there is irreconcilable conflict between them. The. accepted principle of interpretation is that where there is conflict between the two provisions, the entire provisions of the Constitution are required to be read as a whole, and the basic features of the Constitution taken into consideration.

The consideration which weighed more heavily in holding that the appointment of a sitting Chief Justice or a Judge thereof in the Federal Shariat Court under Article 203C, without his consent, being violative of Article 209, was that the provision of the Constitution which corresponds more closely to and gives effect to dominant intent of the Constitution will have to be preferred in its application, to that provision, which detracts from that intent and *spirit. Undoubtedly, Article 209 guarantees the tenure of office of a Judge and explicitly secures the independence of Judiciary, which is dominant intent of the Constitution, whereas Article 203C militates against the security of tenure and independence of Judiciary and, therefore, must yield to the provisions of Article 209 of the Constitution. The introduction of Articles 203C in the Constitution by the Chief Martial Law Administrator, as against Article 209 which was enacted by the framers of the Constitution was merely one of the considerations, to hold that Article 209, which promotes security of tenure and independence of Judiciary must prevail, in its application over Article 203C, which detracts from the intent and spirit of the Constitution namely to fully secure the independence of the Judiciary by inter alia providing full security of tenure to the Judges.

The appointment of sitting Chief Justices and Judges of High Courts, as Judges of Federal Shariat Court, without their consent, therefore, being violative of the provisions of Article 209 of the Constitution will be void. It does not mean that Attic ‘ le 203-C is void. It is, only the action taken thereunder viz. the appointment of Judges of High Courts in Federal Shariat Court, being violative of Article 209 of the Constitution is declared void.

(g) Constitution of Pakistan (1973)--

---- Art.200 --- Transfer of High Court Judges --- Principles --- Permanent Chief Justice cannot be transferred at all --- Transfer of a Judge of one High Court to another High Court can only be made in the public interest after consultation with Chief Justice and not as a punishment.

Per Sajjad Ali Shah, C.J.-,-

Article 200 of the Constitution contemplates transfer of Judges from one High Court to another by the President after "consultation" with the Chief Justice of Pakistan and the Chief Justices of both the High Courts. No such consultation is necessary if the transfer is for two years. It appears that this transfer can be allowed if it is in the public interest and is not by way of punishment.

Per Ajmal Mian, J.--

In any case, the consultation of the Chief Justices is required even if the transfer is for less than two years and secondly, a permanent Chief Justice cannot be transferred under the above provisions of the Constitution. The above consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint or arbitrariness or unfair play.

Transfer of a High Court Judge to another High Court or to the Federal Shariat Court can only be made in the public interest and not for an object alien to the said object, and that the question, whether a transfer is for a public interest is justiciable even at the behest of a lawyer.

Transfer power cannot be invoked by the President/Executive for any purpose other than public interest and that too the transfer order can be made after consultation of the Chief Justice of Pakistan in the above terms. The power of transfer cannot be pressed into service for the purpose of inflicting punishment on a Judge or for any other extraneous consideration.

Per Manzoor Hussain, Sial, J.-

Article 200 of the Constitution relates to transfer of a High Court Judge to another High Court without his consent for a period of two years. The perusal of this provision of the Constitution shows that consultation of the Chief ‘ Justice is needed even if the transfer is for a period of less than 2 years, and a permanent Chief Justice cannot be transferred at all.

Transfer of High Court Judge to another High Court or to the Federal Shariat Court can only be made in the public interest and not for an object alien to the said object, and that the question, whether a transfer is for a public interest is justiciable even at the behest of a lawyer. It is, therefore, clear that the President cannot transfer a Judge of a High Court to another High Court except in public interest after consultation with Chief Justice of Pakistan.

(h) Constitution of Pakistan (1973)-

---- Art. 193(2)(a) --- Appointment of High Court Judges --- Essentials--Requirement of 10 years’ practice under Art. 193(2)(a) of the Constitution relates to the experience/ practice at the Bar and not simpliciter the period of enrolment.

Per Sajjad Ali Shah, C.J.-

Under Article 193 the qualifications are specified for appointment as Judge of a High Court. One requirement is that an Advocate is eligible to be elevated only when he has been advocate of the High Court for ten years. The question arose as to whether it is necessary that such advocate must have put in ten years of active practice in the High Court or mere enrolment is sufficient. For this requirement ten years’ active practice in the High Court is necessary and mere enrolment as an advocate of the High Court is not enough if the advocate concerned has not practised in the High Court but has been doing some other job or business and was not in active practice.

Per Ajmal Mian,

Islam enjoins that, while selecting the Judges, the authority should select the people of excellent character, superior calibre and meritorious record having deep insight and profound knowledge.

If one carefully reads sub-clause (a) of clause (2) of Article 193 of the Constitution, it becomes evident that 10 years' period referred to in sub-clause (a) thereof relates to experience and not the period of enrolment. Under clause (b) thereof not less than 10 years' period is provided for civil servants for being eligible for consideration for appointment as a Judge of the High Court and out of the above 10 years, it has been provided that for a period of not less than three years, he must have served as or exercised the functions of a District Judge in Pakistan. The above sub-clause (b) speaks of actual experience in service and, therefore, if it is to be read with sub-clause (a), it becomes evident that sub-clause (a) also refers to the experience. In any case, it is a matter for consideration by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan. They have to decide, whether a particular candidate has requisite experience and once they form the view that the candidate has the requisite experience as envisaged by sub-clause (a) of clause (2) of Article 193, this issue will not be justiciable before the Court of law. The Court cannot sit and decide, whether a particular person has the requisite experience or

not? It is a matter of subjective satisfaction the Chief Justice of the High' Court concerned and the- Chief Justice of Pakistan.

Per Manzoor Hussain Sial, J.--

The eligibility of an advocate for appointment as Judge of the High Court, as envisaged under Article 193 of the Constitution is that he has for a period of, or for periods aggregating not less than ten years, been an advocate of a High Court. The question arises whether the period of ten years is to be construed from the date of his enrolment alone or that he is required to put in 10 years' practice as an advocate. Whereas sub-clause (2)(b) of Article 193 prescribes a period of not less than 10 years to be a Member of a civil service prescribed by law, and has, for a period of not less than three years served as or exercised the functions of a District. Judge in Pakistan, to become eligible for appointment as Judge of the High Court. It, therefore, necessarily follows that this clause has to be read with clause (a) and experience of a particular period in the profession is necessary for the advocate to become eligible for the appointment of a Judge of High Court. The suitability of the advocate on the basis of the experience for appointment as Judge of the High Court shall, however, have to be determined by the Chief Justice of the High Court, who has to initiate the panel of the candidates for appointment as Judges of the High Court to the Chief Justice of Pakistan for ultimate recommendation for the appointment of suitable persons as Judges of the

High Court. Mere enrolment of an advocate for a period of 10 years is therefore not sufficient to make him eligible for his appointment as Judge of the High Court.

(i) Constitution of Pakistan (1973)---

---- Art. 193 --- Appointment of High Court Judge --- Simpliciter political affiliation of a candidate for judgeship of the Superior Courts may not be a disqualification provided the 'candidate is of an unimpeachable integrity, having sound knowledge in law and is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan --- Appointment of a person who was a strong activist in a political party was not desirable.

Per Saijad Ali Shah, C.J.--

The political affiliation of a candidate for judgeship may not be a disqualification provided he is a person of integrity and has active practice as an advocate of the High Court and has sound knowledge of law and has also been recommended by the Chief Justice of the High Court and the Chief Justice of Pakistan.

Per Ajmal Mian, J.--

A person cannot be appointed as a Judge simpliciter for the reason that he has political affiliation with a particular political party, but if he is a man of integrity and has sound knowledge of law and is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan, then his past political affiliation will not be a disqualification. A person of integrity and sound knowledge normally serves his past connections with the political party with which he had affiliation and decides the matter purely on merits. However, it will be desirable not to appoint a person who is a strong activist in a political party as for him, it will not be possible to erase unconscious tilt in favour of his party.

Simpliciter political affiliation of a candidate for judgeship of a superior Court may not be a disqualification provided the candidate is of an unimpeachable integrity, having sound knowledge

in law and is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan.

Per Manzoor Hussain Sial, J.--

Political affiliation alone may not disqualify the candidate provided he is a person of unimpeachable integrity, having sound knowledge in law and is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan. After he is appointed as Judge of the High Court and takes oath to perform his functions without fear, favour or ill-will and decides cases .purely on merits, he would be as good a Judge as any other Judge, who had no political affiliation before assuming the office of a Judge of the High Court. It, however appears desirable not to appoint a person who has had strong affiliations with one political party or the other, as it would be not only difficult for him to shake off that impression and rather embarrassing for him to do evenhanded justice to all manner of people.

(j) Constitution of Pakistan (1973)---

---- Art. 196 --- Acting Chief Justice of High Court --- Validity --- Conditions--- Sending a Supreme Court Judge as an Acting Chief Justice to a High Court is not desirable in view of clear adverse observations of Supreme Court in the case of Abrar Hasan v. Government-of Pakistan PLD 1976 SC 315 at p.342.

Per Sajjad Ali Shah, C.J.

Although the Constitution does allow under Article 196, which provides for appointment of Acting Chief Justice of a High Court, a Judge of the Supreme Court to act as the Chief Justice of the High Court for a short time but this practice should be avoided and it would be much better if it is not done for reasons firstly that if a Judge of the Supreme Court goes as Acting Chief Justice -then his judgments become appealable in the Supreme Court of which he is a permanent Judge. Secondly, such appointment causes embarrassment to the Judge of the Supreme Court because the Judges of the High Court normally do not welcome such an appointment.

There may be exceptional cases in which no control could be exercised over the situation. For instance, after imposition of Martial Law on 5th July, 1977, the Chief Justices of the High Courts were made Governors of the Provinces and in their places in the High 'Courts Acting Chief Justices were appointed. It so happened that the Chief Justices remained away from the High Courts as the Governors for about fifteen months and Acting Chief Justices had to perform their duties. There was Martial Law in the country and the Constitution was held in abeyance and the system under that arrangement had to continue in such circumstances, the Judges had to be appointed and for such appointments in the High Courts, "recommendations" were made by the Acting Chief Justices. The Martial Law remained operative for a long time and the Supreme Court gave it cover of validity on the ground of the doctrine of necessity and empowered the CMLA to amend the Constitution. Article 270-A was inserted in the Constitution by P.O. No. 14 of 1985, which was substituted by Act XVIII of 1985 passed by the Parliament to enable withdrawal of Martial Law vide Proclamation dated 30th December, 1985. All the appointments made in the past or for that matter in the distant past on the "recommendations" of the Acting Chief Justices are not void ab initio because they were validated later in the process and have become past and closed transaction.

Pier Ajmal Mian, J.--

Sending of a Supreme Court Judge to a High Court as an Acting Chief Justice is undesirable in view of the adverse observations in the judgment of Supreme Court in the case of Abrar Hasan v. Government of Pakistan (PLD 1976 SC 315 at 342). Even otherwise this causes heart burning among the Judges of the High Court concerned, which is not conducive for maintaining congenial working relation. There is no security of tenure for an acting incumbent.

Per Manzoor Hussain Sial, J.

Article 196 is different in its import than Article 193, which relates to -appointment of permanent Chief Justice of the High Court. The concept of Acting Chief Justice was initially introduced in India during pre-partition days, but had always meant appointment of an Acting Chief Justice as stopgap arrangement. He is not supposed to take decisions relating to important policy matters without consulting the permanent Chief Justice;

The definition of Chief Justice as contained in Article 260 of the Constitution includes the Judge for the time being acting as Chief Justice of the Court. The words "time being" clearly indicate that the Acting Chief Justice has only been appointed to meet the emergency and for a brief period. The definition of word "include" indicates that it signifies something which does not belong to

specie. Indeed the Constitution recognises this distinction. Again in Article 200 which deals with the transfer of High Court Judges, while a Judge who is for the time being acting as Chief Justice of A High Court, is deemed to be only a Judge of the High Court; the Chief Justice is not so included. , This clearly demonstrates that an Acting Chief Justice of the High Court is treated as a specie different from the permanent Chief Justice. Acting Chief Justice is not consultee" within the meaning of two relevant Articles of the Constitution. He is supposed to deal with only routine matters, and himself being holder of an office for a brief period cannot give opinion - for the permanent appointment of Judges of the superior Courts, nor can deal with long term policy matters.

(k) Constitution of Pakistan (1973)---

Arts.209 & 203C --- Article 203C of the Constitution of Pakistan having been incorporated by the Chief Martial Law Administrator while Art-209 of the Constitution enacted by the framers of the Constitution, Art.209 of the Constitution shall prevail over Art.203C of the Constitution.---[Interpretation of Constitution] .

(1) Constitution of Pakistan (1973)---

---- Preamble --- Interpretation of Constitution --- Article in the Constitution enacted by the framers of the Constitution to prevail over the one incorporated by the Chief Martial Law Administrator where there is irreconcilable conflict.

Per Sajjad Ali Shah, C.J.; Ajmal Mian, Fazal Ilahi Khan and Manzoor Hussain Sial, JJ.; agreeing--

(m) Constitution of Pakistan (1973)--

---- Art. 185(3) --- Leave to appeal was granted to examine in detail whether the impugned judgment of High Court was sustainable on the ground that it was consistent with the correct interpretations of the Articles in the Constitution relating to the Judiciary.

(n) Constitution of Pakistan (1973)---

---- Arts. 199 & 184(3) --- Invocation of jurisdiction under Arts. 184(3) 4 199 of the Constitution --- Locus standi --- Remedies under Arts. 199 & 184(3), Constitution of Pakistan available in a High Court and the Supreme Court respectively are concurrent in nature --- Question of locus standi is relevant in a High Court, but not in the Supreme Court when the jurisdiction is invoked under Art. 184(3) of the Constitution.

(o) Constitution of Pakistan (1973)---

---- Arts. 184(3) & 199 --- Original jurisdiction of Supreme Court --- Petition under Art. 184(3), Constitution of Pakistan --- Maintainability --- Petitioner filed Constitutional petition under Art. 199 of the Constitution of Pakistan in the High Court which was dismissed without deciding the questions of controversy--- Petitioner filed the petition for leave to appeal before the Supreme Court against the impugned judgment of the High Court and also filed the direct petition under Art. 184(3) of the Constitution before Supreme Court praying for examination of Articles of the Constitution relating to the Judiciary and in that connection he called in question some appointments in the Superior Judiciary --- Maintainability and validity of petition under Art. 184(3) of the Constitution --- Held, petitioner had rightly invoked the jurisdiction of Supreme Court under Art.184(3) of the .Constitution and leave had rightly been granted in the other petition for the reason that in both the cases common questions of interpretation of the Articles of the Constitution relating to the Judiciary were involved which were of public importance --- Contention that interpretation of the Articles of the Constitution in both the cases would be merely an exercise of academic nature was repelled, for such exercise had become very essential and necessary and would help great deal in making the matters very clear by interpreting the relevant provisions of the Constitution relating to Judiciary.

(p) Constitution of Pakistan (1973)---

--Preamble ... Interpretation of Constitution --- Principles --- Interpretation of Constitution is prerogative as well as duty of Superior Courts as envisaged by the Constitution --- Word “jurisdiction” used in the Constitution denotes authority for the Courts to exercise the judicial power, as such power is inherent in the superior Courts to interpret, construe and apply law as a result of system of division of powers --- Such interpretative function of superior Courts cannot be a mere academic exercise without relation to concrete dispute, either between a subject and subject or between a subject and the State --- Supreme Court being creature of the Constitution cannot

claim any right to strike down any provision of the Constitution but can interpret the Constitution even if a provision in the Constitution is a provision seeking to oust the jurisdiction of the Court.

In. the Constitution the word used is, "jurisdiction" which denotes authority for the Courts to exercise the judicial power as such power is inherent in the superior Courts to interpret, construe and apply law as a result of system of division of powers. The "Judicial Power" is not constitutionalised in the Courts as in American Constitution, although the Courts in Pakistan traditionally exercise the jurisdiction over the matters though not exclusive, which includes exercise of judicial power.

Interpretation of the Constitution is the prerogative as well as the duty of the superior Courts as envisaged in the Constitution and this interpretative function cannot be a mere academic exercise without relation to concrete dispute, either between a subject and subject or between a subject and the State. Cases of conflict between the supreme law of the Constitution and an enactment might come for adjudication 'before the ' Courts and in such cases it would be plain duty of the superior Courts, as its preservers, protectors and defenders, to declare the enactment in question as invalid to the extent of its repugnancy with the Constitutional provisions. The power of judicial review therefore must exist in Courts of the country in Order that they may be enabled to interpret, the Constitution in all its multifarious bearings on the life of the citizens in the country. The Constitution ought to be interpreted as an organic whole giving due effect to its various parts and trying to harmonise them so as to make it an effective and efficacious' instrument for the governance of the country.

Supreme Court is the creature of the. Constitution and does not claim any right to strike down any provision of the Constitution, but does claim right to interpret the Constitution, even if a provision in the Constitution is a provision seeking to oust the jurisdiction of the Court. This right to interpret the Constitution is not acquired de hors the 'Constitution but by virtue of the fact that it is a superior Court set up by the Constitution itself. It is not necessary for this purpose to invoke any divine or super-natural right but this judicial power is inherent in the Court itself. It flows from the fact that it is a Constitutional Court and it can only be taken away by abolishing the Court itself.

(q) Interpretation of Constitution---

---- Intention and scope of a word. in the minds of die framers of the Constitution --- Determination --- Court has not to shirk its duty of interpreting the Constitution to supply reasonably correct meaning to a word in the Constitutional provision in order to harmonise

the provision with other provisions and make the Constitution workable to resurrect the independence of the Judiciary as guaranteed in the Constitution and Islam.

(r) Interpretation of Constitution---

---- Choice between two forums or provisions --- Duty of Court --- If there is choice between two forums or provisions, then the provision beneficial to the affected persons should be adopted or resorted to.

Per Ajmal Mian, J.--

(s) Constitution of Pakistan (1973)

---- Art. 184(3) --- Constitutional petition under Art. 184(3), Constitution of Pakistan --- Locus standi to file --- Not only a practising advocate but even a member of the public is entitled to see that the three limbs of the State, namely, the Legislature, the Executive and the Judiciary act not in violation of any provision of the Constitution, which affects the public at large.

(t) Constitution of Pakistan (1973)---

---- Arts 184(3), 177 & 193 --- Constitutional petition under Art. 184(3)--- Maintainability --- Appointment of Supreme Court and High Court Judges --- If the appointments of Judges are not made in the manner provided in the Constitution or in terms thereof, the same will be detrimental to the independence of Judiciary which will lead to lack of confidence among the people--Constitutional questions as to the working of the judiciary as an independent organ of the State are of great public importance and liable to be judicially reviewed under Art. 184(3) of the Constitution of Pakistan.

(u) Constitution of Pakistan (1973)--

---- Art. 184(3) --- Jurisdiction of Supreme Court under Art. 184(3), Constitution of Pakistan --- Scope --- Supreme Court is entitled to take cognizance of any matter which involves a question of public importance with reference to the enforcement of any of the Fundamental Rights, conferred by Chap. 1, Part II of the Constitution even suo motu without having any formal petition.

(v) Constitution of Pakistan (1973)-

---- Arts. 177, 193 & 185(3) --- Appointment of Judges of superior Courts --- Leave to appeal was granted to examine a number of events affecting the working of Judiciary which resulted into lack of confidence in the Judiciary viz. bypassing conventions/practices in the appointment of the Judges of the superior Courts; induction of ad hoc Judges without filling in the vacancies of the sanctioned strength by permanent appointments; practice during Martial Law days to appoint Acting Chief Justices for indefinite long periods, inter alia, in the High Courts malafidely, at present there were three Acting Chief Justices working at Lahore, Karachi and Peshawar; out of these three, two were the permanent Judges of Supreme Court; Chief Justice of the Federal Shariat Court was also appointed about two years back not for any definite period but until further order; two permanent Chief Justices of the High Courts, namely, of Sindh High Court and of Lahore High Court were appointed as ordinary Judges of the Federal Shariat Court---Controversy had also arisen on the question, as to what extent the recommendations of the Chief Justices of the High Courts and of Chief Justice of Pakistan were binding on the Executive, as it was a matter of common knowledge that some of the Judges, who had recently been appointed in the High. Courts, had been appointed despite of opposition, inter alia by the Chief Justice of Pakistan; six Additional Judges of the High Court of Sindh who had completed their two years' tenure, contrary to the well-established practice of their being appointed as permanent Judges in the absence of anything against them, were dropped without disclosing any reason and act of dropping Additional Judges upon the completion of their two years' period was repeated in Lahore High Court inasmuch as they were not appointed as permanent Judges without disclosing any reason upon their completion of two years' period.

(w) Constitution of Pakistan (1973)-

Arts. 4 & 25---Fundamental rights --- Right of "access to justice to all" is an inviolable right enshrined in the Constitution of Pakistan which is equally found in the doctrine of due process of law-7-Right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal --- Without having an

independent Judiciary, the Fundamental Rights enshrined in the Constitution will be meaningless and will have no efficacy or beneficial value to the public at large.

(x) Islamic Jurisprudence-

--Administration of justice --- Foundation of Islam is on justice which is different from the concept of the remedial justice of the Greeks, the natural justice of the Romans or the formal justice of the Anglo-Saxons --- Justice in Islam seeks to attain a higher standard of what may be called "absolute justice".

The foundation of Islam is on justice. The concept of justice in Islam is different from the concept of the remedial justice of the Greeks, the natural justice of the Romans or the formal justice of the Anglo-Saxons. Justice in Islam seeks to attain a higher standard of what may be called "absolute justice" or "absolute fairness". There are repeated references to the importance of justice and of its being administered impartially in Holy Qur'an.

Following is deducible from the Holy Qur'an and other Islamic literature on the subject of Administration of Justice in Islam:--

(i) That the Holy Qur'an repeatedly enjoins that one who believes in Allah His Prophet Muhammad (p.b.u.h.), Qur'an and Sunnah, should stand out firmly for justice, as witnesses to Allah, even as against himself or his parents, his kin rich and poor-,

(ii) that the hatred of others should not make you swerve to wrong and depart from justice;

(iii) that the Judges are not to be led by personal likes or dislikes, love or hate:

(iv) that the Judges should maintain strict impartiality and even in treatment in the Court inter se between the litigant parties notwithstanding that one of the parties might be very powerful and influential;

(v) to a Judge, all are equal in the eye of the law. As God dispenses justice among His subjects, so a Judge should judge without any distinction whatsoever;

(vi) that a Judge must exhibit patience and perseverance in scanning the details, in testing the points presented as true and sifting facts from fiction and when truth presented itself to him, he must pass judgments without fear, favour or prejudice;

(vii) that the power to appoint inter alia Judges is a sacred trust, the same should be exercised in utmost good faith. Any extraneous consideration other than the merits is a great sin entailing severe punishment;

(viii) that while selecting Judges the Authority concerned should be very careful. It should select people of excellent character, superior calibre and meritorious record. Abundance of litigation and complexity of cases should not make them lose their temper;

(ix) that a Judge should not be corrupt, covetous or greedy;

(x) that a Judge should be paid handsomely so that his needs are- fully satisfied and he is not required to beg or borrow or resort to corruption;

(xi) that a Judge must be a man, having deep insight, profound knowledge of Shariah, God-fearing, forthright, honest, sincere, man of integrity;

(xii) that a Judge must be upright, sober, calm and cool. Nothing should ruffle his mind from the path of rectitude;

(xiii) that Judges should be given such a prestige and position in the State that none of the Government functionaries can over lord them or bring them harm.

(y) Interpretation of Constitution-

--- Approach while interpreting a Constitutional provision has to be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively --- Interpretation cannot be a narrow and pedantic---Courts' efforts should be to construe the same broadly, so that it may be able to meet' the requirement of ever changing society --- General words cannot be construed in isolation but the same are to be construed in the context in which they are employed --- In other words their colour and contents are derived from their context.

(z) Constitution-

---- Law of Constitution consisting, of Rules enforced or recognized by Courts and the conventions of the Constitution consisting of customs, practice maxims or precepts which are not enforced or recognized by the Courts --- Applicability--Principles.

An Introduction of the Study of the Law of the Constitution by A.V. Dicey; The Law and the Constitution by Sir W. Ivor Jennings; The Statute of Westminster and Dominion Status, Fifth Edn. by K.C. Wheare, F.B.A.; Modem Constitutions by K.C. Wheare; Studies in Constitutional Law by Professor Colin R. Munro; Constitutional and Administrative Law, 7th Edn. by Late 0. Hood Phillips; Supreme Court Advocates-on-Record Association v. Union of India AIR 1994, SC 268; Constitutional Conventions--The Rules and Forms of Political Accountability by Geoffery Marshall; Constitutional and Administrative Law, Sixth Edn. by Rodney Brazier; Student's English-Arabic Dictionary, Second Edn., printed by Catholic Press, Beirut, The Mejelle translated by C.R. Tyser, B.A.L. President, District Court of Kyrenta and 2 others; The Principles of Muhammadan Jurisprudence by Abdur Rahim, M.A., 1968 Edn.; Pakistan and others v. Public-at-Large and others PLD 1987 SC 304 and Pakistan v. Public-at-Large PLD 1986 SC 240 ref.

(aa) Constitution of Pakistan (1973)---

---- Art. 8(l) --- Provision of Art.8(l) of the Constitution of Pakistan (1973) is founded on the assumption that custom or usage has the force of law as the law has itself but they will not be enforced to the extent of inconsistency within the Fundamental Rights.

(bb) Interpretation of Constitution---

---- Courts, while construing a Constitutional provision, can press into service an established Constitutional convention in order to understand the import and the working of the same, 'if it is not contrary to the express provision of the Constitution --- Islam also recognizes the conventions as binding if these were not contrary to Holy Qur'an and Sunnah.

(cc) Islamic Jurisprudence---

---- Conventions-Effect --- Conventions which are not contrary to Holy Qur'an and Sunnah have binding effect.

(dd) Constitution of Pakistan (1973)"-

---- Preamble --- While construing the provisions of the Constitution, Court can invoke aid of Islamic Jurisprudence besides pressing into service the established conventions, if any.

(ee) Constitution Of Pakistan (1973)---

---- Arts. 177 & 193 --- Appointment of Judges of superior Courts---If a wrong person is appointed as a Judge of a superior Court, it affects adversely the quality of the Court's work, with the result that litigant public criticises the Court --- Since the conduct of a Judge of a superior Court cannot be discussed in the Parliament in view of Art.68, Constitution of Pakistan, the Executive in fact is not accountable as to the working of a Judge.

(ff) Constitution of Pakistan (1973)---

---- Arts. 177 & 193 --- Appointment of Judges of superior Courts --- Islam enjoins that, while selecting the Judges, the Authority should select the people of excellent character, superior calibre and meritorious record having deep insight and profound knowledge.

(gg) Islamic Jurisprudence-

---- Administration of justice --- Appointment of Judges of superior Courts --- Islam enjoins that, while selecting the Judges, the Authority should select the people of excellent character, superior calibre and meritorious record having deep insight and profound knowledge.

(hh) Constitution of Pakistan (1973)-

---- Arts. 209, 203C, 203D, 203F & 203GG --- Federal Shariat Court is not equated with a High Court --- Appointment of a permanent sitting Chief Justice of a High Court or a sitting permanent Judge thereof as a Judge of Federal Shariat Court is in fact a fresh appointment in a different Court --- Such an appointment cannot be treated as a transfer from one High Court to another High Court or a Court equivalent to it --- Such fresh appointment, in fact, impliedly involves removal from office of a Chief Justice or a Judge of a High Court as the case may be for the period for which he is appointed in the Federal Shariat Court Once a sitting Chief Justice of a High Court or a permanent Judge thereof is appointed in the Federal Shariat Court without his consent, he becomes susceptible under Art.203C(4B) of the Constitution to actions detrimental to his security of tenure which is guaranteed by Art.209(7) of the Constitution.

The Federal Shariat Court is a new Court created by the Martial Law regime. It does not fit in the hierarchy of the Courts originally provided under the Constitution. It may be pointed out that Article 203GG lays down that subject to Articles 203D and 203F, any decision of the Court in exercise of its jurisdiction under this Chapter shall be binding on a High Court and on all Courts subordinate to a High Court, meaning thereby, that the Federal Shariat Court is not equated with a High Court. The appointment of a permanent sitting Chief Justice of a High Court or a sitting permanent Judge thereof is in fact a fresh appointment in a different Court. Factually, it cannot be treated as a transfer from one High Court to another High Court or a Court equivalent to it. The above fresh appointment in fact impliedly involves removal from office of a Chief Justice or a

Judge of a High Court, as the case may be, for the period for which he is appointed in the Federal Shariat Court. That once a sitting Chief Justice of a High Court or a permanent Judge thereof is appointed in the Federal Shariat Court without his consent, he becomes susceptible under clause (413) of Article 203C to actions detrimental to his security of tenure which is guaranteed by the Article 209(7) of the Constitution, inasmuch as the President may at any time, by an order in writing, modify the terms of appointment of such a Judge or he may assign to such Judge any other office, i.e. any office other than of a Judge or require him to perform such other functions as the President may deem fit, which may not necessarily be judicial functions.

A Chief Justice of the High Court, who may be senior to the Chief Justice of the Federal Shariat Court, after appointment in the Federal Shariat Court, becomes the junior most Judge. This also adversely affects the terms of a Judge.

(ii) Constitution of Pakistan (1973)---

---- Preamble --- Interpretation of Constitution given by the Supreme Court is binding on the Executive.

Per Manzoor Hussain Sial, J.--

(jj) Interpretation of Constitution---

---- Where the Constitution provides a criterion for doing a thing in one provision then that criterion can be utilised for doing another thing of similar nature provided in the Constitution.

(kk) Interpretation of Constitution ---

---- Conflict between the two provision visions, the entire provisions of the of the Constitution --- Remedy—Where there is conflict between the two pro whole, and the basic features of the Constitution are required to be read as a Constitution taken into consideration.

(ll) Interpretation of Constitution-

---- Conflict between the two provisions of the Constitution --- Provision of the Constitution which corresponds more closely to and gives effect to dominant intent of the Constitution will have to be preferred in its application, to that provision which detracts from that intent and spirit.

(mm) Interpretation of Constitution---

---- Conflicting provision of Constitutive ---Harmonisation by Court--Principles --- Reading words in the constitution or Statute to give effect to the free intention of law-maker does not amount to re-writing or amending the Constitution or the Statute but the purpose is to give effect to its true intent.

The Court is empowered to harmonise conflicting provisions of the Constitution and the Statutes and if it is not possible to reconcile the inconsistent provisions, to declare which of the provisions will be preferred and given effect. The Court in exercise of. its inherent judicial power can even read "words" in the Constitution or Statute in order to give effect to the manifest intention of the Legislature.

In order to give effect to the true intention of the law-makers it is permissible for the Courts to read words in the Statute. it is true that generally Court of law is not authorised to alter the language of the Statute for the purpose of supplying a meaning, yet in certain, circumstances it is permissible for the Courts to give effect to the true and patent intention of the law-maker by supplying omissions" in order to avoid manifest injustice. It is a misconception, therefore, to consider that the reading words in the Constitution or Statute to give effect to the free intention of the law-maker amounts to re-writing or amending the Constitution or the Statute. On the other hand, its purpose is to give effect to its true intent.

The Court following the accepted principles of interpretation acts within its jurisdictional domain to give effect to a particular provision, so as to bring it in accord, with the patent intention of the framers of the Constitution.

[Case-law and Reference Books extensively referred, relied and discussed.]

Petitioner in person (in C.P. No.29 of 1995 and Appellants Nos and 2 in C. A. No. 805 of 1995).

Raja M. Akram, Senior Advocate Supreme Court with Ejaz Muhammad Khan, Advocate-on-Record for Appellants Nos. 3 to 7.

Yahya Bakhtiar, Senior Advocate Supreme Court, Qazi Muhammad Jamil, Attorney-General for Pakistan, Aitzaz Ahsan, Senior Advocate Supreme Court, Faqir Muhammad Khokhar, Raja M. Bashir, Farooq H. Naik, Muhammad Roshan Issani, Deputy Attomey-Generals and Mehr Khan Malik, Advocate-on-Record for the Federation of Pakistan.

Sharifuddin Pirzada, Senior Advocate Supreme Court assisted by Anwar Mansoor, Advocate, S.M. Zafar and Fakhruddin G. Ebrahim, Senior Advocates Supreme Court: Amicus curiae.

Mian Abdul Sattar Najam, Advocate-General, Punjab with Rao Muhammad Yousaf Khan, Advocate-on-Record, Abdul Ghafoor Mangi, Advocate-General, Sindh, Saif-ur-Rehman Kiyani, Advocate-General, N.-W.F.P. and Yakub K. Eusafzai, Advocate-General, Balochistan on Court Notice.

Muhammad Akrarn Shaikh, Senior Advocate Supreme Court, President for the Supreme Court Bar Association.

Dr. Riazul Hassan Gilani, Advocate Supreme Court with Zafar lqbal Chaudhry, Advocate Supreme Court for the Lahore High Court Bar Association.

Shahid Orakzai, Free Lance Journalist and Professor Mehmood Hussain (individuals).

Dates of hearing: 5th, 6th, 19th, 20th, 22nd November, 1995; 21st 24th, 28th, 31st January; 4th, 8th February; 3rd, 6th, 10th and 13th March 1996.

SHORT ORDER

For reasons to be recorded later, we pass the following short order

2. In these two cases some appointments of Judges in the Superior Judiciary are challenged and called in question on the ground that they have been made in contravention of the procedure and guidelines laid down in the Constitution, and in this context we are called upon to examine in detail the relevant Articles pertaining to the Judiciary specified in Part VII of the Constitution to render an authoritative decision on the question of interpretation of such Articles in the light of 6ther co-related Articles.

3. Pakistan is governed by the Constitution of the Islamic Republic of Pakistan, 1973, preamble of which says that the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed and independence of Judiciary fully secured. It also provided that the Muslims shall be enabled to ordain their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah. The Preamble is reflection of the Objectives Resolution which is inserted in the Constitution as Article 2A as substantive part of the Constitution by P.O. No. 14 of 1985. Article 2 of the Constitution states in unequivocal terms that Islam shall be the State religion of Pakistan. Part IX of the Constitution contains Islamic Provisions in which Article 227 envisages that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. The Institution of Judiciary in Islam enjoys the highest respect and this proposition is beyond any dispute. The appointments of Judges and the manner in which they are made have close nexus with independence of Judiciary.

4. In the provisions relating to the Judicature in the Constitution, Article 175 provides that there shall be a Supreme Court of Pakistan, a High Court for each Province and such other Courts as may be established by law. Sub-Article (2) thereof provides that no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. Sub

Article (3) provides that the Judiciary shall be separated progressively from the Executive within fourteen years from the commencing day. After expiry of the stipulated period, this Court has given judgment in the case of Government of Sindh v. Sharaf Faridi and others PLD 1994 SC 105,and has held on the subject of independence of Judiciary as under:--

"that every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences', inducements or pressures, direct or indirect, from any quarter for any reason; and that the Judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review, over all issues /of a judicial nature."

In this judgment this Court has further provided guidelines for financial independence of the Judiciary. The cut-off date of 23rd March, 1996 has been given by this Court to enable the Provincial Governments for final separation of Judiciary from the Executive as envisaged in the judgment mentioned above.

5. We have examined in detail the special characteristics of out present Constitution in conjunction with its historical background and Islamic Provisions while being fully cognizant of the powers of this Court to interpret the Constitution keeping in view the "Doctrine of Trichotomy of Powers", and have heard in detail with utmost patience not only the learned counsel appearing for the parties, but also the most senior counsel as amicus curiae, representatives of the Bar Associations of the Supreme Court and High Courts and the individuals who requested for hearing them on the subject of interpretation of provisions of the Constitution relating to the Judiciary. The valuable assistance rendered by all of them is very much appreciated.

6. Article 177 of the Constitution envisages that the Chief Justice of Pakistan shall be appointed by the President, and each of the other Judges of the Supreme Court shall be appointed by the President after consultation with the Chief Justice. As against this, for appointment of Acting Chief Justice of Pakistan, Article 180 provides that when the office of the Chief Justice of Pakistan is vacant or he is absent or unable to perform the functions of his office, the President shall appoint the most senior of the other Judges of the Supreme Court to act as the Chief Justice of Pakistan. We are not going into the question of interpretation of these two provisions in the light of contention that criterion of the most senior Judge in the appointment of Acting Chief Justice be impliedly read in the appointment of the Chief Justice of Pakistan for the reasons firstly that in Constitutional Petition No.29 of 1994, which is directly filed in this Court, appointment of the Acting Chief Justice was challenged on the ground that when there was clear vacancy after retirement, instead of Acting Chief Justice, the incumbent should have been appointed on permanent basis being the most senior. During pendency of the petition, permanent Chief Justice

of Pakistan was appointed and, therefore, the petitioner did not press the prayer to that extent vide C.M.A. 541-K of 1996, dated 10th March, 1996. Secondly, proper assistance by the learned counsel on this point was also not rendered. Thirdly, the cases are pending in which the same subject-matter is involved. For such reasons, we do not consider it proper to go into the question of interpretation of these two provisions.

7. Our conclusions and directions in nutshell are as under:

(i) The words "after consultation" employed inter alia in Articles 177 and 193 of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to-the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive.

(ii) That if the President/Executive appoints a candidate found to be unfit and unsuitable for judgeship by the Chief Justice of Pakistan and the Chief Justice of the High Court concerned, it will not be a proper exercise of power under the relevant Article of the Constitution.

(iii) That the permanent vacancies occurring in the offices of Chief Justice and Judges normally should be filled in immediately not later than 30 days but a vacancy occurring before the due date on account of death or for any other reasons, should be filled in within 90 days on permanent basis.

(iv) That no ad hoc Judge can be appointed in the Supreme Court while permanent vacancies exist.

(v) That in view Of the relevant provisions of the Constitution and established conventions/practice, the most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the Court concerned.

(vi) An Acting Chief Justice is not a consultee as envisaged by the relevant Articles of Constitution and, therefore, mandatory Constitutional requirement of consultation is not fulfilled

by consulting an Acting Chief Justice except in case the permanent Chief Justice concerned is unable to resume his functions within 90 days from the date of commencement of his sick leave because of his continuous sickness.

(vii) That Additional Judges appointed in the High Court against permanent vacancies or if permanent vacancies occur while they are acting as Additional Judges, acquire legitimate expectancy and they are entitled to be considered for permanent appointment upon the expiry of their period of appointment as Additional Judges and they are entitled to be appointed as such if they are recommended by' the Chief Justice of the High Court concerned and the Chief Justice of Pakistan in the absence of strong valid- reason/reasons to be recorded by the President/ Executive.

(viii) That an appointment of a sitting Chief Justice of a High Court or a Judge thereof in the Federal Shariat Court under Article 203-C of the Constitution without his consent is violative of Article 209, which guarantees the tenure of office. Since the former Article was incorporated by the Chief Martial Law Administrator and the latter Article was enacted by the Framers of the Constitution, the same shall prevail and, hence, such an appointment will be, void.

(ix) That transfer of a Judge of one High Court to another High Court can only be made in the public interest and not as a punishment.

(x)' That the requirement of 10 years' practice under Article 193(2)(a) of the Constitution relates to the experience/practice at the Bar and not simpliciter the period of enrolment.

(xi) That the simpliciter political affiliation of a candidate for judgeship of the superior Courts may not be a disqualification provided the candidate is of an unimpeachable integrity, having sound knowledge in law and is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan.

(xii) That it is not desirable to send a Supreme Court Judge as an Acting Chief Justice to a High Court in view of clear adverse observation of K this Court in the case of Abrar Hassan v. Government of Pakistan and others PLD 1976 SC 315 at 342.

(xiii)That since consultation for the appointment/confirmation of a Judge of a Superior Court by the President/Executive with consultees mentioned in the relevant Articles of the Constitution is mandatory any appointment/confirmation made without consulting any of the consultees as interpreted above would be violative of the Constitution and, therefore, would be invalid.

In view of what is stated above, we direct:

(a) I That permanent Chief Justices should be appointed in terms of the above conclusion No.(iii) in the High Courts where there is no permanent incumbent of the office of the Chief Justice.

(b) That the cases of appellants Nos.3 to 7 in Civil Appeal No.805 of 1995. (i.e. Additional Judges who were dropped) shall be processed. And considered for their permanent appointment by the permanent Chief Justice within one month from the date of assumption of office by him as such.

(c) I That appropriate action be initiated for filling in permanent vacancies of Judges in terms of above conclusion No.(iii).

(d) That ad hoc Judges working at present in the Supreme Court either be confirmed against permanent vacancies in terms of Article 177 of the Constitution within the sanctioned strength or they should be sent back P to their respective High Courts in view of above conclusion No.(iv).

(e) That the cases of the appointees of the Federal Shariat Court be processed and the same be brought in line with the above conclusion Q No.(viii); and

(f) That upon the appointment of the permanent Chief Justices in the High Courts where there is no permanent incumbent or where there are permanent incumbents already, they shall process the cases of the High Courts' Judges in terms of the above declaration No. 13 within one month from the date of this order or within one month from the date of assumption of office by a permanent incumbent whichever is later in time and to take action for regularising the appointments/confirmation of the Judges recently appointed/confirmed inter alia of respondents Nos.7 to 28 in Civil Appeal No.805/95 in the light of this short order. In like manner, the Chief Justice of Pakistan will take appropriate action for recalling permanent Judges of the Supreme

Court from the High Courts where they are performing functions as Acting Chief Justices and also shall consider desirability of continuation or not of appointment in the Supreme Court of Ad Hoc/Acting Judges.

Resultantly, the direct petition and the appeal captioned above are allowed in the terms and to the extent indicated above.

JUDGMENT

SAJJAD ALI SHAH, C.J. ---Constitutional Petition No.29 of 1995 is directly filed in this Court under Article 184(3) of the Constitution in which the petitioner challenged, inter alia, the appointment of the then Acting Chief Justice of Pakistan, appointment of the Chief Justice of the High Court of Sindh as Judge of the Federal Shariat Court and non-confirmation of the six Additional Judges of the High Court of Sindh as they were not appointed as permanent Judges. It is mentioned in this petition that the petitioner had filed Writ Petition No.869/91 in the Lahore High Court, which was admitted for regular hearing and order of constitution of a larger Bench was also passed, but thereafter hearing did not take place and the petition remained pending without final adjudication.

2. Civil Petition 11 of 1995 was filed on 27th October, 1994 seeking leave to appeal against the judgment of the Division Bench of the Lahore Court, whereby three Writ Petitions i.e. Writ Petitions Nos.875/94, 101-86/94 and 9893/94, were dismissed in limine. The petitioner in this petition has challenged, inter alia non-confirmation of six Additional Judges in the Lahore High Court and appointment of twenty Additional Judges and the Acting Chief Justice of the Lahore High Court.

3. After hearing the petitioner it was found that in both the petitions interpretation of Articles 2, 2A, 4, 8,'9, 14, 25, 175, 176, 177, 180, 181, 182, 192, 193, 195, 196, 197, 199, 203(c) and 4(b), 209 and 260 of the Constitution was required. On 4th July, 1995 notice was issued to the learned Attorney-. General as contemplated under Order XXVII-A, C.P.C. to assist the Court on the interpretation of the Articles of the Constitution. The record of Writ Petition No.869/91 was also summoned from the Lahore High Court in view of the grievance of the petitioner that the said writ petition, which was filed in the year 1991 Was pending without progress of the hearing. On 9th July, 1995 notice was issued to the Secretary, Ministry of Law, Justice and Parliamentary Affairs and the learned Advocate-General, Punjab as the appointments in question related mostly to the Lahore High Court and the cases were ordered to be heard by a Bench of five Judges. On 18th July

1995, by a common order, the Constitutional petition was admitted to regular hearing and leave to appeal was granted in the civil petition to examine in detail whether the impugned judgment S was sustainable on the ground that it was consistent with the correct interpretation of the Articles in the Constitution relating to the Judiciary. The, miscellaneous application, which was filed on behalf of the five respondents requesting their transposition as co-petitioners, was directed to be taken up for consideration at the time of final hearing. After grant of leave, Civil Petition No. 11 of 1995 was registered as Civil Appeal No.805 of 1995. M/s. S.M. Zafar and Fakhruddin G. Ebrahim, learned Senior Advocates Supreme Court, were requested to assist the Court as amicus curiae.

4. On 8th October, 1995 the application for transposition of the five respondents as co-appellants was allowed as the learned Attorney-General for Pakistan present in the Court stated that he had no objection. An application was filed on behalf of the President and Vice-President of the Lahore High Court Bar Association with prayer to be impleaded as party in the public interest as the question involved was that of interpretation of the Articles of the Constitution relating to the Judiciary. Mr. S.M. Zafar, Senior Advocate Supreme Court, who was requested to assist as amicus curiae, sent an application for adjournment on the ground that he was out of country as a member of parliamentary delegation to U.S.A. Mr. Fakhruddin G. Ebrahim, who also was requested to assist the Court as amicus curiae, present in the Court stated that there should be one continuous hearing of both the cases and suggested that all the Bar Associations be requested to assist the Court in the proceedings. In the result, notices were issued to the Presid ents of the Supreme Court Bar Association and of all the High Court Bar Associations of the country. Notices were also issued to all the learned Advocates-General of the Provinces. Mr. Sharifuddin Pirzada, Senior Advocate Supreme Court, was also requested to assist the Court as amicus curiae.

5. In Civil Appeal 805 of 1995 as many as five miscellaneous applications were filed and registered. The first application is C.M.A. 703 of 1995 in which the prayer is that the Federal Government may be restrained from filling in the vacancies of respondents 29 to 34 now transposed as co-appellants. The second application is C.M.A. 845 of 1995 in which prayer is for calling for the record specified in paragraph 6 of the application at page 131 of the paper book of that appeal wherein it has been stated that Mr. Justice Saad Saood Jan as Acting Chief Justice of Pakistan refused to make recommendations in the capacity of Acting Chief Justice. The third application is C.M.A. 762 of 1995 by the transposed co-appellants requesting for summoning of the record pertaining to their appointments as Additional Judges and subsequent non-confirmation/non--making as permanent Judges. Part (ii) of the prayer relates to the record pertaining to the appointments of other respondents as Additional Judges till the disposal of the appeal. The fifth application is C.M.A. 864 of 1995 by the President and Vice-President of the Lahore High Court Bar Association with the prayer to be impleaded as party, but has become infructuous as the notices had already been issued by this Court to all the Presidents of the Bar Associations of the High Courts of the Country.

6. The D.M.G./CS.P. Officers Association filed C.M.A. 41 of 1996 in the Constitutional Petition 29/94 with the request that their representative be heard in the proceedings which involved their interest as well. Subsequently, when notice was issued and opportunity was given to them at the end of the proceedings, n o body appeared. On the said. miscellaneous applications orders were not passed and they were kept pending for hearing at the end, of the proceedings because our intention was to concentrate on interpretation of the Articles of the Constitution relating to the Judiciary, and when the proceedings were near completion, order was passed for making available the record of the appointments of the respondents in the civil appeal and other relevant record so as to peruse it if and when such need was felt. The Federal Ministry of Law cooperated and made the record available to be produced in the Court on an hour's notice. We did not feel it necessary to peruse the record.

7. After granting leave in the civil petition and admitting to regular hearing the Constitutional petition at Lahore on 18th July, 1995, these cases were heard at Islamabad for long seventeen days, with adjournments in-between, and in Karachi for ten days. So in all hearing after grant of leave and admission ran over twenty-seven days when the arguments of the learned counsel for both the parties and the learned amicus curiae were concluded on 13th March, 1996. On 17-3-1996, one of us on the Bench, namely. Mr. Justice Mir Hazar Khan Y~hoso could not sit on the Bench due to his indisposition. Mr. Shahid Orakzai, a free lance journalist who had filed an application requesting his impleadment as party to the proceedings, was present in the Court and requested that he,may be heard. He was directed to make his submissions in writing and the hearing was adjourned to the following day. On 18th March, 1996 as well Mr. Justice Haza Khan Khoso was unable to sit on the Bench due to his illness. It was found that Mr. Shahid Orakzai had filed an application in which detailed submissions had been made and annexures and newspaper clippings attached in support of his -submissions. Hence after a short hearing, he was assured that his submissions would be considered. Since one of us namely, Mr. Justice Manzoor Hussain Sial, was due to retire and his last working day was 20th March, 1996, and the arguments had already been concluded, the same date i.e. 20th March, 1996 was fixed for announcement of the short order. Mr. Justice Mir Hazar Khan Khoso did not participate in the writing of the short order because of his indisposition although he was requested to do so and he agreed but did not come, and also did not sit on the Bench when the short order was announced. In fact he sent an application on 18th March, 1996 requesting leave for one week on the ground of his illness which prevented him from sitting on the Bench to decide the lis. Leave was granted. The copies of the order-sheet of l7th and 18th March, 1996 and the short order passed on 20th March, 1996 were sent to Mr. Justice Mir Hazar Khan Khoso, which were received by him.

8. Initially, after the notice, Raja M. Bashir learned Deputy Attorney General, appeared and raised objection that the petition directly filed in this Court was not maintainable as on the same subject-matter the petitioner had filed Writ Petition No.869 of 1991 in the Lahore High Court which was pending. On our inquiry, the petitioner explained that he had filed that writ petition in the year 1991, but somehow it was pending without any hearing taking place, and in that manner more than three years had expired. The petitioner was directed to produce copies of the order-sheet

and the memo. of the petition in the High Court so that it may be ascertained as to whether the petitioner was justified to exercise his right of choice of the forum in the Supreme Court on the ground of delay and inaction in the High Court. He was unable to produce the documents mentioned above and stated that the office of the High Court was indulging in dilatory tactics resulting in his inability to procure the certified copies. In such circumstances, order was passed on 14th June, 1995 for production of the record of the writ petition in the Lahore High Court. Perusal of the record of Writ Petition No.869 of 1991 showed that the petitioner therein had challenged Fifth, Sixth, Seventh, Eighth and Twelfth Amendments in the Constitution. In the direct petition filed in this Court, the subject-matter is more or less same, calling for examination of the Articles of the Constitution relating to the Judiciary, besides challenging certain appointments of Judges made thereunder.

9. At the stage of grant of leave and admission of the two petitions mentioned above, the learned Attorney-General contended that Civil Petition No. 11 of 1995, in which the judgment of the High Court is impugned, was not a fit matter for grant of leave for the reasons firstly that the petitioner had used in the memo of the petition abusive language in respect of the Judges and secondly that as the prayer in the writ petition in the High Court was for issuance of- a writ of quo warranto, it was dismissed because writ in the shape of quo warranto could not be issued against any Judge. Now so far the first reason is concerned, we have gone through the contents of the memo. of the petition alongwith the learned Attorney General, who has pointed out certain portions of the petition, which is written in Urdu, and stated that the language used therein was not proper, and at one place reference was made to the words which have been used in respect of a Judge. It was explained by the petitioner that the words used by him is a proverb in Urdu which means a person who is simpleton and that this portion is not abusive at all. On the other hand the learned Attorney-General stated that the phrase meant weak-willed person from whom anything could be got done. We are of the view that it would have been much better and proper if such a proverb would not have been used in respect of an honourable Judge. But a petition is to be read as a whole and it is to be seen as to what the prayer is and what are the questions involved, and a petition cannot be dismissed on such a short ground.

10. Our attention was drawn by the learned Attorney-General to paragraph, 7 of the petition in which the appointment of one Judge has been described mala fide having been made to reward him for services rendered by him in the past to Pakistan People's Party. Perusal of this paragraph shows that the petitioner has mentioned about a Judge of the Lahore High Court that he was appointed at the time when a murder case was pending against him in which he was on bail. That after appointment this Judge was stationed at the Rawalpindi Bench of the Lahore High Court where the case was pending and at that time hearing of application under section 265-K, Cr.P.C. for his premature acquittal was to take place, which was bound to be influenced by the presence of the learned Additional Judge at Rawalpindi. We are unable to find anything objectionable with the narration or description of this fact. On the contrary we find that the grievance of the petitioner is that appointments of some Judges in, the High Court were not made in strict accordance with the provisions of the Constitution and some Additional Judges appointed already have not been

made permanent, hence such action of the Government is in violation of the Constitutional requirements. In this connection, contention was raised by the petitioner that under Article 193, not only the procedure for appointments is provided, but prerequisite qualifications are also mentioned, and that Article 197 envisages appointment of Additional Judges in the High 'Court, hence both are to be read together showing mode of appointment and permanent appointment in the Constitutional scheme on the basis of "consultation" by the President with the Chief Justice of the High Court concerned, Governor and the Chief Justice of Pakistan as is mentioned in Article 193. Likewise the petition also calls for examination of other like provisions of the Constitution relating to other appointments in the Judiciary, such as, Article 196, which provides for appointment of Acting Chief Justice in a High Court and Article t80 which provides for appointment of Acting Chief Justice of Pakistan.

11. The learned Attorney-General submitted that since Civil Appeal No.397-K of 1990 titled as Abdul Mujeeb Pirzada v. Federation of the Islamic Republic of Pakistan and others and Civil Appeal No.399-K of 1990 titled as Haji Ahmed v. Federation of Pakistan and others are pending on the same subject-matter in this Court, they should also be taken up for hearing alongwith the cases in hand. We have been informed by the office that in both the appeals mentioned above, Eighth Amendment in the Constitution is called in question as having been inserted therein by the National Assembly which was not elected on party basis. It is, therefore, very clear that the issues involved in the two pending civil appeals are different from the issues involved in the two matters in hand in which we are called upon to examine the Articles of the Constitution relating to the Judiciary.

12. Yet another objection raised was that the petitioner could not invoke Article. 184(3) of the Constitution as he has not been able to show whether any one, of his fundamental rights was infringed. To this objection reply of the petitioner was that his fundamental right as enunciated under Article 18 of the Constitution, which relates to freedom of trade, business or profession and provides that subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business, is infringed. It is submitted by the petitioner that he is a practising lawyer and has a very vital interest in the Judicial set-up which can function independently only when there is proper and total compliance of the Articles relating to the Judiciary and appointments are also made in accordance with the Constitutional scheme made thereunder. According to him, a lawyer cannot survive if the Judiciary is not independent. He has further submitted that he is governed by the Legal Practitioners and Bar Councils Act, 1973 and the rules framed thereunder. He made reference to Rule 165 which provides that it is duty of advocates to endeavour to prevent political considerations from outweighing judicial fitness in the appointment and selection of Judges. They should protest earnestly and actively against the appointment or selection of person s who are unsuitable for the Bench. Petitioner also made reference to Rule 175-A which provides that non-observance or violation of the cannons of professional conduct and etiquette mentioned in this chapter by an advocate shall be deemed to be professional misconduct making him liable for disciplinary action. We find sufficient force in this contention. It appears that the remedies under

Articles 199 and 184 (3) available in a High Court and the Supreme Court respectively are concurrent in nature and question of locus standi is relevant in a High Court, but not in the Supreme Court when the jurisdiction is invoked under Article 184(3) of the Constitution. According to the petitioner, he went to the High Court and his writ petition was dismissed without deciding the questions of controversy. He filed the petition for leave to appeal against the impugned judgment and also filed the direct petition under Article 184(3) of the, Constitution praying for examination of the Articles relating to the Judiciary and in that connection has called in question some appointments in the Superior Judiciary. The learned Attorney General has submitted that since the controversy of the appointments challenged by the petitioner before this Court has already been answered by the High Court in its judgment, this Court should refrain from going into the question of interpreting the Articles relating to the Judiciary, which will be an exercise of academic nature and that if such an exercise is undertaken then there is every apprehension of breach of the Doctrine of 'Trichotomy of Powers' in which it is very likely that this Court may go beyond the ambit of interpretation of the Constitution and may re-write the Constitution. He further submitted that the decision of the Supreme Court of India reported as AIR 1991 SC 268 (Supreme Court Advocates-on-Record Association v. Union of India) should not be followed on the ground of judicial restraint.

13. We are of the view that the petitioner has rightly invoked the jurisdiction of this Court under Article 184(3) of the Constitution and leave has rightly been granted in the other petition for the reason that in both the cases common question of interpretation of the Articles relating to the Judiciary are involved, which are of public importance. We are not impressed by the contention that interpretation of the Articles in these cases would be merely an exercise of academic nature. On the contrary, it can be said that this exercise has become very essential and necessary and would help a great deal in making the matters very clear by interpreting the relevant provisions of the Constitution relating to the Judiciary. It is held by this Court in the case of Fazlul Quader Chowdhry and others v. Muhammad Abdul Haque PLD 1963 SC 486 that the interpretation of the Constitution is the prerogative as well as the duty of the superior Courts as envisaged in the Constitution and this interpretative function cannot be a mere academic exercise without relation to concrete dispute, either between a subject and subject or between a subject and the State. It is further held that cases of conflict between the supreme law of the Constitution and an enactment might come for adjudication before the Courts and in such cases, it would be plain duty of the superior Courts, as its preservers, protectors and defenders, to declare the enactment in question as invalid to the extent of its repugnancy with the Constitutional provisions. The power of judicial review therefore must exit in Courts of the country in order that they may be enabled to interpret the Constitution in all its multifarious bearings on the life of the citizens in this country. It is also held that the Constitution ought to be interpreted as an organic whole giving due effect to its various parts . and trying to harmonise them, so as to make it an effective and efficacious instrument for the governance of the country. The abovernentioned judgment is noticed in the case of the State v. Zia-ur-Rahman and others PLD 1973 SC 49 and it is held that the Supreme Court is the creature of the Constitution and does not claim any right to strike down any provision of the Constitution, but does claim right to interpret the Constitution, even if a provision in the Constitution is a provision seeking to oust the jurisdiction of the Court. This right to interpret the Constitution is not acquired de hors the Constitution but by virtue of the fact that it is a superior

Court set up by the Constitution itself. It is not necessary for this purpose to invoke any divine or super -natural right but this judicial power is inherent in the court itself- It flows from the fact that it is a Constitutional Court and it can only be taken away by abolishing the Court itself.

14. In the case of Fauji Foundation v. Shamitur Rehman PLD. 1983 SC 456 distinction between "Judicial Power" and "Jurisdiction" is made and it is held by this Court that in our Constitution the word used is "Jurisdiction" which denotes authority for the Courts to exercise the judicial power as such power is inherent in the superior Courts to-interpret, construe and apply law as a result of X system of division of powers. The "Judicial Power" is not constitutionalised in the Courts as in American Constitution, although the Courts in Pakistan traditionally exercise the jurisdiction over the matters though not exclusive, which includes exercise of judicial power.

15. In support of the proposition that this Court should avoid interpretation of the Constitution as it might end up as an academic exercise when right of the petitioner to move the Court is doubtful, reliance was placed by the learned Attorney-General on the minority view expressed in the case of Hakim Khan v. Government of Pakistan PLD 1992 SC 595. In that case question came up for consideration as to whether the power of the President under Article 45 of the Constitution to grant pardon, reprieve and respite and remit, suspend or commute any sentence passed by any Court, tribunal or other authority, was in conflict with Article 2A of the Constitution which was introduced as substantive part of the Constitution by P.O. No. 14 of 1985 providing that the Objectives Resolution would form part of the substantive provisions of the Constitution. Contention was raised whether the President could waive right of 'Qisas' under the Injunctions of Islam, which power could be exercised by 'Walis' of the deceased only. The Bench of this Court hearing the case composed of five Judges from whom one learned Judge gave dissenting view to the effect that the Court's primary duty was to adjudicate by reference to positive law in a marater to lend certainty, clarity and precision to the application of law to concrete questions of law and fact necessarily required for deciding the matters. It was further held by the learned Judge that the Court should not undertake examination of the, theoretical and academic questions, not should ordinarily look for anomalies in the Constitution with a view to suggest to the Parliament amendment or improvement in the Constitution. On the other hand, majority view of the four learned Judges is that Article 2A has been inserted in the Constitution with the intention that the Objectives Resolution should no longer be treated merely as a declaration but should enjoy the status of substantive provision and become equal in weight and status as other substantive provisions of the Constitution. In case any inconsistency was found to exist between the provisions of 1973 Constitution and those of the Objectives Resolution the same would be harmonised by the Courts in accordance with the well-established rules of interpretation of the Constitutional documents. It was further held that the Constitution was to be read as a whole and the Court was bound to have recourse to the whole instrument in order to ascertain the true intent and meaning of any particular provision. Where any apparent repugnancy appeared to exist between its different provisions, the Court was to harmonise them, if possible. The case was remanded with the observation that if the High Court had considered that Article 45 of the Constitution contravened the Injunctions of Islam, then it should have brought the transgression to the notice of the

Parliament to amend the relevant provision. It further appears from the judgment that the case had to be remanded in view of the contention that impugned judgment of the High Court was liable to interference on other grounds as well, and an observation was made that it was not necessary at all for the High Court to examine that case on the touchstone of Article 2A of the Constitution and that it had fallen into error in resting its entire judgment thereon.

16. Adverting to the' case of Supreme Court Advocates-on-Record Association v. Union of India (AIR 1994 SC 268) it would be necessary to say that initially in the case of S.P. Gupta v. President of India and others AIR 1982 SC 149 four points came up for consideration--firstly, transfer of a Judge from one High Court to another, secondly, validity of non-extension of the term of the Additional Judges, thirdly, validity of the circular of the Law Minister and fourthly, appointments in the superior Judiciary with "consultation". The Articles relating to the appointments in the Judiciary in the Indian Constitution were examined in detail with the main emphasis on the scope of the word "consultation", and it was held that the appointments in the Judiciary were executive action and, therefore, so far consultation was concerned, the opinion of the Chief Justice of India had no primacy as against the other consultees. Subsequently, in the case of Subliesh Sharma v. Union of India AIR 1991 SC 631 fixation of Judge-strength whether justifiable or not alongwith co-related provision carried up for consideration before a Bench of three Judges, who were of the view that in the appointments in the Superior Judiciary recommendations of the Chief Justice of India had preponderant role and to say that power to appoint Judges vested in Executive was over-simplification of Constitutional process and that the word "consultation" was to be understood in the Constitutional scheme. The learned Judges felt inclined to hold that the opinion of the Chief Justice of India had primacy. In such circumstances not agreeing with the majority view in Gupta's case request was made for constitution of a large Bench for consideration of the two questions referred, namely, position o the Chief Justice of India with reference to primacy and secondly, justiciability of fixation of Judge strength.

17. Finally, the points mentioned above came up for consideration in India in the case of Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268 before a Bench of nine Judges in which by majority of seven to two it was held that in the process of consultation with regard to the appointment of Judges, opinion of the Chief Justice of India had primacy. The summary of the conclusions at page 442 of the report is reproduced as under;--

"(1) The process of appointment of Judges to the Supreme Court and the High Courts is an integrated 'participatory consultative process' for selecting the best and most suitable persons available for appointment; and all the Constitution functionaries must perform this duty collectively with a view primarily to reach an agreed decision, subserving the Constitutional purpose, so that the occasion of primacy does not arise.

(2) Initiation of the proposal for appointment in the case of the Supreme Court must be by the Chief Justice of India, and in the case of a High Court by the Chief Justice of that High Court and for transfer of Judge/Chief Justice of a High Court, the proposal has to be initiated by the Chief Justice of India. This is the manner in which proposals for appointments to the Supreme Court and the High Courts as well as for the transfers of Judges/Chief Justices of the High Courts must invariably be made.

(3) In the event of conflicting opinions by the Constitutional functionaries, the opinion of the judiciary 'symbolised by the view of the Chief Justice of India', and formed in the manner indicated has primacy.

(4) No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the Chief Justice of India.

(5) In exceptional cases alone, for stated strong cogent reasons, disclosed to the Chief Justice of India, indicating that the recommendee is not suitable for appointment, that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on reiteration of the recommendation by the Chief Justice of India We appointment should be made as a healthy convention.

(6) Appointment to the office of the Chief Justice of India should be of the Senior-most Judge of the Supreme Court considered fit to hold the office.

(7) The opinion of the Chief Justice of India has not mere primacy, but is determinative in the matter of transfers of High Court Judges/Chief Justices.

(8) Consent of the transferred Judge/Chief Justice is not required for either the first or any subsequent transfer from one High Court to another.

(9) Any transfer made on the recommendation of the Chief Justice of India is not to be deemed to be punitive, and such transfer is not justiciable on any ground.

10) In making all appointments and transfers the norms indicated must be followed. However, the same do not confer any justiciable right in any one.

(11) Only limited judicial review on the grounds specified earlier is available in matters of appointment and transfers.

(12) The initial appointment of a Judge can be made to a High Court other than that for which the proposal was initiated.

(13) Fixation of Judge-strength in the High Courts is justiciable, but only to the extent and in the manner indicated.

(14) The majority opinion in S.P. Gupta v. Union of India (1982) 2 SCR 365: (AIR 1982 SC 149), in so far as it takes the contrary view relating to primacy of the role of the Chief Justice of India in matter of appointments and transfers, and the justiciability of these matters as well as in relation to Judge-strength does not commend itself to us as being the correct view. The relevant provisions of the Constitution, including the Constitutional scheme must now be construed, understood and implemented in the manner indicated herein by us. "

18. Historically speaking, the Indo-Pak Sub-continent was ruled by the British until before the partition in 1947 and the system of governance was provided in the Government of India Act, 1935. Part IX of the Act related to the Judicature. Section 200 of the Act provided for establishment and constitution of the Federal Court of India consisting of a Chief Justice of India and such number of other Judges as His Majesty deemed necessary. The number of puisne Judges was fixed at not exceeding six. It was provided that every Judge of the Federal Court shall be appointed by His Majesty by warrant under the Royal Sign Manual and shall hold the office until he attained the age of sixty-five years. Other terms and conditions were also mentioned in the following sections. Section 202 of the. Act provided for appointment of Acting Chief Justice when the office, of the Chief Justice of India became vacant and for such period the Governor-General could in his discretion appoint any other Judge of the Federal Court as Acting Chief Justice. Section 220 of the said Act envisaged constitution of the High Courts providing that every High Court shall be a Court-of-Record and shall, consist of a Chief Justice and such other Judges as His Majesty from time to time deemed it necessary to appoint. In the provisions mentioned above, it is apparent that there is no mention about , " consultation " -

19. The partition of the Sub-continent too k place in 1947 and Pakistan and India became two independent countries under the provisions of the Indian Independence Act, 1947. Under section 8(2) of the Act, both the dominions were allowed to be governed as nearly as may be in accordance with the Government of India Act, 1935 until their respective Constituent Assemblies framed the Constitutions. India was quick in making the Constitution. She framed the Constitution in the year 1949 and the bulk of it came into force on 26th January 1950 which day is referred to in the Constitution by the expression commencement of this Constitution". Article 124 of the Indian Constitution provides for the establishment and constitution of the Supreme Court and sub Article (2) thereof envisages that every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after I consultation' with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary. Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted. Likewise, Article 217 of the Indian Constitution envisages that every Judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India, the Governor concerned, and in the case of appointment of a Judge, other than Chief Justice, the Chief Justice of the High Court concerned.

20. Mr. Sharifuddin Pirzada, Senior Advocate Supreme Court as amicus curiae, tracing the history of the Judiciary in India, submitted that under the Indian High Courts Act, 1867, three chartered High Courts were established at Calcutta. Madras and Bombay providing therein appointments as Judges of Barristers of not less than five-years' standing, members of the covenanted civil service, persons who had held judicial office and the pleaders with practice of not less than ten years. Section 3 of the Indian High Courts Act, 1911 empowered the Governor-General-in-Council to appoint from time to time persons to act as Additional Judges of any High Court for such period not exceeding two years as may be required. The abovementioned laws continued to apply till the Government of India Act was promulgated in 1935 and came into force on 1-4-1937. The procedure with regard to the appointments as mentioned above continued in India till after the partition when an attempt was made by It, If Sardar Vallabhbhai Patel, the Home Minister, to control the Judiciary and in that connection memo. dated 4-11-1947 was issued providing for procedure of appointment of High Court Judges under which the Chief Minister of a State, acting in "consultation" with the Home Minister of the State concerned, was to send his recommendations to the Home Minister in the Centre. When this memo. was circulated in the High Courts of India, there was resistance and consequently the Chief Justice of Madras High Court resigned from his office. The Governor of the Province also protested and both were of the view that the above procedure would lead to political jobbery and would affect the independence of the Judiciary. A conference of the Chief Justices of India was held on. 26-3-1948 and after thorough discussion a suggestion was made that every Judge of a High Court should be appointed by the President 'by warrant under his hand and seal on the recommendations of the Chief Justice of India. This suggestion was not accepted. (Please see the article on the subject of Separation of Judiciary from Executive by Mr. Justice Ajmal Mian reported as PLD 1993 Journal 54 at 57).

20-A. Sir TaJ Bahadur Sapni headed a committee, which was set up for preparation of Constitutional proposals. This committee recommended on the subject of Judiciary, inter alia, that the Chief Justice of India shall be appointed by the Head of the State and other Judges of the Supreme Court shall be appointed by the Head of the State in "consultation" with the Chief Justice of India. The Chief Justice of a High Court shall be appointed by the Head of the State in "consultation" with the Head of the Unit and the Chief Justice of India. Other Judges of a High Court shall be appointed by the Head of the State in "consultation" with the Head of the Unit, the Chief Justice of the High Court concerned and the Chief Justice of India. Paragraph 261 of the said report, which is very relevant and pertinent, is reproduced verbatim as under:---

"Our main object in making these recommendations is to secure the absolute independence of the High Courts and to put them above party politics or influences. Without some such safeguards, it is not impossible that a Provincial Government may under political pressure affect prejudicially the strength of the High Court within its jurisdiction or the salary of its Judges. If it is urged that the High Court and the Government concerned will be more or less interested parties in the matter, the intervention of the Supreme Court and of the Head of the State would rule out all possibility of the exercise of political or party influences. The imposition of these conditions may, on a superficial view, seem to be inconsistent with the theoretical autonomy of the Provinces, but, in our opinion, the independence of the High Court and of the judiciary generally is of supreme importance for the satisfactory working of the Constitution and nothing can be more detrimental to the well-being of a Province or calculated to undermine public confidence than the possibility of executive interference with the strength and independence of the highest tribunal of the Province."

21 The Committee considered in detail the status and functions of the Head of the State as was to be envisaged in the new Governmental set-up after the independence of India. Paragraph 288 of the said report reflects the thinking keeping in view the attending circumstances on the basis of which recommendations were to be made to identify the exalted position of the Head-of the State with powers and status proposed to be given to him vesting him with power to act in exceptional cases to use his discretion without advice of the cabinet in order to avoid political or communal -graft or taking initiative in the national interest.

22. On the Draft Constitution of India, views were obtained from the Federal Court and the Chief Justices of the High Courts in March 1948 in connection with which a conference was held and detailed discussion took place on the subject ot the independence of the Judiciary and the mode of the appointments of the Judges keeping in view the tendency growing up to detract from the status and dignity of the Judiciary and to whittle down their powers, rights and authority, which were to be checked. It was found that the procedure adopted in the appointment of Judges after the 15th August, 1947 did not ensure appointments being made purely on merit without political communal and party considerations being imported into the matter. A suggestion was made that the Chief

Justice should send his recommendations to the President who after consultation" with the Governor should make the appointment with .concurrence" of the Chief Justice of India. The "concurrence" was justified on the ground that it would provide safeguards against the political and party pressures at the highest level being brought to bear in the matter. This suggestion was. not accepted and finally in the Constitution the Articles relating to the Judiciary provided for appointments to be made by the President after "consultation" with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary and in the case of appointment of a Judge, other than the Chief Justice, the Chief Justice of India shall always be consulted.

23. After promulgation of the Indian; Constitution, appointments in the Judiciary continued to be made "after consultation' with the consultees mentioned therein. But complaints were being made that through the process of .consultation" it was not possible to exclude the political influence from such appointments. In the case of Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268 with relevant portions at page 315 the appointments of the Judges have been commented upon in paragraphs 64 and 65, which are reproduced as under:---

The above fallacious principle receives a fitting reply from the 14th Report of the Law Commission 73 in which the following opinion of a High Court Judge is quoted:

'If the State Ministry (Minister in the State Government) continues to have a powerful voice in the matter, in my opinion, in ten years' time or so, when the last of the Judges appointed under the old system will have disappeared, the independence of the Judiciary will have disappeared and the High Courts will be filled with the Judges who owe their appointments to politicians.'

65. Shri M. C. Setalvad, who was most distinguished jurist and Attorney-General and known for his impeccable integrity and sturdy independence and who presided over the 14th Law Commission had painfully stated in his Report that the Commission, during its visits to all the High Court Centres, heard 'bitter and revealing criticism about the appointment of Judges' and that 'the almost universal chorus of comment is that the selections are unsatisfactory and that they have been inducted by executive influence."

24. In the judgment of Supreme Court of India mentioned above in the preceding paragraph, scope of "consultation" is defined by one of the learned Judges sharing the majority view, per Kuldip Singh, J., which is reproduced hereunder in his own words in the manner which is lucid and self-explanatory at pages 272 and 273 of the report:---

..... The President makes appointments to various (non-elective) Constitutional offices besides appointing the High Court and Supreme Court Judges. No consultation is provided for with regard to the Constitutional offices--except judicial offices. That does not and cannot mean that these appointments are made without consultation. But the specific provisions for consultation with regard to the judicial offices under the Constitution, clearly indicate that the said consultation is different in nature and meaning than the consultation as ordinarily understood. The powers and functioning of the three wings of the Government have been precisely defined and demarcated under the Constitution. Independence of Judiciary is the basic feature of the Constitution. The Judiciary is separate and the Executive has no concern with the day-to-day ftinctioning of the Judiciary. The persons to be selected for appointment to judicial offices are only those who are functioning within the judicial spheres and are known to the Judges of the superior Courts. The executive can have no knowledge about their legal acumen and suitability for appointment to the high judicial offices. In the process of consultation the expertise, to pick-up the right person for appointment, is only with the Judiciary. The 'consultation , therefore, is between a layman (the Executive) and a specialist (the Judiciary). It goes without saying that the advice of the specialist has a binding effect. If the true purpose of consulting the Judiciary is to enable the appointments to be made of persons not merely qualified to be Judges, but also those who would be the most appropriate to be appointed then the said purpose would be defeated if the appointing authority is left free to take its 'own final' decision by ignoring the advice of the Judiciary. The framers of the Constitution placed a limitation on the power of the Executive in the matter of appointment of Judges to the Supreme Court and the High Courts. The requirement of prior 'consultation' with the superior Judiciary is a logical consequence of having an 'independent Judiciary' as a basic feature of the Constitution. If the Executive is left to ignore the advice tendered by the Chief Justice of India in the process of consultation, the very purpose and object of providing consultation 'with the Judiciary is defeated. The Executive is therefore bound by the advice/recommendation of the Chief Justice of India in the process of consultation under Arts. 124(2) and 217(l) of the Constitution."

25. The same word "consultation" is used in the Constitution of the Islamic Republic of Pakistan promulgated in 1973 in the Articles relating to the appointments of the Judges in the superior Judiciary. It is of pivotal importance to give meaning of this word "consultation' and to define its scope which is indisputably a matter of public importance the relevant historical background is that Pakistan got independence on 14th August, 1947 under the provisions of the Indian Independence Act, 1947 as stated above. Quaid-e-Azam Muhammad Ali Jinnah became the first Governor-General and the President of the constituent Assembly of Pakistan.' India was fortunate to have inherited the Federal Government. Since Pakistan was a newly born country, it had to suffer several set-backs and short-comings. Pakistan did not have the ready-made Federal Court. A High Court was established in East Pakistan on the pattern of Calcutta High Court. Quaid-e-Azam was -anxious to set up the Federal Court which was established on 23rd February, 1948 by G.G.O. No.3 called the Federal Court of Pakistan Order, 1948. It was provided under Article 4 of the said Order that the Federal Court of Pakistan shall be deemed to have been established as from the appointed day in accordance with the provisions contained in that behalf

in the Government of India Act, 1935 as adapted by the Pakistan (Provisional Constitution) Order, 1947. Mr. Justice Hidayatullah of India was invited on two occasions to accept appointment as Chief Justice of the Federal Court of Pakistan but he declined. Sir Abdur rashid at that. Time was Chief Justice of the Lahore High Court and Justice H.B. Tayab Jee was Chief Justice of the Chief Court of Sindh. The former was made the Chief Justice of the Federal Court of Pakistan. The jurisdiction of the Privy Council in respect of appeals and petitions from Pakistan was abolished by the Privy Council (Abolition of Jurisdiction) Act, 1950. Pakistan succeeded in framing the Constitution in 1956 called as the Constitution of the Islamic Republic of Pakistan, 1956. Three chapters of Part IX of the Constitution from Articles 148 to 178 covered the subject of the Judiciary providing for setting up a Supreme Court at its apex- and High Courts in the Provinces. 'Article 148 envisaged setting up of the Supreme -Court of Pakistan consisting of a Chief Justice to be known as the Chief Justice of Pakistan and not more than six other Judges. Article 149 provided that the Chief Justice of Pakistan shall be appointed by the President and the other Judges of the Supreme Court -shall be appointed after "consultation" with the Chief Justice. Sub-Article (2) thereof required that a person shall not be qualified for appointment as a Judge of the Supreme Court unless he is a citizen of Pakistan and (a) has been for at-least five years a Judge of a-High Court or two or more High Courts in succession; or (b) has been for at ' least fifteen years an advocate or a pleader of a High Court or of two or more High Courts. Likewise, Article 165 envisaged establishment of a High Court for each province consisting of a Chief Justice and such number of other Judges as the President may determine. Article 166 required that every Judge of a High Court shall be appointed by the President after 'consultation" with the Chief Justice of Pakistan, the Governor of the Province and, if the appointment is not that of the Chief Justice, the Chief Justice of the High Court,-of that province. Article 167 prescribed the qualifications of High Court Judges. Article 168 provided for temporary 'appointment of the Chief Justices and the Judges of the High Courts and Article 169 covered the subject of removal of the Judges of the High Courts.

26. It is clear that in the Articles relating to the Judiciary in the Constitution, the word "consultation" is used as against the word "concurrence' suggested in the Sapru Report, but in this context it is necessary to. -refer to the speech made by late 11 Chundrigar, the then Law Minister, on the floor of the Constituent Assembly, relevant portion of which is reproduced as under--,---

.. Then the Supreme Court Judges and the High Court Judges are not removable once they are appointed, except by following the procedure: prescribed therein. This would, in my humble opinion, completely safeguard the independence of the Judiciary and that is a matter which will really secure the rights of the people. Sir, the independence of the Judiciary is a principle very dear to the people of this country, who believe that they receive justice from, the Courts of this country and that their rights are safe in the hands of the Judges. The impartiality of Judges is one aspect of the nature of the Judge, of which another is independence. A Judge who is not independent cannot be impartial. The provisions in the Bill are intended to ensure the independence of the Judges and to preserve it in future as it is preserved at present. We have at the: outset made provisions in the Constitution which make the interpretation of the Constitution by the Supreme Court final. We

cannot give greater assurances to say that justice is given in Pakistan in a real and unpolluted form .....

27. The language-used in the relevant Articles pertaining to the Judiciary in both the Constitutions of India and Pakistan is same with use of the word "consultation". In Pakistan, the Constitution of 1956 was abrogated and Martial Law was imposed on 7th October 1958 after which the Laws (Continuance in Force) Order, 1958 was promulgated providing in Article 2 that all the Courts in existence before the proclamation shall continue to function subject further to the provisions of the said Order in their powers and jurisdictions.

28. It is worth-mentioning that the Constitution of 1956, which was abrogated, contemplated the Parliamentary form of Government. The Chief Martial Law Administrator later became the President of Pakistan after taking the mandate from the people had himself made and enacted the Constitution of Islamic Republic of Pakistan in 1962 which envisaged the Presidential form of Government.

29. In the 1962 Constitution, Chapter X of Part III related to the Supreme Court of Pakistan covering Articles 49 to 65. Articles 91 to 102 covered the High Courts. For the appointments of the Judges in the Supreme Court and the High Courts including the Chief Justice, the language used was almost same as that of 1956 Constitution and the process of appointment was based upon "consultation". One thing very peculiar about the Constitution of 1962 was that it envisaged the Presidential form of Government, therefore, there was no role for the Prime Minister to advise the President. Before promulgation of 1962 Constitution, a Law Commission was set up which made suggestions on the subject of the appointment of the Judges. The procedure suggested by the Law Commission in respect-of the appointments to the Supreme Court was that the recommendations for judgeship of that Court had to be sent by the Chief Justice in "consultation" with his colleagues and that as a matter of convention the President had to accept the recommendations. In respect of the Chief Justice of Pakistan, it was suggested that the recommendation should be made by the retiring Chief Justice and if on account of unforeseen circumstances no such recommendation could be made, the President should select the Chief Justice out of the Supreme Court Judges. The Report of the Law Commission used the word .recommendation" which was not used in the relevant provisions of the 1962 Constitution in respect of appointments of Judges in the superior Judiciary.

30. While the 1962 Constitution was in force and Field Marshal Muhammad Ayub Khan was President at the Head of the Presidential form of Government, appointments of the Judges in the superior Judiciary were being made on the basis of "consultation". An instance is worth mentioning which is to the effect that Justice Syed Mahboob Murshid, the then Chief Justice of

the East Pakistan High Court, recommended the name of Mr. Tayyabuddin Talukdar for appointment as- the Judge of the High Court and for some reasons that recommendation was not supported by Mr. Justice A.R. Cornelius, the then Chief Justice of Pakistan. The President agreeing with the Chief Justice of Pakistan did not make the appointment and for that reason Justice Murshid later resigned. This shows as to how much, weight used to be given to the .consultation" in respect of the appointment of the Judges which were being made by the President in the Presidential form of Government. The Constitution of 1962 was abrogated on 25th March, 1969 and Martial Law was again imposed in the country.

31. Before the framing of the 1973 Constitution, there was Interim Constitution of 1972. The Constitution Bill was introduced in the National Assembly of Pakistan in which the chapter relating to the Judiciary shows that a proposal was made that the Chief Justice of Pakistan shall be appointed by the President and each of the other Judges shall be appointed by the President out of a panel of three names recommended by the Chief Justice. For appointments in the High Courts, the proposal was that the Chief Justice of the High Court shall be appointed by the President after "consultation" with. the Chief Justice of Pakistan and each one of the other Judges shall he appointed by the President out of a panel of three names recommended by the Chief Justice of Pakistan which shall include at least two names recommended by the Chief Justice of the High Court in "consultation" with the Governor of the Province. The chapter relating to the appointments in the Judiciary in the Draft Constitution Bill was sent to the Judges of the Supreme Court for consideration and advice. A Full Court Meeting took place on 19-1-1973 which was presided over by Chief Justice Hamood-ur-Rehman- After a detailed consideration, the Judges of the Supreme justice Court in the meeting did not support the idea of recommending a panel of three names by Chief Justice and instead suggested that the Chief Justice of Pakistan may be appointed by the President and each of the other Judges be appointed by the President on the recommendation of the Chief Justice. In the High Courts idea of a panel of names was opposed and suggestion was made that "consultation' may be retained, but "consultation" with the Governor of the Province be deleted in view of the emphasis in the Draft Constitution on the greater independence of the Judiciary. It appears that the suggestions of the Supreme Court on the Draft Constitution Bill were partly accepted inasmuch as the requirement of a panel of the Judges was dropped, "recommendation" was replaced with "consultation' and the proposal about dispensing with the consultation" of the Governor was not accepted.

32. The idea to mention all these facts about the provisions of the Draft Constitution Bill of 1973 Constitution and consideration of the Chapter relating to the Judiciary in the Draft Bill by the Judges of the Supreme Court is to spotlight as to how the efforts were made to use or not to use the word "consultation" within the compass of the independence of the Judiciary to make the appointments of the Judges as free as possible to be made with as great say as possible of the Chief Justices. In that light one has to see that even the endeavour was made to use the word "recommendation" instead of consultation to make it more weighty so that the opinion of the Chief Justices should not easily be rejected.

33. At this stage, it would be pertinent to look at the Constitution of the Islamic Republic of Pakistan, 1973 very minutely to find out as to what status does it provide for the Judiciary and how far it intended to make the judiciary independent within the scheme and the four comers of the Constitution. In the preamble to the Constitution, the Objectives Resolution is reproduced which enunciates that the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed and independence of the Judiciary fully secured, it also provides that the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out by the Holy Qur'an and Sunnah. Article 2A of the Constitution envisages that the principles and provisions set out in the Objectives Resolution are hereby made substantive part of the Constitution and shall have effect accordingly. Article 2 of the present Constitution commands that Islam shall be the State religion of Pakistan. Part IX of the Constitution contains the Islamic provisions in which Article 227 envisages that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. What is very important in this context is the fact that Article 2A was inserted in the Constitution by P.O. No.14 of 1985 and made the substantive part of the Constitution which blends the Constitution with the spirit of Islam .

34. Contention was raised before us that "consultation' of the Chief Justice of Pakistan being the Head of the Judiciary carries force of 'Ijma' and, therefore, has binding force. In support of this proposition reliance was placed on Verse 159 of Surat Al-Imran which reads as under:---

"It was by the mercy of Allah that thou was lenient with them (0 Muhammad), for it thou had been stem and fierce of heart they would have dispersed from round about thee. So pardon them and consult with them upon the conduct of affairs. And when thou art affairs. And when thou art resolved, then put thy trust in Allah. Lo' Allah loveth those who put their trust (in Him)."

35. In the book titled written by Moulana Riasat Ali Sahib Bijnouri at page 240 it is stated as under:

36. The judiciary was institutionalised and its independence was maintained under the office of the Chief Justice and Hazrat Umar saw to it that the Qazis would not be under the control of the Governors. After the office of the Chief Justice was institutionalised, he was competent to appoint the subordinate Judges (see Tareekhul Islam by Dr. Hassan Ibrahim Hassan). At page 292 it is stated by the author which is translated as under:---

37. Moulana Abu'al Ala Moudoodi in his book " KHILAFAT-O-MALOKIAT "has stated at page 282 on the subject of Qazis translation of which is as under:---

"During the era of Haroon-ur-Rashid, his influence gradually got hold on Khalifa and went to that extent that he was made the Chief Justice of the Sultinat-e-Abasia. For the first time this post was created in a Muslim State. Before that no person was appointed as Chief Justice. Then on this post Imam Abu Yousuf was appointed. Unlike modem times, he was not only the Chief Justice but also performed functions of the Minister of Law and decided cases and also had power to appoint Qazis. He also gave legal advice in the internal and external affairs of the State.

38. This system of Judicial set up was adopted by the Mughal Emperors as is mentioned in the book titled as it is mentioned at page 49 of this book that the Chief Justice after his appointment had right and power to appoint other subordinate Qazis.

39. In the famous letter written by Hazrat Ali to Malik Ashtar, Governor of Egypt containing advice and directions there is a paragraph about appointment of Qazis which is reproduced as under:---

"When appointing Qadis, select holy and pious persons for the post. They should neither be greedy nor make errors in their judgments. in no way should they deviate from truth deliberately. They should not become arrogant when flattered. But, alas, such persons are few. Supervise your officials, who should be appointed on merit and merit alone. Appoint these officials from those families who accepted Islam the earliest for those are the people who attach more importance to the next world than not this. Give them handsome pay so that they may not be beguiled into monetary temptations. Have a good system of spies to observe their activities. And should any of these officials be found guilty of bribery, misappropriation of Government funds or any similar offence, punish them immediately. They should be suspended, disgraced and dismissed.

40. It is stated in Tafseer Ibn-e-Kaseer, Volume 1, 'which is translated in Urdu as under:---

"Hazrat Ali Bin Abu Talib is stated to have asked a question from the Prophet Muhammad (p.b.u.h.) as to what was the meaning of the word- : used in the Holy Qur'an and he replied that Al-Azam means to consult and upon".

41. Allama Shabir Ahmed Usmani in his 'Tafseer' has mentioned at page 92 as under:---

42. Moulana Muhammad Hafez-ur-Rehman Sewharvi in his book 'Qasasuul Quran', Volume 4 at page 480 has stated as under:---

43. in the book 'Law in the Middle East' edited by Majid Khadduri and Herbert, J. Liebesny in the chapter on the subject of "Origin and Development of Islamic Law" at page 52 it is stated as under:--- -

"Thus the appointment to the position of Qadi al-Qudat (Chief Qadi) entails, without its being expressly mentioned, the right to appoint Na'ibs; for the Qadi al-Qudat is the head of the judicial administration with the right to appoint and dismiss Judges."

The above paragraph is taken from the book 'Ali the Superman' from the Chapter No.XXV 'Literary Achievements' at page 435.

44. In the book " Islam Main Mashwara Ki Ahmiat " by Moulana Habib-ur-Rehman Usmani and Moulana Mufti Muhammad Shafi, Sahib published by Idara-e-Islamiat, Lahore at page 47 it appears that Hazrat Ali used to state that once he asked from the Prophet Muhammad (p.b.u.h.) as to what would happen if one was confronted with a matter about which there was no direction in the Holy Qur'an and the Prophet also had not been heard about it before, the Prophet replied that he would gather the righteous people from the 'Ummat' and consult them. No one should decide on the advice of one alone".

This paragraph is taken from the book, 'Ali the Superman' from Chapter No.XXV 'Literary Achievements at page 435.

45. In the book titled " KHILAFAT-o-MALOKIAT". which is authored by Syed Abul A'la Moudoodi at page 95 on the subject of 'Supremacy of Law' it is mentioned that the Caliphs did not consider themselves to be above the law, but considered themselves to be equal with the common citizens in the eye's of law. Even if the Qazis were appointed by the Head of the State, but after such appointment Qazis became independent in giving decisions against the Head of State as they could give in respect of ordinary citizens. One instance is quoted in which Hazrat Ali saw a Christian in the 'bazar' who was selling an armour belonging to Hazrat Ali. The latter did not exercise his authority to snatch the armour but lodged a complaint with the Qazi who gave decision against the Amirul Moumineen as he could not produce satisfactory evidence. Another instance often quoted is that once Hazrat Ali appeared in the Court of a Qazi in a dispute with another person and Qazi stood up from his seat in different to Hazrat Ali which was deprecated by the latter as conduct highly improper and inconsistent with the independence of the Judiciary.

46. The purpose of quoting from the Islamic books is to show as to how much importance is given in Islam to "consultation" and how much respect and binding force is given to the opinion of the Qazi or Judge and very wide powers given to the Chief Justice including all appointments of subordinate Judges under him.

47. The word "consultation" used in the Constitutional provisions relating to the Judiciary is to be interpreted in the light of the exalted position of the Judiciary as envisaged in Islam as stated above, and also in the light of the several provisions in the Constitution which relate to the Judiciary guaranteeing its independence. An attempt has been made to trace the history of the Judiciary in the Constitutional and the legal documents which governed India before the partition.

48. Since both India and Pakistan were one country before 1947, they inherited more or less the same type of problems and difficulties in their judicial systems with which we are concerned at present. Both the countries have made provisions in their respective Constitutions under which the judicial systems are set up and governed and methodology is provided for appointment of Judges. The pivotal point in both the judicial systems in the process of appointments is the word "consultation" which is categorically defined in India in the famous case of Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268 giving primacy to the opinion of the Chief Justice of India. In the Constitution of 1973, by which Pakistan is being governed, in the chapter relating to the Judiciary and in the process of appointments, the same word "consultation" is used.

49. On the question of "consultation", the learned Attorney-General for Pakistan took up the plea that this was not the point in issue in the appeal because the High Court held that the "consultation" had taken place, hence, it was not open to question and this Court may not enter into an academic

exercise. We are of the view that 'consultation' is a pivotal issue in these cases in which the provisions in the Constitution relating to the Judiciary are being interpreted particularly from the point of view of the independence of the Judiciary. Hence this issue cannot be avoided on hyper-technical grounds. In fact, objection was raised against the maintainability of the petition and the appeal along side another objection that interpretation of the Articles in the Constitution would end in an academic exercise, to which we have adverted to in detail in paragraphs 9 to 15.

50. The learned Attorney-General further contended that the word ,consultation" is used in the relevant Articles of the Constitution with specific purpose and has been construed in the past to mean that there should be participatory and meaningful "consultation" but the final say in the appointments is with the Federal Government. It was further argued that the appointment of Judges is an executive action and that in all the countries of the world appointments are made by the executive and a Judge can always act independently after administration of Oath particularly when his salary is fixed and security of tenure is assured. The idea behind this contention was that in the process of "consultation" when final say is with the Federal Government and appointment is questioned on the ground of having been made on political considerations, then such shortcoming is rectified after the oath is administered to the Judge who can act independently without being influenced by the past and in support reliance has been placed on the case of Malik Hamid Sarfraz v. Federation of Pakistan and others PLD 1979 SC 991 in which it is held that the Supreme Court Judges are bound by their oath of office to do justice without fear or favour in spite of the fact whether the person appearing before the Court combines in himself the office of Attorney-General and the Law Minister or any other offices of the realm.

51. It will suffice to say that in the reported case objections were raised, inter alia, about the composition of the Bench hearing the matter and the fact that Mr. Shariftiddin Pirzada, the Attorney-General, had appeared in the case, and for that reason apprehension was expressed that the Bench would not be able to do justice. Exception was taken by the Court to such insinuation to the effect that the Judges of the Supreme Court would not be able to do justice in the matter as either they would feel beholden to the Attorney-General combining in himself the Office of the Law Minister for their appointment, or they would feel intimidated in his presence because of his power to initiate disciplinary proceedings against them as highly inappropriate and deprecable. The facts of the reported case were entirely different and do not apply to the point in issue in these cases to the extent of defining the import or ambit of "consultation". We are trying to find out as to whether the word "consultation" is to be interpreted and construed as contended by the learned Attorney-General to mean meaningful consultation with last word with the Federal Government or it should be interpreted more liberally to give effective say to the Chief Justices who are named as the consultees in the process of appointments as envisaged in the Constitution.

52. The learned Attorney-General further argued that under Article 193 of our Constitution 'consultation' is required with three consultees namely, the Chief Justice of Pakistan, the Governor

concerned and the Chief Justice of the High Court concerned, hence all these consultees are equal and the CJP being first among the equals is not entitled to a right to exercise veto over the opinions of the other consultees. According to him, the word "consultation" in Article 193 of the Constitution came' up for consideration in the case of Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and others PLD 1989 Kar. 404 in which it has been held that the "consultation" with the Chief Justice of Pakistan and the Chief justice of the High Court concerned by the President should be meaningful as observed in Indian Supreme Court cases.

53. It was further submitted by him that the word "consultation" is not defined in the judgment of the High Court, mentioned above, and what is stated only is that it should be meaningful, hence, in these cases this Court also should not give any further and specific definition of the word "consultation" which word is known and understood by the Constitution-makers as it has been used in other Articles of the Constitution as well. Article 72(l) provides that the President after "consultation" with the Speaker of National Assembly and the Chairman may make rules. Article 160 provides for setting up of the National Finance Commission giving powers to the President to appoint persons after "consultation" with the Governors of the Provinces, Article 177(l) provides that the Chief Justice of Pakistan shall be appointed by the President and each of the other Judges shall be appointed by the President after "consultation" with the Chief Justice. Article 193(1) provides that the President shall appoint a Judge of the High Court after, "consultation" with the Chief Justice of Pakistan, the Governor concerned and the Chief Justice of the High Court concerned (except where appointment is that of the Chief Justice). Article 200(l) provides for transfer of High Court Judges and stipulates that no such, Judge shall be transferred except with his consent and after "consultation" by the President with the Chief Justice of Pakistan and the Chief Justices of both the High Courts. Article 203-C(4) provides for appointment of Judges in the Federal Court and it is stated in the proviso that a Judge of the High Court can be appointed in the Federal Shariat Court for two years without, his consent' after 'consultation' by the President with the Chief Justice of the High Court. Article 203-F(3)(b) where it is stated …… from out of the panel of Ulema drawn by the President in "consultation" with the Chief Justice. Article 218 relates to the Election Commission and in sub-Article (2)(b) it is stated that two members each of whom shall be a Judge of the High Court, appointed by the President after "consultation" with the Chief Justice of the High Court concerned and with the Commissioner, Article 235(l) relates to proclamation in case of financial emergency and provides that the President after "consultation" with the Governors of the Provinces or, as the case may be, the Governor of the Province concerned by proclamation made by declaration to that effect. The learned Attorney-General argued that in the provisions mentioned above the President has power to consult and accept the opinion or not and opinion of such consultees is not binding on the President.

54. Mr. Yahya Bakhtiar, learned Advocate Supreme Court appearing for the Federal Government in the direct petition, painstakingly took us through the whole Constitutional history of Pakistan in the light of the Martial Laws imposed and in consequence how this Court interpreted the relevant provisions in the celebrated cases reported as the State v. Dosso PLD 1958 SC (Pak.) 533, Asma

Jilani v. Government of Punjab and another PLD 1972 SC 139 and Begum. Nusrat Bhutto v. Chief of Army Staff etc. PLD. 1977 SC 657.

55. The learned counsel contended that in the first-mentioned case it was held that the successful revolution brought about by the Martial Law gave a new order which finding was set aside in the second-named case in which it was held that imposition of Martial Law amounted to usurpation of the power and this finding was nullified in Nusrat Bhutto's case. He further stated P.C.O. of 1981 was the first stab in the back of the Judiciary which validated whatever done by the Martial Law authorities. From the oath of Judges the word "Constitution" was omitted and after revival of the Constitution, Eighth Amendment was made which changed the shape of the Constitution, inter alia, providing for setting up of the Federal Shariat Court and imposing curbs on the independence of the Judiciary.

56. On the subject of appointments, Mr. Yahya Bakhtiar stated that the three categories are envisaged in Article 193 of the Constitution firstly, advocates, secondly, members of civil service, and thirdly members of judicial service. According to him, requirement for an advocate is that he should have ten years' standing which need not be actual practice as Further, the advocate should be a man of integrity and may not know law, but may be upright in character.

57. On the subject of "consultation", Mr. Yahya Bakhtiar stated that it is not a formality and that "consultation" should be effective. Serious consideration is to be given to the opinion of all the consultees. Invariably, the opinion of the Chief Justice is accepted unless the recommendation is made for appointment of A relative or friend in which case it can be rejected. He further stated that the Federal Government should give reasons if the recommendation of the CJP is not accepted. If the opinion of the CJP is rejected he may be shown the reasons assigned by the Federal Government for such rejection. But the CJP can sit complacently with hands off the appointment for the reason that he has done his duty and has nothing to worry about and if any criticism is to be made in respect of such appointment, it would be in the Parliament to which the President and Prime Minister are answerable. Under Article 48 the advice of the Prime Minister is binding on the President and under' sub-Article (4) such advice cannot be enquired into by the Court. Mr. Yahya Bakhtiar further stated that this Court can interpret the word "consultation" but should not replace it with "consent" or "concurrence". According to him, the words "consent" and "consultation" are known to the Constitution-makers and have been used in different Articles. having their proper import which is not the same. He further stated that the Judges after appointment take oath and can become independent as they have security of salary and tenure. He quoted from 'Islamic Jurisprudence' by. C.G. Weeramantry on the subject of 'The Notion of the Supremacy of the Law' (at page 79) at relevant portion which is reproduced as under:---

"Judges were enjoined by the Qur'an to follow the law and because this was a Qur'anic duty no ruler could interfere. 'So judke between them by that which Allah has revealed' (V:49), and Whose judgeth not by that which Allah hath, revealed, such are wrongdoers'." (V:45).

58. On the subject of "consultation" noteworthy factor from the arguments of Mr. Yahya Bakhtiar is that, according to him, "consultation" is not a formality but it should be effective and serious consideration should be given to all the consultees and if the recommendation of the CJP is not accepted, Federal Government should give reasons.

59. Mr. Aitzaz Ahsan, Senior Advocate Supreme Court appearing for the Federal Government in Civil Appeal No.805 of 1995, submitted before us that there is separation of powers in the Constitution with checks and balances enmeshed therein. The Legislature is directly responsible to the people through the Legislature. The Judiciary is the third pillar of the State and is separated and saved from answerability as it is intended to be independent. The Judges perform no executive functions and their security of tenure, emoluments, and privileges are guaranteed and further they are immune from political criticism, The conduct of the Judges cannot be debated in the Parliament, With such reasons in the background in the process of appointment of Judges as envisaged in the Constitution, final say in the appointment is given to the Federal Government as it is considered as an executive action, since Executive is the final authority, no reasons are to be assigned by-, them for final decision in the process of 1, consultation" on the basis of which the appointment is made. In support of the proposition he has cited from the Book "Comparing Constitutions" by S.& finer Vernon Bogdarior and Bernard Rudden, Subheading of "Judicial Independence" (at page 88). it is stated therein that in many democracies including Britain_ France and Germany, Judges are appointed by the Executive Branch and in USA such appointments are made by the President but with the consent of the Senate. Hence in all these countries, appointments are in the hands of political charged body, In such circumstances, how can it be said that independence of the Judiciary is secured. Answer to the question is given which is to the effect that a Judge may be appointed by the Executive, he or she shall not, or not easily be removed by it. He has also cited 'Constitutional Dialogues' by Louis Fisher and at page 135) of the said book referred us to the subject of the "Appointment Process". Relevant paragraph from that page is reproduced as under:---

'Subjecting Federal Judges to the Presidential nomination and Senate confirmation creates an intensely political process. Appointments to the Supreme Court 'are highly political appointments by the nation's chief political figure to a highly political body'. From an early date, Senators wielded considerable power in choosing nominees for federal judgeship, Members of the Supreme Court (especially Chief Justice Taft) have lobbied vigorously for their candidates. Other sectors of Government ,are active. An unusually candid Judge remarked: 'A Judge is a lawyer who knew a Governor' ' Private organizations participate. The American Bar Association (ABA) organized in 1878, plays a key role. Its influence increased during the Truman administration when it

established a special committee to judge the professional qualifications of candidates. Acting on names submitted by the Attorney-General, the committee informs the Chairman of the Senate Judiciary Committee whether a 'Nominee to the Supreme Court fits the category of 'well qualified', 'not opposed', or 'not qualified'. The ABA categories for the lower Courts are 'exceptionally well qualified', 'well qualified', or not qualified'.

60. The gist of the arguments of the learned counsel is that appointments of the Judges are to be made by the Federal Government and even if the word "consultation" is used in the relevant provisions of the Constitution, weight can be given to the opinion of the consultees, but the last say in the matter is with the Federal Government and the word "consultation" cannot be given a different meaning of "consent". He further stated that the political Governments come with political-thinkings and do appoint Judges, who support the thinking of the party and such appointments are made in different countries of the world who are prominently known for successful democracy and rule of law and independence of the Judiciary in spite of the fact that the appointments of the Judges are made by the Executive Branch of the Government. He has cited "Encyclopaedia of the American Constitution" by Leonard W. Levy in which it is stated at page 66 that the discretion of the Executive is to be exercised until the appointment has been 'made. But having once made the appointment, his power over the office is terminated as by law the officer is not removable by him. The right to the office is then in the person appointed and he has absolute and unconditional power of accepting or rejecting it.

61. With regard to the judgment from the Indian jurisdiction in the case of Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268, Mr. Aitzaz Ahsan stated that in the process of appointment of the Judges advice of CH has primacy as there is convention. He further stated that as per figures mentioned in the reported judgment, out of 547 proposals, 540 were accepted and only seven were rejected by the President. Hence, if in the normal course and in the majority cases, the opinion of the CH had been accepted and in very few cases rejected, then on that account they should not have any grouse. He further submitted that reliance should not have been placed on the convention, which was not enforceable in law. In nutshell, with regard to the import of the word "consultation", the learned counsel submitted that appointing process is an Executive action which does not give Judges role of appointing themselves and in the Constitutional scheme term "consultation" cannot be read as "consent". In the final analysis, the learned counsel stated that opinion of CJP should be given due weight and normally it should not be ignored but final responsibility or authority in respect of appointment lies with the President on the advice of the Prime Minister. It was further stated by the learned counsel that the "consultation" has to be meaningful and substantive and there should be interaction but "consultation" has no status of "consensus" and is not binding on the Federal Government.

62. Mr. Fakhruddin G. Ebrahim., learned Senior Advocate Supreme Court appearing as amicus curiae, stated before the Court that the independence of the Judiciary is to be found within the four

comers of the Constitution and there is no absolute independence. It is the duty and function of the Judiciary to interpret the Constitution and the Constitution is what the Judges say. It is a very heavy responsibility on the shoulders of the Judiciary and it is. expected that the Judiciary would act, during the process of interpretation, with great restraint, courage and compassion and not re-write the Constitution. The people must have faith in the Judiciary and burden of the independence of the Judiciary is to be shared by the Parliament, Executive, Press and the Members of the Bar. The learned counsel traced the history of the Constitution of 1973 and covered all the amendments made therein right up to the Twelfth Amendment and also dilated upon the various Articles of the Constitution relating to the Judiciary. He highlighted the Martial Laws imposed in the country and in their wake how attempts were made to erode the authority and independence of the Judiciary. He dilated upon the subject of the independence of the Judiciary and the relevant case-law. He also commented upon the case-law on the subject from the Indian jurisdiction and finally submitted before us that the "consultation" contemplated in the Articles of the Constitution ;elating to the appointment of the Judges is intended to be effective., meaningful, consultative, purposive, leaving no room for complaint, arbitrariness or unfair play. He concluded his argument on the question of consultation by saying firstly, that the proposal for appointment must emanate from the Chief Justice of the High Court; secondly, the Government has final say in the matter in not appointing the person recommended by the Chief Justice of the High Court and the Chief Justice of Pakistan; and thirdly, the Government should -not appoint a person not recommended by the Chief Justice of the High Court and the ' Chief Justice of Pakistan, and such appointment if made, would be illegal and unconstitutional and open to challenge in the absence of cogent reason to be assigned by the Government for making such deviation. He suggested that the Chief Justice of the High Court in such circumstances should not assign judicial work to a Judge so appointed.

.63. Mr. S.M. Zafar, learned Senior Advocate Supreme Court, as amicus curiae, assisted this Court and submitted that the federal structure as envisaged in the Constitution. of 1973 is based on the trichotomy of powers in which the federating units (provinces) have joined a federation which discourage concentration of power and instead provide for distribution and fragmentation of powers between the three pillars of the State, namely, Legislature, Executive and Judiciary. The powers of each are distinct and have nexus with each other, but are to be exercised harmoniously. Sometimes grey areas emerge and will continue to emerge and it is the duty of the Judiciary to undertake the exercise to restate the parameters and dimensions of the permissible. interaction. The Constitution is not supposed to validate the past, but provides for the present and future. Keeping in view such concomitant circumstances, the Judiciary is called upon time and against to interpret the provisions of the Constitution. In such background concepts are formed to the effect, which can be worded as under:---

Firstly, independence of the Judiciary versus power of executive to pack the Courts.

Secondly, judicial review versus judicial restraint.

Thirdly, rule of law versus discretion.

Fourthly, purposive interpretation of the Constitution versus literal interpretation.

For the present the most important and pivotal question for consideration is the concept of "consultation" provided in the Constitution for the appointment of the Judges as mentioned in the Articles 177 and 193 thereof. More thought provoking question is whether the "consultation" envisaged in the Constitution in respect of appointment of the Judges is institutionalised, participatory and binding or mere a formality.

64. According to Mr. S.M. War, in order to define, the scope of "consultation" under Article 193 of the Constitution, it is enough if the exercise is confined to the framework of the 1973 Constitution. Perusal of the language in Article 193 clearly shows that the "consultation" is supposed to be participatory and meaningful. It is two-way traffic and the hump is crossed. The nature and object of "consultation" must be related to the circumstances which call for it. The "consultation" contemplated in Article 193 is an object-oriented consultation which provides for checks and balances on the discretionary exercise of powers by the President to see that a wrong person is not appointed. According to the learned counsel, the principle in the scheme is that let a good man to stay out, but a bad one should not enter the temple of justice. In - the process of consultation, three consultees are involved, who are:----

(a) Chief Justice of Pakistan.

(b) Governor concerned, and

(c) Chief Justice of the High Court (except where the appointment is that of the Chief Justice).

If the Chief Justice of Pakistan says "A must be appointed, the President is not bound to appoint him. The consultees must give a choice to the President to select from amongst several candidates. All the consultees give positive opinion for a candidate and if he is post-qualified, the President

may or can choose him. If the Chief Justice of Pakistan says no, and the other consultees say yes, the candidate is disqualified and the President cannot appoint him. The Chief Justice of Pakistan's negative opinion will have supremacy. If a candidate is negatived by the Governor only, the matter should be referred to two consultees and if answer is in affirmative, he stands qualified. Out of post-qualified candidates, President may choose any as free choice is there.

65. Mr. S.M. Zafar submitted that Article 193 requires re-interpretation. The Chief Justice of Pakistan and the Chief Justice of a 'High Court are not consultees in personal capacities, but as Heads of the Judiciary, and the Judiciary is an institution, hence it is institutional "consultation" which is different from personal "consultation". The Court should devise i methodology to give representative character by forming a Committee to help in the recommendation. The selection method must be institutionalised. In America, lawyers and Bar Associations are brought in the process of consultation, which should be done by way of an arrangement or facility on the same lines as doctrine of indoor arrangement. It was suggested by the learned counsel that in that context the Supreme Court Rules can be amended to achieve the object mentioned above. It was suggested that any name not having emanated from the Chief Justice of the High Court and interjected by the Federal Government during consultative process need not be considered at all. The independence of the Judiciary may be read in Article 193 and inspired by such spirit. Judges should be appointed on merit as to their integrity and knowledge. Mr. S.M. Zafar also stated that he does not share the view that a Judge becomes independent after administration of oath.

66. Mr. Muhammad Akram. Sheikh, President, Supreme Court Bar Association, submitted that the independence of the Judiciary is of utmost importance for the consumers of justicemore than any other person or agency or organ of the State. On the question of "consultation" he agreed with the line of reasoning adopted by Mr. Yahya Bakhtiar which, according to him is fair and positive improvement to the effect as said by Mr. Yahya Bakhtiar, "not binding, but should not be disregarded or ignored". He further stated that if the opinion of the Chief Justice of Pakistan is disregarded, then there is no remedy. In India, the opinion of the Chief Justice of India, has support of two other senior Judges of the Supreme Court as is envisaged in the Constitution, hence the opinion of the Chief Justice of India becomes institutionalised opinion. In the Constitution of our country, such provision of support of other Judges in the Supreme Court to the opinion of the Chief Justice of Pakistan does not exist, hence the opinion of the Chief Justice of Pakistan has no primacy as the appointment is ultimately an executive action. He insisted that appointment should be transparent and free from political influence and did not agree with the joint theory of the three counsel appearing on behalf of the Federal Government, namely, the learned Attorney-General for Pakistan and M/s. Yahya Bakhtiar and Ch. Aitzaz Ahsan who took the plea that a Judge after he is administered oath, becomes independent by way of transformation. Mr. Sheikh further submitted that there is an established convention supporting the independence of the Judiciary that the names of the Judges always emanated from the Chief Justice of the High Court and for appointment of the Chief Justice of a High Court, always the most senior Judge was considered and appointed in the normal course with the exception of two or three departures. Mr. Justice Tufail Ali Abdur Rehman was appointed directly as the Chief Justice of the High Court of Sindh, Mr. Justice

Manzoor Qadir was appointed directly as the Chief Justice of the Lahore High Court and Mr. Justice Aslain Riaz Hussain was appointed as the Chief Justice of the Lahore High Court out of turn. He dilated upon the Constitutional conventions, which according to him, should be followed and did not say much on the question of "consultation" and supported the interpretation put on it by Mr. Yahya Bakhtiar. He also emphatically argued that consultation with an Acting Chief Justice is not the same thing as consultation with a permanent Chief Justice.

67. Mr. Shahid Orakazi, a free lance journalist, appeared in the Court and filed an application requesting to be impleaded as patty and to be heard on the questions of public importance relating to the interpretation of the Judiciary related Articles. He offered his assistance on the interpretation of the Articles in the Constitution on the point that the President is bound to accept and act upon the advice of CJP and in that connection sought to give interpretation of Articles 1-82, 183 and 200 and has dilated upon the meaning of the words "consultation", "approval" "advice", "opinion" and "convention". He has mentioned about floor-crossing by the members of the Parliament and on that account has drawn his own conclusion with legal status of the Assemblies with which we are not concerned at present. He has filed documents in support of his assertions which are appended with his application.

68. Mr. Sharifuddin Pirzada, the learned Advocate Supreme Court assisting as amicus curiae on the request of the Court, stated on the 'subject of "consultation" that the CJP has primacy and his opinion is binding on the President who is the appointing authority. He further stated that expression, consultation" in the relevant Articles of the Constitution relating to the Judiciary must be read in its context and its colour and contents are derived from its context. The consultation between the President and the Constitutional functionaries is not a mere formality but a mandatory requirement and has to be full, effective and meaningful.

69. 'Now we take up the interpretation of the Judiciary-related Articles as mentioned - in the Constitution. The first question which shall come up for consideration will be the meaning of the word "consultation" which is very pivotal in nature because the whole controversy with regard to the independence of the Judiciary and the appointments of the Judges have close nexus with it or B in other words deep-rooted in it. In order to find out the true import or meaning of this word "consultation" the whole history of the judicial set-ups in India and Pakistan has been traced going back to the Government of India Act, 1935 and even the period earlier than that as mentioned in the preceding paragraphs of this judgment. It is manifest that in earlier legal instruments before the partition, the word "consultation" is not used because there was no need to mention it as the appointments were directly made by the British Rulers who enjoyed the supreme control and the appointees were at the receiving end. The need was felt to use the word "consultation" in the scheme of appointments in the superior Judiciary in the Constitution when India and Pakistan became independent countries to enjoy the benefit and fruits of democratic rule for which agitation was made by, the people who rendered sacrifices of lives and property and millions of them were

uprooted and migrated for achievement of freedom. It was made known to the people that they were fighting for the freedom and in consequence of freedom what would they gain would be democracy and their own Government and perception of such democracy was Government of the people, for the people and by the people. To set up such democratic Governments, Constitutions were made in India and Pakistan in, order to produce system of governance with trichotomy of powers among the three pillars, namely, the Legislature, Executive and Judiciary. The word "consultation" has been used for the first time in the Constitution of India and the Constitution of Pakistan in connection with appointments of Judges in the Superior Judiciary. The history of India and Pakistan, as mentioned in detail in the preceding part of this judgment, very clearly shows that always effort was made to seek that the Judiciary functioned independently and should not be controlled by the Executive. There is no cavil with the proposition that the Legislature has to legislate; the Executive has to execute laws and the Judiciary has to interpret the Constitution and laws. The C success of the system of governance can be guaranteed and achieved only when C these pillars of the State ~ exercise their powers and authority within their limits without transgressing, into the field of the others by acting in the spirit of harmony, cooperation and coordination. So far the powers of the Judiciary are concerned, -we are exactly going to do that and we are going to interpret the relevant provisions of the Constitution within the limits prescribed so that the provisions are harmonized and the Constitution becomes workable.

70. We have to make reference to India time and again for the reason that before the partition it was one country, hence the problems which we are facing today in the present era, are more or less common. The same problem had arisen in India with regard to the scope of the word "consultation" and resistance was made by the Judiciary to widen its scope. Persistently, efforts were made in India by the Executive to have final say in the appointment of the Judges by restricting the scope of the "consultation" to a mere formality, but finally this question cam up for consideration in the case of S.P. Gupta v. President of India and others 1982 SC 149 and Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268. In the latter case they have definitely laid down in very specific terms the scope of the word "consultation" vis-a-vis Powers of the President and CH in respect of appointments in the Superior Judiciary. In nutshell, the main conclusion is that in the process of consultation" the opinion of the Chief Justice of India has primacy.

71. Likewise, in Pakistan, we are still confronted with this problem and are in constant search to find out as to what is the scope of "consultation" in' respect of the appointments of the Judges as contemplated in the Constitution. Unfortunately, in this country, on three occasions in the past Martial Laws were imposed and we were compelled due to such circumstances to promulgate three Constitutions for the reason that every time we decided on a particular system of governance provided in the Constitution, apples cart was upturned and Martial Law was imposed and in consequence the Constitution was abrogated. Needless to say that every time Martial Law was imposed, jurisdiction of the Courts was curtailed and its independence eroded. After termination of Martial Law we again had to make struggle for making another Constitution and it met the same fate with imposition of Martial law. Lastly, for the third time, we came out with the Constitution

of 1973 which envisages Parliamentary form of Government and the most important aspects of this Constitution is that it has been made and enacted with "consensus" of all the political parties, who were represented in the National Assembly and in this Constitution all the Provinces have ' agreed on the question of autonomy. This Constitution also became from victim of Martial Law but the redeeming feature of this Constitution is that it was not destroyed in totality by the martial Law but was held in abeyance and was revived seemingly for the reason that in this Constitution there was element of "consensus". I emphasise on the word "consensus". It was "consensus" of all the political parties and "consensus" of the Provinces also on the question of autonomy which remained as in-built safeguards, and played an important role in deterring the CMLA from abrogating this Constitution altogether. The magic wand of consensus" saved this Constitution from abrogation and total annihilation and ensured its revival in whatever form and shape it is today.

72. When the 1956 Constitution was in the making, in the chapter relating to appointments in the Superior Judiciary, suggestion made in Sapru's Report to use the word "concurrence" was not accepted and instead the word "consultation" was used as it was used in the Constitution of India, but the text and tenor of the speech of late I.I. Chundrigar, the then Law Minister, on the floor of the Constituent Assembly, shows that this word "consultation" in respect of appointments of the Judges was to be read in conjunction with the preservation and enhancement of the independence 6f the Judiciary. In the 1962 Constitution, which contemplated President Form of Government, a report was obtained from the Law Commission, which is called as Justice Shahabuddin Report. In this Report suggestion was made that the Chief Justice of Pakistan would send "recommendation" after consultation with his colleagues in respect of appointments in the Supreme Court which were supposed to be accepted by the President and such "recommendation" should be obtained from the retiring Chief Justice, failing which the President should select the Chief Justice out of the Supreme Court Judges. The word "recommendation" in the report was not accepted and in the, Constitution instead the word "consultation" incorporated. In the Draft Constitution of 1973 -again attempt was made to use the word "recommendation" and it was proposed that the President shall appoint Judge of the Supreme Court from a panel of three names recommended by the Chief Justice. Similar proposal was made for appointment in the High Courts as well.

73. The Draft relating to the Judiciary was considered by the Judges of the Supreme Court as the Government invited comments from them. The Judges of the Supreme Court opposed the idea of panel of three Judges and 'consultation' with Governor but suggested "recommendation" to be made by the Chief Justice. Some suggestions made by the Judges of the Supreme Court were accepted and in the result "panel of three Judges" was dropped and "recommendation" was not accepted and replaced by "consultation". Even in the Draft Constitution of 1973 on the subject of Judiciary, the emphasis was to make it as far independent as possible and keeping that spirit of independence in view the Judges of the Supreme Court in their comments on the Draft Bill wrote back, relevant part from which is reproduced as under-,

"In view of the emphasis of the Constitution on the greater independence of the Judiciary, it is suggested that the requirement as to "consultation" with the Governor of the Province concerned be deleted from clause (2) of this Article."

74. Now it is to be seen as to what happened on the floor of the National Assembly when the Constitution Bill was processed and passed particularly when the Chapter relating to the Judiciary was being processed. Our anxiety is to and out how the most important word "consultation" was discussed in detail and what meaning or scope was intended by the Legislators to be assigned to this word "consultation". From the debates on the Constitution Bill it appears that Articles relating to the Judiciary were taken up for consideration on 27th March, 1973 and Article 177 in which word "consultation" is used in respect of appointment of Judges of the Supreme Court and Article 193 in which word "consultation" is used in respect of appointment of Judges of the High Court were both deferred and were taken up for consideration again on 7th April, 1973. 1 am surprised to see that on Article 177 no debate took place at all. Two Amendments Nos. 1457 and 1462 were proposed to be made by Malik Muhammad Akhtar and Ch. Jehangir Ali, who were both members of the ruling party and from these amendments Malik Muhammad Akhtar declined to move his- amendment, but Ch. Jehangir Ali did move, which was accepted. This amendment was for deletion of "panel of three names recommended" to be substituted with "after consultation". The Motion was allowed and the amendments were proposed to be moved seemingly by members of the opposition, which were not moved by them for the reason stated that they were not present. Similarly, on Article 193 there were two amendments proposed to be made by members of the ruling party from which one in the name of Malik Muhammad Akhtar was not moved and the other in the name of Malik Muhammad Jaffer was moved, which was allowed and in the result clauses (1) and (2) of Article 193 were substituted and renumbered. It is pertinent to point out that in respect of Article 193, 14 amendments were proposed to be made by members of the opposition, which were not moved for reason stated that they were not present. It appears from the proceedings that opposition members en bloc were absent possibly for the reason of walk out as a measure of protest on account of some dispute or differences with the ruling party. The end result is that discussion in detail did not take place. Nothing was mentioned about the merits and demerits of the word "consultation" and how and for what purpose it was used and what meaning was assigned to it by the Constitution-makers whose wisdom of intention is not to be questioned. I do not propose to make any further comment on this aspect of the matter except that we are left high and dry and cannot get any assistance on this pivotal point as to what was the intention and scope in the minds of the Constitution-makers when this word .,consultation" was used in Articles 177 and 193 of the Constitution. In such circumstances, judiciary should shirk its duty of interpreting the Constitution to supply reasonably correct meaning to the word "consultation" in order to harmonise the provisions with other provisions and make the Constitution workable to resurrect the independence of the Judiciary as guaranteed in the Constitution and Islam.

75. As stated in the short order, if we look at the Constitution of 1973, we find that the title is "The Constitution of Islamic Republic of Pakistan" and Article 2 thereof commands that Islam is to be its State religion. Preamble to the Constitution says that the principles of democracy, freedom,

equality, tolerance and social justice as enunciated by Islam shall be fully observed and independence of judiciary fully secured Objectives Resolution as reproduced in the Preamble has been made as substantive part of the Constitution by Article 2A inserted by P.O. No. 14 of 1985, Part IX of the Constitution contains Islamic provisions in which Article 227 envisages that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. The institution of Judiciary in Islam enjoys the highest respect and in this judgment in the preceding paragraphs from 34 to 46 instances from the Islamic history have been given showing how and on what criteria Judges/Qazis were appointed and how they were respected and even the rulers. of the time used to appear in the Court and obey judgments without any demur, which were binding on them. The Islamic history also shows that rulers were God-fearing, humble, polite, benign, unsarcastic and righteous, and did not claim any air of mundane superiority and submitted to the Jurisdiction of the Courts as a matter of duty. In one case when Amirul Momineen appeared in the Court of Qazi who got. up from his seat as a gesture of deference, Amirul Mornineen disapproved it on the ground that it was inconsistent with the dignity and independence of the Court. In Islam Chief Justice was given power to appoint other Judges in the subordinate Courts.

76. We have to interpret the word "consultation" in' the light of the Objectives Resolution, which is integral part of the Constitution providing in unequivocal terms that the independence of the Judiciary shall be fully secured i Article 175 of the Constitution envisages that Judiciary shall be separated progressively from the executive within 14 years from the commencing day. The time stipulated in the Constitution has expired after which this matter was taken in hand and came up before the High Court of Sindh which allowed the writ petition and then petition for leave to appeal was filed in this Court titled Government of Sindh v. Sharaf Faridi reported as PLD 1.994 SC 105 in which this Court on the subject of independence of Judiciary held as under:--

"That every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter for any reason; and that the Judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature."

77. In the judgment of this 9;ourt further guidelines have been provided for financial independence of the Judiciary. The cut off date given by this Court was 23rd March, 1994. Later the review petitions were filed by the-Federal and the, Provincial Governments for extension of time, which was extended up to 23rd March, 1996 to enable the respective Governments to take steps and finalise the separation of the Judiciary from the Executive as required by the Constitution and the judgment. It may be mentioned that under the judgment of this Court, Judicial Magistrates have been separated from the Executive Magistrates and the former are to act under the supervision and control of the 'High Courts and would have no connection whatsoever with the Executive. The

Magistrates, who would remain with the Executive, would be called Executive Magistrates, who' would not be given any judicial powers except under some minor Acts. With this accomplishment, the Judiciary stands separated from the Executive and even in financial matters the Judiciary has been given independent control over the funds allocated by the Government, which can be reappropriated from one head to another by the Chief Justices.

78. Now there is no dispute about the fact that appointment of a Judge as contemplated in the Constitution is an executive action for the reason that the final order is passed in the name of the President and in consequence notification is to be issued as is contemplated under the law and Rules of Business. So far Article 177 is concerned, it envisages that the Chief Justice of Pakistan shall be appointed by the President and each of the other Judges shall be appointed by the President after "consultation" with the Chief Justice. A point arose whether this Article should be read alongwith Article 180, which provides for appointment of Acting Chief Justice of Pakistan providing therein that the most senior of other Judges shall be appointed by the President to act as the Chief Justice of Pakistan. We have declined to go into this question for the reasons, firstly, that in C.P. No. 2P of 1995 appointment of permanent Chief Justice as such was not challenged, but at the time when the petition was filed, there was Acting Chief Justice of Pakistan and his appointment was challenged on the ground that since there was a permanent vacancy, he should have been appointed as a permanent Chief Justice instead of as Acting Chief Justice. During the pendency of the petition a development took place and permanent Chief Justice of Pakistan was appointed and for that reason the petitioner did not press the prayer to that extent. Secondly, proper assistance by the learned counsel on this point was not rendered. Thirdly, cases are pending in which the same subject-matter is involved.

79. On the subject of "consultation', since no debate took place on point in the proceedings when Constitution Bill was being processed, we have tried to construe it in the light of other factors, such as, Islamic provisions in our Constitution and separation of judiciary which has already taken place. Appointment of a Judge and the mode and manner in which he is appointed has close nexus with the independence of the Judiciary and cannot be separated from each other as advocated by several counsel before us during the hearing. We do not buy the idea that as soon as a Judge takes oath, there is a sudden transformation and he forgets his past connections and turns a new leaf of life. The process of appointment of a Judge must be made transparent so that the litigant public and people at large should have faith in the independence of Judiciary. Normally, people come to the Court to have their disputes adjudicated by the Judges and they come with expectation that Judges are impartial and justice will be imparted strictly according to law without any fear or favour or extraneous considerations. This kind of faith and trust will vanish if appointments are not made in a transparent manner strictly on the basis of merits. Article 5 of the Constitution envisages that loyalty to the State is the basic duty of every citizen and obedience, to the Constitution and law is inviolable obligation of every citizen. Judges are also expected to be loyal to the Constitution.

80. Coming back to Article 193 of the Constitution the plain reading of the provision is that the appointment of a Judge of the High Court is to be made by the President "after consultation" with:--

(a) Chief Justice of Pakistan;

(b) Governor concerned; and

(c) Chief Justice of the High Court (except where the appointment is that of the Chief Justice).

Here the intention is that the appointment is to be made by the President "after consultation" with three consultees, who are mentioned there. In the Constitution proper scheme is provided for the appointment, hence it can be called Constitutional appointment. For such appointment Constitution requires "consultation", which cannot be treated lightly as a mere formality. To say that the President has sole power of appointment and opinion of the consultees can be ignored particularly of the Chief Justice of the High Court and the Chief Justice of Pakistan, who are supposed to be experts in the particular' field of law in which the appointment is to be made, can not be reasonable construction of the word "consultation ". It is understandable that the Governor can find out from intelligence sources about the candidate who is to be appointed as a Judge and his report or opinion is to be confined to that aspect of the matter. The President can refuse to appoint a candidate in whose favour Chief Justice of the High Court and Chief Justice of Pakistan have given their positive opinions, but Governor has given negative opinion for reasons of improper antecedents. The Chief Justice of. the High Court and the Chief Justice of Pakistan normally know advocates who appear in their -Courts regularly and would nominate or recommend names of such advocates who are capable and fit to be Judges of the High Court and their opinion, which is expert opinion in a way, cannot and should not be ignored, but, must be given due weight. "Consultation" in the scheme as envisaged in the Constitution is supposed to be effective, meaningful, purposive, consensus-ori6nted, leaving no room for complaint of arbitrariness ' or unfair play. The opinion of the Chief Justice of Pakistan and Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded in writing by the President/Executive.

81. If the Chief Justice of the High Court and the Chief Justice of Pakistan are of the opinion that a particular candidate is not fit and capable to be appointed as Judge of the High Court, then acting against the expert opinion would not be proper exercise of power to appoint him as a Judge on the ground that the President/Executive has final say in the matter. It is not correct interpretation to say that because word "consultation" is used, which is different from ',consent', opinion of Chief Justice can be ignored. If the opinion of the Chief Justice is ignored, then the President/Executive should give reasons which could be juxtaposed with reasons of the Chief Justices to find out as to which reasons are in public interest.

82. We are interpreting the word ‘consultation’ to widen and enlarge its normal scope for the reasons, firstly, that the Constitution-makers have not debated this word ‘consultation’ and fixed its parameters. Secondly, we would like to assign meaning to ‘consultation’, which is consistent and commensurate with the exalted position of Judiciary as is envisaged in Islam. Thirdly, we would like to give positive interpretation to ‘consultation’ which promotes independence of Judiciary. Executive may have the last word and may issue notification of appointment, but cannot give loose interpretation to the word I consultation’ to ignore or brush aside expert opinion of Chief Justice of the High Court and the Chief Justice of Pakistan. Fourthly, the President is administered oath by the Chief Justice of Pakistan as required under Article 42 of the. Constitution and the Chief Justice of Pakistan administers oath to other Judges of the Supreme Court and Chief Justice of Province administers oath to Judges of his High Court as contemplated under Articles 178 and 194 respectively, which shows that both the Chief Justices are tends of their institutions and their opinion in their own field of expertise should not be treated lightly particularly when they are Constitutional consultees and the appointments are also being made of the Judges within the Constitutional scheme.

83. The scheme of the appointments of the Judges as envisaged in the Constitution clearly indicates that they are of permanent nature and if there are vacancies of temporary nature, then temporary appointments can also be made of Acting and Ad hoc Judges in the Supreme Court, Acting Chief Justices in the Supreme Court and High Courts. If in the normal course, a permanent vacancy occurs, the same should be filled in within thirty days. But if such vacancy occurs before due date of retirement of a Judge on account of death or for any other reason, then the same should be filled in within ninety days on permanent basis. Under Article 181 of the Constitution if there is a vacancy in the Supreme Court or a Judge of the Supreme Court is absent or unable to perform the functions of his office due to any cause. Acting Judge can be appointed from a High Court, who is qualified for appointment in the Supreme Court. The ‘explanation to this Article further provides that a Judge of a High Court includes a person who has retired as a Judge of High Court, which means a retired Judge of a High Court can be appointed as Acting Judge before he attains the age of sixty-five which is the age of superannuation in the Supreme Court. Under Article 182 for want of quorum of the Judges in the Supreme Court or for any other reason if it becomes necessary to increase temporarily the number of Judges, the Chief Justice may in writing have appointment of Ad hoc Judges with the approval of the President. The following persons are eligible for such appointment. A retired Judge of the Supreme Court can be appointed if three years have not elapsed from the date of his retirement. A serving Judge of a High Court can also be appointed provided he is qualified to be the Judge of the Supreme Court. It appears from the perusal of Article 182 that even these appointments cater for temporary situation in which the number of the Judges is to be increased after the sanctioned strength of the Court is filled with the permanent appointments.

84. It was argued by several learned counsel in the Court before us that wherever the Constitutional provisions are silent and do not provide for a particular- situation in which clarification is required,

then the conventions and past practice are to be followed to fill in the gaps. One such convention/practice is that the most senior Judge o f the High Court has a legitimate expectancy to be considered for appointment as Chief Justice and if he is not appointed then valid reasons are to be assigned. The question arises as to how far this convention or practice would be allowed to be applied when in the Constitution contrary provisions exist. In other words, legally or morally speaking if reconcilement is possible, then it should be done, otherwise if such appointment is not to be made then reasons should be assigned.

85. We are of the view that Acting Chief Justices are appointed for a short time and for that reason, in the relevant Articles, automatic arrangement is provided particularly in the appointment of the Acting Chief Justice of Pakistan,. but no criterion is laid down in the provision of appointment of Acting Chief Justice of the High Court. In all fairness, the period for such acting appointment should not be more than, ninety days during which Acting Chief Justice may perform functions of routine nature excluding "recommendations" in respect of appointment of Judges. We say so for three reasons. Firstly, Article 180, which provides for appointment of the Acting Chief Justice of Pakistan and Article 196, which provides for appointment of the Acting Chief Justice of a High Court, do not specifically provide that they can participate in them consultative scheme of the appointment of the Judges as envisaged in the Constitution. Secondly, Acting Chief Justices are supposed to be functioning for a short time and, therefore, it would not be fair to allow them to interfere with policy-making matters and appointments in the Judiciary which should be left for permanent incumbents. Thirdly, Article 209 of the Constitution contemplates the composition of the Supreme Judicial Council which is supposed to be comprised of (a) the Chief Justice of Pakistan, (b) two next senior most Judges of the Supreme Court, and (c) two most senior Chief Justices of the High Courts. In the explanation appointment of Acting Chief Justices is expressly excluded which clearly shows that the intention of the Constitution-makers is that the Acting Chief Justices are allowed to function for a short time and more importance is to be attached to permanent Chief Justices and in the absence of permanent Chief Justices of the High Courts or, even for that matter, of the Supreme Court, the composition of the Supreme Judicial Council becomes imperfect and the Body as such becomes unfunctional.

86. There may be exceptional cases in which no control could be exercised over the situation. For instance, after imposition of Martial Law on 5th July, 1977, the Chief Justices of the High Courts were made Governors of the Provinces and in their places in the High Courts Acting Chief Justices were appointed. It so happened that the Chief Justices remained away from the High L Courts as the Governors for about fifteen months and Acting Chief Justices had to perform their duties. There was Martial Law in the country and the Constitution was held in abeyance and the system under that arrangement had to continue. In such circumstances, the Judges had to be appointed and for such appointments in the High Courts, "recommendations" were made by the Acting Chief Justices. The Martial Law remained operative for a long time and the Supreme Court gave it cover of validity on the ground of the doctrine of necessity and empowered the CMLA to amend the Constitution. Article 270-A was inserted in the Constitution by P.O. No. 14 of 1985, which was substituted by Act XVIII of 1985 passed by the Parliament to enable withdrawal of Martial Law

wide Proclamation dated 30th December, 1985. We are not holding that all the appointments made in the past or for that matter in the distant past on the "recommendations" of the Acting Chief Justices are void ab initio because they were validated later in the process and have become past and closed transaction.

87. We have for the first time examined in detail the word "consultation" used ' in the Articles of the Constitution in respect of the appointment of the Judges and have laid down the parameters for reasons which are stated above. We, have also held that appointment of an Acting Chief Justice is a stop-gap arrangement and is supposed to last for a short time and he is not authorised to deal with the policy matters including making "recommendations" in the appointment of the Judges. In the direct petition and the appeal before us the appointments of the Judges were called in question and several Judges appointed by the present Government were made respondents. The meaning and scope of consultation" now laid down by us and the powers of Acting Chief Justices in connection therewith would affect only such appointments which have been made by the present Government and this exercise would not go beyond that. We are leaving it open that the appointments made with the "recommendations" of the Acting Chief Justices in the High Courts can be reviewed and steps can be taken by the permanent Chief Justices to regularise them if this can be done on the basis of merit within thirty days from the date when the permanent Chief Justices are appointed in the High Courts and take oath. Regularisation shall take place as contemplated under Article 193 of the Constitution.

88. Under Article 197 of the Constitution there is a provision for appointment of Additional Judges and it appears that there is no requirement that they can be appointed only after the sanctioned strength of the Judges of the High Court is filled in with the permanent appointees. From this it appears that even against the vacancies within the sanctioned strength a person can be appointed as Additional Judge of the High Court for a period to be specified and then can be made permanent as communicated under Article 193. We are of the view that such Judges have legitimate expectancy to be entitled and considered for appointment upon expiry of their period of appointment as Additional Judges if and when they are so recommended for the purpose by the Chief Justice of the High Court and the Chief Justice of Pakistan. If such appointments are refused to be made then there should be strong' reasons recorded in writing. Extension to be made or not is not the sole discretion of the Federal Government unless such request is made by the Chief Justice of the High Court and the CJP.

89. Article 200 of the Constitution contemplates transfer of Judges from one High Court to another by the President after "consultation" with the Chief Justice of Pakistan and the Chief Justices of both the High Courts. No such consultation is necessary if the transfer is for two years. It appears that this transfer can be allowed if it is in the public interest and is not by way of punishment.

90. Under Article 193 the qualifications are specified for appointment as Judge of a High Court. One requirement is that an advocate is eligible to be elevated only when he has been advocate of the High Court for ten years. The question arose as to whether it is necessary that such advocate must have put in ten years of active practice in the High Court or mere enrolment is sufficient. We are of the view that for this requirement ten years' active practice in the High Court is necessary "and mere enrolment as advocate of -the High Court is not enough if the advocate concerned has not practised in the High I Court but has been doing some other job or business and was not in active practice.

91. The political affiliation of a candidate for judgeship may not be a disqualification provided he is a person of integrity and has active practice as advocate of the High Court and has sound knowledge of law and has also been recommended by the Chief Justice of the High Court and the Chief Justice of Pakistan.

92. Although the Constitution does allow under Article 196,' which provides for appointment of Acting Chief Justice of a High Court, a Judge of the Supreme Court to act as the Chief Justice of the High Court for a short time but we are of the view that this practice should be avoided and it would be much better if it is not done for reasons firstly that if a Judge of the Supreme Court goes as Acting Chief Justice then his judgments become appeal able in the Supreme Court of which he is a permanent Judge. Secondly, such appointment causes embarrassment to the Judge of the Supreme Court because the Judges of the High Court normally do not welcome such an appointment.

93. Article 209 of the Constitution relates to the composition of the Supreme Judicial Council and its functions. It enables the Council to take action or remove a Judge from the office on the ground of his incapability to perform the duties of his office for the reason of physical or mental incapability or misconduct. Sub-Article (7) of this Article provides that a Judge of the Supreme Court or of a High Court shall not be removed from the office except as provided by this Article. Sub-Article (8) of this Article provides that the Council shall issue the Code of Conduct to be observed by the Judges of the Supreme Court and the High Courts. It is clear from the above provisions that the security of tenure is provided under Article 209 and also the forum for removal from the office as Judge of the High, Court or of the Supreme Court. This provision is, incorporated in the Constitution by the Constitution-makers. Subsequently, Chapter III-A setting up the Federal Shariat Court was inserted in the Constitution vide P.O. No. I of 1980 providing in Article 203-C(4) that a Judge or Chief Justice of the High Court can be appointed to the Federal Shariat Court without his consent for a period not exceeding two years. After such appointment it is open to the President to modify the terms of the appointment of such Judge in the Federal Shariat Court or assign him any other office or require him to perform such other functions as the President may deem fit. If a Judge or Chief Justice of a High Court refuses to accept the appointment to the Federal Shariat Court, then he stands retired. No doubt, Chapter III-A inserted in the Constitution

for the purpose of setting up of the Federal Shariat Court envisages that the provisions of this chapter shall have effect notwithstanding anything contained in the Constitution, still the appointment of a Judge or a Chief Justice of a High Court to the Federal Shariat Court in such manner without his consent accompanying by such harsh conditions in the final analysis is tantamount to removal or forcible retirement which can and should be done only under Article 209 of the Constitution under which the Supreme Judicial Council is constituted and is authorised to take action of such punitive nature. If the Government finds a particular Judge or the Chief Justice of a High Court to be uncooperative and if there is sufficient material to support the charge of misconduct, then in all fairness action should be taken against him and proceedings should be initiated before the Supreme Judicial Council in the manner prescribed under Article 209. We are not striking down provisions (4), (4-B) and (5) of Article 203-C as void being inconsistent with Article 209 but we do say that, keeping in view the rules of interpretation, if there is choice between two forums or provisions, then the provision beneficial to the affected Judge should have been adopted or resorted to, and in such circumstances, the resultant action is to be considered as void in absence of cogent reasons without going into the constitutionality of Article 203-C of the Constitution. The Constitution is to be read as a whole and if -there is any inconsistency, the same can be removed or rectified by the Parliament. In support of the proposition, reliance can be placed on the cases of Fazlul Quader Chowdhry v. Muhammad Abdul Haque (PLD 1963 SC 486) and Hakim Khan v. Government of Pakistan (PLD 1992 SC 595).

94. Before we part with this judgment, we would like to express our thanks to the learned counsel who appeared in these cases before us for the parties and also as amicus curiae and rendered a very useful and commendable assistance. We also appreciate the unrelenting assistance rendered by the members of the staff who worked tirelessly to provide the requisite support in the lengthy hearing of this case.

(Sd.)

SAJJAD ALI SHAH, C J

I had recorded my separate reasons copy of which sent to H.C.J. HJ (5) and then HJ(6). The latter two agreed with me and signed the same with me on 24-3-1996. I adhere to my above reasons.

I also agree with the above reasoning.

(Sd.)

AJMAL MIAN, J

(Sd.)

FAZAL ILAHI KHAN, J

I also agree with above reasoning and have also recorded additional reasons.

(Sd.)

MANZOOR HUSSAIN SIAL, J

AJMAL MIAN, - J./-Since the above two cases involve a number of Constitutional questions of public importance, I intend to record my own reasons.

2. The brief facts leading to the filing of aforesaid Civil Appeal and Constitution petition are that appellant No. 1, who is a practising lawyer of this Court and claims to be the head of appellant No.2 Trust, namely, Al-Jihad Trust, filed Writ Petition No.875 of 1994 in Lahore High Court at Rawalpindi Bench, Rawalpindi, on 1-9-1994, in which he arrayed 34 respondents which inter alia included 20 Additional Judges of Lahore High Court i.e. respondents Nos.7 to 26, who were appointed by a notification dated 5-8-1994 for a period of one year. He also impleaded 8 Additional Judges of Lahore High Court as respondents Nos. 27 to 34, who were appointed during the Government of Mr. Nawaz Sharif as Additional Judges for a period of two years and were not confirmed by the present Government. In addition to that, he also arrayed the Federation, the President, the Prime Minister, Mr. Justice (Retd.) Mahboob Ahmed, Mr. Justice Muhammad Ilyas, the then Acting Chief Justice of Lahore High Court ‘ and the Governor of the Province of Punjab, as respondents Nos. 1 to 6 respectively. The grievance of the appellants was that, the above appointments of 20 Additional Judges were not made in accordance with the Constitution of the Islamic Republic of Pakistan, 1973, hereinafter referred to as the Constitution, inasmuch as 3 women Additional Judges were not qualified to have been appointed and that the remaining male Additional Judges were appointed not on merits but because of their affiliation with the political party in power, which included even a person against whom then a murder case was pending in the Court of Additional Sessions Judge, Rawalpindi. It was also alleged that the latter were not in fact practising advocates and, therefore did not have the required qualification of 10 years’ practice. It was further alleged that the transfer of Mr. Justice (Retd.) Mahboob Ahmed, the then Chief Justice of Lahore High Court, to, the Federal Shariat Court was founded on mala fide for the reason that he did not recommend the names of certain persons for judgeship in whom the Government was interested. It was also averred that the appointment of Mr. Justice Muhammad Ilyas as the Acting Chief Justice of Lahore High Court was also actuated with malice-The appointments of Mr.

Justice Muhammad Munir Khan and Mr. Justice Mir Hazar Khan Khoso as Acting Judges of this Court were also referred to.

3. As regards the appointment of Mr. Justice Saad Saood Jan as the Acting Chief Justice of Pakistan, the, following averments were made:--

4. On the basis of inter alia the above allegations, the appellants had prayed for the following reliefs:--

5. The above petition was resisted by the official respondents. A Division Bench of Lahore High Court disposed of aforesaid writ petition alongwith Writ Petitions Nos.9893 and 10186 of 1994, in which also the appointment s of certain Judges were assailed, through a common judgment dated 4-9-1994. Incidentally, it may be mentioned that one of the Judges of the above Division Bench was Mr. Justice Ch. Mushtaq Ahmed Khan, who was arrayed in the above petition as respondent No.32. The learned Judges of the Division Bench concluded that the appointments of respondents Judges were made it accordance with the Constitutional provisions. It was held that there was no evidence that some of the above appointed Additional Judges had not been practising as advocates in Courts. It was further held that a close reading of Article 193(l) of the Constitution made it clear that an advocate of High Court having 10 years' standing was eligible for elevation to the High Court and it, was not necessary that he or she had been practising as an advocate of the High Court for the aforesaid period. Reliance was placed on certain judgments of Indian jurisdiction. It was also concluded that the petitioners failed to make out a case of mala fide. It was also held that there was no bar to the appointment of women Judges in the Judiciary. It was further concluded that Acting Chief Justice was competent to make recommendation as under Article 260 of the Constitution, Chief Justice includes the Judge for the time being as the Acting Chief Justice of the Court. It was also concluded that ordinarily the above appointments should have been made permanent on the very first day keeping in view the nature of existing permanent vacancies and also keeping in view the pending load of judicial work and, therefore, it might not be necessary for the Prime Minister or the President to wait for the expiry of one year term for which period the above 20 Judges were appointe4 to confirm the said Judges. In result, the above writ petition and the other two connected writ petitions were dismissed. Thereupon, present appellants Nos. 1 and 2 filed a petition for leave to appeal on or about 27-10-1994. It may be observed that prior to the, filing of the aforesaid writ petition in the High Court, the aforementioned two appellants had filed above Constitution Petition No.29 of 1994 on or about 23-4-1994 under Article 184(3) of the Constitution in this Court directly. In the above petition, they arrayed the Federation through the Secretary, Ministry of Justice, the President, the Prime Minister and the Law Secretary, by name as respondents Nos. 1 to 4 respectively. In the memo. of petition it has been averred that every citizen has the right to have an independeiA"i~4iciary for dispensing justice according to Qur'an and Sunnah, which is a' Fundamental Right in view -of Articles 2A, 175, 176, 177, 192 and 199

of the Constitution read with Article 10 of the Charter of United Nations to which Pakistan was a party. In paras. 3 to 7 and 13, the following averments have been made:--

6. In the above Constitution Petition it has also been averred that the petitioners had filed Writ Petition No.869 of 1991 in Lahore High Court for assailing the above amendments in the Constitution referred to in above quoted para. 13 of the Constitution, which writ petition was admitted for regular hearing on 21-8-1991 and it was recommended by the admitting Judge to the learned Chief Justice to form a larger Bench but the above aforesaid writ petition remained pending. In the above Constitution petition, the following reliefs have been prayed for:

7. The Federation has filed a written statement, in which the averments contained in the petition are denied. It has been averred that the appointment of Judges of the High Court is made by the President under Article 197 of the Constitution pursuant to the advice given by the Prime Minister under Article 48 of the Constitution. It has been further averred that the role of the other functionaries mentioned in Article 193 etc. is rather limited as compared to that of the President, the final appointing authority. It is also averred that it is incorrect to assume that without a recommendation, a person could not be appointed as a Judge if otherwise requirement of Article 193 of the Constitution etc. was satisfied.

It is denied that there was any mala fide in appointment of Mr. Justice Mahboob Ahmed as a Judge of the Federal Shariat Court. It has been averred that his appointment was made according to the Constitution, which cannot be made a basis of judicial review. It has been asserted that although as a general rule there is no dispute that on permanent vacancies, Judges should be appointed on a permanent basis. However, it would not be correct as an assumption or as a fact that any appointment on acting or ad hoc basis has been made to keep the Judges of the Courts under pressure as alleged. It has also been asserted. that there is no bar for making appointments for a fixed period against permanent vacancies nor by it the independence of judicial system is impaired. It has also been averred that the provisions of Article 193(2)(a) of the Constitution do not lay down any other condition except that the person has been an advocate of the High Court for 10 years. It has further been denied that any appointment of Judges has been made mala fidely. It has been asserted that the past association of an individual with a political party does not disqualify him if he is otherwise qualified to be i Judge of the High Court. It has been further asserted that in England, out of 139 appointments made between 1832 and 1906, 80 of those appointed were Members of Parliament at the time of their appointment. It has also been asserted that the retiring age of the Judge of the High Court is not part of qualification of a Supreme Court Judge. The allegations made against the President and the Prime Minister are also denied. It has been averred that the petition is liable to be dismissed with costs.

8. It appears that the above petition for leave and the Constitution petition had come up for hearing inter alia on 16th, 17th and 18th July, 1995, before a full Bench of this Court comprising the learned Chief Justice and four companion Judges after notice to the learned Attorney-General. After hearing appellant No.1/petitioner No.1, the learned Attorney-General and Mr.Raja Muhammad Akram, learned Senior Advocate Supreme Court for respondents Nos. 29, 30, 31, 33 and 34, this Court granted leave in the above petition as under----

"Leave is granted to examine in detail whether the judgment of the High Court impugned herein is sustainable on the ground that it is consistent with correct interpretation of the Articles in the Constitution relating to judiciary

(2) Miscellaneous application for transposition of some respondents as co- petitioners will be heard at the time of final hearing.

(3) M/s. S.M. Zafar. and Fakhruddin G. Ebrahim, learned Senior Advocates of the Supreme Court, are requested to assist the Court amucus curiae.

Whereas the above Constitution petition was admitted for the following reasons:

"This petition is directly filed under Article 184(3) of the Constitution which inter alia challenges amendments of certain provisions of the Constitution and it also seeks interpretation of provisions of the Constitution relating to the judiciary.

(2) We admit this petition to the extent of examining the scope and import of provisions relating to the judiciary.

(3) Both the matters to come up for hearing together on date to be fixed by the office.

9. It may be observed that the aforesaid respondents Nos. 29, 30, 31, 33 and 34 in-the above appeal arising out of the petition for leave were transposed on their application as -appellants Nos. 3 to 7 by an order, dated 8-10-1995.

10. Very elaborate and lengthy arguments have been advised by the learned counsel who appeared in the above appeal and the Constitution petition. Mr. Habib-ul-Wahab Al-Khairi, hereinafter referred as to Mr. Khairi, has appeared for himself and for the Trust - appellant No.2; whereas Mr. Raja Muhammad Akram, learned , Senior Advocate Supreme Court represented the above newly added appellants Nos. 3 to 7. The Federation was represented in the above appeal by Mr. Aitzaz Ahsan and in the Constitution petition by Mr.Yahya Bakhtiar, learned Senior Advocate Supreme Court Mr.Qazi Muhammad Jamil, learned Attorney-General, has appeared in response to the Court notice, whereas Messrs S. Shaiifuddin Pirzada, S.M. Zafar, Fakhruddin G. Ebrahim, Sh. Muhammad Akram, President of the Supreme Court Bar Association and Dr. Riazul Hassan Gilani for Lahore High Court Bar Association have appeared as amicus curiae.

11. Before dealing with the contentions of the learned counsel for the parties, I may observe that one of the contentions raised by the learned Attorney General was that Mr. Khan had no locus stand to file the above writ petition in the High Court (from which the aforesaid Civil Appeal has arisen) and the above direct Constitution petition. He has also submitted that the pleadings in the writ petition, from which the above appeal has arisen, do not involve the Constitutional points which have been urged and any discussion on the above question will be merely academic which this Court refrains from doing so. Reliance was placed by him on the case of The Province of East Pakistan and another v. M.D. Mehdi Ali Khan etc. (PLD 1959 SC (Pak.) 387), the case of Miss Asma Jilani v. The Government of the Punjab and another (PLD 1972 SC 139), the case of Hakim Khan and 3 others v. Government of Pakistan through Secretary Interior and others (PLD 1992 SC 595) and the case of Muhammad Siddique, Advocate v. Farhat Ali Khan and another (PLD 1994 Lahore 183).

He also submitted that the ‘ above Constitution petition is not entertainable inter alia for the reason that Mr. Khan’s Writ Petition No. 869 of 1991, in which he sought more or less the same relief as in the present petition, is still pending in the High Court for adjudication.

12. As regards the locus stand of Mr. Khan, I may observe that Mr. Khan has referred to Rule 165 of Pakistan Legal Practitioners. and Bar Councils Rules, 1970, hereinafter referred to as the Rules, framed under section 55 of the Bar Councils Act, 1973, which-provides as follows:---

" 165. , It is the duty of Advocates to endeavour to prevent political considerations from outweighing judicial fitness in the appointment and selection of Judges. They should protest earnestly and actively against the appointment or selection of persons who are unsuitable for the Bench and thus should strive to have elevated thereto only those willing to forego other employments, whether of a business political or other character which may embarrass their free and fair consideration of the questions before them for decision. The aspiration on of Advocates for judicial positions should be governed by an impractical estimate of their ability to add honour to the office and not by a desire for the distinction the position may bring to themselves. "

He has also referred to the following cases:---

(i) Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another PLD 1989 Karachi 404);

(ii) Government of Sindh through Chief Secretary, Karachi v. Sharaf Faridi and others (PLD 19?4 SC 105);

(iii) S.P. Gupta case (AIR 1982 SC 149); and

(iv) Supreme Court Advocates -Record Association v. Union of India (AIR 1994 SC 268).

13. Rule 165 of the Rules relied upon by Mi. Khan enjoins the Advocates to endeavour to prevent political considerations from outweighing judicial fitness in the appointment and selection of Judges. It also enjoins the advocates that they should protest earnestly and actively against appointment and selection of persons who are unsuitable for the Bench and thus should strive to have elevated thereto only those willing to forego other employments whether of business, political or other character which may embarrass their free and fair consideration of the questions before them for decision.

14. The above reports relied upon also support Mr. Khan's contention. I am inclined to hold that not only a practising advocate but even a member of the public is entitled to see that the three limbs of the State, namely, the Legislature, the Executive and the Judiciary act not in violation of any provision of the Constitution, which affect the public at large. The Fundamental Rights, which are enshrined in our Constitution and which also have the backing of our religion Islam, will

become meaningless. if there is no independent Judiciary available in the country. The independence of Judiciary is inextricably linked and connected with the Constitutional process of appointment of Judges of the superior Judiciary. If the appointments of Judges are not made in the manner provided in the Constitution or in terms thereof, the same will be detrimental to the independence of Judiciary which will lead to lack of confidence among the people. In my view, the appellants/petitioners have locus stand as the Constitutional questions raised in the appeal as well as in the aforesaid Constitution petition are of great public importance as to the working of the Judiciary as an independent organ of the State. Even otherwise, the question of locus stand in the present case has lost significance for the reason that we have admitted the above Constitution petition under Article 184(3) of the Constitution for examining the scope and import of the provisions relating to Judiciary. It may be observed that under Article 184(3) of the Constitution, this Court is entitled to take cognizance of any matter which involves a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II of the Constitution even suo motu without having any formal petition.

15. Adverting to the second submission of Mr. Qazi Muhammad Jamil, learned Attorney-General that the pleadings of the writ petition, from which the above appeal has arisen, do not involve the points urged by Mr. Khairi and the learned counsel for the above appellants. To reinforce the above submission he has referred to the case of M/s. Karim Commercial Co. Ltd. v. United Oriental Steamship Co. and 2 others (PLD 1970 Kar. 427) and the case of Mian Muhammad Tahir Ra7a Khan v. Mian Liaquat Hayat Khan and others (PLD 1966 Lahore 15 1), in which inter alia it has been held that a party cannot raise a plea which does not find place in the pleadings.

16. The above cases have no application to the case in hand, firstly, that they relate to suits which are subject to strict application of the provisions of the Code of Civil Procedure, which inter alia contain rules relating to pleadings; whereas C.P.C. as such is not applicable to Constitutional proceedings. Secondly, I may again observe that since we have admitted the above Constitution petition under Article 184(3) of the Constitution for examining the scope and import of the provisions of the Constitution relating to Judiciary, the above plea even otherwise has lost its significance. I am also unable to subscribe to the learned Attorney-General's contention that the present case involves academic discussion on the Constitutional questions.

16. As regards the above third submission, namely, that Mr. Khan's Writ Petition No. 869 of 1991 involving same questions and same relief is still pending in Lahore High Court for adjudication, the present direct Constitution petition under Article 184(3) of the Constitution is not sustainable. In this behalf, it may be pertinent to point out that in above Writ Petition No. 869 of 1991, Mr. Khan had prayed for the following relief:---

Whereas in the present Constitution Petition, the relief covered under para. (6 A"). is the same which is the subject-matter of aforesaid Writ Petition No.869 of 1991, whereas the reliefs prayed for in paras in the present petition are not claimed in the aforesaid writ petition pending in the High Court. The above relief claimed in the aforesaid writ petition pending in Lahore High Court and the -relief covered by para. of the present Constitution petition relate to the amendments of the Constitution. This Court, while admitting the above Constitution petition, has made it clear that the above' Constitution petition is admitted to the extent of examining the scope and import of provisions relating to the Judiciary and not for examining the vires of the above amendments in the Constitution. In this view of the matter, the scope of the present Constitution petition as admitted is different from the scope of the above pending writ petition before the High Court. I may observe that the aforesaid Constitution petition was admitted and leave in the petition for leave to appeal was granted as the following events affecting the working of Judiciary, which are resulting into lack of confidence in the Judiciary, had taken place:---

(i) Bypassing conventions/practices in the appointment of the Judges of the superior Courts.

(ii) Induction of ad hoc Judges without filling in the vacancies of the sanctioned strength by permanent appointments.

(iii) The practice of late General Ziaul Haq during Martial Law days to appoint Acting Chief Justices for indefinite long periods inter alia in the High Courts mala fidely was condemned by politicians particularly by the political parties, who were members of the M.R.D. Unfortunately, at present there are three Acting Chief Justices working at Lahore, Karachi and Peshawar. Out of the above three,, two are the permanent Judges of this Court. The Chief Justice of the Federal Shariat Court was also appointed about two years back not for any definite period but until further order.

(iv) The two permanent Chief Justices of the High Courts, namely, of Sindh High Court and of Lahore High Court were appointed as ordinary Judges of the Federal Shariat Court.

(v) A controversy has also arisen on the question, as to what extent the recommendations of the Chief Justice of the High Courts and of learned Chief Justice of Pakistan are binding on the Executive, as it is a matter of' common knowledge that some of the Judges, who have recently been appointed in the High Courts, have been appointed despite of opposition inter alia by the learned Chief Justice of Pakistan.

(vi) Six Additional Judges of the High Court of Sindh who had completed their two years' tenure, contrary to the well-established practice of their being appointed as permanent Judges in the absence of anything against them, were dropped without disclosing any reason.

(vii) The above act of dropping Additional Judges upon the completion of their two years' period was repeated in Lahore High Court inasmuch as inter alia newly impleaded appellants Nos. 3 to 7 were not appointed as permanent Judges without disclosing any reason upon their completion of two years' period.

The above events, which have reference in the above appeal and the constitution petition, have given rise to the following Constitutional questions of, public importance relating to the working of Judiciary, which-were also argued by the above learned counsel:-

Whether under Article 193 of the Constitution, the President has unfettered discretion to appoint any person as a Chief Justice of a High Court or is he bound to follow- the guide line if provided in the Constitution or Constitutional convention, if any?

(ii) What is the import of the words "after consultation" used inter alia in Articles 177 and 193 of the Constitution? To what extent the President is bound to accept the opinion, of the Chief Justice of 'Pakistan and/or Chief Justice of a High Court while making appointment\ of Judges in the Supreme Court and High Courts under the above Articles 177 and 193 of the Constitution?

(iii) Whether the President is required to appoint the permanent Chief Justice of Pakistan or a Judge of the Supreme Court or a permanent Chief Justice of a High Court in case of vacancy under Articles 177, and 193 within certain period or can he allow acting appointment of the Chief Justice of Pakistan or a Judge of the Supreme Court or a Chief Justice of High Court under Articles 180, 181 and 196 respectively indefinitely for years?

(iv) Whether an Acting Chief Justice is not a consultee as envisaged under Articles 177 and 193 of the Constitution?

(v) Under what circumstances ad hoc Judges can be appointed in the Supreme Court and for what period, and whether such appointment can be made without first filling in the total sanctioned strength under Article 177 of the Constitution?

(vi) Whether Additional Judges can be appointed under Article 197 of the Constitution against permanent vacancies for an indefinite period?

(vii) Whether the Additional Judges appointed against permanent vacancies under Article 197 of the Constitution have any right to be considered for permanent appointment?

(viii)Whether there is any conflict between Articles 203-C(4)(4-B) and 209 of the Constitution. If yes, can it be resolved? If not, what is its effect?

(ix) Whether the requirement provided for in Article 193(2)(a) of the Constitution for a candidate of a High Court judgeship, namely, he has for a period of or for periods aggregating not less than ten years been p advocate of a High Court refers to the actual practice/experience at the Bar or does it refer to did period of enrolment as an Advocate of the High Court?

(x) Whether the political affiliation of a candidate for Judgeship is a disqualification?

(xi) Whether the President has absolute discretion to transfer a High Court Judge to another High Court without his consent up to the period of two years or is he to be guided by some principle?

18. At this juncture, I may point out the right to have access to justice through an independent Judiciary is a Fundamental Right as held in the case of Sharaf Faridi (supra) by Saleem Akhtar, J. In this regard, reference may be made to the following observation:-

“The right of ‘access to justice to all’ is a well recognised inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of ‘due process of law’. The right of access to justice includes the right to be treated according to law, the right to have a fair and

proper trial and a right to have an impartial Court or Tribunal. This conclusion finds support from the observation of Willoughby in Constitution of United States, Second Edition, Vol. II at page 1709 where the term "due process of law" has been summarized. " The above view has been affirmed by this Court in the case of Government of Balochistan through Additional Chief Secretary v. Azizullah Memon and 16 others (PLD 1993 SC 341).

19. I am inclined to agree with the above view as I have already observed herein above that without having an independent Judiciary, the Fundamental Rights enshrined in our Constitution will be meaningless and will have efficacy or beneficial value to the public at large.

20. Before touching upon the submissions made by the learned counsel who. have appeared in the above cases, it may be pertinent to point out peculiar features of our country, namely:

(i) Our country is not a secular State but it is An Islamic Republic of Pakistan as per clause (1) of Article 2 of the Constitution, whereas as per Article 2 thereof, Islam is the State religion. It may further be observed that under Article 2A of the Constitution, the principles and provisions set out in the Objectives Resolution reproduced in the Annexure to the Constitution have been made substantive part of the Constitution, which inter alia enjoins that 'wherein the independence of judiciary shall be fully secured'. It may also be mentioned that under clause (1) of Article 227, it has been provided that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. We will, therefore, have to examine the question of appointment of Judges with reference to Islamic concept.

(ii) We have adopted Federal type of Government under the Constitution. The Constitution envisages trichotomy of power inter se between the three organs of the State, namely, the Legislature, the Executive and the Judiciary. Each organ of the State is required to function/operate within the bounds specified in the Constitution.

(iii) That there exist some Constitutional conventions which are to be invoked while construing Constitutional provisions relating to the appointments/transfers of Judges of the superior Courts.

21. (a) As regards the Islamic concept of justice, it may be pertinent to point out that -in the early days of civilization, the legislative, the executive and the judicial powers were vested in one person in a State, namely, in a Chieftain or a monarch or a ruler. The concept that there are three organs

of the State which share the power of a State, namely, the Executive, the Legislature and the Judiciary, is somewhat a modem concept. Upon the advent of Islam, the Judicial functions were separated from the executive functions at its, very initial stage by the Holy Prophet (P.B.U.H.) by appointing a Qadi for each Province. The separation of judiciary from executive was implemented more effectively during the Caliphate of Second Caliph Hazrat Umar as he appointed Qadis free of control of the Governors. The reason being that the foundation of Islam is on justice. The concept of justice in Islam is different from the concept of the remedial justice of the Greeks, the natural justice of the Romans or the formal justice of the Anglo-Saxons. Justice in Islam seeks to attain a higher standard of what may be called "absolute justice" or "absolute fairness". We find repeated references to the importance of justice and of its being administered impartially i . n Holy Qur'an and some of them are as follows: ---

In one of the Verses of the Holy Qur'an Allah commands that---

Sura Aal-e-Imran;

"Oh ye who believe: Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be against rich or poor, for Allah can best protect both. Follow not the lusts 6f your hearts; lest ye swerve, and if ye distort justice or decline to do justice, verily Allah is well acquainted with all that ye do. " (4-135).

And in other Surahs Allah commands as under--

Surah Maida, 5/9:

Oh ye who believe stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just, that is next to Piety: and fear Allah, for Allah is well-acquainted with all that ye do. "

Surah Nisaa, 4/58;

‘Allah both command you to render back your Trusts to those to whom they are due, and when ye judge between him and man, that ye judge with justice: Verily how excellent is the teaching which He gives you: For Allah is He Who hearth and seeth the all things.

In Surah Maida (5/45) it is ordained;

“If you judge, judge in equity between them, for Allah loves those who judge in equity. “

“Judges are not to be led away by personal likes or dislikes, love or hate. (0 5/8).

I may state that the modem philosophers and theoreticians have borrowed ideas from the above commandments of Al-mighty God. Thus KANT in his “IMMOVEL, Philosophy of Law” has remarked that:---

“Justice would cease to be justice, if it were bartered away for any consideration whatsoever.” ,

“If justice and righteousness perish, human life would no longer five any value in the world.

(b) ‘Reference may also be made to Islamic Jurisprudence-, an International Perspective by C.G. Weeramantry, relied upon by Mr.Yahya Bakhtiar, wherein the author under the captions “The Notion of Judicial Independence” and “The Notion of Judicial Impartiality” has made the following comments:---

“The Notion of Judicial Independence:

Since in Islam Law stood at the apex of social organisation, those who administered the law were likewise elevated. In the early days of the Islamic State this was reflected in the pre-eminent

position of the Judge, to whom even the ruler had to refer disputes to which the latter was a party. The judge was called the Hakim-ush-Shara, i.e. the ruler through law.

The Notion of Judicial impartiality:

The notion of judicial impartiality is heavily underscored in jurisdiction literature. The extent to which impartiality was expected of the judge is well illustrated in the story concerning the Caliph Omar who once had a law suit against a Jew. When both parties went before the Qadi, the 'latter rose in his seat out of deference to Omar. Omar is said to have looked upon this act of deference to one party as being such unpardonable judicial weakness that he dismissed him at once Qadi, Justice in Historical Islam, cited in Ibrahim, .1985, p. xcv). "

(c) I may also refer to certain passages from an article under the caption "Shari'ah The Islamic Law" by Abdur Rehman 1. Do, where in the author has referred to sayings of Holy Prophet (P.B.U.H.) as to the attributes of Qadis as follows:---

"In the administration of justice, therefore, a Judge must be upright, sober, calm and cool. Nothing should ruffle his mind from the path of rectitude. If he does wrong, he is not only responsible to the people but also to God. The noble Prophet (S.A.W.) advised: 'No judge shall pass a judgment between two men while he is angry'. He must not feel kindness in executing the ordained sentences for the prescribed crimes. The Qur'an says: 'Let not pity detain you in the matter of obedience to Allah if you believe in Allah and the Last Day and let a party of believers witness their sentences'. He must decide disputes with as ' much speed and promptness as possible, for delayed justice produces no appreciable good. He must not accept any present or bribery from the parties concerned. He must exert hard to arrive at A just conclusion. The Prophet said: 'Verily Allah is with a judge so long as he is not unjust. When he is (willingly) unjust, he goes off him and the devil keeps attached to him'. To a judge, all are equal in the eye of the law. As God dispenses justice among His subjects, so a judge should judge without any d1stinction whatsoever. The Prophet said: 'The previous nations were destroyed, because they let off persons of high rank and punished the poor and the helpless'. In the Shari'ah, a Judge is a Judge for every matter civil, criminal and military. There is no separate Judiciary for separate civil, criminal and military departments.

Al-Qadi (The Judge) and his responsibilities under. Shari'ah qualification of a Qadi.

As we have seen, Islam has given a great importance to justice which must be done at all cost. Those who perform the function of the Qadis (Judges) or Qadi al-Qudat (Chief Justice) must be not only men of deep insight, profound knowledge of the Shari'ah, but they must also be Allah-fearing, forth right, honest, sincere men of integrity. The Holy Prophet (S.A.W.) has said:

'The Messenger of Allah said: "The Qadis are of three types. One type will go to paradise and the remaining two will end up in the fire of hell. The person who will go to paradise is one who understood the truth and judged accordingly. One who judged unjustly after understanding the truth, he will go to hell. Likewise. Qadi who judged in ignorance also will go to the hell.'

(d) I may also quote certain passages from an article under the caption written by Mr. Syed Nazeerul Hassan Gilani, Secretary, Islami Ideological Council, Azad State of Jammu and Kashmir Government published in a magazine titled (a publication of the Islami University, Islarniibad), which reads as under:---

(e) It will not be out of context to quote the relevant portion of a letter of Hazrat Ali Karam Allah WaJho, the Fourth. Caliph of Islam, addressed to Ashter Malik, the Governor of Egypt, which has direct bearing on the questions of qualifications, selection and emoluments of Judges which reads as follows:---

"So far as dispensing of justice is concerned, you have to be very careful in selecting officers for the same. You must select people of excellent character, superior calibre and meritorious record. They must possess following qualifications. Abundance of litigations and complexity of cases should not make them lose their temper. When they realise that they have committed a mistake in judgment they should persist in it and should not try to justify it. When truth is made clear to them or when right path opens up before them, they should not consider it below their dignity to correct the mistake made or to undo the wrong done. They should not be corrupt, covetous or greedy. They should not be satisfied with ordinary enquiry or scrutiny of a case but scrupulously go through all the pros and cons, must examine every aspect of the problem carefully, and whenever and wherever they find doubtful and ambiguous points they must stop, go through further details, clear the points and only then proceed with their decisions. They must attach greatest importance to reasoning, arguments and proofs. They should not get tired with lengthy discussions and arguments. They must exhibit patience and perseverance in scanning the details, in testing the points presented as true and in sifting facts from fiction and when the truth presented it to them they must pass their judgments without fear, favour or prejudice. They should not develop vanity and conceit when compliments and praises are showered upon them. And they should not be misled by flattery and cajolery.

Pay them handsomely so that their needs are fully satisfied and they are not required to beg or borrow or resort to corruption. Give them such a prestige and position in your State that none of your courtiers or .officers can over lord them or bring harm to them. Let judiciary be above every kind of executive pressure or influence, above fear or favour, intrigue or corruption."

22. From the above-quoted Verses from Holy Qur'an and other literature on the subject, inter alia the following is deducible:---

(i) That the Holy Quran repeatedly enjoins that one who believes in Allah, His Prophet Muhammad (p.b.u.h.), Qur'an and Surmah, should stand out firmly for justice, as witnesses to Allah, even as against himself or his parents, his kin, rich and poor;

(ii) that the hatred of others should not make you severe to wrong and depart from justice;

(iii) that the Judges are not to be lid by personal likes or dislikes, love or' hate,

(iv) that the Judges should maintain strict impartiality and even treatment in the Court inter se between the litigant parties notwithstanding that one of the parties might be very powerful and influential;

(v) to a Judge, all are equal in the eye of the law. As God dispenses justice among His subjects, so a Judge 'Should judge without any distinction whatsoever;

(vi) that a Judge must exhibit patience and perseverance in scanning the details, in testing the points presented as true and sifting facts from fiction and, when truth presented itself to them, he must pass judgments without fear, favour or prejudice;

(vii) that the power to appoint inter alia Judges is a sacred trust, the same should be exercised in utmost good faith. Any extraneous consideration other than the merits is a great sin entailing severe punishment;

(viii) that while sele6ting Judges the Authority concerned should be very careful. It should select people of excellent character, superior calibre and meritorious record. Abundance of litigations and complexity of cases should hot make them lose their temper-,

(ix) that a Judge should not be corrupt, covetous or greedy:

(x) that a Judge should be paid handsomely so that his needs are fully satisfied and he is not required to beg or borrow or resort to corruption;

(xi) that a Judge must be a man of having deep insight, pro found knowledge of Shariah, God-fearing, forth right, honest, 'sincere man of integrity;

(xii) that a Judge must be upright, sober, calm and cool., Nothing should ruffle his mind from the path of rectitude;

(xiii) that Judges should be given such a prestige and position in the State that none of the Government functionaries can over lord them or bring them harm.

23. Adverting to the above second peculiar feature that our country has Federal system of Government which is based on trichotomy of power, it may be observed that each organ, of the State is required to function/operate within the bounds specified in the Constitution though one can say that the Judiciary is the weakest limb as it does not have the resources or power which the Legislature or the Executive enjoy but it has been assigned very important and delicate role to play, namely, to ensure that none of the organs or the Government functionaries acts in violation of any provision of the Constitution or of any other law and because of the above nature of the work entrusted to the Judiciary, it was envisaged in the Constitution that the Judiciary shall be independent. I may reiterate that the independence of Judiciary is inextricably linked and connected with the Constitutional process of appointment of Judges of the superior Judiciary. The

relevant Constitutional provisions are to be construed in a manner which would ensure the independence of Judiciary. At this juncture, it may be stated that a written Constitution, is an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people; Thus, the approach, while interpreting a Constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that 'it may be able to meet the requirement of ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which, they are employed. In other words, their colour and contents are derived from their context.

24. The above principles will have to be kept in view while construing the, provisions of the Constitution relating to the appointments/transfers of Judges of the superior Judiciary.

25. (a) Adverting to the question of Constitutional conventions, it may be pertinent to know what is the meaning of a Constitutional convention and what is its legal status. In this behalf, it may be mentioned that A-V. Dicey i n his well known treatise written by him in 1885, namely "An Introduction of the Study of the Law of the Constitution" has brought out a distinction between the Law of the Constitution and conventions of the Constitution as to the enforceability and non-enforceability in the Court as under:---

"In an earlier part of this work stress was laid upon the essential distinction between the 'law of the Constitution', which, consisting (as it does) of rules enforced or recognised by the Courts makes up a body of 'laws' in the Proper sense of that term, and the -conventions of the Constitution', which consisting (as they do) maxims or precepts which. Are Of customs, practices, not enforced or recognised by the Courts, make up a body not of laws, but of Constitutional or political ethics; and it was further urged that the law, not the morality of the Constitution, forms the proper subject of legal' study. In accordance with this view, the reader's attention has been hitherto exclusively directed to the meaning and applications of two principles which pervade the law of the Parliament and the Rule of Law.

However, at the same' time, Dicey Constitutional conventions in his above book as follows:---

"The conventional code of political morality is, as already pointed out, merely a body of maxims meant to secure respect for this principle. Of these maxims some indeed - such, for example, as

the rule that Parliament must be convoked at least once a year - are so closely connected with the respect due to Parliamentary or national authority, that they will never be neglected by any one who is not 'prepared to play tile part of a revolutionist; -such rules have received the undoubted stamp of national approval, and their observance is secured by the fact that whoever breaks or aids in break the find himself involved in a breach of law.,,

Constitution, namely, the Sovereignty of recognised the importance of the almost immediately

(b) After the above treatise of Dicey written in 1885, time, the Constitutional with the passage of conventions have acquired importance and recognition of the Courts. Sir W. Ivor 'Jennings, in his treatise under the tile "The Law and the Constitution' has defined the purpose or the Constitutional conventions as under:---

"The short explanation of the Constitutional conventions is that they provide ' the flesh which clothes the dry bones of the law; they make the legal Constitution work, they keep it in touch with the growth of ideas, A Constitution does not work itself, it has to be worked by men. It is an instrument of national Cooperation, and the spirit of cooperation is as necessary as the instrument. The Constitutional Conventions are the rules elaborated for effecting that cooperation. Also, the effects of a Constitution must change with the changing circumstances of national life. New needs demand a new emphasis and a new orientation even when the law remains fixed. Men have to work the old law in order to satisfy the new needs. Constitutional conventions are the rules which they elaborate.

Sir William Holdsworth has explained these characteristics. 'Conventions' must grow up at all times and in all places where the powers of Government are vested in different persons or bodies where in other words there is a mixed Constitution. 'The constituent parts of a State', said Burke, 'are obliged to hold their public faith with each other, and with all those who derive any serious interest under their engagements, as much as the whole State is bound to keep faith with separate communities'. Necessarily conventional rules spring up to regulate the working of the various parts of the Constitution, their relation to one another and to the subject. And not only will conventions spring up in these circumstances, but they will always have two common characteristics. In the first place, it is at these conventions that we must look if we would discover the manner in which the Constitution works in practice. They determine the manner in which the rules of law, which they presuppose, are applied, so that they are, in fact, the motive power of the Constitution. In the second place, these conventions are always directed to secure that the Constitution works in practice in accordance with the prevailing Constitutional theory of the time.

(c)K.C. Where, F.B.A. in his book under the caption "The Statute of Westminster and Dominion Status" Fifth Edition, has dilated on the question of convention as under:---

"And, as M. de Fleuriau remarked: 'Lly a du vrai dans cette boutade'. These non-legal rules are given a variety of names, as has been indicated. It appears convenient to adopt two terms, usage and convention. By convention is meant an obligatory rule; by usage, a rule which is no more than the description-of a usual practice and which has not yet obtained obligatory force. A usage, after repeated adoption whenever a given set of circumstances recurs, may for a sufficient reason acquire obligatory force and thus become a convention. But conventions need not have a prior history as us ages. A convention may, if a sufficient reason exists, arise from a single precedent. Or again it may result from an agreement between the parties concerned, declared and accepted by them as binding ... ... The two kinds of rule again may impinge upon each other in such a way that the operation of the rule of strict law is modified by the operation of the non-legal rule. A power which, juridically, is conferred upon a person or body of persons may be transferred, guided, canalized. by the operation of non-illegal rules. In this way a non-legal rule may decide the ends for which and the organs through which some power, which owes its existence to a rule of strict law, may properly be exercised. The rule of strict law is not completely nullified. It is combined with a non-legal rule to make a new Constitutional rule. The working of the cabinet system in Britain illustrates this type of cooperation. The legal power in the hands of the King, by prerogative or under statute, to perform certain (not very extensive) functions in the administrative Government of the country is exercised, by usage and convention, through and on the advice of Ministers responsible to Parliament. In the same way the exercise of the legal executive powers of the President in France has, largely as the result of usage and convention, been transferred to ministers in Parliament, and the effective exercise of the legal power of the College of Electors in the United States to choose a president has been transferred to the electorate.

(d) The same author K.C, Wheare in his book under the title "Modem Constitutions" has dealt with the question of Constitutional conventions as under:---

"The distinctions which have been drawn in the preceding paragraphs will be illustrated when we come to consider the various way4 in which usage and convention operate to affect the law of the Constitution. The first way in which usage and convention: show their effects is in nullifying a provision of a Constitution. This might be expressed by saying that convention paralyses the arm of the law. It is essential to stress that ' it does not amend or abolish the law. It does not impute the limb; it merely makes its use impossible. A well-known example of this effect of convention is found in the fact that in many. Constitutions the legal power of the head of the State to veto or refuse his assent to laws passed by the Legislature is nullified by convention. In the Constitutions of Denmark, Norway, . and Sweden, the King is given certain powers to refuse assent to bills passed by the Legislature, but in all three cases it is now agreed that he may not exercise these powers. The last occasion upon which the King of Denmark refused assent to a bill was in 1865,

and although the King of Sweden vetoed a bill in 1912, he acted on that occasion upon the advice of his minister. In Holland and Belgium similarly the power of the monarch to veto legislation has been nullified by convention.

In the Constitutions of those members of the British Commonwealth which have retained the monarchical form of Government, it is usual to find powers granted either to the Queen or to her representative, the Governor- General, to refuse his assent to a bill. In all these cases it is accepted that,, by convention, this power will not be exercised, "

(e) Reference may also be made to the book of Professor Colin R. Munror under the caption "Studies in Constitutional Law", wherein he has dilated upon the question of Constitutional convention with reference to the views of various, authors and pointed out some of the Constitutional conventions obtaining in United States, Australia etc. It may be advantageous to reproduce the following passages from his above book:--

"For example, in the United States, according, to the Constitution (Article 11 and Amendment XII), the President is-indirectly elected by representatives of the States in electoral colleges. In practice, however, r, the President is elected by popular vote, and the members of the electoral colleges are obliged to cast their votes accordingly. In' Australia, the Constitution provides for the appointment of the It Governor-General by the Sovereign of the United Kingdom, but by conviction the Sovereign is obliged to act on the advice of the e Australian Prime Minister. If that is a straightforward convention, k, many others are not. The Australian Governor-General in 1975, Sir 4 John Kerr, dismissed Mr. Gough Whitlam's Government, on the e ground that, - as it had been refused supply by the Senate, it did not it command the confidence of the Parliament, and should have resigned or r advised dissolution. However, his action was controversial, to say the e least, and in that Constitutional crisis there was ample scope for r debating whether the Prime Minister and the Governor- General I respectively had acted consistently with, or contrary to, what I conventions required.

It is simply a. natural process for other rules and practices to develop alongside the laws of the Constitution. As Sir Ivor Jennings put it:

'The laws provide only a framework; those who put the laws into operation give the framework a meaning and fill in the interstices. Those who take decisions create precedents which others tend to follow, and when they have been followed long enough they acquire the sanctity and the respectability of age. They not only are followed but they have to be followed . .....

In the same way, Dicey was concerned to demarcate the lawyer's special preserve in the, study of the Constitution. He was fully aware that the rules of the Constitution comprised different classes, he conceded that some conventions and practices were as important as laws, and observed that 'a lawyer cannot master even the legal side of the Constitution without paying some attention to the nature of those Constitutional understandings', and he devoted Part III of Law of the Constitution to the discussion of conventions. It is quite unjust, although regrettably not unknown, for Dicey to be accused of promoting a narrowly legal approach to study. But he did say that the lawyer's proper function was the exposition of legal rules, whereas with conventions or understandings he has no direct concern'.

However, his distinguishing between laws and conventions has been criticized. Unless the distinction is abandoned, according to one modem writer, 'it is impossible to present Constitutional law as a coherent subject or relate it in a meaningful way to the functions it has to fulfill or the social and political context in which it has to operate'. To this it may be answered that if in fact laws and conventions are different in kind, then an accurate and meaningful picture of the Constitution will only be obtained if the distinction is made. If the distinction is bluffed, analysis of the Constitution is less complete, which cannot be to -the benefit of lawyers or political scientists . ... The late professor J.D.B. Mitchell built up further arguments of this sort:

Conventions cannot be regarded as less important than rules of law. Often the legal rule is the less important. In relation to subject-matter the two types of rule overlap: in form they are often not clearly distinguishable ... ... very many conventions are capable of being expressed with the precision of a rule of law, or of being incorporated into law. Precedent is an operative in the formation of convention as it is in that of law. It cannot be said that a rule of law is necessarily more certain than is a convention. It may therefore be asked whether it is -right to distinguish law from convention ... ...

The Late O. Hood Phillips in his well-known treatise under the caption "Constitutional and Administrative Law", 7th Edition, has very exhaustively dealt with the question of Constitutional conventions as under:--

"Importance of Constitutional conventions:

The word ‘conventions,’ as used by Constitutional lawyers, refers to rules of political practice which are regarded as binding by those whom they concern especially the Sovereign and statesmen - but which would not be enforced by the Courts if the matter came before them. The lack of judicial enforcement distinguishes conventions from laws in the strict sense. This is an important formal distinction for the lawyer, though the politician may not be so interested in the distinction.

Privileges enforced by each House are also excluded from the definition of conventions.

Conventions are found to a greater or lesser extent in most countries that have written Constitutions. This is so not only in the Commonwealth countries but also, for example, in the United States. There the method of electing the President and the manner of choosing the President’s Cabinet are governed largely by convention. What is characteristic of the British Constitution is the extremely important part played by conventions. Not only do the British have no written Constitution, but they have been reluctant to stereotype their rules of Government in the form of statutes. Many important political developments have been effected since 1688 without recourse to legal forms at all. It is, Constitutional conventions that describe and explain how the Constitution works, how it lives and grows. Their general purpose is to adapt structure to function. In this way the strong monarchy of 1688 has become a limited monarchy with responsible parliamentary Government ... ...

“Purpose of Constitutional conventions:

Conventions are a means of bringing about Constitutional development without formal changes in the law. This they often do by regulating the exercise of a discretionary power conferred on the Crown by the law. It must not be supposed that conventions are peculiar to unwritten Constitutions. They are found to a greater or lesser extent in written Constitutions as well. Canada and Australia, for example, observe the main British Constitutional conventions, and many conventions have been developed in the United States relating to such matters as the method of electing the President, his choice and use of a Cabinet, and I senatorial courtesy’ in making appointments to office. This informal method of change is more adaptable than a series of statutes or Constitutional amendments. The general tendency is towards democracy, due regard being had to the protection of minorities and their right to be heard.

The ultimate object of most conventions is that public affairs should be conducted 'in accordance with the wishes of the majority of the electors. The reason why the Ministry must be chosen from the party or parties enjoying a majority in the Commons is that, on the assumption that the majority of the Commons reflect the views of the majority of the electors . ...

(b) It will not be out of context to lift from para. 450 of the judgment o the Indian Supreme Court in the case of Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268 the then Indian President of the Constituent Assembly Dr. Rajendra Prasad's relevant portion of the speech delivered by him while moving bill for the adoption of Indian Constitution in 1950 which throws light on the importance of Constitutional conventions as under:--

"We have prepared a democratic Constitution. But successful working of democratic institutions requires in those who have to work them willingness to respect the view points of others, capacity for compromise and accommodation. Many things which cannot be written in a Constitution are done by conventions. Let me hope that we shall show those capacities and develop those conventions. The way in which we have been able to draw this Constitution without taking recourse to voting and to divisions in lobbies strengthens that hope ... ...

(g) I may also quote para. 368 from the above judgment of the Indian Supreme Court (Kuldip Singh's opinion) which reads as under:---

"368. We are of the view that there is no distinction between the 'Constitutional law' and an established 'Constitutional convention' and both are binding in the field of their operation. Once it is established to the satisfaction of the Court that a particular convention exists and is operating then the convention becomes a part of the 'Constitutional, law' of the land and can be enforced in the like manner. "

26. (a) The President of the Supreme Court Bar Association, Mr. Muhammad Akrain Sheikh, has referred to the book under the title 'Constitutional Conventions' The Rules and Forms of Political Accountability by Geoffrey Marshall. He has also furnished photostat copy of seven pages relating to conventions without the title of the book (probably it is from the book under the title 'Constitutional and Administrative Law', Sixth Edition by Rodney Brazier. The relevant portion from the former book reads as under: --

"Thirdly, conventions may be the subject of enquiry in the course of statutory construction. The consideration of convention in British Coal Corporation v. The King (1935) AC 500 could be considered in this light. It led to the conclusion that in passing the Judicial Committee Act of 1833, Parliament had had a particular intention, namely to treat the Committee as being a judicial body because of the firmly established convention as to the way in which its advice was accepted by the Crown.

The relevant extracts from the latter book reads as follows: --

"These examples suggest that the distinction between law and convention is reasonably clear. But in a number of contexts the distinction is blurred. In particular, Dicey was exaggerating when he said that conventions were 'not recognized' by the Courts. The Courts do sometimes take cognizance of conventions; sometimes they use them as aids to interpretation ... ...

...

'A striking illustration of a Constitutional convention having as much effect in practice as strict law comes from Canada. The Canadian Government sought patriation of the Constitution in the early 1980s, but agreement on the new settlement could not be reached with the provinces. When the Government decided to proceed without it some of the provinces challenged the legality of the Government's actions in the Courts. The Supreme Court held that, although no rule of law existed which established provincial consent as a prerequisite to any Constitutional amendment, there was a convention that such consent would be obtained. The Government thereupon delayed its plans and held further negotiations in which nine of the ten provinces agreed to revise Federal proposals which formed the basis of Canada's 1983 Constitution. "

(b) Mr. Riazul Hassan Gilani, learned Advocate Supreme Court who has appeared for Lahore High Court Bar Association, has dealt with exhaustively as to the legal status of conventions under the Islamic Jurisprudence. According to him, the conventions have binding force in Islam. He pointed out the factum that after the advent of Islam, the customs or us ages which were then prevalent inter alia in Arabian territory and which were not contrary to Islamic concept, were retained and were given binding legal effect. He has referred to the following books:--

(i) Students English-Arabic Dictionary. Second Edition- printed by Catholic Press at Beirut.

Wherein at page 108 the words ‘convention’ and conventional’ are defined as under:--

“Convention, n. (Ittifaqia)(Motamer)

“Convention, adj,(Mutafiq alai estalahi)(Urfi)

(ii) (Al-ashbah-o-nazair az Al-Imam Jalal-ud-din Abdur Rehman Bin Abobaker siuti)

The relevant portion is: (Alsbit ashaia ad-i-hanfia wamalaikatihi-----wa kazalhanabilah)

Translation by Mr.Gilani,

The usage shall qualify the text.

The relevant portion is:--”Quwaidul fiqa Al-mufti Muhammad Azeem-ul-Ehsan Almajdidi Albarkati”

Translation by Mr. Gilani:

‘177. The usage can qualify the text.

(v) THE MEJELLE translated by-C.-R. Tyser, B.A.L. President-District Court of Kyrenta and two others.

The relevant portions are:

‘37. The use of men is evidence according to which it is necessary to act.

43. A thing known by common usage is like a stipulation which has’ been made.

45. What is directed by custom is as though directed by law. See 2,’ C. L. R. 140. “

The relevant portion is:

(viii)The Principles of Muhammadan Jurisprudence (According to the Hanafi, Maliki. Shafi’s and Hanbali Schools) by Abdur Rahim, M.A., 1968 Edition.

“Section II - Customs and Usages

Those. customs and usages of the people of Arabia, which were not expressly repealed during the lifetime of the Prophet, are held to have been sanctioned by the Law-giver by His silence. Customs (‘urf ta’amul, ‘adat) generally as source of laws, are spoken of as having the force of Ijma’, and their validity is based on the same texts as the validity of the latter. It is laid down in ‘Hedaya’ that custom holds the same rank as ljma’ in the absence of an express text, and in another place in the same book, custom is spoken of as being the arbiter of analogy.”

(ix) The case of Pakistan and others v. Public at Large and Others PLD 1987 SC 304:

wherein it has been retreated that in the case of Pakistan v. Public at Large (PLD 1986 SC 240) the Shariat Appellate Bench of this Court approved the use of Rules of Mas” and Urf amongst others. It is also held that if the controversy can be resolved by direct resort to Holy Qur’an and Sunnah, it is not necessary to invoke Rules of Masalah and Urf.

27. From the above-quoted treatises on the Constitutional Law and the well-known books on the Islamic Jurisprudence, the following principles/inferences are deducible:--

(i) That AV. Dicey in 1885 in his aforesaid treatise has brought out distinction between the Law of the Constitution consisting of Rules enforced or recognised by Courts and the Conventions of the Constitution consisting of customs, practice, maxims or precepts which are not enforced or recognised by the Courts. However, at the same time, he was of the view that the conventional code of political morality has been accepted and acted upon by the politicians and that their observance is secured by the fact that whoever breaks or aids in breaking them, will almost immediately find himself involved in a breach of law.

(ii) Late O. Hood Philips in his aforementioned treatise under caption "Constitutional and Administrative Law", in its earlier part quoted at page 56 herein above, which was relied upon by M/s. Qazi Jamil and Mr. Aitzaz Ahsan, has brought out the above distinction between Constitutional Law and Constitutional convention as to their enforceability and non- enforceability through the Courts of law. But he did not adhere to the above view as in the latter part of the treatise it has been highlighted that Constitutional conventions are a means of bringing about Constitutional development without formal change I s in the law; this they often do by regulating the exercise of a discretionary power conferred on the Crown by the law. He also highlighted that the Constitutional conventions are not peculiar to unwritten Constitutions' but they equally apply to the written Constitutions. He further opined that the ultimate object of most conventions is that public affairs should be conducted in accordance with the wishes of the majority of electors.

(iii) Sir W. Ivor Jennings in his aforecited treatise observed that the short explanation of the Constitutional conventions is that they provide the , flesh which clothes the dry bones of the law; they make the legal Constitution work; they keep in touch with the growth of ideas.

(iv) Sir William Holdaworth was of the view that conventions must grow up at all times in all places where the powers of Government are vested in different persons or bodies.

(v) The conventional rules spring up to regulate the working of various parts of the Constitution. They ensure that the Constitution works in practice in accordance with the prevailing Constitutional theory of the lime. They guide, canalise the exercise of power vested in the State functionaries.

(vi) The Constitutional conventions can even nullify or paralyse a provision of the Constitution, for example, in many Constitutions, the legal power of the head of the State to veto or refuse his assent to laws passed by the Legislature is nullified by conventions like in ,Denmark, Norway and Sweden, where the Kings though have the power to refuse to give assent to any law but by virtue of conventions they refrain from doing so. Same is the case of Queen in England or her representative the Governor-General in Australia.

(vii) That the Constitutional conventions may even change -the mode of operation of a Constitutional provision, for example, in United States, according to the Constitution (Article 11 and Amendment XII) the President is indirectly elected by representatives of the State in electoral colleges but in practice the President is elected by popular votes and the members of electoral colleges are obliged to cast their votes accordingly. Similarly, in Australia, the Constitution provides for the appointment of Governor-General by the Sovereign of the United Kingdom but by conventions the Sovereign is obliged to act on the advice of the Australian Prime Minister.

(viii)That in fact the Courts accord the recognition to Constitutional conventions either by pressing into service the same while construing a Constitutional provision or by giving effect to a convention in the absence of any express provision in the Constitution as the Supreme Court of Canada did in early 1980 when it held that although no rule of law existed which established provincial consent as a prerequisite to any Constitutional amendment but there was a convention that such consent would be obtained. As a result of the above judgment, the Government delayed its plan to carry out the amendment and entered into further negotiations and resolved the matter by consensus of nine out of ten Provinces.

(ix) That the convention is recognised and has legal binding force under the Islamic Jurisprudence as is evident from the above-quoted portions of aforesaid books/treatises on Islamic Jurisprudence.

28. This Court has also affirmed the factum that conventions under Islamic Jurisprudence have the force of law inter alia in the above case of Pakistan and others v. Public-at-Large. This seems to be also in consonance with Article 8 of the Constitution, clause (1) of which brackets “custom or usage” with law by .providing 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. The above Chapter relates to the Fundamental Rights. In other words, the above clause (1) of Article 8 of the Constitution is founded on the assumption that custom or usage has the force of law as the law has itself but they will not be enforced to the extent of inconsistency with the Fundamental Rights.

29. I am inclined to hold that the distinction which was brought out by A.V. Dicey in 1885 between laws and conventions as to the enforcibility and non-enforcibility by the Courts is no longer holding the field. With the passage of time, the other eminent Jurists have not adhered to the above distinction. They have emphasis the importance of the Constitutional conventions for' proper operating/functioning of the Constitutions. Jennings has put it very beautifully by explaining that the Constitutional conventions provide "flesh which clothes the dry bones of the law; they make the legal Constitution work; they keep in touch with the growth of ideas". The above view has been reiterated by the other Professors/Jurists of international repute. Even the President of Indian Constituent Assembly, Dr. Rajendra Prasad, while introducing a bill for the adoption of Indian Constitution in 1950, pointed out in his speech that many things which cannot be written in a Constitution are done by conventions Let me hope that we shall show those capacities and develop those conventions". The Indian Supreme Court, after reviewing the treatises on Constitutional law and the case-law in the case-of Supreme Court Advocates-on-Record Association (supra) has held that there is no distinction between the "Constitutional law" and an established "Constitutional convention" and both are binding in the field of their operation. I am also of the view that the Courts, while construing a Constitutional provision, can press into service an established Constitutional convention in order to understand the import and the working of the same, if it is not contrary to, the express provision of the Constitution.

It is also evident that under Islamic Jurisprudence, the conventions which were not contrary to Holy Qur'an and Sunnah, were recognised from the very inception and they were given binding effect. In this view of the matter, it will be appropriate to refer to the relevant conventions, if any, while construing various Constitutional provisions relating to the Judiciary.

30. I intend to take up the first question referred to in para. 17 herein above at a later stage. I may revert to the second question contained therein as to the import of the words "after consultation" used in Article 177 and Article 193 of the Constitution and the question, as to what extent the President is bound to accept the opinion of the Chief Justice of Pakistan and/or the Chief Justices of the High Courts while making appointments under the above provisions of the Constitution. The thrust of the arguments of Messrs Khan and Raja Muhammad Akram, learned counsel for the appellants/petitioners was that the Chief Justice's opinion has primacy and that without it, there cannot be any independent Judiciary. According to Mr. Khan, the Chief Justice of Pakistan before making any recommendation should consult the Supreme Judicial Council constituted under Article 209 of the Constitution in order to have institutional opinion.

Mr. Qazi Muhammad Jamil, learned Attorney-General, on Court's notice and Messrs Yahya Bakhtiar and Aitzaz Ahsan appearing for the Federation, contended that the appointment of a Judge of a superior Court is an executive act which is to be executed by the President and though the

Chief Justice of Pakistan's views should be invariably accepted by the President but it has no binding effect and, therefore, can even be ignored without recording any reason. According to them, the appointment of the Judges of the superior Courts has no nexus with the independence of Judiciary as the question, whether a Judge is independent or not, arises after his appointment. They were of the view that this is so under the Constitutional scheme in order to keep the Chief Justice of Pakistan out of politics and public criticism and that the Executive is answerable to the parliament whereas the Chief Justice is not answerable.

Messrs Muhammad Akrarn Sheikh and Riazul Hassan Gilani adopted the above line of arguments advanced by Mr. Raja Muhammad Akram. Whereas Mr. Fakhruddin G. Ebrahim urged that the Chief Justice of Pakistan's opinion does not have any primacy but his opinion should not be ignored by the President without recording cogent reasons. Mr. S.M. Zafar's submission was that though the President is not bound to act upon the opinion of the Chief Justice of Pakistan, but the Chief Justice's negative opinion has supremacy inasmuch as a person, who is found to be unfit by the Chief Justice of Pakistan for appointment as a Judge of a High Court or the Supreme Court, cannot be appointed by the President. Mr. S. Sharifuddin Pirzada, after tracing the Constitutional history of Indo-Pak from. 1861 up to 1947 in respect of the Judiciary, submitted that the relevant Articles of the Constitution relating to the Judiciary must be read in its context and its colour and contents should be derived from its context. According to him, the consultation between the President and the other Constitutional functionaries referred to in the Constitution is not merely a formality but it is a mandatory requirement and it has to be full, effective and meaningful. His further submission was that the opinion of the Chief Justice of Pakistan is entitled to primacy and that the supremacy in this behalf does not vest in the Executive and the rejection of his advice would ordinarily be regarded as prompted by oblique consideration vitiating the order. His alternate submission was that cogent and strong reasons must be given by the President for disagreement, which will be open to judicial review.

All the learned counsel appearing as amicus curiae urged that there is a direct nexus between the mode of appointments of the Judges and the independence of Judiciary. There was also unanimity among them that the appointment of the Judges of the superior Courts does not involve any political process and that since the conduct of a Judge cannot be discussed in the Parliament by virtue of Article 68 of the Constitution, the question of accountability of the Executive to the Parliament in regard to the appointments of Judges of the superior Courts is not involved.

31. It may be pertinent to observe that first statute on the 'subject enforced in India was the Indian High Courts Act, 1861, which envisaged the establishment of a High Court of Judicature at Fort William in Ningal and High Courts at the Presidencies of Madras and Bombay. The Chief Justice and Judges were to be appointed by the Crown and they were to hold their office during pleasure of the Crown. This position continued under the Indian High Courts Act, 1911, though some other Courts were established in the meanwhile. Whereas under the Government of India Act, 1935, the

appointment of Judges of the superior Courts remained a matter of pleasure of the Crown but the Judges were given security of tenure up to the age of superannuation mentioned therein. The procedure obtaining 6efore the Independence of Indo-Pak was that Governor of a Province acting in an individual capacity after consulting the Chief Justice of the High Court concerned used to make his recommendations direct to the Governor-General and in turn he used to advise the King through the Secretary of State of India. On the basis of the above advice the appointments were used to be made by the Crown. The above position continued in India till the Home Ministry issued a memo. dated 4-11-1947 providing the procedure for appointment of High Court Judges, under which the Chief Minister of a State .acting in consultation with the Home Minister of the State concerned was to send his recommendations to the Home Minister in the Centre. When the above memo. was circulated inter alia among the High Courts of India, the then Chief Justice of Madras, Sir Frederick Gentle, put forward this as one of the reasons for resigning from his post. Sir Archibald Nye, Governor of Madras, also protested. Both were of the view that the above appointment procedure would lead to political jobbery and would affect the independence of judiciary. To consider the above memo., a Conference of Chief Justices of High Courts of India was held on 26-3-1948. A~ a result of the above conference, a number of recommendations were made which inter alia included a suggestion that "every Judge of the High Court should be appointed by the President by a warrant under his hand and seal on the recommendation of Chief Justice of, the High Court after consultation with the Governor of the State and with the concurrence of the Chief Justice of India". The above suggestions were not accepted by the Government. However, the framers of Indian Constitution, while framing it, provided that the appointments in the Supreme Court are to be made after consultation by the President with the Chief Justice of India and such other Judges of the Supreme Court and of the High Courts in the States as he may deem necessary (Article 124 of the Indian Constitution) and of the High Courts after consultation with the Chief Justice of the High Court concerned and the Chief Justice of India besides consulting the Governor concerned (Article 217 of the Indian Constitution).

32. The controversy as to the import of the words "after consultation" with the Chief Justice inter alia had come up in the case of S.P. Gupta and others v. President of India and others (AIR 1982 SC 149) and finally in the case of Supreme Court Advocates-on-Record Association v. Union of India (supra).

In Pakistan, the provisions of subsection (2) of section 220 of the Government of India Act, 1935, by virtue of Adoption Order, 1947, were followed till the framing of'1956 Constitution. It may be observed that in 1956 and 1962 Constitutions as well as 1972 Interim Constitution and the present Constitution of 1973, the relevant Articles envisage the appointment of the Supreme Court Judges by the President after consultation with the Chief Justice of Pakistan, whereas for the High Courts after consultation with the Chief Justice of Pakistan, with the Governor concerned and with the Chief Justice of the High Court concerned.

33. In India the controversy arose inter alia on the question, as to whether the opinion of the Indian Chief Justice has primacy over the opinion of other Constitutional functionaries, inter alia in the case of S.P. Gupta (supra). The majority consisting of Bhagwati, Desai, S.M.F. Ali and Venkataramiah, JJ. held against the primacy though they were of the view that the consultation contemplated by the Constitution must be fall and effective and by convention the views of the concerned Chief Justice and Chief Justice of India should also always prevail unless there are exceptional circumstances which may impel the President to disagree with the advice given by the above Constitutional authorities. Desai, J. in his opinion opined that independence of judiciary under the Constitution has to be interpreted within the framework and parameters of the Constitution and that there are various provisions in the Constitution which indicate that the Constitution has not provided something "hands off" attitude. P.N. Bhagwati, J., while concurring with the opinion of S.M.F. Ali J., opined that clause (1) of Article 217 provides that the appointment of a High Court Judge shall be made after consultation with all the three Constitutional functionaries without assigning superiority to the opinion of one over that of another. He further opined that "it is true that the Chief Justice of India is the head of the Indian Judiciary and may be figuratively paterfamilias of the brotherhood Judges but the Chief Justice of a High Court is also an equally important Constitutional functionary and it is not possible to say so far as the consultation process is concerned, in any way, less important than the Chief Justice of India". The other questions as to the right of Additional Judges and the validity of transfer of certain High Court Judges were also considered. At this stage, it is not necessary to refer the same.

34. It seems that a Bench comprising Ranganath Misra, C.J. M.N. Venkatachaliah and M.M. Punshhi, JJ. in the case of Subhesh Sharma, petitioner v. Union of India, Respondent and Supreme Court Advocates-on- Record Association and another Petitioners v. Union of India (through its Secretary, Ministry of Law and Justice), Respondent, and Firdaus Taleyarkhan Petitioner v. Union of India and another Respondents (AIR 1991 SC 63 1) was of the view that the majority opinion in the case of S.P. Gupta (supra) not only seriously detracts from and denudes the primacy of the position implicit under the Constitutional scheme, of the Chief Justice of India, in the consultative process but also whittles down the very significance of "consultation" as required to be understood in the Constitutional scheme and context. They. were, therefore, of the view that the matter required reconsideration recommended the constitution of a larger Bench to re-consider the view taken in S.P. Gupta's case on two points as under:--

"44. Judicial Review is a part of the basic Constitutional structure and one of the basic features of the essential Indian Constitutional policy. This essential Constitutional doctrine does not by itself justify or necessitate any primacy to the executive wing on the ground of its political accountability to the electorate. On the contrary what is necessary is an interpretation sustaining the strength and vitality of Judicial Review.

46. The correctness of the opinion of the majority in S.P. Gupta's case (AIR 1982 SC 149), relating to the state is an importance of consultation, the primacy of the position of the Chief Justice of India and the view that the fixation of Judge-strength is not justifiable should be reconsidered by a larger Bench.

35. As a result of the above reference made by the aforesaid Judges, the aforementioned points came up for consideration before a larger Bench consisting of nine Judges which resulted in the above judgment in the case of Supreme Court Advocates-on-Record Association and another Petitioner v. Union of India Respondent (supra). In the said case elaborate arguments were advanced by the lawyers of standing/repute for and against the question of primacy. The majority of the Judges comprising seven Judges held inter alia that the Chief Justice of India's opinion has primacy in the matter of appointments of the High Court and Supreme Court Judges. "

J.S. Verma, J., who wrote his opinion for himself and also on behalf of his four learned brothren, namely, Yogeshwar Dayal, G.N. Ray, A.S. Anand and S.P. Bharucha, JJ. recorded inter alia the following reasons for the majority for holding that the Chief Justice of India's opinion has primacy:--

"474. It is obvious, that the provision for consultation pith the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior Judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a Judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice 'of India should have the greatest weight; the selection should be made as a result of a participatory consultative process in- which the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the Constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word I consultation' instead of 'concurrence' was used, but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as an individual, muchless to the executive, which earlier had absolute discretion under the Government of India Acts.

475. The primary aimniust be to reach an agreed decision I taking into account the views of all the consultees, giving the greatest weight to the opinion of the Chief Justice of India who, as earlier stated, is best suited to know the worth of the appointee. No question of primacy would arise when the decision is reached in this manner by consensus, without any difference of opinion. However, if conflicting opinions emerge at the end of the process, then only the question of giving primacy to the opinion of any of the consultees arises. For reasons indicated earlier, primacy to the executive is negatived by the historical change and the nature of functions required to be performed by each. The primacy must, therefore, lie in the final opinion of the Chief Justice of India, unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable.

480. However, it needs hardly be stressed that the primacy of the opinion of the Chief Justice of India in this context is, in effect, primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion."

He concluded as under:

"501. The absence of specific guidelines in the enacted provisions appears to be deliberate, since the power is vested in high Constitutional functionaries and it was expected of them to develop requisite norms by convention in actual working as envisaged in the concluding speech of the President of the Constituent Assembly. The hereinafter mentioned norms emerging from the actual practice and crystallised into conventions not exhaustive - are expected to be observed by the functionaries to regulate the exercise of their discretionary power in the matters of appointments and transfers.

Appointments:

What is the meaning of the opinion of the judiciary 'symbolised by the view of the Chief Justice of India'?

This opinion has to be formed in a pragmatic manner and past practice based on convention is a safe guide. In matters relating to appointments in the Supreme Court, the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views

of the two senior most Judges of the Supreme Court. The Chief Justice of India is also expected to ascertain the views of the senior most Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court, or otherwise. Article 124(2) is an indication that ascertainment of the views of -some other Judges of the Supreme Court is requisite. The object underlying Article 124(2) is achieved in this manner as the Chief Justice of India consults them for the formation of his opinion. This provision in Article 124(2) is the basis for the existing convention which requires the Chief Justice of India to consult some Judges of the Supreme Court before making his recommendation. This ensures that the opinion of the Chief Justice of India is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary.

In matters relating to appointments in the High Courts, the Chief Justice of India is expected to take into account the views of his colleagues in the Supreme Court who are likely to be conversant with the affairs of the concerned High Court. The Chief Justice of India may also ascertain the views of one of more senior Judges of that High Court whose opinion, according to the Chief Justice of India, is likely to be significant in the formation of his opinion. The opinion of the Chief Justice of the High Court would be entitled to the greatest weight, and the opinion of the other functionaries involved must be given due weight, in the formation of the opinion of the Chief Justice of India. The opinion of the Chief Justice of the High Court must be formed after ascertaining the views of at least the two senior most Judges of the High Court.

The Chief Justice of India, for the formation of his opinion, has to adopt a course which would enable him to discharge his duty objectively to select the best available persons as Judges of the Supreme Court and the High Courts. The ascertainment of the opinion of the other Judges by the Chief Justice of India and the Chief Justice of the High Court, and the expression of their opinion, must be in writing to avoid any ambiguity.

(2) The Chief Justice of India can recommend the initial appointment of a person to a High Court other than that for which the proposal was initiated, provided that the Constitutional requirements are satisfied.

(3) Inter se seniority amongst Judges in their combined seniority on all India basis is of admitted significance in the matter of future prospects. Inter se seniority amongst Judges in the Supreme Court, based on the date of appointment, is of similar significance. It is, therefore, reasonable that ‘this aspect is kept in view and given due weight while making appointments from amongst High Court Judges to the Supreme Court. Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court. Apart from recognising the legitimate expectation of the High Court Judges to be

considered for appointment to the Supreme Court according to their seniority, this would also lend greater credence to the process of appointment and would avoid any distortion in the seniority between the appointees drawn even from the same High Court. The likelihood of the Supreme Court being deprived of the benefit of the services of some who are considered suitable for appointment, but decline a belated offer, would also be prevented.

(4) Due consideration of every legitimate expectation in the decision making process is a requirement of the rule of non-arbitrariness and, therefore, this also is a norm to be observed by the Chief Justice of India in recommending appointments to the Supreme Court. Obviously, this factor applies only to those considered suitable and at least equally meritorious by the Chief Justice of India, for appointment to the Supreme Court. Just as a High Court Judge at the time of his initial appointment has the legitimate expectation to become Chief Justice of a High Court in his turn in the ordinary course, he has the legitimate expectation to be considered for appointment to the Supreme Court in his turn, according to his seniority.

This legitimate expectation has relevance on the ground of longer experience on the Bench, and is a factor material for determining the suitability of the appointee. Alongwith other factors, such as, proper representation of all sections of the people from all parts of the country, legitimate expectation of the suitable and equally meritorious Judges to be considered in their turn is a relevant factor for due consideration while making the choice of the most suitable and meritorious amongst them, the outweighing consideration being merit, to select the best available for the Apex Court.

(5) 1 The opinion of the Chief Justice of India, for the purpose of Articles 124(2) and 217(l), so given, has primacy in the matter of all appointments; and no appointment can be made by the President under these provisions to the Supreme Court and the High Court, unless it is in conformity with the final opinion of the Chief Justice of India, formed in the manner indicated.

(6)’ The distinction between making an appointment in conformity with the opinion of the Chief Justice of India, and not making an appointment recommended by the Chief Justice of India has to be borne in mind. Even though no appointment can be made unless it is in conformity with the opinion of the Chief Justice of India, yet in an exceptional

case, where the facts justify, a recommendee of, the Chief Justice of India, if considered unsuitable on the basis of positive material available on record and placed before the Chief Justice of India, may not be appointed except in the situation indicated later. Primacy is in making an appointment; and, when the appointment is not made, the question of- primacy does not arise. There may be a certain area, relating to suitability of the candidate, such as his antecedents and personal character, which, at times, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other consultees is entitled to due weight, and permits non-appointment of the candidate recommended by the Chief Justice of India, except in the situation indicated hereafter.

It is only to this limited extent of non-appointment of a recommendee of the Chief Justice of India, on the basis of positive material indicating his appointment to be otherwise unsuitable, that the Chief Justice of India does not have the primacy to persist for appointment of that recommendee except in the situation indicated later. This will ensure composition of the Courts by appointment of only those who are approved of by the Chief Justice of India, which is the real object of the primacy of his opinion and intended to secure the independence of the Judiciary and the appointment of the best men available with undoubted credentials.

(7) Non-appointment of anyone recommended, on the ground of unsuitability, must be for good reasons, disclosed to the Chief Justice of India to enable him to reconsider and withdraw his recommendation on those considerations. If the Chief Justice of India does not find it necessary to withdraw his recommendation even thereafter, but the other Judges of the Supreme Court who have been consulted in the matter are of the view that it ought to be withdrawn, the non-- appointment of that person, for reasons to be recorded, may be permissible in the public interest. If the non-appointment in a case, on this ground, turns out to be a mistake, that mistake in the ultimate public interest is less harmful than a wrong appointment. However, if after due consideration of the reasons disclosed to the Chief Justice of India, that recommendation is reiterated by the Chief Justice of India with the unanimous agreement of the Judges of the Supreme Court consulted in the matter, with reasons for not withdrawing the recommendation, then that appointment as a matter of healthy convention ought to be made.

(8) Some instances when non-appointment is permitted and justified may be given. Suppose the final opinion of the Chief Justice of India is contrary to the opinion of the senior Judges consulted by the Chief Justice of India and the senior Judges are of the view that the recommendee is unsuitable for stated reasons, which are accepted by the President, then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible. Similarly, when the recommendation is for appointment to a High Court and the opinion of the Chief Justice of the High Court conflicts with that of the Chief Justice of India, the non appointment, for valid reasons to be recorded and communicated to the Chief Justice of India, would be permissible. If the tenure as a Judge of the candidate is likely to be unduly short, the appointment may not be made.

Non-appointment for reasons of doubtful antecedents relating to conduct, would also be permissible. The condition of health or any such factor relating to the fitness of the candidate for the office, may also justify non-appointment.

(9) In order to ensure effective consultation between all the Constitutional functionaries involved in- the process, the reasons for disagreement, if any, must be disclosed to all others, to enable reconsideration on that basis. All consultations with everyone involved, including all the Judges consulted, must be in writing and the Chief Justice of the High Court, in the case of appointment to High Court, and the Chief Justice of India' in all cases, must transmit with his opinion the opinions of all Judges consulted by him, as a part of the record.

Expression of opinion in writing is an inbuilt check on exercise of the power, and ensures due circumspection. Exclusion of justiciability, as indicated hereafter, in this sphere should prevent any inhibition against the expression of a free and frank opinion. The final opinion of the Chief Justice of India, given after such effective consultation between the Constitutional functionaries, has primacy in the manner indicated.

(10) To achieve this purpose, and to give legitimacy and greater credibility to the process of appointment, the process must be initiated by the Chief Justice of India in the case of the Supreme Court, and the Chief Justice of the High Court in the case of the High Courts. This is the general practice prevailing, by convention, followed over the years, and continues to be the general rule even now, after S.P. Gupta. The executive itself has not understood the correct procedure, notwithstanding consonance with the concept of the independence of the Judiciary.

(11) The Constitutional functionary meant by the expression 'Governor' in Article 2170), is the Governor acting on the 'aid and advice' of his Council of Ministers in accordance with Article 163(l) read with Articles 166(3) and 167.

(12) Adherence to a time-bound schedule would prevent any undue delay and avoid dilatory methods in the appointment process. On initiation of the proposal by the Chief Justice of India or the Chief Justice of the High Court, as the case may be, failure of any other Constitutional functionary to express its opinion within the specified period should be construed to mean the deemed agreement of that functionary with the recommendation, and the President is expected to make the appointment in accordance with the final opinion of the Chief Justice of India. In such a situation, after expiry of the specified time within which all the Constitutional functionaries are to

give their opinion, the Chief Justice of India is expected to request the President to make the appointment without any further delay, the process of consultation being complete.

(13) On initiation of the proposal by the Chief Justice of India or the Chief Justice of the High Court, as the case may be, copies thereof should be sent simultaneously to all the other Constitutional functionaries involved. Within the period of six weeks from receipt of the same, the other functionaries must convey their opinion to the Chief Justice of India. In case any such functionary disagrees, it should convey its disagreement within that period to the others. The others, if they change their earlier opinion, must, within a further period of six weeks, so convey it to the Chief Justice of India. The Chief Justice of India would then form his final opinion and convey it to the President within four weeks, for final action to be taken. It is appropriate that a memorandum of procedure be issued by the Government of India to this effect, after consulting the Chief Justice of India, and with the modifications, if any, suggested by the Chief Justice of India to effectuate the purpose.

(14) The process of appointment must be initiated well in time to ensure its completion at least one month prior to the date of an anticipated vacancy; and the appointment should be duly announced soon thereafter, to avoid any speculation or uncertainty. This schedule should be followed strictly and invariably in the appointment of the Chief Justices of the High Courts and the Chief Justice of India, to avoid the institution being rendered headless for any significant period. In the case of appointment of the Chief Justice of a High Court to the Supreme Court, the appointment of the successor Chief Justice in the High Court should be made ordinarily within one month of the vacancy.

(15) Apart from the two well-known departures, appointments to the office of Chief Justice of India have, by convention, been of the senior most Judge of the Supreme Court considered fit to hold the office; and the proposal is initiated in advance by the outgoing Chief Justice of India. -The provision in Article 124(2) enabling consultation with any other Judge is to provide for such consultation, it there be any doubt ‘ about the fitness of the senior most Judge to-hold the office which alone may permit and justify a departure from the longstanding convention. For this reason, no other substantive consultative process is involved. There is no reason to depart from the existing convention and, therefore, any further norm for the working of Article 124(2) in the appointment of Chief Justice of India is unnecessary.”

As regards the accountability of the Executive to the people in the matter of appointment of Judges of the superior Courts, the contention of the learned counsel for the Executive, was repelled by J.S. Verma J., as under:--

"478. The majority view in S.P. Gupta to the effect that the executive should have primacy, since it is accountable to the people while the judiciary has no such accountability, is an easily exploded myth, a bubble which vanishes on a mere touch. Accountability of the executive to the people in the matter of appointments of superior Judges has been assumed, and it does not have any real basis. There is no occasion to discuss the merits of any individual appointment in the Legislature on account of the restriction imposed 'by Articles 121 and 211 of the Constitution. Experience has shown that it also does not form a part of the manifesto of any political party, and is not a matter which is, or can be debated during the election campaign. There is thus no manner in which the assumed accountability of the executive in the matter of appointment of an individual Judge can be raised, or has been raised at any time. On the other hand, in actual practice, the Chief Justice of India and the Chief Justice of the High Court, being responsible for the functioning of the Courts, have to face the consequence of any unsuitable appointment which gives rise to criticism levelled by the ever vigilant Bar. That controversy is raised primarily in the Courts. Similarly, the Judges of the Supreme Court and the High Courts, whose participation is involved with the Chief Justice in the functioning of the Courts, and whose opinion is taken into account in the selection process, bear the consequences and become accountable. Thus, in actual practice, the, real accountability in the matter of appointments of superior Judges is of the Chief Justice of India and the Chief Justices of the High Courts, and not of the executive which has always held out, as it did even at the hearing before us, that, except for rare instances, the executive is guided in the matter of appointments by the opinion of the Chief Justice of India.

36. In the case of Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another PLD 1989 Kar. 404, which related to the enforcement of Article 175 of the Constitution as to the separation of Judiciary from Executive and which was decided by a Bench comprising the Chief Justice and six Judges, the question of appointment of Judges of the superior Courts came up for discussion with reference to the words "after consultation" and in this regard the following observations were made by me: --

"As regards the appointments of the Judges to the superior Courts, it was vehemently urged by Mr. Sharaf Faridi that the appointments should be solely made on the recommendations of the Chief Justice of Pakistan and the Chief Justice of the High Court concerned and that there should not be any say in the above matter of the Executive. It was also submitted by him that since under Articles 188, 182, the appointments of the Chief Justice of Pakistan and the Judges of the Supreme Court are to be made by the President and so also of the Chief Justice and the Judges of the High Courts under Articles 193 and 196 of the Constitution, the advice of the Prime Minister contemplated in Article 48 is not required and that such advice will militate against the concept of the separation and independence of the judiciary. Reliance was placed on an unreported judgment, dated 21-12-1988 given by a Division Bench of the Lahore High Court in Petition No.810 of 1988 holding that the appointment of 11 Additional Judges to the said High Court without advice of the Prime Minister was legal. In this regard, it may be stated that the above Articles 177, 188, 193 and

196 of the Constitution are in their original form except as to the appointment of an Acting Chief Justice of the High Court. In my view, it is not necessary to examine the above question any further in the instant cases. However, it will suffice to observe that the consultation, with the Chief Justice of Pakistan and the Chief Justice of the High Court concerned by the President should be meaningful as observed in the above-cited Indian Supreme Court cases."

37. The endurance of Mr. Fakhruddin G. Ebrahim was that the view taken in S.P. Gupta's case is a correct view. According to him, the President should record reasons for not accepting the opinion of the Chief Justice of Pakistan and if the rejection of the opinion would be on extraneous considerations, the same would be justiciable. He has also highlighted the factum that under Article 124 of the Indian Constitution, for the appointment of Judges of the Supreme Court, it is not only the opinion of the Chief Justice of -India to be obtained but the President is expected to obtain the views of some of the Judges of the Supreme Court and of the High Courts in the States which he may deem necessary and, therefore, the consultation process is an institutional and not an individual.

38. Mr. Qazi Muhammad Jamil, learned Attorney-General, and Messrs Yahya Bakhtiar and Aitzaz Ahsan had submitted that the view found favour with the majority of the learned Judges in the case of Supreme Court Advocates-on-Record Association (supra) is not sustainable inter alia for the reason that while the debate on the bill relating to the Indian Constitution was going on in 1950, the amendment was sought to be made in clause (2) of Article 103 of the Constitution for substituting the word "concurrence" in place of the-word "consultation" which was rejected. Mr. Qazi Muhammad Jamil has ' referred to the following paras from the judgment in the case of Supreme Court Advocates-on-Record Association (supra), which read as under:--

"57. Shri B. Pocker Sahib moved the following amendment to Article 103: (2) Every Judge of the Supreme Court other than the Chief Justice of India shall be appointed by the President by warrant under his hand and seal after consultation with the concurrence of the Chief Justice o India; and the Chief Justice of India shall be appointed by the President by a warrant under his hand and seal after consultation with the Judges of the Supreme Court and the Chief Justices of the High Courts in the States and every Judge of the Supreme Court shall hold office until he attains the age of sixty-eight years.

58. Similarly, Mr. Mahboob Ali Baig Sahib proposed the following amendment:

"That in the first proviso to clause (2) of Article 103, for the word 'the Chief Justice of India shall always be consulted', the words shall be made with the concurrence of the Chief Justice of India' be substituted. "

159. To the draft Article 193 with the respect to the appointment of High Court Judges, Mr. S. Pocker Sahib suggested the following amendments:

(1) Every Judge of the High Court shall be appointed by the President by a warrant under his hand and seal on the recommendation of the Chief Justice of the High Court concerned after consultation with the Governor of the State concerned and with the concurrence of the Chief Justice of India and shall hold office until he attains the age of sixtythree years.

160. All the above amendments were rejected after a long deliberation in the Constituent Assembly. Mr. Parasaran urges that when those amendments expressly providing for the concurrence of the C.J,.I. were rejected and the present Articles 124 and 217 have been enacted placing all the Constitutional functionaries including the C.J.I. as only consultees, no interpretation can be justifiably given that consultation with the C.J.I. must be given primacy. According to him, if such a Construction is given to the word 'consultation', we would be rewriting the Articles. Then he cites an observation from the Special Courts Bill (1979) 2 SCR 476; (AIR 1979 SC 478) wherein the word 'consultation' was not construed as 'concurrence' but only as 'consultation' as ruled in Sankal Chand AIR 1977 SC 2328. That observation reads thus:

".... .... the process of consultation has its own limitation and they are quite well-known. The obligation to consult may not necessarily act as a check on the executive: ....."

39. The learned counsel appearing as amicus curiae urged that the primacy should be given to the views of the Chief Justice of Pakistan inter alia for the following reasons:--

(i) That there is a well-established convention that the view of the Chief Justice of Pakistan has invariably been accepted in the appointments of Judges of the superior Courts for a quite long period.

(ii) That under the Islamic Jurisprudence, a well-established convention is binding and so also the opinion rendered by a consultee and that, in any case, the office of the Chief Justice of Pakistan carries with it the implied power to appoint the Judges in the superior judiciary.

(iii) That the independence of judiciary as enshrined in the Objectives Resolution, which is now part of the Constitution by virtue of Article 2A thereof, cannot be achieved if the appointments are left in the hands of the executive nor the concept of separation of judiciary from executive, as envisaged by Article 175 of the Constitution, can be fulfilled."

40. Mr. Qazi Muhammad Jamil, learned Attorney-General, and Messrs Yahya Bakhtiar and Aitzaz Ahsan have referred to a number of foreign publications pertaining to the appointments of Judges including of the Supreme Court of United States and of the Judiciary in United Kingdom in order to demonstrate as under:--

(i) That the power to appoint Judges is an executive power, which cannot be exercised by the judiciary.

(ii) That the process of appointment of Judges is an intensely a political process.

(iii) That in U.S.A. as well as in U.K. the persons having political affiliation have consistently been elevated to the Bench.

(iv) That the actual experience as a practising Advocate has not been considered as a prerequisite for appointment of Judges in U.S.A. and U.K.

(41)(a) Mr. Qazi Muhammad Jamil, learned Attorney-General has referred to the following passages from the following books:--

(i) Corpus Juris Secundum. Volume 48-A:

“The power to select Judges, like all other powers, is derived from the people, and Constitutional or statutory provisions transferring the direct selection of Judges from the people should be plain and unambiguous. It can be exercised only by the statutory to whom it is so given, and cannot be delegated; and any encroachment thereon is void.

Time of selection: Selection to a judicial office must be held at the time provided by law. In accordance with Constitutional provisions, the Legislature may have the power to specify the time for the selection. A law which unnecessarily postpones the right to elect a Judge has been held to be unconstitutional.

A person cannot be-selected to a judicial office which does not exist at the time of the selection, but he may be nominated to fill an office when it comes into existence at a future date.

A State has the power to prescribe the manner or method in which Judges are to be selected, and such manner or method must be in accordance with law. It is generally not within the province of the judiciary to determine the manner or method of selecting Judges, and to the extent to which the Constitution is silent on the subject, or expressly delegates the power to the Legislature, the determination thereof is often within the province of the Legislature, particularly where the office of Judges is created by the Legislature.”

(ii) O. Hood Phillil?s’ Constitutional and Administrative Law. Seventh Edition:

“Appointment of Judges:

The appointment of Judges by the sovereign is now largely governed by statute, supplemented by convention.

The sovereign appoints the lords of appeal in Ordinary, the Master of the Rolls, the President of the Family Division, the Vice-Chancellor and the Lords Justices of Appeal, by convention on the advice of the Prime Minister, who consult the Lord Chancellor. The Queen appoints the puisne

Judges of the High Court by convention on the advice of the Lord Chancellor, who no doubt consults the Prime Minister. The Queen on the recommendation of the Lord Chancellor also appoints Circuit Judges to serve in the Crown Court and county Court, and Recorders to act as part-time Judges of the Crown Court. Stipendiary Magistrates are Appointed by the Crown on the advice of the Lord. "

He has also referred to the Stroud's Judicial Dictionary, Volume 1, Fourth Edition, for the definition of the word "consultation", which reads as follows:--

"Consultation (New Towns Act 1946, (C.68), SA(l), "consultation with any local authorities". "Consultation means that, on the one side, the Minister must supply sufficient information to the local authority to enable them to tender advice, and, on the other hand, a sufficient opportunity must be given to the local authority to tender advice" Per Bucknill L.J. in Rollo v. Minister of Town and Country Planning (1948) 1 All E.R. 13. 13, C.A.; see also Fletcher v. Minister of Town and Country Planning (1947) 2 All E.R. 946. (2) "Consultation so far as practicable ... with the ... parochial church councils" (Pastoral Reorganization Measure 1949 (No.3), S.3(l) means that a full and sufficient opportunity for the members of the council to ask questions and to submit their opinions in any reasonable way should be given (re: Union of Benefices of Whippingham and East Cowes, St. James (1954) A.C. 245.

(3) Correspondence in which the Minister of Local Government gave a clear invitation to a local authority to express its views on a clear proposal was a "consultation" within section 73(l) of the Mauritius Local Government Ordinance, 1962 (No. 16) (Port Louis Corporation v. A.G. (Mauritius) (1965) A. C. 11.11). "

(b) Mr. Yahya Bakhtiar has referred to the following passages from the following books:--

Modem Politics and Government by Alan R. Ball, Third Edition:

"As John Schmidhauser has pointed out, states background in the appointment of American Supreme Court Judges is important, persons coming from north-western European ethnic groups, which in American terms indicates roughly middle and upper-middle cases. Nearly all the Judges of the Court have had strong political commitments before appointment, but in place of class background (or because of it) and varying political backgrounds and levels of political partisanship,

the Court has in recent years been more liberal on many matters, including civil rights and the race question, than, other more representative parts of the American political process. Chief Justice Warren, appointed by President Eisenhower in 1953, was expected to reflect more conservatism in these areas, but instead, until his retirement in 1968 .....

(ii) Paper under the caption "The Organization of the Judiciary" on which the President Roosevelt gave a radio talk on 973-1937, in which he inter alia observed as follows:--

"The Court in addition to the proper use of its judicial functions has improperly set itself up as a third House of the Congress a super Legislature, as one of the justices has called it reading into the Constitution words and implications which are not there, and, which were never intended to be there.

We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution not over it. In our Courts we want a Government of laws and not of men.

I want as all Americans want an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written that will refuse to amend the Constitution by the arbitrary exercise of judicial power - amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognised."

"(iii) The Position of the Judiciary under the Constitution of India comprising Sir Chimanlal Setalvad Lectures by H.M. Seervai:

The reference to President Roosevelt's Court packing plan would suggest that Roosevelt was the first President to attempt to pack the U.S. Supreme Court, but it may come as a surprise to most of you to realise that the U.S. Supreme Court has always been packed. In his history of the Supreme Court, Prof. Preffer quotes from a letter to a friend which President Lincoln explained the factors which he considered in selecting a successor to Chief Justice Taney. Lincoln said that we would not ask to man how he would decide cases. If we did ask, and he answered us, we would despise him. Therefore, we must appoint a man whose opinions are known.

(c) Mr. Aitzaz Ahsan has referred inter alia to the following passages from the books mentioned hereinbelow:--

(i) Comparing Constitutions by S.E. Finer, Vernon Bogdanor and Bernard Rudden. 1955 Edition:

131. Judicial Independence.--The independence of the Judiciary from the pressures of both the legislative and the executive branches of Government is a cardinal entailment of the doctrine of the separation of powers. In many democracies, including Britain, Judges of the High Courts and sometimes of all Courts (for example, in Britain, France, and Germany) are appointed. In the last three countries mentioned, it is the executive branch that appoints. In the U.S.A. it is the President, but by and with the consent of the Senate. Thus, in all these instances the appointment is in the hands of a politically charged body. How then is the independence of the judiciary secured?

132. The answer lies in the respective provisions for payment and for removal. The principle seems to be that though a Judge may be appointed by the executive, he or she shall not or not easily be removed by it. Thus, the German Constitution provides (Articles 97) that the Judges cannot be dismissed 'except by virtue of a judicial decision', and under this is subsumed removal by the process of impeachment (Article 98). The French Constitution declares that 'Judges shall be irremovable (Article 64) and that disciplinary proceedings must take place in the Council Superieur de la Magistrature. It must be remembered, however, that in these two countries, as in all civil law countries, Judges are civil servants. In the U.S.A., a common law country like Britain, the Judges are appointed during good behaviour, their salaries may not be tampered with, but they may be impeached before the Senate for misconduct. "

(ii) Constitutional Dialogues: Inte1pretation as Political Process by Louis Fisher:

Subjecting federal Judges to presidential nomination and Senate confirmation creates an intensely political process. Appointments to the Supreme Court are highly political appointments by the nation's chief political figure to a highly political body. From an early date, Senators wielded considerable power in choosing nominees for federal Judgeships. Members of the Supreme Court (especially Chief Justice Tart) have lobbied vigorously for their -candidates. Other sectors of Government are active. An unusually candid Judges remarked:

"A Judge is a lawyer who knew a 'Governor. Private organizations participate. The American Bar Association (A.B.A.) organized in 1976, plays a key role. Its influence increased during the Truman administration when it established a special committee to judge the professional qualifications of candidates. Acting on names submitted by the Attorney-General, the committee informs the Chairman of the Senate Judiciary Committee whether a nominee to the Supreme Court fits the category of 'well-qualified', 'not opposed', or 'not qualified'. The A.B.A. categories for the lower Courts are exceptionally well-qualified, 'well-qualified', 'qualified' or 'not qualified'. ...

"There is no agreement on the qualifications appropriate for judicial appointments. Two giants on the Supreme Court, Oliver Wendell Holmes and Benjamin Cardozo, had years of experience as State Judges. The 'greatness' of the Supreme Court Justice, however, does not seem to depend on prior judicial experience. Some of the most prominent members of the Court, including John Marshall, Joseph Story, Samuel Miller, Charles Evans Hughes, Louis D. Brandeis,

Harlan F. Stone, Hugo Black, William O. Douglas, Robert H. Jackson, Felix Frankfurter, and Earl Warren, had, no previous experience either as a State or Federal Judges. Justice Frankfurter believed that it could be said 'without qualification that the correlation between prior judicial experience and fitness for the Supreme Court is zero'. Competence turns less on technical mastery than, on experience in public affairs and broad political understanding." ;

(iii) American Constitutional Law by Louis Fisher:

"Changes in the Court's composition enable it to incorporate contemporary ideas and attitudes. Justice Jackson denied that this fact did any violence to the notion of an independent, non-political judiciary; let us not deceive ourselves; long-sustained public opinion does influence the process of Constitutional interpretation. Each new member of the ever-changing personal of our Courts brings to his task the assumptions, and accustomed thought of a later period. The practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority".. Vital Speeches, No.24, Vol. XIX, P.761 (Oct. 1, 1953). "

(iv) American Law by Lawrence M. Friedman:

"The situation in the United States could hardly be more different. American Judges are lawyers, plain and simple. Usually, they are lawyers who are, or have been politicians. One survey of Judges in the United States Courts of Appeal, for example, found that about four out of five had been 'political activists' at some point in their careers. The situation is the same on State Courts perhaps more so. Judges are usually faithful party members; as seat, on the Bench is their reward for political service. They are also supported to be good lawyers and to have the stuff of good Judges; whether this is actually taken into account depends on where they are, who does the choosing, and so on."

(v) The Supreme Court and American Democracy by David G. Barnum:

"Social Origins of Supreme Court Justice.--Between 1789 and 1991 (with the confirmation of Clarence Thomas),_ 106 individuals have served on the Supreme Court. Not surprisingly, a large proportion perhaps 85 to 90 per c a come from families that were economically secure and enjoyed high social status. Only a 'handful' of justices, according to one scholars were of essentially humble origin'. Among those justices, of course are some of the Court's most prominent members, including William Douglas, Arthur Goldberg, and Thurgood Marshall, and Chief Justices Earl Warren Burger. The typical appointee, however, is someone from a high status background.

Other features of the background of Supreme Court Justices distinguish them, as a group, from the general population. About two-thirds of the justices have come from politically active families, and about one-third have been related by blood or marriage to individuals who themselves had career in the judiciary. The ability of families to transmit particular values and advantages is clearly evident in the disproportionate number of justices who come from families with a tradition of political activity and/or judicial service."

Political Activity and Partisanship:

"Substantial proportion of justices were deeply involved in Government and politics prior to the appointment to the Supreme Court. Some such as Justice Black and Chief Justice Waren, had held high elective office. Others, for example, Justice White and Chief Justice Rehnquist, had held high administrative positions in the Federal Government. Almost all Supreme Court appointees have been politically active in some sense or other. Good examples of Justice Powell (who was, active in school affairs in Virginia and was at one time President of the American Bar Association), Justice O'Connor (who was elected to and eventually became majority leader of the Arizona State

Senate), Justice Fortas (who practised law in Washington, D.C., and participated myriad ways in Democratic politics at the Federal level. “

(vi) Constitutional Texts edited by Rodney Brazier:

“It has become progressively more difficult to combine membership of the Commons with a successful practice at the Bar. Lord Hailshain has regretted that he was unable to appoint a single High Court Judges from among M.Ps. There is something of a vicious circle in that the lack of a reasonable prospect of elevation to the Bench may discourage the ablest lawyers from seeking a political career. Political experience has been regarded by some as an asset for an appointee. Lord Simon has argued that: ‘although no one would wish to see a predominantly political Bench, a seasoning of Judges with experience of politics and administration is far from disadvantageous; constituency duties, for example, are calculated to develop a social awareness which ordinary forensic work is not apt to inculcate’. “

(vii) American Constitutional law, Sixth Edition by Martin Shapiro:

“Prior judicial experienced is not essential because of the -peculiar nature of the Court’s work. The Supreme Court is concerned principally with resolving major questions of public law that is, questions arising out of broad, fundamental issues of public policy. Throughout history, almost every major political issue before the country has ultimately reached the Supreme Court in the guise of litigation. What is required for the resolution of these issues is political judgment of the highest order rather than technical judicial proficiency in private law. Hence, judicial experience, although perhaps helpful, is not essential for success on the Court; in fact, if it had been a prerequisite in the past, most of the greatest Supreme Court Justices, such as Marshall, Story, Taney, Miller, Hughes (first appointment), and Brandeis, would have never reached the highest Bench. It is interesting to note, however, that three recent appointees, Justices Goldberg, Fortas, and Marshall, although lacking extended prior judicial experience, had previously had long and very successful records as practising attorneys representing important clients before the Supreme Court. “

(viii)The Tempting of America ‘The Political Seduction of the Law by Robbert H. Bork, P.34:

"There is a story that two of the greatest figures in our law, Justice Holmes and Judges Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, 'Do Justice, Sir, do justice.' Holmes stopped the carriage and reproved Hand: 'That is not my job. It is my job to apply the law.' I meant something like that when I dissented from a decision that seemed to proceed from sympathy rather than law: We administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law'. "

It may be pointed' out that the above treatise also deals with the famous case of a slave by the name Dred Scott, which matter went up to the Supreme Court of United States, wherein Taney, C.J. strongly pleaded in favour of the slavery. It further deals with the decision rendered by Salmon P. Chase, who was a rival candidate for Presidential nomination for the Republican in 1860, who was then made the Secretary of the Treasury by President Lincoln and in that capacity he supported the paper currency but when he was appointed Chief Justice by Lincoln, he in the case of Hepburn v. Grisword took the view that the Constitution forbade making papers legally tender.

(ix) Encyclopaedia of the American Constitution by Leonard W. Levy and two others:

"Only the President and his close advisers know the actual motivations for the choice of a particular Supreme Court appointee. But a perusal of the records of the thirty-five Presidents who nominated Justices (four - W.H. Harrison, Zachary Taylor, Andrew Johnson, and Jimmy Carter - had no opportunity to do so) points to several predominating criteria, most apparent of which have been; (1) objective merit; (2) personal friendship; (3) considerations 'of 'representative-ness'; (4) political ideological compatibility, what Theodore Roosevelt referred to as a selectee's real politics; and (5) past judicial experience.

(x) Constitutional Law by Mark V. Tushnet:

"Mr. Justice Frankfurter has recently reminded us, a surprinsingly large proportion of the Justices, particularly of the great justices who have left their stamp upon the decisions of the Court, have had little or no prior judicial experience. Nor have the justices certainly not the great justices been timid men with a passion for anonymity. Indeed, it is not too much to say that if justices were appointed primarily for their 'judicial' qualities without regard to their basic attitudes on fundamental questions of public policy, the Court could not play the influential role in the American political system that it does in reality play. "

(xi) Comparative Constitutional Law by Dr. (Justice) Durga Das Basu:

"In the light of the foregoing decisions, it is evident that the spate of judicial activism in India should be resisted by pointing out that even the theory that the role of the Court is wider in the matter of interpreting a Constitution than an ordinary statute, would not justify a Court in rewriting the Constitution. Bhagwati, J. has rightly observed, in a recent case:

'We have ... to rid our mind of any preconceived notions or ideas and interpret the Constitution as it is and not as we think it ought to be. We can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation. (Supta v. Union of India AIR 1982 SC 149).

(xii) Parliament--Functions, Practice and Procedures by J.A.G. Griffith:

"The Lord Chancellor is always a member of the Government with a seat in the Cabinet, and has responsibility for a department with recently enlarged duties for the administration of justice. It has increasingly proved difficult for him to obey the standing order which enjoins that 'it is the duty of the Lord Chancellor ordinarily to attend the Lords House.' When in the House, unlike the Speaker in the Commons, he may take part in debate and vote. There is no convention inhibiting him from party political controversy, and he does not have a casting vote.

When the Lord Chancellor is not present, other Lords may sit as Speaker, by virtue of a Royal Commission; in their absence and that of any Deputy Chairman, the House may, on motion, appoint its own Speaker."

Mr. Aitzaz Ahsan has also referred to the Halsbury's Laws of England, Fourth Edition, Volumes 8 and 10 to indicate as to the Procedure Of appointment of the Lord Chancellor and the Judges in United Kingdom besides referring to "The Due Process of Law% Landmarks in the Law by Lord Denning and O. Hood Phillips Constitutional and Administrative Law, Seventh Edition. It is not necessary to refer to the contents of the above books as they do not directly deal with the matter in controversy except that the last book has relevance, the relevant portion of which has already been dealt with hereinabove while dealing with the legal status of the Constitutional conventions.

He has also submitted photostat copies of the relevant provisions relating to the appointment of judiciary of seventy-one countries from the treatise Constitutions of Nations by Amos J. Peaslee, which indicates that in some countries Judges are appointed by election; in some countries Judges are appointed by the Head of the Government; in some countries the President nominates and the appointments are made with the consent and approval of Legislature and in some countries the appointments are made on the advice of the Judicial Commission/Judicial Service Commission by the Head of the Government.

(d) Mr. S.M. Zafar has referred to the following passages from the following books:--

(i) The Search –for justice by Joshua Rozenberg

"'Mere would be a public Outcry if it became known that High Court Judges were being selected or rejected on political grounds-- It is no longer the case that M.Ps. are regularly appointed to the Bench as they were during the nineteenth century. And it is no longer case, as it was until the Second World War, that a retiring Attorney-General can expect appointment as Lord Chief Justice or some other high judicial office when a vacancy next arises. However, it is still possible for a defendant to find himself appearing in Court before someone with declared political views; a number of M-Ps. sit from time to time as Recorders of the Crown Court indeed, there is always a chance that the part-time Judges called upon to interpret an unintelligible provision in the latest Criminal Justice Act was the M.P. who helped fashion it."

(ii) A MATTER OF JUSTICE—THE LEGAL SYSTEM IN FERMENT BY MICHAEL ZANDER; THE APPOINTMENT PROCESS AND POLITICS

Since the Lord Chancellor is a political appointment and a member of the executive by virtue of his membership of the Cabinet, how far does politics intrude into the business of appointing Judges? In former times the appointment of Judges was decidedly prone to party political influence. Professor Baroin Laski, for instance, produced statistics to show that out of 339 Judges appointed between 1822 and 1906, 80 were Members of Parliament at the time of nomination and another had been candidates; and that out of 83 Judges appointed who left Parliament for the Bench, 63 were appointed by their party while in office. It has been calculated that in 1956, 23 per cent. of the High Court, Court of Appeal or House of Lords Judges had been either M.Ps. or candidates 11 per cent. Conservative, 10 per cent. Liberal, and 2 per cent. Labour. But for the past two or more

decades it has been broadly accepted that the Lord Chancellor does not allow party political considerations to influence his choice of Judges. During that period it has become very rare for anyone to be appointed to the Bench direct from Parliament, and it is equally rare for the issue of party politics to be brought-, up in criticism of the Lord Chancellor's appointments. "

(iii) Judges by David Pannick.

"Nothing can be more fantastical than the distribution of prizes in the lottery of legal promotion. Yet, as Lord Hailshain recognized, the selection and appointment of the judiciary is one of the most important responsibilities of a Lord Chancellor. No one can calculate the aggregate amount of evil inflicted on the community by a bad decision--------."

In the U.S.A. the President has the power to appoint Supreme Court Justices with the consent of the Senate. A Presidential nominee has to undergo a Senate examination of his record and jurisprudential beliefs. This serves a valuable function in helping to articulate the criteria of a good Judge, in publicizing the beliefs of the nominee, in rejecting inadequately qualified candidates, and in focusing public attention on the process of appointment. The Senate has declined to confirm twenty seven of the nearly 140 Supreme Court nominees placed before it since 1789. Other Federal U.S. Judges are similarly appointed by the President, subject to confirmation by a vote of the Senate. The tasks of the President and the Senate are facilitated by the practice of the American Bar Association of assessing whether the nominee is qualified to be a Judge."

(iv) Judges and the Judicial Power Essays in Honour of Justice V.R. Krishna lyer edited by Rajeev Dhavan, R. Sudarshan and Salman Khurshid:

"In the end there is this problem before us. As the great historian Lord Acton said: All power tends to corrupt. Total power corrupts absolutely. Who is to control the exercise of power? Only the Judges. Some one must be trusted. Let it be the Judges."

(v) The Politics of the U.S. Supreme Court by Richard Hodder Williams:

"Like Roger Taney's judgment in Dred Scott then, he assumed that the Constitution spoke with the same words and the same meaning to all generations. Even on his own terms, this view presents problems, since the historical context does not always ensure a clear and perfect understanding of the precise implications intended by the Founding Fathers in the general phrases of the Constitution. Besides, it is, as John Marshall said, a Constitution to be interpreted, a blueprint requiring detailed infilling in the interstices and grey areas left by its generalities. The notion of what constitutes 'equal protection', for example, does change over time both in meaning and application. Indeed, one of the strongest defences of the Supreme Court has been that, despite momentary and sometimes not so momentary abarrations, it has adapted and reformulated the Constitution to meet the exigencies of the time. This has been crucial; for only by a gradual process of reformulation and redefinition could the Constitution retain its reverence, its legitimacy and its effectiveness."

(vi) The Independence of the Judiciary by Robert Stevens:

"While Judges and indeed the Judicial Office may be admirably suited to factual investigations, such as accidents, when Judges are assigned tasks as commission or committee chairs, which require them to articulate policies and to choose between these policies, the separation of powers is inevitably blurred. However, one defines it, judicial independence is threatened. This becomes especially important when the Cabinet rejects reports that it has commissioned from Judges. This has happened at least twice within relatively recent memory. "

(vii) Constitutional Interpretation by Philip Bobbitt:

"On July 7, 1987 the Judiciary Committee of the United States Senate received the President's nomination of Judge Robbert Bork to be an Associate Justice of the Supreme Court. Hearings on the nomination began on September 15, and continued until the end of the month, during which the nominee himself testified for thirty hours."

(viii) Constitutional Dialogues: Interpretation as Political Process by Louis Fisher:

Justice Stone once lectured his brethren: 'the only check upon our own exercise of power is our own sense of self-restraint."

He has also referred to the Mejelle by C.R. Tyser and Shariah The Islamic Law by Abdur Rahman, I. Doi, which I have already referred to and quoted their relevant portions hereinabove.

(e) Mr. Muhammad Akrain Sheikh has referred to the following publications besides the two treatises which I have already referred to hereinabove but he has not read out any portions of the same:-

(i) Constitutional Practice by Rodney Brazier;

(ii) The Constitution in Flux by Philip Nortton;

(iii) Constitutional Reform by Rodney Brazier;

(iv) de Smith and Brazier's Constitutional and Administrative Law, Sixth Edition by Rodney Brazier;

(v) The Constitution, The Courts, And Human Rights by Michael, J. Perry;

(vi) Constitutional Text edited by Redney Brazier; and

(vii) V.,N. Shukla's Constitution of India, Ninth Edition.

I have gone through the same and find that the points dealt with in the above treatises are covered by the aforesaid foreign publications cited by Messrs Qazi Muhammad Jamil, Yahya Bakhtiar, Aitzaz Ahsan and S.M. Zafar.

(b) Mr. Riazul Hassan Gilani has referred to the following publications on the import of the word "consultation" and in support of his contention that the office of the Chief Justice impliedly carries the power to appoint Judges in the superior judiciary:--

(i) Holy Qur'an with English translation. He has relied upon the Verse 159 of Surah Al-Imran, the English translation of which reads as under-

159. It was by the mercy of Allah that thou wast lenient with them (0 Muhammad), for it thou hadst been stem and fierce of heart they would have dispersed from round about thee. So pardon them and ask forgiveness for them and consult with them upon the conduct of affairs. And when thou art resolved, then put thy trust in Allah. Lo! Allah loveth those who put their trust (in Him)."

(ii) Tafseer IbneKaseer Aljuz Awal

He relied upon the following Verse from Surah Al-Imran of Holy Qur'an:--

He relied upon the following translation:--

(v) The Holy Qur'an by Maulana Abdul Maiid Dgaabadi:

He relied upon the following English translation of Verse 159 of Surah Al-Imran and para. 300:--

" 159. It was then of the mercy of Allah that thou hast been gentle with them; and wert though rough, hardhearted, they had surely dispersed from around thee. So pardon them thou, and ask thou forgiveness for them and take thou counsel with them in the affair, and when thou hast resolved, put thy trust in Allah. Verily Allah loveth the trustful. "

300. i.e. in the important affairs of the community, such as peace' and war. Note the essentially democratic character of the commonwealth of Islam. Even the divinely guided Prophet is enjoined to establish, by his example, the practice of deliberation in the community. "

He relied upon the following:--

Translation by Mr. Gilani:

Translation by Mr. Gilani:

He relied upon the following:

Its translation:

He relied upon the following:

Translation.

Ijma" is synonym of lzma- i.e. Azam and Ittifaq.

He relied upon the following:

Translation.

He relied upon the following:

Translation:

He relied upon the following:

(xviii) “Law in the Middle East” edited by Maiid Khadduri and Herbert, J. Liebesny.

He relied upon the following extract:--

“Thus, the appointment of the position of Qadi al-Qudat (Chief Qadi) entails, without its being expressly mentioned, the right to appoint Na’ibs; for the Qadi al-Qudat is the head of the judicial administration with the right to appoint and dismiss Judges.”

42. The question, as to whether the appointment of Judges is an executive act or not, will depend on the language employed in the relevant provisions of the Constitution in issue. I have ‘ already referred to hereinabove the facturn that Mr. Aitzaz Ahsan has furnished photostat copies of the relevant Articles of the Constitution of 71 Countries, which inter alia indicate different modes of appointment of Judges, namely:--

(i) by election through the mode provided in the relevant Articles of the Constitution;

(ii) by nomination by the head of the State but appointment with the consent of the legislative body;

(iii) by the head of the Government on the advice of Judicial Commission/Judicial Services Commission,

(iv) by the head of the Government; and

(v) by the head of the State in consultation with the heads of the Judiciary.

The extracts of the foreign publications quoted hereinabove relate to the appointments of inter alia Supreme Court Judges in the United States and the Judges of various Courts in United Kingdom. The publications relating to the appointment of Supreme Court Judges in. U.S.A. indicate that various Presidents of U.S.A. attempted to pack the United State Supreme Court with the Judges having some political affiliation or belonging to certain class or certain areas of the United States. According to David G. Barnum, in his book under the title "The Supreme Court and American Democracy", referred to hereinabove in subpara. (v) of para. 41(c), during the period between 1789 to 1991, 106 individuals had served on the Supreme Court, out of them perhaps 85 to 90 per cent. had come from families that were economically secure and enjoyed high social status. He further observed that about two-third of the justices had come from politically active families and out of them one-third had been related by blood or marriage to individuals who themselves had career in the judiciary. Whereas, according to another author Martin Shapiro, in his book under the caption American Constitutional Law, referred to hereinabove in sub-para. (vii) 'of para. 41(c). prior judicial experience is not essential because of the peculiar nature of the Courts work as, according to him, the Supreme Court is concerned principally with resolving major questions of public law the questions arising out of broad fundamental issues of public policy. Louis Fisher in his treatise under the caption "Constitutional Dialogues"--Interpretation as Political Process, stated that Justice Frankfurter believed that it could be said without qualification that the correlation between prior judicial experience and fitness for the Supreme Court is zero". It may also be observed that Mark B. Tushnet, in his treatise on Constitutional Law referred to the facturn that Justice Frankfurter reminded that large proportions of justice particularly of great justices, who had left their stamp upon the decisions of the Court had little or no prior judicial experience.

The then American President, Roosevelt, on his radio talk on 9-3-1937, referred to by Mr. Yahya Bakhtiar, was highly critical of the working of the United States Supreme Court and observed that we have therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself". He worked out a plan to back up the Supreme Court with the new Judges in order to outnumber the sitting Judges who were not supporting his views/actions, and for that purpose, he sent a bill but the Senate Committee in its report frustrated the above attempt. In this regard, it may be pertinent to quote the relevant portion of the above report from the book under the title "Constitutional Dialogues"--Interpretation as Political Process by Louis Fisher, relied upon by Mr. S.M. Zafar, which reads as under:--

"The report's harsh language was designed to repudiate the bill so emphatically that no President would ever float the idea again:

This is the first time 'in the history of our country that a proposal to alter the decision of the Court by enlarging its personnel, has been so boldly made. Let us meet it. Let us now set a salautary precedent which will never be violated. Let us, of the Seventy-fifth Congress, in words that will never be disregarded by any succeeding Congress, declare that we would rather have an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defence of the liberties of the people, then a Court that, out of fear or sense of obligation to the appointing power, or factional passion, approves any measure we may enact. We are not the Judges of the Judges. We are not above the Constitution,"

The above committee's report was supported by the then Chief Justice of U.S. Supreme Court, Mr. Justice Hughes, who wrote a letter stating that the Court was fully abreast of its work and there was no congestion of cases upon our calendar.

After the successful revolution in the United States and the formation of the Federation, the situation was not stable and, therefore, the concepts of rule of law or an independent judiciary were different. The anxiety oil the part of the Presidents of the United States who were in office immediately after the revolution was to consolidate the Federation. To achieve the above object, the appointments in the U.S. Supreme Court used to be made with the consent of the Senate of the person known having same views as the President and his party had about the broad political and public policy matters. With the passage of time and after the emergence of United States as a great country, thinking and their perceptions about the rule of law, independence of judiciary has undergone material change. The U.S. Supreme Court also became more active in practising activism. There also seems to be a change in the trend in the appointments of Judges in the Supreme Court in United States and the people want an independent Court, a fearless Court, a Court that will dare to announce its honest opinions in what it believes to be the defence of the liberties of the people, than a Court that, out of fear or sense of obligation to the appointing authority or factional passion, approves any measure which the Congress may enact. The Bar Association also played part in projecting the candidates for judgeship for U.S. Supreme Court. There is a long drawn process of scrutiny of a candidate for judgeship of the Supreme Court by the Judicial Committee of the Senate in which all sorts of questions are put to him namely, about his character, conduct, past and present life besides testing his legal knowledge and ability. The above examination by the Senate Committee is telecast nationally so that public should know about the person who is going to sit in the Supreme Court for his remaining life and they may come forward with the adverse information about him.

Mr. Robert Bork, who was nominated for an associate justice of the Supreme Court by the President, remained under cross-examination during the scrutiny process conducted by the Judicial Committee of Senate for the period commencing from 15-9-1957 and continued until the end of the month for 30 hours and eventually the Senate rejected him.

It is true that even in England up to about two decades back, the Judges were appointed from the members of the Parliament belonging to political parties particularly to the party in power. Michael Zander in his book under the title "A Matter of Justice - The Legal System in Ferment", relied upon by Mr. S.M. Zafar and referred to hereinabove, has referred to the statistics collected by Professor Herold Laski, which indicates that out of 339 Judges appointed between 1822 and 1906, 80 were members of the Parliament at the time of nomination and another I I had been candidates; and that out 83 Judges appointed who left for the Bench, 63 were appointed by the party while in office. The same also indicates that in 1956, 23 per cent. of the High Court, Court of Appeal or House of Lords, Judges had been either M.Ps. or candidates; out of them, I I per cent. Conservative, 10 per cent. Liberal and 2 per cent. Labour. The author also points out that for the past two or more decades, it has been broadly accepted that the Lord Chancellor does not allow party political considerations to influence his choice of Judges.

43. Mr. S.M. Zafar has also produced a booklet under the caption "Judicial Appointments" --- The Lord Chancellor's Policies and Procedures, issued in November, 1990, by the present Lord Chancellor Lord Mackay of Clashfern to make it public the procedure prevalent in U.K. for the appointment of Judges in the various Courts. The above booklet indicates that a thorough scrutiny of a candidate for Judgeship is carried out by the staff, which is known as Judicial Appointments Group, and by the Lord Chancellor himself and the appointment is made on merits not for political reasons. It will not be out of context to reproduce the following extract from the above booklet:--

"I share with all my predecessors the view that the appointment of Judges and judicial officers is among my most important responsibilities. The volume of work in the judicial system is constantly increasing and, despite the measures the Government, the Judges and the profession are taking to improve efficiency, the number of Judges and judicial officers continually rises. This makes it essential to ensure that those appointed are of the highest professional calibre, integrity and judicial quality. I regard this as a vitally important personal responsibility. Therefore, I myself take all the decisions on individual appointments and about our policy and procedures. I am assisted in this task by a small team of officials and also by a much wider circle of Judges and of senior members of both branches of the legal profession. As Lord Hailsharn said when introducing the first edition of this booklet, our arrangements depend on a working partnership between my Department, the judiciary and the profession. "

. Reference may also be made to the procedure adopted by the Lord Chancellor's department:--

"In order to follow the principle of wide consultation observed by successive Lord Chancellors, the small team of officials in the Lord Chancellor's Department who make up the Judicial Appointments Group have, with the approval of the Lord Chancellor, developed the following system.

Every year there is a review of the potential candidates for appointment in each Circuit. In the case of the South Eastern Circuit, which is very large, this process is more or less continuous. In the other Circuits, the review takes the form of a visit to the Circuit by a senior member of the appointments team extending over a period of about a fortnight, in which Judges at all the principal Courts are consulted. Each is asked to express a view of the suitability of Recorders for full-time appointment, of Assistant Recorders for promotion to Recorder, and of members of the profession for appointment as Assistant Recorders. Following these visits, there are consultations with the Presiding Judges and Leaders of the Circuits. Senior members of either Bench of the profession may also be consulted in certain cases.

With regard to those who apply to sit as Deputy District Judges, Acting Stipendiary Magistrates or Tribunal Chairman, similar consultations are undertaken with members of the judiciary before whom the candidate often appears. References are also taken up.

The views thus obtained are then collated and recorded. When the Lord Chancellor is considering an appointment, therefore, he will have before him a collection of informed views about a candidate's ability, standing in the profession, and suitability for judicial office. Before making an appointment, he will also consult the senior Judges. In the Circuits, the Presiding Judges play a key role and are regularly consulted on appointments. When appointments are made to the ranks of Queen's Counsel or to the High Court, the process involves consultation between the Lord Chancellor and the four Heads of Division, the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Vice-Chancellor, together with the Senior Presiding Judges."

It is evident from the above-quoted extracts from the aforesaid booklet that in U.K. there is a very effective system in selecting the candidates for judgeship be selection is based after collecting information in respect of the candidate or the members of the profession, members of judiciary which inter alia include Heads of four Divisions i.e. the Lord Chief Justice, the Master of the rolls, the President of the Family Division, together with the Senior Presiding judges.

44. In my view, the system of appointment of Judges obtaining in U.S.A. and U.K. has no direct bearing on the controversy in issue. Out of deference to the learned counsel, I have quoted certain extracts from the books cited by them The systems of appointment of Judges in the above two countries are different as, compared to our country. The relevant Articles in our Constitution relating to appointments in Judiciary with minor variations have been lifted from the Indian constitution, 1950, and, therefore, the factum as to how they have been interpreted and acted upon in India is relevant. I have also referred to and quoted the relevant extracts from the relevant judgments of the Indian Supreme Court covering the controversy in issue.

I have already pointed out hereinabove that while construing the relevant provisions of our Constitution, we will have to invoke aid of the Islamic jurisprudence for the reasons already discussed besides pressing into service the established conventions, if any.

Mr. Riazul Hassan Gilani, learned A.S.C. appearing for Lahore High Court bar Association, has referred to hereinabove a number of Verses from Holy Qur'an and books on Islamic Jurisprudence to indicate the import of the word "consultation". The above-quoted Verses and the extracts from the aforesaid books indicate that though Holy Prophet Muhammad (p.b.u.h) was divinely guided because of divine revelations but he used to consult his companions and other Muslims in important affairs as commanded in Verse No.159 of Surah Al-Imran. It is also evident that the four Caliphs also used to consult people in all matters. Holy Prophet as well as Caliphs used to accept the advice tendered by colleagues and people who had the status of Ijma having binding effect. However, in my humble view, the consultation referred to in the above-quoted Verses from the Holy Qur'an and the books is different inasmuch as the same relates to the collective consultation from-the people, whereas the present consultation is of an individual character. In this view of the matter, we cannot press into service the principle of Ijma.

Mr. Riazul Hassan Gilani has also cited a number of treatises, of which relevant portions have been quoted hereinabove, in furtherance of his above submission that the office of (Chief Qadi) impliedly carries the power to appoint Naib Qadis. In this regard, it may be pertinent to observe that during Banu Ummayyad period, the judicial system had suffered a set back inasmuch as the Qadis were not appointed on merits but they were appointed on extraneous considerations with the object to obtain decision according to the desire of the ruler. In this behalf, reference may be made to the. Instance quoted in the above book under the caption" Imam abu Hanifa Az Mufti Aziz-ur-Rehman" namely, that during the period of Khalifa Mansoor's Mehdi, a dispute arose between an officer of the Army and a businessman about the ownership of the land. The matter was taken up before Qadi Ubaid Ullah Bin Hassan. Mehdi sent a message to the above Qadi that the case should be decided in favour of the Army Officer. Contrary to the above instruction, Qadi Ubaid Ullah Bin

Hassan decided the case against the Army Officer. Thereupon, immediately he was dismissed by Mehdi.

However, there seems to be divergence of views inasmuch as a well-known Muslim Jurist, was of the view that a (Chief Qadi) did not have the power to appoint other Qadis unless the king expressly conferred the powers to do so. It will not be out of context to mention that during the days of Holy Prophet Muhammad (p.b.u.h.) and the four Caliphs, there was no office of (Chief Qadi). The Qadis were appointed by Holy Prophet himself and by the Caliphs. The first time the above office was introduced by Khalifa Haroon Rashid, who appointed Imam Abu Yousaf as the first (Chief Qadi). He was not only (Chief Qadi) but was also Minister of Law. Khalifa Haroon Rashid had great - respect and liking for Imam Abu Yousaf and, therefore, he used to consult him in various State matters. This office was maintained by the Muslim Rulers.

In my view, there is not sufficient material before me to decide authoritatively the question, as to whether the preponderance of Islamic Jurists view is in favour of the facturn that the office of Chief Qadi carries the implied power to appoint other Qadis and, therefore, I. am not inclined to decide the above question. Additionally, the office of the Chief Justice of Pakistan has been created by Article 176 of the Constitution. The above Article and the subsequent Articles do not confer any power on the Chief Justice to appoint other Judges. .No Chief Justice has ever claimed any implied power to appoint Judges in the superior judiciary. The role assigned by the Constitution to the Chief Justice is that inter alia he is to be consulted by the President before any appointment of a Judge in the Supreme Court or in a High Court is made.

45. Mr. S. Sharifuddin Prizada has pointed out that after the judgment in the case of S.P. Gupta (supra) was handed down by the Supreme Court of India which included the opinion of Mr. Justice Bhagwati to the effect that if all the consultees mentioned in the, relevant Articles of Indian Constitution were to recommend a particular candidate for judgeship unanimously, the Executive could decline to accept the same, there was lot of criticism inasmuch as a number of articles commenting adversely on the above judgment appeared in the Indian Press which inter alia included articles by Mr. Arun Shourie. According to him, Mr. Justice Bhagwati issued an explanation that certain portions of his opinion had been left out from the typed script. He also issued a corrigendum containing the above left out matter, which reads as follows:--

“It may prima facie be vulnerable to attack on the ground that it is mala fide or based on irrelevant grounds. The same position would obtain if an appointment is made by the Central Government contrary to the unanimous opinion of the Chief Justice of the High Court and the Chief Justice of India. “

In this regard, it may also be pertinent to point out again that though it was held that the Chief Justice of India's view did not have primacy but, at the same time, it was held that the consultation contemplated by the Constitution must be full and effective and by convention, the views of the Chief Justice of the High Court concerned and the Chief Justice of India should always prevail unless there are exceptional circumstances which may impel the President to disagree with the advice given by the above Constitutional authorities.

I may now revert back to the recent judgment of the Indian Supreme Court in the case of Supreme Court Advocates-on-Record Association (supra). I have already quoted hereinabove in para.35 the relevant portion of J.S. Verma, J.'s opinion, who wrote for himself and for his four. learned brethren. A close scrutiny of the same indicates that the above learned Judges's opinion that the Chief Justice of India's view will have primacy is contingent on the conditions mentioned by him and in certain events the view of the Chief Justice of India can be ignored. In this regard, it may be pertinent to point out that in sub-para. (1) of para.501 of the opinion, he opined that the opinion given by the Chief Justice of India in the consultative process has to be formed taking into account the views of the two senior most Judges of the Supreme Court. He further opined that the Chief Justice of India is also expected to ascertain the views of the senior most Judges of the Supreme Court belonging originally to a particular High Court, from which High Court a candidate for Supreme Court judgeship is under consideration. Incidentally, I may point out that though under Article 124 of the Indian Constitution the President may consult some of the Judges of the Supreme Court and the High Court while considering the question of appointment of a Supreme Court Judge, but there is no requirement for the Chief Justice of India to consult any of his colleagues. The above observation of the learned Judges is founded on a convention obtaining in the Indian Supreme Court and not in terms of the Constitution.

Whereas in sub-para. (6) of para. 501 of his opinion, he observed that there may be a certain area, relating to suitability of the candidate, such as his antecedents and personal character, which, at time, consultees, other than the Chief Justice of India, may be in a better position to know. In that area, the opinion of the other consultees is entitled to -due weight, and permits non-appointment of the candidate recommended by the Chief Justice of India". Reference may also be made to sub-para. (8) of aforesaid para. 501, where Verma, J. opined that if the opinions of senior Judges consulted by the Chief Justice are contrary to the views of the Chief Justice as to the suitability of the recommendee for the reasons recorded by them, the President may accept their views and then the non-appointment of the candidate recommended by the Chief Justice of India would be permissible. He further opined that similarly, when the recommendation is for appointment to a High Court and the opinion of the Chief Justice of the High Court conflicts with that of Chief Justice of India, the non-appointment for valid reasons to be recorded and communicated to the Chief Justice of India would be permissible. It is, therefore, evident that factually it has not been held that the Chief Justice's views would have primacy in all matters of recommendations made by him for the appointment of Judges in the superior Courts.

46. Mr. S. Sharifuddin Pirzada has also invited our attention to the case of Issuarchand Aggarwal- v. State of Punjab AIR 1974 SC 1292 to point out that even earlier in 1974 the Indian Supreme Court's view was -that the Chief Justice's views should be accepted. The above case related to the interpretation of Article 235 read with Article 311 of the Indian Constitution pertaining to subordinate judiciary. The Bench comprised, A.N. Ray, C.J. D.G. Palekar, K.K. Mathew, Y.V. Chandrachud, A. Alagirisami, P.N. Bhagwati and V.R. Krishan Iyer, JJ. He has invited our attention to para. 148 from the opinion of V.R. Krishan Iyer, J., which reads as under:--

"148. In the light of the scheme of the Constitution we have already referred to, as to the personal satisfaction of the President is correct. We are of the view that the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is Constitutionally secured when his Ministers arrive at such opinion, satisfaction or decision. The independence of the Judiciary which is cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant Article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian Justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue."

He has also referred to the case of M.M. Gupta and others v. State of J&K and others AIR 1982 SC 1579, which case was decided on 15-10-1982 i.e. several months after the decision in the S.P. Gupta's case (supra). To the above judgment, Bhagwati, J. was also a party, in which Article 235 of the Indian Constitution relating to the appointment of District and Sessions Judges, which provided consultation by the Governor with the High Court concerned, was dilated upon. He has particularly relied upon the following observations contained in para. 33, which read as follows-

"Unfortunately, for some time past there appears to be an unhappy trend of interference in the matter of judicial appointments by the executive both at the State and the Central level. The unfortunate interference by the executive results in prolonged and unnecessary delay in making the appointments and judicial vacancies continue for months and in cases for years with the result that the cause of justice suffers. It is common knowledge that members of the Bar who are considered suitable to be on the Bench are reluctant to join the Bench and the Office of a Judge has for various reasons ceased to attract the talented members of the Bar. The further unfortunate fact is that even in cases when competent members of the Bar may be persuaded to accept the

office of a High Court Judge or join the higher judicial service, they ultimately withdraw their consent in view of the delay in making the appointments and because of various restrictions sought to be imposed. ... .. We are of the opinion that normally, as a matter of rule, the recommendations made by High Court for the appointment of a District Judge should be accepted by the State Government and the Governor should act on the same. If in any particular case, the State Government for good and weighty reasons find it difficult to accept the recommendations of the High Court, the State Government should communicate its views to the High Court and the State Government must have complete and effective consultation with the High Court in the matter. There can be no doubt that if the High Court is convinced that there are good reasons for the objections on the part of the State Government, the High Court will undoubtedly 'reconsider the matter and the recommendations made by the High Court. Efficient and proper judicial administration being the main object of these appointments, there should be no difficulty in arriving at a consensus as both the High Court and the State Government must necessarily approach the question in a detached manner for achieving the true objective of getting proper District Judges for due administration of justice."

He also referred to the book under the title Recollections and Reflections by late Mr. Justice (Retd.) Muhammad Shahabuddin, former Chief Justice of Pakistan, in which late Justice Shahabuddin referred to the method of selection of Judges as under:-----

"Selection was made on the recommendation of the Chief Justice of the highest Court--Federal Court before 1956 Constitution and Supreme Court since that Constitution came into force which was based on what the Chief Justice of the High Court had recommended. Whenever, there was a difference of opinion between the two Chief Justices or the Governor and the said Chief Justices, the President decided the issue after consultation with the authorities who had differed. This method of selection was continued for some time even after the revolution of 1958. But before the present (1969) Martial Law regime started, persons considered eligible for judgeship were being interviewed by the former President and the Governor of the Province concerned. This innovation created in the minds of the intelligentsia the apprehension that it would adversely affect the independence of the judiciary. It was feared that persons who were in the run for this High Office would try to bring political influence to bear on the authorities. I hope that the old system would be restored. If, however, interviews are considered necessary, the Supreme Judicial Council should be asked to interview the candidates. Interviews by a judicial body would not impair the public confidence. It is of utmost importance that care is taken to avoid measures which are liable to be misinterpreted as steps adopted to secure convenient Judges."

He further referred to the relevant portion from the book under the caption Highways and Bye-ways of Life by Muhammad Munir, retired Chief Justice of Pakistan, in which the author had mentioned an instance about the appointment of a Judge in the erstwhile East Pakistan High Court

by late Mr. Suhrawardy, the then Prime Minister of Pakistan, contrary to his recommendation as under:--

"I have said that MT. Suhrawardy was assertive and conscious of the powers he enjoyed. I am tempted to mention here an incident of the appointment of a Judge of the East Pakistan High Court. A new Judges had to be appointed to that Court. I had recommended a Muslim Lawyer (he was, though I am not sure, Mr. Saim who became the President of Bangladesh after Mujib's assassination). Mr. Suhrawardy however, appointed a Hindu, Nandi by name, without consulting me. Nandi was the ablest member of the Bar; but his loyalty to, and citizenship of Pakistan were doubtful. His family lived in Calcutta and he sent all the money he earned in East Pakistan to his home in Calcutta. He came to Dacca only when he had to argue a case there and accepted briefs for Dacca in his Calcutta office. At a dinner at Dacca when I was sitting next to Suhrawardy I told him that I was waiting for an appeal from Nandi's judgment. Why so, he asked me. I told him that his appointment having been made without consulting me, it Was void and I would hold, whenever an occasion arose, that his judgments for that reason were void. Suhrawardy folded his hands before me and said Guruji don't do this please, I can send the papers to you for a retrospective approval."

Mr. Sharifuddin Prizada has also referred extensively to Sapru Committee's recommendations as to the framing of Indian Constitution inter alia in support of his submission that the Chief Justice's views should have primacy. Whereas Qazi Muhammad Jamil, learned Attorney-General, has submitted that reference to the above report is not pertinent as the Indian Constituent Assembly did not accept the same.

It will not be out of context to mention as to how Sapru Committee was formed. It seems that the Standing Committee of the Non-Party Conference which met on the 18th and 19th November, 1944, at New Delhi adopted a resolution deciding to appoint a committee with terms of reference which were contained therein. The resolution reads as under:--

"The Standing Committee of the Non-Party Conference, having considered the present situation in view of the breakdown of the Gandhi-Jinnah talks on the communal issue, hereby resolves to appoint a committee which will examine the whole communal and minorities question from a Constitutional and political point of view, put itself in touch with different parties and their leaders including the minorities interested in the question and present a solution within two months to the Standing Committee of the Non-Party Conference. The Standing Committee will take all reasonable steps to get that solution accepted by all parties concerned. The Standing Committee authorities Sir Tej Bahadur Sapru to appoint members of the committee and announce their names in due course."

Sir Tej Bahadur Sapru, pursuant to the above resolution, constituted a' committee comprising 30 persons of outstanding repute from all walks of life and from Muslim, Hindu and Christian religions etc. The above committee headed by Sapru formulated inter alia recommendations as to the contents of the provisions of the proposed Constitution relating to judiciary. In para. 261 of the report, the committee highlighted the object which was kept in mind while proposing the draft of the relevant provisions in the Constitution. The above para. 261 reads as follows:--

"261. Our main object in making these recommendations is to secure the absolute independence of 'die High Court and to put them above party politics or influences. Without some such safeguards, it is not impossible that a Provincial Government may under political pressure affect prejudicially the strength of the High Court within its jurisdiction or the salary of its Judges. If it is urged that the High Court and the Government concerned will be more or less interested parties in the matter, the intervention of the Supreme Court and of the Head of the State would rule out all possibility of the exercise of political or party influences. The imposition, of these conditions, may, on a superficial view, seem to be inconsistent with the theoretical autonomy of the Provinces, but, in our opinion, the independence of the High Court and of the judiciary generally is of supreme importance for the satisfactory working of the Constitution and nothing can be more detrimental to the well-being of a Province or calculated to undermine public confidence than the possibility of executive interference with the strength and independence of the highest tribunal of the Province."

Be that as it may, in my view, it is not necessary to enter into the above controversy. However, it will suffice to observe that the framers of Indian Constitution substantially lifted from Sapru Committee's Report the provisions relating to judiciary.

47. Mr. Muhammad Akram Sheikh inter alia referred to the speech of Mohtarma Benazir Bhutto made in the National Assembly on 14-5-1991 as the then Leader of the Opposition on a bill which inter alia included her views about the appointments in the judiciary. The relevant portion of the same reads as follows:--

"Mr. Speaker why is it when a Bill chooses to transfer power from the Parliament to the judicial branch of Government, it is not the judicial branch which is strengthened, but it is executive branch which is strength; the reason Mr. Speaker is that the executive appoints the Judges, the executive, and in our country by practice, not always by law .the President appoints the Justice and thereby we see that the effective control of the judiciary goes into the hands of the executive and when the Legislative Parliamentary Power is broken and the judiciary is male captive of the Chief Executive,

then, one can say they are entering a new form of tyranny or a new form of Government: That is one person shall be above and beyond the decision of the representatives of the people."

He has also referred to the declarations made on 19-8-1995 by the Chief Justices of South East Asia which included Honourable Chief Justice of Pakistan, particularly to paras. and 1, 2 relating to appointment of Judges. The above paras. read as under:--

"11. to enable the Judiciary to achieve its objectives and perform its functions, it is essential that Judges be chosen on the basis of proven competence, integrity and independence.

12. The mode of appointment of Judges -must be such as will ensure the appointment of persons who are, best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed."

48. Mr. Qazi Muhammad Jamil, learn Attorney-General, in support of his submission that the Chief Justice's views cannot be given primacy and that the views of all the consultees mentioned in the relevant Articles of the Constitution are equal and that it is for the President/Executive to decide which of the views should be accepted or not, has pointed out that Pakistan has a Federal structure which has the following peculiar features:--

(i) Written Constitution.

(ii) Rigid Constitution in which making of amendments- is difficult;

(iii) Distribution of power between the Federation and the Federating units and the three organs of the State; and

(iv) An independent Judiciary to ensure that the Constitutional provisions or any other law is not violated.

According to him, the Federation as well as the Federating units ,derived power from the same source, namely, the Constitution. He vehemently urged that if we were to hold that the Chief Justice of Pakistan's views would have primacy over the views of a Chief Justice of a High Court or Governor of the Province concerned, that would militate against the concept of Federation as according to him, a Chief Justice of the High Court or a Governor of the Province concerned will have better knowledge and more information about a candidate for judgeship than the Chief Justice of Pakistan and, therefore, their views cannot be ignored.

49. Mr. Yahya Bakhtiar has referred to Articles 74, 5(4) 46(l) and 147 of the Constitution to show that the word "consent" has been employed by the framers of the Constitution.

He has also referred to Articles 100(3), 48(l) and 105(l) of the Constitution to demonstrate that the word "advice" has been used by the framers.

He has further referred to Articles 160(l), 198(4), 200(l), 203-C(4), 218(2)(b) to show that in the above provisions of the Constitution, the words after consultation' have been used.

He has lastly referred to Articles 146(3), 152 and 159(4) to indicate that in the above Articles, the Chief Justice of Pakistan has been given the power to appoint arbitrators in the cases referred to therein.

On the basis of the above provisions of the Constitution, he vehemently contended and in this contention he was joined by Mr. Qazi Muhammad Jamil, learned Attorney-General and Mr. Aitzaz Ahsan, that the framers - of the Constitution were mindful of various terminologies which is apparent from the above provisions of the Constitution. According to him, the words "after consultation" cannot be construed as the words "after consent" in the relevant Articles relating to appointment of Judges in the superior judiciary as the word "consent' as pointed out hereinabove, has been used in above Articles in contradistinction to the words "after consultation". Mr. Qazi Muhammad Jamil, learned Attorney-General, has again pointed out that the attempt on the part of santé members of the Indian Parliament to get the word "concurrence" in place of the word "consultation" in the relevant Articles of the Indian Constitution relating to appointment of Judges in the superior Courts, was consciously rejected by the framers of Indian Constitution and, therefore, it is not legally permissible on any principle to read the words after consultation" as the words after consent".

The learned counsel for the Federation vehemently contended that since the Executive is accountable to the people and to the Parliament, whereas the Chief Justice is not accountable to anyone except to his conscience, the primacy cannot be given to his views. This is also so that in order to keep him away from the public criticism.

50. I have cited hereinabove in para. 478 from the judgment in the case of Supreme Court Advocate-on-Record Association (supra), wherein more or less identical contention has been repelled by J.S. Verma, J. In my view, the above contention is not tenable as if a wrong person is appointed as a Judge of a superior Court, it affects adversely the quality of the Court's work, with the result that litigant public criticize the Court. I may also mention that since the conduct of a Judge of a superior Court cannot be discussed in the Parliament in view of Article 68 of the Constitution, the Executive in fact is not accountable as to the working of a Judge.

I am inclined to hold that the act of appointment of a Chief Justice or a Judge in the superior Courts is an executive act. No doubt this power is vested in the Executive under the relevant Articles of the Constitution, but the question is, as to how this power is to be exercised. I have already dealt with the question as to the legal status of conventions. They can be pressed into service while construing a provision of the Constitution and for channelising and regulating the exercise of power under the Constitution; whereas under the Islamic Jurisprudence, a convention, which is termed as Urf has a binding force as' highlighted by me hereinabove- in paras. 26 and 27 on the basis of various M Islamic sources. Nobody has disputed that it has been a consistent practice which -M has acquired the status of convention during pre-partition days of India as well M as post-partition period that the recommendations of the Chief Justice of a High Court and the Chief Justice of the Supreme Court in India as well as in Pakistan have been consistently accepted and acted upon except in very rare cases. The practice of consultation of the Chief Justice of a High Court and the Indian Federal Court was obtaining even under the Indian High Courts Act as well as under the Government of India Act, 1935, though the appointment of Judges of superior Courts in India was a matter of pleasure vested in the Crown. The recommendations of the Chief Justices even in those days were accepted as a matter of course. In this regard, it may be pertinent to first reproduce para. 388 from the judgment of the Indian Supreme Court in the case of Supreme Court Advocates-on-Record Association (supra) and then paras 382 and 384 of the same, referred to be Mr. Sharifuddin Pirzada, which read as under.-

"388. The first test is what are the precedents? Under the Government of India Act, 1935, which remained operative till 1950, all appointments of Judges to the Federal Court and the High Courts were made with the concurrence of the Chief Justice of India. The apex Judiciary in its memorandum dated March, 1948 recorded in writing that the appointments of Judges were made under the British Raj with the concurrence of the Chief Justice of India on the basis of an

established convention. We have the precedents for the period from 1950 to 1959 and from January 1, 1983 to April 10, 1993. Almost all the appointments during the said period were made with the concurrence of the Chief Justice of India. The preceding thus clearly indicate the existence of the convention and, as such, the first question, according to us, is complied with.

382. Finally, Mr. Gobind Ballagh Pant, Minister for Home Affairs (Appointment of Judges was dealt with by the Home Ministry) replying to the debate on the 14th Report of the Law Commission in the Rajya Sabha on November 24, 1959, stated as under: --

'Sir, so far as appointments to the Supreme Court go, since 1950 when the Constitution was brought into force, nineteen Judges have been appointed and everyone of them was so appointed on the recommendation of the Chief Justice of the Supreme Court. I do not know if any other alternative can be devised for this purpose. The Chief Justice of the Supreme Court is, I think, rightly deemed and believed to be familiar with the merits of his own colleagues and also of the Judges and advocates who hold leading positions in different States. So we have followed the advice of the most competent, dependable and eminent person who could guide us in the matter.

Similarly, Sir, so far as High Courts are concerned, since 1950, 211 appointments have been made and out of these except one, i.e. 210 out of 211 were made on the advice, with the consent and concurrence of the Chief Justice of India.

I have listened to some of the speeches that were made and also gone through the record of the speeches, which unfortunately I could not myself personally listen to. It was suggested that the Chief Justice of India might make these appointments well, I do not know if that would approve matters because virtually they have been made by the Chie Justice of India. Only the orders were issued by us, and in any case the orders would have to be issued by the executive authority.' (Emphasis supplied).

384.'Mr. S.K. Bose, Joint Secretary, Department of justice, Ministry of Law and Justice has filed an affidavit dated April 22, 1993 before us. In para. 6 of the said affidavit is stated as under:

As regards the appointments of Judges made, not in consonance with the views expressed by the Chief Justice of India, it 'is respectfully submitted that since 1-1-1983 to 10-4-1993, there have been only seven such cases, five of these were in 1983; (2nd January 1983, 2nd July, 1983, 1st

August 1983) one in September 1985 and one in March 1991, out of a total of 547 appointments made during this period'. "

51. As regards Pakistan, the Federation has not filed any statistics to indicate-in how many cases the recommendations of the Chief Justices of the High Courts and/or the Chief Justice of Pakistan were not accepted by the Executive in the past since the inception of Pakistan. However, Messrs Yahya BakhtiaT and Aitzaz,Ahsan, learned counsel appearing for the Federation, have candidly submitted that the recommendations of the Chief Justice of the High Court and/or the Chief Justice of Pakistan are accepted invariably. It is rarely not accepted. This position is also reinforced from the above extracts from the books written by late Justice Muhammad Shahabuddin and late Justice Muhammad Munir, both former Chief Justices of Pakistan.

Even otherwise if we were to assume that the Executive has the discretion to appoint Judges in the superior Courts, it is a well-settled proposition of law that the discretion is to be exercised fairly and justly and not arbitrarily or in a fanciful manner. In this regard, reference may be made to the case of Aman Ullah Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others (PLD 1990 SC 1092), the case of Chairman, Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Limited, Rawalpindi. (PLD 1991 SC 14) and the case of Inamur Rehman v. Federation of Pakistan and others (1992 SCMR 563).

In the first case, it has been held that "Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Text by Kenneth Culp Davis (page 94) that the structuring of discretion only means regularising it, organizing it, producing order in it so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, in our context, the wide-worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalise it and regulate it by Rules, or Policy statements or precedents, the Courts have to intervene more often, than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times. "

In the second case, the above principle has been reiterated.

In the third case, this Court, while construing the provisions of the Foreign Exchange (Prevention of Payments) Act, 1972, held that "the impugned provisions are, therefore,, justifiably exposed to attack on the ground that the classification does not rest on any intelligible differentiate, which word means an attribute by which a species is distinguished from all other species of the same genus, or a distinguishing mark. The dicta laid down in the case of Waris Meah (supra) are also fully attracted in the present case, in that, as should be discussed next, the impugned provisions conferred unguided discretion to the executive to pick and choose to persons against whom claims would be invited. Therefore by virtue of the conferment of such unbridled discretion, the provision is ex facie discriminatory and arbitrary".

52. I may examine the above issue from the Islamic point of view. I have already held in para. 22(vii) on the basis of various Islamic sources that the power to appoint inter alia Judges is a sacred trust, the same should be exercised in utmost good faith, any extraneous consideration other than the merit is a great sin entailing severe punishment. The object of providing consultation inter alia in Articles 177 and 193 for the appointment of Judges in the Supreme Court and in the High Courts was to accord Constitutional recognition to the practice/convention of consulting the Chief Justice of the High Court concerned and the Chief Justice of the Federal Court, which was obtaining prior to the independence of India and post independence period, in order to ensure that competent and capable people of known integrity should be inducted in the superior judiciary which has been assigned very difficult and delicate task of acting as watch dogs for ensuring that all the functionaries of the State act within the limits delineated by the Constitution and also to eliminate political considerations. Mohtarma Benazir Bhutto, as the then Leader of the Opposition, while making a speech on 14-5 1991 on Shari'ah Bill in the National Assembly, had rightly pointed out that the power of appointment of Judges in the superior Courts had direct/nexus with the independence of judiciary. Since the Chief Justice of the High Court concerned and the Chief Justice of Pakistan have expertise knowledge about the ability and competency of a candidate for judgeship, their recommendations, as pointed out hereinabove, have been consistently accepted during pre-partition days as well as post-partition period in India and Pakistan. I am, therefore, of the view that the words "after consultation" referred to inter alia in Articles. 177 and 193 of the Constitution involve participatory consultative process between the consultees and also with the Executive. It should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. The Chief Justice of a High Court and the Chief Justice of Pakistan are well equipped to assess as to the knowledge and suitability of a candidate for Judgeship in the superior Courts, whereas the Governor of a Province and the Federal Government are better equipped to find out about the antecedents of a candidate and to acquire other information as to his character/conduct. I will not say that anyone of the above consultees/functionaries is less important or inferior to the other. All are' important in their respective spheres. The Chief Justice of Pakistan, being Paterfamilias i.e. head of the judiciary, having expertise knowledge about the ability and suitability of a candidate, definitely, his views deserve due deference. The object of the above participatory consultative process should be to arrive at a consensus to select best persons for the Judgeship of a superior Court keeping in view the object enshrined in the Preamble of the Constitution, which is part of the Constitution by virtue of Article 2A thereof, and ordained by our religion Islam to ensure independence of judiciary. Quaid-e-Azam, the Founder of Pakistan, immediately after establishment of Pakistan, on 14-2-1948, while addressing the gathering of Civil

Officers of Balochistan, made the following observation which, inter alia included as to the import of discussions and consultations, copy of which is furnished by Mr. Yahya Bakhtiar:--

"In proposing this scheme, I have had one underlying principle in mind, the principle of Muslim democracy. It is my belief that our salvation lies in following the golden rules of conduct set for us by our great law-giver, the Prophet of Islam. Let us lay the foundation of our democracy on the basis of truly Islamic ideals and principles. Our Almighty has taught us that 'our decisions in the affairs of the State shall be guided by discussions and consultations'. I wish you, my brethren of Balochistan, God speed and all success in the opening of this new era. May your future be as bright as I have always prayed for and wished it to be. May you all prosper." (Underlining is mine).

The views of none of consultees can be rejected arbitrarily in a fanciful manner. I am further inclined to hold that the views of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan cannot be rejected arbitrarily for extraneous consideration and if the Executive wished to degree with their views, it has to record strong reasons which will be justiciable. I am also inclined to hold that a person found to be unfit by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan for appointment as a Judge of a High Court or by the Chief Justice of Pakistan for the judgeship of 0 the Supreme Court cannot be appointed as it will not be a proper exercise of power to appoint under the above Articles of the Constitution.

It may be stated that there seems to be unanimity of views among the learned counsel appearing for the parties and the learned counsel appearing as amicus curiae that consultatory process is mandatory and without it n appointment/confirmation can be made. It must follow that in absence of consultation as contemplated and interpreted by this Court as above, the appointment/confirmation of a Judge in the superior Court shall be invalid. The above view which I am inclined to take is in consonance with the well established conventions, Islamic concept of 'Urf' and the proper exercise o power.

53. In our short order dated 20-3-1996 we have refrained from interpreting Article 177 read with Article 180 of the Constitution as to the appointment of Chief Justice of Pakistan for the following reasons: --

"Firstly that in Constitution Petition No.29 of 1994, which is directly filed in this ' Court, appointment of the Acting Chief Justice was challenged on the ground that when there was clear vacancy after retirement, instead of Acting Chief Justice, the incumbent should have been appointed on permanent basis being the most senior .,During pendency of the petition, permanent

Chief Justice of Pakistan was appointed and, therefore, the petitioner. did not press the prayer to that extent vide C.M.A.541-K of 1996 dated 10th March, 1996. Secondly, proper assistance by the learned counsel on this point was also not rendered. Thirdly, the cases are pending in which the same subject matter is involved. For such reasons, we do not consider it proper to go into the question of interpretation of these two provisions. “

I would, therefore, deal only with the appointment of a permanent Chief Justice in a High Court as there are vacancies of the permanent Chief Justices in the High Courts and a guideline is to be provided so that the appointments are made in terms of the Constitution. In this behalf, it may be pertinent to refer to clause (1) of Article 193, which pertains to the appointments of High Court Judges and Chief Justice and original Article 196, which relates to appointment of Acting Chief Justice in the High Court. The same read as follows: --

Clause (1) of Article 193 of the Constitution:

193. --(l) A Judge of a High Court shall be appointed by the President after -consultation--

(a) with the Chief Justice of Pakistan:

(b) with the Governor concerned; and

(c) except where the appointment is that of Chief Justice, with the Chief Justice of the High Court. “

Clause (1) of Article 196 of the Constitution

“ 196. Acting Chief Justice. --At any time--

(a) the office of Chief Justice of a High Court is vacant, or

(b) the Chief Justice of a High Court is absent or is unable to perform the functions of his office due to any other cause,

the President shall appoint the most senior of the other Judges of the High Court to act as Chief -Justice."

A perusal of clause (1) of Article 193 indicates that for appointment of a Chief Justice of a High Court, the president is required to consult--

(i) the Chief Justice of Pakistan;

(ii) Governor of the Province concerned.

It may further be noticed that under the original Article 196 of the Constitution, it was provided that the Resident shall appoint most senior of other Judges of the High Court in the events mentioned in above-quoted clauses (a) and (b) of Article 196. This was amended by President Order No. 14 of 1985. The amended last portion of Article 196 reads as under:--

"the President shall appoint one of the other Judges of the High Court, or may request one of the Judges of the Supreme Court, to act as Chief Justice. "

Similarly Article 180 of the Constitution relating to the appointment of Acting Chief Justice of Pakistan was amended by President Order No. 14 of 1985 in the above terms. However, before the lifting of Martial law, the-Article 180 was restored in its original form, whereas Article 196 was not restored in its original form obviously for the reason that under the amended provision even a Judge of the Supreme Court can be requested to act as the Chief Justice of a High Court.

It may be observed that sending of a Supreme Court-Judge to a High Court as an Acting Chief Justice is undesirable in view of the adverse. observations in the judgment of this Court in the case of Abrar Hasan v. Government of Pakistan (PLD 1976 SC 315 at 342). Even otherwise this causes heart burning amongst the Judges of the High Court concerned, which is not conducive for maintaining congenial working relation.

It will not be out of context to state that at the time of creation of Pakistan, there were only two High Courts in Pakistan, namely, Lahore High Court and Dacca High Court. In Sindh, there was a Chief Court, whereas in N.W.F.P. and Balochistan, there were Judicial Commissioners. However, at the time of creation of One-Unit upon framing of 1956 Constitution, West Pakistan High Court was created having jurisdiction throughout West Pakistan. It had its Principal Seat at Lahore and Permanent Benches at Karachi and Peshawar. The Province of Balochistan was catered by Circuit Benches.

After the fall of Dacca and upon the dissolution of One-Unit in 1971, three High Courts emerged, namely, Lahore High Court, a Joint High Court for Sindh and Balochistan, and Peshawar High Court. in December, 1976, Sindh and Balochistan High Court was bifurcated and a separate Balochistan High Court was established.

Mr. Sharifuddin Pirzada, learned Senior Advocate Supreme Court appearing as amicus curiae, pointed out that just before partition, Mr. Justice Abdur Rashid was appointed as the Chief Justice of Lahore High Court on the basis of seniority as he was the senior most Judge at that time.

Mr. Muhammad Akram Sheikh, learned counsel appearing as amicus curiae, has also urged that it has been the consistent practice/convention to appoint the senior most Judge as the Chief Justice in the High Court against permanent vacancy. He pointed out that whenever rarely the above convention was broken, there was a lot of resentment in the Bar and the Judiciary itself. He pointed out that during Ayub Khan's regime, Mr. Manzoor Qadir was directly appointed as the Chief Justice of West Pakistan High Court for the reason that there was split among the senior Judges at Lahore Bench on account of Mr. Gardezils case with his wife Renata. He further submitted that Mr. Manzoor Qadir was an outstanding Jurist in the Sub-Continent but his above appointment was resented by the Bar as well as by the Bench. Consequently, he resigned within about one year. He also invited our attention to the facturn that in or about 1972, Mr. Tufail Ali'Abdur Rahman, who was also an outstanding Jurist of repute, was directly appointed as the Chief Justice in the then High Court of Sindh and Balochistan, which was also resented by the Bar and the Bench inasmuch as Mr. Justice Nurul Arfin, who was the then most senior Judge, took retirement. However, Mr. Tufail Ali Abdur Rahman died after short period. He further invited our attention that after the dissolution of One-Unit, in Lahore High Court Mr. Justice Aslam Riaz Hussain was appointed as

the Chief Justice by superseding a number of his colleagues. This too was resented by the Bar as well as by the Bench.

It seems that before the Partition of India as well as after partition, most senior of the High Court Judges were appointed as the Chief Justices except in the above three cases; out of the above three appointments, two of the persons were outsiders and they were Jurists of outstanding calibre in the Sub-Continent. They had not superseded any sitting Judges. The only supersession which had taken place was that in the case of appointment of Mr. Justice Aslam Riaz Hussain.

The rule of seniority was recognized even under the Government of India Act, 1924. Section 103 thereof provided as follows:--

"103 (1) The Chief Justice of a High Court shall have rank and precedence before the other Judges of the same Court.

(2) All the other Judges of a High Court shall have rank and precedence according to the seniority of their appointments, unless otherwise provided in their patents."

The above provision was retained in the subsequent enactments. The above rule of seniority was maintained while appointing the Chief Justices in the High Courts before partition as well as post-partition. This practice/convention was accorded Constitutional recognition by incorporating Article 196 in the Constitution by providing that in case of vacancy or when the Chief Justice of a High Court is unable to perform his functions, the most senior of other Judges of the High Court to act as Chief Justice. The Constitution further reinforces the seniority rule by maintaining it under clause (2) of Article 209 by providing as under:--

"(2). The Council shall Consist of---

(a)' the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief justices of High Courts."

The Supreme Court of India in the case of Supreme Court Advocates- on-Record Association (supra), Verma, J. who spoke for himself and on behalf of four learned brethren, maintained the rule of seniority.

It is true that in Article 193 of the Constitution which relates to inter alia to the appointment of a Chief Justice in a High Court, it has not been provided that most of the senior of Judges shall be made as the Chief Justice. The reason seems to be obvious, namely, it is possible that the senior most Judge, at the relevant time, may not be physically capable to take over the burden of the office or that he may not be willing to take upon himself the above responsibility. The Chief Justice of Pakistan, who is one of the consultees under Article 193 will be having expertise knowledge about the senior most Judges of a High Court. If the senior most Judge is bypassed for any of the above reasons, he cannot have any grievance but if he is superseded for extraneous considerations, the exercise of power under Article 193 of the Constitution will not be in accordance therewith and will be questionable.

I am, therefore, of the view that keeping in view the provisions of the Constitution as a whole and the well-established convention as to the appointment of the senior most Judges in the High Court as the Chief Justice followed consistently in conjunction with the Islamic concept of 'Urf'. The most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the Court concerned.

Before parting with the discussion on the above question, I may observe that there seems to be wisdom in following the convention of seniority. If every Judge in a High Court aspires to become Chief Justice for the reason that he knows that seniority rule is not to be followed, it will adversely affect the independence of judiciary. The junior most Judges may feel that by having good terms with the Government in power he can become the Chief Justice. This will destroy the institution and public confidence in it. The Chief Justices of the High -Courts have the power to fix the roster i.e. to decide when a case is to be fixed and before whom it is to be fixed. In other words, they regulate the working of the forum It is, therefore, very important that the Chief Justices should not be pliable and they should act independently.

54. I may revert to question No.(iii), namely, whether the President is required to appoint the permanent Chief Justice of Pakistan or a Judge of the Supreme Court or a permanent Chief Justice of High Court in case of vacancy under Articles 177 and 193 within certain period or can he allow acting appointment of the Chief Justice of Pakistan, a Judge of the Supreme Court and a Chief Justice of High Court under Articles 180, 181 and 196 respectively indefinitely for years. In this regard, it may be pertinent to mention that Messrs Fakhruddin G. Ebrahim and S.'M. Zafar have

vehemently argued that an Acting Chief Justice is not a consultee 'in terms of the relevant Articles of the Constitution. According to them, an Acting Chief Justice is a stop-gap arrangement for a short period, Articles 180 and 196 of the Constitution relating to appointment of Acting Chief Justices cannot take over Articles 177 and 193 which pertain to the permanent appointments of Chief Justice of Pakistan and Chief Justice of a High Court. Both also urged that though under Article 181 an Acting Judge can be appointed in the Supreme Court against a permanent vacancy but this is also a stop-gap arrangement to cater the case where vacancy occurs all of a sudden and not on the due date because of death or because of the fact the incumbent resigns or is removed.

Mr. S. M. Zafar has invited our attention to the factum that all the books and literature relating to judiciary are unanimous on the question that permanency or definiteness in appointments is necessary for independence of judiciary, having acting incumbents against the permanent vacancies undermine the same. According to him though Article 260, which defines various terms used in the Constitution, provides that the Chief Justice will include the Judges for the time being acting as Chief Justice of the Court, but this is for the purpose of stop-gap arrangement. To reinforce the above submission, he has referred to the definition of the word "include" from Ai yar's Judicial Dictionary, Tenth Edition, -and contended that the meaning of the above word indicates that it purports to bring something which does not belong to the specie.

Mr. Sharifuddin Pirzada has invited our attention to the speech of Quaid-e-Azain made in 1931 in the Federal Structure Sub-Committee of the Second Indian Round Table Conference, while speaking on the composition, jurisdiction and other matters confronting the future of Federal Court. The relevant portion of the same reads as under:--

"Then, Sir, there is the other question with regard to the Letters Patent Appeals and Additional Judges being appointed, and the provisions in the Government of India Act as to fixing the quota for the certain number of members of the Civil Service. All those matters do not strictly arise out of this question which we are at present discussing; but I am in. general agreement with Sir Tej Bahadur Supru. I quite agree with him that this practice of appointing Additional Judges is not desirable. I remember, in my High Court, recently knocking against about half a dozen Judges, who had been on the Bench, roaming about in the corridors of the High Court with briefs in their hands."

Mr. Jinnah: "It is demoralising to the Bench; it is demoralising to the profession. I think it is an undesirable practice. Once you appoint a Judge, let him remain there. It may be pressed on the ground of economy, but I think in the long run it does more harm."

He has also produced Human Rights Commission's Resolution No.1994/41 as a result of the Human Rights Commission meeting at Geneva The relevant portions of the same read as follows: --

Sir Tej Bahadur Sapru: "Or possibly without briefs" -

"34. In his study, Dr. Singhvi correctly noted that the violation of the principle of the independence of justice 'is by no means a stray occurrence' (para. 372). Indeed, he listed what he described as 26 "types of deviance" relating to Judges and yet another 26 relating to lawyers. Because these occurrences are at the heart of the present study, it is perhaps worth repeating them.

35. Those which affect Judges were categorized as follows:--

(c) appointment of Judges for a limited term or on an acting or officiating basis, and confirmation of Judges in permanent posts and tenure on political considerations;

(d) in countries where promotion or confirmation of Judges proceeds by established rules or conventions rather than by exercise of executive discretion, abrogation of rules or conventions for promotion may be considered as a variant of the punitive use of transfers;

(e) …….

(f) …….

(g) ……..

(h) …….

(i) …….

(j) ……

(k) ……..

(l) …….

(m) promotion of Judges on the basis of extraneous considerations and neglect of ability and integrity in matters of judicial promotions;

(n) use of temporary, ad hoc, part-time tenures by the executive to object the judiciary to a phychosis of fear;"

He has further referred to the relevant portion of the speech relating to judiciary of Mr. I.I. Chundrigar in the Pakistan Constituent . Assembly made by him while moving Bill for 1956 Constitution, which reads as, follows:--

"Then the Supreme Court Judges and the High Court Judges are not removable once they are appointed, except by following the procedure prescribed therein. This would, in my humble opinion, completely safeguard the independence of the Judiciary and that is a matter which will really secure the rights of the people.

Sir, the independence of the Judiciary is a principle very dear to the people of this country, who believe that they receive justice from the Courts of this country and that their rights are safe in the hands of the Judges. The impartiality of Judges is one aspect of the nature of the Judges, of which another is independent. A Judge who is not independent cannot be impartial. The provisions in the Bill are intended to ensure the independence of the Judges and to preserve it in future as it is preserved at present. We have at the outset made provisions in the Constitution which make the interpretation of the Constitution by the Supreme Court final. We cannot give greater assurances to say that justice is given in Pakistan in a real and unpolluted form .....

There seems to be force in the above contention of Mr. S. M. Zaf as admittedly there is no security of tenure for an acting incumbent. We are experienced recently that Mr. Justice Saad Saood Jan, the senior most Jud e of the Supreme Court, was appointed as Acting Chief Justice of Pakistan the permanent vacancy but the notification of his appointment was withdrawn within a day without assigning any reason after about one and a half months. Same is the position of an acting Judge of the Supreme Court as under clause (2) of Article 181, it has been provided that "An appointment under this Article shall continue until it is revoked by the President". The case of an Acting Chief Justice of a High Court is also identical as he can also be removed at any time. According to Mr. S. M. Zafar, our Constitution provides guidelines as to the time within which a Constitutional office is to be filled in particularly of the head of an institution. He has invited our attention to

clause (5) of Article 41 of the Constitution which lays down that an election to fill a vacancy in the office, of President shall be held not later than 30 days from the occurrence of the vacancy. His submission was that date of retirement of an incumbent of the office of Chief Justice of Pakistan or a Judge of the Supreme Court or a Chief Justice of a High Court is known to the Federal Government from the dates when the above incumbents are appointed and, therefore, the process of appointment of the successors should be initiated much in advance so that the:: successors should be appointed a few days before the incumbent retires. It is only in case of vacancy which occurs on account of death or any other unforeseen reasons, the appointment is to be made after the occurrence of the vacancy, in such cases, according to him, at the most, 30 days' time is sufficient as provided under clause (5) of Article 41 for the President's election.

Mr. Riazul Hassan Gilani, from the Islamic Jurisprudence's point of view, has urged that under it an acting incumbent carries out day to day work and not other important works. He also submitted that Hazrat Umar, when he was grievously injured by a Jew while leading morning prayers, fixed three days' period for electing his successor by a panel on six Sababis and, therefore, according to him, this indicates that the permanent vacancy of an important public office is to be filled in within shortest possible period of three days. He has invited our attention to the following portion from the book under the title:

From the above-quoted passage from the Islamic history, the following facts emerge;----

(i) That Hazrat Umar did not nominate his successor but left the matter to the well-known Sahabis for electing his successor-,

(ii) that he fixed the period of three days for electing his successor; and

(iii) that he authQrized Hazrat Suhaib Bin Sanan Roomi to lead prayer in his place for three days, but he was not authorized to carry out any State functions.

I am, therefore, of the view that it is the Constitutional obligation of the President/Executive to ensure that the Constitutional offices do not remain vacant and the vacancies are filled in without any delay. The provisions relating to appointments of Acting Chief Justice of Pakistan, Acting Judges of the Supreme Court and Acting Chief Justice of a High Court are intended and designed to cater for emergency. They cannot be used as a substitute for making permanent appointments

under Articles 177 and 193 of the Constitution. of the High Courts, namely, Lahore and Sindh have been headed by Acting Chief Justices for the last nearly two years. In Peshawar High Court there is an Acting Chief Justice since for about a year. In other words out of 4 High Courts in 3 of them which cater for about 94% population of the country, we have Acting Chief Justices. This state of affairs militates against the independence of judiciary and is violative of the Constitution. I am, therefore, of the view that a normal permanent vacancy should be filled in advance and, in any case, not later than 30 days, whereas vacancy occurring on account of death or for any unforeseen cause, at the most, should be filled in within 90 days, which is generally considered to be a reasonable period.

The above view, which I am inclined to take, is in consonance with the provisions of the Constitution, keeping in view the concept of the independence of judiciary as enshrined therein. It is also in accord with the above speech of the Quaid-i-Azam, wherein he depricated the practice of appointment of Additional Judges. It is further in line with the aforesaid International Human Rights Commission's Report.

55. This leads me to the fourth question, namely whether an Acting Chief Justice is not a consultee under Articles 177 and 193 of the Constitution. I have already referred to Messrs S. M. Zafar and Fakhruddin G. Ebrahim's submissions in this regard. Mr. Muhammad Akrarn Sheikh, learned counsel also vehemently submitted that an Acting Chief Justice cannot be a consultee as he is to select a person for judgeship who may sit in the Court for more than two decades and, therefore, the permanent incumbent will be in a better position to give his views. His further sub ' mission was that a permanent incumbent will not be susceptible to any executive influence and, therefore, the selection will be on

merits. In this regard, I may observe that the concept of an Actin Chief justice was introduced during pre-partition days as the Chief to be Englishmen and they used to go on leave to United Kingdom. The provisions of Justice Acting Chief Justices were retained by India in its Constitution and by Pakistan in its four Constitutions which we had up to 1973. The object of Acting Chief Justice is to have a stop-gap arrangement. It is a matter of common knowledge that most of the Acting Chief Justices do not take any decision, relating to important policy matters of the Court concerned without consulting the permanent Chief Justice. If the permanent incumbent concerned is not accessible, the acting incumbent waits for his return. However, unfortunately during Martial Law days, the practice of appointing Acting Chief Justices for

long periods as adopted apparently with the intention to keep the judiciary under the control of executive, which was not a commendable object. It militated against the concept of independence of judiciary and separation of judiciary from the executive. I have already stated here in above that

even now there are Acting Chief Justices in three High Courts and the Federal Shariat Court. It may be pointed out that under Article 203-C(4), the Chief Justice of Federal Shariat Court is to be appointed for a period not exceeding three years, but he may be appointed for further term or terms as the President may determine. The notification dated 18-7-1994 of the present incumbent, which has been filed in the present proceedings, indicates that he was appointed on 18-7-199-4 with immediate effect and until further orders.

Keeping in view the concepts of independence of judiciary, separation of judiciary as enshrined in our Constitution and the guidelines provided therein as to the time of filling in of the public offices in conjunction with the Islamic! Jurisprudence, I am inclined to hold that an Acting Chief Justice is not a consultee for the purpose of Articles 177 and' 193 of the Constitution' as the appointment of Acting Chief Justices is a stop-gap arrangement for a short i period not for more than 90 days. However, I may clarify that if a permanent incumbent has fallen sick seriously and he remains in the hospital or under treatment and is not in a position to perform his functions and because of that an Acting Chief Justice remains in office for more than 90 days, in such a case, the Acting Chief Justice may consult,the permanent incumbent while acting as a consultee, under the above Articles, but if it is not possible to consult the permanent incumbent, in that event, the Acting Chief Justice will be a consultee for the purpose of the above Articles because of the doctrine of necessity.

It may also observe that if a permanent incumbent of the office of a Chief Justice of a High Court is appointed in the Federal Shariat Court with the object to ~ bring an Acting Chief Justice inter alia for obtaining his recommendations for appointment of judges as per desire of the Government in power, that will be violative of the spirit of the Constitution and will be mala fide in fact and in law, which will vitiate the entire exercise.

The allegation of the petitioner in the petition was that the Chief Justice of re and Sindh High Courts were appointed as the Judges of the Federal Shariat Court inter alia for the above object, which allegation is denied by the Federation.

We wanted inter alia to examine the record of the above two Chief Justices in respect of their appointments in the Federal Shariat Court to ascertain the reasons which prompted the Federation to take above actions. But this was resisted by it.

In this view of the matter an adverse inference can be drawn.

56. I may revert to question No.(v) framed by me, namely, under what circumstances ad hoc Judges can be appointed in the Supreme Court and for what period, and whether such appointment can be made without first filling in the total sanctioned strength under Article 177 of the Constitution. There seems to be unanimity of views among the learned counsel for the petitioners/appellants and learned amicus curiae that an ad hoc Judge in the Supreme Court cannot be appointed in presence of permanent vacancy. Mr. Yahya Bakhtiar, learned counsel appearing for the Federation, submitted that factually the Federal Government is not involved in the appointment of ad hoc Judges as the power is given to the Chief Justice. He requests a Judge of the High Court with the -approval of the President to attend sit ‘ ting of the Supreme Court as an ad hoc Judge. Mr. S. M. Zafar has also urged that while permanent vacancies in the Supreme Court exist, even the Chief Justice of Pakistan cannot make a request for the appointment of an ad hoc Judge. It may be advantageous to reproduce Article 182 of the Constitution relating to the appointment of ad hoc Judges. The above Article reads as under:-

182. If at any time it is not possible for want of quorum of Judges of the Supreme Court to hold or continue any sitting of the Court, or for any other reason it is necessary to increase temporarily the number of Judges of the Supreme Court, the Chief Justice of Pakistan may, in writing,---

(a) with the approval of the President, request any person who has held the office of a Judge of that Court and since whose ceasing to hold that office three years have not elapsed; or

(b) with the approval of the President and with the consent of the Chief Justice of a High Court, require a Judge of that Court qualified for appointment as a Judge of the Supreme Court, to attend sittings of the Supreme Court as an ad hoc Judge for such period as may be necessary and while so attending an ad hoc Judge shall have the same power and jurisdiction as a Judge of the Supreme Court.

A perusal of the above-quoted Article indicates that if the Chief Justice is of the view that it is not possible for want of quorum of Judges of Supreme Court to hold or - continue any sitting of the Court, or for any other reason it is necessary to increase temporarily the number of Judges of the Supreme Court, may in writing;

(a) with the approval of the President, request any person who has held the office of a Judge of that Court and since whose ceasing to hold that office three years have not elapsed; or

(b) with the approval of the President and with the consent of the Chief Justice of a High Court, require a Judge of that Court qualified for appointment as a Judge of the Supreme Court, to attend sittings of the Supreme Court as an ad hoc Judge for such period as may be necessary.

It is evident from the above-quoted Article that such a request can only be made if "it is necessary to increase temporarily the number of Judges of the Supreme Court", for the two reasons given hereinabove. It implies that in presence of permanent vacancies in the Supreme Court, above Article 182 of the Constitution cannot be invoked and an ad hoc Judge cannot be appointed keeping in view the provision of Article 181 of the Constitution, under which an Acting Judge of the Supreme Court can be appointed against a permanent vacancy. Thus, Mr. S. M. Zafar's submission seems to be correct. I may also observe that under Article 260 of the Constitution, which defines the various terms including "Judge", the definition of the Judge given therein does not include an ad hoc Judge. In other words, he is not a Supreme Court Judge for the purpose of various Articles of the Constitution except for the purpose of Article 182 thereof. The practice of appointing ad hoc Judge against the permanent vacancies seems to be violative of the above provisions of the Constitution. This also militates against the independence of judiciary as highligbted by Quaid-e-Azam 'Muhammad Ali Jinnah in his speech of 1931 before the above Sub-Committee, and the International Human Rights Commission at Geneva referred to hereinabove. Reference may also be made to the following observations of Lord Denning in his book under the caption "What Next In The Law":--

"Lions under the throne"

It was Francis Bacon in his Essay, Of Judicature, who said;

Let Judges also remember that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.'

True enough if the Throne is occupied by a Constitutional monarch as ours is. But the Judges are not to be lions under the Government of the day--or of any Government. They, are and must be independent of the executive Government--ready to check or oppose it if it should in any way misuse or abuse its power.

Francis Bacon ends his essay with a less controversial percept;

Let not Judges also be so ignorant of their own right, as to think there is not left to them, as a principal part of their office, a wise use and application of laws. For they may remember what the Apostle saith of a greater law than theirs: Nos scimus quia lex. boan est, mode quis ed utatur legitime'

which is translated in the Authorized Version, I Timothy 1:8;

'But we know that the law is good, if a man uses it lawfully'."

It will not be out of context to quote the relevant portion from the "Commentary on the Constitution of India", Sixth (Silver Jubilee) Edition, 1983 (Vol-G) by Mr. Justice Basu on Article 127 of the Indian Constitution, which deals with the appointment of ad hoc Judges in the Supreme Court and which reads as under:--

"Cl. (1). Ad Hoc Judges.---No such -appointment has so far been made.

The above-quoted comments of the above author of well repute on Indian Constitution indicate that in India, no ad hoc appointments of Supreme Court Judges were made during nearly 33 years from the date of enforcement of the Indian Constitution as the above book was published in 1983.

The upshot of the above discussion is as under:--

(i) That no ad hoc Judge can be appointed under the above Article while permanent vacancies exist;

(ii) that an ad hoc Judge is to act for a short period for attending the sittings of the Supreme Court; and

(iii) that he is not a Judge of the Supreme Court except for the purpose of the cases in which he sits and participates.

57. I may now take up questions Nos. (vi) and (vii), which read as under: --

(vi) Whether Additional Judges can be appointed under Article 197 of the Constitution against permanent vacancies for an indefinite period? -

(vii) Whether the Additional Judges appointed against permanent vacancies under Article 197 of the Constitution have any right to be considered for permanent appointment?

The above questions are interlinked and, therefore, I intend to deal with the same together. Mr. Sharifuddin Pirzada has traced the history, as to how the provision for Additional Judges was introduced. He pointed out that under section 3 of the Indian High Courts Act, 1911, the Governor-General-in-Council was empowered to appoint from time to time persons to act as Additional Judges of any High Court for such period not exceeding two years as may be required. He also pointed out that under President's Order Post-Proclamation No.3 of 1958, the Courts (Additional Judges) Order, 1958 was issued on 19-11-1958 after Ayub Khan took over the power. The above Order came into force at once. Article 2 of it provided that "If by reason of any temporary increase in the business of the Supreme Court or of a High Court or by reason of arrears of work in any such Court it appears to the President that the number of the Judges of the Court should be for the time being increased, the- President may appoint persons duly qualified for appointment as Judges to be Additional Judges of the Court for such period not exceeding two years as he may specify. "

It will not be out of context to mention that the above provision was lifted from clause (1) of Article 224 of the Indian Constitution, 1950, which reads as follows:--

"224. Appointment of-additional and acting Judges.---(1) If by reason of any temporary increase in the business of a High Court or by reason of arrears of work therein, it appears to the President that-the number of the Judges of that Court should be for the time being increased, the President may appoint duly qualified persons to be additional Judges of the Court for such period not exceeding two years as he may specify."

At this juncture, it may be pertinent to mention that in 1956 Constitution, there was no provision for appointment of Additional Judges in view of above speech of Quaid-e-Azam made by him in 1931 in the aforesaid Sub-Committee depricating the practice of appointing Additional Judges. But in 1958, the then President Ayub Khan issued the above President Order. Article 96 was incorporated in 1962 Constitution for appointment of Additional Judges even against permanent vacancies. This provision has been lifted in 1972 Interim Constitution and 1973 Permanent Constitution.

It may be noticed that under the above President Order of 1958 and under clause (1) of Article 224 of the Indian Constitution, an Additional Judge could be appointed in the following, two contingencies: --

(i) temporary increase in the business of a High Court; and

(ii) temporary increase in arrears of work.

Whereas under Article 197 of the Constitution, an Additional Judge can be appointed against a permanent vacancy or when a High Court Judge is absent or is unable to perform the functions of his office due to any other cause or for any reason it is necessary to increase the number of Judges of a High Court. In other words, under Article 224(l) of the Indian Constitution, the appointment of an Additional Judge is purely temporary to achieve the above two objects, whereas under our Constitution, though the appointment of an Additional Judge is to be made for a period not exceeding two years but an Additional Judge can be appointed against a permanent vacancy. This makes a lot of difference.

I may observe that the parity of reasoning for not appointing an Acting Chief Justice or an Acting Judge in the Supreme Court against, permanent vacancies for a long period is equally applicable to an appointment of an Additional Judge in the High Court against a permanent vacancy. However, I may point out that a practice/convention has developed in Pakistan that in the High Courts Judges are first appointed as Additional Judges; either for a period of one year initially and then this period is extended to two years or they are initially appointed for a period of two years (during 1977 Martial Law this period was extended to three years) and then they are appointed as permanent Judges. Since there was no provision in the late Pakistan Constitution of 1956, which remained operative for a short period, for appointment of Additional Judges, in those days Judges in the High Courts initially were appointed permanently. In India, the controversy arose, as to whether the Additional Judges have any right to be considered for appointment as permanent Judges even

though they were not appointed against permanent vacancies. The above controversy came up for hearing before the Supreme Court of India inter alia in the case of S.P. Gupta (supra). Bhagwati, J., who was one of the Judges of the majority view, held that though an Additional Judge is not entitled as a matter of right to be appointed as an Additional Judge for a further term on expiry of his original term or as a permanent Judge, the only right he has, is to be considered for such appointment and this right also belonged to him not because of clause (1) of Article 224 of the Indian Constitution but because of peculiar manner in which clause (1) of Article 224 has been operated for quarter of a century, namely, that the Additional Judges were appointed as permanent. He observed as follows:--

"The entire object and purpose of the introduction of clause (1) of Article 224 was perverted and Additional Judges were appointed under this Article not as temporary Judges for a short period who would go back on the expiration of their term as soon as the arrears are cleared off, but as Judges whose tenure, though limited to a period not exceeding two years at the time of each appointment as an Additional Judge, would be renewed from time to time until a berth was found for them in the cadre of permanent Judges. By and large, every person entered the High Court Judiciary as an Additional Judge in the clear expectation that as soon as a vacancy in the post of a permanent Judge became available to him in the High Court he would be confirmed as a permanent Judge and if no such vacancy became available to him until the expiration of his term of office, he would be reappointed as an Additional Judge for a further term in the same High Court. Therefore, far from being aware that on the expiration of their term, they would have to go back because they were appointed only as temporary Judges for a short period in order to clear off the arrears -- which would have been the position if clause (1) of Article 224 had been implemented according to its true intendment and purpose -- the Additional Judges entered the High Court judiciary with a legitimate expectation that they would not have to go back on the expiration of their term but they would be either reappointed as Additional Judges for a further term or if in the meanwhile, a vacancy in the post of a permanent Judge became available, they would be confirmed as permanent Judges. This expectation which was generated in the minds of Additional Judges by reason of the peculiar manner in which clause '(1) of Article 224 was operated, cannot now be ignored by the Government and the Government cannot be permitted to say that when the term of an Additional Judge expires, the Government can drop him at its sweet will. By reason of the expectation raised in his mind through a practice followed for almost over a quarter of a century, an Additional Judge is entitled to be considered for appointment as an Additional Judge for a further term on the expiration of his original term and if in the meanwhile, a vacancy in the post of a permanent Judge becomes available to him on the basis of seniority amongst Additional Judges, he has a right to be considered for appointment as a permanent Judge in his High Court."

Bliagwati, J. further observed as under:--

"So long as the case of the Additional Judge is considered by the Central Government for reappointment or appointment as the case may be, the decision of the Central Government cannot be questioned except on the ground that it was reached without full and effective consultation with the Chief Justice of the High Court, the Governor of the State and the Chief Justice of India or that it was based, on irrelevant considerations. Where such a challenge is made, the burden is on the Central Government to show that there was full and effective consultation and the decision was based on relevant considerations. In fact, whereas Additional Judge is not appointed as an Additional Judge for a further term or as a permanent Judge despite the unanimous opinion of the Chief Justice of the High Court and the Chief Justice of India, the decision of the Central Government would prima facie be liable to attack and the burden would lie heavy on the Central Government to show that it had cogent reasons to disagree with the Chief Justice of the High Court and the Chief Justice of India."

Mr. Sharifuddin Pirzada has also produced the relevant extracts from the "Constitutional Law of India" by H. M. Seervai, Third Edition, Volume II, wherein the author has observed as under: --

"25.178. The practice of appointing Judges and then confirming them as permanent Judges, had been followed under the G.I. Act, 35 and even before. No doubt a few Additional Judges resigned and reverted to 'practice at the Bar. Again,' on very rare occasions an Additional Judge was not reappointed. However, the practice of appointing Additional Judges, and then making them permanent Judges, reinforced by the English tradition of an independent judiciary, posed no problems about the independence of the Judiciary. This was because although an Additional Judge had, in theory, no security of tenure, for all practical purposes his, tenure of office was secure. The French Conseil d'Etat shows how an important practice, reinforced by tradition, can effectively secure judicial independence ... ... Tulzapurkar, J. said, first, that there was a valid classification between proposed appointees for initial recruitment and a sitting Additional Judge, who had a preferential right to be considered for reappointment. Secondly, unlike a proposed initial appointee, an Additional Judge had an enforceable right not to be dropped illegally and/or the whim or caprice of the appointing authority, and to be considered for continuance either as Additional Judize or for appointment as a permanent Judge in the High Court ... ...

25.230-C. The salient facts for deciding the central issue are not in dispute. They show that all talk of safeguards in the reappointment of an Additional Judge, or against the arbitrary or mala fide dropping of an Additional Judge, sounds well on paper, but has no relation to reality. Confining ourselves to Additional Judge, it is said that there are two safeguards before an Additional Judge is dropped. First, an Additional Judge can be dropped only in the public interest, and not mala fide or for extraneous considerations. Secondly, he can be dropped only after full consultation as required by Article 217(l). The consultation between the Chief Justice-of India, and the Chief Justice of the High Court, were designed to secure competent advice as to the fitness of a person to be a High Court Judge, and a sitting Additional Judge had already passed that test."

From the above Indian Supreme Court judgment and the comments of the above author, it seems that in India though Article 224(l) does not visualis6 appointment of an Additional Judge against. a permanent vacancy and the appointment is purely temporary but on account of practice/convention developed during 25 years, it has been held that an Additional Judge had the right to be considered for appointment as a permanent Judges and that the decision of the Central Government cannot be questioned except on the ground that it was reached without full and effective consultation of the State and the Chief Justice of India or that it was based on irrelevant considerations. It has been further held that where such challenge is made, the burden is on the Central Government to show that there was full and effective consultation and the decision was based on relevant considerations. It was also held that where an Additional Judge is not appointed as an Additional Judge for a further term or as a permanent Judge despite the unanimous opinion of the Chief Justice of India, the decision of the Central Government would prima facie be liable to attack and the burden would lie heavily on the Central Government to show that it had cogent reasons to disagree with the Chief Justice of the High Court and the Chief F Justice of India. However, in Pakistan, the above Article 197 is on different footing as it inter alia postulates the appointment of an Additional Judge against a permanent vacancy. It is also well-established practice/convention that if an Additional Judge performs his functions during the period for which he was appointed to the satisfaction of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan, he has always been appointed as a permanent Judge except in a rare case. In this view of the matter,' a person who is appointed against a permanent vacancy as Additional Judge in a High Court or if a permanent vacancy occurs during his period as an Additional Judge, he acquires a reasonable expectancy to be considered as a permanent Judge and in case he is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan, he is to be appointed as such in the absence of very strong reasons to be recorded by the President/Executive which may be justiciable. Additionally, the Executive, instead of accepting the recommendations of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan for permanent appointments without further consulting them, cannot extend the period instead of appointing them on permanent basis as recommended by the two Chief Justices.

58. Before dealing with the provisions relating to the Federal Shariat Court, I may deal with the question No.(ix), namely, as to whether the requirement provided for in Article 193(2)(a) of the Constitution for a candidate of a High Court judgeship, namely, he has for a period of or for periods aggregating not less than ten years been an Advocate of a High Court refers to the actual practical experience at the Bar or does it refer to the period of enrolment as an Advocate of the High Court? The contention of Mr. Khairi as well as the learned counsel appearing as amicus curiae was that the above sub-clause (a) of clause (2) of Article 193 refers to the actual practice/experience at the Bar and not the period of enrolment, whereas the submission of the learned counsel for the Federation, Messrs Yahya Bakhtiar and Aitzaz Ahsan, was that it relates to the period of enrolment. They heavily relied upon the above foreign treatises/publications, in which it has been mentioned that in UA.A. and U.K. experience at the bar was not a precondition for appointment as a Judge in the superior Courts; I have already dealt with hereinabove the reason as to why in U.S.A., the past experience at the bar for appointment in the U. S. Supreme Court was not considered as a

precondition. I have also quoted hereinabove the relevant portions from the booklet issued by the Lord Chancellor's office in U.K. about the procedure obtaining in England for appointment of the Judges in various Courts. From the above extracts, it is evident that the appointments are nowadays made purely on merits.

I have also quoted hereinabove various Verses from the Holy Qur'an and the relevant portions of the letter of Hazrat Ali Karam Allah Wajho, addressed to Ashter Malik, 1he Governor of Egypt, from which it is evident that Islam enjoins that, while selecting the Judges, the authority should select the people of excellent character, superior calibre and meritorious record having deep insight and profound knowledge.

if we we're to read carefully sub-clause (a) of clause (2) of Article 193 of the Constitution, it becomes evident that 10 years' period referred to in subclause (a) thereof relates to experience and not the period of enrolment. Under clause (b) thereof not less than 10 years' period is provided for civil servants for being eligible for consideration for appointment as a Judge of the High Court and out of the above 10 years, it has been provided that for a period of not less than three years, he must have served as or exercised the functions of a District Judge in Pakistan. The above sub-clause (b) speaks of actual experience in service and, therefore, if it is to be read with sub-clause (a), it becomes evident that sub-clause (a) also refers to the experience. In any case, it is a matter for consideration by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan. They have to decide, whether a particular candidate has requisite experience and once they form the view that the candidate has the requisite experience as envisaged by sub-clause (a) of clause (2) of Article 193, this issue will not be justiciable before the Court of law. The Court cannot sit and decide, whether a particular person has the requisite experience or not? It is a matter of subjective satisfaction of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan.

59. As regards question No.(x), namely, whether the political affiliation of a candidate for judgeship is a disqualification, I may observe that Mr. Khairi and the learned counsel appearing as amicus curiae have vehemently contended that a candidate for judgeship should not ,have political affiliation. They emphasised that a person having political affiliation would not inspire public confidence.

On the other hand, Mr. Qazi Muhammad Jamil, learned Attorney-General, as well as Messrs Yahya Bakhtiar and Aitzaz Ahsan have vehemently contended that the mere fact that a candidate has political affiliation with a political party, is no disqualification. The learned Attorney-General has referred to the examples of American Chief Justices, Marshall and Earl Warran, the former was the Secretary of State before elevation and the latter was Governor of California. He also cited

example of Justice K. Iyer of India, who was a Minister in Karnatak Province, and in Pakistan Mr. Justice Zahoorul Haq, Mr. Justice Ghous Ali Shah and Mr. Justice Akhtar Ali G. Qazi. Mr. Aitzaz Ahsan has relied upon inter alia the above-quoted extracts to show that in the Supreme Court of United States, Judges were appointed who had political affiliation, which was not considered as a disqualification and so was the case in U.K.

However, I may observe that there seems to be a change in the above trend recently in U.S.A. as well as in U.K. In my humble view, a person cannot be appointed as a Judge simpliciter for the reason that he has political affiliation with a particular political party, but if he is a man of integrity and has sound knowledge of law and is recommended by the Chief Justice of the High court concerned and the Chief Justice of Pakistan, then his past political affiliation will not be a disqualification. A person of integrity and sound knowledge normally severs his past connections with the political party with which he had affiliation and decides the matter purely on merits. However, it will be desirable not to appoint a person who is a strong activist in a political party and for him it will not be possible to erase unconscious tilt in favour of his party.

The learned counsel for the Federation also referred to the facturn that after the establishment of Pakistan, most of the Judges, who were elevated to the Bench, were active Muslim Leaguers during pre-partition days.

In my humble view, their case is distinguishable as during pre-partition days, Muslims were fighting for a homeland. It was a joint cause of all clauses of persons belonging to our religion Islam. Secondly, in those days, generally people were of high calibre and integrity, which unfortunately, we are lacking nowadays.

I am, therefore, of the view subject to what I have observed hereinabove that simpliciter political affiliation of a candidate for judgeship of a superior Court may not be a disqualification provided the candidate is of an unimpeachable integrity, having sound knowledge in law and is recommended by the Chief Justice of the High Court concerned and the Chief Justice or Pakistan.

60. I may now take up question No.(viii), namely, whether is there any conflict between Articles 203C(4)(4B) and 209 of the Constitution. If yes, can it be resolved. If not, what is its effect? Mr. Khairi, Mr. Raja Muhammad Akram and almost all the learned counsel appearing as amicus curiae contended that transfer of a sitting Chief Justice of a High Court or a sitting Judge of the said Court to the Federal Shariat Court is a punishment, the Government transfers those Judges to the Federal Shariat Court, who are not liked by it. Mr. Yahya Bakhtiar has candidly submitted that the Chapter

relating to the creation of Federal Shariat Court in the Constitution was incorporated by the then Chief Martial Law Administrator, late Ziaul Haq, mala fidely with the object to keep the judiciary under his influence and control. According to him, the transfer of a sitting Chief Justice or a sitting Judge of a High Court to the Federal Shariat Court is a punishment. He also pointed out that there is a conflict between clause (4-B) of Article 203-C and Article 209 of the Constitution.

Mr. S. M. Zafar was of the view that Article 203-C is a specimen of bad drafting. However, Mr. Qazi Muhammad Jamil, learned Attorney-General, has submitted that as under Article 203-C the President has the power to appoint any High Court Judges including the Chief Justice, no exception can be taken.

Mr. Yahya Bakhtiar has also submitted that -since the above Article is in the Constitution, it is invoked by the Government in power. He further submitted that this Court should make suggestions for deletion of various amendments made in the Constitution by late General Ziaul Haq.

It will be advantageous to reproduce clause (1), clause (4), clause (4B) and clause (5) of Article 203-C and clauses (1), (2), (5), (6) and (7) of Article 209 of the Constitution, which read as follows: --

Clauses (1). (4) (4-B) and (5) of Article 203-C of the Constitution:

“203-C.--(I) There shall be constituted for the purposes of this Chapter a Court to be called the Federal Shariat Court.

(4) The Chief Justice and a Judge shall hold office for a period not exceeding three years, but may be appointed for such further term or terms as the President may determine:

Provided that a Judge of a High Court shall not be appointed to be a Judge for a period exceeding two years except with his consent and, except where the Judge is himself the Chief Justice, after consultation by the President with the Chief Justice of the High Court.”

(4-B). The President may, at any time, by order in writing,--

(a) modify the term of appointment of a Judge

(b) assign to a Judge any other office; and

(c) require a Judge to perform such other functions as the President may deem fit;

and pass such other order as he may consider appropriate.

Explanation. ---In this clause and clause (4C), Judge' includes Chief Justice,

(5) A Judge of a High Court who does not accept appointment as a Judge shall be deemed to have retire from his office and, on such retirement, shall be entitled to receive a pension calculated on the basis of the length of his service as Judge and total service, if any, in the service of Pakistan."

Clauses (1), (2),15). (6) and (7) of Article 209 of the Constitution:

"209.--(1) There shall be a Supreme Judicial Council of Pakistan, it this Chapter referred to as the Council.

(2) The Council shall consist of-

(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts.

(5) If,. on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court--

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct, the President shall direct the Council to inquire into the matter.

(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion--

(a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and

(b) that he should be removed from office, the President may remove the Judge from office.

(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.

A perusal of the above-quoted clause (4) of Article 203-C of the Constitution indicates that the President has been empowered to appoint a Judge of a High Court for a period not exceeding two years without his consent but for a period more than two years with his consent after consultation with the Chief Justice of the High Court (Except where the Judge himself is the Chief Justice)!

It may further be noticed that under clause (4-13), the President may at any time modify the terms of appointment of a Judge, assign to a Judge any other office and require a Judge to perform such other functions as he may deem fit or to pass such other order at he may consider appropriate.

It may also be noticed that clause (5) envisages that if a Judge of a High Court, which includes the Chief Justice, does not accept appointment as a Judge of the Federal Shariat Court, he shall stand retired from the office.

It may be noticed that clause (1) of Article 209 envisages the constitution of a Judicial Council of Pakistan, whereas above clause (2) thereof gives the composition of the above Council. It may further be noticed that clause (5) deals with the procedure of initiation of the proceedings against a Judge of a High Court or of the Supreme Court on the ground of being incapable of properly performing the duties of his office by reason of physical or mental incapacity or because he has been guilty of misconduct.

It may further be stated that clause (6) of the above Article relates to the formation of opinion by the Council for recommending the removal of the Judges on any one of the above two grounds. The President has been empowered to pass the removal order upon receipt of such opinion.

Whereas, clause (7) thereof guarantees the tenure of a Judge of Supreme Court and of a High Court by providing that a Judge of the Supreme Court or a High Court shall not be removed from office except by this Article.

The Federal Shariat Court is a new Court created by the Martial Law regime. it does not fit in the hierarchy of the Courts originally provided under the Constitution. it may be pointed out that Article 203-GG lays down that subject to Articles 203-D and 203-F, any decision of the Court in exercise of its jurisdiction under this Chapter shall be binding on a High Court and on all Courts subordinate to a High Court, meaning thereby, that the Federal Shariat Court is not equated with a High Court. The appointment of a permanent sitting Chief Justice of a High Court or a sitting permanent Judge thereof is in fact a fresh appointment in a different Court. Factually, it cannot be treated as a transfer from one High Court to another High Court or a Court equivalent to it. The above fresh appointment in fact impliedly involves removal from office of a Chief Justice or a Judge of a High Court, as the case may be, for the period for which he is appointed in the Federal Shariat Court. It may further be observed, that once a sitting Chief Justice of a High Court or a

permanent Judge thereof is appointed in the Federal Shariat Court without his consent, he becomes susceptible under clause (4-B) of Article 203-C to actions detrimental to his security of tenure which is guaranteed by the above Article 209(7) of the constitution, inasmuch as the President may at any time by an order in writing modify the terms of appointment of such a Judge or he may assign to such Judges any other office, i.e. any office other than of a Judge or require him to perform such other functions as the President may deem fit, which may not necessarily be judicial functions. In the past, Mr. Justice Aftab Hussain, who was the Chief Justice of Federal Shariat Court, was made an Officer on Special - Duty in a Ministry. He declined and took retirement.

A Chief Justice of the High Court, who may be senior to the Chief Justice of the Federal Shariat Court, after appointment in the Federal Shariat - , Court,, becomes the junior most Judge, For example, Mr. Justice M. Mahboob Ahmad was appointed as a Judge in 4978 and Mr. Justice Nasir Aslam Zahid was appointed in 1980. Mr. Justice M. Mahboob Ahmad had not joined the "' Federal Shariat Court, whereas Mr. Justice Nasir Aslam Zahid joined the same, with the result that he became junior to all the Judges of the Federal Shariat Court at the time when he joined including the Chief Justice; though all of them were junior to him on the basis of dates of their respective induction, in the High Court. This also adversely affects the terms of a Judge.

Since there is a conflict between the above two Articles, efforts are to be made to resolve the same by reconciling it. The Constitution is to be read as a whole as an organic document. A close scrutiny of the various provisions of the Constitution highlights that it envisages that the independence of judiciary should be secured as provided by the founder fathers of the country by passing Objectives Resolution and by providing security of tenure. The Constitution also envisages separation of judiciary from the executive. Keeping in view the various provisions of the Constitution, it is not possible to reconcile the above provisions of Article 203-C and Article 209. In such a situation, the question arises, which of the Article should prevail. One view can be that since Article 203-C was incorporated subsequent to Article 209, the former should prevail. The other view can be that since Article 209 was incorporated by consensus by the framers of the Constitution and whereas Article 203-C was incorporated by the then Chief Martial Law Administrator and as the same is detrimental to the basic concept of independence of judiciary and the separation of judiciary, the former should prevail. I am inclined to prefer the latter interpretation as it will be more in consonance with the various provisions of the Constitution and in accord with justice and fairplay. A person cannot be appointed on adverse terms in a new Court without his consent.

The effect of the above view, which I am inclined to take, would be that any appointment of a sitting Chief Justice of a High Court or a permanent IM, Judge thereof without obtaining his consent, would be violative of Article 2-09 of IM the Constitution and, therefore, would be void. I may also observe that even Mr. Yahya Bakhtiar, learned counsel for the Federation, has candidly submitted 1M besides Mr. Fakhruddin G. Ebrahim, learned counsel appearing as amicus' curiae, that the Federal Shariat Court was used as a during ground for Judges who were not wanted by the

Government in power. Even if it is to be treated as a transfer, which is in fact not, a Judge cannot be transferred as a punishment but for the public interest.

61. This leads me to the last question, namely, as to whether the President has the absolute discretion to transfer a High Court Judge to another High Court without his consent up to a period of two years or is he be guided by some principles. In this regard, reference may be made to clause (1) of Article 200 of the Constitution, which reads as under-

"200.7-(1) The President may transfer a Judge of a High Court from one High Court to another High Court, but no Judge shall be so transferred except with his consent and after consultation by the President with the Chief Justice of Pakistan and the Chief Justices of both High Courts:

Provided that, such consent, or consultation wit h the Chief Justices of the High Courts, shall not be necessary if such transfer is for a period not exceeding two years at a time.

Explanation.--In this Article, 'Judge' does not include a Chief Justice but includes a Judge for the time being acting as Chief Justice of a High Court other than a Judge of the Supreme Court acting as such in pursuance of a request made under paragraph (b) of Article 196. "

A perusal of the above-quoted clause shows that the President has been empowered to transfer a Judge of a High Court from one High Court to another High Court with his consent and after consultation by the President with the Chief Justice of Pakistan and the Chief Justices of both the High Courts. The proviso, which was added by Fifth Amendment with effect from 13-9-1976, originally provided that such consent or consultation with the Chief Justices of the High Courts shall not be necessary if such transfer is for a period not exceeding one year at a time. However, the above period of one year in the proviso was substituted by two years by President Order No.14 of 1985 by the Chief Martial Law Administrator/President.

The Explanation to the above clause (1) indicates that the term "Judge" used in the aforesaid Article does not include a Chief Justice but includes a Judge for the time being acting as Chief Justice' of a High Court. This Explanation was added by President Order No.24 of 1985.

It is clear from the above amended form of above clause that, in any case, the consultation of the Chief Justices is required even if the transfer is for less than two years and secondly, a permanent Chief Justice cannot be transferred under the above provisions of the Constitution. The above consultation as I have already held while construing inter alia Articles 177 and 193, should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. In this behalf, it may be pertinent to refer the two Indian Supreme Court cases on the subject.

(i) Union of India, Appellant v. Sankalchand Himatlal Sheth and another, Respondent (AIR 1977 SC 2328);

in which the Indian supreme Court, while construing Article 222(l) of the Indian Constitution relating to the transfer of Judges, held that the paramount consideration while making a transfer order after consulting the Chief Justice is the public interest and that the transfer of a High Court Judge is made in a given case for an extraneous consideration, the exercise of the power can appropriately be struck down as being vitiated by legally mala fide. It was further held that the above extraordinary power cannot be exercised by the President in a manner which is calculated to defeat or destroy in one stroke the object and purpose of the various provisions concerned with such care to insulate the judiciary from the influence and pressure of the Executive. It may be advantageous to reproduce para.43 from the opinion of Y. V. Chandrachud, J., which reads as follows:--

"43. Article 222(l) postulates fairplay and contains built-in safeguards in the interests of reasonableness. In the first place, the power to transfer a High Court Judge can be exercised in public interest only. Secondly, the President is under an obligation to consult the Chief Justice of India which means and requires that all the relevant facts must be placed before the Chief Justice. Thirdly, the Chief Justice owes a corresponding duty, both to the President and to the Judge who is proposed to be transferred, that he shall consider every relevant fact before lie tenders his opinion to the President. In the discharge of this Constitutional obligation, the Chief Justice would be within his rights, and indeed it is his duty whenever necessary, to elect and ascertain further facts either directly from the Judges concerned or from other reliable sources. The executive cannot and ought not to establish rapport with the Judges which is the function and privilege of the Chief Justice. In substance and effect, therefore, the Judge concerned cannot have reason to complain of arbitrariness or unfair play, if the due procedure is followed. I must add that Mr. Seervai did not argue that the order of transfer is bad for non-compliance with the principles of natural justice.

The majority of the Judges were of the view that since the word consent" did not figure in Article 222(l) of the Indian Constitution, the consent of the Judges involved is not required. Whereas

Bhagwati, J., with whom N.L. Untwalia, J. agreed, was of the view that the word "transfer", which is used in clause (1) of Article 222, is a neutral word, which can mean consensual as well 8 compulsory transfer and that keeping in view the noble purposes of the Constitution to secure the independence of the superior judiciary by insulating it from all forms of executive control or influence, the word "transfer" must be read in the limited sense of consensual transfer.

62. This question was again considered in S.P. Gupta's case (supra). The above majority view was reiterated.

63.. Mr. Sharifuddin Pirzada has furnished the relevant portions from the book "Constitutional Law of India" by H. M. Seervai, Third Edition, Vol.2, relating to transfer of a High Court Judge from one High Court to another High Court in India. The author seems to be in favour of Bhagwati, J.'s views that the transfer should be consensual.

64. I had the occasion to touch upon the above question in a passing reference while heading the Bench of seven members in the High Court of Sindh in the case of Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another (supra), in which I observed as under:--

"It may be observed that the relevant provisions of the Constitution pertaining to transfer of a High Court Judge to another High Court and his appointment to the Federal Shariat Court are referred to and I discussed hereinbelow. However, it will suffice to observe that I am inclined to hold that a transfer of a High Court Judge to another High Court or to the Federal Shariat Court can only be made in the public interest and not for an object alien to the said object, and the question, whether a transfer is for a public interest is justiciable even at the behest of a lawyer.

Mr. Sharifuddin Pirzada, learned Senior Advocate Supreme Court appearing as amicus curiae, has submitted that the view taken by the High Court of Sindh in the above case was in consonance with law as to the transfer of a Judge from one High Court to another High Court.

65. 1 am, therefore, of the view that the above transfer power cannot be invoked by the President/Executive for any purpose other than public interest and that too the transfer order can be made after consultation of the Chief Justice IG of Pakistan in ' the above terms. The power of transfer cannot be pressed into service for the purpose of inflicting punishment on a Judge or for any other extraneous consideration.

66. Before parting with the -above discussion, I may observe that Mr. Sharifuddin Pirzada has contended that the appointment of Judges in the superior Courts by the President is not an act of the nature which needs' advice of the Prime Minister under Article 48 of the Constitution. According to him, the relevant Articles of the Constitution confer power on the President to appoint the Judges of the superior Courts after consulting the consultees mentioned in the relevant Articles, which do not include the Prime Minister. His further submission was that since the special Articles provide specifically the consultees who are to be consulted, this will negate Article 48 of the Constitution and thus the Prime Minister's advice is not required. In support of his submission, he has referred to certain cases and other material.

Mr. Khairi and Mr. Raja Muhammad Akram, learned counsel for the newly added appellants Nos.3 to 7, had also submitted arguments in line with Mr. Shariftiddin Pirzada's above arguments.

67. On the other hand, Mr. Qazi Muhammad Jamil, learned Attorney-General, and Mr. Aitzaz Ahsan, learned counsel for the Federation, have submitted that the appointment of a Judge in a superior Court is an executive act and the Executive includes the President and the Prime Minister. According to them, it is not necessary to go into the above question.

68. Since the interpretation of various Articles given by this Court hereinabove will be binding on the Executive, as such it is not necessary to go into the above question in this case.

69. These are the reasons pursuant to the short order dated 20-3-1996, which is to be treated as part of this judgment, which reads as follows: --

(i) The words "after consultation" employed inter alia in Articles 177 and 193 of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness-and suitability of a candidate for Judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive.

(ii) That if the President/Executive appoints a candidate found to be unfit and unsuitable for judgeship by the Chief Justice of Pakistan and the Chief Justice of the High Court concerned, it will not be a proper exercise of power under the relevant Article of the Constitution.

(iii) That the permanent vacancies accruing in the offices of Chief Justices and Judges normally should be filled in immediately not later than 30 days but a vacancy occurring before the due date on account of death or for any other reasons, should be filled in within 90 days on permanent basis.

(iv) That no ad hoc Judge can be appointed in the Supreme Court while permanent vacancies exist.

(v) That in view of the relevant provisions of the Constitution and established conventions/practice, the most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the President/Executive, he is entitled to be appointed as such in the Court concerned.

(vi) An Acting Chief Justice is not a consultee as envisaged by the relevant Articles of the Constitution and, therefore, mandatory Constitutional requirement of consultation is not fulfilled by consulting an Acting Chief Justice except in case the permanent Chief Justice concerned is unable to resume his functions within 90 days from the date of commencement of his sick leave because of his continuous sickness.

(vii) That Additional Judges appointed in the High Court against permanent vacancies or if permanent vacancies occur while they are acting as Additional Judges, acquire legitimate expectancy and they are entitled to be considered for permanent appointment upon the expiry of their period of appointment as Additional Judges and they are entitled to be appointed as such if they are recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan in the absence of -strong valid reason/reasons to be recorded by the President/Executive.

(viii)That an appointment of a sitting Chief Justice of a High Court or a Judge thereof in the Federal Shariat Court under Article 203-C of the Constitution without his consent is violative of Article 209, which guarantees the tenure of office. Since the former Articles was incorporated by the Chief Martial Law Administrator and the latter Article was enacted by the framers of the Constitution, the same shall prevail and, hence, such an appointment will be void.

(ix) That transfer of a Judge of one High Court to another High Court car only be made in the public interest and not as a punishment.. -

That the requirement of 10 years' practice under Article 193(2)(a) of the Constitution relates to the experience/practice at the Bar and not simpliciter the period of enrolment.

(xi) That the simpliciter political affiliation of a candidate for judgeship of the superior Courts may not be disqualification provided the candidate is of an unimpeachable integrity, having sound knowledge in law and is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan.

(xii) That it is not desirable to send a Supreme Court Judge as an Acting Chief Justice to a High Court in view of clear adverse observation of this Court in the case of Abrar Hasan v. Government of Pakistan and others (PLD 1976 SC 315 at 342).

(xiii) That since consultation for the appointment/confirmation of a Judge of a superior Court by the President/Executive with consultees mentioned in the relevant Articles of the Constitution is mandatory, any appointment/confirmation made without consulting any of the consultees as interpreted above would be violative of the Constitution and, therefore, would be invalid.

In view of what is stated above, we direct;

(a) That permanent Chief Justices should be appointed in terms of the above conclusion No.(iii) in the High Courts where there is no permanent incumbent of the office of the Chief Justice;

(b) that the cases of appellant Nos.3 to 7 in Civil Appeal No.805 of 1995(i.e. Additional Judges who were dropped) shall be processed and considered for their permanent appointment by the permanent Chief justice within one month from the date of assumption of office by him as such;

(c) that appropriate action be initiated for filling in permanent vacancies of Judges in terms of above conclusion No.(iii);

(d) that ad hoc Judges working at present in the Supreme Court either be confirmed against permanent vacancies in terms of Article 177 of the Constitution within the sanctioned strength or they should be sent back to their respective High Courts in view of above conclusion No.(iv);

(e) that the cases of the appointees of the Federal, Shariat Court be processed and the same be brought in lint with the above conclusion No.(viii); and

(f) that upon the appointment of the permanent Chief Justice in the High .Courts where there is no permanent incumbent or where there are permanent incumbents already, they shall process the cases of the High Court Judges in terms of the above ‘ declaration No. 13 within one month from the date of this order or within one month from the date of assumption of office by a permanent incumbent, whichever is later in time and to take action for regularising the appointments/confirmation of the Judges recently appointed/confirmed inter alia of respondents Nos.7 to 28 in Civil Appeal No.805/95 in the light of this short order. In like manner, the Chief Justice of Pakistan will take appropriate action for recalling permanent Judges of the Supreme Court from the High Courts where they are performing functions as Acting Chief Justices and also shall consider desirability of continuation or not of appointment in the Supreme Court of Ad hoc/Acting Judges.

Resultantly, the direct petition and the appeal captioned above are allowed in the terms and to the extent indicated above.

70. This Court is grateful to Messrs Khairi and Raja Muhammad Akram, the learned Attorney-General, Mr. Qazi Muhammad Jamil, Messrs Yahya Bakhtiar and Aitzaz Ahsan, learned counsel for the Federation, and Messrs Syed Sharifuddin Pirzada, S. M. Zafar, Fakhruddin G. Ebrahim, Muhammad Akram Sheikh and Riazul Hasan Gilani, and the counsel who assisted them for rendering valuable services to this Court in the above cases, particularly the counsel who had appeared as amicus curiae.

(Sd.)

AJMAL MIAN, J

(Sd.)

FAZAL ILAHI KHAN, J

(Sd.)

MANZOOR HUSSAIN SIAL,. J

I agree With the judgment of my learned brother HJ(2) but would like to add my reasons thereto.

(Sd.)

MANZOOR HUSSAIN SIAL,. J

MANZOOR HUSSAIN SIAL, J.---Mr. Habib-ul-Wehab-ul-Khairi, Advocate Supreme Court, and another filed in this Court C. P. No. 11 / 1995, and prior to it, Al-Jehad Trust also filed through him C.P. No. 29/1994. The first petition was directed against judgment dated 4-9-1994 of the Lahore High Court, whereby Writ Petition No. 875/1979 filed by him was dismissed and the second petition was moved under Article 184(3) of the Constitution invoking original jurisdiction of this Court for the relief prayed for in the petition.

2. On 18-7-1995 both these petitions were taken up together, and after hearing learned Attorney-General and learned counsel for the parties, an order to the following effect was passed:---

C.P. No. 11/1995,-

(1) Leave is granted to examine in detail whether the judgment of the High Court impugned herein is sustainable on the ground that it is consistent with correct interpretation of the Articles in -the Constitution relating to Judiciary.

(2) Miscellaneous application of some respondents as co-petitioners will be heard at the time of final hearing,

(3) M/s. S.M. Zafar and Fakhruddin G Ebrahim learned Senior Advocates of the Supreme Court are requested to assist the Court as amicus curiae.

Constitutional Petition No. 29/1994:

(1) This petition is directly filed under Article 184(3). of the Constitution which inter alia challenges amendments of certain provisions of the Constitution and it also seeks interpretation of provisions of the Constitution relating to Judiciary.

(2) We admit this petition to the extent of examining the scope and import of provisions relating to the Judiciary.

(3) Both the matters to come up for hearing together on a date -to be fixed by the office.

3. On 8-10-1995, the application filed by respondents Nos. 29, 30, 31, 33 and 34 in C.P. No. 11/95 with a prayer to be transposed as co-petitioners/correspondents, was allowed on the ground that leave to appeal had already been granted in the case and the prayer of the respondents was not opposed by the learned Attorney-General for Pakistan. The necessary amendment was made in the Memorandum of Appeal and they were transposed as appellants Nos. 3 to 7 in Civil Appeal No. 805/1995. On the same day on suggestion made by Mr. Fakhruddin G. Ebrahim, Senior Advocate, Supreme Court, amicus curie, notices to the President, Supreme Court Bar Association and Presidents of all the High Courts Bar Associations in the country were issued to assist the Court. Mr. Sharifuddin Pirzada, Senior Advocate Supreme Court was also requested to assist the Court as amicus curie. Notices to all the Avocates-Gcneral of all the Provinces were also issued in the matter.

4. The regular hearing of these cases commenced on the 5th November, 1995 and concluded on,13th March, 1996.

We heard Mr. Habib-ul-Wahab-ul-Khairi, the appellant. Raja Muhammad Akram, learned Senior Advocate Supreme Court for appellants Nos.3 to 7. Mr. Aitzaz Ahsan Advocate, on behalf of Federation, in Civil Appeal No. 805 of 1995. Mr. Yahya Bakhtiar, learned Senior Advocate Supreme Court for Federation in the Constitutional petition, Qazi Muhammad Jamil, learned Attorney-General, appeared in response to Court notice. Mr. Syed Sharifuddin Pirzada, S.M. Zafar and Fakhruddin G. Ebrahim, Sheikh Muhammad Akram, Senior Advocate, President, Supreme Court Bar Association, Dr. Riazul Hasan Gilani for Lahore High Court Bar Association, as amicus curiae.

5. On 20-3-1996 this Court allowed the aforementioned appeal and the Constitutional petition in terms indicated in the brief order, which is re-produced hereunder:---

(i) The words "after consultation" employed inter alia in Articles 177 and 193 of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive.

(ii) That if the President/Executive appoints a candidate found to be unfit and unsuitable for judgeship by the Chief Justice of Pakistan and the Chief Justice of the High Court concerned, it will not be a proper exercise of power under the relevant Article of the Constitution.

(iii) That the permanent vacancies occurring in the office of Chief Justices and Judges normally should be filled in immediately not later than 30 days but a vacancy occurring before the due date on account of death or for any other reasons, should be filled in within 90 days on permanent basis.

(iv) That no ad hoc Judge can be appointed in the Supreme Court while permanent vacancies exist.

(v) That in view of the relevant provisions of the Constitution and established conventions/practice, the most senior Judge of a High Court has a legitimate expectancy to be considered for appointment as the Chief Justice and in the absence of any concrete and valid reasons to be recorded by the President/Executive he is entitled to be appointed as such in the Court concerned.

(vi) An Acting Chief Justice is not a consultee as envisaged by the relevant Articles of the Constitution and, therefore, mandatory Constitutional requirement of consultation is not fulfilled by consulting an Acting Chief Justice except in case the permanent Chief Justice concerned is unable to resume his functions within 90 days from the date of commencement of his sick leave because of his continuous sickness.

(vii) That Additional Judges appointed in the High Court against permanent vacancies or if permanent vacancies occur while they are acting as Additional Judges, acquire legitimate expectancy and they are entitled to be considered for permanent appointment upon the expiry of their period of appointment as Additional Judges and they are entitled to be appointed as such if they are recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan in the absence of strong valid reason/reasons to be recorded by the President/Executive.

(viii)That an appointment of a sitting Chief Justice of a High Court or a Judge thereof in the Federal Shariat Court under Article 203-C of the Constitution without his consent is violative of Article 209, which guarantees the tenure of office. Since the former Article was incorporated by the Chief Martial Law Administrator and the latter Article was enacted by the framers of the Constitution, the same shall prevail and, hence, such an appointment will be void.

(ix) That transfer of a Judge of one High Court to another High Court can only be made in the public interest and not as a punishment.

(x) That the requirement of 10 years' practice under Article 1932 (a) of the Constitution relates to the experience/practice at the Bar and not simpliciter the period of enrolment.

(xi) That the simpliciter political affiliation of a candidate for judgeship of the superior Courts may not be a disqualification provided the candidate is of an unimpeachable integrity, having sound knowledge in law and is recommended by the Chief Justice of the High Court concerned the Chief Justice of Pakistan.

(xii) That it is not desirable to send a Supreme Court Judge as an Acting Chief Justice to a High Court in view of clear adverse observation of this Court in the case of Abrar Hasan v. Government of Pakistan and others (PLD 1976 SC 315 at 342).

(xiii)That since consultation for the appointment/confirmation of a Judge of a superior Court by the President/Executive with consultees mentioned in the relevant Articles of the Constitution is mandatory, any appointment confirmation made without consulting any of the consultees as interpreted above would be violative of the constitution and, therefore would be invalid.

In view of what is stated above, we direct:

(a) That permanent Chief Justices should be appointed in terms of the above conclusion No. (iii) in the High Courts where there is no permanent incumbent of the office of the Chief Justice;

(b) that the cases of appellants Nos. 3 to 7 in Civil Appeal No. 805 of 1995 (i.e. Additional Judges who were dropped) shall be processed and considered for their permanent appointment by the Justice within one month from the date permanent Chief of assumption of office by him as such;

(c) that appropriate action be initiated for filling in permanent vacancies of Judges in terms of above conclusion No. (iii);

(d) that ad hoc Judges working at present in the Supreme Court either be confirmed against permanent vacancies in terms of Article 177 of the Constitution within the sanctioned strength or they should be sent back to their respective High Courts in view of above conclusion No. (iv);

(e) that the cases of the appointees of the Federal Shariat Court be processed and the same be brought in line with the above conclusion No. (viii); and

(f) that upon the appointment Of the Permanent Chief Justices in the High Courts where there is no permanent incumbent or where there are Permanent incumbents already, they shall process the

cases of the High Courts' Judges in terms Of the above declaration No. 13 within one Month from the date of this order or within one month assumption of Office by a Permanent incumbent, whichever is later in time and to take action for regularising the appointments/confirmation of the Judges recently appointed/confirmed inter alia of respondents NOS- 7 to 28 in Civil Appeal No. 805/1995 in the light of this short order. In like manner, the Chief Justice of Pakistan will take appropriate action or recalling permanent Judges of the Supreme Court ,from the High Courts where they are performing functions as Acting Chief Justices and also shall consider desirability of continuation or not pf appointment in the Supreme Court of ad hoc/Acting Judges.

6. In support of the above-quoted short order, my learned brother Ajmal Mian, J. has authored an elaborate judgment, with which I agree. He has not only set out the Constitutional history forming the background of the various issues involved in these cases, but also addressed all the contentions raised by' the learned counsel, who appeared in these cases and felicitiously answered the questions raised. I therefore, need not advert the adding some further reasons for the order with which I am in full agreement.

7. Before dealing with the relevant provisions of the Constitution relating to the Judiciary, I may point out that of late, the intention of the Legislature framing the provisions of the Constitution relating to Judiciary had either been misunderstood or intentionally applied incorrectly, with the result that it had adversely affected the confidence of the public in general in the Judiciary. Following are the glaring instances where the intent of the provisions relating appointment and transfer of Judges was defeated. The Government in power I always entertained the desire and attempted to pack the Courts with Judges their choice. The ad hoc Judges in the Supreme Court were inducted against permanent vacancies, whose appointments were revocable at any time. I appointment of Acting Chief Justice in the Supreme Court and High Court indefinite period; the transfer of Chief Justices and Judges of the High Courts Federal Shariat Court entailing in the event of their refusal to accept such Order of appointment in the Federal Shariat Court, the penalty of retirement from the offices in the High Court. Some of the Additional Judges of the High Court who had completed the tenure of their appointments were dropped and appointed as permanent Judges for undisclosed reasons. At this juncture, I n point out that the principles and provisions set out in the Objectives Resolution now form substantive part of the Constitution, wherein it is categorically provided that independence of Judiciary shall be "fully secure as also Article 2 of the Constitution mandates that all existing laws are required to be brought conformity with the Injunctions of Islam as laid down in the Holy Qu'ran Sunnah. The Constitution contemplates trichotomy of power inter se the pillars of the State, namely, Legislature, Executive and the Judiciary, each of the organs of the State has to function within the limits provided in Constitution. The Constitutional provisions relating to the appointments transfers of Judges of the superior Courts, therefore, need to be examined in light of the Islamic concept of justice. Islam had always attached unparalleled importance to the concept of justice. The persons, who administered justice, had been men of deep insight, God-fearing, honest and men of integrity. In t regard, the relevant portion of famous letter of Hazrat Ali "Karam Allah Wajho", addressed to Ashter Malik, the Governor of Egypt throws a flood of light on this subject and is reproduced hereunder:---

"So far as dispensing of justice is concerned, you have to be very careful in selecting officers for the same. You must select people excellent character, superior calibre and meritorious record. They must possess following qualifications. Abundance of litigations complexity of cases should not make them lose their temper. While they realise that they have committed a mistake in judgment they should persist in it and should not try to justify it. When truth is made clear to them or when right- path opens up before them, they should not consider it below their dignity to correct the mistake made or to undo the wrong done. They should not be corrupt, covetous or greedy. They should be satisfied with ordinary enquiry or scrutiny of a case but scrupulously go through all the pros and cons, must examine every aspect of the problem carefully, and whenever and wherever they find doubtful and ambiguous points they must stop, go through 'further details, clear the points and only then proceed with their decisions. They must attach greatest importance to reasonings, arguments and proofs. They should not get tired with lengthy discussions and arguments. They must exhibit patience and perseverance in scanning the details, in testing the points presented as true and in sifting facts from fiction and when the truth presented itself to them they must pass their judgments without fear, favour or prejudice. They should not develop vanity and conceit when compliments and praises are showered upon them. And they should not be misled by flattery and cajolery.

Pay them handsomely so that their needs are fully satisfied and they are not required to beg or borrow or resort to corruption. Give them such a prestige and position in your State that some of your courtiers or officers cannot over lord them or bring harm to them. Let Judiciary be above every kind of executive pressure or influence, above fear or favour, intrigue or corruption. "

In the light of the Islamic background where Judiciary had been highly respected and the verdict of the Qadis enjoyed great esteem, coupled with the role assigned to it in the framework of our Constitution, particularly after the introduction of Objectives Resolution a substantive constituent of the Constitution, it may be said that the Judiciary now occupies unique position and has to play a decisive role in ensuring that none of the functionaries of the Government act in violation of the provisions of the Constitution or the law. The nature of the role, that the Judiciary has to play, demands that it should be independent. The independence of Judiciary is deeply connected with the Constitutional process of the appointment and transfer of Judges of the superior Courts. It is, therefore, imperative that the Constitutional provisions relating to Judiciary are interpreted in a manner, so as to secure the complete independence of Judiciary. The approach to interpret the provisions should be progressive, dynamic and meeting the ever-changing requirements of the society.

8. Now I take up our conclusions Nos.(i) and (ii) in the short order, which are interlinked and wherein nutshell it is held that the words "after consultation" occurring in Articles 177 and 193 of

the Constitution, connote that the consultation, should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of High Court regarding fitness and suitability of the candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the appointing authority, and if the -President/Executive appoints a candidate found to be* unfit by the Chief Justice of Pakistan and Chief Justice of High Court concerned, it will not be a proper exercise of power under the relevant Articles of the Constitution.

The words "after consultation" mentioned in Articles 177 and 193 o the Constitution envisage participatory consultative process between consulteed and the appointing authority. The Chief Justice of Pakistan, as also the Chie Justice of High Court concerned have the best expert knowledge about the suitability of a person to be appointed as Judge of the High Court. The other consultee, namely, the Governor of the Province may provide adequate information about character of the candidate. All the consultees contemplated in the above mentioned provisions of the Constitution have vital role to play in the matter. The opinion of the Chief Justice of Pakistan, however, would deserve significant importance to select best persons for securing the independence o Judiciary. The opinion of the Chief Justice of High Court and the Chief Justice of Pakistan having direct knowledge, about the suitability of the candidate ca therefore be not ignored for any extraneous reason, and in case of disagreement the appointing authority is required to record sound reasons which will be justiciable. It, therefore, follows that if a person is declared unfit by the Chie Justice of the High Court, as also the Chief Justice of Pakistan, for appointment as Judge, he cannot be validly appointed, and if appointed it will not be a proper exercise of the jurisdiction vested in the appointing authority.

The perusal of Article 193 of the Constitution shows that that the appointment of a Judge of High Court is made by the President after consultation with the Chief Justice of Pakistan, the Governor concerned and the Chief Justice of the High Court (except where the appointment is that of a Chief Justice. The President has to consult three persons when making appointment of a Judge. The appointment of a Judge is a Constitutional appointment and a mode thereof is provided in the Constitution itself. The consultation required by the President from the consultees cannot be deemed to be a formality. Learned counsel for the parties, as also the learned counsel who assisted the Court a amicus curiae were unanimous in submitting that the consultory process envisaged in the above-noted provision is mandatory and valid appointment of Judge or his confirmation cannot be made without resorting to consultory process. The Chief Justice of the High Court and the Chief Justice of Pakistan in give a positive opinion about the suitability of a candidate, but the Governor of the basis of information received about his antecedents gives negative opinion the President is empowered to decline the appointment of the candidate. On the other hand, if the Chief Justice of the High Court and the Chief Justice of Pakistan give a negative opinion about a candidate on the basis of their expert opinion that candidate cannot be appointed and in this way the opinion of the Chief Justice cannot be ignored and due weight is to be given to his opinion The extended meaning given to the word 'consultation' is mainly for the reason that it secures the independence of Judiciary. The due deference in to be attached to the opinion of the Chief Justice of Pakistan and

the Chief Justice of the High Court due to their exalted position as envisaged it Islam, so that the appointment of the Judges are made in a transparent manner on the basis - of the merits alone. In Government of Sindh v. Sharaf Faridi PLD 1994 SC 105 this Court while dealing with the subject of independence of Judiciary held---

"that every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law Without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason; and the Judiciary is independent of the Executive and Legislature, and has Jurisdiction, directly or by way. of review, over all issues of a nature."

This object can only be achieved if Judges of integrity having sound knowledge in law-are appointed on the basis of the expert opinion given by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan. The word consultation" used in the relevant Article of the Constitution relating to Judiciary must be read in its context and being a mandatory requirement has to be effective, meaningful, purposive and consensus-oriented, to have best persons appointed as Judiciary.

Article 177 of the Constitution deals with the appointment of the Chief Justice of Pakistan, whereas Article 180 relates to the appointment of the Acting chief Justice of Pakistan. 'Me question, as to whether the most senior Judge of the Supreme Court is entitled to be considered for appointment as Chief Justice of 'Pakistan against permanent vacancy is not being decided because cases involving' the same subject-matter are already sub judice before the Courts, and the petitioner himself did not press the prayer to that extent vide. Civil Miscellaneous Application No.541-F of 1996. Another reason for not interpreting these provisions. is that proper assistance was not rendered by learned counsel for the parties in this regard.

The permanent vacancies occurring in the offices of Chief Justice and Judges of the superior Courts are required to be filled in immediately not later than 30 days, but if the vacancy occurs before the due date on account of death or for any other reason, that should be filled in within 90 days on permanent basis. The Constitutional offices like that of Chief Justice or the Judges should not remain vacant for indefinite period, which may tend to impair the independence of Judiciary.. Under Article 41(5) of the Constitution, the vacancy, of an -office of the President is filled in by election not later than 30 days from the occurrence of the vacancy. The date of retirement of the Judges is known to the, Federal Government, since the day they are appointed. The process of appointment of their successors, therefore, can be commenced in advance, so that the- successors-judges are appointed immediately after the vacancies occur. In case of a vacancy arising suddenly on account of death or for any other reason the appointment of the successor

Judge can be made within reasonable, time. The period of 30 days to fill in the vacancy of Constitutional office of a Judge has been laid down by adopting the criterion given in the provision of Article 41(5) of the Constitution which prescribes the period for filling in the vacancy of another Constitutional office. The law is that where the Constitution provides a criterion for doing a thing in one provision then that criterion can be utilised for doing another thing of similar nature provided in the Constitution. (See Maqsood v. Ali Muhammad and another 1971 SCMR 657). Here it was laid down that where a Statute itself lays down certain principles 'for do' ' some acts, they may be taken as a guideline for doing something of the same nature.

The period of 90 days to fill in the vacancy having occurred suddenly on account of death or for any other reason is considered a reasonable period because it is important to fill in the vacancies of the Constitutional offices of Y Judges speedily and by doing so the concept of independence of Judiciary will be strengthened.

Article 181 of the constitution relates to the appointment of Acting Judges. When office of a Judge of the Supreme Court is vacant or he is absent and is unable to perform the functions of his office due to any other reason the President may in the manner provided in clause (1) of Article 177 appoint a Judge of the High Court qualified for appointment as Judge of the Supreme Court to act temporarily as Judge of the Supreme Court. A retired Judge of the High Court is also eligible to be appointed as Judge of the Supreme Court and the appointment of Acting Judge of the Supreme Court shall continue until it is revoked by the President. This provision is not correctly applied or has been misused inasmuch as that since the appointment of the Acting Judge of the Supreme Court is revocable by the President at any time, the threat that his appointment can be revoked at any time keeps on constantly hanging over him for the entire period he continues in office, which undermines his independence. The independence of the Judiciary is also thereby undermined, which however is necessary to be fully secured.

Article 182 of ' Constitution relates to the appointment of ad hoc the Judges in the Supreme Court. If at any time it is not possible for want of quorum of the Judges of the Supreme Court to hold or continue the sittings of the Court or for any other reason it is necessary to increase temporarily the number of he Judges of the Supreme Court, the Chief Justice of Pakistan may in writing, with the approval of the President request any person who has held the office of a Judge of the Supreme Court and three years have not elapsed since he ceased to hold that office or a Judge of the High Court qualified for appointment as Judge of the Supreme Court with the approval of die President and with the consent of the Chief Justice of the High Court, may be asked to attend the sittings of the Supreme Court as ad hoc Judge for such period as may be necessary in the circumstances and while so sitting he shall have the same power and jurisdiction as Judge of the Supreme Court. The bare reading of the provision of this Article indicates that an ad hoc Judge in the Supreme Court cannot be appointed against existing permanent vacancy. indeed there was unanimity of learned counsel for the parties and amicus curiae that ad hoc Judge in the supreme Court cannot be

appointed against the permanent vacancy and is appointed only` when it has become imperative to increase temporarily the existing strength of the Judges of the Supreme Court. The practice of appointing ad hoc Judges against permanent vacancies is therefore in contravention of the provision of Article 182 of the Constitution. Even otherwise the appointment of ad hoc Judges in the Supreme Court is for a specific purpose, namely, where at any time it is not possible for want of quorum of the Judges of the Supreme Court to hold or continue the sitting of the Court or for any other reason it is necessary to increase temporarily the number of Judges of the Supreme Court, this provision can be availed of. The language of the provision clearly indicates that an ad hoc Judge is appointed temporarily to cater for a particular or special situation and not as a substitute for filling a permanent vacancy.

Article 193 of the Constitution empowers the President of Pakistan to appoint the Chief Justice of the High Court. Apparently there is no Constitutional requirement to appoint senior most Judge as Chief Justice of the High Court whenever permanent vacancy occurs in the High Court, but to I secure the independence of Judiciary from the Executive, it is necessary to advert to the Constitutional convention which has developed by the continuous usage and practice over a long period of time. The Constitutional convention to appoint most Senior Judge of the High Court as a Chief Justice, had been consistently followed in the High Courts since before partition of the subcontinent. The senior most Judge has an edge over rest of the Judges of the High Court on the basis of his seniority and entertains a legitimate expectancy to be considered for appointment as Chief Justice against permanent vacancy of the office of the Chief Justice. Apparently there is wisdom in following the Constitutional convention of appointing most senior Judge of the High Court as permanent Chief Justice otherwise a junior most Judge in the High Court may aspire to become Chief Justice of the High Court by bypassing his seniors and to achieve this object resort to undesirable conduct by going out of his way to oblige the Government in power. If he succeeds in securing his appointment as Chief Justice by superseding his seniors, by resorting to such measures he will endanger the independence of Judiciary and destroy the public confidence in the Judiciary. If a departure to follow the established convention of appointing the senior most Judge is to be made, the appointing authority should, record reasons for not appointing most senior Judge as Chief Justice of the High Court. The complexion of the Institution is likely to be impaired by so doing.

The next important question for consideration is whether the Acting Chief Justice is not a consultee within the meaning of Articles of the Constitution. The mandatory Constitutional requirement of consultation is not fulfilled by consulting the Acting Chief Justice. The concept of appointment of the Acting Chief Justice is that it is for a stopgap arrangement only for a short period when the office of the Chief Justice is vacant or the Chief Justice of High Court is absent, or is unable to perform the functions of his office due to any other reason. The President shall appoint one of the other Judges of the High Court to act as Chief Justice or may request one of the Judges of the Supreme Court to act as Chief Justice.

Article 496 is different in its import than Article 193, which relates to appointment of permanent Chief Justice of the High Court. The concept of Acting Chief Justice was initially introduced in India during pre-partition days, but had always meant appointment of an Acting Chief Justice as stopgap arrangement. He is not supposed to take decisions relating to important policy matters without consulting the permanent Chief Justice. This provision of the Constitution was unfortunately misused during the Martial Law regime, where contrary to the intention of the framers of the Constitution the Acting Chief Justices were allowed to continue as such for long periods apparently to keep the Judiciary - under the control of Executive, which militated against the independence of Judiciary. The definition of Chief Justice as contained in Article 260 of the Constitution includes the Judge for the time being acting as Chief Justice of the Court. The words "time being" clearly indicate that the Acting Chief Justice has only been appointed to meet the emergency and for a brief period. Reference to the definition word "include" from Aiyer's Judicial Dictionary, 10th Edition, indicates that it signifies something which does not belong to specie. Indeed the Constitution recognises this distinction. Thus in Article 209 for the purpose of determining the inter se seniority of Chief Justices of the High Courts the dates of their appointment as Acting Chief Justices have to be ignored. Again in Article 200 which deals with the transfer of High Court Judges, while a Judge who is for the time being acting as Chief Justice of a High Court, is deemed to be only a Judge of the High Court; the Chief Justice is not so included. This clearly demonstrates that an Acting Chief Justice of the High Court is treated as a specie different from the permanent Chief Justice. Both Mr. Fakhruddin G. Ebrahim and S.M. Zafar stated that Acting Chief Justice is ' not consultee" within the meaning of two relevant Articles of the Constitution. He is supposed to deal with only routine matters, and himself being holder of an office for a brief period cannot give opinion for the permanent appointment of Judges of the superior Courts, nor to deal with long term policy matters. A concept of acting appointment can be gathered from the fact that HaZrat Umer (Razi Allah Unoho) was grievously injured by a Jew. He fixed only three days' period for electing his successor by a panel of 6 Sohabis to fill in the vacancy of important public office. The nominee was only required to lead prayers in place of Caliph for three days, but was not authorised to carry out any other State functions. Quaid-e-Azam in his speech made in 1931, in the Federal Structure Sub-Committee Ro d Table Conference had expressed his general agreement with Sir Tej Bahalur Sapru, on the point that the practice of appointing Additional Judges was not desirable. Similarly, Mr. Chundrigar, Law 'Minister, made a speech regarding Judiciary in the *Pakistan Constituent Assembly and wherein he emphasised the independence of the Judiciary, impartiality of Judges, to be preserved and interpretation of the Constitution by the Supreme Court to be final. The Acting Chief Justice, therefore, cannot be ii, proper consultee within the meaning of the relevant provisions of the Constitution for appointment of the Judges, as this militates against the concept of providing for an independent Judiciary. Resultantly, the mandatory, Constitutional requirement of consultation is not fulfilled for F, appointment/confirmation of the Judges by consulting the Acting Chief Justice. F The interpretation of Article 196 of the Constitution that Acting Chief Justice is F not a consultee within the ambit of the relevant provision of the Constitutional advances the spirit of the Constitution qua fully securing the independence of Judiciary and suppresses the mischief of having the appointments of lasting nature manoeuvred through him.

Article 196 of the Constitution also provides that the President of Pakistan may request one of the Judges of the Supreme Court to act as Chief Justice. It has been noticed that this Constitutional provision has also been misapplied as the Judges of the Supreme Court were appointed as Acting Chief Justices for indefinite periods against the spirit of the Constitution. It shakes the confidence of Judiciary and tends to show lack of confidence in the serving Judges of the High Court. In Abrar Hussain v. Government of Pakistan and others PLD 1976 SC 315 at 342 an adverse observation was made by the Full Bench of this Court to the following effect :--

"Before parting with the matter I should like to observe that the appointment of the respondent, a permanent Judge of the Supreme Court, as Chief Justice of a High Court, is unprecedented. For the first time a Judge of the highest Court of the land is appointed a Judge of a High Court, which occupies a lower position in the hierarchy of Courts in Pakistan. Such appointment, even if permissible, may not always be beneficial to the interests of the Judiciary or the people at large, and should not be regarded as a healthy precedent."

Besides, the fact, that the Judge of the Supreme Court when appointed as Acting Chief Justice of High Court, is not a consultee within the meaning of Article 193 of the Constitution, his appointment as such in a lower position for indefinite long period is not appreciable.

The question whether the principle of natural justice that none should be condemned unheard was violated in the instant case, it is pointed out that the Court was called upon to interpret the relevant provisions of the Constitution relating to Judiciary and this has been done after fully hearing all concerned, namely I the learned Attorney-General of Pakistan, the learned Advocates-General of all the Provinces, Senior Counsel appointed by the Federal Government namely, Mr. Yahya Bakhtiar and Mr. Aitzaz Ahsan, besides eminent amicus curiae Syed Sharifuddin Pirzada, S.M. Zafar and Fakhruddin G. Ebrahim, Sheikh Muhammad Akram, Senior Advocate Supreme Court President, Supreme Court Bar Association, Dr. Syed Riazul Hasan Gitani for the President, Lahore High Court Bar Association.

As regards the next declaration to the effect that the appointment of a sitting Chief Justice of a High Court or a Judge thereof in the Federal Shariat Court under Article 203-C of the Constitution without his consent is violative of Article 209 of the Constitution is concerned, it appears appropriate to re-produce there under the relevant provisions of these Articles:---

"203-C.--(I). There shall be constituted for the purpose of this Chapter a Court to be called the Federal Shariat Court.

(4) The Chief Justice and a Judge shall hold office for a period not exceeding three years, but may be appointed for such further term or terms as the President may determine:

Provided that a Judge of a High Court shall not be appointed to be a Judge for a period exceeding two years except with his consent and (except where the Judge is himself the Chief Justice), after consultation by the President with the Chief Justice of the High Court.

4-B. The President may, at any time, by order in writing---

(a) modify the term of appointment of a Judge;.

(b) assign to a Judge any other office; and

(c) require a Judge to perform such other functions as the President may deem fit;

and pass such other order as he may consider appropriate.

Explanation.---In this clause and clause (4-C) “Judge” includes Chief Justice.

(5) A Judge of a High Court who does not accept appointment as a Judge shall be deemed to have retired from his office and, on such retirement, shall be entitled to receive a pension calculated on the basis of the length of his service as Judge and total service, if any, in the service of Pakistan.

209.---(1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.

(2) The Council shall consist of---

(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts. (5)

if, on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court---

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct, the President shall direct the Council to inquire into the matter.

(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion--

(a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and

(b) that he should be removed from office, the President may remove the Judge from office.

(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article."

The perusal of these provisions of the Constitution makes it abundantly clear that the President is empowered to appoint a Judge of the High Court under Article 203-C of the Constitution, as Judge of the Federal Shariat Court, for a period of two years without his consent, but for a period exceeding two years with his consent, after consultation with the Chief Justice of the High Court (except where the Judge himself is the Chief Justice). Similarly under clause (4-b) the President

may at any time by order in writing modify the terms of the appointment of the Judge, assign to him any other office, require him to perform any other function as he deems fit and to pass any other order as he may consider appropriate in the matter. Clause (5) further stipulates that if the High Court Judge does not accept appointment as Judge of the Federal Shariat Court, he shall stand retired from his office.

Whereas Article 209(l) contemplates constitution of a Supreme Judicial Council of Pakistan and its functions. The Supreme Judicial Council is empowered to reconituend removal of a Judge from his office for being incapable of properly performing his duties by reasons of his physical or mental incapacity or for being guilty of misconduct. Clause (7) thereof guarantees the tenure of his office and mandates that he shall not be removed from his office except as provided under that Article. Clause (8) of the Article provides that the Supreme Judicial Council shall issue Code of Conduct to be observed by the Judges of the superior Court.

It is significant to point out that the Federal Shariat Court was constituted by addition of Chapter 3-A in the Constitution by the Chief Martial Law Administrator ‘in 1980, that is long before the introduction of the Eighth Amendment in the Constitution. This Court was established under the cover of H the Martial Law and did not fit in the scheme of the existing Courts, It cannot H possibly be equated with High Court. The appointment of a Judge or Chief H Justice of High Court, as Judge of Federal Shariat Court, is therefore not a H transfer from one High Court -to another, rather operates as his removal from H office in the High Court and is fresh appointment in another Court with lack security of tenure and risk of the modification of his terms of appointment he enjoyed as Judge or Chief Justice of the High Court. It may be observed that there are several instances where Chief Justices and Senior Judges of High Courts, not liked by the Government in power, were appointed as most junior Judges of Federal Shariat Court, who-otherwise by length of period served ... High Courts were senior to all Judges of Federal Shariat Court including the Chief Justice. In one case, the Chief Justice of the Federal Shariat Court, who earned displeasure of the appointing authority, was made an Officer of Special Duty in a Ministry, which position he declined to accept and stood retired.

The abovementioned instances go to show that Federal Shariat Court has been used by the Government in power, as rightly said by Mr. Fakhruddin G. Ebrahim., amicus curie, a ‘dumping ground’ for the High Court Judges, and according to Mr. Yahya Bakhtiar, learned Senior Advocate, the High Court Judges were sent to Federal Shariat Court as punishment. The Chief Justices and Judges of High Courts feel reluctant to accept appointment as Judges of Federal Shariat Court, but they have no option, in case of their refusal to accept the appointment, they stand retired.

The close-examination of the abovementioned two provisions of the Constitution reveals that there is irreconcilable conflict between them. The accepted principle of interpretation is that where there is conflict between the two provisions, the entire provisions of the Constitution are required to be read as a whole, and the basic features of the Constitution taken into consideration.

The consideration which weighed with the Court more heavily in holding that the appointment of a sitting Chief Justice or a Judge thereof in the Federal Shariat Court under Article 203-C, without his consent, being violative of Article 209, was that the provision of the Constitution which corresponds more closely to and gives effect to dominant intent of the Constitution will have to be preferred in its application, to that provision, which detracts from that intent and spirit. Undoubtedly, Article 209 guarantees the tenure of office of a Judge and explicitly secures the independence of Judiciary, which is dominant intent of the Constitution, whereas Article 203-C militates against the security of tenure and independence of Judiciary, therefore, must yield to the provisions of Article 209 of the Constitution. 'The introduction of Article 203-C in the Constitution by the Chief Martial Law Administrator, vas against Article 209 which was enacted by the framers of the Constitution was merely one of the considerations, to hold that Article 209, which promotes security of tenure and independence of Judiciary must prevail, in its application over Article 203-C, which detracts from the intent and spirit of the Constitution namely to fully secure the independence of the Judiciary by inter alia providing full security of tenure to the Judges.

The appointment of sitting Chief Justices and Judges of High Courts, as Judges of Federal Shariat Court, without their consent, therefore, being violative of the provisions of Article 209 of the Constitution will be void. I may not be misunderstood to have held that Article 203-C is void. It is only the action taken thereunder viz. the appointment of Judges of High Courts in Federal Shariat Court, being, violative of Article 209 of the Constitution is declared void.

In this connection it is pertinent to observe that it is well-settled principle of interpretation that the Court is empowered to harmonise conflicting provisions of the Constitution and the Statutes and if it is not possible to reconcile the inconsistent provisions, to declare which of the provision will be preferred and given effect. The Court in exercise of its inherent judicial power can even read "words" in the Constitution or Statute in order to give effect to the manifest intention of the Legislature. In Muhammad Ismail v. The State PLD 1969 SC 2 ' 4 this principle was duly recognized by this Court and it was observed that in order to give effect to the true intention of the law-makers it is permissible for the Courts to read words in the Statute. It is true that generally a Court of law is not authorised to alter the language of the Statute for the purpose of supplying a meaning, yet in certain circumstances it is permissible for the courts to give effect to the true and patent intention of the law-maker by 1K supplying "omissions" in order to avoid manifest injustice. It is a misconception, e therefore, to consider that the reading of the words in the Constitution or Statute to give effect to the free intention of the law-maker amounts to re-writing or amending the Constitution or the Statutes. On the other hand, its purpose is to give effect to its true intent.

In Mst. Fazal Jan v. Roshan Din and 2 others (PLD 1990 SC 661) this I Court added the word "Judiciary" in the definition of the word "State" in Article 7 of the Constitution. Although the word 'Judiciary' did not form part of the definition of the word 'State' in the Constitution, but in the peculiar context of Article 25(3) of the Constitution it was held that the word "State" would include the judicial functions in its definition. Similarly in Hasham Khan v. State (PLD 1991 SC 367) this Court added the word "extending" in section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979) to give effect to the true and patent intention of the law-or by supplying the said omission. The Court following the accepted principles of interpretation acts within its jurisdictional domain to give effect to a particular provision, so as to bring it in accord with the patent intention of the framers of the Constitution.

Article 197 of the Constitution relates to the appointment of Additional Judges. It envisages that when the office of a Judge of the High Court is vacant, or he is absent or unable to perform his functions as such for any other reasons, or it is necessary to increase the number of Judges of the High Court, the President may appoint a person qualified for appointment as Judge of the High Court to be Additional Judge of the High Court for such period as the President may determine. In Indian Constitution, there is distinction in corresponding provision for the appointment of Additional. Judges in the High Courts. Neither in the 1956 Constitution of Pakistan nor prior to that there was any provision for appointment of the Additional Judges in the High Courts. In 1962 as well as in 1973 Constitutions a specific provision was introduced. A practice/convention has developed in Pakistan for the last about 25 years that Additional Judges are appointed against permanent vacancies and after the expiry of the period for which they were initially appointed they. are considered for permanent appointment as Judges of the High Court. Invariably, if Additional Judge of High Court performs his functions during the period for which he is appointed to the satisfaction of the Chief Justice of the High Court as also the Chief Justice of Pakistan, he is appointed as permanent Judge of the High Court. The Additional Judge, who is appointed against a permanent vacancy, or the vacancy having occurred d6ring the period he was working as Additional Judge clearly acquires a reasonable expectancy to be considered for appointment as permanent M Judge. In order to secure the independence of Judiciary if the Additional Judge is recommended by the Chief Justice of the High Court concerned and the Chie.' Justice of Pakistan, he is normally to be appointed as a permanent fudge in the M absence of strong reasons to the contrary, which must be. recorded by the appointing authority. It is in accord with the spirit of the Constitution that the period of his initial appointment as Additional Judge can only be extended on the recommendation of the Chief Justice of the High Court concerned or Chief Justice of Pakistan and not otherwise by the appointing authority. It is pointed out that legitimate expectancy of an Additional Judge, Oho had performed his functions to the satisfaction of the Chief Justice of the High Court concerned and Chief Justice of Pakistan for the period he was initially appointed, is only with regard to his being considered for permanent appointment.

The eligibility of an Advocate for appointment as Judge of the High Court, as envisaged under Article 193 of the Constitution is that he has for a period of, or for periods aggregating, not less than ten years, been an Advocate of a High Court. The question arises whether the period of ten years is to be construed from the date of his enrolment alone or that he is required to put in 10 years' practice as an Advocate. Whereas sub-clause (2)(b) of Article 193 prescribes a period of not less than 10 years to be a Member of a civil service prescribed by law, and has, for a period of not less than three years served as or exercised the functions of a District Judge in Pakistan, to become eligible for appointment as Judge of the High Court. It, therefore, necessarily follows that this clause has to be read with clause (a) and experience of a particular period in the profession is necessary for the ' Advocate to become eligible for the appointment of a Judge of High Court. The suitability of the Advocate on the basis of the experience for appointment as Judge of the High Court shall. however has to be determined by the Chief Justice of the High Court, who has to initiate the panel of the candidates for appointment as Judges of the High Court to the Chief Justice of Pakistan for ultimate recommendation for the appointment of suitable persons as Judges of the High Court. Mere enrolment of an Advocate for a period of 10 years is therefore not sufficient to make him eligible for his appointment as Judge of the High Court.

The question whether political affiliation of a candidate for judgeship of superior Court would disqualify him to be appointed as Judge of High Court, has been examined in depth, and it has been found that political affiliation alone may not disqualify the candidate provided he is a person of unimpeachable integrity, having sound knowledge in law and is recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan. After he is appointed as Judge of the High Court and takes oath to perform his functions without fear, favour or ill-will and decides cases purely on merits, he would be as good a Judge as any other Judge, who had no political affiliation before assuming the office of a Judge of the High Court. It, however, appears desirable not to appoint a person who has had strong affiliations with one political party or the other, as it would be not only difficult for him to shake off that impression and rather embarrassing for him to do even-handed justice to all manner of people.

Article 200 of the Constitution relates to transfer of a High Court Judge to another High Court without his consent for a period of two years. The perusal of this provision of the constitution shows that consultation of the Chief Justice is needed even if the transfer is for a period of less than 2 years, and a permanent Chief Justice cannot be transferred at all. While interpreting this provision of the Constitution in the case titled Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another PLD 1989 Kar. 404 at 425 my teamed brother Ajmal Mian, J as Member of that Bench (as then he was) after discussing the relevant provisions of the Constitution pertaining to transfer of a High Court Judge to another High Court and his appointment to the Federal Shariat Court went on to add:

". . . . it will suffice to observe that I am inclined to hold that a transfer of High Court Judge to another High Court or to the Federal Shariat Court can only he made in the public interest and not for an object alien to the said object and that the Question, whether a transfer is for a public interest is justiciable even at the behest of a lawyer." It is, therefore, clear that the President cannot transfer a Judge of a High Court to another High Court except in public interest after consultation with Chief Justice of Pakistan.

M.B.A./A-1377/S Orders accordingly.

Case 7
Musharraf Takeover Validation case

PLD 2000 SC 869

[Supreme Court of Pakistan]

Present: Irshad Hasan Khan, C J., Muhammad Bashir Jehangiri, Sh. Ijaz Nisar, Abdur Rehman Khan, Sh.Riaz Ahmed, Ch. Muhammad Arif, Munir A. Sheikh, Rashid Aziz Khan, Nazim Hussain Siddiqui, Iftikhar Muhammad Chaudhary, Qazi Muhammad Farooq and Rana Bhagwan Das, JJ

Syed ZAFAR ALI SHAH and others---Petitioners

versus

General PERVEZ MUSHARRAF, CHIEF EXECUTIVE OF PAKISTAN and others---Respondents

Constitutional Petitions Nos. 62, 63, 53, 57, 66, 64 of 1999 and 3 of 2000, decided on 12th May, 2000.

(Constitution petition under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973).

(a) Constitution of Pakistan (1973)---

----Art.184---Provisional Constitution Order (1 of 1999), Preamble---Oath of Office of (Judges) Order (1 of 2000), Art.3---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Power of judicial review of Supreme Court---Concept and scope---Restriction imposed

by Provisional Constitution Order, 1999 does not in any way restrict the power of judicial review of Supreme Court whereunder the Court has an inherent power to interpret any provision of the Constitution or any other legislative instrument or law, even if that particular provision is the one which seeks to oust the jurisdiction of Supreme Court---No form of oath taken by or administered to the Judges of superior Courts can restrict the judicial power and derogate from the legal position that the Courts, as final arbiters in any constitutional controversy, retain their power and jurisdiction to say as to what a particular provision of the Constitution or the law means or does not mean even if that particular provision is one seeking to oust such jurisdiction of the Court---On no principle of necessity could powers of the judicial review vested in the superior Courts under Constitution of Pakistan (1973) be taken away---Any provision purporting to restrain the power of judicial review of the superior Courts is to be ignored altogether--Principles.

Judicial power means that the superior Courts can strike down a law on the touchstone of the Constitution. The nature of judicial power and its relationship to jurisdiction are all allied concepts and the same cannot be taken away. It is inherent in the nature of judicial power that the Constitution is regarded as the supreme law and any law or act contrary to it or infringing its provisions is to be struck down by the Court in that the duty and function of the Court is to enforce the Constitution.

The basic question, which needs to be resolved in the present case is whether the restriction imposed by the Provisional Constitution Order 1 of 1999 on the jurisdiction of Supreme Court does in anyway restrict the power of judicial review of Supreme Court whereunder if has an inherent power to interpret any provision of the Constitution. or any other legislative instrument or law, even if that particular provision is a provision which seeks to oust the jurisdiction of Supreme Court.

Judiciary is the only forum recognized by both the rulers and the ruled where: (1) questions of validity and legitimacy are capable of being resolved finally with a view to controlling the recklessness of the Government in power and where (2) declining to resolve it would tantamount to self-condemnation, self-destruction and betrayal of the trust of the people of Pakistan. No form of oath taken by or administered to the Judges of the superior Courts can restrict the judicial power and derogate from the legal position that the Courts, as final arbiters in any constitutional controversy, retain their power and jurisdiction to say as to what a particular provision of the Constitution or the law means or does not mean even if that particular provision is one seeking to oust such jurisdiction of the Court. Any attempt to control or circumscribe the judicial power of the superior Courts with a view to denying them the right to decide the validity and the quantum of legislative power of the new regime, would be an exercise in futility. Changing the form of oath will neither take away power of judicial review nor the jurisdiction of Supreme Court. Notwithstanding the new oath or its language, the Courts shall continue to have jurisdiction to decide the controversy involved as if the new oath and the “new constitutional documents” under

which the oath is administered, do not adversely affect the jurisdiction and power of the Court. Superior Courts follow the Code of Conduct prescribed for the Judges and inherently owe allegiance to the State of Pakistan, which requires Supreme Court to decide the issue of validity of the new regime under which the Judges are being asked to take new oath inasmuch as such allegiance cannot be taken away. The oath administered under the Constitution has to be respected because that draws its authority from the people of Pakistan whereas the oath under the Constitution to defend the same has a different meaning than an oath administered under a document, validity whereof is yet to be determined and thus the two are incomparable.

The Objectives Resolution recognises the `Islamic doctrine of sovereignty' as expounded in the Holy Book (Qur'an), that sovereignty belongs neither to the ruler nor the ruled but Almighty Allah alone which is to be exercised by the people of Pakistan through their chosen representatives. The Objectives Resolution also envisages that the independence of Judiciary is to be fully secured. It is a fundamental principle of jurisprudence that Courts must always endeavour to expand their jurisdiction so that the rights of the people are guarded against arbitrary violations by the executive. The orders of the Chief Executive are subject to the jurisdiction of the Constitutional Courts of the land. By including paragraphs 2(b) and 7 in the Provisional Constitution Order, 1999, it has been recognized that the superior Courts, which are respected by the people being an embodiment of the ideals of justice and guardian of the rights of the people are not merely entitled to continue but have, in fact, done so in the past as well. The Oath of Office (Judges) Order, 2000 (Order 1 of 2000), dated 25th January, 2000 allows all the Courts to continue to function and exercise powers, which is a reiteration of what was earlier stated by the Oath of Office (Judges) Order, 1999 (Order 10 of 1999), paragraph 3 whereof states that Order 1 of 2000 shall apply to:. (1) newly appointed Judges; (2) that Oath shall be made before the constitutional authority; and (3) that it would be in accordance with the appropriate form set out in the Third Schedule to the Constitution. This required the newly appointed Judges to take oath before the constitutionally designated authority and as per the procedure prescribed by the Constitution and not by the Order 1 of 2000. Any provision purporting to restrain the power of judicial review of the superior Courts is to be ignored altogether. A Judge acting in his conscience and in good faith may decide to resign or he may decide that in the higher public interest he would retain office as has been done by the Judges of Supreme Court and other Judges of the Superior Judiciary.

Contention that after having taken oaths -of their offices under the Provisional Constitution Order, 1999 as amended, the Judges of the superior Courts are bound to defend the Proclamation of Emergency and the Provisional Constitution Order, 1999 as amended, in that, the old Constitution has been replaced by a new revolutionary order on the basis of the verdict earlier given by Supreme Court in the case of Begum Nusrat Bhutto PLD 1977 SC 657, is totally misconceived in that it was clearly stated in the said judgment that on no principle of necessity could powers of the judicial review vested in the superior Courts under 1973 Constitution be taken away. The old Order has not been replaced by a new Order but it was merely a case of constitutional deviation for a temporary period.

The evolution of judicial power is coterminous with the evolution of civilization and this is so because judicial power has to check the arbitrary exercise of powers by any organ or authority. Provisional Constitution Order, 1999 purports to suspend the Constitution on the one hand and, on the other, it says that the country will be governed in accordance with the provisions of the Constitution as nearly as possible. What emerges from this is that the Fundamental Rights are left intact except those which had been suspended by the earlier Proclamation of Emergency dated 28-5-1999 i.e. Articles 15 to 19 and 24 of the Constitution.

The Court must take into account before determining the legitimacy of a revolutionary regime, the two oblique arguments, which would attempt to undermine it: one relating to collapse of its jurisdiction with the disappearance of .the old Constitution; and the other relating to subservience of the Judiciary to the new regime.

Judicial review, must, therefore, remain strictly judicial and in its exercise, Judges must take care not to intrude upon the domain of the other branches of Government.

The power of judicial review should be exercised with caution.

The Army take-over of 12th October, 1999 was extra constitutional. The superior Courts of Pakistan retain the power of judicial review despite the ouster of jurisdiction which came either from within the Constitution, or by virtue of Martial Law Orders or by legislation. Even non obstante clauses in these cases would fail to prevent such objectives of the incumbent administrations.

Thus visualised, the purported ouster in the Proclamation and the Provisional Constitution Order, 1 of 1999 of the jurisdiction of the superior Courts is an exercise in futility and the power of judicial review remains intact. Both under Islamic doctrines as well as under its constitutional/ juridical personality, the superior Courts would continue to exercise this power.

Imtiaz Ahmad v. Government of Pakistan through Secretary, Interior Division 1994 SCMR 2142; William Marbury v. James Medison 2 Law Ed. 60; Spirit of Law by Montesquieu; Begum Nusrat Bhutto v. Chief of the Army Staff PLD 1977 SC 657; Principles of Revolutionary Legality by J.M.

Eekelaar and Constitutional Legitimacy---A Study of the Doctrine of Necessity by Leslie Wolf-Phillips ref.

(b) Constitution of Pakistan (1973)---

----Arts.2A & 175---Independence, of Judiciary---Concept---Independence of Judiciary is basic principle of the constitutional system of governance--Judiciary has to be properly organized and effective and efficient enough to quickly address and resolve public claims and grievances; and also has to be strong and independent enough to dispense justice fairly and impartially--Efficient and independent Judiciary can foster an appropriate, legal and Judicial environment where there is peace and security in the society, safety of life, protection of property and guarantee of essential human rights and fundamental freedoms for all individuals and groups, irrespective of any distinction or discrimination on the basis of caste, creed, colour, culture, gender or place of origin etc. ---Such a legal and judicial environment, is conducive to economic growth and social development---Principles.

The Objectives Resolution contained in the Preamble to the Constitution, which now forms substantive part thereof by virtue of Article 2A as well as declaration of Quaid-e-Azam about democratic set-up and social justice, envisage independence of Judiciary.

The basic functions of the Judiciary are to promote the administration of justice, to protect Human Rights and to maintain Rule of Law in the country.

The independence of Judiciary is a basic principle of the constitutional system of governance in Pakistan. The Constitution of Pakistan contains specific and categorical provisions for the independence of Judiciary. The Preamble and Article 2A state that “the independence of Judiciary shall be fully secured”; and with a view to achieve this objective, Article 175 provides that “the Judiciary shall be separated progressively from the executive”.

In a system of constitutional governance, guaranteeing Fundamental Rights, and based on principle of trichotomy of powers, such as ours, the Judiciary plays a crucial role of interpreting and applying the law and adjudicating upon disputes arising among governments or between State and citizens or citizens inter se. The Judiciary is entrusted with the responsibility for enforcement of Fundamental Rights. This calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society.

The Constitution makes it the exclusive power/responsibility of the. Judiciary to ensure the sustenance of system of "separation of powers" based on checks and balances. This is a legal obligation assigned to the Judiciary. It is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals. To do so, the Judiciary has to be properly organized and effective and efficient enough to quickly address and resolve public claims and grievances; and also has to be strong and independent enough to dispense justice fairly and impartially. It is such an efficient and independent Judiciary which can foster an appropriate legal and judicial environment where there is peace and security in the society, safety of life, protection of property and guarantee of essential human rights and fundamental freedoms for all individuals and groups, irrespective of any distinction or discrimination on the basis of caste, creed, colour, culture, gender or place of origin, etc. It is' indeed such a legal and judicial environment, which. is conducive to economic growth and social development.

The independence of Judiciary requires that the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect; from any source. The Judiciary in Pakistan is, independent. It claims and has always claimed that it has the right to interpret the Constitution and any legislative instrument and to say as to what a particular provision of the Constitution or a legislative instrument means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of the Supreme Court.

Al-Qur'an: Sura Al-Nisa, Verses 135-136 by Allama Abdullah Yousaf. Ali; Letter sent by Hazrat Umar to Abu Musa Al-ash'ari, Governor Basra/Chief Qazi; Beijing Statement of Principles of the Independence of Judiciary in the LAWASIA Region (6th Conference of Chief Justices of Asia and the Pacific held at - Beijing on 19-8-1995); Government of Sindh v. Sharaf Faridi PLD 1994 SC 105; Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324; Malik Asad Ali v. Federation, of Pakistan PLD 1988 SC 161; Mehram Ali v. Federation of Pakistan PLD 1998 SC 1445 and Sh. Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504 and The Federalist Papers by Alexander Hamilton-James Madison-John Jay ref.

(c) Corruption---

---- Connotation and scope---Effect of corruption on society and way of life of the people.

`Corruption' is generally defined as the abuse of public office for private gain. In view of the fact that scope of corruption has widened, this definition would include the abuse of all offices of trust.

It has diverse meanings and far-reaching effects on society, government and the people. Of late, the culture of corruption and bribe has embedded in the society to the extent that even routine works which should be done without any approach or influence, are commonly known to be done only on some such consideration. This bribe culture has plagued the society to the extent that it has become a way of life.

Values in public life and perspective of values in public life, have undergone serious changes and erosion during the last few decades. What was unheard before is commonplace today. A new value orientation is being undergone in our life and culture.' People are at the threshold of the crossroads of values. It is for the sovereign people of the country to settle these conflicts yet the Courts have a vital role to play in these matters.

Once corruption pervades in the body politic and official circles, then the entire Government/administration becomes completely crippled and paralyzed.

When corruption permeates in the social, political and financial transactions to such an extent that even proper and honest orders and transactions are suspected to the point of belief, being a result of corruption, one is compelled to infer all is not well and corruption has gone deep in the roots. No doubt, this is an age of "corruption eruption", but during the last few years there have been large scale prosecutions of former world leaders in various countries on the charges of corruption and corrupt practices, in some cases leading to convictions, which phenomenon must not be taken lightly and the issue must be addressed adequately and effectively through transparent institutionalized processes.

(1988) 2 SCC 602; Kh. Ahmed Tariq Rahim's case PLD 1992 SC 646; Mian Muhammad Nawaz Sharif's case PLD 1993 SC 47~ and Benazir Bhutto's case PLD 1998 SC 388 ref.

(d) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Allegations of corruption etc. against parliamentarians or politicians or members from the general public---Proceedings commenced against all said persons were to be decided on their own merits in accordance with law and on the basis of the

legally admissible material brought before the concerned fora in those proceedings and only after the finalisation of the said proceedings that the country will be geared up for resort to democratic principles and corruption-free society which are prerequisites for good governance.

(e) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan ---Factors---Validity---Misdeclaration of assets before the Wealth Tax Authorities qua the Election Commission and allegations of massive corruption and corrupt practices by the large number of politicians by itself may not be a ground for intervention of the Armed Forces but such aspect of the matter, when viewed in the overall context and with particular reference to the alleged massive corruption and corrupt practices, becomes a relevant factor.

(f) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan ---Factors---Validitiy---Combined effect of the overall policies and methodology adopted by the former Government was the total collapse of the country's economy inasmuch as G. D. P. growth during the past three years had hardly kept pace with the growth of population and Pakistan had a debt burden which equalled the country's entire national income---Supreme Court also took judicial notice of the fact that the trade imbalance was persistent and due to defective economic policies and lack of economic discipline by the previous regime, the industrial sector had suffered a great set back.

Federation of Pakistan v. Shaqkat Ali Mian PLD 1999 SC 1026 ref.

(g) Provisional Constitution Order (1 of 1999)--

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999--Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity-=-On the day when the Army took over and for years prior to that time there was merely a feigned appearance of what could be called a form of "oligarchy" which means a Government in which the authority constitutionally reposes in a few individuals and families and a small coterie of individuals who, because of economic and other power, could influence measurably the policy of the Government.

New Dictionary of American Politics by Smith and Zucher, First Edn., p.114 and The Politics of American Democracy by M. Irish, Third Edn., pp. 52 to 81 ref.

(h) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Low turnout of voters during past elections---Effect---General apathy and indifference is discernible and has a direct nexus with the unenviable performance of the former Governments--Had appropriate steps been taken by the Governments in the past to undo the damage done to the general thinking of the people, the things would have been totally different---Proportions which the misrule had taken beginning before the take-over by the Army, were to the discredit of all concerned.

(i) Provisional Constitution Order (1 of 1999)---

---Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Arts.184(3). & 91(4), (5)---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Suspension of Assemblies and the Senate through extra-constitutional measures by the Chief of Army Staff--Factors---Validity---Doctrine of State necessity---Applicability---Role of public representatives---Principle of joint and ministerial responsibility in Parliamentary system---Rest of the members of representative bodies cannot be absolved of their responsibility if, despite wrongdoings by the cabinet, they remained silent spectators---Suspension of the Assemblies and the Senate through extra-constitutional measures taken by the Chief of Army Staff, warrants validation on the ground of State necessity and State survival.

(j) Constitution of Pakistan (1973)---

----Art.58(2)(b) [since repealed]---Dissolution of National Assembly--Balance governing the powers of the President and the Prime Minister--Never safe to confer unfettered powers on a person who was holding the reins of the affairs of the country as "power corrupts and absolute corrupts absolutely"---Situation could have been avoided if checks and balances governing the powers of the President and the Prime Minister had been in the field by means of Art.58(2)(b) of the Constitution of Pakistan (1973).

(k) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Arts.184(3) & 63(2)--Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Ridiculing the Judiciary and tapping of telephones of Judges of superior Courts---Debates of Parliament of the relevant period clearly demonstrated that integrity and independence of the Judiciary of Pakistan were challenged by the Members of Parliament which had the effect of defaming and bringing the Judges into ridicule and disparaging remarks against the Judiciary crossed all limits and no Reference was made to the Chief Election Commissioner for their disqualification as Members of the Parliament under Art.63(2) of the Constitution of Pakistan (1973)---Such acts of tapping the telephones of Judges of the superior Courts and maligning the Judiciary were most detestable, immoral, illegal and unconstitutional.

Sh. Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504 and Mohtarama Benazir Bhutto's case PLD 1998 SC 388 ref.

(l) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Doctrine of State necessity--Applicability---Machinery of the Government at the Centre and the Provinces had completely broken down and the Constitution had been rendered unworkable, and a situation had arisen for which the Constitution provided no solution and the Armed Forces had to intervene to save the

State from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations, of State necessity and welfare of the people.

(m) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extraconstitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Precedents from foreign jurisdictions--Applicability ---Precedents from foreign jurisdictions, though entitled to reverence and respect but are not ipso facto applicable to the facts and circumstances prevailing on the day of taking over by the Armed Forces.

(n) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extraconstitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Doctrine of State necessity---Applicability---To save and maintain the integrity, sovereignty and stability of the country and having regard to the welfare of the people while interpreting the legislative instruments i.e.. Provisional Constitution Order, 1999 and Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999, Court has to make every attempt to save "what institutional values remained to be saved" with a view to maintaining and upholding the independence of Judiciary which in turn would protect the State fabric and guarantee Human/Fundamental Rights---Doctrine of State necessity had not been rejected in the judgment of Supreme Court in Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504---Prerequisites of doctrine of State necessity stated.

Sh. Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504; Attorney-General of the Republic v. Mustafa Ibrahim Cypress Law Reports 105; Begum Nusrat Bhutto v. Chief of the Army Staff PLD 1977 SC 657 and Miss Asma Jilani's case PLD 1972 SC 139 ref.

(o) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extraconstitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Doctrine of State necessity ---Application--All the elements viz. inevitable necessity; exceptional circumstances; no other remedy to apply, measures taken being proportionate to the necessity and of temporary character limited to the duration of exceptional circumstances, were present, inasmuch as, the Constitution provided no solution to meet the extraordinary situation prevailing on 12th October, 1999 when the Armed Forces took over the affairs of Pakistan.

Sh. Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504; Attorney-General of the Republic v. Mustafa Ibrahim Cypress Law Reports 105 and Begum Nusrat Bhutto v. Chief of the Army Staff PLD 1977 SC 657 ref.

(p) State necessity, doctrine of---

----Applicability---Elements---Inevitable necessity; exceptional circumstances; no other remedy to apply; measures taken being proportionate to the necessity and of temporary character limited to the duration of exceptional circumstances, were the elements for application of the doctrine.

Sh. Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504; Attorney-General of the Republic v. Mustafa Ibrahim Cypress Law Reports 105 and Begum Nusrat Bhutto v. Chief of the Army Staff PLD 1977 SC 657 ref.

(q) Provisional Constitution of Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extraconstitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity- -;.Doctrine of State necessity ---Applicability--Intervention by the Armed Forces on 12th October, 1999 was an imperative and inevitable necessity in view of the exceptional circumstances prevailing at that time, and, therefore, there was no valid justification for not validating the extra-constitutional measure of the Armed Forces on the technical distinction between “doctrine of necessity” and the “doctrine of State necessity”.

Begum Nusrat Bhutto v. Chief of the Army Staff PLD 1977 SC. 657; The Classics of International Law by Hugo Grotius; A Treatise on the Law of the Prerogative of the Crown and the Relative Duties and Rights of the Subject by Joseph Chitty; The Gabcikovo-Nagymaros Project, decided by International Court of Justice; Corpus Juris Secundum, Vol.65, p.387; Constitutional and Administrative Law by Stanley De Smith and Rodney Brazier, 8th Edn. 1998; Makenete v. Lekhanya and others (1993) 3 LRC; Attorney-General of the Republic v: Mustafa Ibrahim Cypress Law Reports 105; Mitchell and others v. Director of Public Prosecutions and another 1986 LRC. (Grenada); States of Emergency---Their Impact on Human Rights; From Military to Civilian Rule, Edited by Constantine P. Danopoulos and Democracy, the Rule of Law and Islam, Edited by Eugene Cotran and Adel Omar Sherif ref.

(r) Constitution of Pakistan (1973)---

----Art.232---Proclamation of Emergency---State of emergency--Interpretation---State of emergency includes "regimes of exception" i.e. regimes which have overthrown and not merely suspended the previous constitutional order and have assumed legislative and executive powers analogous to those under a formal state of emergency---Government to take steps to ensure that the Fundamental Rights of citizens are not affected and derogation must be proportionate to the emergency, while adopting constitutional as well as extra-constitutional means---Effort to be made to minimize emergencies and to induce the authorities concerned to respect. the Fundamental Rights.

Begum Nusrat Bhutto v. Chief of the Army Staff PLD 1977 SC 657; The Classics of International Law by Hugo Grotius; A Treatise on the Law of the Prerogative of the Crown and the Relative Duties and Rights of the Subject by Joseph Chitty; The Gabcikovo-Nagymaros Project decided by International Court of Justice; Corpus Juris Secundum, Vol.65, p.387; Constitutional and Administrative Law by Stanley De Smith and Rodney Brazier, 8th Edn. 1998; Makenete v. Lekhanya and others (1993) 3 LRC; Attorney-General of the Republic v. Mustafa Ibrahim Cypress Law Reports 105; Mitchell and others v. Director of Public Prosecutions and another 1986 LRC (Grenada); States of Emergency---Their Impact on Human Rights; From Military to Civilian Rule, Edited by Constantine P. Danopoulos and Democracy, the Rule of Law and Islam, Edited by Eugene Cotran and Adel Omar Sherif ref.

(s) Provisional Constitution Order (1 of 1999)--

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extraconstitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Doctrine of State necessity ---Applicability--Invocation of the "doctrine of State necessity" depends upon the peculiar and extraordinary facts and circumstances of a particular situation---Superior Courts alone can decide as to whether any given peculiar and extraordinary circumstances warrant the application of doctrine of State necessity or not--Such dependence has a direct nexus with what preceded the action itself--Material available on record generally will be treated at par with the "necessity/State necessity/continuity of State" for the purposes of attaining the proportions justifying its own scope as also the future and expected course of action leading to restoration of democracy.

Begum Nusrat Bhutto v. Chief of the Army Staff PLD 1977 SC 657; The Classics of International Law by Hugo Grotius; A Treatise on the Law of the Prerogative of the Crown and the Relative Duties and Rights of the Subject by Joseph Chitty; The Gabcikovo-Nagymaros Project, decided by International Court of Justice; Corpus Juris Secundum, - Vol.65, p.387; Constitutional and Administrative Law by Stanley De Smith and Rodney Brazier, 8th Edn. 1998; Makenete v. Lekhanya and others (1993) 3 LRC; Attorney-General of the Republic v. Mustafa Ibrahim Cypress Law Reports 105; Mitchell and others v. Director of Public Prosecutions and another 1986 LRC (Grenada); States of Emergency---Their Impact on Human Rights; From Military to Civilian Rule, Edited by Consiantine P. Danopoulos and Democracy, the Rule of Law and Islam,, Edited by Eugene Cotran and Adel Omar Sherif ref.

(t) Doctrine of necessity---

---- Not restricted to criminal prosecution alone.

(u) State necessity, doctrine of---

----Invocation---Conditions detailed.

The invocation of the doctrine of State necessity depends upon the peculiar and extraordinary facts and circumstances of a particular situation. It is for the superior Courts alone to decide whether any given peculiar and extraordinary circumstances warrant the application of the above doctrine or not. This dependence has a direct nexus with what preceded the action itself. The material

available on record generally will be treated at par with the "necessity/State necessity/continuity of State" for the purposes of attaining the proportions justifying its own scope as also the future and expected course of action leading to restoration of democracy.

Begum Nusrat Bhutto v. Chief of the Army Staff PLD 1977 SC 657; The Classics of-International Law by Hugo Grotius; A Treatise on the Law of the Prerogative of the Crown and the Relative Duties and Rights of the Subject by Joseph Chitty; The Gabcikovo-Nagymaros Project decided by International Court of Justice; Corpus Juris Secundum, Vol.65, p.387; Constitutional and Administrative Law by Stanley De Smith and Rodney Brazier, 8th Edn. 1998; Makenete v. Lekhanya and others (1993) 3 LRC; Attorney-General of the Republic v. Mustafa Ibrahim Cypress Law Reports 105; Mitchell and others v. Director of Public Prosecutions and another 1986 LRC (Grenada); States of Emergency---Their Impact on Human Rights; From Military to Civilian Rule, Edited by Constantine P. Danopoulos and Democracy, the Rule of Law and Islam, Edited by Eugene Cotran and Adel Omar Sherif ref.

(v) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validation accorded to the action of the Armed Forces by Supreme Court---Effect---Held, though initially the status of the Government after taking over the affairs of Pakistan was de facto, but in view of the validation accorded by the Supreme Court through its short order, it had attained the status of a de jure Government.

(w) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extraconstitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Doctrine of State necessity---Applicability---All that is required to be considered that the extra-constitutional action should have nexus with the facts on the ground---Duty of superior Court is that it recognizes the evil, suggests remedial measures therefor and lays down infrastructure for a journey leading to the restoration of the democratic processes/institutions as expeditiously as possible---If, however, those responsible for achieving said objectives fall short of the measures within the contemplation of the law during their tenures respectively, then the remedy lies in identifying the facts on the ground and taking remedial measures to suppress the evil---Prolonged involvement of the Army in civil affairs runs

a grave risk of politicizing it, which would not be in national interest and civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives as reflected in the speeches of the Chief Executive dated 13th and 17th October, 1999 which necessitated the military take-over---Action of Armed Forces of taking over the affairs of Pakistan qualified for validation on the ground of State necessity/survival in circumstances,

Recognition of a situation of whatever magnitude does call for remedial measures to be considered/contemplated with a view to purging the situation on the- ground. All that is required to be considered is that the action should have a nexus with the facts on the ground. Such consideration can be undertaken only by the superior Courts in the exercise of their powers under Articles 199 and 184 of the Constitution. It is the duty of the superior Courts that they recognize the evil, suggest remedial measures therefore and lay down infrastructure for a journey leading to the restoration of the democratic processes/institutions as expeditiously as possible. If those responsible for achieving these objectives fall short of the measure within the contemplation of the law during their tenures respectively, then the remedy lies in identifying the facts on the ground and taking remedial measures to suppress the evil. The action of 12th October, 1999 being what it is, qualifies for validation on the ground of State necessity/survival. It is for the representatives of the people to see to it that everything is in order and nobody can raise his little finger when their actions are in dine with the fundamentals of the Constitution. No rule except that by the representatives of the people within the contemplation of the Constitution and the law has the support of the Superior Judiciary. Courts are firmly committed to the governance of the country by the people's representatives and the definition of the term `democracy' to the effect that "it is Government of the people, by the people and for the people" and not by the Army rule for an indefinite period. Prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in national interest and that civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives as reflected in the speeches of the Chief Executive, dated 13th and 17th October, 1999, which necessitated the military take-over.

(x) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Factors---Validity---Doctrine of State necessity---Applicability---Whole spectrum of circumstances prevalent on or before 12th October, 1999, the day when Armed Forces took over the affairs of Pakistan, revealed that the representatives of the people, who were responsible for running the affairs of the State, were accused of corruption and corrupt practices and failed to establish good governance in the country as a result whereof a large number of references had been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account thereof---Process

of accountability carried out by the former Government was shady, inasmuch as, either it was directed against the political rivals or it was not being pursued with due diligence---All institutions of the State including Judiciary were being systematically destroyed in the pursuit of self-serving policies---Democratic institutions were not functioning in accordance with the Constitution, they had become privy to the one man rule and the very purpose for which they were established stood defeated by their passive conduct---Attempts were made to politicize the army, destabilize it and create dissension within its ranks and had the former Prime Minister been successful in his designs, there would have been chaos and anarchy rather a situation of civil war where some factions of Armed Forces were fighting against other---Action of Armed Forces of taking over the affairs of Pakistan having nexus with the facts on the ground, was qualified to be validated on the ground of State necessity/survival in circumstances.

An overall view of the whole spectrum of circumstances prevalent on or before 12th October, 1999 revealed that the representatives of the people who were responsible for running the affairs of the State were accused of corruption and corrupt practices and failed to establish good governance in the country as a result whereof a large number of references had been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account thereof. The process of accountability carried out by the former Government was shady, inasmuch as, either it was directed against the political rivals or it was not being pursued with due diligence. All institutions of the State -including Judiciary were being systematically destroyed in the pursuit of self-serving policies. The democratic institutions were not functioning in accordance with the Constitution, they had become privy to the one man rule and the very purposes for which they were established stood defeated by their passive conduct. Attempts were made to politicise the army, destabilise it and create dissension within- its ranks. Had the former Prime Minister been successful in his designs, there would have been chaos and anarchy rather a situation of civil war where some factions of Armed Forces were fighting against others.

(y) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Arts. 91 & 184(3)--Term "Chief Executive", import of---Constitution of Pakistan (1973) envisages Parliamentary form of Government where the Prime Minister acts as, the Chief Executive of the country---By means of Proclamation of Emergency dated 14-10-1999 as also the Provisional Constitution Order, 1999 the Constitution has been only held in abeyance and the country is to be run as nearly as may be ii-o accordance with the Constitution, therefore, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff while taking over the affairs of the country assumed to himself the title of "Chief Executive"---Validity---Since practically the Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff was

performing the functions of the Prime Minister, he held the position of Chief Executive in the scheme of the Constitution of Pakistan.

The term "Chief Executive" means President where there is a Presidential form of Government and Prime Minister in a Parliamentary form of Government. The Constitution of 1973 envisages Parliamentary form of Government where the Prime Minister acts as the Chief Executive of the country. By means of the Proclamation of Emergency as also the PCO 1 of 1999, the Constitution has only been held in abeyance and the country is to be run as nearly as may be in accordance with the Constitution, therefore, General Pervez Musharraf, while taking over the affairs of the country, assumed to himself the title of "Chief Executive". Since practically, he is performing the functions of the Prime Minister, he holds the position of Chief Executive in the scheme of the Constitution.

Indian Constitutional Law by H.M. Seervai, 4th Edn., p,20; Fazalul Qadir Chaudhry's case PLD 1963 SC 486 and American Constitutional Law, 1995 Edn., p.204 ref.

(z) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution -of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Nature---Coup d'etat or revolution---Coup d'etat and revolution are interchangeable in the context of step of taking over the affairs of Pakistan by the Armed Forces and nothing substantial would turn on considering it from one angle or another.

In coup d'etat as well in revolution, power changes from one man to another from one clique to another depending upon the facts and circumstances of each case. Coup d'etat is generally undertaken to achieve a particular objective motivated by various considerations.

In the context of the present case the terms coup d'etat and revolution are interchangeable and nothing substantial would turn on considering it from one angle or another.

Farzand Ali v. Province of West Pakistan PLD 1970 SC 98; Madzimbuto v. Lardner Burke (1968) 3 AER 561; Texas v. White 74 US (7 Wall) 700 (at p. 733), 1868; Madzimbuto v. Lardner Burke

1966 Rhodesian L. Rep. 228 (General Division); Revolution and Political Change by C. Welch and Bunker Taintor; Attorney-General v. Mustafa Ibrahim 1964 Cyprus LR 195 Sup. Ct.; Revolutions, published in the Irish Jurist, 1977 and Begum Nusrat Bhutto v. Chief of the Army Staff PLD 1977 SC 657 ref.

(aa) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Grant of power to Chief Executive of Pakistan to amend the Constitution---Extent---Power of the Chief Executive of Pakistan to amend the Constitution is strictly circumscribed by the limitations laid down by the Supreme Court---Limitations with regard to amendment of the Constitution by Chief Executive of Pakistan as laid down by the Supreme Court enumerated.

If the Parliament cannot alter the basic features of the Constitution, power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by the Parliament. Clearly, unbridled powers to amend the Constitution cannot be given to the Chief Executive even during the transitional period even on the touchstone of `State necessity'. The Constitution of Pakistan is the supreme law of the land and its basic features i.e. independence of Judiciary, federalism and parliamentary form of Government blended with Islamic Provisions cannot be altered even by the Parliament. Resultantly, the power of the Chief Executive to amend the Constitution is strictly circumscribed by the limitations laid down by the Supreme Court.

Mahmood Khan Achakzai's case PLD 1997 SC 426 ref.

Following are the limitations laid down by the Supreme Court with regard to the powers of Chief Executive of Pakistan to amend the Constitution:

(i) The Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff through Proclamation of Emergency, dated the 14th October, 1999, followed by PCO 1 of 1999, whereby he has been described as Chief Executive, having validly assumed power by means of an extra constitutional

step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter, namely:--

(a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including, the power to amend it.

(b) All acts which tend to advance or promote the good of the people.

(c) All acts required to be done for the ordinary orderly running of the State; and

(d) All such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive.

(ii) That Constitutional Amendments by the Chief Executive can be resorted to only if the Constitution fails to .provide a solution for attainment of his declared objectives and further that the power to amend. the Constitution by virtue of clause (6), sub-clause (i) (a) ibid is controlled by sub-clauses (b), (c) and (d) in the same clause.

(iii) That no amendment shall be made in the salient features of the Constitution i.e. independence of Judiciary, federalism, parliamentary form of Government blended with Islamic provisions.

(iv) That Fundamental Rights provided in Part II, Chapter 1 of the Constitution shall continue to hold the field but the State will be authorized to make any law or take any, executive action in deviation of Articles 15, 16, 17, 18, 19 and 24 as contemplated by Article 233 (1) of the Constitution, keeping in view the language of Articles 10, 23 and 25 thereof.

(v) That these acts, or any of them, may be performed or carried out by means of orders issued by the Chief Executive or through Ordinances on his advice;

(vi) That the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity as stated above. Their powers under Article 199 of the Constitution, thus, remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf.

(vii) That the Courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches, dated 13th and 17th October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the superior Courts.

(bb) Provisional Constitution Order (I of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble--Constitution of Pakistan (1973), Arts.209 & 184(3)---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Supreme Judicial Council---Judges of the Supreme Court and High Courts cannot be removed without resorting to the procedure prescribed in Art.209 of the Constitution-Cases of the Judges who ceased to be Judges of the Supreme. Court and High Courts by virtue of Oath of Office (Judges) Order, 2000, however, was hit by the doctrine of past and closed transaction and could not be re-opened.

(cc) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Restoration of democratic institutions---Supreme Court, in view of the circumstances explained by the Attorney-General, observed that there wag no choice but to grant reasonable time to enable the Chief Executive to restore the democratic institutions to the rightful holders of the public representations under the Constitution.

Contention of the Attorney-General was that the Federation intended to restore true representative democracy in the country as early as possible. It was, however, not possible to give specific timeframe for the above, among others, for the reasons that the Authorities/Government require time for:

(a) Revival of country's economy, which stands ruined.

(b) For completion of the process of accountability.

(c) Recovery of huge plundered national wealth including bank loans running into billions of rupees and foreign exchange abroad worth billions of US dollars.

(d) The task of unavoidable electoral reforms including preparation of fresh electoral rolls.

(e) To ensure harmonious and efficient working of the important organs of the State, stable and good governance including maintenance of law and order, to prevent abuse of power, and to ensure and safeguard smooth functioning and enjoyment of democracy by the people.

Supreme Court observed that the Court was not in favour of an Army rule in preference to a democratic rule. There were, however, evils of grave magnitude with the effect that the civilian Governments could not continue to run the affairs of the country in the face of complete breakdown. The remedy to the said evil was the holding of fair and impartial elections by the Chief Election Commissioner at the earliest possible time, but the same could not be achieved till the electoral rolls were updated. Ordinarily, Court would have allowed minimum time for holding of fresh elections as contemplated under the. Constitution, but the Attorney-General made a statement at the Bar that as per report. of the Chief Election Commissioner, updating of the electoral rolls could not be done before two years and thereafter objections and delimitation process etc. were to be attended to. In the absence of proper and authentic electoral rolls, millions of people will be disenfranchised. This statement of the Attorney-General was not rebutted. This being so, there was no choice but to grant reasonable time to enable the Chief Executive to restore the democratic institutions to the rightful holders of the office of public representatives under the Constitution.

(dd) Constitution of Pakistan (1973)---

----Art. 2A---Independence of Judiciary---Extent---Stability in the system, success of the Government, democracy, good governance, economic stability, prosperity of the people, tranquillity, peace and maintenance of law and order depend, to a considerable degree, on the interpretation of Constitution and legislative instruments by the superior Courts and it is, therefore, of utmost importance that the Judiciary was independent and no restraints were placed on its performance and operation---Interpretation of Constitution by superior Courts---Scope and extent.

Stability in the system, success of the Government, democracy, good governance, economic stability, prosperity of the people, tranquillity, peace and maintenance of law and order depend to a considerable degree on the interpretation of Constitution and legislative instruments by the superior Courts. It is, therefore, of utmost importance that the judiciary is independent and no restraints are placed on its performance and operation. It claims and has always claimed that it has the right to interpret the Constitution or any legislative instrument and to say as to what a particular provision of the Constitution or a legislative instrument means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of this Court. Under the mandate of the Constitution, the Courts exercise their jurisdiction as conferred upon them by the Constitution or the law. Therefore, so long as the superior Courts exist, they shall continue to exercise powers and functions within the domain of their jurisdiction and shall also continue to exercise power of judicial review in respect of any law or provision of law, which comes for examination before the superior Courts to ensure that all persons are able to live securely under the rule of law; to promote, within the proper limits of judicial functions, the observance and the attainment of human and Fundamental Rights; and to administer justice impartially among persons and between the persons and the State, which is a sine qua non for the maintenance of independence of judiciary and encouragement of public confidence in the judicial system.

(ee) Constitution of Pakistan (1973)---

----Arts. 184 & 199---Judicial review by superior Courts---Powers and scope.

Superior Courts have the right to interpret the Constitution or any legislative instrument and to say as to what a particular provision of the Constitution or a legislative instrument means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of Supreme Court. Under the mandate of the Constitution, the Courts exercise their jurisdiction as conferred upon them by the Constitution or the law. Therefore, so long as the superior Courts exist, they

shall continue to exercise powers and functions within the domain of their jurisdiction and shall also continue to exercise power of judicial review in respect of any law or provision of law, which comes for examination before the superior Courts to ensure that all persons are able to live securely under the rule of law; to promote, within the proper limits of judicial functions, the observance and the attainment of human and Fundamental Rights; and to administer justice impartially among persons and between the persons and the State, which is a sine qua non for the maintenance of independence of judiciary and encouragement of public confidence in the judicial system.

(ff) Interpretation of statutes-

---- Provision seeking to oust the jurisdiction of Supreme Court--Interpretation---Power of superior Courts---Scope---Superior Courts have right to interpret the Constitution or any legislative instrument and to say as to what a particular provision of the Constitution or a legislative instrument means or does not mean, even if that particular, provision is a provision seeking to oust the jurisdiction of Supreme Court.

(gg) Constitution of Pakistan (1973)

----Art. 178---Provisional Constitution Order (1 of 1999), Preamble---Oath of Office of (Judges) Order (1 of 2000), Art.3---Oath of office by Judges of Supreme Court under Provisional Constitution Order, 1999 and Oath of Office of (Judges) Order, 2000---Object and beneficial effects necessitating such oath highlighted.

Fresh oath under Oath of Office (Judges) Order No. l of 2000, does not in any way preclude the Judges of Supreme Court from examining the questions raised in the Constitutional petitions under Article 184(3) of the Constitution of Pakistan (1973), which have to be decided in accordance with their conscience and law so as to resolve the grave crises and avoid disaster by preventing imposition of Martial Law for which the Constitution does not provide any remedy.

New oath of Office was taken by the Judges of Supreme Court under PCO No. l of 1999 read with Oath of Office (Judges) Order No. l of 2000 with ‘a view to reiterating the well-established principle that the first and the foremost duty of the Judges of the superior Courts is to save the judicial organ of the State. This was exactly what was done. By virtue of PCO No.l of 1999, the Constitution has not lost its effect in its entirety although its observance as a whole has been

interrupted for a transitional period. The activity launched by the Armed. Forces through an extra Constitutional measure, involves the violation of "some of the rights" protected by the Constitution, which still holds the field but some of its provisions have been held in abeyance. A duty is cast upon the Superior Judiciary to offer some recompense for those rights which were purportedly violated in view of the promulgation of PCO No. 1 of 1999. This could be achieved only by taking the Oath and not by declining to do so and thereby becoming a party to the closure of the Courts, which would not have solved any problem whatsoever but would have resulted in chaos, anarchy and disruption of peaceful life. Independence of judiciary does not mean that Judges should quit their jobs and become instrumental in the closure of the Courts. Indeed, the latter course would have been the most detestable thing to happen. Independence of judiciary means that the contentious matters, of whatever magnitude they may be, should be decided/resolved by the Judges of the superior Courts according to their conscience. This Court, while performing its role as "the beneficial expression of a laudable political realism", had three options open to it in relation to the situation arising out of the military take-over on twelfth day of October, 1999, firstly, it could tender resignation en bloc, which most certainly could be equated with sanctifying (a) chaos/anarchy and (b) denial of access to justice to every citizen of Pakistan wherever he may be; secondly, a complete surrender to the regime by dismissing Constitutional petitions for lack of jurisdiction in view of the purported ouster of its jurisdiction under PCO No. 1 of 1999 and thirdly, acceptance of the situation as it is, in an attempt to save what "institutional values remained to be saved". Supreme Court, after conscious deliberations and in an endeavour to defend and preserve the national independence, the security and stability of Pakistan, sovereignty and honour of the country and to safeguard the interest of the community as a whole, decided to maintain and uphold the independence of judiciary, which, in its turn, would protect the State fabric and guarantee human rights/Fundamental Rights. It took the Oath under PCO No. 1 of 1999 so as to secure the enforcement of law, extend help to the law enforcing agencies for maintenance of public order and with a view to restoring democratic institutions, achieving their stability and guaranteeing Constitutional rights to the people of Pakistan.

Oath of Office prescribed under Articles 178 and 194 of the Constitution for the Judges of the superior Courts contains a specific provision that - a Judge shall abide by the Code of Conduct issued by the Supreme Judicial Council. Same is the position with regard to the provisions regarding Oath of Office (Judges) Order No. 1 of 2000. The precise provisions in the Oath of Office (Judges) Order, 2000 are that a Judge, to whom oath is administered, shall abide by the provisions of Proclamation of Emergency of Fourteenth day of October, 1999, PCO 1 of 1999, as amended, and the Code of Conduct issued by the Supreme Judicial Council. But there is specific omission of words, "to preserve and defend the Constitution". Adherence to the Code of Conduct has not been subjected to any pre-conditions and there can be no deviation from it by a Judge who takes oath either under the Constitution or PCO No. 1 of 1999 or Oath of Office (Judges) Order 1 of 2000. One of the requirements of the Code of Conduct is that the oath of a Judge implies complete submission to the Constitution, and under the Constitution to the law. Subject to these governing obligations, his function of interpretation and application of the Constitution and the law is to be discharged for the maintenance of the Rule of Law over the whole range of human activities within the nation. Thus, the new Oath merely indicates that the Superior Judiciary, like the rest of the country, had accepted the fact that on 12th October, 1999, a radical transformation took place.

(hh) Provisional Constitution Order (1 of 1999)--

----Preamble---Effect of Provisional Constitution Order, 1999 on the Constitution of Pakistan (1973). ‘

By virtue of PCO No. 1 of 1999, the Constitution has not lost its effect in its entirety although its observance as a whole has been interrupted for a transitional period. The activity launched by the Armed Forces through an extra-Constitutional measure, involves the violation of “some of the rights” protected by the Constitution, which still holds the field but some of its provisions have been held in abeyance.

(ii) Constitution of Pakistan (1973)-- .

----Art. 2A---Independence of Judiciary means that the contentious matters of whatever magnitude they may be, should be decided/resolved by the Judges of the superior Courts according to their conscience.

Independence of judiciary means that the contentious matters, of whatever magnitude they may be, should be decided/resolved by the Judges of the superior Courts according to their conscience.

(jj) Provisional Constitution Order (1 of 1999)--

----Preamble---Oath of Office (Judges) Order (1 of 2000), Preamble--Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution of Pakistan (1973) before Supreme Court calling in question the validity of Provisional Constitution Order, 1999 [as amended], Oath of Office (Judges) Order, 2000 and Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Maintainability---Notwithstanding anything contained in the Proclamation of Emergency dated 14-10-1999, the Provisional Constitution Order, 1999 [as amended] and the Oath of Office (Judges) Order, 2000, all of which purportedly restrained Supreme Court from calling in

question or permitting to call in question the validity of any of the provisions thereof, Supreme Court, in the exercise of its inherent powers of judicial review, has the right to examine validity of said instruments---Principles---Constitutional petitions before Supreme Court under Art. 184(3) of Constitution of Pakistan (1973) are therefore, maintainable.

Notwithstanding anything contained in the Proclamation of Emergency of the Fourteenth day of October, 1999, the Provisional Constitution Order No. l of 1999, as amended and the Oath of Office (Judges) Order No. l of 2000, all of which purportedly restrained Supreme Court from calling in question or permitting to call in question the validity of any of the provisions thereof, Supreme Court, in the exercise of its inherent powers of judicial review, has the right to examine the validity of the aforesaid instruments. Additionally, submission of the Federation in response to the Court's notice concerning its own legitimacy, also suggests that Supreme Court has an inherent authority, arising from the submission of both the parties to its jurisdiction, notwithstanding the preliminary objection raised in the written statement as to the maintainability of the Constitutional petitions. In the exercise of its right to interpret the law, Supreme Court has to decide the precise nature of the ouster clause in the above instruments and the extent to which the jurisdiction of the Courts has, been ousted, in conformity with the well-established principles that the provisions seeking to oust the jurisdiction of the superior Courts are to be construed strictly with a pronounced leaning against ouster. The Constitution petitions under Article 184(3) of the Constitution are, therefore, maintainable.

(kk) Provisional Constitution Order (1 of 1999)--.

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution of Pakistan (1973), Art.184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---State necessity, doctrine of, and salus populi est suprema lex, principle of---Applicability---Supreme Court, while recording in detail the factors for action by Armed Forces validated the same on the basis of the doctrine of State necessity and the principle of salus populi est suprema lex for a transitional period to prevent any further destabilization, to create corruption-free atmosphere at national level through transparent accountability and revival of economy before restoration of democratic institutions under the Constitution, in that Constitution offered no solution to the prevailing crisis.

National Assembly is the highest representative body, which reflects the will and aspirations of the people of Pakistan. Similar is the status of a Provincial Assembly in a Province. Senate, being a symbol of unity of the federating units has its own utility for the country as a whole. It is, therefore, of utmost importance that the impugned suspension of the above democratic institutions is examined with great care and caution, otherwise it would adversely affect the democratic process

in the country, which may cause instability, impair the economic growth and resultantly prove detrimental to the general well-being of the people. However, where the representatives of the people, who are responsible for funning the affairs of the State are themselves accused of massive corruption and corrupt practices and in the public as well as private sectors are benefiting therefrom and resist establishing good governance; where a large number of references have been filed against the former Prime Minister, Ministers, Parliamentarians and Members of the Provincial Assemblies for their disqualification on account of corruption and corrupt practices; where there is a general perception that corruption is being practised by diversified strata including politicians, Parliamentarians, public officials and ordinary citizens and that a number of Parliamentarians and Members of the Provincial Assemblies misdeclared their assets before Election Commission and Tax Authorities; where there was no political and economic stability and bank loan defaults were rampant and that as per report of Governor, State Bank of Pakistan Rs.356 billion are payable by the bank defaulters up to 12-10-1999, having no accountability and transparency; where economic stability in Pakistan was highly precarious and there was an overall economic slowdown as GDP growth during the past three years had hardly kept pace with the growth of population; where Pakistan has a debt burden, which equals the country's entire national income; where all the institutions of the State were being systematically destroyed and the economy was in a state of collapse due to self-serving policies of the previous Government, which had threatened the existence, security, economic life, financial stability and credit of Pakistan; where a situation had arisen under which the democratic institutions were not functioning in accordance with the provisions of the Constitution, inasmuch as, the Senate and the National and Provincial Assemblies were closely associated with the former Prime Minister and there was no real democracy because the country was, by and large, under one man rule; where an attempt was made to politicize the Army, destabilize it and create dissension within its ranks and where the judiciary was ridiculed, leaving no stone unturned to disparage and malign it by making derogatory and contemptuous. speeches by some of the members of the previous ruling party inside and outside the Parliament and no Reference was made to the Chief Election Commissioner for their disqualification as members of the Parliament under Article 63(2) of the Constitution; where the disparaging remarks against the judiciary crossed all limits with the rendering judgment by this Court in the case of Sh. Liaquat Hussain v Federation of Pakistan PLD 1999 SC 504, declaring the establishment of Military, Courts as ultra vires of the Constitution. which resulted into a slanderous campaign against the judiciary launched by the former Primc. Minister registering his helplessness in the face of the Judiciary not allowing him the establishment of Military Courts as. a mode of speedy justice; where the image of the judiciary' was tarnished under a well-conceived design; where the telephones of the Judges of the superior Courts and other personalities were tapped in spite of the law laid down by this Court in the case of Mohtarma Benazir Bhutto v. President of Pakistan PLD 1999 SC 388, 'that tapping of telephones and eaves-dropping was immoral, illegal and unconstitutional; where storming of the Supreme Court was resorted to allegedly by some of the leaders and activists of the Pakistan Muslim League which ultimately- led to the issuance of contempt notices against them/contemners by the Full Bench of Supreme Court in a pending appeal; where Mian Nawaz Sharif's Constitutional and moral authority stood completely eroded and where situation was somewhat similar and analogous to the situation that was prevalent to July, 1977, the extra-Constitutional step of taking over the affairs of the country by the Armed Forces for a transitional period to prevent any further destabilization, to create corruption-free atmosphere at national level through transparent accountability and revive the economy before

restoration of democratic institutions under the Constitution, is validated, in that, the Constitution offered no solution to the present crisis.

Probably, the situation could have been avoided if Article 58(2)(b) of the Constitution (1973) had been in the field, which maintained parliamentary form of Government and had provided checks and balances between the powers of the President and the Prime Minister to let the system run without any let or hindrance to forestall the situation in which Martial Law can be imposed. With the repeal of Article 58(2)(b) of the Constitution, there was no remedy provided in the Constitution to meet the situation like the present one with which the country was confronted, therefore, Constitutional deviation made by the Chief of the Army Staff, for the welfare of the people rather than abrogating the Constitution or imposing Martial Law by means of an extra-Constitutional measure is validated for a transitional period on ground of State necessity and on the principle that it is in public interest to accord legal recognition to the present regime with a view to achieving his declared objectives and that it is in the interest of the community that order be preserved. Legal recognition/legitimacy can be accorded to the present regime also on the principle that the Government should be by the consent of the governed, whether voters or not. Here there is an implied consent of the governed i.e. the people of Pakistan in general including politicians/parliamentarians, etc. to the Army take-over, in that, no protests worth the name or agitations have been launched against the Army take-over and/or its continuance. The Court can take judicial notice of the fact that the people of Pakistan have generally welcomed the Army takeover due to their avowed intention to initiate the process of across the board and transparent accountability against those, alleged of corruption in every walk of life, of abuse of national wealth and of not taking appropriate measures for. stabilizing the economy and democratic institutions. Another principle, which is attracted is that since an extra-Constitutional action has been taken by General Pervez Musharraf wielding effective political power, it is open to the Court to steer a middle course so as to ensure that the framework of the pre-existing Order survives but the Constitutional deviation therefrom be justified on the principle of necessity, rendering lawful what would otherwise be unlawful. However, prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in national interest, therefore, civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives, which necessitated the military take-over and Proclamation of Emergency as spelt out from the speeches of the Chief Executive, dated 13th and 17th October, 1999. The acceptance of the above principles do not imply abdication from judicial review in the transient suspension of the previous legal order.

Sh. Liaquat Hussain v. Federation of Pakistan PLD 1990 SC 504 and Benazir Bhutto v. President of Pakistan PLD 1998 SC 388 ref.

(ll) Provisional Constitution Order (1 of 1999)--

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Constitution.of Pakistan (1973), Arts.184(3) & 199 Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Powers of superior Courts---Scope and extent---Situation in the country having arisen for which the Constitution had provided no solution and the intervention by the Armed Forces through an extra-constitutional measure having become inevitable, Supreme Court validated the measures taken by Armed Forces including all past and closed transactions, as well as such executive actions as were required for the orderly running of the State and all acts which tended to advance or promote the good of the people on the basis of State necessary and the principle of salus populi est suprema lex as embodied in Begum Nusrat Bhutto's case reported as PLD 1977 SC 657---Chief Executive of Pakistan having validly assumed power by means of an extra-constitutional step, in the interest of the State and for the welfare of the people, was entitled to perform all such acts and promulgate all legislative measures as indicated by the Supreme Court---Superior Courts, however, continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity---Powers of superior Courts under Art.199 of the Constitution of Pakistan (1973), thus, remained available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or am order issued by the Chief Executive or by any person or Authority acting on his behalf---Courts were not merely to determine whether there existed any nexus between the orders made, proceedings taken and acts done by the, Chief Executive or by any Authority or person acting on his behalf, and his declared objectives as spelt out from his speeches dated 13th and 17th October., 1999, on the touchstone of State necessity but orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the superior Courts---Rule laid down by Supreme Court for validation of action of Armed Forces on 12-10-1999 detailed.

Following is the text of rule laid down by the Supreme Court while validating the action of taking over the affairs of Pakistan by the Armed Forces of Pakistan on 12th October, 1999:

"1. On 12th October, 1999 a situation arose for- which the Constitution provided no solution and the intervention by the Armed Forces through an extra-Constitutional measure became inevitable, which is hereby validated on the basis of the doctrine of State necessity and the principle of salus populi est suprema lex as embodied in Begum Nusrat Bhutto's case. The doctrine of State necessity is recognised not only in Islam and other religions of the world but also accepted by the eminent international jurists including Hugo Grotius, Chitty and de Smith and some superior Courts from foreign jurisdiction to fill a political vacuum and bridge the gap.

2. Sufficient corroborative and confirmatory material has been produced by the Federal Government in support of the intervention by the Armed Forces through extra-Constitutional measure. The material consisting of newspaper clippings, writings, etc. in support of the impugned intervention is relevant and has been taken into consideration as admissible material on the basis of which a person of ordinary prudence would conclude that the matters and events narrated therein did occur. The findings recorded herein are confined to the controversies involved in these cases alone.

3. All past and closed transactions, as well as such executive actions as were required for the orderly running of the State and all acts, which tended to advance or promote the good of the people are also validated.

4. That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity.

5. That the superior Courts continue to function under the Constitution. The mere fact that the Judges of the superior Courts have taken a new bath under the Oath of Office (Judges) Order No. l of 2000, does not in any manner derogate from this position, as the Courts had been originally established under the 1-973 Constitution, and have continued in their functions in spite of the Proclamation of Emergency and PCO No. l of 1999 and other legislative instruments issued by the Chief Executive from time to time.

6.(i) That the Chairman, Joint Chiefs of Staff Committee and the Chief of the Army Staff through Proclamation of Emergency dated the 14th October, 1999, followed by PCO 1 of 1999, whereby he had been described as Chief Executive; having validly assumed power by means of an extra Constitutional step, in the interest of the State and for the welfare of the people, was entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter, namely:-
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(a) All acts or legislative measures which. were in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;

(b) All acts which tended to advance or promote the good of the people;

(c) All acts required to be done for the ordinary orderly running of the State; and

(d) All such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive.

(ii) That Constitutional amendments by the Chief Executive could be resorted to only if the Constitution failed to provide a solution for attainment of his declared objectives and further that the power to amend the Constitution by virtue of clause (6), sub-clause (i) (a) (ibid) was controlled by sub-clauses (b), (c) and (d) in the same clause.

(iii) That no amendment shall be made in the salient features of the Constitution i.e. independence of judiciary, federalism, parliamentary form of Government blended with Islamic provisions.

(iv) That Fundamental Rights provided in Part II, Chapter 1 of the Constitution shall continue to hold the field but the State will be authorized to make any law or take any executive action in deviation of Articles 15, 16, 17, 18, 19 and 24 as contemplated by Article 233(1) of the Constitution, keeping in view the language of Articles 10, 23 and 25 thereof.

(v) That these acts; or any of them, may be performed or carried out by means of orders issued by the Chief Executive or through Ordinances on his advice;

(vi) That the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity as stated above. Their powers under Article 199 of the Constitution, thus, remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on. his behalf.

(vii) That the Courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting

on his behalf, and his declared objectives as spelt out from his speeches, dated 13th and 17th October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the superior Courts.

6. That the previous Proclamation of Emergency of 28th May, 1998 was issued under Article 232(1) of the Constitution whereas the present Emergency of 14th October, 1999 was proclaimed by way of an extra- Constitutional step as a follow up of the Army take-over which also stands validated notwithstanding the continuance of the previous Emergency which still holds the field.

7. That the validity of the National Accountability Bureau Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage.

8. That the cases of learned former Chief Justice and Judges of the Supreme Court, who had not taken oath under the Oath of Office (Judges) Order, 2000 (Order 1 of 2000), and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High Court, who were not given oath, cannot be re-opened being hit by the doctrine of past and closed transaction.

9. That the Government shall accelerate the process of accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law.

10. That the Judges of the superior Courts are also subject to accountability in accordance with the methodology laid down in Article 209 of the Constitution.

11. General Pervez Musharraf, the Chief of the Army Staff and. the Chairman, Joint Chiefs of Staff Committee is a holder of Constitutional post. His purported arbitrary removal in violation of the principle of audi alteram partem was ab initio void and of no legal effect.

12. That this order will not affect the trials conducted and convictions recorded including proceedings for accountability pursuant to various orders made and Orders/laws promulgated by the Chief Executive or any person exercising powers or jurisdiction under his authority and the pending trials/proceedings may continue subject to this order.

13. This is not a case where old legal order has been completely suppressed or destroyed, but merely a case of Constitutional deviation for a transitional period so as to enable the Chief Executive to achieve his declared objectives.

14. That the current electoral rolls are outdated. Fresh elections cannot be held without updating the electoral rolls. The learned Attorney-General states that as per report of the Chief Election Commissioner this process will take two years. Obviously, after preparation of the electoral rolls some time is required for delimitation of constituencies and disposal of objections, etc.

15. That we take judicial notice of the fact that ex-Senator Mr. Sartaj Aziz moved a Constitution Petition No. 15 of 1996, seeking a mandamus to the concerned authorities for preparation of fresh electoral rolls as, according to Mr. Khalid Anwar, through whom, the above petition was filed, the position to the contrary was tantamount to perpetuating disenfranchisement of millions of people of Pakistan in violation of Articles 17 and 19 of the Constitution. Even MQM also resorted to a similar Constitution Petition bearing No.53 of 1996 seeking the same relief. However, for reasons best known to the petitioners in both the petitions, the same were not pursued any further.

16. That having regard to all the relevant factors involved in the case including the one detailed in paragraphs 14 and 15 above, three years' period is allowed to the Chief Executive with effect from the date of the' Army take-over i.e. 12th October, 1999 for achieving his declared objectives.

17. That the Chief Executive shall appoint a date, not later than 90 days before the expiry of the, aforesaid period of three years, for holding of general elections to the National Assembly and the Provincial Assemblies and the Senate of Pakistan.

18. That this Court has jurisdiction to review/re-examine the continuation of the Proclamation of Emergency dated 12th October, 1999 at any stage if the circumstances so warrant as held by this Court in the case of Sardar Farooq Ahmed Khan Leghari v. Federation of Pakistan PLD 1999 SC 57."

(mm) State necessity, doctrine of---

----Doctrine of State necessity is recognised not only in Islam and other religions of the world but also accepted by the eminent international jurists to fill a political vacuum and bridge the gap.

(nn) Maxim:

----"Salus populi est suprema lex"----Applicability.

(oo) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble--Effect of Provisional Constitution Order, 1999; Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999 and Oath of Office (Judges) Order, 2000 was that Constitution of Pakistan (1973) still remained the supreme law of the land subject to the condition that certain parts thereof had been held in abeyance on account of State necessity.

(pp) Constitution of Pakistan (1973)---

----Arts. 175 & 184(3)---Provisional Constitution Order (1 of 1999), Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble---Constitution of Pakistan (1973), Preamble and Art.184(3)---Oath of Judges of superior Courts under Oath of Office (Judges) Order, 2000---Effect--Powers of superior Courts---Superior Courts continued to function under the Constitution of Pakistan (1973)---Mere fact that the Judges of the superior Courts had taken a new oath under the Oath of Office (Judges) Order, 2000 did not in any manner derogate from the said position, as the Courts had been originally established under the Constitution of Pakistan (1973,) and had continued their functions in spite of the Proclamation of Emergency by the Chief Executive of Pakistan and Provisional Constitution Order, 1999 and other legislative instruments issued by the Chief Executive from time to time.

(qq) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble--Constitution of Pakistan (1973), Preamble and Art. 184(3)---Powers of Chief Executive of Pakistan---Scope and extent---Judicial review of powers of the Chief Executive of Pakistan by superior Courts---Scope---Chief Executive of Pakistan having validly assumed power by. means of an extra-constitutional step, in the interest of the -State and for the welfare of the people, was entitled to perform all such acts and promulgate all legislative measures as indicated by Supreme Court---Superior Courts, however, continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged; in the light of the principles underlying the law of State necessity---Powers of superior Courts under Art. 199 of the Constitution of Pakistan (1973), thus, remained available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf---Courts were not merely to determine whether there existed any nexus between the orders made; proceedings taken and acts done by the Chief Executive or by any Authority or person acting on his behalf, and his declared objectives as spelt out from his speeches dated 13th and 17th October, 1999, on the touchstone of State necessity but orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the superior Courts.

The Chairman, Joint Chiefs of Staff Committee and the Chief of Army Staff through Proclamation of Emergency dated the 14th October, 1999, followed by PCO 1 of 1999, whereby he had been described as Chief Executive, having validly assumed power by means of an extra Constitutional step, in the interest of the State and for the welfare of the people, was entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter, namely:--

(a) All acts or legislative measures which were in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;

(b) All acts which tended to advance or promote the good of the people;

(c) All acts required to be done for the ordinary orderly running of the State; and

(d) All such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive.

(ii) That Constitutional amendments by the Chief Executive could be resorted to only if the Constitution failed to provide a solution for attainment of his declared objectives and -further that the power to amend the Constitution by virtue of clause (6), sub-clause (i) (a) (ibid) was controlled by sub-clauses (b), (c) and (d) in the same clause.

(iii) That no amendment shall be made in the salient features of the Constitution i.e. independence of judiciary, federalism, parliamentary form ,of Government blended with Islamic provisions.

(iv) That Fundamental Rights provided in Part II, Chapter I of the Constitution shall continue to hold the field but the State will be authorized to make any law or take any executive action in deviation of Articles 15, 16, 17, 18, 19 and 24 as contemplated by Article 233(1) of the Constitution, keeping in view the language of Articles 10, 23 and 25 thereof.

(v) That these acts, or any of them, may be performed or carried out by means of orders issued by the Chief Executive or through Ordinances on his advice;

(vi) That the superior Courts continue to have the power of judicial review to judge the validity of any act ‘or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity as stated above. Their powers under Article 199 of the Constitution, thus, remain available to their full extent, and may be exercised as heretofore, notwithstanding -anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf.

(vii). That the Courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive of by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches, dated 13th and 17th October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the superior Courts.

(rr) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble--Validation of Proclamation of Emergency dated 14-10-1999 in continuation of Emergency proclaimed on 28-5-1998---Proclamation of Emergency dated 28th May, 1998 issued under Art.232(1) of Constitution of Pakistan (1973) and Proclamation of Emergency dated 14-10-1999 issued by Chief Executive by way of an extra-constitutional step as a follow up of the Army take-over stood validated notwithstanding the continuance of the Emergency proclaimed on 28th May, 1998 still held the field.

(ss) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of. Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), .Preamble--Constitution of Pakistan (1973), Preamble, Arts.209 & 184(3)---Past and closed transaction, doctrine of---Applicability---Cases of former Chief Justice and Judges of Supreme Court who had not taken oath under the Oath of Office (Judges) Order, 2000 and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High Court, who were not given oath, could not be reopened being hit by the doctrine of past and closed transaction.

The cases of former Chief Justice and Judges of the Supreme Court, who had not taken oath under the Oath of. Office (Judges) Order, 2000 (Order 1 of 2000), and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High Court; who were not given oath, cannot be reopened, being hit by the doctrine of past and closed transaction.

The practical effect of the above observation is that the action of the Chief Executive in this behalf has been validated. It is a well-settled principle that in such situations the Court may refuse relief in respect of a particular decision, but go on to determine the general question of law or interpretation that the case raises. Clearly, the Judges of the Superior Judiciary enjoy constitutional guarantee against arbitrary removal. They can be removed only by following the procedure laid down in Article 209 of the Constitution by filing an appropriate reference before the Supreme Judicial Council and not otherwise. The validity of the action of the Chief Executive was open to question on the touchstone of Article 209 of the Constitution. But none of the Judges took any remedial steps and accepted pension as also the right to practise law and thereby acquiesced in the action. Furthermore, the appropriate course of action for Supreme Court in these proceedings would be to declare the law to avoid the recurrence in future, but not to upset earlier actions or decisions taken in this behalf by the Chief Executive, these being past and closed transactions. The Courts can refuse relief in individual cases even though the action is flawed, depending upon the facts and circumstances of each case. The action of Chief Executive in the context given above has not encroached on the judicial power or impaired it in the process. However, the observations

made herein as to the declaration of law under Article 209 of the Constitution would not entitle the relevant authorities or Supreme Court to reopen the cases of the above Judges which have become final.

The Judges of the Supreme Court and High Courts cannot be removed without resorting to the procedure prescribed in Article 209 of the Constitution, but the cases of Judges who ceased to be Ridges of the Supreme Court and High Courts by virtue of Oath of Office (Judges) Order, 2000 (Order 1 of 2000) is hit by the doctrine of past and closed transaction and cannot be reopened.

(tt) Constitution of Pakistan (1973)---

----Arts. 209 & 184(3)---Provisional Constitution Order (1 of 1999), Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble--Constitution of Pakistan (1973), Preamble and Arts.184(3) & 209--Accountability, process of---Government shall accelerate the process of accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law---Judges of superior Courts were subject to accountability only in accordance with the methodology laid down in Art.209 of the Constitution of Pakistan (1973).

(uu) Constitution of Pakistan (1973)---

----Arts. 243 & 184(3)---Command of Armed Forces---Removal of Chief of the Army Staff and Chairman, Joint Chiefs of Army Staff Committee--Procedure---Chief of the Army Staff and Chairman, Joint Chiefs of Army. Staff Committee being a holder of constitutional post, his arbitrary removal in violation of the principle of audi alteram partem was ab initio void and of no legal effect.

(vv) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble--Constitution of Pakistan (1973), Preamble and Art.184(3)---Validity of extra-constitutional step of taking over the affairs of Pakistan by the

Armed Forces accorded by Supreme Court---Effect---Order of Supreme Court validating the extra-constitutional step of taking over the affairs of the country by the Armed Forces and rules laid down in the said order will not affect the trials conducted and convictions recorded including proceedings for accountability pursuant to various orders made and orders/laws promulgated by the Chief Executive of Pakistan or any person exercising powers or jurisdiction under his authority and the pending trials/proceedings may continue subject to the present order of validation by the Supreme Court.

(ww) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble--Constitution of Pakistan (1973), Preamble and Art.184(3)---Extraconstitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Effect---Effect of action of Armed Forces was not that legal order in the country had been completely suppressed or destroyed, but it was merely a Constitutional deviation for a transitional period so as to enable the Chief Executive of Pakistan to achieve his declared objectives.

(xx) Constitution of Pakistan (19’73)---

----Arts. 224 & 184(3)---Provisional Constitution Order (1 of 1999), Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Extra-constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Elections---Time frame---Current electoral rolls being outdated, fresh elections. could not be held without updating ,the electoral rolls and after preparation of the electoral rolls as some time was required for delimitation of constituencies and disposal of objections etc.---Supreme Court, after having regard to all the relevant factors involved allowed three years’ period to the Chief Executive of Pakistan with effect from the date of the Army take-over i.e. 12-10-1999 for achieving his declared objectives---Chief Executive of Pakistan shall appoint a date, not later than 90 days before the expiry of three years, for holding a general election to the National Assembly and the Provincial Assemblies and the Senate of Pakistan.

(yy) Provisional Constitution Order (1 of 1999)---

----Preamble---Proclamation of Emergency by Chief Executive of Pakistan dated 14-10-1999---Oath of Office (Judges) Order (1 of 2000), Preamble--Constitution of Pakistan (1973), Preamble and Art. 184(3)---Extra constitutional step of taking over the affairs of Pakistan by the Armed Forces of Pakistan---Validity---Jurisdiction to review/re-examine by Supreme Court the continuation of Proclamation of Emergency. dated 12-10-1999---Scope--Supreme Court having validated the extra-Constitutional step of taking-over the affairs of the country by the Armed Forces subject to rules laid down in the validating order, had jurisdiction to review/re-examine the continuation of Proclamation of Emergency dated 12-10-1999 at any stage, if the circumstances so warrant.

Sardar Farooq Ahmed Khan Leghari v. Federation of Pakistan PLD 1999 SC 57 ref.

Ahmad Saeed Karmani's case PLD 1956 (W.P) Lah.807; Darvesh M. Arbey's case PLD 1977 Lah.846; Iqbal Ahmad Khan's case PLD 1977 Lah.337; Muhammad Bachal Memon's case PLD 1987 Kar.296; Muhammad Naeem Akhtar's case 1992 CLC 2043; Shams-ud-Din's case 1994 MLD 2500; Manzoor Ahmed Wattoo's case PLD 1997 Lah.38; Muhammad Anwar Durrani's case PLD 1989 Quetta 25; A.K. Fazalul Quader Chaudhry's case PLD 1966 SC 105; Pit Sabir Shah's case PLD 1994 SC 738; Tfie Speaker, Balochistan Provincial Asembly, Quetta's case PLD 1996 SCMR-1969; Mrs. Shahida Zahir Abbassi's case PLD 1996 SC 632; Mahmood Khan Achakzai's case PLD 1997 SC 426; Wukala Mahaz Barai Tahafaz-e-Dastoor's case PLD 1998 SC 1263; Sardar Farooq Ahmed Khan Leghari's case PLD 1999 SC 57; Syed Jalal Mehmood Shah's case PLD 1999 SC 395; Sh. Liaqat Hussain's case PLD 1999 SC 504; Miss Benazir Bhutto' case PLD 1988 SC 416; Mian Muhammad Nawaz Sharif's case PLD 1993 SC 473; Dosso's case PLD 1958 SC (Pak.) 533; Miss Asma Jilani's case PLD 1972 9C 139; Begum Nusrat Bhutto v.- Chief of Army Staff 'and others PLD 1977 SC 657; Special Reference No: 1 of 1955 PLD 1955 SC 435; Yousaf Ali v. Muhammad Aslam Zia PLD 1958 SC 104; William Marburty v. James Medison 2 Law Edn.60; PLD.1955 FC 435; R v. Stratton (1779) (21 St. Tr. 1222); Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324; Al-Jehad Trust v. Federation of Pakistan 1999 SCMR 1379; Usif Patel and 2 others v. The Crown PLD 1955 FC 387; Miss Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Controller of Patents and Designs, Karachi v. Muhammad Quadir Hussain 1995 SCMR 529; Zahid Akhtar v. Government of Punjab PLD 1995 SC 530; Federation of Pakistan v. N.-W.F.P. Government PLD 1990 SC 1172; Mian Aziz A. Sheikh v. The Commissioner of Income-tax, Investigation, Lahore PLD 1989 SC 613; Mst. Kaneez Fatima v. Wali Muhammad PLD 1993 SC 901; Fazle Ghafoor v. Chairman, Tribunal of Disputes, Dir, Swat at Chitral at Mardan 1993 SCMR 1073; Ghulam Hamdani. v. Muhammad Iqbal 1993 SCMR 1083; M. Ismail Qureshi v. M. Awais Qasim 1993 SCMR 1781; Zaheeruddin v. The State 1993 SCMR 1718; Brig. Retd. Imtiaz Ahmad v. Government of Pakistan through Secretary, Interior Division 1994 SCMR 2142; Speech of the Chief Executive dated 17-10 1999; Mokotso v. H.M. King Moshoehoe II 1989 LRC (Const.) 24; Mitchell v. Director of Public Prosecutions 1986 LRC (Const.) 35; Hamza Shehbaz Sharif v. Federation of Pakistan 1999 PCr.LJ 1584; Huddaibia Engineering v. Pakistan PLD 1998 Lah. 90; Mushtaq Ahmed Gormani v. State PLD 1958 SC 333; Amanullah Khan v. Federal Government of Pakistan PLD 1990 SC 1092; M. Inayat Khan v. M.

Anwar and 2 others PLD 1976 SC 354; Ex-Major-General Akbar Khan v. The Crown PLD 1954 FC 87; F.B. Ali v. The State PLD 1975 SC. 506; Shahida Zahir Abbasi v. President of Pakistan PLD 1996 SC 632; Muhammad Umar Khan v. The Crown PLD 1953 Lah. 528; Reference by the President of Pakistan under Art. 162 of the Constitution of Islamic Republic of Pakistan PLD 1957 SC (Pak.) 219; Federation of Pakistan v. Moulvi Tamizuddin Khan PLD 1955 FC 240; Attorney-General of the Republic v. Mustafa Ibrahim and others 1964 Cyprus Law Reports 195; Ziaur Rehman's case PLD 1973 SC 49; PLD 1989 SC 166; 1997 SCMR 1043 at 1057 and 1059; Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161; William Marbury v. James Medison 2 Law Ed. 60; Mehram Ali v. Federation of Pakistan PLD 1998 SC 1445; Federation of Pakistan v. M. Nawaz Khokhar PLD 2000 SC 26; Anatulay VIII (1988) 2 SCC 602; Kh. Ahmed Tariq Rahim's case PLD 1992 SC 646; Federation of Pakistan v. Shaukat Ali Mian PLD 1999 SC 1026; Makenete v. Lekhanya and others (1993) 3 LRC; Mitchell and others v. Director of Public Prosecutions and another 1986 LRC (Grenada); Edwin Ward Scadding v. Louis Lorant 10 ER 164; Toronto R. Co. and City of Toronto 46 DLR 547; Farzand Ali v. Province of West Pakistan PLD 1970 SC 98; Fazalul Qadir Chaudhry's case PLD 1963 SC 486; Madzimbuto v. Lardner Burke (1968) 3 AER 561; Texas v. White 74 US (7 Wall) 700 (at p.733), 1868; Madzimbuto v. Lardner Burke 1966 Rhodesian L.Rep. 228 (General Division) and Muhammad Yusuf v. The Chief Settlement and Rehabilitation Commissioner Pakistan, Lahore and another PLD 1968 SC 101; Al-Qur'an: Sura Aale-e-Imran, Verses 4-135; Surah Maida, Verses 5/9; Sura AI-Nisa, Verses 135-136; Spirit of Law- by Montesquieu; The Constitutional History of England by F.W. Maitland; Law of Necessity by Glanville William, p.216; Principles of Revolutionary Legality by J.M. Eekelaar, pp.29,30,39 to 43; Cases in Constitutional Law by D.L. Keir and F.H. Lawson. 5th Edn., pp.73 to 116; English Constitutional Conflicts of the Seventeenth Century, 1603-1689 by J.R. Tanners, pp.20, 41-45, 62, 65, 70, 78, 79; The Constitution of England from Queen Victoria to George VI by Arthur Berriedale .Keith; Judging the State by One Paula R. Newberg; Constitutional Legitimacy---A Study of the Doctrine of Necessity by Leslie Wolf-Phillips; Commentaries on the Constitution of the United States by Joseph Story; Constitution in Crisis, Political Violence and the Rule of Law by John E. Finn; 'The Federalist Papers by Alexander Hamilton-James Madison-John Jay, pp. 464 to 470, 479, 481; Dissolution of Constituent Assembly of Pakistan and the Legal Battles of Moulvi Tamizuddin Khan by Syed Sharifuddin Pirzada; Destruction of Pakistan's Democracy by Allen Mcgrath; Transfer of Power, Vol. VII; The Statute of Westminster and Dominion Status by K.C. Wheare; Voyage through History by Masarrat Husain Zuberi; Corpus Juris Secundurn, Vol. 65, pp.115, 116, 118, 387, 389; Sorensen, pp. 271, 272; Judicial Review on Administration Action by De Smith, p. 544; States of Emergency---A Study prepared by the International Commission of Jurists, pp.14, 17, 18, 21, 23; Constitutional and Administrative Law by Hilaire Barnett; Constitutional and Administrative. Law by Stanley De Smith and Rodney Brazier; Public Opinion .and Political Developments in Pakistan by Inamur Rehman; Pakistan in the 80s Law and Constitution, Edited by Wolfgang Peter Zingel Stephanie Zingel Ave Lalemant; In Defence of the Continuity of Law--Pakistan's Courts in Crises of State by Dieter Conrad; Black's Law Dictionary; A History of Militarism,. Civilian and Military by Alfred Vagts: Recognition of Governments in International Law with particular Reference to Governments in Exile by Stefan Talmon; The Man on Horseback---The Role of the Military in Politics by S.E. Finer; Machiavelli On Modern Leadership by Michael A. Ledeen; Through the Crisis; Standard Journal of International Law; The Indian Army and the Pakistan Army by Stephen P. Kohento; Beijing Statement of Principles of the Independence of Judiciary in the LAWASIA Region; The Federalist Papers by Alexander Hamilton-James Madison-John Jay; Corruption and Government, Cause,. Consequences and

Reform by Susan Rose-Ackerman; Commonwealth Finance Minister Meeting held on 21-23rd September, 1999 at Grand Cayman, Cayman Islands; Money Laundering---A Practical Guide to New Legislation h) Rowan Bosworth-Davies and Graham Saltmarsh, 1994 Edn.; New Dictionary of American Politics by Smith and Zucher, First Edn., p.114; The Pollitics of American Democracy by M. Irish, Third Edn., pp.52 to 81; The Hidden Wiring- --Unearthing the British Constitution by Peter Hennessy, pp.35, 37; Arthur Berriedale Keith---The Chief Ornament of Scottish Learning by Ridgway F. Shinn Jr.; The 1~rtgiish Constitution by Walter Bagehot; The Classics of International Law by Hugo Grotius; A Treatise on the Law of the Prerogative of the Crown and the Relative Duties and Rights of the Subject by Joseph Chitty; The; (iabcikovo-Nagymaros Project, decided by International Court of Justice; From Military to Civilian Rule, Edited by Constantine P. Danopoulos; Democracy, the Rule of Law and Islam, Edited by Eugene Cotran and Adel Omar Sherif; Constitutional Limitations by Colley, Eighth Edn., Vo1.2, 8:1357; Indian Constittitionai Law by H.M Seeravi, 4th Edn., p.20; American Constitutional Law, 1995 Edn., p.204 Revolution and Political Change by C. Welch and Bunker Taintor and Revolutions published in Irish Jurist, 1977 ref.

Ch. Muhammad Farooq, Senior Advocate Supreme Court and S. Abul Aasim Jafri, Advocate-on-Record for Petitioner (in C.P. No. 62 of 1999). .

Khalid Anwar, Senior Advocate Supreme Court, M Rafique Rajwana, Advocate Supreme Court, Umar Bandial, Advocate Supreme Court, Ms. Saadia Abbasi, Advocate and S. Abul Aasim Jafri. .Advocate-on-Record for Petitioners (in C.P. No. 63 of 1999).

Habibul Wahabul Khairi, Advocate Supreme Court for Petitioner (in C.P. No. 53 of 1999).

Petitioner in person (in C.P. No.57 of 1999).

Fazal Illahi Siddiqui, Advocate Supreme Court for Petitioner (in C.P. No.. 3 of 2000).

Petitioner in person (in C.P. No. 66 of 1999).

Petitioner in person (in C.P. No. 64 of 1999).

Aziz A. Munshi, Attorney-General for Pakistan, Syed Sharifuddin Pirzada, Senior Advocate Supreme Court, Tanvir Bashir Ansari, Deputy Attorney-General, Mansur Ahmad, Deputy Attorney-General, S.A. Mannan, Advocate Supreme Court, Sh. Maqbool Ahmad, Advocate Supreme Court, Ch. Bashir Ahmad, Advocate Supreme Court, Ch. Fazle Hussain, Advocate-on-Record, Mehr Khan Malik, Advocate-on-Record and Waqar Rana, Advocate for Respondent (Federation).

M. Ashraf Khan Tanoli, Advocate-General, Balochistan, M.Younis Khan Tanoli, Advocate-General, N.-W.F.P., Maqbool Illahi Malik, Advocate-General, Punjab, Nasim Sabir, Additional Advocate-General, Punjab, Tariq Mahmood Khokhar, Additional Advocate-General, Punjab, Rao M. Yousuf Khan, Advocate-on-Record, Raja Qureshi, AdvocateGeneral, Sindh, Abdul Haleem Pirzada, President, Supreme Court Bar Association, Kadir Bakhsh Bhutto, Vice-Chairman, Pakistan Bar Council and Dr. Farooq Hassan for President, Lahore High Court Bar Association (on Court's Notice).

S.M. Zafar, Senior Advocate Supreme Court assisted by Syed Ali Zafar, Advocate Supreme Court, Haider Zaman Qureshi and Raja Zafar Khalid, Advocates: Amicus curiae.

Dates of hearing: 1st November, 6th December, 1999; 31st January, 1st to 3rd March; 6th to 10th, 13th, 14th, 22nd, 24th March; 1st to 5th and 8th to 12th May, 2000.

JUDGMENT

IRSHAD HASAN KHAN, CJ.---Through this common judgment we propose to dispose of Constitution Petitions Nos. 62 to 64, 66, 53, 57, of 1999 and Constitution Petition No. 3 of 2000, challenging the validity and legal effect of the army take-over, the issuance of Proclamation of Emergency (hereinafter referred to as the Proclamation) and promulgation of Provisional Constitution Order No. 1 of 1999 (hereinafter referred to as the PCO) and the Oath of Office (Judges) Order, 2000 (hereinafter called the Order I -of 2000). Some of the Constitution Petitions, fully or partly, support the army take-over, the Proclamation, the PCO and the Order I of 2000.

2. The above petitions raise questions of great public importance and of far reaching consequences..

3. Ch. Muhammad Farooq, learned Senior ASC, for the petitioner in C.P. No. 62 of 1999, Mr. Khalid Anwar, learned Senior ASC, for the petitioners in C.P. No. 63 of 1999, Mr. Habib-ul-Wahabul Khairi, learned ASC, petitioner in C.P. No. 53 of 1999, Syed Iqbal Haider, petitioner in C.P.No. 57 of 1999, Mr. Shahid Orakzai, petitioner in C.P. No. 64 of 1999, Syed Imtiaz Hussain Bukhari, petitioner in C.P. No. 66 of 1999 and Mr. Fazal Illahi Siddiqui, learned ASC, petitioner in C.P. No. 3 of 2000 as well as Mr. Aziz A. Munshi, learned Attorney-General for Pakistan; Syed Sharifuddin Pirzada, learned Senior ASC for the Federation; Mr Abdul Haleem Pirzada, President, Supreme Court Bar Association; Dr. Farooq Hasan for President, Lahore High Court Bar Association; Mr. Kadir Bakhsh, Vice-Chairman, Pakistan Bar Council; Advocates-General of the Provinces and Mr. S.M. Zafar, learned Senior ASC as amicus curaie have addressed elaborate arguments as to the validity or otherwise and legal effect of the army take-over by General Pervez Musharraf. The parties have also filed voluminous documents on the factual aspects of the case and set out their respective versions of the events culminating in the army take-over, issuance of the Proclamation on 12th October, 1999 and other legal instruments referred to above. ,

4. Facts of the case, briefly stated, are that the Chairman Joint Chiefs of Staff Committee and Chief of Army Staff General Pervez Musharraf on 12-10-1999 seized power in Pakistan by dismissing the Government of the then Prime Minister Mian Muhammad Nawaz Sharif, putting him under house arrest, on charges of interfering in the affairs of the Armed Forces, politicising the Army, destabilising it and trying to create dissension within its ranks. He briefly addressed the nation on radio and television at 3-00 a.m. on 13-10-1999. The text of the Chief of Army Staff's speech reads thus:

TEXT OF THE COAS SPEECH

"My dear countrymen, Assalam-o- Alaikum.

You are all aware of the kind of turmoil and uncertainty that our country has gone through in recent times. Not only have all the institutions been played around with, and systematically destroyed, the economy too is in a state of collapse. We are also aware of the self-serving policies being followed, which have rocked the very foundation of the Federation of Pakistan.

The armed forces have been facing incessant public clamour to remedy the fast declining situation from all sides of the political divide. These concerns were always conveyed to the Prime Minister

in all sincerity, keeping the interest of the country foremost. It is apparent that they were never taken in the correct, spirit. My singular concern has been the well-being of our country alone. This has been the sole reason that the army willingly offered its services for nation building tasks, the results of which have already been judged by you.

All my efforts and counsel to the Government it seems were to no avail. Instead they now turned their attention on the army itself. Despite all my advices they tried to interfere with the armed forces, the last remaining viable institution in which all of you take so much pride and look up to, at all times, for the stability, unity and integrity of our beloved country. Our concerns again were conveyed in no uncertain terms but the Government of Mr. Nawaz Sharif chose to ignore all these and tried to politicize the army, destabilize it and tried to create dissension within its ranks.

I was in Sri Lanka on an official visit. On my way back the PTA commercial flight was not allowed to land at Karachi but was ordered to be diverted to anywhere outside Pakistan, despite acute shortage of fuel, imperiling the life of all the passengers. Thanks to Allah, this evil design was thwarted through speedy army action.

My dear countrymen having briefly explained the background, I wish to inform you that the armed forces have moved in as a last resort, to prevent any further destabilization. I have done so with all sincerity, loyalty and selfless devotion to the country with the armed forces firmly behind me. I do not wish to make a lengthy policy statement at this moment. I shall do that very soon. For the moment I only wish to assure you that the situation in the country is perfectly calm, stable and under control. Let no outside forces think they can take advantage of the prevailing situation.

Dear brothers and sisters, your armed forces have never and shall never let you down, Inshallah, we shall preserve the integrity and sovereignty of our country to the last drop of our blood. I request you all, to remain calm and support your armed forces in the reestablishment of order to pave the way for a prosperous future for Pakistan. “

May Allah guide us on the path of truth and honour. Allah Hafiz.”

5. On 14-10-1999 the Chief of the Army Staff General Pervez Musharraf issued the Proclamation, effective from 12-10-1999, whereby the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution) was held in abeyance and the whole of

Pakistan brought under the control of Armed Forces. The text of the Proclamation dated 14-10-1999 reads thus:

"PROCLAMATION OF EMERGENCY"

"In pursuance of deliberations and decisions of Chiefs of Staff of the Armed Forces and Corps Commanders of Pakistan Army, I, General Pervez Musharraf, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff proclaim Emergency throughout Pakistan, and assume the office of the Chief Executive of the Islamic Republic of Pakistan.

"I hereby order and proclaim as follows:

(a) The Constitution of the Islamic Republic of Pakistan shall remain in abeyance;

(b) The President of Pakistan shall continue in office;

(c) The National Assembly, the Provincial Assemblies and Senate shall stand suspended;

(d) The Chairman and Deputy Chairman of the Senate the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies shall stand suspended;

(e) The Prime Minister, the Federal Ministers, Ministers of State, Advisors to the Prime Minister, Parliamentary Secretaries, the Provincial Governors, the Provincial Chief Ministers, the Provincial Ministers and the Advisors to the Chief Ministers shall cease to hold office;

(t) The whole of Pakistan will come under the control of the Armed Forces of Pakistan.

This Proclamation shall come into force at once and be deemed to have taken effect on and 12th day of October, 1999."

This was followed simultaneously by the Provisional Constitution Order No. l of 1999, as amended, dated 14-10-1999, which reads thus:

TEXT OF PROVISIONAL CONSTITUTION ORDER NO. 1 OF 1999

"In pursuance of Proclamation of the 14th day of October, 1999, and in exercise of all powers enabling him in that behalf, the Chairman Joint Chiefs of Staff Committee and Chief of Army Staff and Chief Executive of the Islamic Republic of Pakistan under the Proclamation of Emergency of 14th October, 1999 (hereinafter referred to as the Chief Executive) is pleased to make and promulgate the following Order-

1. (1) This Order may be called Provisional Constitution Order No. 1 of 1999.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

2. (1) Notwithstanding the abeyance of the provisions of the Constitution of the Islamic Republic of Pakistan, hereinafter referred to as the Constitution, Pakistan shall, subject to this Order and any other Orders made by the Chief Executive, be governed, as nearly as may be, in accordance with the Constitution.

(2) Subject as aforesaid, all courts in existence immediately before the Commencement of this Order shall continue to function and to exercise their respective powers and jurisdiction:

Provided that the Supreme Court or High Courts and any other Court shall not have the powers to make any order against the Chief Executive or any person exercising powers or jurisdiction under his authority.

(3) The Fundamental Rights conferred by Chapter 1 of Part II of the Constitution, not in conflict with the Proclamation of Emergency or any Order made thereunder from time to time shall continue to be in force.

3. (1) The President shall act on, and in accordance, with the advice of the Chief Executive.

(2) The Governor of a Province shall act on, and in accordance with the instructions of the Chief Executive.

4. (1) No Court, tribunal or other authority shall call or permit to be called in question the Proclamation of Emergency of 14th day of October, 1999 or any Order made in pursuance thereof.

(2) No judgment, decree, writ, order or process whatsoever shall be made or issued by any Court or tribunal against the Chief Executive or any authority designated by the Chief Executive.

5. Notwithstanding the abeyance of the provisions of the Constitution, but subject to the Orders of the Chief Executive all laws other than the Constitution, all Ordinances, Orders, Rules, Bye-laws, Regulations, Notifications and other legal instruments in force in any part of Pakistan whether made by the President or the Governor of a Province; shall be inserted and shall be deemed' to have always been so inserted, shall continue in force until altered; amended or repealed by the Chief Executive or any authority designated by him.

5-A(1) An Ordinance promulgated by the President or by the Governor of a Province shall not be subject to the limitation as to its duration prescribed in the Constitution.

(2) The provisions of clause (1) shall also apply to an Ordinance issued by the President' or by the Governor which was in force immediately before the commencement of the proclamation Order of Chief Executive of the Fourteenth day of October, 1999.

Subject to the Proclamation Order of the Chief Executive of the Fourteenth day of October, 1999 and the provisions of the Provisional Constitution Order No. 1 of 1999 as amended, the President of the Islamic Republic of Pakistan on the advice of the Chief Executive, and the Governor of the Province on instructions of the Chief Executive, may issue and promulgate Ordinances which shall not be subject to the limitation as to their duration prescribed in the Constitution.

6. The Proclamation of Emergency issued on 28th day of May, 1998, shall continue but subject to the provisions of Proclamation of Emergency, dated 14th day of October, 1999 and this Provisional Constitution Order and any other Order made thereunder.

7. All persons who, immediately before the commencement of this Order, were in the service of Pakistan as defined in Article 260 of the Constitution and those persons who immediately before such commencement were in office as Judge of the Supreme Court, the Federal Shariat Court or a High Court or Auditor-General or Ombudsman and Chief Ehtesab Commissioner, shall continue in the said service on the same terms and conditions and shall enjoy the same privileges, if any."

6. On 13th December, 1999, the Chief of Army Staff, General Pervez Musharraf, after assuming the office of the Chief Executive of Pakistan, promulgated the Oath of Office (Judges) Order, 1999 (Order X of 1999), which reads thus: '

OATH OF OFFICE (JUDGES) ORDER, 1999 ORDER NO. 10 OF 1999

"Whereas in pursuance of the Proclamation of Emergency of the fourteenth day of October, 1999, and the Provisional Constitution Order No. 1 of 1999, the Constitution of the Islamic Republic of Pakistan has been held in abeyance;

Whereas Pakistan is to be governed, as nearly as may be, in accordance with the Constitution;

Whereas all Courts in existence immediately before the commencement of this Order have been continued to function and exercise their respective powers and jurisdiction;

And whereas to enable the Judges of the Superior Courts to discharge their functions, it is necessary that they take Oath of their office;

Now, therefore, in pursuance of the aforesaid Proclamation and Provisional Constitutional Order, the Chief Executive is pleased to make and promulgate the following Order:---

1. Short title and commencement.---(1) This Order may be called the Oath of Office (Judges) Order, 1999.

(2) It shall come into force at once.

2. Interpretation.--In this Order, "Superior Court" means the Supreme Court of Pakistan or a High Court or the Federal Shariat Court and "Judge" includes Chief Justice.

3. Oath of Judges.---A Judge of Superior Court appointed after the commencement of this Order shall, before entering upon office, make Oath before the authority specified in the Constitution and in the appropriate from set out in the Third Schedule to the Constitution. "

(Sd.)

General

The Chief Executive of the Islamic Republic of Pakistan

Chairman Joint Chief of Staff Committee

and Chief of Army Staff

(Pervez Musharraf)

Rawalpindi

31st December, 1999.

On 25th January, 2000, the Chief Executive promulgated the following amended Oath of Office (Judges) Order, 2000 (Order I of 2000):

"OATH OF OFFICE (JUDGES) ORDER, 2000 ORDER NO. 1 OF 2000

"Whereas in pursuance of the Proclamation of Emergency of the Fourteenth day of October, 1999, and the Provisional Constitution Order No. 1 of 1999, as amended, the Constitution of the Islamic Republic of Pakistan has been held in abeyance;

Whereas Pakistan is to be governed, as nearly as may be, in accordance with the Constitution and the Chief Executive has and shall be deemed always to have had, the powers to amend the Constitution;

Whereas all Courts in existence immediately before the commencement of this Order have been continued to function and to exercise their respective powers and jurisdiction; subject to the Proclamation of Emergency and Provisional Constitution Order No. l of 1999 as amended.

And whereas to enable the Judges of the Superior Courts to discharge their functions, it is necessary that they take Oath of their office;

Now, therefore, in pursuance of the aforesaid Proclamation and Provisional Constitution Order as amended and in exercise of all other powers enabling him in that behalf, the Chief Executive is pleased to make and promulgate the following Order:-

1. Short title and commencement.---(1) This Order may be called the Oath of Office (Judges) Order, 2000.

(2) It shall come into force at once

2. Interpretation. ---In this Order, "Superior Court" means the Supreme Court of Pakistan or a High Court or the Federal Shariat Court and "Judge" includes Chief Justice.

3. Oath of Judges.---(1) A person holding office immediately before the commencement of this Order as a Judge of Superior Court shall not continue to hold that office if he is not given or does not make, Oath in the form set out in the Schedule, before the expiration of such time from such commencement as the Chief Executive may determine or within such time from such commencement as the Chief Executive may determine or within such further time as may be allowed by the Chief Executive.

(2) A Judge of Superior Court appointed after the commencement of this order shall, before entering upon office, make Oath in the form set out in the Schedule.

(3) A Person referred to in clauses (1) and (2) who has made Oath as required by these clauses shall be bound by the provisions of this Order, the proclamation of Emergency of the Fourteenth day of October, 1999 and the Provisional Constitution Order No. 1 of 1999 as, emended and, notwithstanding any judgment of any Court., shall not call in question or permit to be called in question the validity of any of the provisions thereof. ‘

(4) A Judge of Supreme Court or Federal Shariat Court shall make Oath before the President/Chief Executive or a person nominated by him and a Judge of High Court shall make the Oath before the Governor or a person nominated by him.

4. The Chief Executive may, for- the purpose of removing any difficulties,, or for bringing the provisions of this Order into effective operation, make such provisions as he may deem to be necessary or expedient.

The Oath of Office (Judges) Order No. 10 of 1999 is hereby repealed. “

(Sd.)

General

The Chief Executive of the Islamic Republic of Pakistan

Chairman Joint Chief of Staff Committee and Chief of Army Staff

(Pervez Musharraf)

Islamabad

25th January, 2000. “

7: We have heard the learned counsel appearing on behalf of the petitioners with great patience and Mr. Aziz A. Munshi, the learned Attorney General for Pakistan, Syed Sharifuddin Pirzada, Senior ASC, learned counsel appearing on behalf of the Federation of Pakistan, Mr. Abdul Haleem Pirzada, President, Supreme Court Bar Association and Dr. Farooq Hasan for President, Lahore High Court Bar Association as also Mr. S.M. Zafar, learned amicus curaie:

CONSTITUI'ION PETITION NO. 62 OF 1999

Syed Zafar Ali Shah v. General Pervez Musharraf etc.

8. The petitioner in this petition is an Advocate of the Lahore High Court as well as the Supreme Court of Pakistan. He is also a former member of the suspended National Assembly of Pakistan having been elected from Constituency No. NA-35, Islamabad. Besides, he is President of Pakistan Muslim League, Islamabad capital territory and former Parliamentary Secretary, Law and Parliamentary Affairs.

9. It is pleaded that sometime prior to the eventful day viz 12th October, 1999, the petitioner had left for the United States to attend 54th Session of the United Nations General Assembly, being a member of the delegation headed by Mr. Muhammad Siddique Kanju, Minister of State for Foreign Affairs. On 12th October, 1999, while he was in New York he learnt that the Prime Minister of Pakistan had removed General Pervez Musharraf, who was out of country, from his office and appointed Lt. General Ziauddin as the Chief of Army Staff. He had also learnt that Lt. General Mahmood Ahmed, Corps Commander 10 Corps had. captured the Pakistan Television Station, Islamabad, and after entering the Prime Minister's House forcibly had arrested the Prime Minister and his Colleagues present there. General Pervez Musharraf had appeared on the PTV on 13th October, 1999 at 3-00 a.m. and announced the dismissal of the Prime Minister. and his Government. Thereafter, on 14th October, 1999, he proclaimed state of emergency throughout Pakistan, assumed the office of the Chief Executive of the Islamic Republic of Pakistan and issued Provisional Constitutional Order No. 1 of 1999 whereby the Constitution was held in abeyance, the National and Provincial assemblies as well as the Senate were suspended and the country-was placed under the control of the Armed Forces and formation of the National Security Council, and the Cabinet was announced.

10. Ch. Muhammad Farooq, learned counsel for the petitioner, highlighted the grounds of challenge contained in the petition and also the grievance of the petitioner emanating from dismissal of the Pakistan Muslim League Government, holding in abeyance of the Constitution

and suspension of the Senate, National and the Provincial Assemblies. He also referred extensively to the written statement filed by the respondents and the rejoinder filed by the petitioner in order to augment his petition and meet the points raised in the written statement. Referring to the grounds of challenge he emphasised that the Army take-over having been directed against an elected Prime. Minister and lawful Government was immoral, illegal and unconstitutional, the role of the Chief Executive assumed by General Pervez Musharraf was ultra vires the Constitution, and he and his colleagues had not only violated the oath taken by them under Article 244 of the Constitution but also committed the offence of high-treason by subverting the Constitution. The Chief Executive was performing his functions without taking oath of office and his actions being tainted with mala fide could not be justified on any ground whatsoever. He further submitted that the axed Government having been formed by duly elected representatives and in accordance with the Constitution and the law, was vested with a legal right to complete its tenure unless replaced by another Constitutional Government and its sudden and un-constitutional dismissal had tarnished the image of Pakistan and put at stake the interest of the country, in the global context, as well as of the Armed Forces, which were held in high esteem by one and all. According to him the expenditure being incurred on the present set up from national Exchequer was unauthorized. He thoroughly dissected the Proclamation of Emergency and the PCO and dubbed them as void ab initio and ultra vires the Constitution. He expressed his surprise on issuance of the Proclamation of Emergency from Karachi instead -of the Capital of the country. He was of the view that both the instruments offended against the Objectives Resolution enshrined in Article 2A, an integral and substantive part of the Constitution, which had not only laid down in most unequivocal terms that the State shall exercise its powers and authority through the chosen representatives of the people but had also guaranteed that the method of governance shall be based on Federalism, Parliamentary form of Government, Independence of Judiciary and the Injunctions of Islam as set out in the Holy Qur'an and Sunnah. Referring to the written statement he submitted that it .had been filed in the connected petition without any prayer to 6e treated as written statement in this petition, therefore, the assertions made in this petition had gone virtually unchallenged. He also took exception to the preliminary objections taken in the written statement. that this Court was bereft of jurisdiction to entertain the petition; the petition was not maintainable owing to suspension of the Fundamental Rights and. the General Elections held on 3rd February, 1997, were a farce. He stated vociferously that the turn out of voters was about 36% ; the election was transparent by all standards having been held under the Military umbrella and organized and conducted honestly, justly and fairly by a Chief Election Commissioner who was ex-Chief Justice, Peshawar High Court and an appointee of Mohtarma Benazir Bhutto and. the factum of transparency had been confirmed by the local and the foreign observers. He lamented that the democratic process was interrupted at regular intervals with the result that the country, which was created by force of vote had remained under Military rule for 30 long years.

11. Adverting to the objection in regard to bar of jurisdiction contained in the Proclamation of Emergency and the PCO, he submitted that these unconstitutional provisions cannot oust the jurisdiction of this Court which in the past .had not abdicated its jurisdiction even in the face of bar of jurisdiction contained in Articles. 63A(6) 66, 69, 199(3), 236(2), 239(5), 245(2), 270-A and 48(4) and had struck down the orders, decisions or actions which were found to be coram non

judice, mala fide, in excess of jurisdiction or without jurisdiction. He cited the following authorities in support of his contention:- .

(1)PLD 1956 (W.P) Lahore 807 (F.B) (Ahmad Saeed Karmani's case).

(2) PLD 1977 Lahore 846 (Darvesh M. Arbey's case).

(3) PLD 1977 Lahore 1337 (Iqbal Ahmad Khan's case).

(4) PLD 1987 Karachi 296 (F.B) (Muhammad Bachal Memon's case).,

(5) 1992 CLC 2043 (D.B), (Muhammad Naeem Akhtar's case).

(6) 1994 MLD 2500 (D.B) (Shams-ud-Din's case).

(7) PLD -1997 Lahore 38 (F.B), (Manzoor Ahmed Wattoo's case). .

(8) PLD 1989 Quetta 25 (F.B)(Muhammad Anwar Durrani's'case).

(9) PLD 1966 SC~ 105 (A.K. Fazalul Quader Chaudhry's case).

(10) PLD 1994 SC 738 (Pir Sabir Shah's case).

(11) PLD 1996 SCMR 1969 (The Speaker, Balochistan Provincial Assembly, Quetta's case).

(12) PLD 1996 SC 632 (F.B) (Mrs. Shahida Zahir Abbassi's case).

(13) PLD 1997 SC 426 (Mahmood Khan Achakzai's case).

(14) PLD 1998 SC 1263 (Wukala Mahaz Barai Tahafaz-e-Dastoor's case). .

(15) PLD 1999 SC 57 (Sardar Farooq Ahmed Khan Leghari's case).

(16) PLD 1999 SC 395 (Syed Jalal Mehmood Shah's case).

(17) PLD 1999 SC 504 (Sh. Liaqat Hussain's case).

Criticizing the third preliminary objection raised in the written statement about non-maintainability of the petition on account of suspension of the Fundamental Rights he submitted that the Fundamental Rights enshrined in the Constitution could not be suspended being based on the last Sermon of the Holy Prophet (p.b.u.h.) and the Islamic principles. Besides, the power conferred on the Courts by Article 4 of the Constitution cannot be curtailed even if the Fundamental Rights are suspended. In any event, notwithstanding the curb of suspension imposed by the Proclamation of Emergency and the P.C.O., the Fundamental Rights were alive and enforceable and the petition was maintainable, in view of the law laid down by this Court in the cases of Miss Benazir Bhutto PLD 1988 SC 416, Mian Muhammad Nawaz Sharif PLD 1993 SC 473, Wukala Mahaz Barai Tahafaz-e-Dastoor PLD 1998 SC 1263, Sardar Farooq Ahmed Khan Leghari PLD 1999 SC 57 and Sheikh Liaqat Hussain PLD 1999 SC 504.

12. He also took exception to the assertion made in the written statement that the Military take over was welcomed by the people of Pakistan as was evident from 'the public statements made by, leaders of various political parties. He was of the view that the people, by and large, were unhappy and disappointed and the coup d'etat was supported either by a few self-styled political leaders who wanted to secure slots in the new setup or those politicians whose political parties had no representation in the Parliament.

13. He also raised a technical point that in view of the imminent threat of external aggression, the President of Pakistan had already issued a Proclamation of Emergency under Article 232(1) of the Constitution, therefore, the Proclamation of Emergency issued by General Pervez Musharraf was void ab initio being an unwarranted duplication.

14. Referring to the Constitutional status and role of the Armed Forces he submitted that according to Article 243 of the Constitution the Armed Forces were under the command and control of the Federal Government and in view of the explicit provisions of Article 245 of the Constitution, were obliged, under the directions of the Federal Government, to. defend Pakistan against external aggression or threat of war and, subject to law, act in aid of civil power when called upon to do so and there was no provision in the Constitution empowering them to take over the Federal Government or perform functions of any organ of the State. In order to lend support to the contention he read out the following excerpts from the case of Sheikh Liaqat Hussain PLD 1999 SC 504 by one of us (Irshad Hasan Khan, J.) (now the Chief Justice):-

"The soldiers and the citizens stand alike under the law. Both must obey the command of the Constitution and obedient to its mandates. The Armed Forces have to act within the scope of their jurisdiction as defined in the Constitution."

"A Government elected by the Constitution can only perform its functions and ensure observance of the provisions of the Constitution by making the civil power superior to and not subordinate to the Armed Forces during peace as well as war."

15. He further submitted that the Prime Minister had not done anything unconstitutional by removing the Chief of the Army Staff as under Article 243 of the Constitution he was fully empowered to do so. It was not the first time that he had exercised this power because in the past also he had removed the Chiefs of the Army, Navy and Air Force. The reaction of the Chief of the Army Staff and his colleagues was unjustified because under Article 91(4) of the Constitution the Cabinet was responsible to the National Assembly and not to them. While elaborating the role of the Armed Forces he made an outburst that the concept of Military Government was alien to the civilized world but unfortunately in our country the power is taken over by the Army after every decade on one pretext or the other.

16. He repeatedly and emphatically submitted that the Military take over and its concomitant two invalid instruments cannot be validated by invoking either the Kelsen's theory highlighted in Dosso's case PLD 1958 SC 533 as it was rejected in cases of Miss Asma Jilani PLD 1972 SC 139 and Begum Nusrat Bhutto PLD 1977 SC 657 or the `doctrine of necessity' propounded in the latter cases which according to the judgment of this Court' in the case of Sheikh Liaqat Hussain PLD 1999 SC 504 has been buried for ever and cannot be dug out from its grave. Besides, a parallel cannot be drawn between the situations prevailing at the time of imposition of Martial Law by General Ziaul Haq and the present take-over by General Pervez Musharraf. General Ziaul Haq had imposed Martial Law as the people had not accepted the result of the rigged election and there were violent demonstrations whereas in the present case there was no breakdown of law and order, the Federal and the Provincial Governments were running smoothly and the acts of terrorism committed by some anti-state elements in Karachi were successfully combated and curbed by imposing Governor's Rule. The Proclamation of Emergency and the P.C.O. were too invalid to be validated by any doctrine or the Agenda announced by the Chief Executive in his speech delivered on 17th October, 1999.

17. Another argument advanced by him with all the vehemence at his disposal was that the Army take-over had posed a grave danger to the Federalism as it had impaired the judicially recognized trichotomy of powers by eliminating the Executive, suspending the Legislature and making an attempt to curtail the independence of Judiciary. .

18. Reverting to the criticism leveled in the written statement against the person and policies of the former Prime Minister, he submitted that the allegation of making a fortune through kickbacks and other corrupt methods was vague, bald and false and could not serve as a springboard for justifying the take-over. The allegation that these amendments were bulldozed was a figment of the imagination of the respondents. The criminal cases registered against the former Prime Minister and his colleagues were also false and fabricated. The allegation that the former Prime Minister had taken steps to impair the Independence of Judiciary were also without any substance. The controversy in regard to freezing of the Foreign Exchange Accounts can be settled in the light of the detailed report of the State Bank of Pakistan. The Governor Rule imposed in the Province of Sindh was validated by this Court in the case of Syed Jalal Muhammad Shah PLD 1999 SC 395.

19. Ch. Muhammad Farooq, elaborating his arguments made a reference to The State v. Dosso PLD 1958 SC (Pak.) 5'33, wherein this ,Court, relying on Kelsen's theory of "revolutionary legality", validated the imposition of Martial Law by General Muhammad Ayub Khan and then proceeded to refer the case of Miss Asma Jilani v. Government of the Punjab PLD 1972 SC 139, wherein this Court overruled the dictum laid down in the case of Dosso (supra). Extensive references were made from Miss Asma Jilani's case, wherein at page 178 Placitum-I, it was observed:--

"Nevertheless, with utmost respect to the learned Chief Justice, I do feel that in laying down a novel juristic principle of such far reaching importance he did proceed on the basis of certain assumptions, namely:-

(1) "that the basic doctrines of legal positivism", which he was accepting, were such firmly and universally accepted doctrines that "the whole science of modern jurisprudence" rested upon them;

(2) that any "abrupt political change not within the contemplation of the Constitution" constitutes a revolution, no matter how temporary or transitory the change, if no one has taken any step to oppose it; and

(3) that the rule of international law with regard to the recognition of States can determine the validity also of the States' internal sovereignty. "

"These assumptions were, in my humble opinion, not justified. As I have earlier indicated Kelsen's theory was, by no means, a. universally accepted theory nor was it a theory which could claim to have become a basic doctrine of the science of modern jurisprudence, nor did Kelsen ever attempt to formulate any theory which "favours totalitarianism".

At page 179 Placitum-I, of the above report, it was observed:-

"Kelsen has done so but unfortunately he still continues to be grievously misunderstood. He was only trying to lay down a pure theory of law as a rule of normative science consisting of `an aggregate or system of norms'. He was propounding a theory of law as a `mere jurists' proposition about law'. He was not attempting to lay down any legal norm or legal norms which are `the daily concerns of Judges, legal practitioners or administrators'. In his early works this distinction was not made clear but in 1960 he attempted in his book `Rechtslehre' to clarify the confusion by pointing out, as Julius Stone observes, `that the propositions of the pure theory of law are mere jurists' propositions about law and that they do not bind the Judge, in the way in which legal norms bind him.

At pages 181.-182, Placita-L, M, N of the report, it was observed:

"Kelsen in his attempt to evolve a pure science of law as distinguished from a natural science attached the greatest importance to keeping law and might apart. He did not lay down the proposition that the command of the person in authority is a source of law ...."

"I am also unable to agree with the learned Chief Justice that upon the principles of International Law if the territory and the people remain substantially the same there is "no change in the corpus or international entity of the State and the revolutionary Government and the new State are, according to International Law, the legitimate Government and the valid Constitution of the State". With great respect I must point out that this proposition does not find support from any principle of International Law. According to Oppenheim's view as propounded in his bbok on International Law if the revolutionary Government is ineffective and or has no "reasonable expectancy of permanence" and/or does not "enjoy the acquiescence of the population", then the international community may well-refuse to recognise it, even though its territorial integrity remains unchanged and its people remain substantially the same."

"In any event, if a grand-norm is necessary for us I do not have to look to the Western legal theorists to discover one. Our own grundnorm is enshrined in our own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people without the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March, 1949. This Resolution has been described by Mr. Brohi as the `corner stone of Pakistan's legal edifice' and recognized even by the learned Attorney-General himself `as the bond which binds the nation' and as a document from which the Constitution of Pakistan `must draw its inspiration'. This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or. Civil. Indeed, it cannot be, for, it is one of the fundamental principles enshrined in the Holy Qur'an:

Says, `O Allah, Lord of sovereignty. Thou givest sovereignty to whomsoever Thou pleasest; and Thou takest away sovereignty from whomsoever Thou pleasest. Thou exaltest whomsoever Thou pleasest and Thou abasest whomsoever Thou pleasest. (Pt.3, Ch.3, A1 `Imran, Ay,26.)

The basic concept underlying this unalterable principle of sovereignty is that the entire body politic becomes a trustee for the discharge of sovereign functions. Since in a complex society every citizen cannot personally participate in the performance of the trust, the body politic appoints State functionaries to discharge these functions on its behalf and for its benefit, and has the right to remove the functionary so appointed by it if he goes against the law of the legal sovereign, or commits any other breach of trust or fails to discharge his obligations under a trust. The functional Head of the State is chosen by the community and has to be assisted by a Council which must hold its meetings in public view and remain accountable to public. It is under this system that the Government becomes a Government of laws and not of men, for; no one is above the law. It is this that led Von Hammer, a renowned orientalist, to remark that under the Islamic system `the law rules through the utterance of justice, and the power of the Governor carries out the utterance of it.'

Reference was also made to head-note from page 143 of the report, which reads thus:-

"It is clear that under the Constitution of 1962, Field-Marshal Muhammad Ayub Khan had no power to hand over power to anybody. Under Article 12 of the Constitution he could resign his office by writing under his hand addressed to the Speaker of the National Assembly and then under. Article 16 as soon as the office of President fell vacant the Speaker of the National Assembly had to take over as the acting President of the Country and an election had to be held within a period of 90 days to fill the vacancy. Under Article 30 the President could also proclaim an emergency if the security or economic life of Pakistan was threatened by internal disturbances beyond the power of a Provincial Government to control and may be for the present purposes that he could also proclaim Martial Law if the situation was not controllable by the civil administration. It is difficult, however, to appreciate under what authority a , Military Commander could proclaim Martial Law. "

He then proceeded to refer passages from pages 206, 267 and 270, which are reproduced hereunder respectively as follows-

"I too am of the opinion that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but I respectfully beg to disagree with the view that this is a doctrine of validating the illegal acts of usurpers. In my humble opinion, his doctrine can be invoked in aid only after the Court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization."

"The learned Attorney-General has very frankly conceded that it is this Court that can put the final seal on the validity or otherwise of a law. He has also frankly conceded that it is difficult for him to support the provision of section 3(1)(a) of the President's Order No. 3 of 1969 which prohibits the Court from receiving or entertaining any complaint etc. The Court's power to discover law applicable to a situation has been accepted in the GovernorGeneral's Reference No. 1 of 1955 (PLD 1955 FC 435). In the case under report the Governor-General having found himself in a difficult situation and having been unable to find any legal basis to meet the situation had to approach the then Federal Court for a solution of the problem and the Court answered the reference and indicated the manner in which the problem could be legally solved. "

"It is, thus, evident that the very foundations upon which the decision rested did not exist. I, therefore, think that this Court should make it clear that the validity or otherwise of an existing order can only be determined with reference to the laws of Pakistan and not to any theory of international jurisprudence. It is also necessary to state firmly that the question of existence of a revolution or its success are questions of fact which can only be decided upon evidence, and not assumed. This will remove once for all the temptations that have been placed in. the way of an adventurer seizing power illegally and destroying an existing legal order."

20. In order to reinforce his standpoint as to theory. of `revolutionary legality' Ch Muhammad Farooq made extensive references from the case of Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan PLD 1977 SC 657, wherein at pages 671-674 of the report, it was observed as under:--

"Mr. A.K. Brohi, learned counsel appearing for the Federation of Pakistan, which was also made a party at his request, has taken two preliminary objections as to the maintainability of this petition:-

(a) That it is directed against the Chief of the, Army Staff, whereas the orders of detention had been passed by the Chief Martial Law Administrator; and

(b) That the petitioner is not an aggrieved person in terms of Article 184(3) of the Constitution read with Article 199 thereof, as she does not allege any violation of her own Fundamental Rights, but only those of the detenus.

"He also maintains that this Court has no jurisdiction to grant any relief in this matter owing to the prohibition contained in Articles 4 and 5 of the Laws (Continuance in Force) Order, 1977, which clearly contemplate that no Court, including the High Court and the Supreme Court, can question the validity of any Martial Law Order or Regulation, or any order made thereunder by a Martial Law Authority. He submits that under clause (3) of Article 2 of the aforesaid Laws (Continuance in Force) Order the right to enforce Fundamental Rights stands suspended, and for this reason as well the petition is not maintainable.

"As to the legal character of the new regime, and the validity of the Laws (Continuance in Force) Order, 1977, and the various Martial Law Regulations and Orders issued by the Chief Martial Law, Administrator and the President under its authority, Mr. Brohi submits that up to the 5th of July, 1977, Pakistan was being governed under the 1973 Constitution, but on that day a new Legal Order came into force by virtue of the Proclamation issued by the Chief Martial Law Administrator, and this Legal Order has displaced-albeit temporarily-the old Legal Order. The validity or legality of any action which takes place after the 5th of July, 1977 can only be tested against the guidelines provided by the new Legal Order. According to him, the grundnorm of the old Legal order, as provided by the 1973 Constitution, has given way to a new grundnorm. provided by the Proclamation and the Laws (Continuance in Force) Order, and to that extent the jurisdiction of the superior Courts has been altered. He submits that as the transition from the old Legal Order to the new Legal Order has not been brought about by arty means recognised or contemplated by the 1973 Constitution, therefore, it constitutes a meta-legal or extra Constitutional fact, attracting the doctrine of "revolutionary legality". In this context, according to Mr. Brohi, whenever a Constitution and the national Legal order under it are disrupted by an abrupt political change not within the contemplation of the Constitution, such a change is called a revolution, which term also includes coup d'etat. In such a situation the Court has to determine certain facts which may be termed "constitutional facts", which relate to the existence of the Legal Order within the framework of which the Court itself exists and functions. If it finds that all the institutions of State power have, as a matter of fact, accepted the existence of the new Legal Order, which 'has, thus, become effective, then all questions of legality or illegality are to be determined within the framework of the new Legal Order: Mr. Brohi submits that, on this view of the matter, a viable alternative can be found between the two extreme positions adopted by this Court in Dosso's Case (PLD 1958 SC (Pak.) 533) and Asma Jillani's case-one holding that every revolution, once successful is legal, and the other holding that a revolution as such is illegal. According to him, the Supreme Court in Dosso's case could have decided the controversy by simply holding that, as a matter of constitutional fact, a new Legal Order had come into being in the country, and the question in issue in that case could only be decided by reference to this new Legal Order which had attained effectualness. He contends that the view taken by the Supreme Court in Asma Jillani's case leaves several questions unanswered, by rejecting Kelsen's pure theory of law, because it does not provide any guidelines as to what law the Courts ought to apply in case a revolution has become effective by suppressing or destroying the old Legal Order. As a result, Mr. Brohi submits that this Court should, therefore, lean in favour of holding that a new Legal Order has effectively emerged in Pakistan by means of a meta-legal or extra-Constitutional change, and for the time

being this is the legal framework according to which all questions coming before the Court must be decided. In his view it is not necessary for the Court, nor is it a concomitant of judicial power to either side with the revolution or to act as a counter-revolutionary, by giving its seal of approval to a military intervention or to condemn it by describing it as illegal. Judicial restraint requires that the Court should only take judicial notice of events which have transpired in the country, and decide as a constitutional fact, whether the new Legal Order has become- effective or not. "

"As to the necessity for the imposition of Martial Law on the 5th of July, 1977, Mr. Brohi has stated that the events leading thereto fall into two phases:-

(i) The first phase relates to the unconstitutional and illegal governance of this country by the detenus and their associates and terminates on the eve of the imposition of Martial Law; and

(ii) The second phase relates to the preparations which were being made by detenus and their associates for the fomenting of civil war within the country and their intention to frustrate and prevent the holding of free and fair elections and thereby consolidate their illegal tenure of office." .

"He submits that the Court may take judicial notice of the picture emerging from the mosaic of these events, which are cited merely to illustrate the overall pattern of-events, and not to embark upon a detailed factual inquiry which would be outside the scope of these proceedings. According to the learned counsel, the specific illegalities committed by or at the instance of the former Government will form the subject-matter of independent legal proceedings in which the persons concerned will be afforded a reasonable opportunity for their defence in accordance with law."

"Mr. Brohi goes on to state that massive rigging took place during the elections held on the 7th of March, 1977 in accordance with the directions issued at the -highest Government level, and that the then Chief Election Commissioner, in an interview given to the daily Millat, Karachi, pointedly commented on the widespread irregularities committed in relation to these elections, and recorded this opinion that results in more than 50%a of the seats were affected thereby. He had, further .expressed the view that the appropriate course would be to hold fresh elections."

"Mr. Sharifuddin Pirzada next submits that although he would generally support Mr. Brohi's submissions as to the legal character of an effective revolution, yet he does not wish to adopt a position contrary to the one he took up while appearing as amicus curiae in Asma Jillani's case,

regarding the validity and applicability of Kelsen's pure theory of law relating to the meta-legal character of the change and the birth of a new grundnorm. He submits that there are several renowned jurists who do not fully subscribe to Kelsen's view and consider that effectualness alone, to the exclusion of all considerations of morality and justice, cannot be made a condition of the validity of the new Legal Order. The learned counsel, however, submits that the circumstances culminating in the imposition of Martial Law on the 5th of July, 1977 fully attract the doctrine of State necessity and of salus populi est suprema lex, with the result that the action taken by the Chief Martial Law Administrator must be regarded as valid, and the Laws (Continuance in Force) Order, 1977, must be treated as being a supra-Constitutional instrument, now regulating the governance of the country. The learned Attorney-General contends that the doctrine of necessity is not only a part of the legal systems of several European countries, including Britain, but is also recognised by the Holy Qur'an. Hecontends that consequently all actions taken by the Chief Martial Law Administrator to meet the exigencies of the situation and to prepare the country for future election with a view to the restoration of democratic institutions must be accepted by the Courts as valid, and there can be no question of condonation, which concept can apply only in the case of the acts of a usurper. On this view of the matter, Mr. Sharifuddin Pirzada submits that . the Court cannot grant any relief to the detenus, under Article 184(3) of the Constitution, as the Fundamental Rights stand suspended by virtue of clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977. " .

"Mr. Brohi as well as Mr. Sharifuddin Pirzada were also asked to address the Court on the possible effect and implications of the new oath of office administered to the Judges of the Supreme Court and the High Courts after the imposition of Martial Law. They both stated that, in their view, the new oath has not in any manner restricted the independence of the superior judiciary, nor affected their obligation to perform their judicial functions according to law; it only indicates that the superior judiciary, like the rest of the country, has accepted the fact, which is even otherwise also evident, that, on the 5th of July, 1977, a radical transformation took place in the pre-existing Legal Order. Both the learned counsel are agreed, and Mr. Yahya Bakhtiar, learned counsel for the petitioner, joins them, that the taking of the fresh bath by the Judges of this Court does not in any way preclude them from examining the 'question of the validity of the new Legal Order and decide the same in accordance with their conscience and the law."

At page 681 of the report, it was observed:

"I have no cavil with the propositions and observations referred to by Mr. Brohi, but I do not see how they affect the correctness of the view taken in Asma Jillani's case. Even if the Court erred in observing that the assumption regarding the success of the revolution was not justified for the reason that a few days after the pronouncement of the Court President Iskander Mirza was himself deposed by Field Martial Muhammad Ayub Khan, and the Court should have assumed the facts as stated by Muhammad Munir, C.J., the view taken by the Court as to the applicability of Kelsen's

theory is not affected by this error. The Court. has given sound reason for rejecting it, particularly the fact that it was at best a theory about law, which had not been universally accepted by other renowned jurists. Unless, therefore, compelling reasons are shown for departing from the view. taken by this Court in Asma Jillani's case, I would like to adhere to the same for the reasons so ably stated in the judgments of Hamoodur Rehman, C.J. and Muhammad -Yaqub Ali, J. (as he then was)."

At page 693, it was observed:

"The stage has now been reached for a somewhat detailed examination of the circumstances culminating in the imposition of Martial Law on the 5th of July, 1977. A brief mention thereof has already been made in the earlier part of this judgment, while summarising the contentions raised by Messrs. A.K. Brohi and Sharifuddin Pirzada. It may be stated that many of the averments made in this behalf in the written statement filed by Mr. A.K. Brohi have been strenuously controverted by the detenus who have filed written rejoinders and also appeared in person before the Court. Mr. A. K. Brohi has filed a rejoinder in reply to these statements of the detenns, and Mr. Zulfikar Ali Bhutto has filed a further written statement in response thereto. An affidavit of General (Retd.) Tikka Khan, a former Chief of Staff of the Pakistan Army and Minister of State in Mr. Bhutto's Government has also been placed on me record in refutation of certain actions attributed to him in the respondent's written statement. While taking note of all these statements and counter-statements, I think that in the present proceedings the Court is not called upon .to record a judicial finding as to the factual correctness or otherwise of the several allegations and counter-allegations made by the parties against each other. The Court is primarily concerned with ascertaining the broad trends and circumstances which culminated in the overthrow of, the Government of Mr. Z.A. Bhutto. For this purpose, we must take judicial notice of various events which happened in the country during the period commencing from the 7th of March, 1977 on which date the General Elections to the National Assembly of Pakistan were held, resulting in an overwhelming majority for the Pakistan People's Party led by Mr. Z.A. Bhutto. Ample material appears to be available on the record of this Court to enable us to arrive at the necessary conclusions."

At pages 701-702 it was observed:

"On the basis of the material thus brought to the notice of the Court by Messrs A.K. Brohi and Sharifuddin Pirzada, consisting.mostly of official reports and decisions as well as contemporary reports in the official newspapers, 1 think the Court is entitled to take judicial notice of the following facts:-

(1) That from the evening of the 7th of March, 1977 there were widespread allegations of massive official interference with the sanctity of the ballot in favour of candidates of the Pakistan People's Party;

(2) That these allegations, amounting almost to widespread belief among the people, generated a national wave of resentment and gave birth to a protest agitation which soon spread from Karachi to Khyber and assumed very serious proportions;

(3) That the disturbances resulting, from this movement became beyond the control of the civil armed forces;

(4) That the disturbances resulted in heavy loss of life and property throughout the country;

(5) That even the calling out of the troops under Article 245 of the Constitution by the Federal Government and the consequent imposition of local Martial Law in several important cities of Pakistan, and they calling out of troops by the local authorities under the provisions of the Code of Criminal Procedure in smaller cities and towns did not have the desired effect; and the agitation continued unabated;"

(6) That the allegations of rigging and official interference with elections in favour of candidates of the ruling party were found to be established by judicial decisions in at least four cases, which displayed a general pattern of official interference;

(7) That public statements made by the then Chief Election Commissioner confirmed the widespread allegations made by, the Opposition regarding official interference with the elections, and endorsed the demand for fresh elections;

(8) That in the circumstances, Mr. Z.A. Bhutto felt compelled to offer himself to a Referendum under the Seventh Amendment to the Constitution, but the offer did not have any impact at all on the course of the agitation, and the demand for his resignation and for fresh elections continued unabated with the result that the Referendum Plan had to be dropped;

(9) That in spite of Mr. Bhutto's dialogue with the leaders of the Pakistan National Alliance and the temporary suspension of the Movement against the Government, officials charged with maintaining law and order continued to be apprehensive that in the event of the failure of the talks there would be a terrible explosion beyond the control of the civilian authorities;

(10) That although the talks between Mr. Bhutto and the Pakistan National Alliance leadership had commenced on the 3rd of June, 1977, on the basis of his offer for holding fresh elections to the National and Provincial Assemblies, yet they had dragged on for various reasons, and as late as the 4th of July, 1977, the Pakistan National Alliance leadership was insisting that nine or ten points remained to be resolved and Mr. Bhutto was also saying that his side would similarly put forward another ten points if the General Council of P.N.A. would not ratify the accord as already reached on the morning of the 3rd of July, 1977;

(11) That during the crucial days of the dead-lock between Mr. Z.A. Bhutto and the Pakistan National Alliance leadership the Punjab Government sanctioned the distribution of fire-arms licenses on a vast scale, to its party members, and provocative statements were deliberately made by the Prime Minister's Special Assistant, Mr. G.M. Khar, who had patched up his differences with the Prime Minister and secured this appointment as late as the 16th of June, 1977; and

(12) That as a result of the agitation all normal economic, social and educational activities in the country stood seriously disrupted, with incalculable damage to the nation and the country."

21. Ch Muhammad Farooq, maintained that in the light of the abovementioned circumstances/conditions prevailing in the country at the relevant time the Court reached the conclusion that the imposition of Martial Law, which was for a limited period so as to attain limited objectives, was valid. He submitted that the Court can take note of the fact that no such circumstances existed in the present case as the State institutions were working normally and even meeting of the National Assembly had been convened for 15th October, 1999.

22. He submitted that this Court took notice of the salient points of the speech made by General Muhammad Ziaul Haq on the evening of the 5th of July, 1977 wherein the reasons for the action he had taken of overthrowing the Government of Mr. Z. A. Bhutto and dissolving the Federal and Provincial Legislatures, were summarized in the following terms:-

"From the objective narration of events as they were happening from the 7th of March, 1977 onwards, one is left in no doubt that the Constitutional and moral authority of the National Assembly which had come into being as a result of the elections held on the 7th of March, 1977, as well as of the Federal and Provincial Governments formed thereafter as a result of mandates given to them by the National and the Provincial Assemblies had, been continuously and forcefully repudiated throughout the country over a prolonged period of nearly four months, thus, resulting in serious disruption in all spheres of national life. It can only be a matter of conjecture at this stage, whether an accord between the Government and the Pakistan National Alliance would have finally emerged if the Army had not intervened. From the material placed on the record, in the shape of deliberations of official committees, it has become abundantly clear that the situation was surcharged with possibilities of further violence, confusion and chaos.

"Having found that the extra-Constitutional step taken by the Armed Forces of Pakistan was justified by requirements of State necessity and welfare of the people it is now necessary to examine its legal consequences."

23. He then referred to pages 714-715, to quote some other extracts from the speech of General Ziaul Haq, the then Chief Martial Law Administrator, wherein he had declared the objectives of imposition of Martial law in the country. These extracts run as under:-

"But the Constitution has not been abrogated. Only the operation of certain parts of the Constitution has been held in abeyance. Mr. Fazal Elahi Chaudhry has very kindly consented to continue to discharge his duties as President of Pakistan as heretofore under the same Constitution. I am grateful to him for this. To assist him in the discharge of his national duties, a four-member Military Council has been formed. The council consists of the Chairman, Joint Chiefs of Staff, and Chiefs of Staff of the Army, Navy and the Air Force.

"I will discharge the duties of the Chief of Army Staff and Chief Martial Law Administrator. Martial Law Orders and instructions as and when required will be issued under my orders."

"He further stated on this occasion that:

"I want to make it absolutely clear that neither I have any political ambitions nor does the Army want to be detracted from its profession of soldiering. I was obliged to step in to fill in the vacuum created by the political leaders. I have accepted this challenge as a true soldier of Islam. My sole aim is to organise free and fair elections which would beheld in October this year. Soon after the polls power will be transferred to the elected representatives of the people. I give a solemn assurance that I will not deviate from this schedule. During the next three months my total attention will be concentrated on the holding of elections and I would not like to dissipate my powers and energies as Chief Martial Law Administrator on anything else."

"As to the place of Judiciary, he stated that:-

"It will not be out of place to mention here that I hold the Judiciary of the country in high esteem. I will do my best to refrain from doing anything which is likely to restrict the power of the Judiciary. However, under unavoidable circumstances, if and when Martial Law Orders and Martial Law Regulations are issued, they would not be challenged in any Court of law."

"It will be seen that the declared objectives of the imposition of Martial Law are to create conditions suitable for the holding of free and fair elections in terms of the 1973 Constitution, which was not being abrogated, and only certain parts of which were being held in abeyance, namely the parts dealing with the Federal and the Provincial Executives and Legislatures. The President of Pakistan was to continue to discharge his duties as heretofore under the same Constitution. Soon after the polls the power is to be transferred to the elected representatives of the people. It is true that owing to the necessity of completing the process of accountability of holders of public offices, the holding of elections had to be postponed for the time being but the declared intention of the Chief Martial Law Administrator still remains the same, namely, that he has stepped in for a temporary period and for the limited purpose of arranging free and fair elections so as to enable the country to return to a democratic way of life."

He also referred a passage from page 721 of the report, which reads thus:-

"It has already been seen that the conditions culminating in the Proclamation of Martial Law on the 5th of July, 1977, were-so grave that the very existence of the country was threatened, that chaos and bloodshed, was apprehended and there eras complete erosion of the constitutional authority of the Federal Government, leave alone that of the various Provincial Governments. The situation had indeed deteriorated to such an extent that it justified an extra-Constitutional step, resulting in the suspension of certain parts of the Constitution itself by the Armed Forces. Such

being the case, the situation was obviously at least of the kind contemplated by clause (12) .of Article 232 of the Constitution. In the circumstances, the Chief Martial Law Administrator was justified in providing in clause (3) of Article 2 of the Laws (Continuance in Force) Order that the right to. enforce Fundamental Rights shall be suspended. It was clearly an order which could have been made under the 1973 Constitution. No exception can, therefore, be taken to the validity of this provision."

He then referred to the conclusions reached by the Court after somewhat lengthy discussion of the various questions raised therein, which were summed up as follows:-

"(i) That the legal character and validity of any abrupt political change, brought about in a manner not contemplated by the pre-existing Constitution or Legal Order, cannot be judged by the sole criterion of its success or effectiveness, as contemplated by Kelsen's pure theory of law. Not only has this theory not been universally accepted, or applied, it is also open to serious criticism on the ground that, by making effectiveness of the political change as the sole condition or criterion of its legality, it excludes from consideration sociological factors or morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. The legal consequences of such a change must, therefore, be determined ,by a consideration of the total milieu in which the change is brought about, including the motivation of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed;

(ii) That in any case the theory of revolutionary legality can have no application or relevance to a situation where the breach of legal continuity is of a purely temporary nature and for a specified limited purpose. Such a phenomenon can more appropriately be described as one of constitutional deviation rather than of revolution;

(iii) That examined in this light, the Proclamation of Martial Law on the 5th of July, 1977, appears to be an. extra-Constitutional step necessitated by. the complete breaks down and erosion of the constitutional and moral authority of the Government of Mr. Z.A. Bhutto, as a result of the unprecedented protest movement launched by the Pakistan National Alliance against the alleged massive rigging of elections to the National Assembly, held on the 7th of March, 1977. It was a situation for which the Constitution provided no solution, and the Armed Forces had, therefore, to intervene to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster;

(iv) That the imposition of Martial Law, therefore, stands validated on the doctrine of necessity, and the Chief Martial Law Administrator is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity;

(v) That it has also become clear from a review of the events resulting in the culmination of Martial Law, and the declaration of intent made by the Chief Martial Law Administrator, that the 1973 Constitution still remains the supreme law, subject to the condition that certain parts thereof have been held in abeyance on account of State necessity; and the President of Pakistan as well as the superior Courts continue to function under this Constitution. In other words, this is not a case where the old Legal Order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a temporary period and for a specified and limited objective, namely, the restoration of law and order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of the restoration of democratic institutions under the 1973 Constitution;

(vi) That, accordingly, the superior Courts continue to have' the power of judicial review to judge the validity of any act or action of the Martial Law Authorities if challenged in the light of the principles underlying the law of necessity as set out in this judgment. Their powers under Article 199 of the Constitution, thus, remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance; and

(vii) That the provisions contained in clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977, suspending the right to enforce Fundamental Rights are valid for the reason that ,the situation prevailing in the country was obviously of such a nature as to amount to an Emergency contemplated by clause (1) of Article 232 of the Constitution, and the right . to enforce Fundamental Rights could, therefore, be legitimately suspended by an order of the kind which could have been made under clause (2) of Article 233 of the constitution."

24. He then made reference to the, case of Sardar Farooq Ahmed Khan Leghari v. Federation of Pakistan PLD 1999 SC 57, to contend that though Proclamation of Emergency was validated, but the action of suspension of fundamental rights was overruled. To substantiate his view, he took the Court through paragraphs 78 to 82, wherein Irshad Hasan Khan, J. (as he then was), now the Chief Justice observed

"78. I appreciate the frank and bold statement made by Syed Sharifuddin Pirzada, though appearing on behalf of the Government that a judicial order to the Executive could be' passed to revoke the Proclamation of Emergency if the material presented against the same satisfied the Court, on solid grounds, that the circumstances did not warrant to proclaim emergency. I am also inclined to agree with him. "

"79. Clearly, the petitions are maintainable. I fully subscribe to the reasoning assigned by the Hon'ble Chief Justice in repelling the contention of the learned 4ttorney-General on the question of maintainability."

"80. I am not impressed by the plea raised by the learned Attorney-General that this Court has no authority ~ to examine the Proclamation of Emergency issued by the President. The Parliament, the President, the Executive and Judiciary are the creatures of the Constitution. Each organ of the State has to function within the sphere allotted to it under the Constitution. Neither of them can be permitted to invade into the functions and powers of the other organs of the State. As to what power was granted to the Courts and what limitations were imposed on it are questions which have always been, and always will be, the subject of a close examination by the superior Courts, under the Constitutional scheme envisaged by the Constitution of Islamic Republic of Pakistan, 1973. The independence of the judiciary can never be taken away."

"81. Loyalty to the State is the basic duty of every citizen. Obedience to the Constitution and law is equally applicable to every citizen wherever he may be and every other person for the time being within Pakistan including the Government in power and the Courts. Clearly, the Court can, exercise the power vested in it under the Constitution to examine the validity of the proclamation with a view to ascertain as td whether the pre-conditions laid down under Article 232(1) of the Constitution exist or not or it is without jurisdiction, coram non judice or mala fide. But the Courts while exercising judicial power must also abide by the Constitution. It is true that the powers available under the above provisions are drastic and might be abused. The danger of abuse is theoretically present. But in this case, it is wholly absent. The Proclamation is intra vires of the Constitution. There has been no abuse of exercise of power by .the President. In fact, Mr. Shahzad Jehangir emphatically stated that no motive could be attributed to the President and that he acted in good faith."

"82. Fundamental Rights provide Constitutional safeguards to civil liberties. These rights guaranteed by the Constitution are essential human rights which inherently belong to every citizen of a country governed in a civilized mode. Not one of these safeguards can, the President of Pakistan, the Parliament, the Executive or the Judiciary, disturb under the scheme of the Constitution, except those having reasonable nexus with the object of the Proclamation of

Emergency during its continuance. This is essential to ensure so that the Government may not derogate from Fundamental Rights. If arbitrary and unlimited powers for suspending Fundamental Rights is conceded to. the Government, during the period of Emergency, and without having any reasonable nexus with the object of Proclamation, the dangers to human liberties are frightful to contemplate. Such a concession to the Government is likely to lead to despotism and anarchy, which cannot be countenanced by the Courts. I respectfully do not subscribe to the view taken by the Indian Supreme Court in the case of Muhammad Yaqub (supra) that it is open to the President to suspend the enforcement of any of the Fundamental Rights conferred under the Constitution during the continuance of emergency and wherever such suspension is made it is in the interest of the country and no further proof of it is necessary. In my humble view only such Fundamental Rights can be suspended which have nexus with the reasons which led to the Proclamation of Emergency. A satisfactory solution can, therefore, be had only if the power available to the President under the Constitution to proclaim emergency is exercised with the least encroachment upon the rights and liberties of the citizens. "

He also referred to paragraph 21 of the report at page 394, wherein Muhammad Bashir Jehangiri, J. observed as under:-

"21. It would, thus, be noticed that we have developed an unfortunate trend over a period of half a century of our independent national existence to rush to suspend the Fundamental Rights on one pretext or another. As soon as the country had tested its nuclear capability, the 'respondents, for no reason readily understandable, clamped a state of emergency under the cover of which firstly, the citizens of Pakistan were stripped off all the fundamental rights but later on only the Fundamental Rights provided for in Articles 10, 15, 16, 17, 18, 19, 23, 24 and 25 were ordered to remain suspended. Even if, Proclamation- of a state of emergency was justified as we have held the suspension of Fundamental Rights were unwarranted a move which created fresh doubts about the intention of the Government. Not only the Government revealing the extent of its faith in the patriotism of ordinary Pakistanis, it was also insulting their intelligence unnecessarily. The learned Attorney-General had, of course, argued that in the first rush of excitement after the nuclear explosions, it did not have enough time to weigh these matters with the care they deserved. Worse, even when it had an opportunity to make amends, it thought fit not to do so. The President (which means the Government and the Federation) has modified the emergency order and restored some rights like the freedom to practise religion but the order carrying this direction does not touch the freedoms which have a practical bearing on every day life like the freedom from arbitrary arrest or the freedom of speech and association."

Ch Muhammad Farooq, also referred some passages from the case of Sh. Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504, which read as under:-

"25. It may be stated that it seems to be correct that after the taking over of the executive power by the Governor in Sindh, commission of the crimes has been reduced including the acts of terrorism. This is also visible if one is to visit Karachi and see the situation obtaining now and talk to the common people, of which this Court can take judicial notice. According to the learned Attorney-General's submission, the establishment of the Military Courts in Karachi and other parts of Sindh also contributed in bringing the normalcy in Sindh. In this behalf, it may be stated that the law and order situation started improving immediately on the taking over of the executive power by the Governor on 3-10-1998. Whereas the impugned Ordinance was promulgated on 20-11-1998. According to Mr. M. Akram Sheikh, learned counsel, the above improvement in the law and order situation was because of sharpening up of the administrative response. There are more people to catch and lesser people to influence or interfere with the process of apprehending and prosecuting accused persons and not on account of establishment of the Military Courts. Be that as it may, even if we were to accept the above contention of the learned Attorney General, the question which needs consideration is that if the establishment of the Military Courts is not warranted by the Constitution, simpliciter the fact that their establishment had contributed to some extent in controlling the law and order situation or the factum of delay in disposal of the criminal cases by the Courts existing under the general laws or under the special laws, as was urged by the learned Advocate-General, Sindh, would justify this Court to uphold their validity. In my humble view, if the establishment of the Military Courts under the impugned Ordinance is violative' of the Constitution, we cannot sustain the same on the above grounds or on the ground of expediency. Acceptance of the Doctrine of Necessity by this Court inter alia in the case of the State v. Dosso and another (PLD 1958 SC (Pak.) 533), turned out to be detrimental to the evolution and establishment of a democratic system in this Country. It may be observed that some critics feel that the same had encouraged and caused the imposition of the Martial Law in this country more than once, which adversely affected the attainment of maturity by the Pakistani nation in the democratic norms. As a fall out, our country had been experiencing instability in the polity. The doctrine of necessity cannot be invoked if .its effect is to violate any provision of the Constitution, particularly keeping in view Article 6 thereof which provides that "Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason."

"It may be pointed out that the concept of imposition of Martial Law in Pakistan in connection with the maintenance or restoration of order in any area was visualized till the framing of the present Constitution of 1973, as highlighted in the above two judgments of the full Benches of Sindh and Lahore High Courts."

"26. It may be observed that the present Constitution of the Islamic Republic of Pakistan, 1973, does not admit the imposition of Martial Law in any form. This is indicated from the language employed in Article 237 of the Constitution which empowers the Parliament to make any law indemnifying any person in the service of the Federal Government or a Provincial Government, or any maintenance or restoration of order in any area in Pakistan. But it does not admit the imposition of Martial Law in any form. This is indicated from the language employed in Article 237 of the

Constitution which empowers the Parliament to make any law indemnifying any person in the service of the Federal Government or a Provincial Government, or any maintenance or restoration of order in any area in Pakistan. But it does not cover indemnification, for acts done during the period of Martial Law. In contrast to the above provision of the present Constitution, our three late Constitutions of 1956, 1962 and Interim Constitution of 1972, provided for enacting of law for indemnifying any person in the service of the Federal Government or a Provincial Government or any other person, in respect of any act done in connection with the maintenance or restoration of order in any area in Pakistan where Martial Law was in force."

"45. The soldier and the citizen stand alike under the law. Both must obey the command of the Constitution and obedient to its mandates. The Armed Forces have to act within the scope of their jurisdiction as defined under the Constitution as long as the acts of the Armed Forces fall within the scope of their jurisdiction the same are protected while such are in excess of their jurisdiction, are exceptionable. It is only where the civil power is completely broken, Courts in the country have ceased to function, the danger of imposition of Martial Law cannot be ruled out notwithstanding the provisions of Article 6 of the Constitution, which provides that any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other unconstitutional means shall be guilty of high treason. But in all other cases, the expression to call the Armed Forces `in aid of civil power' excludes the substitution of Civil Courts by the Military Courts. The Armed Forces should be kept in strict subordination to be governed by the civil power and the State as is apparent from a bare reading of Article 243 of the Constitution, which provides that the Federal Government shall have the control and command of the Armed Forces. The necessity of the Armed Forces for the preservation of the society, peace, defence, integrity and solidarity of Pakistan cannot be under estimated. Needless to say that during the present emergency and until the danger of terrorism and internal disturbances is removed, the Armed Forces may be called by the Federal Government to "act in aid of civil power" `subject to law' and confer on it such other powers as the situation may require. However, the Armed Forces cannot be permitted to substitute the ordinary Civil Courts while acting `in aid of civil power'. A Government elected by the Constitution can only perform its functions and ensure observance of the provisions of the Constitution by making the civil power superior to and not subordinate to the Armed Forces during peace as well as war. This is the foundation stone of Constitution of Pakistan as reflected in Article 2A that sovereignty over the entire universe belongs to Almighty Allah alone and the authority to be exercise by the people of Pakistan within the limits prescribed by Him is a sacred trust and that the State shall exercise its powers and authority through the chosen representatives of the people, wherein the fundamental rights shall be guaranteed, including equality of status, of opportunity and before law, social economic and political justice and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality and that the independence of the Judiciary shall be fully secured. Clearly, the integrity of the territories of the Federation, its independence and all its rights, including the sovereign rights on land, sea and air, shall be safeguarded by the Armed Forces, under the control and directions of the Federal Government. The term `in aid of civil power' implies that some assistance may be necessary to the civil power for the performance of its functions and not the taking over of the civil powers, especially the judicial powers of the Judiciary."

“47. Examination of the above case-law also fortifies the view that the phrase `to act in aid of civil power’ used in Article 245(1) of the Constitution, clearly does not include the power to substitute the existing judicial system and/or to establish a parallel system. It is true that the State has a right to protect itself against terrorist activities including all those who would destroy it, and it could be said that that right has been linked with the right of the individual to his self-defence but in the exercise of such right and with a view to preserving the society and the State, it must take all measures in conformity with the Constitution and not in derogation thereof. Clearly, in order to protect the innocent citizens against terrorist activities the Army can act `in aid of civil power’ by rendering such assistance as may be needed under the direction of the Federal Government excluding the power to share the judicial power exclusively vesting in the Judiciary and/or to supplant the existing system by establishment of parallel Courts as has been done pursuant to the impugned Ordinance. When the Army is `acting in the aid of civil power’ to restore peace and normalcy, the power to apprehend accused, their investigation, arrest and assistance in expeditious submission of the challan to the Courts, production and attendance of witnesses and their security including that of the Presiding Officers and the Advocate, is incidental to the directions of the Federal Government `to act in aid of civil power’. It is difficult to enumerate the acts/steps that may be taken by the Armed Forces while `acting in aid of civil power’ but in the exercise of the said power they cannot either directly or indirectly share the judicial powers of the Courts or replacement thereof. The impugned legislation, to that extent, is therefore, wholly unwarranted and cannot sustain even on ground of alleged necessity, as canvassed by the learned Attorney-General, the learned Advocate-General, Sindh and Syed Iqbal Haider. The term `to act in aid of civil power’ no matter how liberally it may be construed, would not in any manner whatsoever embrace the judicial powers conferred on the Courts under the scheme of the Constitution.”

“48. I am fully inclined to agree with the learned Attorney-General that the impugned Ordinance was promulgated bona fide with a view to restore peace and normalcy in the country and, particularly, in Sindh, but, however,-bona fide an action may be in itself, it cannot be a touchstone for judging the constitutionality of the impugned Ordinance. Its validity is to be judged only on the touchstone of the Constitutional provisions. Reading Articles 175, 203 and 245 together and in the light of the judgment rendered by this Court in the case of Mehram Ali (supra), it indubitably leads to the conclusion that the Military Courts envisaged under the Constitution tantamount to establishment of parallel Courts for which there was no warrant. The bare reading of Article 245 would show that it does not contemplate declaration of Martial Law or Mini-Martial Law in any form whatsoever. It is not the case of the learned Attorney-General that the Courts are not functioning. He, however, argued that the Courts were not deciding the cases expeditiously on account of fear of the terrorists. If that is so, the proper course was to take appropriate measures by improving methods of investigation, expeditious submission of challan to the trial Courts security of witnesses/litigants as well as the Presiding Officers of the Courts and to take long/short term measures including appropriate increase in the strength of Judges in the light of the various reports of the Law Commission.

"49. Thus, visualized, the Courts established pursuant to the impugned Ordinance do .not fall within the purview of any of the Constitutional provisions. The Constitution envisages trichotomy of powers of the three organs of the State, namely, Legislature, Executive and the Judiciary. The Legislature is assigned the task of law-making, the Executive to execute such laws and the Judiciary to construe and interpret the laws. None of the organs of the State can encroach upon the fields allotted to others. The Constitution does not countenance the take-over of the judicial functions by the Armed Forces at the direction of the Federal Government in the purported exercise of power conferred on it under Article 245 of the Constitution. Article 245 does not by itself create the law but enables the making of a law, which should have nexus with the phrase to act in aid of civil power'. The replacement of Courts either partially or wholly is not recognized under any provisions of the Constitution. A bare reading of Article 243 would show that the Armed Forces are subject to the control and authority of the Federal Government i.e. a civilian Government. No circumstances existed in the country, which indicated the breaking down of the judicial organ, necessitating establishment of Military Courts. It is imperative for the preservation of the State that the existing judicial system should be strengthened and the principle of trichotomy of power is adhered to by following, in letter and spirit, the Constitutional provisions and not by making deviation thereof on any ground whatsoever."

"58. The plea raised on behalf of the learned Attorney-General that the Doctrine of Necessity is not outdated and can be invoked in the present case for a `limited purpose' cannot be countenanced, for, if it is approved of, it may very frequently be resorted to at the incidence of a situation presently prevailing in the country, by the Executive. In, fact, such approval whereby the Executive is allowed to cross the barriers of Constitutional provisions at its whim, would turn a democratic rule into a despotic one. Clearly, any deviation from the Constitution may lead to anarchy. It is true that the takeover by the Chief of the Army Staff as Martial Law Administrator was validated by this Court in Begum Nusrat Bhutto's case PLD 1977 SC 657 wherein it, was inter alia observed :-

`On no principles of necessity could power of judicial review vested in the superior Courts under the 1973 Constitution, be taken away' (p.716 last para. extending to page 717).

"However, in the case of Asma Jilani (supra), this Court took the view that the acts of usurper may be condoned and/or validated by the application of the law of necessity. Viewed from this angle, the impugned Ordinance being ultra vires the Constitution cannot be validated even on the touchstone of State necessity. Additionally, in view of the plea raised by the learned Attorney-General that the establishment of Military Courts is spelt out from the power vesting in the Federal Government under Article 245 is contradictory with the theory of State necessity, inasmuch as, the concept of law of necessity, would arise only if an act which would otherwise be illegal becomes legal if it is done bona fide, in view of State necessity, with a view to preserving-- the State or the society from destruction by the terrorists. In the instant case, we have no doubt that the impugned Ordinance was issued bona fide with a view to suppress the menace of terrorism. Nevertheless,

the constitutionality of the Ordinance is not to be judged on the question of bona fides of the Federal Government simpliciter but on the touchstone of the Constitutional provisions. Here, impugned legislation is ultra vires the Constitution in so far as it takes away the functions of the Courts in determining the guilt or innocence of an accused. Be that as it may, the prerequisites for the application of Doctrine of Necessity are not satisfied in the instant case for upholding the impugned legislation,. even for a limited period. The prerequisites, as laid down in the case of Attorney-General of Republic v. Mustafa Ibrahim 1964 CLR 195, which was also referred in the Begum Nusrat Bhutto's case (supra), are :-

"(a) An imperative and inevitable necessity or exceptional circumstances;

(b) no other remedy to apply;

(c) the measure taken must be proportionate to the necessity; and

(d) it must be of a temporary character limited to the duration of the exceptional circumstances.'

"In the instant case, the Courts are functioning and the question of backlog and expeditious disposal of terrorists' case can be remedied by taking effective measures, in the light of the guidelines provided by this Court in the short order as well as the recommendations in the concluding paragraphs of this note. The Courts are functioning properly and administering justice according to the Constitution and the law. These Courts, therefore, cannot be replaced by Military Courts as attempted to be done either partially or wholly by virtue of the impugned Ordinance. The role of Armed Forces as contemplated under Article 245 is to defend the country from external aggression or threat of war or to come to the `aid of civil power' subject to law. The second function of coming in the `aid of civil power' to be performed by the Armed Forces is subject to a condition precedent of enacting a law. The law so made must have nexus with the term `to act in aid of civil power'. The role of Armed Forces while acting `in aid of civil power' does not in any way confer the power either directly or indirectly to interfere with the Courts established under Article 175(1) of the Constitution and/or to supplant them."

"59. Let me now discuss the contention raised on behalf of the petitioners as to the independence of Judiciary, which, according to them, has been set at naught with the promulgation of the Ordinance in question. The Constitution of the Islamic Republic of Pakistan, 1973 in its preamble

(now made a substantive part thereof vide Article 2A) declares that "the independence of the Judiciary shall be fully secured" therein. According to a consensus of the jurists, the independence of the Judiciary means that every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason; and that the Judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review, overall issues of a judicial nature. This Court vide its judgment in the case of Sharaf Afridi (supra), has separated the Judiciary from the Executive."

Reliance was also placed on the case of Miss Asma Jilani (supra), wherein at page 181 sideline `L' of the report, it was observed:

"Kelsen's attempt to justify the principle of effectiveness from the standpoint of International Law cannot also be justified, for it assumes `the primacy of International Law over National Law.' In doing so he has, to my mind, overlooked that for the purposes of International Law the legal person is the State and not the community and that in International Law there is no `legal order' as such. The recognition of a State under International Law has nothing to do with the internal sovereignty of the State, and this kind of recognition of a State must not be confused with the recognition of the Head of a State or Government of a State. An individual' does not become the Head of a State through the recognition of other States but through the -municipal law of his own State. The question of recognition of a Government from the point of view of International Law becomes important only when a change in the form of Government also involves a break in the legal continuity of the State or where the question arises as to whether the new Government has a reasonable expectancy of permanence so as to be able to claim to represent the State" (vide Oppenheim's International Law, Vol. I, page 127)

At page 183 sideline,`O' of the report, it was observed:

"The principle enunciated in Dosso's case, therefore, is wholly unsustainable, and it cannot be treated as good law either on the principle of stare decisis or even otherwise."

"We have also in this connection been referred to a case from Cyprus sub-nomine. The Attorney-General of the Republic v. Mustafa Ibrahim and others 1964 CLR 195 where the Supreme Constitutional Court of Cyprus also applied the doctrine of necessity to validate a certain legislation which was otherwise inconsistent with certain Articles of the Cyprus Constitution on the ground that they would be justified `if it can be shown that it was enacted only in order to avoid

consequences which could not otherwise be avoided, and which if they had followed, would have inflicted upon the people of Cyprus, whom the Executive and Legislative organs of the Republic are bound to protect, inevitable irreparable evil, and furthermore if it can be shown that no more was done than was reasonably necessary for that purpose, and that, the evil inflicted by the enactment in. question, was not disproportionate to the evil avoided'. This the Court thought was its duty to do in view of its `all important and responsible function of transmitting legal theory into living law, applied to the facts of daily life for the preservation of social order'."

ACTS CONDONED UNDER THE

PRINCIPLE OF CONDONATION:

"Applying this test I would condone:

(1) all transactions which are past and closed, for no useful purpose can be served by reopening them;

(2) all acts and legislative measures which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order;

(3) all acts which tend to advance or promote the good of the people;

(4) all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of, or in our case, the objectives mentioned in the Objectives Resolution of 1954:

(5) I would not, however, condone any act intended to entrench the usurper more firmly in his power or to directly help him to run the country contrary to its legitimate objectives.

(6) I would not also condone anything which seriously impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity."

(1) From the foregoing it is evident that, in the first place, President's Order No.3 of 1969 and Martial Law Regulation No.78 do not exist so far as this Court is concerned, and therefore, they are not valid laws.

(2) In the second place even if it be assumed that they do exist, they can not deprive the Court of its inherent jurisdiction to consider the validity or otherwise of those laws or any action taken thereunder."

ILLUSTRATION OF INTERFERENCE AGAINST ORDERS PASSED BY MARTIAL LAW AUTHORITIES

"(3) Supposing by an order passed under Martial Law Regulation No. 78, `X' has been ordered to be detained. While executing this order, however, instead of `X', `Y' is arrested and detained. It is absurd to say that the Court is deprived of its jurisdiction to consider the validity of the order vis-a-vis the person detained merely because the order is by a Martial Law Authority."

At pages 268-269 of the report, it was observed:

"It has been contended by the learned Attorney-General that President's Order No. 2 has provided for a remedy in a matter like this. I am unable to agree with him. Having regard to the provisions made in section 3 of the President's Order No. 3 of 1969, any question regarding the correctness, legality or propriety of exercise of any powers or jurisdiction of a Martial Law Authority could not be referred to the Chief Martial Law Administrator for decision by a Martial Law Authority itself, for the Court's jurisdiction even to receive or entertain any complaint in that respect has been sought to be ousted. The position, therefore, is that any order passed by a Martial Law Authority, if it is labelled as such, it must be accepted as a good order whether it is in fact made or could be made under any Martial Law Order or Regulation, or not. Such an unlimited and undefined power, which is at the same time arbitrary and not governed by any rule of law, can never be accepted as good by any Court of law. Such an unlimited power is not only foreign to Islamic Law but is also not recognised in any modern society."

"I, therefore, fully agree that Dosso's case must be reviewed on the grounds mentioned by my Lord the Chief Justice."

25. Ch Muhammad Farooq reiterated the principles laid down in the case of Sh. Liaquat Hussain (supra) reproduced above, summary whereof is given below :

" 1. Armed Forces cannot abrogate, abridge or displace civil power.

2. Doctrine of necessity-imposition of Martial Law in Pakistan has been done away with.

3. No Martial Law can be imposed-Parliament cannot enact a law to indemnify the acts done during Martial Law.

4. Command of the Armed Forces vests with Federal Government.

5. Martial Law cannot come in scheme of the Constitution.

6. Impugned legislation cannot be sustained on ground of alleged necessity.

7. Control of the Armed Forces vests with Federal Government i.e. a civilian Government.

8. Loyalty to the State, duty of every citizen-Doctrine of Necessity discussed.

9. Judiciary custodian of Fundamental Rights."

26. Ch. Muhammad Farooq also made extensive references from the case of Darvesh M. Arbey, Advocate v. Federation of Pakistan and 2 others PLD 1977 Lah. 846, as follows:

"6. It is important to note that even a nexus or connection has not been provided by the amendment between the offences made exclusively triable by the Military Courts by virtue of this amendment and the subject for which the Armed Forces had been called in Lahore i.e. to restore law and order. The result is that even to that extent this amendment in the Army Act, has in fact, resulted in the displacement of the ordinary- criminal Courts in the District of Lahore by the Military Courts."

"The provision in the proviso to section 3 of Act X of 1977 that the authorised Army Officer can transfer any such case, in his discretion to the ordinary criminal Courts, does not in our view improve the status of the ordinary Courts."

"7. It is, therefore, obvious that to the extent that the Courts established by the Armed Forces are trying civilians of Lahore for offences which have no nexus with the object for which they are said to have come, they (i.e. the Armed Forces) are not acting "in aid" of the civil power but in derogation or replacement thereof. This is certainly not envisaged by Article 245(1) that the "laws" subject to which the Armed Forces are required to act under that Article are intended to be of a nature as would not place the Armed Forces in a position superior or dominant to that of the civil power or to bestow such powers on them that; instead of acting in aid of the civil power, the Armed Forces, in fact, start acting in supersession or displacement of the civil power. We are, therefore, of the view that as far as Act X of 1977; (which amends the Army Act, 1962), is concerned, the most essential precondition prescribed by clause (3) of Article 245 which is mentioned by the learned Attorney-General as the 2nd jurisdictional fact; is absent. Consequently, we hold that clause (3) of Article 245 does not have the effect of ousting the jurisdiction of this Court under Article 199."

27. Ch Muhammad Farooq submitted that out of 87 Members of the Senate, 217 Members of the National Assembly and (nearly 500) Members of the Provincial Assemblies, charges so far have been levelled against very few including the ex-Prime Minister (in a sub judice Helicopter Case) and Sardar Mehtab Abbasi, ex-Chief Minister of N.-W.F.P. detained under NAB Ordinance. He further submitted that F.I.R. in hijacking case was filed after one month's contemplation/deliberations. He repelled the impression that 13th and 14th Constitutional Amendments were passed in haste with Parliament as a Rubber Stamp and contended that both amendments were passed unanimously with the support of all parliamentary parties and that in the

case of Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan PLD 1998 SC 1263. at page 1444, the Supreme Court by majority. upheld the 14th Amendment declaring it to be intra vireo of the Constitution. subject to clarification in respect of paragraph (a) to Explanation to clause (1) of Article 63-A of the Constitution, which reads thus:

"(i) That paragraph (1) to be read in conjunction with paragraphs (b) and (c) to Explanation to clause (1), of Article 63A of the Constitution. It must, therefore, follow as a corollary that a member of a House can be disqualified for a breach of party discipline in terms of said paragraph (a) when the alleged breach relates to the matters covered by paragraphs (b) and (c) to the Explanation to clause (1) of Article 63-A of the Constitution and that the breach complained of occurred within the House."

"(ii) That paragraph (a) to Explanation to clause (1) of Article 63A of 'the Constitution is to be construed in such a way that it should preserve the right of freedom of speech of a member in the House subject to reasonable restrictions as are envisaged in Article 66 read with Article 19 of the Constitution."

28. Ch.Muhammad Farooq vehemently argued that the impugned proclamation and PCO are ultra vires the Constitution and that the jurisdiction of this Court is not barred to examine the controversy. He referred to the case of Ahmed Saeed Kirmani (supra), wherein it was observed: .

"Article 89 of the Constitution of Pakistan does not confer a total or absolute immunity on the proceedings of the Provincial Assembly. "……."The High Court has jurisdiction in appropriate cases to exercise its extraordinary writ jurisdiction in connection with such proceedings e.g., when the so-called proceedings are really outside the Constitution." (pp. 816, 818) E, F."

The observations relied upon in the case of Darvesh M. Arbey (supra) are as under:

"No nexus or connection provided by amendments introduced by Act X of 1977, between offences made exclusively triable by Military Courts and restoration of law and order, object for which armed forces called in" .... : "Amendment, to such extent, resulting in displacement of ordinary criminal Courts by Military Courts" .... "Provision authorising army officers to transfer any case to ordinary criminal Courts in their

discretion not improving status of ordinary Courts at all" .... "Courts established by Armed Forces to such extent as they try civilians for offences having no nexus with restoration of law and order, held, not acting in `aid' of civil power but in derogation or replacement thereof and such position not envisaged by cl,(1) of Art. 245." -- "Laws subject to which Armed Forces required to act under Art. 245(1) of the Constitution" .... "Intended to be of a nature not placing Armed Forces in a position superior or dominant to that of civil power or to enable them to act in supersession or displacement of civil power" .... "Act X of 1977 accordingly, held, lacks essential precondition prescribed in cl. (3) of Art. 245 of acting in aid of civil power in pursuance of Federal Government's direction and jurisdiction of High Court under Art. 199 not ousted in view of cl. (3) of Art. 245."

The observations relied upon in the case of Iqbal Ahmad Khan (supra) are as., under:

"Act X of 1977 having been held to be ultra vires and beyond scope of Art. 245 by Full Bench in case reported as PLD 1977 Lah.846, Army Officers/Military Tribunals devoid of jurisdiction to deal with cases transferred to them from ordinary criminal Courts under provisions of Act X of 1977"……"Order passed by Army Officers/Military Tribunals committing petitioners to custody of police/jail authorities of extending - remand order, in circumstances, held, without any legal substance and ineffective."

The observations relied upon in the case of Muhammad Bachal Memon (supra) are as under:

"Where actions taken between 5-7-1977 and 29-12-1985 under any Martial Law. Regulation, Martial Law Order, enactment, rule etc. were mala fide, without jurisdiction. or coram non judice, immunity provided under Art. 270-A(2) would not save them completely from scrutiny of Superior Courts and, therefore, Art. 270-A(2) did not provide a complete bar in respect of such actions."....."Clause (1) of Article 270-A, Constitution of Pakistan, 1973 given validity to the laws including Martial Law Orders and Regulations made during 5-7-1977 to 30-12-1985 and provides that the same shall not be called into question in any Court on any ` ground whatsoever notwithstanding any judgment of any Court or anything contained in the Constitution."……Proviso of clause (1) of Article 270-A although covers a small period of 30-9-1985 to 30-12-1985, yet it does provide a scope for examining the laws made by the C.M.L.A. daring this period."……"More important in respect of the actions of Martial Law Authorities is clause (2) of Article 270-A which has provided that actions taken by the Martial Law Authorities during the specified period shall not be called into question on any ground whatsoever notwithstanding any judgment of any Court."……"In spite of the bar provided, the jurisdiction of the Superior Courts .to scrutinise actions of Military Authorities

is not completely barred in respect of those actions which were mala fide, without jurisdiction or coram non judice."……."If the actions were mala fide, coram non judice or without jurisdiction, then in spite of the validity conferred on such actions and the immunity, the Superior Courts were not completely debarred from scrutinising the actions. However; the scope of scrutiny was limited to actions which were mala fide, coram non judice and without jurisdiction. In other respects the immunity was considered complete."……The legislature was aware of the interpretation placed by the Supreme Court of .Pakistan on a similar provision. Therefore, when it enacted clause (2) of Article 270-A of the Constitution, the Legislature knew that it is providing validity and immunity to the actions to the extent already explained and interpreted by the Supreme Court and that this validity did not extend to action which were mala fide, coram non judice of without jurisdiction. "……."By reading only clause (2) of Article 270-A without taking into consideration the other provisions of the same Article, it would be clear that the legislature had intended that if the impugned actions were mala fide, without jurisdiction or coram non judice, then the immunity provided under Article 270-A, clause (2) would not save them completely from the scrutiny .of the Superior Courts and, therefore, clause (2) of the Article 270-A does not provide a complete bar in respect of such actions. "

The observations relied upon in the case of Muhammad Naeem Akhtar (supra) are as under:

"Action of Speaker in accepting resignation in question, would neither come within the meaning of term "any proceedings in the Provincial Assembly" used in Art. 69(1) read with Art. 127 of the Constitution, nor such action could be described as an exercise of power by the Speaker for regulating the procedure or the conduct of business in the Assembly" ……."Constitutional petition against action . of Speaker in accepting resignations of Members of Assembly was, thus, maintainable. " .

The observations relied upon- in the case of Shams-ud-Din ,(supra) are as under:-

"Internal proceedings which were carried out by the Assembly, during its session, were not amenable to the jurisdiction of Court, however, all other administrative actions by the Speaker including recruitment of employees, would not enjoy immunity from judicial review particularly when such action of Speaker, prima facie, was in violation of existing rules or the discretion vested in him to take certain decisions in' order to run smoothly the functions of Provincial Assembly . Secretariat, had not been exercised judiciously, High Court under Art. 199 of the -Constitution was competent to examine validity or otherwise of such action."

The observations relied upon in the case of- Manzoor Ahmad Wattoo (supra) are as under:

"Bar of jurisdiction . provided in provision of cl. (2) of Art. 236, Constitution of Pakistan (1973) does not cover a Proclamation which is without jurisdiction, coram non judice or mala fide" .... "Superior Courts have the jurisdiction to examine a Proclamation under their power of judicial .review and declare same as invalid and unconstitutional."

The observations relied upon in the case of Muhammad Anwar Durrani (supra) are as under:

"Ousted only in respect of irregularity of procedure" ……."Where interpretation of Constitutional instrument is involved, jurisdiction of High Court is unaffected."

The observations relied upon in the case of A.K. Fazalul Quader (supra) are as under:

"Letter purporting to communicate a resignation from membership of National Assembly, addressed to President of Pakistan, instead of to Speaker, National Assembly" .... "Member,later, protesting [by two telegrams and a letter, addressed to Speaker, dispatched before his letter of "resignation" had reached the Speaker (Speaker being out of country)] that he had not intended to resign from membership of Assembly, but from membership of "Council Muslim League National Assembly Party" ...."Speaker declaring that member had resigned his seat within meaning of Art. 107(a), by Gazette Extraordinary Notification" .... "Consequent action taken by Chief Election Commissioner to fill vacancy and a new member elected accordingly" . ... "Member challenging vires of Speaker's Gazette Notification by petition under Constitution of Pakistan (1962), Art. 98" .... - "Plea taken on behalf of Speaker that matter was not justiciable in view of bar of jurisdiction raised by Constitution of Pakistan (1962), Art. 111 " . .... . "Held, that member had not intended to resign from membership of National Assembly (in circumstances of case)" "Letter complying with conditions of Art. 107(a) takes effect automatically and does not require "acceptance" by any authority" ....Locus poenitentiae available to member" .... "Communication to Speaker essential ingredient of application of Art. 107" .... "Speaker to construe documents together" .... "Constitution of Pakistan (1962), Art. lll(2)" ... . "Question of `resignation' of member not a question of `procedure', `conduct of business', or of `maintenance or order' within meaning of Art. 111(2):" .... "Supreme Court and High Court have power to "intervene" (under Art. 98) in cases of "excess" of lawful authority."

The observations relied upon in the case of Pir Sabir Shah (supra) are as under:

"Provision of Art. 236(2) of the constitution will not cover Proclamation by the President under Art. 234 of the Constitution which is without jurisdiction, coram non judice or mala fide" ....."Superior courts will have jurisdiction to examine such a Proclamation." .... "Clause (2) of Article 236 of the Constitution of Pakistan will not cover a Proclamation which is without jurisdiction, coram non judice or mala fide and the superior Courts will have jurisdiction to examine a Proclamation from the above three jurisdictional legal aspects."

The observations relied upon in the case of Mrs Shahida Zahir Abbasi (supra) are as under:

"Bar contained in Art. 199(3) of the Constitution on the powers of High Court is not absolute in nature"……."Such bar is not applicable to the cases namely where the impugned action is mala fide or without jurisdiction or coram non judice."

The observations relied upon in the case of Mahmood Khan Achakzai (supra) are as under:-

"Contention that the Judges of the Superior Courts having taken oath under the impugned Amended Constitution (by Constitution (Eighth Amendment) Act, 1985) and had been receiving salary which had been increased from time to time could not strike out the impugned Constitutional Amendment (Constitution (Eighth Amendment) Act, 1985, was repelled" .... "Power and jurisdiction of judicial review could not be controlled and fettered on such basis" .... "Judges of the Superior Courts had taken oath to defend, preserve and protect the Constitution" .... "If any illegal amendment was made or had been made in the constitution, the Courts were competent to examine the same and make interpretation to reconcile its provision in which inferior rights must yield to higher rights" ....."Salary paid to the Judges was not a bounty or favour it was a Constitutional duty to provide salary and benefits to the judges by which independence of judiciary was guaranteed" .... "Courts while striking down any illegal and unconstitutional provision or interpreting the Constitution defend, protect and preserve the Constitution." .... "Fact that any question is a political question will not deter the Court from determining it provided the same involves the interpretation of Constitution or the validity of such question is to be determined on the touchstone of the Constitution" .... "Court should not adopt "political question doctrine" for refusing to determine difficult and knotty, questions having

political. overtones which would amount to abdication of judicial power which neither the Constitution permits nor the law allows" ..."Any action taken, act done or policy framed which violates the provisions of the Constitution or .is not permissible under the Constitution or law, - the Court, irrespective of the fact that it is a political question, must exercise powers of judicial review" .... "Abuse, excess or non-observance of the provisions of the Constitution has to be checked by the Court unless its jurisdiction is barred by the Constitution or law." .... "Provision of Art. 270-A, Constitution of Pakistan 1973, as provided legal cover for deviation by President from the mandate given by Supreme Court in Begum Nusrat Bhutto v. Chief of Army Staff PLD 1977 SC 657" .... "Validity of Art. 270-A, Constitution of Pakistan 1973, having been determined consistently, competence of Parliament and the laws enacted up to 30-12-1985 which had been validated and protected, could not be questioned" .... "Actions under such laws, however, could be challenged on grounds of coram non judice, mala fides and lack of jurisdiction."

The observations relied upon in the case of Wukala Mahaz Barai Tahafaze Dastoor (supra) are as under:

"Bar contained in Art. 63-A(6) does not completely take away the jurisdiction of Supreme Court or High Courts" ..... "Jurisdiction of Supreme Court and High Courts tinder Art. 199 of the Constitution, in respect of actions t en under Art. 63-A of the Constitution, will be available in c as of such order being coram non judice, mala fide or without jurisdiction" .....Any amendment in the Constitution which purports to alter the existing federal structure or the Islamic character of the Constitution or the existing parliament by system or which undermines independence of judiciary or abrogates or abridges any Fundamental Right may be regarded as repugnant to the basic structure of the Constitution." .... "Supreme Court as a guardian of the Constitution, has a right and the power to declare an amendment in the Constitution as un forceable or void if the same is construed to be violative of a basic structure of the Constitution or is found to have been assed in derogation of a Fundamental Rights. However, the question as to what are the basic essential features of the Constitution f Pakistan is yet to be answered with clarity. Nevertheless, regarding certain basic essential' features of the Constitution, there can hardly be expressed any. doubt. Any amendment in the Constitution which purports to alter the existing federal structure or Islamic character of the Constitution or the existing Parliamentary system or which undermine independence of judiciary or abrogates or abridges any fundament 1 right may be regarded as repugnant to the basic structure o f the Constitution."

The observations relied upon in the case of Sardar Farooq Ahmed Khan Leghari (supra) are as under:

“Provisions of Art. 236(2), Constitution of Pakistan (1973), which bar the jurisdiction of the Courts from examining the validity of any Proclamation will not cover a Proclamation which is without jurisdiction, coram non judice or mala fide.

The observations relied upon in the case of Jalal Mehmood Shah (supra) are as under:

“Provision of Art. 236(2) of the Constitution will not cover a Proclamation- which is without jurisdiction. coram non judice or mala fide “ ... . “Superior Courts have jurisdiction to examine a Proclamation from the said three jurisdictional legal aspects “

The observations relied upon in the case of Federation of Pakistan and another v. Ghulam Mustafa Khar PLD 1989 SC 26 are as under:

“Article 270-A does not -take away the jurisdiction of the High Courts from reviewing acts, actions or proceedings which suffered from defect of ,jurisdiction or were coram non judice or were male fide”……”Drawing a distinction between malice in fact and malice in law was not necessary for such purpose.”

Support was also sought from the following authorities:

1. Sh. Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504.

2. Speaker Balochistan Provincial Assembly v. M. Azam 1996 SCMR 1969.

3. Yousaf Ali v. uhammad Aslam Zia PLD 1958 SC 104.

to contend that notwithstanding the PCO promulgated on 14-10-1999, this Court has jurisdiction to hear and decide the controversy raised in the petition on merits. learned counsel laid great emphasis on certain observations made in the cases of:

1. Pir Sabir Shah (supra)

2. Sardar Farooq hmed Khan Leghari (supra)

3. Sh. Liaquat Hus sain (supra)

The observations relied upon in the case of Farooq Ahmad Khan Leghari (supra) are as follows:

Per Irshad Hasan Khan. J.

(as he then was) (now Chief Justice)

"However, whether in a particular situation the extent of powers used is proper and justifiable? is a question which would remain debatable and beyond judicially discoverable and manageable standards unless the exercise of the excessive power is so palpably irrational or mala fide as to invite judicial intervention. In fact, once the issuance of the Proclamation is held valid, the security of the kind and degree of power used under the Proclamation, falls in a narrow compass. There is every risk and fear of the Court undertaking upon itself the task of evaluating with fine scales and through its own lenses the comparative merits of one rather than the other measure. The Court will, thus, travel unwittingly into the political arena and subject itself more readily to the charges of encroaching upon policy making. The `political thicker' objection sticks more easily in such circumstances. Although, therefore, on the language of Article 356(1), it is legal to hold that the President may exercise only some of the powers given to him, in practice it may not always be easy to demonstrate the excessive use of the power. "

“The learned Attorney-General, while giving a brief legislative history of Emergency Provisions in the sub-continent, in particular, argued that emergency provisions of enforcement of Fundamental Rights, had been provided since the promulgation of the Government of India (Consolidated) Act, 1924, which were retained in the Government of India Act, 1935. “

“In this connection it was also said that external aggression means armed aggression and as for some time past there was no armed aggression against the territory of India, the continuance of the Proclamation was unjustified. This contention must also fail on the ground which we have just mentioned.”

“The Parliament, the President, the Executive and Judiciary are the creatures of the Constitution. Each organ of the State has to function within the sphere to it under the Constitution. Neither of them can be permitted to invade into the functions and powers of the other organs of the State. As to what power was granted to the Courts and what limitations were imposed on it are questions which have always been, and always will be, the subject of a close examination by the superior Courts, under the Constitutional scheme envisaged by the Constitution of Islamic Republic of Pakistan, 1973. The independence of the judiciary can never be taken away.”

“Loyalty to the State is the basic duty of every citizen. Obedience to the Constitution and law is equally applicable to every citizen wherever he may be and every other person for the time being within Pakistan including the Government in power and the Courts. Clearly, the Court can, exercise the power vested in it under the Constitution to examine the validity of the proclamation with a view to ascertain as to whether the pre-conditions laid down under Article 232(1) of the Constitution exist or not or it is without jurisdiction, coram non judice or mala fide. But the Courts while exercising judicial power must also abide by the Constitution. “

The observations relied upon in the case of Liaquat Hussain (supra) are as follows :

Per Ajmal Mian. CJ.

(as he then was)

"The civil power is to be preserved and invigorated through the employment of the Armed Forces. The Armed Forces can be called in aid under the above clause by the Federal Government inter alia to perform police functions for limited purpose of suppressing riots or preventing threatened disorder or for the purpose of maintaining law and order and security or to assist/help in natural calamities alongwith the civil authorities. But the Armed Forces cannot abrogate, abridge or displace civil power of which Judiciary is an important and integral part. In other words, the Armed Forces cannot displace the Civil/Criminal Courts while acting in aid of civil power. They can certainly arrest those who threaten to disturb peace and tranquillity. They may also assist in investigation of a case and the prosecution of the same but the case is to be tried by a Court established in terms of the judgment of this Court in the case of Mehram Ali (supra). The employment of the expression `subject to law' clearly demonstrates that the Armed Forces will have to act .within the parameters of the Constitution and the law obtaining. The scope of the above power which is exercisable by the Armed Forces in aid of the civil power can only be enlarged by amending Article 245 of the Constitution. In this behalf Mr.Aitzaz Ahsan has invited our attention to the case of Goplan v. State of Madras AIR (37) f 950 SC 27 in which the Indian Supreme Court took the view that the Courts are not at liberty to declare an Act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution and the Courts cannot declare limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument."

"I may point out that Article 190 of the Constitution has also employed the expression "shall act in aid of the Supreme Court" by providing that all Executive and Judicial Authorities throughout Pakistan shall act in aid of the Supreme Court. Can the. Executive Authority when called in aid by the Supreme Court under the above Article substitute or displace it. The object of the above Article 190 seems to be to assist or to help the Supreme Court in getting its directions, orders and judgments implemented and executed."

"There cannot be two opinions that the representative Government in Sindh had failed to eradicate terrorism from the Province of Sindh particularly from Karachi: In my opinion in the case of Syed Jalal Mehmood Shah, I had held that invocation of Article 245 of the Constitution by the Federal Government was warranted by the situation which was obtaining in Sindh. The relevant portion reads as follows

14. That it may be observed that under paragraph (c) of clause (2) of Article 232 of the Constitution the Federal Government can assume to itself or direct the Governor of a Province to assume on behalf of Federal Government all or any of the functions of the Government of the Province, and all or any of the powers vested in or exercisable by, anybody or authority in the Province other than the Provincial Assembly. Indeed this power, like any other power vested in a state functionary, is to be exercised in good faith. It is a matter of common knowledge, of which this Court can take judicial notice that the Provincial Government of Sindh had failed to restore law and order in

the Province during its tenure of nearly two years, particularly in Karachi where hundreds of people became victim of terrorism and lost their lives. The acts of terrorism had been going on for quite some period in Sindh particularly in Karachi. Inter alia the previous Federal Government was dismissed under repealed Article 58(2)(b) of the Constitution by the then President on the ground that it had resorted to extra judicial killing in Sindh, which ground was upheld by a Bench of this Court headed by the then Hon'ble Chief Justice Mr. Justice Sajjad Ali Shah. [The case of Mohtarma Benazir Bhutto and another v. President of Pakistan and others (PLD 1998 S.C. 388)]. Thus prima facie the Federal Government's above action under paragraph (c) of clause (2) of Article 232 of the Constitution was warranted by the situation obtaining.' "

"The above principle of law enunciated in the case of Federation of Pakistan and another v. Malik Ghulam Mustafa Khar PLD 1989 SC 26 (supra) covers an executive action. No mala fide can be attributed to the Parliament as it is sovereign to legislate on any subject for which it has been empowered by, the Constitution to legislate with the parameters thereof. The Court cannot strike down a statute on the ground of mala fide, but the same can be struck down on the ground that it is violative of the constitutional provision. In this respect reference may be made to the case of Mehr Zulfiqar Ali Babu and others v. Government of the Punjab and others PLD 1997 SC 11. In the present case I have already held hereinabove that neither Article 245 of the Constitution nor Entry No.l of tile Federal Legislative List read with Entry No.59 empowers the Legislature to legislate a statute which may establish or convene Military Courts in substitution of the ordinary criminal and civil courts. In this view of the matter, the above contention of the learned Attorney-General is not germane to the controversy at issue."

Per Irshad Hasan Khan. J.

(as he then was) (now Chief Justice)

"These Courts, therefore, cannot be replaced by Military Courts as attempted to be done either partially or wholly by virtue of the impugned Ordinance. The role of Armed Forces as contemplated under Article 245 is to defend the country from external aggression or threat of war or to come to the `aid of civil power' subject to law. The second function of coming in the `aid of civil power' to be performed by the Armed Forces is subject to a condition precedent of enacting a law. The law so made must have nexus with the term `to act in aid of civil power'. The role of Armed Forces while acting `in aid of civil power' does not in any way confer the power either directly or indirectly to interfere with the Courts established under Article 175(1) of the Constitution and/or to supplant them."

29. The learned counsel further submitted that the Motorway was initiated to strengthen the links with the Central Asian Republics to earn revenue, just as Suez Canal does for Egypt. Repelling the contention in paragraph 25 of the written statement learned counsel referred Syed Jalal Mehmood Shah's case PLD 1999 SC 395, wherein this Court validated the Governor Rule but scrutinized the notification only in respect of powers of Speakers and Deputy Speakers.

He also read out last paragraph from page 400 of the report, which reads thus:-

"In a Parliamentary form of Government the Legislature not only legislates but it is also instrumental for the election/appointment of the Prime Minister or the Chief Minister and the Members of the Cabinet, as the case may be, inasmuch as only the Member commanding the majority of the Members of the Parliament/Provincial Assembly can be elected/appointed as the there was dictatorship of the Prime Minister under the cover of democracy, the steps were taken by the Government of the chosen Representatives to put economy on sound footings, the democratic Government showed highest respect to the Superior Judiciary.

12. That the Federal Government, comprising the Prime Minister and its Cabinet were only responsible to the National Assembly under Art. 91(4) of the Constitution, and, the Chief of the Armed Forces, who had been removed by the Prime Minister on 12-10-1999, in the exercise of his Constitutional and lawful authority, cannot be allowed to be a Judge on the acts and deeds of the Prime Minister, Members of the Cabinet, the Chief Ministers, the Provincial Cabinets and the Members of the two Houses and the Provincial Assemblies.

13. The petitioner has established beyond any doubt that the impugned Proclamation of Emergency And PCO 1 of 1999 and the entire super-structure of actions/declarations of respondent No. l 'based thereon, lack constitutional and legal authority. and merit grant of relief claimed in Paras. (a) to (h) and (1) in C.P. No. 62 of 1999 by accepting the petition with costs. "'

CONSTITUTION PETITION N0.63 OF 1999

32. Mr. Khalid Anwar, learned Senior ASC, appearing on behalf of the petitioners in Constitution Petition No. 63 of 1999, submitted that he represented the petitioners from very wide spectrum including Speaker, National Assembly, Chairman Senate, the Leader of the House in the Senate with members of Provincial Assemblies and various political parties across the political divide.

33. At the outset, Mr. Khalid Anwar has placed on record formulations of his main points as follows:

Formulation of Main Points

"I. The central point can be stated quite simply. Pakistan was being governed under the Constitution of Pakistan. The validity of the Constitution has not been; and cannot be, challenged by any one. With effect from October 12, 1999 an authority unknown to law has purported to suspend the Constitution. It is not for the Petitioners but for the Government to justify this;

So far no justification has been forthcoming. The Written Statement contains a vague reference to the so-called "Doctrine of Necessity". This doctrine, has, firstly, not been defined, secondly; its scope and ambit has not been set out, and, thirdly, it has not been explained as to how it could have been invoked in the circumstances prevailing on that day or how long it will last;

This doctrine has been referred to in the case of Begum Nusrat Bhutto. On the assumption that that case was correctly decided (which assumption is not admitted) there can be no conceivable doubt that the ratio of that case is wholly inapplicable for the following inter alia reasons:

(i) In that case the factual position was that since the elections had been massively rigged there was no Constitutional Government in existence. There being a vacuum it had to be filled in.

(ii) There had been a total collapse of law and order and the civil Government was incapable of controlling the nationwide agitation.

(iii) No legal means existed for filling in the vacuum.

(iv) The C.M.L.A. announced that his sole intention was to hold elections. .

(v) The C.M.L.A. did not have a seven point agenda existing for upto twenty years.

(iv) The Attorney-General made a solemn commitment to the Supreme Court that elections would be held within six months.

(vii) The Chief Justice certified the sincerity of the C.M:L.A. in the above circumstances and observed that it would be very unfair to doubt his commitment.

(viii)The avowed intention of the C.M.L.A. was to preserve the Constitution.

(ix) The C.M.L.A. did not announce in advance that he would not permit the electorate to elect specified political leaders.

"None of the above criteria are fulfilled in the present case. Therefore, even if the reasoning in Begum Nusrat Bhutto's case was correct that would not justify the Government's stand in the present matter."

"II. We now come to the second question which relates to the correctness of the decision in Begum Nusrat Bhutto. Reliance was placed on the earlier judgment by Munir, C.J. in the case of the Governor-General's Reference, 1955 (hereinafter referred to as the "Reference"). Unfortunately there was no application of mind to the question as to whether the facts of that earlier case were at all applicable in the changed circumstances of 1977. This is despite the fact that the fundamental difference was glaringly obvious. In the earlier case the entire discussion proceeded on the hypothesis that the Head of State had a supreme obligation to take all necessary steps for the preservation of society. Obviously this, is completely different from the present situation.

There was also no application of mind as to the criteria laid down by Munir, C.J. He had stated that:

(i) There must be a condition (i.e. situation) of "absoluteness, extremeness and imminence". In other words, there must be an immediate situation requiring action now for which no Legal remedy is available at all.

(ii) The act must have been done under stress of necessity, and this necessity must be referable to a need to preserve and prevent from dissolution, the Constitution, the State or the Society.

(iii) The act must be done bona fide.

(iv) Additionally the act must only be of a temporary nature and the remedy .must be proportionate, i.e. no more than is necessary to remedy the situation..

"In the facts of the present case. one thing is clear beyond any doubt: whatever the crisis, whatever the emergency, whatever the necessity, there had been a complete resolution in favour of the Army Command within a matter of two hours at most. By that time the Army was in full control, the former Prime Minister had been islodged and arrested, the country was completely peaceful and quiet. What then prevents the holding of fresh elections?

"The above is on the assumption that Munir, C.J.'s views regarding the doctrine of necessity are correct. In fact there is a complete consensus in the legal community that his opinion derailed the country from the constitutional track and caused a decisive setback to the nation.

"III. In the Petition an objection has been taken as to the nature of the so-called Proclamation of Emergency. In what way is this different from Martial Law. This objection remains unanswered despite a lengthy Written Statement having been filed by the Government. It follows, therefore, that the Government has no answer to 'this objection either."

34. Elaborating his above formulations, he submitted that the written statement has not addressed the questions raised. in. the petition, inasmuch as, the petition has been filed by various elected persons whereas the written statement solely targets Mian Muhammad Nawaz Sharif, the former Prime Minister, who is not petitioner in the instant petition, and levels various allegations of mismanagement, corruption and even of hijacking (though sub judice) against him and, thus, seeks

to justify the action of 12th October, 1999. He argued that assuming that Mian Muhammad Nawaz Sharif was guilty of various charges levelled against him in the written statement, but this fact does not justify that the Constitution, which is the real petitioner, should be condemned and the constitutional dispensation should come to an end. He further submitted that it is the blessing of the Constitution that various office holders including the Judges of this Court and the Attorney-General for Pakistan are holding their respective offices.

35. Mr Khalid Anwar then dilated upon the significance of judicial power which, according to him, means that the Court can strike down a law as the Supreme Court did in Mehram Ali's and Sh. Liaquat Hussain's cases. He emphasised that the nature of judicial power and its relationship with jurisdiction are all allied concepts and contended that one facet of judicial power cannot be taken away though jurisdiction can be curtailed but this has to be decided by the Court itself. He submitted that the concept of judicial review was laid down in the United States by Chief Justice John Marshal in the case of William Marbury v. James Medison (2 Law Ed. 60), wherein the US Supreme Court had observed that it Vas inherent in the nature of judicial power that the Constitution was regarded as the supreme law and any law or act contrary to it or infringing its provisions was to be struck down by the Court and that this was the duty and function of the Court to enforce the Constitution. He argued that the concept of judicial review did not exist in England because the supreme law in England was that the Queen in Parliament can do anything and that once an Act of Parliament had been passed, the Courts were to follow it. The Founding Fathers of the United States Constitution, however, deviated from it and in doing so indeed followed the view expounded by Montesquieu in his treatise "Spirit of Law", which enumerates the concept of separation of powers: the judicial, the legislative and the executive powers, who based his opinions on the practice, but not the law of England, in that, in practice, there was separation of powers in England but constitutionally that was not. He submitted that unlike Constitution of Pakistan, the Constitution of United States does not confer power on the Supreme Court to strike down laws but the Supreme Court of United States stated so in the case of William Marbury v. James Medison (supra).

36. Mr Khalid Anwar then analyzing the Proclamation of Emergency, posed two questions: (i) what was the source of power to issue the Proclamation and (ii) what was the nature of power that had been exercised, and contended that so far as the deliberations/discussions of the Chiefs of the Armed Forces and Corps Commanders were concerned, these were only a historical fact and not a source of power. He argued that a Proclamation of emergency can never be a source of power and that an `emergency' issued under Article 232 of the Constitution does not include the power to suspend the Constitution, therefore, the power so exercised under the present Proclamation of Emergency was a new concept, unknown to the jurisprudence of Pakistan. The learned counsel further argued that as per the Proclamation, respondent has assumed the office of Chief Executive whereas no such office exists, though the office of Chief Executive did exist in the Original Constitution under Article 90, prior to adoption of 8th Amendment, which reads thus:

"90 (1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers which shall act through the Prime Minister who shall be the Chief Executive of the Federation."

Mr Khalid Anwar then went on to quote the definition of "Proclamation" given in Black's Law Dictionary, which is as follows:

"Proclamation. ---The act of publicly proclaiming or publishing; a formal declaration; an avowal; a public announcement giving notice of a governmental act that has been done or is to be done. The act of causing some governmental matters to be published or made generally known. A written or printed document in which are contained such matters, issued by proper authority, usually by a high governmental executive (President, Governor, Mayor).

"The declaration made by the bailiff, by authority of the Court, that something is about to be done.

"In equity practice, proclamation made by sheriff upon a writ of attachment, summoning a defendant who has failed to appear personally to appear and answer the plaintiff's bill."

37. The learned counsel then read out the first speech of the respondent delivered in the early hours of 13th October, 1999, scrutinized its contents and contended that in Chief Executive's. own words, the situation in the country was calm, stable and under control, therefore, there was no need for issuance of the Proclamation. He made comparison of the present situation vis-a-vis the conditions which prevailed in July, 1977 and argued that due to chaos and political unrest, the constitutional machinery had completely broken down in 1977. Mr. Khalid Anwar reiterated that the Court should examine the source of power behind the issuance of Proclamation by resolving the question whether a Proclamation, in the absence of law, ipso facto, could be a source of power for any authority. He referred to extracts from the book titled, "The Constitutional History of England" by F.W. Maitland, which reads thus:-

"A still better illustration, however, at once of the actual tractability of parliaments and of the theoretic supremacy of king in parliament is afforded by an act of 1539, which has been called the Lex Regia of England, and the most extraordinary act in the Statute Book -power was given to the king to make proclamations with the advice of his council, or a majority of his council, to make

proclamation which should have the force -of statutes; the punishment for disobedience might be fine or unlimited imprisonment; it was not to extend to life, limb, or forfeiture. This act was repealed in the first year of Edward VI - you will at once see the importance of its enactment and its repeal; they seem distinctly to confirm the doctrine that the king is not supreme, king and parliament are supreme; statute is distinctly above ordinance or proclamation; statute may give to the king a subordinate legislative power, and what one statute has given another statute may take away."

"This act, however, was at once repealed on the accession of Edward VI, by a statute of 1547……"

"We must now look at the powers wielded by the king with the assistance of his council. We will bring the subject under four heads - (1) legislation, (2) taxation, (3) judicature, (4) administration……."

"In 1610 the commons protested - `it is the indubitable right of the people of this kingdom not to be made subject to any punishment that shall extend to their lives, lands, bodies or goods, other than such as are ordained by the common laws of this land, or the statutes made by their common consent in parliament……By reason whereof there is a general fear conceived and spread among your majesty's people, that proclamations will, by degrees, grow up and increase to the strength and nature of laws.' To all this, and there is more of it, the only answer is that the proclamations shall go no further than is warranted by law."

"Before this answer was given the great oracle of the law had been consulted. Coke, then Chief Justice of the Common Pleas, was summoned to the council, and the question was put to him, whether the king by proclamation might prohibit the erection of new buildings in London and the making of starch from wheat. He was pressed to answer in the affirmative. He refused to answer without consulting his brethren. He consulted with three Judges, and they answered that the King cannot by his prerogative create any offence which was not one before, but. the King may by proclamation admonish all his subjects that they keep the laws and do not offend them upon punishment to be , inflicted by the law-neglect of a proclamation aggravates the offence; lastly, if an offence be not punishable in the Star Chamber, the prohibition of it by proclamation cannot make it so. This probably was sound law-that is to say, there was a distinct precedent for it coming from the middle of the Tudor period. In Mary's reign the Judges had delivered this opinion: "The King, it is said, may make a proclamation quoad terrorem populi, to put them in fear of his displeasure, but not to impose any fine, forfeiture, or imprisonment: for no proclamation can make anew law, but only confirm and ratify an ancient one.' But though James I had the opinion of his Judges against him, still he went on issuing proclamations. It is difficult for us to realize the state

of things -that of the Government constantly doing what the Judges consider unlawful. The key is the Court of Star Chamber--the very council which has issued these proclamations enforces them as a legal tribunal, and as yet no one dares resist its judicial power."

"(2) It seems probable that at the beginning of Elizabeth's reign the opinion of the Judges was taken by the council as to the legality of these impositions, and that their opinion was not favourable. The queen, however, did not abandon the impost, that she herself set an impost on sweet wines. James imposed a duty on currants over and above the tax which was set on them by the statute of tonnage and poundage. Bate refused to pay……I think, we must say that the King succeeded in obtaining from the barons of the Exchequer a declaration that there is a large sphere within which there is no law except the King's will. `The matter in question is material matter of state, and ought to be ruled by the rules of policy; and if so, the king has done well to execute his extraordinary power ....They said that the king cannot set impositions upon imported goods at his pleasure, but that he may do so for the good of the people, thus, if foreign princes set taxes on English goods the king may retaliate. Their doctrine seems to have been that the king may not set impositions merely for the sake of revenue, but that he may do so for other ends, as for the protection of English merchants: obviously this is an unstable doctrine ... ...They carried a bill enacting that no imposition should be set without the consent of parliament, but the lords rejected it. The immediate consequence had been that in 1608 the king, having the judgment in Bates case at his back, issued a book or rates imposing heavy duties upon almost every article of merchandise. The subject was resumed in the short parliament of 1614; the commons passed a unanimous vote denying the king's right of imposition. They refused to grant any subsidy until this grievance should be redressed. James dissolved the parliament."

It is by means of the judicial power of the Court of Star Chamber that the king enforces his proclamations. We have already said something of this Court. Let us remember that a statute of 1487 (3 Hen, VII, c.I) gave authority to certain persons to punish certain crimes. These persons are the chancellor and treasurer of England and the keeper of the privy seal, or two of them, calling to them a bishop and a temporal lord of the king's council and the two chief justices, or in their absence two other justices. The offences that they are to punish are riots, unlawful assemblies, bribery of jurors, misdoing of sheriff, and some others which we may describe as interference with the due course of justice. It is evidently contemplated by the statute that the accused persons will not be tried by jury. The statute does not mention the Star Chamber, but that is a room which the council has long used ... ...

(b) It did not confine itself to dealing with the crimes specified in the statute of 1487. Its jurisdiction over crime was practically unlimited, or limited only by this-that it did not pass sentence of death. We know it best as dealing with what may be called political crimes-sedition

and the like; but it dealt also with commoner offences-robbery, theft, and so forth. It dealt with some misdoings for which the common law had as yet no punishment, in particular with libels."

"Now was this the Court created by the statute of Henry ~ VII? Under Charles I (for we must anticipate this much) the opinion had gained ground that it was, that consequently whatever it did beyond the. sphere marked out by that statute was an unlawful usurpation of jurisdiction."

"... ... But that it was a tyrannical Court, that it became more and more tyrannical, and under Charles I was guilty of great infamies is still more indubitable. It was a Court of politicians enforcing a policy, not a Court of Judges administering the law. It was cruel in ifs punishments and often had recourse to torture. It punished jurors for what it considered perverse verdicts; thus, it controlled all the justice of the kingdom. The old process of attaint, of which we have before spoken, had long gone out of use, but in the Star Chamber the jurors had- to fear a terrible tribunal which would resent a -verdict against the king."

"On 22nd January, 1655, Cromwell dissolved this body. His third parliament met on 17th September, 1656; it offered him the kingly title which he refused; it instituted an upper house consisting of his nominees, and then fell quarrelling as to whether this was a House of Lords. On 4th February, 1658, he dissolved it; on 3rd September he died."

"The parliament was the Convention Parliament, and of some of its doings we have already spoken. With the King's assent, for Charles was restored in May, it passed an act declaring the dissolution of the Long Parliament; it was dissolved on 29th December, 1666. Charles's second parliament met on 8th May, 1661, and was not dissolved until 31st December, 1678, having, thus, sat between seventeen and eighteen years.

"The second parliament met on 20th May, 1690; it held six sessions and was dissolved in the autumn of 1695. Meanwhile it had passed another Triennial Act-carefully to be distinguished from the acts of 1641 and 1664. It was passed in 1694 (6 and 7 William and Mary,c.2). This act was directed not so much against intermissions of parliament, though it repeated what was already law, namely, that a parliament shall be holden once in three years at least, but against long parliaments: no parliament is -to endure for more than three years-it is then to die a. natural death:"

38. Mr Khalid Anwar, quoting relevant extracts, traced the history of evolution of the `doctrine of necessity' and its ultimate rejection by the British Courts. By referring the case law he contended that the `doctrine of necessity' and Divine Rule by King/Queen, was buried long ago by the British Courts but in Special Reference No. 1 of 1955 PLD 1955 FC 435, wherein opinion was authored by Muhammad Munir, the then Chief Justice, this doctrine was resurrected and that doctrine of necessity. was applied in Begum Nusrat Bhutto's case (supra) and the same is now being sought to be employed by the respondents in the present case, though it stands rejected in a recent judgment passed by this Court, in Sh. Liaquat Hussain's case (supra) PLD 1999 SC 504.

39. Mr Khalid Anwar, however, elaborated that the `doctrine of necessity' is accepted as a defence in criminal prosecution and tortuous acts, which concept is different from that of State necessity and this Court in the case of Begum Nusrat Bhutto PLD 1977 SC 657, mixed the two and thereby found justification for legalizing Martial Law. He submitted that except 1973 Constitution, all the previous Constitutions had clauses providing 4or acts of indemnity. To substantiate his point of view, the learned counsel referred to a book by Glanville William on "Law of Necessity" at page 216 whereof, under the heading, "The Defence of Necessity" it has been observed:

"The defence of necessity is not so much a current as a perennial legal problem. The Chinese sage Mencius, a contemporary of Plato and Aristotle, was asked by K `wan: `Is it the rule that males and females shall not allow their hands to touch in giving or receiving anything?' Mencius replied: `It is the rule'. K `wan asked: `If a man's sister-in-law be drowning, shall he rescue her with his hand?' Mencius said: `He who would not so rescue the drowning woman is a wolf. For males and females not to allow their hands to touch in giving and receiving is the general rule; when a sister-in-law is drowning, to rescue her with the hand is a peculiar exigency.' .

"Notwithstanding the doubts expressed by some modern writers, one can say with some assurance that the defence is recognised by English law. This does not even need judicial authority; it can be proved by a hypothetical example. P is rendered unconscious in an accident, and an immediate operation is necessary to save his life. D, a Surgeon, performs this operation; afterwards P ungratefully prosecutes him for assault. What defence had D? Not the surgeon's usual defence of consent, for here P was unconscious throughout. D's only defence is that of necessity, and it can hardly be doubted that this is open to him."

"The law for necessity dispenses with things which otherwise are not lawful to be done'. Sir William Scott said in The Gratitudine (1801): `Necessity creates the law;-it supersedes rules; and whatever is reasonable and just in such cases, is likewise legal'.

“ILLUSTRATIONS OF NECESSITY”

Examples of necessity given in the old books are: pulling down a house to prevent a fire from spreading; jurors departing from the Court without leave of the Judge because an affray breaks out and they are in peril of death; prisoners leaving a burning jail; and jettisoning cargo to lighten a boat in a storm. In modern times the most striking application of the defence was in R. v. Bourne, where necessity was, held to justify abortion.”

Reference was also made to the following passages from the above book at page 223, under the sub-heading, “The Theoretical Basis” wherein it has been observed:

“It is time to turn to the theoretical question: What is the basis of the defence of necessity? Bacon thought that an act done under necessity was not voluntary; but we no longer hold that opinion. An act dictated by necessity is still an exercise of the will, as Hobbes pointed out: `There is nothing there involuntary, but the hardness of the choice’. Strictly speaking there is perhaps no such thing as necessity, in the context in which lawyers speak of it. A particular act is never necessary, in the sense that there is literally no option, even though the only alternative is one’s own death. One is reminded of the Comte d’Argenson’s reply to the Abbe who had excused himself for writing scurrilous attacks, on the ground that `he must live’-’I do not see the necessity’.

“What it comes to is this, that the defence of necessity involves a choice of the lesser evil. It requires a judgment of value, an adjudication between competing `goods’ and a sacrifice of one to the other. The language of necessity disguises the selection of values that is really involved.”

“If this is so, is there any legal basis for the defence? The law itself enshrines values, and the Judge is sworn to uphold the law. By what right can the judge declare some value, not expressed in the law, to be superior to the law? How, in particular, can he do this in the face of the words of a statute? Does not the defence of necessity wear the appearance of an appeal to the Judge against the law?

“The doubts cast upon the doctrine of necessity come from those who fear its abuse; and abused it certainly has been, as in the terrible case of Gregson v. Gilbert (1783), where 150 slaves were pushed overboard, because water was running short. It was under the plea of State necessity that the Star Chamber used the rack to extract information not only from the accused but even from

witnesses. Yet it is ancient wisdom that the abuse of a rule does not take away its uses-abusus non tollit usus. `Sir', said Johnson, you must not neglect doing a thing immediately good, from fear of remote evil from fear of its being abused. A man who has candles may -sit up late, which he would not do if he had not candles; but nobody will deny that the art of making candles, by which light is continued to us beyond the time that the sun gives us light, is a valuable art, and ought to be preserved'

"Some fear the effect that an argument of State necessity may have upon private rights and individual liberty. `Necessity', declared Pitt. 'is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves' ..... First, Coke: ` The law of God saith, Non facias malum, ut rode fiat bonum'-thou shalt not do evil, that good may come thereof. On the other hand Wilmot, L.C.J., asserted roundly that `the end directs and sanctifies the means'; and Bentham in effect agreed. Bentham's qualifications do not essentially affect his acceptance of the maxim. `The end justifies the means. Yes: but on three conditions, any of which failing, no such justification has place."

(1) One is, that the end be good.

(2) That the means chosen be either purely good, or if evil, having less evil in them than on a balance there is of real good in the end.

(3) That they have more of good in them, or less of evil, as the case may be, than any others, by the employment of which the end might have been attained'.

"Many will think that, even with these conditions, some means are ethically barred irrespective of ends. The opposite doctrine that ends can justify means that lying, trickery and torture are all right so long as you do them from a good motive-is now commonly regarded as being characteristic of Communism and Totalitarianism. There are ethical differences between Communist and free societies, but I do not think they can be stated so simply as this. In England we hang and incarcerate criminals, and such punishments can be justified only by reference to their purpose……"

"In reality the difference between the two views seems to be one of emphasis. Most of us think that the moral values we cherish are, in the long run, more important for society and for human

welfare than any gain that may seem immediately to accrue from disregarding them. This attitude does not altogether exclude a saving for necessity."

"Bacon attempted to restrict the doctrine of necessity by saying that it was an-excuse only for invading private rights, not where the act was against the commonwealth. Necessity privileges quoad iura privata, but necessitas publica maior est quam privata. The examples given by Bacon clarify his meaning. You may throw cargo overboard in a storm to lighten the vessel, but not if the cargo consists of ordnance and munitions which you have been commanded to take to relieve a besieged town. You may pull down a -house to stop a fire spreading, but you may not, if attacked in a house, set fire to it as the only way of saving your life. In the latter case, if the fire that you start spreads to a neighbour's house, you are liable to him in damages. Bacon concocted this somewhat fanciful illustration to help his point; there is no judicial authority on it. Bacon went on to say that a man may commit a mere trespass to save his own life; a trespass is not a thing against the commonwealth, as setting fire to houses is. It is clear from this example that what is involved is an assessment of values; the infliction of an evil is justifiable if it is the lesser of two alternative evils

"A second limitation postulated by Bacon was that necessity is no defence where the exigency was caused by the fault of the actor."

"NECESSITY AND PREROGATIVE"

"A further element of confusion arose in public law. At first sight the doctrine of necessity is somewhat difficult to separate from the prerogative. The difference is that the defence of necessity is open to everybody, . while the prerogative relates only to the King……" "On the other hand there were some politically necessary things that only the King could do; these belonged to his prerogative. Thus, he could (and can) erect sea walls and embankments against sea or tide, and enter the land of a subject to do to. It was said that before Magna Carta, c.21, he could take wood for the repair of his castles. He requisitioned ships, subject to the payment of compensation, and by the prerogative of purveyance similarly requisitioned provisions for his household and armed forces, including even the impressment of labour. Such powers rested upon the prerogative justified by necessity. In the Case of the King's Prerogative in Saltpetre (1606), the Judges declared that the King had a prerogative to dig for saltpetre, for the necessary defence of the realm, notwithstanding that gunpowder had been invented within time of memory. The opinion, which was an advisory one, was hedged about with various qualifications, and reads more like a piece of legislation than a statement of existing law. The King was required to restore the place afterwards; and in practice compensation was paid.

"This doctrine of State necessity was brought into bad odour by the excesses of Charles I. Trying to govern without Parliament, Charles justified the exaction of ship-money on the ground of public necessity. Now if it were assumed as a premise that Parliament was not there to grant money, the exaction was necessary, and might reasonably have been regarded as lawful. The weakness in the King's case was that he was deliberately refraining from summoning the constitutional organ for taxation. The necessity was, therefore, a self-induced necessity, which in law is not one at all. Although Hampden lost, when he challenged the tax, it is the subsequent reversal of the decision by a special statute of 1640 that is taken to settle the legal principle."

"Since the Revolution the law may be stated as follows. The King cannot acquire new prerogatives by reference to State necessity. The Case of Saltpetre, though not overruled, is based upon an obsolete political philosophy. However, necessary the behaviour, the Government must today invoke the aid of Parliament if the behaviour involves breaking the letter of the law. It can act under the doctrine of necessity only to the same extent as a private person. Parliament's alleged failure to give adequate powers cannot be an excuse for conduct, because the necessity of the powers claimed is for Parliament to decide, not for the Judges over the head of Parliament. The question is not whether it is necessary to do the act but whether it is necessary to do it without the sanction of Parliament."

"Paradoxically, this seems to give necessity less scope in public than in private law. The doctrine is a dispensing power exercised by the Judges when Parliament cannot reasonably be expected to act. Since Parliament generally can act in great national emergencies, the doctrine is less applicable to these than it is to the minor troubles of individuals."

"This does not altogether exclude necessity in public affairs. At one time the Parliamentarians might have wished to confine it in this way, for they were impressed more by the danger of the notion than by its utility. Milton called necessity "the tyrant's plea"; and Selden said: 'there is not anything in the world more abused than this sentence, salus populi suprema lex esto'. Cromwell declared: `Necessity hath no law. Feigned necessities, imaginary necessities are the greatest cozenage that men can put upon the Providence of God, and make pretences to break known rules by'.' It is this attitude of mind that explains such sweeping judicial utterances as that of Prat, C.J., in Entick v. Carrington (1765): `With respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions'. Notwithstanding the esteem in which this pronouncement is commonly held, it does not seem to represent the law. Our books do take notice of State necessity in the particular matter of throwing up bulwarks against the enemy, to mention only one. The view of all lawyers who have considered the subject is that the Crown may by necessity use force to quell insurrection or repel invasion; and this is about all

that a so-called declaration of martial law within the realm amounts to. It is also clear from Humphrey v. O'Connor (1864) that a constable may commit what would otherwise be an assault upon an innocent person if that is the only way of preserving the peace."

"A more difficult case of State necessity was presented in R. v. Stratton (1779). The Governor of Madras acted illegally and unconstitutionally in refusing to count the votes of some of the members of his Council. Councillors accordingly imprisoned him for eight months and carried on the Government themselves. Upon being indicted in England they set up the defence of necessity. Lord Mansfield directed the jury that the defence was one of `civil or State necessity'. He remarked:-.

`In India you may suppose a possible case, but in that case, it must be imminent, extreme necessity; there must be no other remedy to apply to for redress; and in the whole they do, they must appear clearly to do it with a view of preserving the society and themselves……What immense mischief would have arisen to have waited for the interposition of the council at Bengal?'

"The jury returned a verdict of guilty. Notwithstanding Lord Mansfield's direction, it may be doubted whether the doctrine of necessity is appropriate to such politically harmful effects as the defendants in that case tried to avoid. In all other cases where the doctrine of necessity has been invoked, the harm sought to be avoided was of an immediate and physical kind. It is submitted that indirect social evils are for the consideration of the legislature, and do not fall within the purview of the doctrine."

40. Repelling the plea on behalf of the Federation that the Judges of the Superior Courts, after having taken oaths of their offices under the PCO, are bound to defend the same, in that, the old Constitution has been replaced by a new revolutionary order, Mr Khalid Anwar vehemently contended that it is incorrect. To meet the argument, he referred to the book titled "Principles of Revolutionary Legality" authored by J.M. Eekelaar, wherein at pages 29-30 and 39 to 43, it has been observed as under:

"Indeed, in most societies the Courts are the means, recognized by rulers and ruled alike, through which questions of validity and legitimacy are resolved. In practical terms, then, whether the `ruled' can be taken to have accepted the validity of the rule-making authorities and, indeed, whether there exists a 'juristic postulate' about this validity depends upon whether this validity has been accepted by the Courts. Jurisprudence can in this way recognize that a society whose judicial agencies accept its rulers as legitimate is radically different from one in which this acceptance is lacking.

Rules and Principles

“If the Courts choose to. follow their duty and apply the `law’ so defined, an absurd result could be reached. If an absolute monarch died without making provision of a successor, the `law’ would compel them to insist on regarding him as the lawful ruler. To avoid such futility, it would be reasonable to limit the legitimacy of a ruler to the period in which he remains in effective power.”

Constitutional Principles

“The present purpose is not to attempt to make an exhaustive list of the kinds of principles that may be relevant to a decision whether revolutionary activity should be given legal justification, but the more limited one of salvaging this area of investigation from total extinction by the operation of positivist dogmatism. But it may be helpful to set out some of the principles which may be pertinent to revolutionary situations:

1. The principle of effectiveness.

2. The principle of legitimate disobedience to authority exercised for improper purposes.

3. The principle of necessity.

4. The principles that violation of a right demands a remedy and that no one should profit from his own wrongful act. As a .revolution will invariably have involved the violation of some of the `rights’ protected by the previous Constitution, a combination of hose principles suggests that, even if the new order is considered legitimate, some recompense should be offered to those whose rights were infringed.

5 The principle that a Court will not permit itself to be used as an instrument of injustice.

6 The principle that it is in the public interest that those in de facto impregnable control should be accorded legal recognition. This was the main principle upon which the four Commonwealth tribunals rested their decisions. Put more crudely, the principle states that might, once established, ipso iure becomes right. It gives effect to the acceptable policy value that it is in the interest of the community that order be preserved. But one might be reluctant to hold that it is the only relevant principle and that there cannot be others which would militate against automatically accepting revolutionaries as legitimate regardless of any other circumstance..

7 The principle, common to both public and private international law and which Grotius considered a central tenet of natural law, that promises are to be kept: pacta sunt servanda. A Government elected under a Constitution expressly or impliedly pledges with the electorate that it will hold to the Constitution. If it abrogates that Constitution, it breaks faith with the electorate and, therefore, contravenes this principle unless and until it submits itself once more to the same electorate to express its acceptance or rejection of the action.

8 The principle that government should be by the consent of the governed, whether voters or not. There is nothing new in this principle. Authority can be found in political writings at least from the Middle Ages to the present day.

9 International law now probably supports the principle of the right to self-determination and of the unacceptability of relied discrimination. As the Rhodesian Court, in particular, relied heavily on an appeal to international law for support for the principle it in fact applied (that revolutionary success demands legal recognition) it would have been proper to have weighed against that principle other norms of international law relevant to the situation."

Authority of the Court

"In concluding the defence of the proposition that principles of the kind enumerated above may properly be taken into account by a Court in order to determine whether or not to uphold the legitimacy of a revolutionary regime, it is necessary to consider two oblique arguments which would attempt to undermine it. One is to take theoretical objection to the jurisdiction of a Court which indulges in the exercise. The claim is that, as the Court acquired its authority to determine disputes by 'virtue of jurisdiction conferred on it by the old Constitution, the disappearance of that Constitution implies the collapse of the court's own authority. The other argument is the severely

practical one that, whatever the legal theorist or the Judges may say, any Court making a finding adverse to a revolutionary regime is certain to be disbanded so that in reality a judiciary will be allowed to function only if it is subservient to the new regime.

"The second questionable premises is that by suffering the Court to continue to function, the new executive thereby assimilates the Court into its own revolutionary order and that this compels the de jure recognition of the Government. But against this it might be urged that the very .submission by the revolutionaries to litigation before the Court concerning their own legitimacy suggests that the Court may have an inherent authority arising from the submission of both parties, rulers and ruled, to its jurisdiction.

"The dismissal of Judges is an extreme step which might have dangerous domestic and international consequences for a revolutionary executive. Nor should it be too readily assumed that a regime which takes this step will easily find a replacement judiciary without leaving itself open to ridicule…….Had the Rhodesian Court, for example, held that the revolutionary regime could be considered lawful only if confirmed in office by the electorate which had elected them under the old Constitution and if some satisfactory evidence was produced that the new Constitution was broadly acceptable to the majority of the population (in accordance with principles 7 and 8 listed above) is it inconceivable that the regime might have preferred to attempt to comply with that finding rather than to dismiss the Judges? The opportunities open to the judiciary to influence the course of events should not be dismissed out of hand. It may be that this is unaccustomed territory for the judiciary to enter. But this is rue for many areas of law in modern times, especially with respect to the interaction between the executive and the citizen. It is hard to believe that our legal and cultural tradition is too weak to develop sound and acceptable principles in this new context. But in order that they may take root, it is necessary to rid ourselves of the conceptual block which would forever bar the entry of juristic thought into this domain. "

41. According to the learned counsel the history of civilization is indeed he history of evolution of the doctrine of separation of powers. Thus, no matter if one is the wisest such as Socrates, the most knowledgeable such as Aristotle and the most virtuous such as Imam Abu Hanifa, all need be subject to the limits of checks and balances to prevent tyranny. He then quoted references from the book titled CASES IN CONSTITUTIONAL LAW authored by D. L. KEIR and F. H. LAWSON, 5th Edition, at pages 73 to 116, which are as follows:

"By the word prerogative we usually understand that special preeminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in it's etymology (from prae and rogo), something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in it's nature

singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And, therefore, Finch lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject."

"1. The King's `special pre-eminence' carried with it certain property rights which he enjoyed as feudal lord and conferred on him certain advantages in litigation. Such had throughout the Middle Ages been the meaning generally, and almost solely, attached to the term Prerogative. The apocryphal statute Praerogativa Regis, in the thirteenth century, was wholly concerned with the King's exceptional rights as feudal lord. The chief among his advantages in litigation was that he could not be made defendant to an action at law; this was hardly a prerogative in the earlier Middle Ages since it was shared by other lords, being. merely an application of the feudal rule that a lord cannot be sued in his own Court. It later came quite correctly to be regarded as a prerogative; for which the King's Courts had become national Courts and absorbed the greater part of the legal business of the country, the King's immunity ceased to have any real connexion with feudalism. It was further recognized that the King's goods and chattels were under no tribute, toll, or custom, nor otherwise distrainable. Such prerogative as these were capable of full enumeration and description. They were that part of the common law which concerned the King, and could be discussed and applied by the Courts in West-minister Hall."

"2. But the Stuarts had also inherited from their medieval predecessors powers of Government which were not so defined. True, the medieval lawyers had held the view that the law was a bridle on the King, and in their famous maxim, `The King can do no wrong', they had insisted that his power extended to do only what was right. They held, further, that the King could do certain things only in certain ways……."

"Yet even in the exercise of his residuary powers he was considered to be subject to law. The power of supplementing and overriding positive law was given to him, not that he might arbitrarily exert his own personal will, but that he might provide for cases where the positive law either was insufficient or worked injustice. Moreover, he was in practice dependent for the execution of his decisions on the cooperation of persons whom he could not effectively control. The characteristic vice of Government in the later Middle Ages was not the arbitrary power but the executive weakness of the King."

"It was expressed in the maxim that the King can do no wrong. This maxim lost its medieval significance and came to mean first that no intention of abusing his power can be attributed to him, and finally that whatever he does is right.

“The gist of the decision was that the King might impose what duties he pleased if it was only for the purpose of regulation of trade and not of raising revenue, and the Court could not go behind the King’s statement that the duty was in fact imposed for the regulation of trade.”

“We are of opinion, that when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, your majesty may, by Writ, under the Great Seal of England, command all the subjects of this your kingdom, at their charge, to provide and furnish such number of Ships, with men, munition, and victuals, and for such time as your majesty shall think fit, for the defence and safeguard of the kingdom from such danger and peril; and that by law your majesty may compel the doing thereof, in case of refusal or refractoriness. And we are also of opinion, that in such case, your majesty is the sole Judge, both of the danger, and when and how the same is to be prevented and avoided.”

“Recourse must be had to ordinary means before extraordinary, but if the latter are . necessary (and Salus populi suprema lex) a parliament should be summoned.”

“2. The Parliament moves too slowly to be consulted in an emergency. Answer: even in the Statute of Proclamations, 31 Hen. 8, which was made to provide for emergencies, power to tax by proclamation without parliamentary consent is expressly excluded. 3. Some time the existence of danger will justify taking the subject’s goods without his consent. Answer: admitted, but this is only in case of immediate danger, when the necessity of self preservation overrides all law. It is not a prerogative, but belongs equally to every subject, and cannot be used to justify an invasion of property except where the necessity is immediate. A similar right is admitted to exist while war is actually raging, but that is on the principle, inter arma silent leges.

“But in times of war, and when salus populi was at stake, private property must give way to the common good. Quod necessitas cogit, defendit. And this not only when war is actually raging, but also upon rumours of wars. Matters of war and peace are for the King; sometimes dangers are not fit to be communicated to the people, and yet it is very fit that preparation be made beforehand.”

“HOLBORNE (for the defendant) refused to admit that the King’s allegation of imminent danger was conclusive, and contended that the allegation was not clearly set out on the face of the writ.

“[To state this argument in the language of the twentieth century, parliament is established to limit the power of the king; how can it do so, if he may tax whenever he chooses to allege the existence ‘of an emergency?]

“[The modern counterpart of this argument would be that the law will not give him a power which he might be tempted to use to interfere wrongfully with the property of the subject.] He is said, it is admitted, to judge of the necessity, but `in judgment so to do it, is all one as to leave it to him arbitrarily, if he will, which is that only which was intended to be prevented.’

“It is admitted that the subject must serve in case of necessity, but only in person; if his goods are to be taken the necessity must be immediate, and mere rumours of wars or apprehension of danger are not enough.”

“I never read nor heard, that Lex was Rex; but it is common and most true, that Rex is Lex, for he is `lex loquens’, a living, a speaking, an acting law: and because the king is `lex loquens’, therefore, it is said, that `rex censetur habere omnia jura in scrinio pectoris sui.’

“iii The Judges who decided them have been denounced as time-servers or traitors, but it is by no means certain that they decided contrary to law.”

“But in fact the. parliamentary lawyers found it difficult, having gone so far, to deny that the King had the best means of knowing about foreign affairs, and was the fittest person to judge of an emergency.”

“that the people’s liberties strengthen the king’s prerogative, and that the king’s prerogative is to defend the people’s liberties.”

“The absolute power of the king is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people, and is salus populi; as the people is the body, and the king the head; and this power is [not] guided by the rules, which direct only at the common law, and is most properly named Policy and Government; and as the .constitution of this body varieth with the time, so varieth this absolute

law; according to the wisdom of the king, for the common good; and these being general rules and true as they are, all things done within these rules are lawful."

Prerogative (iv)

"Much of the contents of the Prerogative perforce disappeared when the Star Chamber was abolished. They could not be exercised without the intervention of a Court. The prerogative of executing martial law, at any time of peace, had already been taken away by the Petition of Right; so had the power to commit per special mandatum regis. The decision in R. v. Hampden hadbeen reversed by a special Act. The Crown still had full legal control of foreign policy, and prerogatives such as the power of dissolving parliament, of appointing to offices and of pardon. But these prerogatives could not affect the property of the subject. Arid from the time of the Long Parliament it had been clear that wherever any prerogative came into conflict with the exclusive right of Parliament to tax, it must give way to it."

"There was one doctrine of the Prerogative and one prerogative right which were dangerous to Parliament, and were not yet dead. Nothing had been done directly to kill the notion that certain prerogatives were inseparably annexed to the Crown, so that no statute could avail to take them away, and no attempt had been made to destroy the dispensing power. The Restoration period, and especially the reign of James II, showed that unless Parliament could contrive to advance still further, all was not irreparably lost to the Crown. By means of dispensations, the King could legalize anything which was no malum in se, provided his dispensation deprived no third party of his rights; that is to say, his dispensing power could have no effect where property or private law was at stake, but could be used to evade a statue which expressed the wishes of Parliament on a point of public law. Moreover, because the prerogative to dispense with statutes, was looked upon as inseparably annexed to the Crown, there was no means of curbing the power of a king who did not owe his authority and even his title to Parliament."

"But this writ and the Star Chamber both disappeared in the time of the Long Parliament. Hence that portion of the Prerogative which could be exercised only through the intervention of a Court disappeared for good in 1641. Nor can it be revived, for the Privy Council case of In re Lord Bishop of Natal (p.113 below) clothed with judicial authority the doctrine. found in the old books, that the King by his Prerogative cannot establish a Court to administer any but the common law, and as such a Court would nowadays be almost useless, it is very unlikely that his prerogative will be exercised……"

"The rest of the prerogative might survive, but only subject to the approval of the ordinary Courts. In every case the King must make good at common law his claim to the prerogative; the mere plea of prerogative no longer ousts the jurisdiction of the Court. The plea of matter of State has no more .force than the plea of prerogative; further, inasmuch as the common law knows no matter of State except such as is comprised in the more force than the plea of prerogative; further, inasmuch as the common law knows no matter of State except such as is comprised in the. more convenient and technical term Prerogative, there was no point in keeping two phrases where one would do……..."

But the idea that Government is, apart from Prerogative, entitled to special treatment died very hard. In Carr's Case (1860), 7 St. Tr. 929, Scroggs, C.J. went so far as to say, `If you Write on the subject of Government, whether in terms of praise or censure, it is not material; for no man has a right to say anything of Government'. The modern view was first clearly stated by Lord Camden in his famous judgment in Entick v. Carrington.

"With respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions."

"Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provision contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?"

"7. Since the Case of Proclamations (p.110 below) it has been clear law that the Crown could not create a new offence except by Act of Parliament, and it had always been understood that unparliamentary legislation of every kind was against the law .....

"A controversy of land between parties was heard by the King, and sentence given, which was repealed for this, that it did belong to the common law: then the King said, that the thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the like, or inheritance, or goods, or fortunes of his subjects, are not to

be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, quod Rex non debet esse sub homine, sed sub Deo et lege. "

"It is a settled Constitutional principle or rule of law, that although the Crown may by its Prerogative establish Courts to proceed according to the Common Law, yet that it cannot create any new Court to administer any other law; and it is laid down by Lord Coke in the 4th Institute, that the erection of a new Court with a new jurisdiction cannot be without an Act of Parliament."

42. Mr Khalid Anwar argued that as per the above case law of Great Britain, Chief Justice Coke, whose writings are regarded as an important source of common law, expounded the view that the Bench should be independent of the Crown and arbiter of the Constitution to decide all disputed questions whereas Bacon took the view that the Court is under the King but then following Plato's theory he (Bacon) wanted the King to be a philosopher. Dilating further on the point, the learned counsel contended that the evolution of judicial power is coterminous with the evolution of civilization and this is so because judicial power has to check the arbitrary exercise of power by any organ or authority. He next argued that in UK the doctrine of parliamentary sovereignty was evolved and the Parliament includes the Queen, the House of Lords and the House of Commons acting together. To support his contention Mr Khalid Anwar, referred some passages from the book titled "English Constitutional Conflicts of the Seventeenth Century 1603-1689" by J. R. Tanners, at pages 20, 41-45, 62, 65, 70, 78, 79, respectively, which are reproduced as follows:

"That which concerns the mystery of the King's power is not lawful to be disputed; for that is to wade into the weakness of Princes, and to take away the mystical reverence that belongs unto them that sit in the throne of God .... As for the absolute prerogative of the Crown, that is no subject for the tongue of a lawyer, nor is lawful to be disputed. It is atheism and blasphemy to dispute what God can do; good Christians content themselves with His Will revealed in His Word: so it is-presumption and high contempt in a subject to dispute what a King can do, or say that a King cannot do this or that, but rest with that which is the King's revealed will in his law. "

"Bacon was by far the greater man, for in him the philosopher included both the lawyer and the statesman; and thinking after the manner of a philosopher he advocated a large reform of English law. Coke on the other hand, with, a mind fanatically narrow, was possessed with a profound veneration for the law as it stood-for its technicalities as well as its substance-and he was convinced that it was not by change and reform but by the following of precedents that the liberties of England

were to be defended. Thus, upon one of the great test questions in the politics of the time-the nature and limits of the royal prerogative-Bacon half suggested, half accepted the mystical views of James; while Coke resolutely opposed the inferences which the King drew from the principles which he laid down, and entrenched himself in precedents, and verbal interpretations of statute law. Coke's idea was that the Bench should be independent of the Crown and should act as arbiter of the Constitution to decide all disputed questions. Bacon, on the other hand, referred all disputed questions to the King, saying, with his mind running upon the ivory throne on which King Solomon sat to give judgment, that the Judges. `should be lions, but yet lions under the throne'. This Coke represented a rigid conservatism-the conservatism of Constitutional liberties as they were; Bacon represented reform-but reform carried out by a philosopher-king wielding a sovereignty unlimited and half-divine. We shall come upon the same antagonism again, a generation later, in the persons of Pym and Strafford."

"But that State is rare in which the kings are philosophers or the philosophers kings. Bacon was not a king, and James was not really a philosopher. The philosopher had. fallen on evil days, for the kings were Stuarts; and what was really needed was the conservation of existing liberties against encroachment, and not the efficient paternal Government which Bacon and Strafford dreamed of but which-James and Charles could never hope to attain."

"In the eyes of his contemporaries Coke's legal fame overtopped his other claims to greatness. In 1631, when his death was expected, Charles I gave orders that his papers should be secured, lest anything against the prerogative should be found among them and published, `for he is held too great an oracle among the people, and they may be misled by anything that carries such an authority as all things do which he either speaks or writes.' `His parts', says Fuller, `were admirable; he had a deep judgment, faithful memory, active fancy; and the jewel of his mind was put into a fair case ...His learned and laborious works on the laws will last to be admired by the judicious posterity whilst Fame has a trumpet left her and any breath to blow therein."

"The Petition of Right dealt first with the two main grievances of arbitrary taxation and arbitrary imprisonment, providing (1) `That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such-like charge, without common consent by Act of Parliament', and (2) That no free man be detained in prison without cause shown. But to these were added two other grievances which had been felt bitterly by the humbler classes: the billeting upon them of Buckingham's disorderly levies, and the attempt which had been made, not so much to enforce discipline among the soldiers as to punish ordinary crimes committed by soldiers by the application of martial law instead of the ordinary law of the land. It was, therefore, further provided, (3) that soldiers and mariners should not be billeted upon inhabitants against their wills, thus, recognising the ancient custom, `no man is forced to take soldiers but inns, and they to be paid by them'; and (4) that commissions for proceedings by martial law `against soldiers and mariners or other

dissolute persons joining with them' be revoked, and no fresh commissions be granted in time to come.

"The King fought hard to save his emergency power of imprisoning without showing cause. The petition, he said, involved `the very intermitting of that constant rule of Government practised for so many ages within this Kingdom', and it would soon `dissolve the foundation and frame of our monarchy'. The middle party in the Lords tried to save the situation for him by proposing the addition of a saving clause:"

"On March 10, 1629 an abrupt dissolution followed, `the most gloomy, sad, miserable day for England that happened in five hundred years last past'. But for the present the victory was with the King, for it was only in Parliament that he could be fought. Sir Benjamin Rudyerd, the reasonable Parliamentarian, who had said in the House on April 28, 1628, that `moderation is the virtue of virtues and the wisdom of wisdoms', recognises this."

"The King took quite a different view of Parliaments. `They are of the nature of cats', he wrote to Wentworth later, `they ever grow cursed with age'. He now inflicted on the nation the 'loss of Parliaments' for a period of eleven years. This opened the way for him to take vengeance on his enemies, and his prosecution of Eliot and other leaders of the Common was to illustrate the truth of Wentworth's own observation, that it was ill contending with the King outside of Parliament."

he decision in Hampden's case also caused a 'general loss of confidence in the Courts of law. As Clarendon points out, shipmoney had been declared lawful 'upon such grounds and reasons as every stander-by was able to swear was not law'. The reasoning of the Judges 'left no man anything which he might call his own', and all men 'found their own interest, by the unnecessary logic of that argument, no less concluded than Mr. Hampden's'. It is not necessary to go so far as Hallam, and to say, 'Those who had trusted in the faith of the Judges ...looked with indignation on so prostituted a crew'; but the parliamentary leaders now perceived that the majority of the Judges was likely to be always against them, even if the minority was not dismissed. This knowledge made Parliament a necessity for them. They had nothing to hope for from the Judges, who were leaving them to work out their own salvation independently of the Courts of law; and the only other place where salvation was to be found was in Parliament. "

43. Mr Khalid Anwar argued that jurisprudence recognises four categories of facts: (1) adjudicative facts, pertaining to decision on merits; (2) jurisdictional facts, containing exercise of jurisdictional powers; (3) constitutional facts, relating to nature of the powers exercised under

different Articles of the Constitution; and (4) the law constitutive facts, pertaining to nature of legal system as a whole from which all law constitutive facts may be inferred and that last category is important. He elaborated that this Court is the sole institution to confer or deny legitimacy on the Government and no other body can do so and that no one can take away this power from the Court. He argued that law to be enforced must be one which is enacted by Parliament and no other law including the Proclamation of Emergency by giving it the colour or status of law and that this Court can only allow the enforcement of laws enacted by Parliament or expounded by the Court and cannot countenance or allow its use for the purpose of enforcing what is essentially, if not Martial Law, a step child of Martial Law. He further submitted that laws tend to protect not only the people but also the Sovereign. He further submitted that this Court, which is the embodiment of the laws of Pakistan, should interpret the Proclamation and the PCO, which are subservient to the Constitution and not above it. To support his assertions, the learned counsel referred to the following passages at pages 312 and 313, from the book titled "THE CONSTITUTION OF ENGLAND FROM QUEEN VICTORIA TO GEORGE VI" by Arthur Berriedale Keith, which read thus:-

"2. Judicial Control of the Executive and other Authorities.

"It is an essential duty of the executive Government to obey the law of the land, whether or not there is any means of compelling it to do so, and the judiciary has an absolute duty to restrain actions of the executive which are illegal. It cannot refrain from doing so because of any considerations of State convenience; the ancient doctrine of Entick v. Carrington (1765), 19 St. Tr. 1029 is perhaps hardly likely to be ignored in Britain itself, but it has been found desirable to remind colonial Courts that they must give it full effect, even if it should be found that to do so may interfere with the convenience of the administration. In fact, as shown in discussing the rights of the subject, the Courts have been busy in recent years in reasserting the principle that Parliament alone can impose taxation, and the executive must not do so without precise authorisation; that interference with liberty must be strictly justified by law, and is not to be excused merely because the person affected might be treated by the crown as an enemy, though it has not done so; or because, under earlier regulations made inoperative by the creation of the Irish Free State, arrest and deportation of an alleged revolutionary would have been legal."

"It rests with the Courts to define and by doing so limit the prerogative power of the Crown, a term the extent of which has been a subject of some discussion in recent years."

44. He made a distinction between the necessity and prerogative by stating that doctrine of necessity may be availed by all citizens but the prerogative is for the King and as of "Glorious Revolution" 1688, no new prerogative may be created by reference to doctrine of necessity. He

emphasised that the liberty to choose is an important right and that common wisdom ought to be given more weightage than that of the wisdom of one man. He reiterated that doctrine of necessity was rejected in Britain since 1765. Elaborating that Martial Law is justified only to quell insurrection or riots or rebellion from within and invasion from outside, he argued that the insurrection, riots and rebellion are ex facie, an assault on the Rule of Law, therefore, to curb an unconstitutional action, this measure can be adopted. He, however, vehemently contended that Martial Law is not meant to be an instrument of social reform or economic progress as envisaged in the 7-point Agenda of the Chief Executive, therefore, though this Agenda is admirable and noble but the suspension of the Constitution could not be justified for the sake of realizing the same. - He next submitted that social reform and economic progress are in the best interest of the nation which takes place under the law and not in violation thereof.

45. He submitted that R v. Stratton (1779) (21 St.Tr.1222), which was relied upon by Muhammad Munir, C J, provided that the 'doctrine of necessity' may be relied upon only in imminent danger and extreme necessity so as to preserve the society, when no other remedy for redress is available, in that, this doctrine is detrimental to political system. He next submitted that the task of removing the social evils be left for the consideration of the Parliament and should not be undertaken under the doctrine of necessity.

Mr Khalid Anwar then read the speech of the Chief Executive dated 17-10-1999 and formulated the following propositions:-

"(1) That though the speech claims occurrence of deterioration of the system in a period of 52 years and lays emphasis on the Provincial autonomy but the same is restricted by the PCO.

(2) That the Chief Executive accepts in unqualified terms the importance of the Constitution by saying that in earlier Martial Laws the Constitutions were abrogated and politicians condemned, therefore, there was no justification for issuance of proclamation of emergency on the 12th October, 1999 to suspend the Constitution.

(3) That the Chief Executive states that he was not imposing the Martial Law and the present period is a pause to democracy.

46. He submitted that in Moulvi Tamizuddin's case the Federal Court on a technical point struck down the judgment of Chief Court of Sindh despite the fact that in, at least, three cases the superior Courts had upheld the view that the assent of the Governor-General to section 223-A of the Government of India Act, 1935, was not required, and this practice was accepted by Quaid-e-Azam, the Constituent Assembly and the Executive organ of the State. - He referred the following passage in support of his contention:

"Pakistan's Constituent Assembly met in Karachi for the first time on August 11 and unanimously elected Jinnah to preside over its meetings, amid thunderous applause, as its first business. Jinnah took the chair, thanking the assembled delegates for the greatest honour that is possible for this Sovereign Assembly to confer-by electing me as your first President ....I sincerely hope that ....we shall make this Constituent Assembly an example to the world. The Constituent Assembly has got two main functions to perform. The first is the very onerous and responsible task of framing our future Constitution of Pakistan and the second of functioning as a full and complete Sovereign body as the Federal Legislature of Pakistan. We have to do the best we can ...."

47. Mr Khalid Anwar submitted that in Begum Nusrat Bhutto's case (supra) there was Martial Law and the CMLA claimed vast powers including power to amend the Constitution and this Court granted him that power. He further submitted that the circumstances in which the powers to amend the Constitution were granted to CMLA have been referred to in Mehmood Khan Achakzai's case (supra), which 'show that the need for granting the power to amend the Constitution arose, in that the then Chief Justice, who had assumed the office by virtue of nullification of 6th and 7th Constitutional Amendments by the CMLA, would have, ipso facto, lost that office if power to amend the Constitution had not been granted. He further submitted that this Court should not confer such power on the Chief Executive. He next submitted that the Court should examine the scope/ambit of emergency promulgated by the Chief Executive, which is not envisaged by the Constitution, to determine as to what this emergency entails and under its cover what the Government can do and cannot do. He emphasised that the curse of the country is not less laws instead more laws, but no enforcement thereof. He also made a reference to the example of Chancellor Halmet Kohl of Germany and Finance Minister of France, who were involved in financial bungling and rightly condemned but without impinging upon the system of Constitutional governance. He argued that every law has two facets: (1) what is the content of the law and (2) who has the power to make it. He drew a distinction between Martial Law and Emergency to contend that the Martial Law is a nullification of the Constitution whereas the present emergency is claimed to have been imposed to save the system, therefore, minimum period should be taken for restoration of democracy.

48. Mr Khalid Anwar submitted that it would be improper to impute responsibility for writing judgment in Begum Nusrat Bhutto's case to Anwarul Haq, the then Chief Justice alone, who was

only a primus inter pares (first among equals), in that, indeed, it was a decision, which was given by the Court, comprising all the Judges on the Bench then.

49. He submitted that it is not the judicial function of this Court to pronounce upon the competence, ability and integrity, especially of four rulers/politicians, namely, General Muhammad Ziaul Haq, General Agha Muhammad Yahya Khan,, Mohtarma Benazir Bhutto and Mian Muhammad Nawaz Sharif. He referred to the case of Begum Nusrat Bhutto wherein this Court relying on the statement of Mr Sharifuddin Pirzada, the then Attorney-General, appdaring on behalf of the respondents therein, observed that the election would1 be held in six month's time or as soon as the accountability process is completed and that the petitioner's counsel when asked for a framework for election to be determined, the Court responded that it would be unfair t o cast doubt on the sincerity of CMLA, to contend that it is no part of the judicial power of the highest Court of the land to pass a verdict on the sincerity or insincerity of the rulers whether civilian or military and prayed that Rio such edict should be issued by this Court on the present ruler. The learned counsel next submitted that the conditions prevalent at the time of promulgation of Martial Law in 1977 were like rebellion/resurrection, in that, as per determination of the Chief Election Commissioner, the elections conducted earlier in March that year were a farce, therefore, there was no Constitutional justification for the Government to remain in power and the Supreme Court, which is the ultimate guardian/custodian of the constitutional values had to find a bridge for bringing the country back to legal/constitutional dispensation. He argued that the doctrine of unwritten limitations on the judicial power has a long heritage in American Constitutional law and that the Courts refrain from entering into the political environment to determine a political question, in that, it is a dangerous/perilous terrain for the Court to tread. He argued that the foundation of power of the Court is ethical, resting upon the prestige and dignity of this august institution, therefore, every Government is in need of seeking from the Court the seal of legitimacy for its powers. He submitted that the judicial powers are the weakest and the most powerful. Mr. Khalid Anwar submitted that this Court should not authorize the Chief Executive to take political decisions and it should restrict him within legal/constitutional limits. In support of his contentions, the learned counsel relied upon certain passages from the research paper titled `Judging the State' by one Paula R. Newberg.

50. The learned counsel argued that Article 58(2)(b), which authorized the President to dissolve the National Assembly, now repealed by virtue of the 13th Amendment, is, sometimes, referred to as a safety valve and that with the removal of that safety valve the continuance of the Constitutional governance has been placed in jeopardy, was not, in fact, a safety valve but a valve to control the flow of democratic power. He submitted that Article 58(2)(b) was borrowed from a similar provision i.e. section 45 of the Government of India Act, 1935, which was repealed on 14th August, 1947 by PCO-22 of 1947. He submitted that the scope of Article 58(2)(b) was even wider than section 45 of the Act of 1935. He then referred to Article 58(2)(b) of the Constitution which reads thus:

"[(2) Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion,-

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate ifs necessary.]"

51. Mr Khalid Anwar next submitted that perusal of the two speeches of the Chief Executive delivered on 13th and 17th October, 1999, shows that he claimed no power to amend the Constitution. but m the subsequent proclamations he does. The learned counsel argued, that the Proclamation of Emergency does not explain the source of its authority and that since the PCO is based on the Proclamation, therefore, if the Proclamation is found to be ultra vires the Constitution then the super-structure thereon i.e. the PCO would also stand demolished. He further contended that the Proclamation does not confer any power on the Chief Executive in that it merely states that the country has been brought under the control of the Armed Forces. He next argued that the PCO is, at best, a quasi Constitutional order and that it cannot be accepted as a constitutional dispensation of either temporary or permanent nature. He submitted that the PCO is a Constitutional conundrum/riddle , as, on the one hand, it purports to suspend the Constitution and, on the other, says that the country will be governed in accordance with the provisions of the Constitution as nearly as possible. He contended that the maker of the document does not reject the Constitution nor does he claim any such right but merely claims the right to fine tune the document and that what emerges from this is that he leaves the Fundamental Rights intact except those suspended by the earlier Proclamation of Emergency dated 28-5-1999 i.e. Articles 15 to 19 and 24 of the Constitution. He contended that, thus, what remains intact is the Objectives Resolution, which is now substantive part of the Constitution under Article 2A thereof.

52. He argued that the Objectives Resolution recognises the `Islamic doctrine of sovereignty' as expounded in the Holy Book, that sovereignty belongs neither to ruler nor the ruled but Almighty Allah alone and the consequential doctrine is that authority is to be exercised by the people of Pakistan through their chosen representatives, and that such authority shall be exercised within the limits prescribed by Almighty Allah, which is a sacred trust. He contended that this is a complete doctrine of Islamic sovereignty and that this is the law of God and the law of nature. He further submitted that these being the contours of Islamic doctrine of sovereignty, there is need of a physician/surgeon to prescribe the medicine/surgery after diagnosing the disease/ailment in the body politic of the nation. He submitted that the remedy is certainly not to kill the chosen representatives but to bring them on the path of rectitude. He next argued that the Chief Executive by accepting the Objectives Resolution accepts the Islamic doctrine of sovereignty which is a right of the people to govern themselves through the chosen representatives, to have a democratic State, an independent Judiciary as well as preservation of democracy and protection of political unity. The learned counsel also referred to Articles 4 and 5 of the Constitution which are left intact by the PCO. He argued that it is a fundamental principle of jurisprudence that Courts must always

endeavour to extend their jurisdiction and not restrict it. Mr Khalid Anwar argued that proviso to Article 2 clause (2) of the PCO does not confer absolute immunity on Chief Executive of the nature of Articles 248(1), 269 and 270-A of the Constitution. He, submitted that the immunity conferred by these Articles has been restricted in cases of Ghulam Mustafa Khar (supra) and Sardar Farooq Ahmed Khan Leghari (supra).

53. Mr Khalid Anwar next contended that as the legislator is deemed to know the previous law before he amends it, the drafters of the PCO are deemed to have known that notwithstanding the clauses inserted. therein the Court has jurisdiction to examine the vires of any action and that by missing out this important point the drafters have accepted it tacitly/impliedly that the orders of the Chief Executive are subject to the jurisdiction of the Constitutional Courts of the land. He further submitted that by including paragraphs 2(b) and 7 in the PCO, its author has recognized that Courts and Judges are not merely entitled to but are in fact continuing in office, which fact also implies that both the documents i.e. the Proclamation of Emergency and the PCO have accepted the necessity of Judges to continue, they being the guardian of the Constitution.

54. He next argued that the Order 1 of 2000, dated 25th January, 2000 allows all the Courts to continue to function and exercise powers, which is a reiteration of what was earlier stated by the Oath of Office (Judges) Order, 1999 (Order 10 of 1999), paragraph 3 whereof states that Order I of 2000 shall apply to: (1) newly appointed Judges; (2) that Oath shall be made before the Constitutional authority; and (3) that it would be in accordance with the appropriate form set out in the Third Schedule to the Constitution. He submitted that the doctrine of necessity required the newly appointed Judges to take oath before the constitutionally designated authority and as per the procedure prescribed by the Constitution and not by the Order 1 of 2000. He pin-pointed the defects/deficiencies in the Order 1 of 2000 viz. assuming the power to amend the Constitution stipulated in the preamble of the said Order and without prescribing any amendment of the Proclamation or the PCO in pursuance of which it is promulgated. He submitted that amendment in the Constitution is not justified for three reasons: (1) that it is being done by means of subordinate instrument as the preamble of the Order 1 of 2000 recognises the supremacy of the Proclamation and the PCO; (2) that the contents of the preamble are simply a statement of intent and (3) that it claims to do so retrospectively, which a preamble cannot do. He further argued that paragraph 3 of the above Order is ultra vires Article 209 of the Constitution. Mr. Khalid Anwar, however, added that a Judge acting according to his conscience and in all good faith may decide to resign or he may decide that in the higher public interest he should retain his office. In this connection, the learned counsel referred to the book titled "Constitutional Legitimacy" `A Study of the Doctrine of Necessity' authored by Leslie Wolf-Phillips, wherein the following passage occurs: -

"A former member of "the Argentine Supreme Court has justified the role of the Court as `the beneficial expression of a laudable political realism'. He saw choices before the Court in a

revolutionary situation as irresponsible resignation, acceptance of the situation, an attempt to save what `institutional values' remained to be saved:

It has exercised a function of institutional salvation by guarding human rights and the independence of the judiciary. It has been as if they said to the military men……we recognise the practical power that you exercise, because otherwise there would be chaos instead of order and authority in the country..."

55. He next submitted that Order 1 of 2000, is contrary to the PCO, which is a sub-constitutional Order and re-affirms the right of the Judges to continue in office. He argued that the Proclamation states that the whole of Pakistan will come under the control of Armed Forces, which does not and cannot amount to a charter or open legal licence to suspend the Constitution but is only intended to ask the Armed Forces of Pakistan to discharge their constitutional obligation to restore ordinary governance in accordance with the mandate of the Constitution. He contended that this submission. is in line with Asma Jilani's case having the same legal and conceptual reiteration, which Hamoodur Rehman, C J (as he then was), had made. He submitted that emergency is to re-affirm the restoration/establishment of Constitutional rule and not to abrogate or reject it and this follows from the Proclamation itself if interpreted in the light of Asma Jilani's case.

56. He argued that there being a conflict between the PCO and Order 1 of 2000, it is the Order which must yield to the superior mandate of the PCO. Mr. Khalid Anwar also referred to some observations from the case of Miss Asma Jilani (supra) from pages 183, 193, 194, 195, 196, 197 and 198 which were also referred to by Ch.Muhammad Farooq, learned ASC.

57. Mr Khalid Anwar further argued that if necessity was to remove the Prime Minister then that necessity was fulfilled on 12th October, 1999. He submitted that this Court is the ultimate guardian of the Constitution and various rights of the people of Pakistan. He submitted that this Court is the only institution, which is respected by the people because it is an embodiment of the ideals of justice and guardian of Rule of Law. He contended that the Proclamation and the PCO are to be authoritatively and definitively interpreted in the present case and that there are three possible interpretations:

"(1) that under the PCO the Chief Executive may amend the Constitution, make new laws. postpone elections indefinitely and take whatever action he deems fit and appropriate --- which is a Duke of Willington theory of Martial Law that it is the will of the Army Commander- If Court would accept this interpretation, his petition will be dismissed.

(2) The petitioner's interpretation is contained in the prayer at pages 67-69 of the petition, which if accepted in terms thereof, the previous Government is restored,

(3) The Court examines the situation with a view to giving finding of what may be termed as a law constituting fact, which relates to the nature of the legal system while giving this finding the Court will not proceed on the basis of political speeches and statements of intent and render a verdict about sincerity of either of the present rulers or the former rulers, instead the Court will proceed on the objective realities."

58. He submitted that the following Latin American countries had experienced Army take-overs. Some of these countries' Constitutions explicitly restricted the role of military, others did so impliedly. Some explicitly described it as treason, as for example, Article 3 of the Constitution of Costa Rica states, "No person or group of persons may assume representation of the people, usurp their rights, or make petitions in their name. Violation of this article is sedition." Others laid dawn that it was the duty of the Armed Forces to guarantee stability to the Government as is the case in Bolivia where it was so prescribed in their Constitution. In the case of Ecuador Article 114 states that, "Military authorities shall not obey higher orders that have as their purpose an attack upon the organs of the public power or that are manifestly contrary to the Constitution or laws." Article 112 of the El Salvador Constitution states that "The Armed Forces are established to protect the integrity of the territory and the sovereignty of the Republic, enforce the law, maintain public order and guarantee Constitutional rights ....Article 114 says "The Armed Forces are nonpolitical and essentially obedient". In the case of Panama, President Dr. Arnulfo Arias was deposed by a coup which was led by Colonel Omar Torrijos Herrera and Colonel Jose Maria Pinilla was installed as President by the, military leaders. Colonel Torrijos later obtained legality from the newly elected Assembly in order to legalise the almost unlimited powers already possessed by him. In Paraguay, a military General seized power in a coup and later provided for in the Constitution against armed rising in these words: "Any armed force or gathering of armed persons that arrogates to itself the rights of the people and makes demands on their behalf commits the crime of sedition". In the case of Venezuela, its Constitution of 1961 contains two articles of particular interest to the problem of Constitutional breakdown: Article 132 which asserts that `The National Armed Forces form a non-political, obedient and non-deliberative institution, organised by the State to ensure the national defence the stability of democratic institutions and respect for the Constitution and the laws…….;and Article 1 250 follows Article 136 of the Mexican Constitution in its declaration that `This Constitution shall not lose its effect even if its observance is interrupted by force or if it is repealed by means other than those provided therein. In such eventuality, every citizen, whether or not vested with authority, has the duty to collaborate in the reestablishment of its effective validity.' In the case of Brazil, section 6, Article 91 of the 1967 Brazil Constitution declares that "It is the mission of the armed forces, which are essential to the execution of the national security policy, to defend the country and to guarantee the constituted powers, and law and order." In Chile, Dr: Salvador Allende Gossens was elected to the Presidency in 1970 and his Government was

overthrown in a coup planned and executed by the Armed Forces. The Commander-in-Chief appointed by Allende was proclaimed President on 11th September, 1973. Constitutional Act No.2 of September 1976 states the role of the Armed Forces as follows: -

"In observance of their essential duty to safeguard the sovereignty of the Nation and the permanent superior values of the Chilean people... the armed forces undertook the leadership of the Republic .... .

The 1886 Cronstitution of Colombia also gives no lead to the military in political intervention. Article 168 provides that the military may not 'deliberate' and may not `assemble except by order of the legitimate authority He argued that whatever limits are on exercise of power, the contents of the PCO be spelt out lucidly leaving nothing to chance: His precise submission was that the status of present Government is that of a de facto government and not of a de jute government.

59. Mr, Khalid Anwar then referred to paragraph No. 842 at page 599 of the book titled COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES by Joseph Story to contend that Courts exist to uphold the rule of law and not to grant legitimacy to unconstitutional form of Government.:-

"The considerations above stated lead us to the conclusion, that in republics there are, in reality, stronger reasons for an independent tenure of office by the Judges, a tenure during good behaviour, than in a monarchy. Indeed, a republic with a limited Constitution, and yet without a judiciary sufficiently independent to check usurpation, to protect public liberty, and to enforce private rights, would be as visionary and absurd, as a society organized without any restraints of law. -It would become a democracy with unlimited powers, exercising through its rulers a universal despotic sovereignty. The very theory of a balanced republic of restricted powers presupposes some organized means to control, and resist, any excesses of authority. The people may, if they please, submit all power to their rulers for the time being; but, then, the Government should receive its true appellation and character. It would be a Government of tyrants, elective, it is true but still tyrant; and it would become the more fierce, vindictive, and sanguinary, because it would perpetually generate factions in its own bosom, which could succeed only by the ruin of their enemies. It would be alternately characterized, as a reign of terror, and a reign of imbecility. It would be as corrupt, as it would be dangerous. It would form. another model of that profligate and bloody democracy, which, at one time, in the French revolution, darkened by its deeds the fortunes of France, and left to mankind the appalling lesson, that virtue and religion, genius and learning, the authority of wisdom and the appeals of innocence, are unheard and unfelt in the frenzy of popular excitement; and, that the worst crimes may be sanctioned, and the most desolating principles inculcated, under the banners, and in the name of liberty. In human governments, there

are but two controlling powers; the powers of arms and the power of law. If the latter are not enforced by a judiciary above all fear, and above all reproach, the former must prevail; and thus, lead to the triumph of military over civil institutions. The framers of the Constitution, with profound wisdom, laid the corner stone of our national republic in the permanent independence of the judicial establishment. "

Mr. Khalid Anwar referred to the following passages at pages 1621, 146-151, 168-169, from the book titled CONSTITIJTIONS IN CRISIS, Political Violence and the Rule of Law by John E. Finn :-

"Carl J. Friedrich and Carl Schmitt similarly began their well-known studies of Constitutional emergency powers with a review of the Roman dictatorship, and others have found in that institution `a theoretical standard ...a sort of moral yardstick against which to measure modern institutions of Constitutional dictatorship.'

There were four conditions to the Roman dictatorship, all of which, Friedrich argued, are of contemporary utility:

1. The appointment of the `dictator' must take place according to precise constitutional forms.

2. The dictator must not have the power to declare or to terminate the state of emergency.

3. Dictatorial, discretionary powers must obtain for only a (relatively) precise time, and the limit must not be subject to indefinite extension.

4. The ultimate objective of Constitutional emergency powers must be the defense and restoration of the Constitutional order."

Constitutional Dictatorship and the Prerogative

“More recently, Arthur Schlesinger, Jr., devoted much of The Imperial Presidency to the problems of emergency government. Schlesinger conceded, as have all who preceded and followed him, that there will be times when the President must act in extraordinary fashion to ensure national survival. `Crises threatening the life of the nation,’ he wrote, `have happily been rare. But, if such a crisis comes, a President must act.’ The question is whether the Constitution authorizes these extraordinary actions.

“Schlesinge, concluded that emergency government should be recognized for what it is: an extra-constitutional resort to raw political power, necessary but not lawful.’ The alternative view, that the Constitution contemplates (if it does not authorize) extraordinary power, renders the document so meaning-less that it fails to possess real authority even in normal conditions, a conclusion Corwin had reached earlier in his pointed analysis of the -effects of World War II find the New Deal upon American Constitutional law.

“The similarities between Schlesinger’s argument and the Lockean defense of executive prerogative are, of course; substantial. In the Second Treatise of Government, Locke argued, as did Jefferson later, that `a strict and rigid observation of the laws [in some cases] may do harm.’ The executive must have a Power-the prerogative-to act ‘according to discretion, for the public good, without the prescription of law, and sometimes even against it.’

“The prerogative of the Crown, or some institution like it, suggested for Schlesinger that the American presidency `must be conceded reserve powers to meet authentic emergencies.’ Without clearly specifying the source of their authority, Schlesinger argued that the invocation and use of emergency powers must be subject to a number of restraints, most of which are directed toward establishing the authenticity of the emergency:

“ 1. there must be a clear, present and incontestable danger to the life of the nation;

2. the President must define and explain to Congress and the people the nature of this threat;

3. the perception of the emergency, the judgment that the life of the nation is truly at stake, must be broadly shared by Congress and by the people;

4. time must be of the essence; waiting for normal legislative action must constitute an unacceptable risk;

5. existing statutory authorizations must be inadequate, and Congress must be unwilling or unable to prescribe a national course;

6. the problem must be one that can be met in no other way than by presidential action beyond the laws and the Constitution;

7. the President must report what he has done to Congress, which will serve as the Judge of his action;

8. none of the presidential acts can be directed against the political process itself.

"In so far as Schlesinger conceded that at times ,the Constitution must be suspended, these restraints cannot strictly trace their authority to the constitutional document. Schlesinger failed to provide any source at all for their origination; presumably they find authority in political necessity and their fidelity to the Roman principle that all exercises of emergency power must be directed to defense and restoration of the constitutional order. But we might well-wonder why these extratextual principles should bind in the absence of an obligation to respect limitations set forth in the constitutional document itself. As Madison counseled, `The restrictions, however, strongly marked on paper will never be regarded when opposed to decided sense of the public, and after repeated violations in extraordinary cases they will lose even their ordinary efficacy.' It is difficult to see why a crisis severe enough to overwhelm the constitutional document would not also overwhelm extratextual restraints.

"There is yet another difficulty with Schlesinger's argument. The second principle-which requires that the President must define and explain to Congress and the people the nature of the crisis-implies the continued constitutional status of both Congress and the President. But once we suspend the Constitution, the status of the offices and institutions it creates are themselves problematic. An official who claims the Lockean prerogative, the power to suspend the Constitution; `risks the absurdity of saying: `An officer who shall be recognized by criteria set

forth in this Constitution shall have the power to act contrary to this Constitution." Officers in the strict sense cannot have such a power because `we need rules they cannot lawfully change if we are t o recognize those persons who lawfully claim the authority to act as officials.' Arguably, then, an individual who claims the Lockean prerogative is not the `President' but rather is an individual `strategically situated' to exercise emergency power. Consequently, the constitutional status of an officer who claims the Lockean prerogative is troublesome, as is the status of the `Congress' to which he must report his actions. Moreover, as some critics have observed, the crucial issue must be the severity of the danger, not how `Congress' Judges its severity. Surely a President should not fail to act simply because Congress does not share his or her sense of alarm.

"This formulation of the problem denies the possibility that the Constitution's military powers are sufficient to cope with all emergencies. Instead, Bessette and Tulis defend a liberal method of interpretation that compensates for the shortcomings of these powers. Their argument indicates that one possible way to make sense of the claim to perpetuity is to treat it as a claim about how to interpret constitutional language: When faced with a crisis, constitutional maintenance demands that we interpret the document in such a way as authorize whatever powers and measures are necessary to cope with f emergency. The argument complements . Hamilton', who argued in Federalist 23 that a properly framed constitution accounts for the inevitability of crisis, so that there can be `no limitation of that authority which is to provide for the defense and protection of the community in a mater essential ,to its efficacy.' Hamilton merely restated the position, Machiavelli adopted in his discussion of the Roman Republic in the Discourses:

"Now in a well-ordered republic it should never be necessary to resort to extra constitutional measures; for although they may for the time be beneficial, yet the precedent is pernicious, for if the practice is once established of disregarding the laws for good objects, they will in a little while be disregarded under that pretext for evil purposes. Thus, no republic will ever be perfect if she has not by law provided for everything having a remedy for every emergency, and fixed rules for applying it."

"No doctrine, involving more pernicious consequences, was ever invented by the wit of man that any of [the Constitution's] provisions can be suspended during any of the great exigencies of Government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence."

"There are subtle and important differences between this position and the one advanced by Bessette and Tulis (Hamilton's requires framers with extraordinary prescience, whereas Bessette and Tulis defend a method of interpretation that makes up for their lack of it;. but both have the signal benefit

of not impairing the constitutional status of the other branches of the Federal Government. Other institutions, thus, have some constitutional basis for questioning a President's exercise of emergency power, a legitimacy they cannot claim one the Constitution is set aside. "The decisive fact is that under the United States Constitution the functioning of the coordinate institutions of American Government is not suspended nor is their authority dissolved……..when the President undertakes extraordinary actions."

"It gives to the President a strong weapon which we cannot renounce under any circumstances." Press later wrote: "If ever in history, dictatorial powers were indispensable to a public authority, they were so for the national government of the young German Republic."

"As it appeared in final form, Article 48 in full provided:

"If a State does not fulfil the duties incumbent upon it according to the national Constitution or laws, the President of the Reich may compel it to do so with the aid of the armed forces."

"If the public safety and order in the German Reich are seriously disturbed or endangered, the President ...may take the measures necessary to the restoration of public safety and order, and may if necessary, intervene with the assistance of the armed forces. To this end, he may temporarily suspend in whole or in part, the Fundamental Rights established in Articles 114, 115, ,117, 118, 123, 124 and 153."

"The President ...must immediately inform the Reichstag of all measures taken in conformity with sections one or two of this Article. The measures are to be revoked upon the demand of the Reichstag. In cases where delay would be dangerous, the State Government may take for its territory temporary measures of the nature described in section two."

"The measures are to be revoked upon the demand of the President or the Reichstag.".

"A national law shall prescribe the details. The national law promised in the last sentence was never enacted. But even without supplemental legislation, it was clear that emergency powers were ultimately subject to civilian, and in particular legislative, control. Article 48 nevertheless also

reinforced the President's constitutional position because his authority derived directly and independently from the text and not from the delegated authority of the legislature, as was later the case with executive ordinances issued under Weimar's many enabling acts. In this respect Article 48, like so much of the Weimar Constitution, reflected an uneasy compromise between parliamentary and Presidential Government."

"Hitler also used Article 48 to intimidate his opposition in the March elections, in which the National Socialists, coupled with the Nationalists, finally secured an absolute majority in the Reichstag. Again in accordance with constitutional precedent, Hitler then sought an enabling act in which the Reichstag would effectively yield its legislative competence to the executive. The Reichstag, over the objection of the Social Democrats, granted the authority (in the Law for the Relief of the People and the Reich) for a period of four years, but conditioned it with limitations designed to protect itself and the institutional structure of the republic. Paragraph two sentence one provided; "The statutes decreed by the government may deviate from the Constitution with the reservation that they should not affect the institutions of the Reichstag and of the Federal Council" These qualifications did not, however, prevent Hitler from abolishing life tenure for civil servants or from compromising the independence of the judiciary. Nor did the act contain protections for individual liberties. "

60. He argued that judicial power is such which can never transform that which is unconstitutional into that which is constitutional. Mr. Khalid Anwar referred to the following passages from the book titled "The Federalist Papers" by Alexander Hamilton-James Madison-John Jay, wherein, at pages 464 to 470, 479 and 481 it was observed as under:-

"No. 78: Hamilton"

"We proceed now to an examination of the judiciary department of the proposed government. "

"In unfolding the defects of the existing Confederation the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined. "

“The manner of constituting it seems to embrace these several objects; 1st. The mode of appointing the Judges, 2nd. the tenure by which they are to hold their places, 3rd. The partition of the judicial authority between different Courts and their relations to each other.”

“Second. As to the tenure by which the Judges are to hold their places: this chiefly concerns their duration in office, the provisions ‘ for their support, the precautions for their responsibility.

“According to the plan of the convention, all Judges who ‘nay be appointed by the United States are to hold their offices during good behavior; which is conformable to the most approved of the State Constitutions, and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan is no light-symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of Government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any Government to secure a steady, upright, and impartial administration of the laws.”

“Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules .by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments..

“This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the Courts of justice, the general liberty of the people can never by endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that “there is no liberty if the power of judging be not separated from the legislative and executive powers.” And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone but would have everything, to fear from its union

with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being over powered, awed, or influenced by its co-ordinate branches; and that as nothing-can contribute so much to its firmness and independence as permanency in office, this quality may, therefore, be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

"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 the like. Limitations of this kind can be preserved in practice no other way than through the medium of Courts of justice, whose duty must be to declare all acts contrary to the manifesto tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." ,

"This independence of the Judges is equally requisite to guard the Constitution and the rights of individuals from 'the effects of those ill-humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies. in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it ,inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives' of the people; whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the Courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community. "

"First. To all cases in law and equity, arising under the Constitution and the laws of the United States. This corresponds to the two first classes of causes which have been enumerated, as proper for the jurisdiction of the United States.

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“The judicial power of the United States is” (by the plan of the convention) “to be vested in one Supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish.”

61. Mr Khalid Anwar describing the distinction between the judicial, legislative and executive power explained that whereas the executive and legislative power is pro-active the judicial power is essentially passive but it does not mean that it is weak but it means that it has to be invoked and that the Judges are to remain neutral, detached and impartial during judicial proceedings. Explained that the Bill of Attainder was criticized and condemned because in practice it amounted to pronouncement of legislative judgment which is an encroachment on the powers of the Judiciary. He appreciated the fact that in this case the Court vastly expanded the frontiers and scope of judicial powers and transformed its nature. Mr Khalid Anwar also placed reliance on the following observations made in the case of Al Jehad Trust v. Federation. of Pakistan PLD 1996 SC 324:-

“7. Our conclusions and directions in nutshell are as under:-

(i) The words “after consultation” employed inter alia in Articles 177 and 193 of the Constitution connote that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive.

(ii) That if the President/Executive appoints a candidate fund to be unfit and unsuitable for judgeship by the Chief Justice of Pakistan and the Chief Justice of the High Court concerned, it will not be a proper exercise of power under the relevant Article of the Constitution.

(viii) That an appointment of a sitting Chief Justice of a High Court or a Judge thereof in the Federal Shariat Court under Article 203-C of the Constitution without his consent is violative .of Article 209, which guarantees the tenure of office. Since the former Article was incorporated by

the Chief Martial Law Administrator and the latter Article was enacted by the Framers of the Constitution, the same shall prevail and, hence, such an appointment will be void."

"(xiii) That since consultation for the appointment/confirmation of a Judge of a Superior Court by the President/Executive with consultees mentioned in the relevant Articles of the Constitution is mandatory, any appointment/confirmation made without consulting any of the consultees as interpreted above would be violative of the Constitution and, therefore, would be invalid."

"82 We are interpreting the word `consultation' to widen and enlarge its normal scope for the reasons, firstly, that the Constitution-makers have not debated this word 'consultation' and fixed its parameters. Secondly, we would like to assign meaning to `consultation', which is consistent and commensurate with the exalted position of Judiciary as is envisaged in Islam. Thirdly, we would like to give positive interpretation to 'consultation' which promotes independence of Judiciary."

"88. Under Article 197 of the Constitution there is a provision for appointment of Additional Judges and' it appears that there is no requirement that they can be appointed only after the sanctioned strength of the Judges of the High Court is filled in with the permanent appointees. From this it appears that even against the vacancies within the sanctioned strength a person can be appointed as Additional Judge of the High Court for a period to be specified and then can be made permanent as communicated under Article 193. We are of the view that such Judges have legitimate expectancy to be entitled and considered for appointment upon expiry of their period of appointment as Additional Judges if and when they are so recommended for the purpose by the Chief Justice of the High Court and the Chief Justice of Pakistan. If such appointments are refused to be made then there should be strong reasons recorded in writing. Extension to be made or not is not the sole discretion of the Federal Government unless such request is made by the Chief Justice of the High Court and the CJP."

"93. Article 209 of the Constitution relates to the composition of the Supreme Judicial council and its functions. It enables the Council to take action or remove a Judge from the office on the ground of his incapability to perform the duties of his office for the reason of physical or mental incapability or misconduct. Sub-Article (7) of this Article provides that a Judge of the Supreme Court or of a High Court shall not be removed from the office except as provided by this Article. Sub-Article (8) of this Article provides that the Council shall issue the Code of Conduct to be observed by the Judges of the Supreme Court and High Courts. It is clear from the above provisions that the security of tenure is provided under Article 209 and also the forum for removal from the office as Judge of the High Court or of the Supreme Court. This provision is incorporated in the Constitution by the Constitution-makers. Subsequently, Chapter III-A setting up the Federal

Shariat Court was inserted in the Constitution vide P.O. No.l of 1980 providing in Article 203-C(4) that a Judge or Chief Justice of the High Court can be appointed to the Federal Shariat Court without his consent for a period not exceeding two years. After such appointment it is open to the President to modify the terms of the appointment of such Judge in the Federal Shariat Court or assign him any other office or require him to perform such other functions as the President may deem fit. If a Judge or Chief Justice of a High Court refuses to accept the appointment to the Federal Shariat Court, then he stands retired. No doubt, Chapter III-A inserted in the Constitution for the purpose of setting up of the Federal Shariat Court envisages that the provisions of this chapter shall; have effect notwithstanding anything contained in the Constitution, still the appointment of a Judge or a Chief Justice of a High Court to the Federal Shariat Court in such manner without his consent accompanying by such harsh conditions in the final analysis is tantamount to removal or forcible retirement which can and should be done only under Article 209 of the Constitution under which the Supreme Judicial Council is constituted and is authorised to take action of such punitive nature. If the Government finds a particular Judge or the Chief Justice of a High Court to be uncooperative and if there is sufficient material to support the charge of misconduct, then in all fairness action should be taken against him and proceedings should be initiated before the Supreme Judicial Council in the manner prescribed under Article 209. We are not striking down provisions (4), (4-B) and (5) of Article 203-C as void being inconsistent with Article 209 but we do say that, keeping in view the rules of interpretation, if there is choice between two forums or provisions, then the provision beneficial to the affected Judge should have been adopted or restored to, and in such circumstances, the resultant action is to be considered as void in absence of cogent reasons without going into the constitutionality of Article 203-C of the Constitution. The Constitution is to be read as a whole and if there is any inconsistency, the same can be removed or rectified by the Parliament. In support of the proposition, reliance can be placed on the cases of Fazlul Quader Chowdhry v. Muhammad Abdul Haque PLD 1963 SC 486 and Hakim Khan v. Government of Pakistan PLD 1992 SC 595.

At page 424, paragraph 21 of the above report it was observed:-

“21. (a) As regards the Islamic concept of justice, it may be pertinent to point out that in the early days of civilisation, the legislative, the executive and the judicial powers were vested in one person in a State, namely, in a Chieftain or a monarch or a ruler. The concept that there are three organs of the State which share the power of a State, namely, the Executive, the Legislature and the Judiciary, is somewhat a modern concept. Upon the advent of Islam, the Judicial functions were separated from the executive functions at its very initial stage by the Holy Prophet (p.b.u.h.) by appointing a Qadi for each Province. The separation of judiciary from executive was implemented more effectively during the Caliphate of Second Caliph Hazrat Umar as he appointed Qadis free of control of the Governors. The reason being that the foundation of Islam is on justice. The concept of justice in Islam is different from the concept of the remedial justice of the Greeks, the natural justice of the Romans or the formal justice of the Anglo-Saxons. Justice in Islam seeks to attain a higher standard of what may be called “absolute justice” or “absolute fairness”. We find

repeated references to the importance of justice and of its being administered impartially in Holy Qur'an and some of them are as follows:--

In one of the Verses of the Holy Qur'an Allah commands that---

Sura Aale-e-Imran

"O ye .who believe: Stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be against rich or poor, for Allah can best protect both. Follow not the lusts of your hearts; lest ye swerve, and if ye distort justice or decline to do justice, verily Allah is well-acquainted with all that ye do. "(4-135)

And in other Surah Allah commands as under---

Surah Maida, 5/9

"O ye who believe stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just, that is next to Piety: and fear Allah, for Allah is well-acquainted with all that ye do."

"Since there is a conflict between the above two. Articles, efforts are to be made to resolve the same by reconciling it. The Constitution is to be read as a whole as an organic document. A close scrutiny of the various provisions of the Constitution highlights that it envisages that the independence of judiciary should be secured as provided by the founder fathers of the country by passing Objectives Resolution and by providing security of tenure. The Constitution also envisages separation of judiciary from the executive. Keeping in view the various provisions of the Constitution, it is not possible to reconcile the above provisions of Article 203-C and Article 209. In such a situation, the question arises, which of the Article should prevail. One view can be that since Article 203-C was incorporated subsequent to Article 209 was incorporated by consensus by the framers of the Constitution and whereas Article 203-0 was incorporated by the then Chief Martial Law Administrator and as the same is detrimental to the basic concept of independence of judiciary and the separation of judiciary, the former should prevail. I am inclined to prefer the

latter interpretation as it will be more in consonance with the various provisions of the Constitution and in accord with justice and fairplay. A person cannot be appointed on adverse terms in a new Court without his consent." '

Reliance was also placed on the following observations made in the case of Mahmood Khan Achakzai (supra)

"For reasons to be recorded later, we pass following short order:

"What is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality but it can be said that the prominent characteristics of the Constitution are amply reflected in the Objectives Resolution which is now substantive part of the Constitution as Article 2A inserted by the Eighth Amendment.

"The Objectives Resolution was Preamble of the Constitutions made and promulgated in our country in 1956, 1962 and 1973. Perusal of the Objectives Resolution shows that for scheme of governance the main features envisaged are Federalism and Parliamentary Form of Government blended with Islamic provisions. The Eighth Amendment was inserted in the Constitution in 1985, after which three elections were held on party-basis and the resultant Parliaments did not touch this Amendment, which demonstrates amply that this Amendment is ratified by implication and has come to stay in the Constitution unless amended in the manner prescribed in the Constitution as contemplated under Article 239 and Article 58(2)(b) brought in the Constitution by the Eighth Amendment, which maintains Parliamentary Form of Government has provided checks and balances between the powers of the President and the Prime Minister to let the system work without let or hindrance to forestall a situation in which martial law could be imposed. "

"24. In the Pakistan Resolution passed on 23-3-1940 at Lahore it was resolved that. regions with Muslim majority, should be grouped together to constitute "Independent States" in which constituted units shall be autonomous and sovereign and rights of minorities to be protected. After partition Constituent Assembly of Pakistan passed Objectives Resolution, which was inserted in 1956 Constitution as Preamble. Objectives Resolution retained as Preamble in the Constitution of 1973 also can be read in order to gather the intention of the Constitution makers as to what type of governance and working set up was intended. It is noteworthy that to the Objectives Resolution it is mentioned that sovereignty over the entire universe belongs to Almighty Allah and the State shall exercise its power through the chosen representatives of the people. It is also mentioned in the Objectives Resolution that principles of democracy, freedom, equality, tolerance and social

justice as enunciated by Islam shall be enabled to order their lives in accordance with teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah and independence of judiciary shall be fully secured. Objectives Resolution was even retained in the Interim Constitution of 1972 as Preamble. This Court examined Preamble of Interim Constitution of 1972 in the case of Miss Asma Jillani v. Government of Punjab and another PLD 1972 SC 139 with relevant portion at page 141 with leading judgment by learned C.J. Hamoodur Rehman, who held as under:--

"In any event, if a grund norm is necessary, Pakistan need not have to look to the Western legal theorists to discover it. Pakistan's own grund norm is enshrined in its own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable norm which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on the 7th of March, 1949. This has not been abrogated by any one so far, nor has this been departed or deviated from by any regime, military or civil. Indeed, it cannot be, for, it is one of the fundamental principles enshrined in the Holy Qur'an."

"25. This question with regard to grund norm was examined again in the case of. State v. Ziaur Rehman PLD 1973 SC 49 and the same learned C.J. has clarified the position and the relevant portion of page 54 of the report is reproduced as under:--

"In Asma Jillani's case PLD 1972 SC 139 it has not been laid down that the Objectives Resolution is the grund norm of Pakistan but that the grund norm is the doctrine of legal sovereignty accepted by the people of Pakistan and consequences that flow from it. It does not describe the Objectives Resolution as "the cornerstone of Pakistan's legal edifice' but has merely pointed out that one of the counsel appearing in the case had described it as such. It is not correct, therefore, to say that the Objectives Resolution has been declared 'to be a transcendental part of the Constitution' or 'to be a transcendental part of the Constitution' or to be a `supra Constitutional instrument which is unalterable and immutable".

The "grund norm' referred to by the Supreme Court was something even above the Objectives Resolution which "embodies the spirit and the fundamental norms of the Constitutional concept of Pakistan'. It was expected by the Objectives Resolution itself to be translated into the Constitution. Even those that adopted the ' Objectives Resolution did not envisage that it would be a document above the Constitution. It is incorrect, therefore, to say that it was held by the Supreme Court that the Objectives Resolution of the 7th March, 1949, stands on a higher pedestal than the Constitution itself. "

……
……

"27. We are going into the question of validity of the Constitution (Eighth Amendment) Act, 1985, later but for the time being it would suffice to say that freedom bestowed upon the Parliament in clause (6) of Article 239 after amendment does not include power to amend those provision so the Constitution by which would be altered salient features of the Constitution, namely federalism, Parliamentary Form of . Government blended with Islamic provisions. As long as these salient features reflected in the Objectives Resolution are retained and not altered in substance, amendments can be made as per procedure prescribed in Article 239 of the Constitution."

62. Mr Khalid Anwar submitted that in the light of above observations it is not permissible to alter by amendment the salient features of the Constitution including Federal structure of the country and the parliamentary system of governance blended with Islamic provisions. Mr. Khalid Anwar also referred to the following observations of this Court in the case of Mahmood Khan Achakzai (supra).

Per Sajjad Ali Shah, C.J.

"28. Having disposed of the question with regard to the basic structure of the Constitution as stated above, now I advert to the second important issue with regard to the Eighth Amendment inserted in 1985 in the Constitution of 1973. Before I go into the arguments and contentions of the learned counsel appearing on behalf of appellants and petitioners, it would be pertinent to recapitulate the history very briefly. It was done so very succinctly by Mr. Abdul Hafeez Pirzada, who supported the stance of Mr. Abdul Mujeeb Pirzada, who is appellant. in C. A. No. 397-K- of 1990. Pakistan came into existence in 1947 after .which for the first time Constitution of 1936 was promulgated contemplating parliamentary form of Government. This Constitution was abrogated in 1958 and Martial Law was imposed. President Muhammad Ayub Khan gave to the country Constitution of 1962 contemplating Presidential form of Government which was again abrogated in 1969 when Martial Law was imposed. In the aftermath of Martial Law of 1969 C.M.L.A. General Yahya Khan did away with One Unit in West Pakistan and in the result four Provinces; Punjab, Sindh, N.W.F.P., and Balochistan re-emerged. This was done in response to persistent demand from-East Pakistan to stop acting on the principle of parity between two Provinces of East and West Pakistan as it was felt in East Pakistan that population-wise they had edge over people in West Pakistan. Demand of the people of East Pakistan was also conceded and elections were held by General Yahya Khan on the basis of adult franchise and one-man-one-vote. There was also discontentment in the East Pakistan and elections were fought on the basis of Six Points of Awami League of Sheikh Mujeebur Rahman of East Pakistan demanding maximum autonomy allowing only three subjects

for Centre and in other words it was a demand for a loose confederation. In the result of election Awami League of Sh. Mujeebur Rahman won with sweeping majority in East Pakistan and Pakistan People's Party was declared as having won as majority party in the West Pakistan. General Yahya Khan started negotiations between the parties for amicable settlement but was not successful and in the meantime military action was taken in East Pakistan as there was law and order situation resulting in riots and loss of life and damage to property. Finally, war broke out between Governments of India and Pakistan with India supporting morally and materially militant groups in East Pakistan. Finally, we lost East Pakistan as there was unilateral declaration of independence and a new country, Bangladesh came into existence."

Per Saleem Akhtar,J.

"42. The Constitution of India also provides for amendment of the Constitution. Before amendment of Article 368 it was identical to the original Article 239 of our Constitution. However when the Supreme Court of India struck down the amendments holding that it was in conflict with basic structure, Article 368 was amended and is identical to our amended Article 239. From a general assessment of the Constitutions 'of various countries it seems clear that in all the Written Constitutions, provision for amendment has been made. The object being to keep the Constitution alive and in line with the pace of progress, aspiration, will, needs and demands of the people. Constitution cannot be made static and stoic. It must progress, blossom and flower. A rigid Constitution having no provision for amendment is likely to suffer crack by violence or Constitutional deviation. Perhaps it is the historical experience that political philosophers and jurists favour provision for amendment in a written Constitution. Such provisions may restrict the power of amendment specifically as provided in France and Germany. But where an unrestricted power is given to the Legislature then Court will see whether an amendment to the existing Constitution has been duly proposed, adopted and assented in the manner required by the Constitution so as to become a part thereof. However, there are factors which restrict the power of the Legislature to amend the Constitution. It is the moral or political sentiment, which binds the barriers of Legislature and forms the Constitutional understandings. The pressure of public opinion is another factor which restricts and resists the unlimited power to amend the Constitution. In Pakistan although Article 239 confers unlimited power to the Legislature, yet it cannot by sheer force of morality and public opinion make laws amending the Constitution in complete violation of the provisions of Islam. Nor can it convert democratic form. in completely undemocratic one. Likewise by amendment Courts cannot be abolished which can perish only with the Constitution. It seems to be an emerging legal theory that even if the Constitution is suspended or abrogated, the judiciary continues to hold its position to impart justice and protect the rights of the people which are violated and impinged by the actions of the powers and authorities which saddle themselves by unconstitutional means. As held in Asma Jillani's case, such actors are usurps and the Courts had only condoned their action without approving it. The provisions of the Constitution cannot be suspended except as provided by the Constitution itself. The concept of abrogation of the Constitution is alien to the Constitution. The fact that whenever there occurred Constitutional deviation, it was legalised by condonation or validation granted by the Supreme Court, clearly

demonstrates that such deviations and actions were void ab initio and unconstitutional. The validation or condonation was granted merely to avoid any disruption of civil and personal rights, to maintain continuity of administration and governance and to bring the polity and system of government on democratic and constitutional rails. But such situation, with reference to Article 6 of the Constitution has to be viewed with greater seriousness."

"50. The learned Advocate for the respondents and the learned amicus curiae have contended that the competency of the members of the National Assembly is protected by the doctrine of de facto. Reference has been made to Farzand Ali v. Province of West Pakistan PLD 1970 SC 98 and Sabir Shah v. Federation of Pakistan PLD 1994 SC 738. This is a well-recognized doctrine embedded in our jurisprudence. Under this doctrine bona fide acts in public interest performed by persons assuming authority which turns out to be illegal are assumed to have been performed by a de jure authority/person and binding. This doctrine is intended to avoid dislocation, instability and confusion while declaring a de-facto authority illegal. In order to create stability, regularity and to 'prevent confusion in the conduct of public business and insecurity of private rights the acts of the officers de facto are not sufficient to be questioned because of want of legal authority except by some direct proceeding instituted for the purpose by the State or someone claiming office de jure ... ...' (Constitutional Limitations by Cooley - 8th Edition, Vo1.2, page 1357). Besides this, Mr. Khalid Anwar has referred to Norton v. Shelby County 118 US 425 where it was observed that the doctrine of de facto is based on considerations of policy and public interest. For good order and peace of society the title of persons in apparent authority is to be respected and obeyed until their title is investigated in some regular mode prescribed by law. In Gokaraju v. State of Andhra Prashad AIR 1981 SC 1473 it has been observed that `the acts of the officers de facto performed by them within the scope of their assumed official authority in the interest of the public or third persons and not for their own benefit are generally as valid and binding as if they were the acts of officers de jure'. This doctrine can be applied if the Parliament is declared to be illegally constituted and Eighth Amendment is declared unconstitutional. It is only in such situation that to preserve continuity, prevent disorder and protect private rights, this doctrine can be pressed in service."

"51. Mr. Syed Sharifuddin Prizada has contended that the Eighth Amendment has introduced checks and balances between the power of the President and the Prime Minister. As discussed above, the Constitution of 1973 had vested supreme power to the Prime Minister and though democratic in form it was Prime Minister in character. Amendments made in Articles 48, 58, 91 and 92 have curtailed the power of the Prime Minister and have strengthened the hand of the President. In a democratic system check and balance is provided to avoid autocratic rule and to provide balance of power for a proper functioning of the Government according to the Constitution. No doubt the amendments particularly Article 58(2)(b) have tilted the balance in favour of the President, yet this Court has structured and circumscribed the discretionary power of dissolution. One reason given in favour of Article 58(2)(b) is that it prevents Constitutional deviation. This seems to be plausible because when Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary, the

President may exercise his power before any person, agency or authority taking advantage of such situation strikes not at the Assembly but at the Constitution. One may comment that to save the Constitution, Assembly is dissolved. The exercise of power under Article 58(2)(b) or Constitutional deviation can be avoided not by the letters of the Constitution but by political ethics, morality and maturity. Unless a responsible Government exists which has respect for law, opportunity shall continue to be provided for Constitutional strike.

"53. It has also been pointed out that the controversy involves political question which the Courts should avoid to decide. The contention is more relevant with reference to the balance of power between the President and the Prime Minister. Such question is a political question to be decided by the Constituent Power. It, therefore, requires determination of what is a political question. A political question is one which because of its political sensitivity is not fit for adjudication by the Court or the Constitution requires it to be determined finally by any other organ of the State. This political question doctrine' is based on the respect for the Constitutional provisions relating to separation of power among the organs of the State. But where in a case the Court has jurisdiction to exercise power of judicial review, the fact that it involves political question, cannot compel the Court to refuse its determination.

63. Mr. Khalid Anwar then referring to the case of Wukala Mahaz Barai Tahafaza-e-Dastoor (supra), submitted that the rationale behind the said judgment .was that under the. 14th Amendment of the Constitution, certain restrictions were placed on speeches made .by the Members of National Assembly contrary to party policy and that any violation "thereof would lead to disqualification, but this Court by a majority decision held, as an aspect of judicial activism, that notwithstanding the language of the amendment, speeches made outside Parliament were not covered. The learned counsel termed it as an expansion of judicial power, in that, the amendment itself did not differentiate between speeches inside the parliament or outside it.

64. Mr. Khalid Anwar also referred to the short order in the case of Mehram Ali and others v. Federation of Pakistan etc. PLD 1999 SC 1445, to contend that this Court demonstrated expansion of judicial power in a wider shade. He made reference to the following observations of this Court in the case of Sardar Farooq Ahmad Khan Leghari and others v. Federation of Pakistan and others PLD 1999 SC 57:

"It has been pleaded that the petitions are also not maintainable because, the act of the President in proclaiming Emergency was in his sole power based on his own satisfaction which is not justiciable in a Court of law. It has also been averred that the Proclamation of Emergency as well as the order passed under Article 233(2) of the Constitution having been approved by the resolution of the joint sittings of the Parliament, now, expressed the will and satisfaction of the people of

Pakistan. It has been further averred that the will of the people of Pakistan having been expressed in the resolution of the joint sittings of the Parliament, an individual or a citizen of Pakistan has no locus standi to call in question the Proclamation of Emergency and the orders suspending the Fundamental Rights.

"12. The arguments were concluded on 28-7-1998 and the aforementioned Constitution Petitions were disposed of on the same day by the following Short Order:-

"For the reasons to be recorded later on, we unanimously hold as under: -

(1) That the petitions are maintainable.

(2) That the materials placed before this Court and shown to us in the chambers, prima facie indicate that the President was justified in issuing the Proclamation under clause (1) of Article 232 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution).

(3) That keeping in view the effect of the Proclamation provided for in clause (1) of Article 233 of the Constitution, which authorises the State to make any law or to take any executive action in deviation of Articles 15, 16, 17, 18, 19 and 24 of the Constitution and also keeping in view the language of Articles 10, 23 and 25 (which are hedged with- qualifications), we are of the view that an order under clause (2) of Article 233 of the Constitution for suspending the enforcement of the Fundamental Rights was not justified and, therefore, the original order dated 28-5-1998 and the order dated 13-7-1998 varying the above earlier order are declared as without lawful authority and of no legal effect.

(4) That this Court has jurisdiction to review/re-examine the continuation of Emergency at any subsequent stage, if the circumstances so warrant." .

"Then it was urged by Ch. Muhammad Farooq, learned Attorney General, that there is a significant distinction between the above two Articles inasmuch as once a Proclamation of Emergency is issued under clause (1) of Article 232 of the Constitution and an order under clause (2) of Article

233 thereof is passed for suspending the enforcement of Fundamental Rights mentioned therein, this Court cannot enforce, any Fundamental Right and, hence, it cannot entertain a petition under Article 184(3) of the Constitution, whereas there is no such suspension of the enforcement of Fundamental Rights in a case of issuance of a Proclamation under Article 234 of the Constitution. Indeed the above distinction exists. However, it may be pointed out that the suspension of the jurisdiction of this Court to enforce any one or more Fundamental Rights mentioned in an order passed by the President under clause (2) of Article 233 depends on the questions, as to whether the preconditions provided for in clause (1) of Article 232 were present at the time of the issuance of the Proclamation, and, whether the suspension of enforcement of anyone or more Fundamental Rights was warranted in terms of the constitutional framework. In other words, the exercise of power by the President under clause (1) of Article 232 is conditional and can be invoked if the conditions/prerequisites contained therein are present. If the said conditions do not exist, the exercise of power by the President under the above clause will be without jurisdiction and coram non judice. For example, if we were to hold that the expression "the security of Pakistan, or any part thereof is threatened by war or external aggression" used in clause (1) of Article 232 means actual war or actual external aggression, the exercise of power under the above clause would be without jurisdiction if factually no actual war or actual external aggression existed at the time of issuance of the Proclamation under the above provision; or if we were to hold that the reasons which prompted the issuance of Proclamation under aforesaid clause (1) of Article 232 have no nexus with the objects contained therein, such exercise of power by the President will also be without jurisdiction and coram non judice. "

" 17. It seems that by now it is a well-entrenched proposition of law that notwithstanding the ouster of jurisdiction of the Court and the fact that the formation of opinion in terms of the relevant provision of the Constitution or of a statute is to be based on the satisfaction of a State functionary mentioned therein, the Court has the jurisdiction to examine whether the pre-requisites provided for in the relevant provision of the Constitution/statute for the exercise of the power thereunder existed, when the impugned order was passed. If the answer of the above question is in the negative, the exercise of power will be without jurisdiction calling for interference by the Court.

"It may also be pointed out that the above views run counter to the Fundamental Rights guaranteed by the Constitution and the aforesaid International Covenants of Civil and Political Rights, European Convention on Human Rights and American Convention on Human Rights. In my view, a distinction is to be made between an emergency which is imposed when a country is engaged in an actual war or is subjected to actual external aggression and when the same is imposed on account of imminent danger thereof for the purpose of suspension of fundamental rights and continuation of the emergency. In the former case, the above Latin maxim inter arma silent leges (i.e. when there is an armed conflict, the law remains silent) or that the national success in the war is to be ensured in order to escape from national plunder or enslavement even if the personal liberty and other rights of the citizens are sacrificed as observed by Lord Atkinson in the case of King v. Halliday (supra) would be applicable. But in the latter case the` rule of proportionality is to be followed as propounded by some of the eminent authors and adopted under above Article 4 of the

International Covenants of Civil and Political Rights, Article 15 of the European Convention of Human Rights 1967 i.e. a public emergency permits a State to take derogatory measures in derogation of the covenants subject to the condition that the rule of proportionality is observed meaning thereby, that the derogatory steps/actions should be to the extent required by the exigencies of the situation provided such measures are not inconsistent with their other obligations under the international law. The above view is reinforced by the report of International. Law Association, 1986 referred to hereinabove in para. 36 (xix), that while imposing emergency following factors should be considered :-

(i) severity of cause defined generally as threatening' the life of the nation.

(ii) good faith on the part of the imposing Government;

(iii) proportionality (relating to geographic scope, duration, and choice of measures strictly required by the exigencies of the situation);

(iv) proclamation or notification;

non-derogability of certain rights;

(vi) respect for other international obligations;

(vii) non-discrimination.

"The rule of proportionality is also in consonance with the view obtaining in U.S-A. and Australia etc. namely, that a distinction has been drawn between the power of judicial review during actual war and after the cessation of hostilities already referred to hereinabove. Reference may again be made to the observation of Latham, C.J. in the case of Australia Communist Party (supra) that "tit Court in its decisions applied a rule that there must be a real- and substantial connection between the legislation and the defence situation so created in order that the legislation could be valid".

"47. In the present case the President passed first order under clause (2) of Article 233 of the Constitution on 28-5-1998 providing the right to move any Court including a High Court and the Supreme Court for the enforcement of all Fundamental Rights conferred by Chapter 1 of Part II of the Constitution and all proceedings pending in a Court which were for the enforcement or involving determination of any question as to the enforcement of any of the said rights, shall remain suspended for the period during which the said Proclamation was to remain in force."

He submitted that this Court, however, held that it has jurisdiction despite the suspension of Fundamental Rights.

65. Mr Khalid Anwar further argued that the alleged emergency took place on the evening of 12th October, 1999, which arose out of challenge to the removal from office of the Army Chief. He submitted that the Army Act is a complete code in relation to such matters and, therefore, if any illegality had been committed that should have been challenged under the Army Act and that with the removal of the Prime Minister from office, whether rightly or wrongly, the principle of proportionality, which is defined in this judgment as being limited to the geographic scope, duration and choice of measures strictly required by the exigencies of the situation, does not justify destruction of Constitutional governance for an indefinite period of time on a completely unrelated exigency, namely, the introduction of social or economic or financial policies. Mr. Khalid Anwar referred to the case of Al-Jehad Trust v. Federation of Pakistan 1999 SCMR 1379 to contend that the people of Northern Areas have been held to be entitled to self government, the right to vote, the right for enforcement of fundamental rights and, therefore, the people of Pakistan cannot be deprived of the similar rights.

66. Mr. Khalid Anwar next, quoting Article 14 of the Constitution which is to the effect that "the dignity of man and subject to law, the privacy of home, shall be inviolable", referred to a US case Roe v. Wade decided in 1972 whereunder the right of abortion was decided as a penumbra of right to privacy and, thus, expanded its judicial power.

67. Mr Khalid Anwar made a distinction between the ratio decidendi and obiter dicta, -saying that ratio decidendi contemplates the essential facts and principles upon which the case is decided and the rest is obiter dicta. He further submitted that on the basis of principle of stare decicis all these observations of the Court are obiter dicta and did not bind the Court. He submitted that assuming but not conceding that the doctrine of necessity is valid, still the finding in Begum Nusrat Bhutto's case is not applicable to the facts of the present case. .

68. Mr. Khalid Anwar referred to various observations from the case of Usif Patel and 2 others v. The Crown PLD 1955 FC 387 and Reference No. 1 of 1955 by His Excellency the Governor-General PLD 1955 FC 435. He also referred to the following passages from the book titled "Dissolution of Constituent Assembly of Pakistan and The Legal Battles of Moulvi Tamizuddin Khan" by Syed Sharifuddin Pirzada:

"It is submitted that the reasoning of Justice Munir is fallacious and his conclusions are erroneous. They have been aptly dealt with by Justice Cornelius in his dissenting opinion. On the question of dissolution Justice Muhammad Bukhsh in his Judgment has given cogent reasons. Reference may, therefore, be made to extracts from the aforesaid two judgments."

"The Governor-General's power of dissolution of Federal Legislature is withdrawn because the dissolution of Federal Legislature will mean the dissolution of the Constituent Assembly, which is not permissible under the provisions of Independence Act."…….The language employed in the Proclamation, however, is somewhat extraordinary. Relevant extract from it reads as follows.

"The Governor-General having considered the political crisis with which the country is faced, has with regret come to the conclusion that the constitutional machinery has broken down. He, therefore, has decided to declare a state of emergency throughout Pakistan. The Constituent Assembly as at present constituted has lost the confidence of the people and cannot longer function."

Mr. Khalid Anwar also relied on a passage from the book titled "Destruction of Pakistan's Democracy", by Allen McGrath, which reads thus :

"Instead, the Court upheld Umar Khan's sentence, not by relying on the precedents found in Anglo-American cases dealing with civil disturbances, but instead, by citing cases arising from British suppression of the Irish and African peoples in the nineteenth century. In the cases relied on, the British judiciary had allowed the colonial military authorities powers beyond those they would have been allowed to exercise at home or in other colonies during times of peace. Convictions of civilians by military boards were upheld by the Privy Council in several cases where civilian Courts were functioning at the time of the trial and sentencing. Munir relied oh cases which have been called `forgotten episodes' which had `provided a few fragmented rules'. An American Constitutional historian has commented on these cases, calling them `harsh'. And adding, `the many vigorous protests from eminent legal authorities suggest that such measures are

looked upon as usurpations and wholly out of harmony with the genius and spirit of English institutions.

"Munir was utilising cases which represented Britain the conqueror rather than Britain the law-giver. What resulted was a law of military rule in Pakistan not based on the restrained regulations for the use of the military which the British had found sufficient to control India. Instead, he relied on law which had arisen from the actions of the British Authorities taken amidst the bitter armed conflicts with conquered peoples in revolt in Ireland and South Africa, and applied that law to his own countrymen in peacetime."

He next relied on the extracts from the book titled "Transfer of Power Vol. VII", which read as follows:

"Q. Nobody objects to interim dominion status. Suppose there are two constituent Assemblies. Is it open to one of them to declare itself absolutely independent and the other to declare itself a dominion: That was the point that Mr. Devadas Gandhi made.

"A. If you grant independence and at the same time try to impose restrictions, the independence becomes a mockery.

"My dear Prime Minister,

"I am much conceived to hear from my colleagues whom you consulted yesterday that you propose to call the India Bill, "The Indian Independence Bill". This, I am, assured, is entirely contrary to the text, which corresponds to what we shave previously been told were your intentions. The essence of the Mountbatten proposals and the only reason why I gave support to them in because they establish the phase of Dominion status. Dominion status is not the same as Independence, although it may be freely used to establish independence. It is not true that a community is independent when its Ministers have in fact taken the Oath of Allegiance to The King. This is a measure of grave constitutional importance and a correct and formal procedure and nomenclature should be observed. The correct title would be, it seems to me, "The Indian Dominions Bill". I should, however, be quite willing to support if it were called, "The India Bill, 1947" or "The India Self-Government Bill.

I am glad to hear you are considering such alterations.

Believe me,

Yours sincerely,

WINSTON S. CHURCHILL"

"My dear Churchill,

I have delayed replying to your letter while awaiting any further communication from the Viceroy on the point raised by your colleagues as to the title of the Bill. Owing to the time factor, it was impossible to make a change evens if it was desirable.

"I do not agree with the point which you make. Dominion Prime Ministers constantly stress the point that they are independent States within the British Commonwealth. They bear allegiance to The King who is The King of all the Dominions. The insistence on independence does not touch the point of allegiance, but emphasizes the complete freedom of every member of the Commonwealth from control by any other member.

"I think this is a most valuable counter to the demand for independence outside tile Commonwealth as it shows that this demand can be satisfied within it. This is, in fact, the meaning of Dominion Status.

Yours sincerely,

C. R. ATTLEE"

Mr Khalid Anwar next referred to the following passage from "The Statute of Westminster and Dominion Status" by K. C. Wheare, which reads thus:

"There appear to be three distinguishing characteristics of the Dominions. First, they were marked off from the rest of the political world by the characteristic that they were territorial communities, other than Great Britain, which shared with Great Britain a common allegiance to the Crown; they all had the same king".

"By this criterion the Dominions were distinguished in status from foreign nations in international law and relations. They were shown to be `within the British Empire'. But, thus far, they .are not distinguished from other portions of the British Empire. India equally with Great Britain and the Dominions owed allegiance to the Crown; all the territorial communities within the British Empire owed allegiance in some form or another. How were the Dominions to be distinguished from these other communities? There was a second criterion. The Dominions were all equal in status to Great Britain; and, consequently they were all equal in status to one another. They were `in no way subordinate one to another in any aspect of their domestic or external affairs'. Equality is a difficult term. It is not certain what are its full implications here……."

69. Mr. Khalid Anwar vehemently argued that as a result of this Court's judgment in Moulvi Tamizuddin Khan's case (supra) whereby it was held that assent of the Governor-General was necessary to all laws passed by the Constituent Assembly, some 44 Constitutional Amendments were rendered invalid and as to section 223 A of the Government of India Act it was held that since it had not received such assent, it was not yet law. The Court did so notwithstanding the fact that the three organs of the State namely, the Legislature, the Executive and the Judiciary were unanimous on the point that the Constituent Assembly was a sovereign body and that when it functioned as a Constitution making body, the laws so framed by it did not require the assent of the Governor-General, though when it functioned as an ordinary Legislature, it required assent. He then referred to section 223-A of the Government of India Act, 1935, which reads as under

"223-A. Every High Court shall have power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority including in appropriate cases any government within those territories writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them."

70. Mr Khalid Anwar next submitted that under the Indian Independence Act, 1947, Britain transferred unconditionally and in unqualified manner all its powers to the people of Pakistan. This was irrevocable cession of power. He referred to the old version of section 19 of the Indian Independence Act, 1935, whereunder the Governor-General had the power to dissolve the legislature, to contend that such power was withdrawn in 1947. He then submitted that the conditions prevailing during that time do not fit in or apply to the present conditions.

71. Mr Khalid Anwar argued that in Reference No. 1 of 1955, sent by the Governor-General, the then Chief Justice Muhammad Munir, while expressing his opinion justifying the emergency, limited its scope by the following four conditions:

(i) immediate action for maintenance of law and order;

(ii) he exercises de facto powers, not de jure power;

(iii) only those de facto powers which the legislature would certainly have given to the Governor-General if the emergency could have been foreseen trusting that whatever he had honestly done was for the safety of the State, will be ratified by an Act of Indemnity and;

(iv) the legislature would have, without any doubt, approved and indemnified the same."

He contended that on the basis of Chief Justice Munir's formulation, the present Emergency deserves to be declared as unconstitutional.

72. Rebutting the plea on behalf of the government that the present Proclamation of Emergency is not Martial Law, in that, the Martial Law Courts are not operating, Mr. Khalid Anwar vehemently contended that apart from the fact that Martial Law Courts are not functioning, there is no difference between Martial Law as it existed in the past and the present Proclamation of Emergency. He submitted that there was a divergence between the stated objectives of the Chief Executive and the contents of the PCO whereunder he purportedly assumed the power to amend the Constitution. He explained that this happened merely because the present PCO is a copy of the previous PCOs. As to the plea of the Government that, there is a difference between Martial Law and an Emergency, in that, in an emergency powers of the Government are more restricted, Mr. Khalid Anwar contended that this Court should determine the limits of such powers. He next contended that the Constitution cannot be amended as the Proclamation does not confer any such power on the Chief Executive. He reiterated that this Court has jurisdiction and the power to declare the nature of Constitutional dispensation in Pakistan.

73. Arguments of Mr Khalid Anwar, can be summarized as follows:

1. That he will not request this Court to do the impossible.

2. That he referred to the nature of judicial power and its relationship with jurisdiction and maintained that no authority can take away power of this Court to confer legitimacy on a Government.

3. That the deliberations of Chiefs of Staff of -the Armed Forces and Corps Commanders of Pakistan Army alluded to therein was a historical fact and not a source of power.

4. That the Chief Executive had assumed an office which was non existent.

5. That there was no need to proclaim or continue Emergency as the situation in the country was calm and there were no agitations or demonstrations before the Army take-over.

6. That a Proclamation ipso facto cannot be a source of power in the absence of law.

7. That the doctrine of necessity was defective and in any event it cannot be invoked to justify the Military take-over and the instruments issued and actions taken subsequently.

8. That the National Accountability Ordinance, 1999 offends against the settled law and human rights having created an offence retroactively, was unconstitutional and also did not meet the criteria of establishment of Special Courts.

9. That the seven-point Agenda is in the best interest of the country which takes place under the law and not in violation of the law.

10. That seven-point Agenda was a political Agenda as the points unfolded by it were contained in the manifestos of the Pakistan Muslim League and the Pakistan People's Party.

11. That the suspension of the Constitution cannot be justified on the ground of good intentions of the Chief Executive.

12. That the PCO No. 1 of 1999 is devoid of legal authority being based on the Proclamation of Emergency dated 14-10-1999 which had neither disclosed the source of power under which it was issued nor had conferred any power on the Chief Executive, who was its sole author.

74. When asked by the Court to suggest a workable solution for resolving the controversy raised in these petitions, Mr. Khalid Anwar respectfully replied in the following terms:---

First, the Court can condone past and closed transactions in order to avoid chaos and anarchy though they were not valid;

Secondly, the Court. can condone those actions which are conducive to return to constitutional rule. He, however, emphasised that the Court may either allow the petitions as a whole or in the

alternative may confine it to a declaration in this case and lay down a roadmap and a time frame for return to democratic rule and holding of elections.

CONSTITUTION PETITION NO. 53 OF 1999

75. At the outset, Mr. Habib-ul-Wahab-ul-Khairi, learned ASC, petitioner in Constitution Petition No. 53 of 1999, quoted verses 8 to 10 from Chapter V Sura Al-Ma'idah and verse 135 from Chapter IV Sura AnNisa of the Holy Qur'an to contend that the Islamic concept of `Adl', which is a universal concept and also provides for equity and `Ihsan', should be followed by this Court in' deciding the present and the connected petitions. He further submitted that it is the Judiciary alone which can make or mar the destiny of our nation, because the absence of justice invariably leads to the disintegration and ultimate destruction. He argued that Judges are the watchmen and their watchman is their conscience as they are answerable to their conscience and God.

76. He. stressed that so far as Judiciary is concerned, there was no need of the PCO because the Courts. were functioning normally on October 12, 1999. He supported the law laid down in the case of Begun Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan PLD 1977 SC 657, with special reference to the observations made at pages 692 (citation-F), 715-717 (citation-UV), 721-22 and 733 (citation- HH). He also quoted an extract from the above judgment wherein views of Mr. Brohi and Syed Sharifuddin Pirzada were recorded , to the effect that notwithstanding fresh oath administered to the then Judges of the Superior Courts, their independence and impartiality to decide the cases had not been affected. He contended with vehemence that this Court has the power and jurisdiction to hear these petitions.

77. It was next contended that a Judge of the Superior Court cannot be removed otherwise than by following the procedure laid down in Article 209 of the Constitution. He further contended that the Judges are deputies of God for administering justice, therefore, the Judiciary should guard against attacks on its independence. He submitted that even after the promulgation of PCO, the Judges of the superior Courts have to abide by the provisions of the Code of Conduct and perform their primary duty of administering justice according to their conscience. He then quoted some extracts from the case of Miss Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416, which read as under:

"Our Constitution envisages democracy as ethos and a way of life in which equality of status, of opportunity, equality before law and equal protection of law obtains. It has its foundation in representation; it is not a system of self-government, but a system of control and the limitations of

government. A democratic polity is usually identified by the manner of selection of its leaders and by the fact that the power of the government functionaries is checked and restrained. In a democracy the role of the people is to produce a government and, therefore, the democratic method is an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive, struggle for the people's vote. Fundamentally democracy rests upon the idea of freedom."

"Parliamentary Government is a government of the party and a party government is a vital principle of a representative government. The political party is a connecting link between the Executive and the Legislature, between the Cabinet and the Parliament. It is also a connecting link between the Cabinet and the people and between the Parliament and the people. For this reason the political parties are necessary and important features in a Parliamentary democracy. They are important because the group victorious at a general election becomes the government. In a nutshell a Parliamentary democracy depends for its success on the organization of political parties and its disciplined support of Parliamentary majority is sine qua non of Cabinet Government composed of the Prime Minister and the Ministers from the majority party. They, thus, provide leadership to public offices through the elections.. They are now necessary part of a democratic government. Rival parties make elections meaningful by giving voters a choice among candidates who represent different interests and points of view. The party or parties that are out of power serve as a "loyal opposition" as understood in Parliamentary democracy. That is, they criticise policies and actions of the party in power. In this way the party in power is called on to justify its actions and is made responsible to the people." .

"Therefore, there cannot be any doubt that the Ideology of Pakistan is based on Muslim nationhood and includes Islamic Ideology which in clear terms in the Constitution means Injunctions of Holy Qur'an and Sunnah and was the principal factor in the concept of Muslim nationhood. It is this Pakistan Ideology which resulted in the partition of the sub-continent and is knows as a two-nation theory."

"Quaid-e-Azam in his speech on the Pakistan Resolution of the All India Muslim League on 24th March, 1940, said:

"Mussalmans are a nation according to any definition of opinion and they must have their home and their territory and their State. We wish our people to develop to the fullest spiritual, cultural, economic, social and political like in a way that we think best and in consonance with our own ideas according to the genius of our people. "

"The concept of Islamic Ideology is interwoven with the ideology of Pakistan and is inseparable as it is the foundation of two-nation theory. Therefore, "integrity of Pakistan" not only includes Ideology of Pakistan but also Islamic Ideology. Any invasion of "integrity of Pakistan" will inevitably lead' to an invasion of its sovereignty and vice versa. I may here state that maintenance of public order is an aspect of exercise of sovereignty. (Encyclopaedia Britannica, Vol. 17, Ed. .15, P.309. As will appear from the conclusions of Hamoodur Rahman, C.J., "public order" must be regarded to be included in the expression "sovereignty or integrity of Pakistan". This is not all. Any attempt to create doubts in the people's belief either vocally or by force against the comprehensive concept of Ideology of Pakistan which is the basis of the creation of the country will also be an invasion of the sovereignty or integrity of Pakistan as it would undermine the security and solidarity of the State by destroying the legal order."

"It was contended by the learned counsel for the petitioner that the Partition Agreement which guaranteed the safeguards of the minorities in Pakistan should also be regarded as a part and parcel of the expression "Ideology of Pakistan". I do not see how it can be included within it as this was a special creed which led to the Partition of India and has its own meaning and significance and even today preserves the sovereignty and integrity of Pakistan. The safeguards have been duly implemented in the Constitution in the shape of Fundamental Rights where there is no discrimination and so also in the Principles of Policy and elsewhere. The agreement stands apart and cannot be read as a constituent of the Ideology of Pakistan. "

"While raising this submission the learned Attorney-General filed to notice that this Order was an existing law under sub-Article (3) of Article 270-A and was not protected either under sub-Article (6) of this Article nor was it specified in the First Schedule under Article 8(3) (b) of the Constitution. Article 2 of this Order places it higher than the Constitution by the use of the words "shall have effect" which mean shall have legal effect, while Article 3 is worded so as to make it a substitute of Article 17(2) of the Constitution. It provides additional constraints apart from sovereignty or integrity of Pakistan. Upon the revival of the Constitution the Fundamental Rights were also revived including Article 17 without any amendment. Article 17(2) was, therefore, a higher norm than this Order which could not prevail as against it in spite of the enacting words "notwithstanding anything contained in the Constitution." It can only co-exist as a subordinate legislation if it is consistent with the Fundamental Right. Abdul Wali Khan's case has confined the restrictive clause to sovereignty or integrity of Pakistan. This being so other specified constraints are outside the purview of Article 17(2) and cannot operate to override the fundamental norm; and as President's Order No. 20 of 1978 is existing law under sub-Article (3) of Article 270-A, no question of any repeal by implication arises. What I find is that this Order is the basis for extensive amendments in section 3 and the other provisions of the Act by Ordinance 41 of 1978. Before the amendment of this section the only words which found place in it were "sovereignty or integrity of Pakistan" which were inserted in the light of the constraints in Article 17(2) of the 1973 Constitution. Sections 3-A and 3-B of the Political Parties Act, 1962, were inserted by Ordinance 42 of 1979 on 30-8-1979 and 3-C by Ordinance 53 of 1979, 'dated 8-10-1979. Section 3-B was further amended by Ordinance 52 of 1979 promulgated on 27-9-1979. President's Order

20 of 1978 by its status as being an ordinary law cannot give any protection to the impugned as being an ordinary law cannot give any protection to the impugned provisions of the Political Parties Act as against Fundamental Right 17(2). Therefore, even if it co-exists with the Political Parties Act, 1962, it is of no effect although it remains on the statute book."

"8. The foregoing observations are for the implementation of a very important part of the mandate of Article 17(2). It might help avoid any large scale national effort to overthrow a fully entrenched political party which otherwise falls within the mischief of Article 17(2) - by unorganized force or by organized one which might be projected as right. In either case the Courts including the superior ones are the worst-hit, besides other consequences. For example, superior Courts, in such situations are made to lose their effectiveness; which in ordinary course, in the case of normal Government, can and do exercise checks through the balancing process, in eventualities of undue acquisition or use of State Power. Our code of conduct, when left free to operate ordains as follows:---

"The Constitution, by declaring that all authority exercisable by the people is a sacred trust from Almighty Allah, makes it plain that the justice of this nation is of Divine origin. It connotes full implementation of the high principles which are woven into the Constitution, as well as the universal requirements of natural justice. The oath of a Judge implies complete submission to the Constitution, and under the Constitution to the law .... On equipondernace stand the heavens and the earth. By equiponderance, oppression meaning unjust and unequal burdens is removed. The Judge's task is to secure that such equality should prevail in all things."

78. He emphasised that Pakistan owes its existence to Islamic ideology and justice or 'Adl' is the pivot of Islam, therefore, the Judiciary in Pakistan is not a creation of the Constitution, as is assumed, but it came into existence with the creation of the country and can never be abolished. He argued that the Judiciary derives its powers and duties from the Islamic principles and since Islam gives fundamental importance to the system of justice, the Courts will continue to exist and the Judges will perform their functions in accordance with the Islamic principles and their conscience. He further submitted that with the suspension of the Constitution, Islam is not suspended. In the beginning, all the powers, viz., executive, legislative and judicial, vested in one man, the Holy Prophet (p.b.u.h.), but with the advent of the institution of Khilafat, they were gradually separated.

79. He contended that whenever the Armed Forces take over the government of the country, they promulgate PCO and the Judges of the Superior Courts are required to take fresh oath under it. Elucidating his point the learned counsel submitted that the oath taken by the then Judges of the Superior Courts under the PCO of 1981 and the oath taken by the Judges of this Court under the

Order 1 of 2000 was only recognition of the ground realities and it did not disqualify, in any way, the Judges of the Superior Courts from doing justice according to the law and their conscience. He submitted that in other words, with the taking of fresh oath by the Judges of the Superior Courts under the new dispensation, the judicial system of the country has neither been abolished nor replaced by a new one. In this behalf, he referred to the following observations of this Court in Begum Nusrat Bhutto's case PLD 1977 SC 656:-

"Mr. Brohi as well as Mr. Sharifuddin Pirzada were also asked to address the Court on the possible effect and implications of the new oath of office administered to the Judges of the -Supreme Court and the High Courts after the imposition of Martial Law. They both stated that, in their view, the new oath has not in any manner restricted the independence of the superior judiciary, nor affected their obligation to perform their judicial functions according to law; it only indicates that the superior judiciary, like the rest of the country, has accepted the fact, which is even otherwise also evident, that on the 5th of July, 1977, a radical transformation took place in the pre-existing Legal Order. Both the learned counsel are agreed, and Mr. Yahya Bakhtiar, learned counsel for the petitioner, joins them, that the taking of the fresh oath by tile Judges of this Court does not in any way preclude them from examining the question of the validity of the new Legal Order and decide the same in accordance with their conscience and the law."

At page 704-K it was observed:-

"It will be seen that the explanation given by General Muhammad Ziaul Haq for the Army.'s intervention is a true reflection of the situation which had been developing over the past four months as a result of the Pakistan National Alliance agitation and repudiation of Mr. Bhutto's constitutional and moral authority as Prime Minister of Pakistan. The statement correctly brings out the necessity for the imposition of Martial Law. It is also clear that this sincere and unambiguous declaration of his objectives by the Chief Martial Law Administrator was a major factor in persuading the people of Pakistan to willingly accept the new dispensation as an interim arrangement to bridge the gap between the break-down of the previous administration and the induction of the new elected Government under the terms of the 1973 Constitution. The new arrangement, therefore, acquired its effectiveness owing to its moral content and promise of restoration of democratic institutions. I may add here that the willingness of the Judges of the superior Courts to take the new oath after the proclamation of Martial Law was also founded upon the same considerations. "

80. Justifying the Military take-over, Mr. Khairi submitted that removal of the Chief of the Army Staff, who was holding a constitutional post and was responsible for the defence of the country, in a derogatory manner, amounted to high treason, especially in view of the fact that he was first

appointed as Chief of the Army Staff by the then government and was later appointed as Chairman, Joint Chiefs of Staff Committee and confirmed as such just a week before his removal. There was, thus, no option with the Army but to take over the affairs of the country as a last resort.

81. He alleged that a conspiracy was hatched by Mr. Nawaz Sharif against the Armed Forces, whereby he removed Gen. Pervez Musharraf while the latter was out of Pakistan and instead appointed Lt. Gen. Ziauddin Butt.

82. Mr. Khairi next contended that Mr. Nawaz Sharif was responsible for creating dissension among the ranks of the Armed Forces. In this connection, Lt. Gen. Tariq Pervaiz had had a meeting with the former Prime Minister without permission of the higher Army authorities, which was a grave breach of discipline. Thus, he was retired for violating the discipline of the Army.

83. Mr Khairi submitted that since with the appointment of Lt. Gen. Ziauddin Butt as Chief of the Army Staff, the defence of the country was jeopardized and the order of removal of General Pervez Musharraf from his office, passed by the former Prime Minister had no sanctity in law, therefore, by refusing to obey an illegal order, the military authorities had not committed any wrong. In this context, reliance was placed on Begum Nusrat Bhutto's case, wherein at page 727 (EE), it is observed as under: -

"It is thus abdundantly clear that submission to the authority of the ruler and obedience to his commands does not extend to illegal and un-Islamic directives or orders……."

He further relied on Controller of Patents and Designs, Karachi v. Muhammad Quadir Hussain 1995 SCMR 529 at page 533 placitum-B and 534 placitum-C, which read as under: -

"There can be no cavil with the proposition that the Government of Pakistan or for that matter any of the holder of its offices, or any Government functionary do not enjoy any conventional prerogative as was or is available to Crown in England except those discretionary powers which are either specifically conferred by the Constitution or under any law passed by the Parliament. We are also of the view that any discretionary power available to Government or its functionaries in the nature of prerogative either under the Constitution or under any of the Act of the Parliament is subject to the-process of Judicial review by the Superior Courts, in accordance with their jurisdiction under the Constitution. However, any exercise of discretionary power in the nature of

a prerogative claimed by the Government or holder of any of its offices, or its functionaries has to be justified either under some statute law or under the provisions of the Constitution, before it is pressed into service before a Court.

"7. Considering the above definitions of the word `prerogative', we are of the view that the expression `prerogative of the Federal Government, used in section 79 of the Act is to be understood in the sense of a discretionary power of the Government conferred on it under the provision of the Act. Prerogative as commonly understood a divinely right or an unbridled or uncontrolled discretion of a Ruler or a Sovereign is neither available in Pakistan nor it is contemplated in that sense, under section 79 of the Act. Since the prerogative of the Federal Government mentioned in section 79 of the Act is exercisable only as a discretionary power wider the Act in public interest, it is naturally subject to review by the Superior Courts in exercise of their power of judicial review under the Constitution. A careful study of various provisions of the Act will show that the right to claim a patent under the Act is not an absolute right. For instance, the Controller, under section 69 of the Act has the discretion to refuse to grant a patent for an invention or register a design of which the use would, in his opinion, be contrary to law or morality. The controller, under section 68 of the Act, in case of any doubt or difficulty arising in giving effect to the provisions of the Act, is empowered to make a reference to the Central Government for seeking directions in the matter. By reading sections 68 and 69 of the Act together it can be gathered that the Central Government in exercise of its prerogative or discretionary power, under section 79 of the Act, can withhold the grant of a patent or restriction of a design, if it reaches the conclusion that such withholding will be in the public interest or for the public good or would be against any provisions of the Act or morality."

He also sought support from the judgments reported as Zahid Akhtar v. Government of Punjab PLD 1995 S.C. 530; in this behalf.

84. He also referred to Article 243 of the Constitution, which deals with the Armed Forces. Clause (1) of the said Article provides that the Federal Government shall have control and command of the Armed Forces. He submitted that although the word `government' is not defined in the Constitution, but certainly Prime Minister alone is not the `government'. It is the cabinet headed by the Prime Minister. He submitted that the order passed by the Prime Minister removing the Chief of the Army Staff was not approved by the Cabinet, but was the result of whims of one man. He next submitted that though under the Constitution, procedure for the appointment of Chief of the Army Staff is given but no procedure for his removal has been laid down therein. In this behalf, he also referred to sections 16, 17 and 20 of the Pakistan Army Act and contended that procedure for dismissal or removal of personnel of the Armed Forces is laid down therein, but it does not contain any provision regarding removal of the Chief of the Army Staff. The above sections read thus:-

16. Dismissal or removal by Federal Government.-The Federal Government may dismiss or remove from the service any person subject to this Act. .

17. Dismissal or removal by Chief of the Army Staff or other authorised officer.- (1) The Chief of the Army Staff may dismiss or remove from the service any junior commissioned officer or warrant officer or any person enrolled under this Act.

(2) An officer having power to convene a district Court martial or an officer not below the rank of lieutenant-colonel empowered by the Chief of the Army Staff in this behalf may dismiss or remove from the service any person enrolled under this Act who may be serving under his command.

20. Discharge or dismissal when out .of Pakistan.- (1) Any person subject to this Act, who is entitled under the conditions of his service to be discharged, or whose discharge is ordered by competent Authority, and who, when he is so entitled or ordered to be discharged, is serving out of Pakistan, and requests to be sent to Pakistan, shall, before being discharged, be sent to Pakistan with all convenient speed.

(2) Any person subject to this Act who is dismissed from the service and who, when he is so dismissed is serving out of Pakistan, shall be sent to Pakistan with all convenient speed.

(3) When any such person as is mentioned in subsection (2) is sentenced to dismissal combined with any other punishment, such other punishment, or in the case of a sentence of imprisonment for life or for a shorter term, a portion of such sentence, may be inflicted before he is sent- to Pakistan.

Explanation- For the purposes of this section, the word “discharge” shall include retirement or release, and the word “dismissal” shall include removal.”

He was of the view that it is the constitutional duty of the Supreme Court to safeguard the defence of the country and even the Armed Forces are obliged to obey the orders passed by this Court in this regard. In support of his plea, he relied upon the judgment reported as Al-Jehad Trust v. Federation of Pakistan 1999 SCMR 1379, wherein at page 1396 (citation F) it was observed as under:-

"20. Keeping in view the above judgments of this Court in the cases of Mian Muhammad Nawaz Sharif (supra), Azizullah Memon (supra), AI-Jehad Trust (supra), Mahmood Khan Achakzai (supra) and Mehram Ali (supra), and the above Articles 2A and 17 of the Constitution, the people of Northern Areas are entitled to participate in the governance of their area and to have an independent judiciary to enforce inter alia the Fundamental Rights." .

At page 1400 of the above report, it was observed thus:

"25.It is apparent that direction/directions to take administrative actions/measures required by the Constitution can be issued against the Federation, but no direction can be issued to the Legislature to legislate a particular law. However, a direction can be issued to the Federation to initiate administrative and legislative measures for complying with the mandate of the Constitution ...."

85. He vehemently contended that democratic governments come into existence as a result of free and fair elections, but all the elections except the election for the Constituent Assembly held in Pakistan, were a total fraud, therefore, the governments coming into existence on the basis of such fraudulent elections had no constitutional and moral sanctity. First elections under the 1973 Constitution were held on 7th March, 1977, which were not free and fair and their real facet is to be found in the judgment in Nusrat Bhutto's case (supra), wherein this Court dilated upon the details of large scale rigging that took place in those elections and concluded that the government of Mr. Bhutto had no legal and moral authority to continue in office. He further contended that in order to guard against the corrupt practices in elections, Article 218 of the Constitution has laid down a mechanism, but unfortunately the commandments of the Constitution are not obeyed and that PML (Nawaz Group), in its first term, after its coming into power, omitted sections 48, 49, 50 and 51 of the Representation of People Act, 1976 whereby the restrictions regarding election expenses were removed and resultantly only moneyed persons in Pakistan could contest elections and it has been rendered impossible for an ordinary citizen to participate in the election. He next contended that political cell of ISI played a major role in election of the members of the Parliament by distributing huge sums of money among the candidates of IJI and, thus, paved the way for corrupt elements to come into power, who were not true representatives of the people of Pakistan. He submitted that no action was taken against corrupt members of parliament under Article 63 of the Constitution. Dilating further on those elections, Mr. Khairi referred to affidavits filed by

General Asad Durrani, the then Chief of ISI and Gen. Naseerullah Babar wherein details of the amounts disbursed by the ISI among various politicians have been given. He emphasized that in presence of the political cell of the ISI, fair elections cannot be held and that it is the legal duty of the present regime to abolish this cell. He further contended that in 1997 Elections the so-called "heavy mandate" claimed by the former government was also the result of manipulation of the ISI and it was for this reason that Mr. Nawaz Sharif had refused to abolish this cell and that the mandate so obtained by Nawaz Sharif was a farce and had no lawful and moral authority. He submitted that democracy means 50% votes at least and that in fact the people of Pakistan had never voted to that extent and the governments had only technically won the elections. That is why when such governments were removed, there was none to express remorse for them.

86. Mr. Khairi next contended that every regime considers the Judiciary as a hurdle in its way and tries to eliminate or undermine it.

87. Mr. Khairi submitted that the Court should explore as to what laws should hold the field during the period the Constitution is held in abeyance In this behalf, he referred to the judgment reported as Federation of Pakistan v. N.-W.F.P. Government PLD 1990 SC 1172 wherein at page 1175 of the report it was observed:

"In such state of vacuum, vis-a-vis, the statute law on the subject, the common Islamic law/the injunctions of Islam as contained in the Qur' an and Sunnah relating to the offence of Qatl and Jurh (hurt) shall be deemed to be the law on the subject."

He also, referred to the case of Mian Aziz A. Sheikh v. The Commissioner of Income Tax, Investigation, Lahore PLD 1989 SC 613, wherein at page 626, it was observed:

"But, this prohibition in clause (2) of Article 227 does not apply to decisions by functionaries of State of judgment, as distinguished from exercise of law-making or statutory rule-making authority, they take decisions. In other words whatever a decision is contained in any such judgment of any such. functionary which lays down a rule of law or declares so as a rule of law the superior Courts, shall be within their competence in a properly instituted proceedings to strike it down both under the general mandate contained in clause (1) of Article 227 as well as under Article 2A read with the Objectives Resolution."

88. He submitted that it has been laid down by this Court that in case of vacuum, the Islamic common law shall be applied by the Courts. In Hakim Ali's case, the Judiciary has been included in the `Oo lil amr'. He reiterated that no authority can violate the Islamic ideology. The supremacy of the injunctions of the Holy Qur'an and the Sunnah of the Holy Prophet (p.b.u.h.) is an established phenomenon as held in the case of Mst Kaneez Fatima v. Wali Muhammad PLD 1993 SC 901 wherein it was observed:

"8. In this context it may be observed that while interpreting Constitution, enactments, rules and regulations having the force of law and examining orders, acts and actions of Government functionaries/authorities the Court is competent to apply well-recognised principles of Islamic Common Law and such interpretation which is in conformity with the Injunctions of Islam. In the fields not occupied by statutory dispensation, principles of Islamic Common Lava or principles in conformity with Injunctions of Islam can be pressed into service.

"9. Article 2A is one of the provisions of the Constitution which strives at bringing the existing law in conformity with the Injunctions of Islam and also gee to it that no law in conflict with such Injunctions is legislated. The method for testing such legislation and enactments has been provided under the Constitution. One is provided in Article 227 in Part IX of the Constitution and the other and more effective method is provided by Chapter 3-A of Part VII of the Constitution; that is the Federal Shariat Court. Article 203-D vests powers and jurisdiction in the Federal Shariat Court to examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam. On coming to an affirmative answer it shall give its decision with reasoning for holding such an opinion and shall specify the day on which the decision shall take erect. However, if any party files an appeal before the Supreme Court, effect shall not be given till such time the appeal is disposed of. Consequences of declaring any law or provision of law to be repugnant to the Injunctions of Islam are contained in Article 203-D(3). The President and the Governor in cases of law within their. respective jurisdiction shall take steps to amend the law so as to bring such law or provision of law in conformity with the Injunction-s of Islam and such law or provision of law shall cease to have effect on the day on which the decision of the Court takes effect. Therefore. a proper scrutiny of the provisions of law by the . Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court with an interregnum period has been provided to enable the President and the Governor, as the case may be; to move the Legislature to bring the law in conformity with the Injunctions of Islam. The intervening period has been provided to enable the Legislature to legislate proper laws and there may not be a vacuum of lawlessness which may create complications and confusion. The process. of Islamisation of the laws is an important and difficult subject. The lead given by Pakistan in this regard is being watched with interest by all the Muslim countries who are anxious to bring their laws in conformity with the injunctions of Islam and by the non-Muslim countries as well. Any hasty action without the process of Ijma at Ummah level may lead to difficulties and confusion which may prove irreversible. Furthermore, due to sudden change, complex problems in economic, commercial and financial fields may arise creating difficulties. However, it does not mean that in the fear of such new controversies and

problems the process of Islamisation may be retarded or stopped. It is an ongoing process. It has to take effect with utmost despatch, vision and regularity. .

He also referred to the case of Fazle Ghafoor v. Chairman, Tribunal of Disputes, DIR, SWAT at Chitral at Mardan 1993 SCMR 1073 wherein at page 1077 Placitum-D, it was observed:

"This mode of proof is adaptable in the Islamic dispensation also, even if not in any other. When there is such a vacuum on a question of law left by statutory silence, the prevailing mode having full Constitutional support, would be that of Islamic common law. See Muhammad Bashir v. The State PLD 1982 SC 139.

He also referred to Ghulam Hamdani v. Muhammad Iqbal 1993 SCMR 1083, wherein at page 1089 Placitum-C, it was observed:

"In the case of Federation of Pakistan v. N.-W.F.P. Government PLD 1990 SC 1172 the Shariat Appellate Bench of this Court, though in a criminal matter, expressed the view that in a state of vacuum like the one in question the injunction of Islam as contained in the Qur'an and Sunnah shall be deemed to be the law on the subject. The appellant has pleaded Talbs in the plaint and has based his right of pre-emption on contiguity and participation in immunities and appendages such as the right of way. This much was sufficient to complete the pleading."

Case of M. Ismail Qureshi v. M. Awais Qasim 1993 SCMR 1781, was also pressed into service wherein it was observed:

"It is not the students organization which is primarily responsible for the observance of the ideological basis of Pakistan in the educational institutions; rather the institution and its functionaries are not only responsible primarily but always responsible in this behalf. A functionary in a Pakistan institution who is against the ideological basis of Pakistan, as is enshrined in our Constitutional set-up; or is against the training of his wards entrusted by the institution to him in line with it; is against or neglects and does not propagate ideology of Pakistan, amongst the students community, has no right to remain in the institution. And if the institution itself commits such acts or omissions, it is better to close, rather than to permit it, to contravene the Constitutional set-up of Pakistan. Therefore, it will be more advisable to re-entrust the education and training of the students on the lines of the ideology of Pakistan to the teachers and the institutions themselves

under the pain of penalty. This of course is with a clarification that the groups under whatever name, through which the so-called Union activity will be revived in the educational institution, would not be debarred from the ideological path and educating and training themselves in that behalf; but only with the assistance, guidance and help from their parents, their teachers and institutions. No one student or group can be given an unbridled right to control and coerce another student or group. The parental atmosphere jurisdiction and philosophy has to be followed on this subject also. "

"The argument advanced by the Jamiat; which has been dealt with above is not only relevant; but is also important in another context of practical application in Pakistan. It is also in line with the whole gamut of our statecraft. Its features are spread over several parts of our Constitution and the entire Constitutional set-up can be very useful for future ideological orientation in our polity. . Thus, the possibility of creating a mid-way, political party structure as some youth wings are, cannot be excluded altogether. But instead of riding the wings of educational institutions or flying under the wings of the student community; the politically oriented/minded youth after completing the education and/or training in the institutional atmosphere, may join those youth wings of the like minded political parties. Those who are imbued with national service and we do feel that entry in political life is also a national service, might be able to develop such a youth political set-up, which would obviate the "indulgence in politics" in the educational institutions."

"Such experiment can be faithfully and honestly undertaken by educated young people, fresh from the Universities who are full of like and vigour with national spirit, might join the profession of politics in the form of apprentices or make junior political parties. If such intermediary system develops, the linkage with senior parties and senior politicians would automatically start developing. And without any "indulgence in politics" in the educational institutions, final stage students community also, might start looking towards the intermediary political organizations in the country. This possibility cannot and should not be treated as a verdict by this Curt. It is only a possibility which amongst many others can be visualised as to how those young people who have clearly and cleanly passed their allotted time in the educational institutions and want to improve the society through their participation in the political like of the country, might start a beginning with an organizational set-up like the one at the youth wing stage. But this set-up if develops will also have to be kept out of the educational institutions. They would not be provided facilities in these easy to reap, fields."

Reference was also made to the case of Zaheeruddin v. The State 1993 SCMR 1718 wherein at page 1773 (citation-QQ), it was observed:

"The contention, however, has not impressed us at all. The term `positive law', according to Black's Law Dictionary, is the law actually enacted or adopted by proper authority for the Government of an organised jural society. So; that term comprises not only enacted law but also adopted law. It is to be noted that all the above-noted cases were decided prior to the induction of Article 2A in the Constitution, which reads as under:-

"2A. Objectives Resolution to form part of substantive provisions.- The principles and provisions set out in the Objectives Resolution reproduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly."

"This was the stage, when the chosen representatives of people, for the first time accepted the sovereignty of Allah, as the operative part of the Constitution, to be binding on them and vowed that they will exercise only the delegated powers, within the limits fixed by Allah. The power of judicial review of the superior Courts also got enhanced."

89. Mr. Khairi further contended that Article 63(1)(g) of the Constitution does not permit anyone to ridicule the Judiciary and the Armed Forces. However, the said provision of the Constitution is not implemented by the Speaker of the National Assembly because he fears vote of no confidence by the majority party in case proceedings for violation of this Article are initiated by him against any member of the Assembly.

90. He also contended that the Constitution did not provide a solution for the grave crisis created by the former Prime Minister, who not only created dissension in the ranks of the Army and thereby attempted to weaken the defence of the country but also endangered the territorial integrity and independence of the country. He submitted that the Court is under a constitutional duty to ensure that the integrity of the territories of the Federation, its independence and all its rights including its sovereign rights on land, sea and air are safeguarded by the Armed Forces of Pakistan, therefore, the steps taken by the Chiefs of Staff of the Armed Forces and Corps Commanders of Pakistan Army, after due deliberations and decisions, were imperative and should be validated in the interest of Pakistan.

91. He submitted that since under Article 243 only appointments of the Chairman of Joint Chiefs of Staff Committee, Chief of Army Staff, Chief of Naval Staff and Chief of Air Staff have been provided and nothing has been provided as to their removal from office, therefore, how the ex-Prime Minister could remove General Pervez Musharraf, the way it was done, in that he was both

the Chairman, Joint Chiefs of Staff Committee as well as the Chief of the Army Staff at the time of his removal.

92. He next submitted that neither the Constitution visualized an unfettered right to rule the country to the ex Prime Minister nor the so-called heavy mandate had granted him the right to become an absolute ruler nor it can be said that success by securing 13 or 14 % votes by PML (N) was a heavy mandate in any sense of the term.

ARGUMENTS OF MR. SHARIFFUDDIN PIRZADA

93. Syed Sharifuddin Pirzada, learned Senior ASC appearing on behalf of the Federation submitted that the main arguments on facts as well as on law will be advanced by the learned Attorney-General and that he will only be covering some of the legal points viz. judicial review and applicability of the doctrine of necessity to the facts and circumstances of the present case. He submitted that this Court is dealing with the situation, which arose on 12th October, 1999 in respect whereof two speeches/statements, dated 13th October, 1999 and 17th October, 1999, have to be read together to spell out the circumstances and reasons for the intervention of the Armed Forces: He further submitted that the above speeches/statements of the Chief Executive clearly make out that true democracy is to be restored as soon as possible and certain measures for the time being are to be taken to improve the conditions in the country. He next submitted that on 12th October, 1999 situation arose for which the Constitution provided no solution, therefore, the intervention by the Armed Forces became inevitable. He emphasised that the intervention by the Armed Forces has saved the country from disastrous consequences and accordingly it is valid and justified on the basis of the doctrine of necessity and the principle of salus popult supremo lex. Supporting the intervention by the Armed Forces, he further submitted that there was no political and economic stability in the country; corruption and bank loan defaults were rampant; there was no accountability or transparency; Mian Nawaz Sharif's constitutional and moral authority stood completely eroded and that the situation was somewhat similar and analogous to the situation that prevailed in July, 1977; the adoption of 13th Amendment had removed the checks and balances in the Constitution and the Senate, the National Assembly and Provincial Assemblies were closely associated with the former Prime Minister and there was no democracy but one man rule, which was rightly displaced.

94. On the question of judicial review he referred to the Objectives Resolution, which inter alia, envisages that independence of Judiciary is to be fully secured. He submitted that the Preamble to the Constitution takes notice of Quaid-e-Azam's declaration about democratic set-up and social justice which are the basis of Rule of Law. Syed Sharifuddin Pirzada, however, made the following statement at the Bar:

"So, in consonance with those principles I have formulated the points which I will be placing before your lordships, but let' me make one thing clear. On this issue I am expressing my views as a counsel, which I am entitled to. I have done so in earlier cases. Therefore, I am approaching this question from that angle."

95. Dilating further on the question of judicial review, Syed Sharifuddin Pirzada, relied on the inaugural address by one of us (Irshad Hasan Khan, CJ) in the Conference of Board of Directors, Asian Ombudsman Association held on 22nd February, 2000, wherein it was observed:

"The requires that the judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source. The Judiciary in Pakistan is independent. It claims and has always claimed that it has the right to interpret the Constitution and any legislative instrument and to say, as to what a particular provision of the Constitution or a legislative instrument means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of the Supreme Court."

96. He submitted that in his view a very comprehensive statement has been made about the judicial review in a concise manner and with permission of the Court, he adopted it in toto. He, however, said that power of judicial review should be exercised with caution. In this regard reference was made to the case of Brig. (Retd.) Imtiaz Ahmad v. Government of Pakistan through Secretary, Interior Division 1994 SCMR 2142, wherein paragraph 12 placitum B, reads thus:

"Judicial review, must, therefore, remain strictly judicial and in its exercise, Judges must take care not to intrude upon the domain of the other branches of Government."

97. Syed Sharifuddin Pirzada reiterated that the Court is dealing with a case, which is analogous and somewhat similar to Begum Nusrat Bhutto's case and in fact strong reliance was placed by him on that case, wherein at page 716, it was observed:

"There is yet another, and a stronger reason for holding that the power of judicial review continues. The 1973 Constitution provides for a clear trichotomy of powers between the executive, legislative and judicial organs of the State. However, owing to reasons of necessity, the executive and the legislative power now stands combined in one authority, for the reason that these two organs of

the State had lost their constitutional and moral authority in the circumstances arising since the 7th of March, 1977, but no such considerations arose in regard to the judicial organ of the State. Accordingly, on no principle of necessity could powers of judicial review vested in the superior Courts under the 1973 Constitution, be taken away."

He also referred to Pir Sabir Shah's case (PLD 1994 SC 738), wherein at page 765, paragraph 17 placitum C, it was observed:

"I am, therefore, of the view that clause (2) of Article 236 will not cover a proclamation which is without jurisdiction, coram non judice or mala fide and the Superior Courts will have jurisdiction to examine a proclamation from the above three jurisdictional legal aspects. "

98. Syed Sharifuddin Pirzada formulated his points as under:

1. The intervention by the Armed Forces of Pakistan on 12th October, 1999 is valid.

2. The Defence Forces are viable and vital institution of the country. Attempts were made to destabilise them and to create dissension within their ranks, which would have adversely affected the defence, security and territorial integrity of Pakistan.

3. The pernicious attempts were contrary to the Preamble of the Constitution and Objectives Resolution whereunder the integrity of the territory of the Federation, its independence and all its rights, including the sovereign rights on land, sea and air are to be safeguarded.

4. As it is, due to collusion between Lord Mountbatten and Sir Cyril Radcliff, Pakistan got truncated territory, the tragic circumstances in which it was dismembered in 1971 are well-known. The intervention by the Armed Forces has saved the country from disastrous consequences.

5. On 12th October, 1999 situation arose for which the Constitution provided no solution and the intervention became inevitable.

6. Mian Nawaz Sharif's conviction on serious offences is under appeal. However, prima facie, it confirms the stand and the steps taken by the Armed Forces.

7. The claim of heavy mandate by Mian Nawaz Sharif in election is belied by the facts and figures available on the record.

8. The adoption of the 13th Amendment removed the checks and balances in the Constitution.

9. The Senate, the National arid Provincial Assemblies were closely associated with the former Prime Minister. There was no democracy, but despotism, which was rightly displaced.

10. There were no political and economic stability in the country. Corruption, bank loan defaults were rampant. There was no accountability or transparency. Mian Nawaz Sharif's Constitutional and moral authority stood completely eroded.

11. The situation was somewhat similar and analogous to the situation that prevailed in July 1977.

12. In the exceptional circumstances Doctrine of State Necessity and the principle of Salus populi suprema lex are fully applicable.

13. The Doctrine of State Necessity is well-known and has been ecognised by Islam and other religions and accepted by Hugo Grotius, Chitty, De Smith and other jurists and the superior Courts of various countries to fill the vacuum and to bridge the gap. Even the mother Parliament's existence is traceable to the Doctrine of Necessity.

14. The judgment in Nusrat Bhutto's case PLD 1977 SC 657 has been approved among others by the Court of Appeal of Grenada (1986 LRC (Constitution) 35 and reaffirmed in Achakzai's

Case PLD 1997 SC 426. The caution mentioned in the last case that checks and balances are necessary for prevention of such situations was completely ignored.

15. The same caution is reflected in concrete terms in the drafts prepared by Justice A. R. Cornelius and Justice Hamud-urRahman, former Chief Justices of Pakistan.

16. The cases of Mehram Ali PLD 1998 SC 1443 and Liaqat Hussain PLD 1999 SC 504 do not deal with the situation that arose on 12-10-1999 and/or affect the principles laid down in Nusrat Bhutto's case.

17. It will be noticed that

a) Martial Law was not imposed.

b) The Constitution was not abrogated and remains in abeyance.

c) The Courts continue to function.

d) The Fundamental Rights, not in conflict with the Proclamation and the Orders continue to be in force.

18. The Proclamation of Emergency, PCO and other Orders are not sub-constitutional but of extra-constitutional nature.

19. The intervention is not of a permanent nature, but for a limited period and is of a temporary character to enable the country to return to a true democratic way of life as soon as possible.

20. The course embodied in Nusrat Bhutto's case is fully attracted.

Particular reference was also made to a passage from Nusrat Bhutto's case at pages 708-709, which reads thus:

"Mr. Sharifuddin Pirzada has next drawn our attention to certain Articles in the Majelle in support of his proposition. Article 17 enjoins that "Hardship causes the giving of facility; that is to say, difficulty becomes a cause of facility, and in times of embarrassment it becomes necessary that latitude should , be shown." Article 21 says that "Necessities make forbidden things canonically harmless". Article 22 lays down that necessities are estimated according to their quantity, and Article 26 embodies the maxim salus populi suprema lex by saying that "To repel a public damage a private damage is preferred." He submits that although these maxims are directly relevant to cases of private necessity but the principle can certainly be extended to State necessity."

99. Elucidating the concept and meaning of democracy, Syed Sharifuddin Pirzada took us through some extracts from the book titled "Voyage through History" by Masarrat Husain Zuberi, which read thus:

"Before I go further, one important episode is worth recalling. Lord Mountbatten returned to Delhi on 30th May; but two days earlier on 28th May Quaid-e-Azam expressed a wish to meet senior Muslim officers posted at Delhi and a meeting was arranged at the residence of Hasnie to maintain secrecy: Quaid also directed that no Press people should be present and not a word of what he was going to say there should appear in the Press. The meeting was held on 29th May and he came there accompanied by Liaquat Ali Khan, Nishtar and Chundrigar. On arrival he spotted one Muslim officer, who was in the Information and Broadcasting Department and so known to him personally. He asked him to leave as he came under the category of Press people. The meeting was arranged in the open on the spacious lawns of Hasnie's house and the Quaid feared that he might be overheard across the road. So, he asked everybody to get nearer and sit on the carpet. He also sat down leaving his sofa seat. Liaquat, because of his bulk, continued sitting on the sofa."

"In clear measured tones, he spoke for nearly half an hour and then invited questions. Even in this hour of triumph he showed no sign of emotion nor did he indulge in hyperbole or_self-glorification except one sentence, and that too in matter of fact tone that "future generations would say that Muslim League won them Pakistan. What does Muslim League consist of: myself and my Stenographer?"…….The two questions that' stand out in my memory were which for their perspicuity still surprise me. They were asked by one not so senior an officer a Deputy Director in

the inspection wing of the Supply Department, Iqbal by name. After Quaid replied to a few questions on the status of the Muslims outside Pakistan, which also stunned a few, Iqbal said: "Sir, I have two questions to ask: The first is what is the guarantee that on establishment of Pakistan a coterie of people would not take over the country and run it in their own particular interest" and waited for a reply Quaid only said, "And your second question?" "Sir, the second is what will happen if at any time later Bengal wishes to secede from Pakistan". The Quaid kept quiet for a few seconds-and then said: "The answer to both of your questions is not with me. It is with you. You, Muslims, will have to create conditions in which Bengal exists happily with you as they have helped you in the common struggle and create such forceful public opinion too that no coterie of people get control and run the country in its own interest. After all guardians of democracy are the people; not your Quaid or his successors."

100. In support of the formulations made by Syed Sharifuddin Pirzada, he relied upon exhaustive case law from Pakistani and foreign jurisdictions including the views expressed by renowned international jurists as reflected in the various text books, law reports and research papers.

ARGUMENTS OF MR. AZIZ A. MUNSHI, LEARNED ATTORNEY GENERAL FOR PAKISTAN

101. Mr. Aziz A. Munshi, the learned Attorney-General for Pakistan began his arguments with the submission that it is with a sense of responsibility that in making submissions before this Court, it was not his intention to cast aspersion on any one and that when he would speak in respect of the parliamentarians particularly the former Prime Minister, it should be clearly understood that this is not with a view to maligning any one. It is only intended to meet the case and put the facts before this Court. He further stated that in doing so, he would be only doing his duty as Attorney-General.

102. He submitted that the country is faced with a situation where the former Prime Minister stands convicted on 6th April, 2000 on charges of hijacking and terrorism and at the same time his associates are also accused of various offences. He stated that the leader of the opposition stands disqualified and it seems, she has chosen to abdicate responsibility of taking over or responding to the political challenge, which is facing the country and that the parliamentarians from both the major parties, viz. Pakistan Muslim League and Pakistan People's Party have leaders who are either disqualified or do not appear to be qualified, prima facie unde0judgments of various Courts in various proceedings and thus the present situation can be called one of political vacuum. He submitted that a democratic polity to which the people of Pakistan are committed requires responsible parliamentarians and not a vacuum in that behalf; it requires and presupposes that elected representatives are qualified, present and alive politically to steer the governance of the country and to take responsibility in terms of the sacred mandate given by the Constitution. He

emphasized that the country needed a body of men, who were responsible, who were above board and who were accepted by the people as their elected representatives and who were not only responsible to the people themselves, but also to their own conscience and the conscience of those who had elected them. He contended that there was large scale accusation of corruption, allegations of disqualification in presence of convictions and judgments, a large scale plunder of national wealth, a breakdown of the economy and finally, worst of all, an attempt to create dissension and disunity in the only disciplined institution of the country besides the Judiciary, namely, Army, which almost subverted that institution and created a dangerous challenge to the very existence of Pakistan.

103. The learned Attorney-General submitted that keeping in mind the gravity of the events which occurred on the 12th of October, 1999, this Court would find that the Chief of Army Staff was sent abroad on official duty and was in the air at an altitude of 25000 ft, on the Indian ocean midway between Colombo and Karachi when the unfortunate events happened, which have landed the country today where it is. He submitted that had the incident succeeded, horrendous consequences resulting from this course would have rendered the country with an Army divided in its ranks and entangled in a civil war. He submitted that without mentioning the ugly facts and details of the incident, which happened at the Karachi Airport, the fact remains that a body of 300 policemen went to arrest the Chief of Army Staff and according to General Pervaiz. Musharrafs own speech delivered on 13th October, his life was put in danger and the plane carrying him was asked to land anywhere outside Pakistan and possibly in India. According to the learned Attorney-General, this kind of attitude and action by the head of the Government smacked of irresponsibility, an offensive attitude in breach of the constitutional authority of office and a grave danger to the solidarity, integrity and sovereignty of the State of Pakistan.

104. The learned Attorney-General submitted that the Army as an institution has refused to accept the illegal and unconstitutional orders, which were directed towards undermining the unity of the Army and the integrity of the country as such. Referring to the submission made by Mr. Khalid Anwar on behalf of the petitioners that no matter what happened on the 12th October, the elected representatives could not be displaced, the learned Attorney-General contended that the mandate given by the people is couched in sacred, but limited language, which does not extend to the annihilation of the Army command and the action of the former Prime Minister, it is public perception, appeared to be an act of enemy because in a war, the first lesson of strategy for the enemy is to strike at the effectiveness of the command and disturb it. He submitted that there are certain norms of dealing with a friend, dealing with their own Commander-in-Chief and dealing with the enemy. According to him, the former Government headed by the former Prime Minister adopted a course as if the Chief of Army Staff, representing an Army of 600,000 men, who had taken oath to defend this country as a united force, was an enemy of Pakistan.

The learned Attorney-General contended that such an assumption is not only preposterous, it needs to be disapproved in the strongest possible language by every Pakistani, particularly the apex Court.

105. At this stage he invited attention of this Court to the oath of office of the Prime Minister, given in Schedule IV to the Constitution, which reads thus:

(In the name of Allah, the most Beneficent, the most Merciful)

I,_____, do solemnly swear that I am a Muslim and believe in the Unity and Oneness of Almighty Allah, the Books of Allah, the Holy Qur'an being the last of them, the Prophethood of Muhammad (peace be upon him) as the last of the Prophets and that there can be no Prophet after him, the Day of judgment, and all the requirements and teachings of the Holy Qur'an and Suntah.

That I will bear true faith and allegiance to Pakistan:

That, as the Prime Minister of Pakistan, I will discharge my duties, and perform my functions, honestly, to the best of my ability, faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law, and always in the interest of the sovereignty, integrity, solidarity, well-being and prosperity of Pakistan:

That I will strive to preserve the Islamic Ideology which is the basis for the creation of Pakistan:

That I will not allow my personal interest to influence my official conduct or my official decisions:

That I will preserve, protect and defend the constitution of the Islamic Republic of Pakistan:

That, in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill-will:

And that I will not directly or indirectly communicate or reveal to any person any matter which shall be brought under my consideration or shall become known to me as Prime Minister, except as may be required for the due discharge of my duties as prime Minister.

[May Allah Almighty help and guide me (A'meen).]"

According to the learned Attorney-General, the words, "sovereignty, integrity, solidarity, prosperity and well being", embody the essence of the Constitution and are the touchstone and the test before this Court for judging the actions of the former government, particularly the then Prime Minister. He contended that the actions of the former Government were not in conformity with the maintenance of sovereignty, integrity, well being and prosperity of Pakistan because when the Chief of Army Staff was attempted to be handed over to another country and he was exposed to physical elimination, it was not safeguarding the sovereignty of Pakistan. Further, when the former Prime Minister exposed the Armed Forces to dissension and disintegration, it was not maintenance of the sovereignty or safeguarding the sovereignty, rather the sovereignty and integrity of the country were seriously endangered because it is the only institution, which is capable of safeguarding the integrity of Pakistan. The learned Attorney-General stated that the well being of the people is a reflection of the combined effect of sovereignty, integrity and solidarity and there can be no well being of the people without sovereignty, integrity, solidarity and prosperity. Likewise, prosperity again embodies all these ingredients and also extends to the economic prosperity of the people. According to him, all these tests when applied to the former Government and the former Prime Minister, turn out in the negative and to a long way in disqualifying him under Article 63 from being either a member of the Parliament or incharge of the affairs of the State. Reference was also made to Article 63 of the Constitution, which reads thus:

63. (1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if-

(a) he is of unsound mind and has been so declared by a competent Court; or

(b) he is an undischarged insolvent; or

(c) he ceases to be a citizen of Pakistan, or acquires the citizenship of a foreign State; or

(d) he holds an office of profit in the service of Pakistan other than an office declared by law not to disqualify its holder; or

(e) he is in the service of any statutory body or anybody which is owned or controlled by the Government or in which the Government has a controlling share or interest; or

(f) being a citizen of Pakistan by virtue of section 14-B of the Pakistan Citizenship Act, 1951 (II of 1951'), he is for the time being disqualified under any law in force in Azad Jammu and Kashmir from being elected as a member of the Legislative Assembly of Azad Jammu and Kashmir; or

(g) he is propagating any opinion, or acting in any manner, prejudicial to the Ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan; or

(h) he has been, on conviction for any offence which in the opinion of the Chief Election Commissioner involves moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his dismissal; or

(i) he has been dismissed from the service of Pakistan on the ground of misconduct, unless a period of five years has elapsed since his dismissal; or

(j) he has been removed or compulsorily retired from the services of Pakistan on the ground of misconduct unless a period of three years has elapsed since his removal or compulsory retirement; or

(k) he has been in the service of Pakistan or of any statutory body or anybody which is owned or controlled by the Government or in which the Government has a controlling share or interest, unless a period of two years has elapsed since he ceased to be in such service; or

(1) he is found guilty of a corrupt or illegal practice under any law for the time being in force, unless a period of five years has elapsed from the date of such conviction; or

(m) he has been convicted under section 7 of the Political Parties Act, 1952 (III of 1962), unless a period of five years has elapsed from the date of such conviction; or

(n) he, whether by himself or by any person or body of persons in trust 'for him or for his benefit or on his account or as a member of a Hindu undivided family, has any share or interest in a contract, not being a contract between a cooperative society and Government, for the supply of goods to, or for the execution of any contract or for the performance of any service undertaken by, Government:

Provided that the disqualification under this paragraph shall not apply to a person-

(i) where the share or interest in the contract devolves on him by inheritance or succession or as a legatee, executor or administrator, until the expiration of six months after it has no devolved on him;

(ii) where the contract has been entered into by or on behalf of a public company as defined in the Companies Ordinance, 1984 (XLVII of 1984), of which he is a shareholder but is not a director holding an office of profit under the company; or

(iii) Where he is a member of a Hindu undivided family and the contract has been entered into by any other member of that family in the course of carrying on a separate business in which he has .no share or interest; or

Explanation.-In this Article "goods" does not include agricultural produce or commodity grown or produced by him or such goods as he is, under any directive of Government or any law for the time being in force, under a duty or obligation to supply

(o) he holds any office of profit in the service of Pakistan other than the following offices, namely:-

(i) an office which is not whole time office remunerated either by salary or by fee;

(ii) the office of Lumberdar, whether called by this or any other title;

(iii) the Qaumi Razakars;

(iv) any office the holder whereof, by virtue of such office, is liable to be called up for military training or military service under any law providing for the Constitution or raising of a Force; or

(p) he is for the time being disqualified from being elected or chosen as a member of the Majlis-e-Shoora (Parliament) or of a Provincial Assembly under any law for the time being in force.

(2) If any question arises whether a member of the Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall refer the question to the Chief Election Commissioner and, if the Chief Election Commissioner is of the opinion that the member has become disqualified, he shall cease to be a member and his seat shall become vacant."

106. The learned Attorney-General vehemently contended that according to the record almost 80% of the actions of the former Government were directed towards self-aggrandizement and furtherance of personal interest and were taken for the purpose of amassing wealth by unlawful means. Thus, the Constitution was violated in letter and spirit on a wide scale, almost rendering it

illusory and inoperative; democracy was throttled out and instead dictatorship was sought to be established.

107. The, learned Attorney-General next argued that a reign of victimization of political opponents, whether they belonged to party A, B, or C, was let loose with a view to perpetuating power. He contended that the conduct of the petitioners in juxtaposition with the contents of the oath of office of the Speaker of the National Assembly, Federal Ministers and the members of the Senate, which are almost identical, does not entitle them to the reliefs claimed by them in these petitions, inasmuch as they had taken oath to act in the interest of sovereignty, integrity, solidarity, well being and prosperity of Pakistan, which they did not. Moreover, when they owe their existence and allegiance to a political party and when they even today say that Mian Nawaz Sharif whose conduct has been described above, is still their. leader and they have not publicly disowned him or disassociated from him, all of them have acted jointly and have, thus, disentitled themselves in law and under the Constitution to the reliefs they have prayed for in these petitions.

108. Commenting on the conduct of the former government, the learned Attorney-General further submitted that the 13th Amendment was got passed within 13 minutes. He submitted that the 8th Amendment including Article 58(2)(b) was passed by consensus by an elected body in 1985. A debate had taken place in the National Assembly and the Senate, which deliberated for 40 days. There were committees, sub-committees and experts and members elected from various parties and members forming independent groups of opposition led by Haji Saifullah Khan, who negotiated every word of it, who disputed every word of it and after having considered every word proposed by the Government party, they themselves agreed on the phraseology of Article 58(2)(b) having checks and balances, which was a product of divergent opinions ultimately resulting in a consensus and that was true spirit of democracy. Article 58(2)(b) stood the test of time for 10 years and there was no Martial Law. The only result of Article 58(2)(b) was repeated appeal to the political sovereign i.e. the electorates from holding general elections within 90 days.

109. The learned Attorney-General then formulated his submissions in writing which are as under:-

(1) That in the facts and circumstances prevailing on 12th October, 1999 and prior thereto the taking over of the governance by the Armed Forces was valid, legitimate, bona fide and unavoidable to save the State and its institutions and is justified by the Doctrine of State Necessity.

(2) That the legitimacy of the Proclamation, dated 14th October, 1999, the various Provisional Constitutional Orders and all actions pursuant thereto derived their own legality from the Doctrine

of State Necessity and State survival. Further, the fact that no remedy was available under the prevailing legal order including the Constitution, intervention was unavoidable and necessary for the preservation of the State.

(3) Such course of action by the Armed Forces is approved in Begum Nusrat Bhutto's case, by a full Bench of this Hon'ble Court. The facts of the present case are far more serious .to justify the application of Doctrine of Necessity inasmuch as, the main protective institution of the State against external aggression and internal disturbances i.e. the Armed Forces of Pakistan was exposed to internal disunity, division and dislocation of military command by the former Government. The only point involved in Begum Nusrat Bhutto's case was rigging of elections and civil disobedience while in the present case, it is a matter of State survival.

(4) That the deposed Prime Minister and his partymen, having grossly violated their Oath of office as is evident from the events of 12th October. 1999 and prior thereto, the Armed Forces of Pakistan under the provisions of the Constitution of Islamic Republic of Pakistan. 1973 and by virtue of their oath of office, were under a sacred duty and legal obligation to save the country from internal subversion which -is self-evident from the events of 12th October, 1999, as adjudged by the judgment, dated 6th April, 2000 pronounced by the Anti-Terrorist Court at Karachi and other facts on the record. In the face of these events intervention by the Armed Forces was necessary and natural.

(5) Where there exists reasonable basis for concluding that existence of the State and its sovereignty is at stake, the Courts will not substitute their own judgment for that of the Armed Forces/Executive which acted under the compelling necessity of saving the State and its sovereignty. Thus, the Proclamation dated 14th October, 1999 was issued pursuant to deliberations and discussions of the Corps Commanders of the Armed Forces and the three Service Chiefs of the Army, the Air force and the Navy. All legal ,instruments, laws and orders issued thereunder such as the Provisional Constitutional Orders are valid, proper and bona fide. All actions taken thereunder are also legal and valid. Thus, the Proclamation and all other legal instruments were not the individual acts of one person having been issued in the best interest of saving the country. The bona fides of all its authors, i.e. the entire Armed Forces cannot be questioned.

(6) The source of power and validity of the Proclamation of Emergency is to be determined by consideration of the total milieu in which the change is brought about, namely, the objective situation obtaining at the time in relation to the break down of constitutional machinery for the change and the paramount Necessity for the preservation of the State and its organs. It is such destruction which justifies the taking over of the country by the Armed Forces in order to save total destruction and extinction of the State and the Executive, Legislative and Judicial institutions

of the country including undermining the unity and discipline of Armed Forces all of which occurred on account of the action of the former Government.

(7) That in the present case, after taking a comprehensive view of all the facts necessitating the Proclamation, it is submitted that the same is fully justified on the doctrine of Necessity and it is not amenable to judicial review.

(8) That what is described and understood as State Necessity is nothing more than an extension of Doctrine of Necessity as recognised by jurisprudence. In the political sense, Doctrine of State Necessity has direct nexus with the situation necessitating such abrupt political change and has its validity/justification thereunder. It would, therefore, follow that the Doctrine of State Necessity justified the existence of the present legal order and the exercise of power thereunder which is for the preservation of the country. The reference to the so-called theory of Divine Right of Kings by the Petitioners who were privy to the former Government is wholly irrelevant and preposterous. In fact the petitioners. were active participants and supporters of the former Government in their illegal actions. They never objected to the same, including the events of 12th October.

(9) The Doctrine of Necessity is embedded in ancient as well as contemporary Jurisprudence. According to this an act which would otherwise be illegal becomes legal under the stress of Necessity, and in the context of governance is referable to an intention to preserve the "State or Society, even by extra-Constitutional or meta-legal acts."

(10) That the Doctrine of Necessity is a recognised principle of Islamic Jurisprudence and applies equally to individual and collective perception of social behaviour.

(11) That the term "Necessity" does not have a fixed character. It is relative and elastic rather than absolute. It has various degrees and meanings and may connote different measures of Necessity and it should be construed with reference to existing conditions. Necessity has been held to be synonymous or equivalent to Emergency. (Corpus Juris Secundum Vol. 65, pp. 115, 116, 118)

(12) That once the assumption of extra-Constitutional Power is held to be valid, the legality of actions taken by such authority is to be judged in the light of principles pertaining to the Law of Necessity. (Begum Nusrat Bhutto's case, p. 657).

(13) That it is not correct to limit the doctrine of Necessity only as a defence to a criminal prosecution referable to self-defence or defence in Torts. (Corpus Juris Secundum, Vol. 65, p 387).

(14) That once it is found that the prevailing situation did warrant an abrupt change and there was no remedy available under the prevailing Legal Order, the persons responsible for the change are fully competent to bring about such change in law, including the Constitution, which intends to correct the flawed Old Legal Order for preservation of the State as well as welfare of the people. (Begum Nusrat Bhutto's case, p.657).

(15) That the revolutionary political change is not in derogation of the Objectives Resolution under Article 2A of the Constitution, as ultimately the method of governance shall be through chosen representatives of the people. The process. and mode of Devolution of Power has already been declared which shall guarantee true representation as against the hithertofore sham democracy. (Speech of the Chief Executive dated 17-10-1999).

(16) That International Law recognises the right of the people to alter by any means, including force, the form of Government under which they live. Accordingly if the Government is in effective control and without any effective opposition particularly when the previous Government has ceased to exist, the efficacy or effectualness of the change has moral as well as legitimate justification. (Sorensen pp.271,272)

(17) That the principle of proportionality is not attracted in case an abrupt political change becomes absolutely necessary, as in this case, and displaces the Old Legal Order for valid reason and the previous Government ceases to exist. In fact the situation demands a complete change of the old, decadent and destructive structure.

(18) That the circumstances necessitating the political change in Begum Nusrat Bhutto's case PLD 1977 SC 657 though similar for application of the Doctrine of Necessity the situation prevailing in the present case is far more serious and appropriate for application of the Doctrine of Necessity which rendered the political change inevitable inasmuch as:

(i) Failure of Law and Order situation in 1977 was similar as described in PLD 1977 SC 657 at 693 to 703. Law and Order situation was worse in the present case as is in PLD 1997 SC 426 at 465 para.40 (pages 465 to 469, paras.40-42), and PLD 1999 SC 504 at 709-733, as well as the recent Judgment of the Anti-Terrorist Court, Karachi delivered on 6th April, 2000.

(ii) That the General Elections of 1977 were found in Begum Nusrat Bhutto's case to be the result of massive and wholesale rigging and thus, the then Prime Minister was held to 'be a usurper. In the present case the former regime has committed such acts by virtue of which the powers of all the different organs of the State were usurped by the former regime with the intention of concentrating power in the single person of the ousted Prime Minster.

(iii) The so-called heavy mandate was illusory and a farce and the Assemblies were rubber stamp of one man rule. The so-called heavy mandate consisted of votes not exceeding 12 to 13 % including bogus votes.

(iv) By the 13th Amendment the former Prime Minister arbitrarily repealed Article 58(2)(b) which empowered the President to dissolve the Government for failure of Government machinery and by the same amendment repealed the power of the President to act in his discretion in the appointment of Chiefs of the Armed Forces. All this was done without discussion in the Parliament with the result that no check and balance was left on the action of the Prime Minister and his chosen few in the Parliament, while they plundered national wealth and amassed personal wealth by creating bank defaults of Rs. 1215 billion, indulged in acts of corruption and corrupt practices and destroyed national economy. Thus, he became a despot using State apparatus for personal gain.

(v) By the 13th Amendment he managed to concentrate all power in his hands. The Anti-Defection Law passed without allowing a debate in the Parliament empowered him to expel any member of the Parliament who disagreed with him. Thus, the Government of the former Prime Minister throttled freedom of speech, freedom of action and freedom of vote of the legislators only for assuming dictatorial powers. All these measures resulted in negation of democracy as contemplated by the various provisions of the Constitution including Article 2A, the Preamble and Fundamental Rights and destruction of all democratic norms. All these actions are alien to the Parliamentary democracy which guaranteed freedom of expression and other Fundamental Rights of equality before law, protection of life, liberty and property etc.

(vi) The cumulative effect of all these actions of the former Government was betrayal of oath of office of the Prime Minister, the various Ministers and the Parliamentarians, Members of the Provincial Assemblies, all of whom lost thereby the moral and legal authority to govern.

(vii) That the judgment passed in Begum Nusrat Bhutto's case has been considered minutely in Mehmood Achakzai's case and it has been held (para.45-PLD 1997 SC 426) that no exception can be taken to `ratio decidendi' laid down in the judgment of Begum Nusrat Bhutto's case, whereunder the Full Court dismissed the petition as not maintainable.

(19) The result of despotic rule was total destruction of economy, mass violation of fundamental rights, political victimization, tapping of several hundred telephones of political rivals, ridiculing of superior judiciary, storming of the Supreme Court, appointment of political favourites as Judges and massive corruption in the various agencies of the Government. (see paper books attached and particularly the list of references filed by NAB and the bank statements issued by the State Bank of Pakistan etc. as stated therein Reference is also made to Vol. A, B and C filed by Mr. Syed Sharifuddin Pirzada, Sr. ASC for the Federation).

(20) That the former Government arid their functionaries as well as Members of the Parliament scandalized, harassed and humiliated the Superior Judiciary in public which was reflected in (i) TV programmes against the verdict of Supreme Court in the case of Military Courts (ii) speeches of the former Prime Minister against the Judiciary. (P.B. Volume IX, at pages 135, 204-228, 227-243) (iii) speeches in the Senate and the National Assembly/Provincial Assembly. The storming of the Supreme Court by and at the instance of the former ruling party including elected representatives and judgment therein by the Hon'ble Supreme Court establishes gross Contempt of Court, which shows total ridiculing and undermining the apex Court.

(21) Former Speaker of the National Assembly and the Chairman of the Senate of Pakistan were in League with the Government, as no reference was made to the Chief Election Commissioner for disqualification of any Member of the Government in terms of Article 63(2). (P.B. Volume-VII, pages 76-79 - Reference of Mr. Muhir Ahmad Khan (Volume-IX, pages 229, 230, 231.

(22) Tapping of the telephones including those of the Judges and officials of the Supreme Court, despite judgment of the Benazir Bhutto's case holding it to be unconstitutional and illegal (VolumeVIII, page 59).

(23) The former Prime Minister made active attempts to create ,dissension to divide the Army. Further, dangers of such dissension are apparent from the facts disclosed and judgment given by the Anti-Terrorist Court at Karachi. Further, facts as disclosed show unconstitutional attempt at removal of the Chief of the Army Staff at a time when he was away from Pakistan on official duty and in the air at the height of 25000 feet. The Court at Karachi has found the former Prime Minister guilty of the offences of hijacking and terrorism. The offences of which the former Prime Minister has been convicted include section 402(b) of the Penal Code and section 7 of the Anti-Terrorists Act. It is most significant and serious among other facts disclosed by the Chief of the Army Staff, his speech of October 17, 1999 (p.39 of Vo1.1 - Written Statement), when he stated that circumstances were created which would have forced his plane either to land in India or crash (p.79 of C.P. 63 of 1999).

(24) The former Government actively tried to create a parallel command which the Army has refused to accept. Former Chief of the Army Staff, General Jehangir Karamat, a celebrated soldier was removed for making constructive suggestion for formulation of National Security Council and so was the removal of the Chief of the Air Staff, Air-Marshal Abbas Khattak for concentrating power in the hands of the former Prime Minister.

(25) Hijacking was culmination of various incidents and in any case apart from any other factors, the Army takeover was justified on the following grounds:-

(a) Humiliation of the Judiciary.

(b) Dissension created in the Army and potentially rendering its command ineffective and forcing the COAS to be handed over to India and exposing him to certain death.

(c) Destruction of the democratic set-up, Parliament and the Provincial Assemblies.

(d) The Parliament and the Provincial Assemblies cannot be restored on the following grounds:-

(i) Large scale corruption of the Parliamentarians, who have not even paid charges for boarding and *lodging besides being Bank defaulters.

(ii) References filed against Parliamentarians for misconduct and Bank defaults before Accountability Court.

(iii) The abatement and ridicule of the Judiciary and storming of the Supreme Court and discrediting the Army by the former Parliamentarians.

(e) No fresh elections can be held without updating the electoral rolls. As per report of the Chief Election Commissioner, this process will take two years.

(f) The process of accountability will be carried out to combat corruption. Already 79 references are pending and more than 200 are on the way.

(g) Reforms are needed to be carried out.

(h) The economy is to be revived and steps are to be taken for the purpose of welfare of the people.

(i) Reforms are to be undertaken keeping in mind the state of resources, requirements of the people and defence of the country.

(j) Government has already taken various steps for reform, including conservation of foreign exchange and recovery of Bank defaults. Already over Rs. 11 Billion have been recovered after 12th October from defaulters and the process of revival of economy continues."

110. The learned Attorney-General submitted that Proclamation of Emergency, dated 12th October, 1999 is of a different character from the one issued by General Yahya Khan, inasmuch as, this time it has been approved unanimously after due deliberations by all the Corps Commanders who represent the whole Army, and there was imminent danger to the very survival of the State, which perception they clearly realised and decided to confront it.

111. The learned Attorney-General, then presented a list giving the cases of corruption, loan defaulters etc., which reads thus: -

CORRUPTION

Description

Statement of Governor, State Bank that the defaulters owe 356 billions rupees.

Two cases against former Prime Minister sent to NAB.

26 Top defaulters held.

List of 39 references pending against Mian Nawaz Sharif.

List of 40 references pending against Mian Nawaz Sharif.

Transcript of BBC Television documentary on corruption in Pakistan.

Summary of Reference filed against Mian Nawaz Sharif and others.

Order dated 5-I1-1999 passed by High Court of Justice Queen's Bench Division England in Al-Towfeek Company v. Hudaibiya Paper Mills.

Statement of Shezi Nackvi Director AI-Towfeek Company.

Documents annexed to statement of Shezi Nackvi.

Judgement dated 16-3-1999 of Queen's Bench Division in AlTowfeek Company v. Hudaibiya Paper Mills.

11 Billion Dollars in Pakistan Banks were removed without consent of Accounts Holders FEBC accounts were frozen and foreign exchange misappropriated, huge sums removed by former Prime Minister even after the freeze.

Former Prime Minister and family established Sugar Mills in Kenya purchased four flats in London.

Building of vast Raiwind Estate - Misuse of Government money for construction of road to Raiwind and declaration of Raiwind House as official residence of P.M. - maintenance at the expense of Pak PWD.

Contracts for transportation of wheat, yellow cab Scheme, construction of Motorway kick backs and commissions.

Money Laundering through traveller cheques, dollar bearer certificates, overseas accounts and purchase of property in London.

Copy of F.I.R. No.12 of 1994 against Directors of Hudaibiya Engineering regarding opening of fictitious accounts.

Copy of F. I. R. No. 13 of 1994.

Press Clippings of Foreign press.

Internet reports of Daily Dawn.

Brief of Finance Division.'

Properties relating to District Lahore (Raiwind).

Reference application by Munir Ahmad Khan, Allama Iqbal Town to Chief Ehtesab Commissioner Islamabad against former Prime Minister, Chief Minister and others regarding misusing the official resources and causing loss to the National Exchequer to the tune of Rs.620 million.

List of properties in Lahore District.

Raiwind.

Sheikhupura District

Kasur

Rawalpindi District

Murree

Letter from D.C., Vehari to Deputy Secretary to Chief Secretary Punjab regarding ownership of 111 Kanals, 19 Marlas near Sahib Ali of Sharif's family.

Land in the name of Industries owned by Mian Nawaz Sharif and family in District Lahore and Kasur.

Grand total of land properties in the name of Nawaz Sharif and his relatives

Land purchased by Mian Nawaz Sharif and family owner wise categorization in District Sheikhupura, Lahore, Kasur, Rawalpindi, Murree, Vehari.

White paper on Mian Nawaz Sharif Family's corruption etc.

Extraction of. money from banks/DFIs by Mian Nawaz Sharif, Shehbaz Sharif and other members of Shehbaz Sharif family with Annexures A, B, C and D.

Details of history of business of Sharif family viz. Ittefaq Foundry etc.

Outstanding liabilities against Ittefaq Group - Annexure-"A".

Properties owned by infamous Ittefaq Foundry as it stood on 20th March, 1990, Annexure "B".

Ittefaq (Accounts Department) Annexure “E”.

Documents relating to bid price. Lahore and Islamabad Motorway, 27-11-1991.

Income Tax Statement regarding Mian Nawaz Sharif released by the Interior Minister.

Estimate of Lahore Islamabad Motorway given by National Highway Authority Project Management Cell, 18-11-1991

Office Note by Additional Director Industries, Directorate of Industries and Mineral Development Punjab, Lahore with regard to setting up of an Industrial Estate in 41 Villages Tehsil Chunian covering 60466 acres of Land, 6-3-2000.

Punjab Gazette Notification issued by Collector Kasur with regard to acquisition of land for Industrial Estate in Tehsil Chunian with detail of Khasra Nos. in various villages, 25-3-1987.

Notification from Ministry of Finance, Government of Pakistan regarding amendment in the Original Notification (25-3-1987) with map showing Tax Free Zone, 26-5-1987.

Letter dated 7th January, 1998 from PM Secretariat declaring House at Raiwind Farm as official residence of the Prime Minister.

CORRUPT PRACTICES IN RESPECT OF DEPOSIT OF HUGE SUMS OF MONEY TO SPEND UPON ELECTIONS

Affidavit of (R) General Nasirullah Babar filed in this Court in HRC No. 19 of 1996 with index.

List of amounts deposited in Accounts of various Banks of Pakistan by a representative of Mr. Younus Habib

Detail of total amount of Rs.14 crore deposited by a Representative of Mr. Younus Habib (from 10-9-1990 to 22-10-1990).

List of names of 14 politicians and the amounts deposited in their names with lit of amount transferred to HQ. 313 Survey and Constructions Rwp.

Statement of Accounts No. 1726.

Affidavit of Lt. Gen. (Retd.) M. Asad Durrani in HRC 19 of 1996 regarding providing logistic support to the disbursement of donations campaign of UI in the four provinces, 24-7-1994.

Affidavit of Lt. Gen. (Retd.) M. Asad Durrani in HRC No. 19. of 1996 as to press release issued on behalf of Gen. (R) Mirza Aslam Baig that Mr. Younus Habib and his community had donated rupees one hundred forty million and deposited this amount in a Government Agency.

FAILURE OF LAW AND ORDER SITUATION

Details of extra-judicial killings in Punjab.

Details of extra-judicial killings, dacoities, high profile killings, loot and arson etc. in Sindh. Mehmood Achhakzai's case.

FAILURE OF LEGISLATIVE ORGAN

Promulgation/re-promulgation or ordinances by the previous Government.

13th Amendment in the Constitution of Pakistan, 1973 - powers of the President under Article 58(2)(b) withdrawn - similar powers of the Governor under Article 112(2) also taken away discretionary power of the President to appoint Governors made subject to advice of Prime Minister the discretion of the President to appoint Chairman, Joint Chiefs of Staff Committee has been taken away.

14th Amendment-provides for defection if MNA or MPA votes contrary to any direction issued by the Parliamentary Party to which he belongs. This amendment takes away the right of freedom of speech.

The 15th Amendment bill published in Gazette of Pakistan Extraordinary on 1-9-1998 contemplates to give unbridled power to the executive as against the legislature.

16th Amendment bill published in the Gazette of Pakistan Extraordinary dated 17-11-1998 also proposed to confer unlimited power upon the Executive as against the legislature.

FAILURE OF JUDICIAL ORGAN OF THE STATE

Unwanted confrontation with the Judges of the Superior Courts, National Assembly Proceedings/debates ridiculing Judiciary.

Senate proceedings/debates ridiculing Judiciary.

The infamous storming of the Supreme Court to prevent the apex Court from proceeding in contempt petition against the former PM in Criminal Original No.29 of 1997.

The President and the Chief Justice of Pakistan resigned on 2-12-1997 which was justified in the Assembly.

Ridiculing of judiciary is a valid ground for dissolution of the Government as stated in PLD 1998 SC 388 (at page 431).

Failure of the Executive/Bureaucracy

PLOT TO DIVIDE ARMED FORCES

Interview of the Chief Executive with APP throwing light on the 12th October drama at Karachi Airport.

Article by Akhtar Isphahani published in Newsline of October, 1999, titled "What happened in Flight PK-805".

Article by Kamran Khan of News Intelligence Unit, published in the daily News dated 14-10-1999, titled "Ambitious Ziauddin steered Nawaz to political disaster."

Article by Kamran Khan of News Intelligence Unit, published in the Daily News dated 14-10-1999, titled "Ambitious Ziauddin steered Nawaz to political disaster."

Statement of Allama Tahirul Qadri published in Asas Rawalpindi dated 13-10-1999 titled "On seeing dissension in Army, India was going to open attack on Pakistan".

News item published in daily Khabrain dated 13-10-1999, with the title “Plan of Rana Maqbool, I.-G. Sindh failed - Gen. Pervaiz Musharraf could not be arrested”.

OBJECTIVES OF MILITARY TAKE OVER.

First speech of General Pervaiz Musharraf

Statement of General Pervaiz Musharraf that restoration of democracy is the top priority.

Statement of General Pervaiz Musharraf about setting up of National Security Council.

Announcement of the Chief Executive about accountability welcomed by B.N.P Mengal, J.U.I. Fazalur Rehman and Awami National Party.

Council of Islamic Ideology endorsed Chief Executive’s agenda

Chief Executive briefed Sheikh Zayed Bin Sultan Al-Nahyan of UAE.

Chief Executive pledged civilian rule after reforms

National Accountability Bureau set-up.

Chief Executive promised maximum autonomy at district level

Statement of the Chief Executive that improving economy and ruthless accountability are his two major objectives.

Statement of the Chief Executive that improving economy and ruthless accountability are his two major objectives.

Civil and Military combine to manage affairs

Chief Executive emphasised formulation of policies to give relief to common man.

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Cover story by Zahid Hussain published in Newsline of October, 1999 titled "Day of the General" explaining circumstances under which the Army was, once again, compelled to intervene in the country's chequered democratic history.

Press clipping from the daily "News" dated 31-10-1999 with the title "Gentlemen and Officers".

Radio Monitoring Report of BBC dated 15-10-1999, interview with Ghulam Sarwar Cheema, former Defence Minister saying that Army has no intention to impose Martial Law.

News item published in the daily Pakistan dated 20-10-1999, about the interview of Mr. Niaz A. Naik, former Foreign Secretary, with BBC.

PUBLIC PERCEPTION/ WELCOME/ ACCEPTANCE

Cartoon from A.K. Sajjad Painter “Donkeys pondering ways to plunder Pakistan”

Mrs. Benazir Bhutto welcomed the bold Proclamation of the Chief Executive

Leaders hail Chief Executive’s address to the Nation. Statement of the President of Hyderabad Chamber of Commerce and Industry that the Military action saved country from destruction.

Leaders demand change in system.

Statement of Mr. Ghulam Mustafa Jatoi, NPP Chief that Army action was inevitable.

Chief Executive to visit and brief Saudi and UAE Rulers about Afghanistan.

Statement of Rasool Bux Palijo, Awami Tehrik Chief that all Provinces should be treated as equal.

King Fahad of Saudi Arabia hoped that the Armed Forces will preserve stability and strength of Pakistan.

Chief Executive satisfied with Saudi support Chief Executive assured of Saudi Arabia’s support.

Muttahida Qaumi Movement assured the Chief Executive of its cooperation.

Ijazul Haq declared that 7 point agenda of the Chief Executive is reflective of national aspirations.

Sindh Taraqqi Pasand Party declared that military take-over is logical outcome of dictatorship.

Chief Executive discussed relations with Amir of Qatar and addressed Pakistani community.

Article by Nasim Zehra of Gulf News based in Islamabad, published in the Gulf News dated 14-10-1999, with the title "No time for rejoicing now". Also a picture showing people in Lahore city celebrating Nawaz Sharif's dismissal with fireworks.

Article by Rehmat Shah Afridi, published in Frontier Post Peshawar on 17-10-1999, with the title "No coup d'etat, but coup de grace.

Article by Shafqat Mahmood, published in daily News Islamabad dated 16-10-1999, titled "A bitter harvest and new beginning."

News item published in daily Nation Islamabad dated 14-10-1999, regarding Army take-over, Mian Azhar backing Army action, Imran Khan's stinging attack on dictator Nawaz, and Benazir urging military to set-up care-taker Government.

News item published in daily News Islamabad and Frontier Post Peshawar, dated 14-10-1999, titled "Qazi Hussain Ahmed welcomes Nawaz's ouster, demands elections' and "salute to army"

Article by Miangul Naeem of Peshawar, published in daily Nation dated 14-10-1999, titled "Dismissal of Nawaz Government welcomed".

Statement of Imran Khan issued from London, published in the daily Dawn Karachi dated 14-10-1999, with the title "Army stops Nawaz from becoming dictator".

Statement of the Deputy Secretary General of Sipah-e-Sihaba published in the daily Nawa-e-Waqt to the effect that the Army Chief has saved the country from internal civil war by taking action at right time.

Statement of Ijazul Haq, Senior Vice-President of PML(N) published in daily Nation dated 15-10-1999, to the effect that Army was left with no other option.

Statement of the President of Pakistan Tehrik-e-Insaf Peshawar District, published in the daily Frontier Post terming military action as timely.

News item published in the daily News, Islamabad, dated 15-10-1999, with the title "75% people back army action: Gallup Poll".

News item published in the daily News. Islamabad dated ' 15-10-1999, with the title "Peshawar, Lahore Bars back Nawaz removal".

Radio Monitoring Report of BBC dated 15-10-1999 - Maleeha Lodhi on Army Coup,

News item published in the daily Nation Islamabad dated 15-10-1999, titled "Chishti [General (Retd.) Faiz Ali] endorses army action."

News item published in daily Pak. Observer Islamabad dated 15-10-1999, containing statement of Gen. (Retd.) Hamid Gul, lauding Army action.

News item published in daily Jang Rawalpindi dated 15-10-1999, about supporting of Army action by the Peshawar and Lahore High Court, Bar Associations.

Statement of Ijazul Haq published in daily Jang Rawalpindi dated 15-10-1999, with the title "Removal of Nawaz Government was necessary - Nation is with the Army".

News item published in daily News Islamabad dated 16-10-1999, with the title "Politicians continue to hail Nawaz's ouster".

Radio Monitoring Report of BBC dated 17-10-1999, titled "Ordinary people accept coup in Pakistan."

News item published in daily Nation Islamabad dated 16-10-1999, with the title "Army action welcomed."

News item published in daily Frontier Post Peshawar dated 16-10-1999, with the title "Full support to Army".

Statement of Habib Wahabul Khairi published in daily Din Rawalpindi dated 16-10-1999, to the effect that Nawaz Sharit committed the offence of high treason and Proclamation of Emergency is a democratic action.

News item published in daily Pak. Observer Islamabad dated 19-10-1999, with the title "PPP to extend silent support to Musharraf."

Statement of Ghulam Sarwar Cheema, former Defence Minister and MNA of PML(N) published in daily Nation Islamabad, dated 19-10-1999, with the title "Army action was inevitable".

Statement of Ijazul Haq published in daily Khabrain Islamabad dated 18-10-1999, to the effect that if Nawaz Government had continued, the country would have faced grave crisis.

News item published in daily Nation, Islamabad dated 18-10-1999 with the title "seven political parties, groups support military action".

Radio Monitoring Report of BBC dated 18-10-1999 titled "Proclamation of Emergency welcomed".

Decision of Grand Democratic Alliance that "people are not with us but are with the Chief Executive - No party included in GDA will issue any statement against the present set-up".

Statement of Ghulam Mustafa Jatoi; Chief of the National People's Party that Army action was inevitable.

Statement' of Prof. Abdul Ghafoor of Jamat-e-Islami published in the Dawn Karachi, dated 21-10-1999, that Military take-over saved institutions.

Article by Nazar Ali Suhail published in daily News Islamabad dated 21-10-199, with the title "Public welcomes Musharaf's agenda."

News item published in daily news Islamabad dated 21-10-1999, with the title "G.D.A. supports Musharraf's agenda - Demands restoration of true democracy."

Publication of the United Farmers Association Pakistan published in daily Nawa-e-Waqt, Islamabad dated 25-10-1999, with the title "Army and Peasants are one."

Picture published in daily News dated 30-10-1999 showing the people dancing- in front of a huge hoarding of Gen. Pervaiz Musharraf.

Statement of Kabir Wasti of Muslim League (Qasim) published in Jang Rawalpindi dated 13-12-1999 to the effect that Army has taken-over to defend-Federation.

Statement of Hamid Nasir Chatha published in News Islamabad. dated 1-11-1999 that 90% people support Musharraf.

Statement of Aftab Ahmed Khan Sherpao of PPP published in News Islamabad dated 2911-1999 that Army enjoys popular support.

News item published in Pak. Observer Islamabad dated 5-12-1999 with the title "ANP declares full support to C.E.

News item published in Pak. Observer Islamabad dated 13-I0-1999 to the effect that Allama Tahirul Qadri backs Army take-over.

News item published in Pak. Observer dated 13-10-1999 with the title "People welcome take-over, demand accountability".

News item published in News Islamabad dated 13-10-1999, with the title "People shout Army Zindabad outside T. V. Station".

Statement of Allama Tahirul Qadri published in daily Nawa-e-Waqt dated 13-10-1998, titled "Army has taken over to defend the country".

News item published in News Islamabad dated 13-10-1999 with the .title. "Political, religious leaders hail change".

News item published in Nawa-e-Waqt dated 14-10-1999 titled “Teachers will offer prayer of thanks in Liaqat Bagh”.

News item published in daily Khabrain dated 14-10-1999, comprising statements of the constitutional experts that Army did well - high treason case can proceed against former rulers.

Radio Monitoring Report . dated 14-10-1999 of BBC that Peshawarites welcome Nawaz Government’s dismissal.

Radio Monitoring Report of BBC dated 14-10-1999 that JWP welcomes military action.

Radio Monitoring Report of BBC dated 14-10-1999 titled “Calm prevails in Pakistan after Military take-over”.

Radio Monitoring Report of BBC dated 14-10-1999 “Life normal in Islamabad despite Military coup”.

Radio Monitoring Report of BBC dated 14-10-1999 titled “Pak Army supports Gen. Musharraf’s action”.

Picture published in Pakistan Times ‘Rawalpindi showing the jubilant people dancing in front of a banner reading “Long Live Pakistan Army”.

News item published in News Islamabad dated 14-10-1999, with the title “Leaders continue to welcome Nawaz’s ouster”.

Statement of Mian Azhar Ex-Governor, Punjab, published in Khabrain dated 3-12-1999, titled “Army action is justified under the doctrine of necessity.”

MAL-GOVERNANCE/CORRUPTION/ACCOUNTABILITY

Legislators Pervaiz Ali Shah and others welcomed dismissal of Nawaz_Sharif and demanded across the board accountability.

Statement of Lt. Gen. ` Moinuddin Haider Ex-Governor that "Nawaz was urged not to appoint Advisers".

Statement of Governor State Bank that the defaulters owe 356 billion rupees.

Article of Prof. Dr. Shahida Wizarat titled "Crisis management of the economy".

Prof. Dr. Tahirul Qadri demanded accountability.

Two more cases against former Prime Minister sent to NAB.

Banks and financial institutions recovered Rs.5.6 billion out of their struck up loans.

26 top defaulters held

List of 31 references pending against the former Prime Minister Nawaz Sharif.

Transcript of BBC Television's documentary on corruption in Pakistan.

Summary of References filed against Nawaz Sharif and others for corruption and abuse of office.

A report to the people of Pakistan presented by the Pakistan People's Party about systemic corruption, money laundering and abuse of office by Nawaz Sharif.

Order dated 5-11-1999 passed by the High Court of Justice Queen's Bench Division, England, in Al-Towfeek Co. v. Hudaibiya Paper Mills Ltd. etc. about execution of decree against Sharif family.

Statement of Shezi Nackvi, Director of Al-Towfeek Co.

Exhibits "S N I" to the statement Shezi Nackvi, Director of Plaintiff Co.

Judgment dated 16-3-1999 of the Queens Bench Division in case titled Al-Towfeek Co. v. Hudaibiya Paper Mills etc.

Pedigree-table of Nawaz Sharif

List of Directors of Hudaibiya Paper Mills Ltd.

Sharif family's money laundering through travelling cheques, dollar bearer certificates and overseas accounts and purchase of property in London.

Letter/complaint of Mian Khalid Siraj (brother of Mian Sharif) addressed to Benazir Bhutto the then Prime Minister for inquiry into plundering and looting by Nawaz Sharif.

Statement of Saifur Rehman, Manager, Habib Bank A.G. Zurich, Lahore, about opening of accounts in the names of Muhammad Ramzan, Asghar Ali and Suleman Zia by Javed Kiani.

Statement of Syed Wajahat Hussain, Foreign Exchange Manager, Habib Bank AG Zarich, Lahore, about operating of 3 accounts of Muhammad Ramzan, Asghar Ali and Salman Zia.

Statement of Zaka. A. Malik, Handwriting Expert about comparison of writings/figures on transactions of foreign exchange.

Copy of F.I.R. No.12 of 1994 under sections 419, 420, 468, 471 and 109, P.P.C. and section 5 of the Prevention of Corruption Act, 1947, against Directors of Hudaibiya Engineering (Ptv.) Ltd. Regarding opening of fictitious Accounts in Habib Bank AG Zurich, Lahore.

Copy of F.I.R. No. 13 of 1994 under sections 419, 420, 468, 471 and 109, P.P.C. read with section 5 of the Prevention of Corruption Act, 1947 and Article 3 of Holders of Representative Office (Punishment for Misconduct) Order, 1977, against Directors of Hudaibiya Paper Mills. ‘

Bank record about the Account of Salman Zia.

Bank record about the Account of Asghar Ali.

Bank record about the Account of Muhammad Ramzan.

Extracts from the British Virgin Island Corporate Register about payment for purchase of property in London.

Payments to Shamrock Consulting Corporation through Salman Zia.

Photographs of Land Registry Records about property purchased by Sharif 'family in London.

Illustrative Charts about flood of funds from Salman Zia Account and money laundering by Sharif family.

Press clippings of foreign press about amassing of wealth by Sharif family.

Statement of Shezi Nackvi, Director of Al-Towfeek Co. as witness in the High Court of Justice Queens Bench Division.

Press clippings from News International titled "Living like a king Sharif's litany of abuses"

Internet Report of Daily Dawn dated 22-10-1999 with the title "Sharifs business Partners deprived country of 110 Million Dollars.

Internet Report of Daily Dawn titled "four cases against Nawaz being sent to F.I.A.".

Internet Report of Daily Dawn titled "Banks challenge Ittefaq claims of engineered loan default".

Internet Report of Daily Dawn titled "Sharif family liable for all Ittefaq Group loans".

Where do we stand today? Economic Crisis.

Police encounters during the period from 1-7-1997 to 30-6-1999

Death in Police custody during the period from 1-7-1997 to 30-6-1999.

Reasons of pendency of judicial inquiries in police encounters.

Details of murders/crime against women and motive behind murder.

Punishments awarded to police officials accused during the period from 1-7-1997 to 30-6-1999.

Article by Amir Nawaz published in Friday Times of 22/ 28-10-1999, titled "Treason case against Nawaz;"

Statement of Imran Khan, published in Pak. Observer, Islamabad dated 20-10-1999, to the effect that Army interference had become compulsory and the elections before accountability will be meaningless.

Statement of retired Generals published in daily Jang Rawalpindi dated 27-10-1999, demanding impartial accountability of those who plundered the national exchequer.

Statement of retired Generals published in daily Jang Rawalpindi dated 27-10-1999, demanding impartial accountability of those who plundered the national exchequer.

Statement of Mr. Farooq Ahmed Khan Leghari, former President published in Khabrain dated 14-10-1999 demanding severe accountability.

Review of economic performance 1990-99.

Brief of Finance Division, Government of Pakistan (E.F. Wing) on Lahore-Islamabad Motorway Project (M-2)

Brief of Finance Division (E.F. Wing) on Islamabad-Peshawar Motorway Project (M-I)

Brief of Finance Division (E.F. Wing) on Lahore International Airport. New passenger terminal complex.

Brief of Finance Division (E.F. Wing) on exact nature and scope of cooperative scandal to the Members of the National Assembly.

List of cooperative societies, their directors doing banking business illegally.

Package announced by Prime Minister on 7-12-1993 to compensate affectees of Cooperative Societies.

Report of Finance Division (Budget Wing), Government of Pakistan in respect of "Mera Ghar Scheme".

List of defaulters of Rs.100 Million and above, as on 31-10-1999.

List of Telephone Numbers of Politicians tapped during previous regime without permission of D-.G., I.B.

List bf Telephone Numbers of Politicians monitored without approval of D.G., I. B. .

List of telephone numbers of Judiciary tapped without written approval of D.G., I.B.

CONDEMNATION OF DEPOSED REGIME

Press release .of Benazir Bhutto urging World condemnation of Nawaz reign of terror on Press in Pakistan.

Protest of the Committee to protect journalists against Government sponsored attacks on independent journalists, addressed to Nawaz Sharif.

BBC report about protest of journalists regarding arrest of Mr Najam Sethi, Editor Friday Times.

Article by Nadeem Shahid published in daily Nation Islamabad on 25-10-1999 titled “He wanted to be the King.”

Article -by M.S. Qazi, published in Frontier Post Peshawar on 18-10-1999, titled “Nawaz’s fall from grace”.

Statement of Lt. General Sardar F.S. Lodi published in Nation Islamabad dated 21-10-1999, with the title “Losing heavy mandate. “

Article by Aslam Effendi published in the daily Nation, Islamabad, dated 16-10=1999 titled “Operation retribution or coup de grace”.

Statement of Malik Meraj Khalid published in the daily Frontier Post dated 15-10-1999, hailing Army action with title “Nawaz’s misdeeds paved way for army.”

Statement of Altaf Hussain, MQM Chief published in daily news Islamabad with the title "Nawaz responsible for army action.

Radio Monitoring Report of BBC dated 14-10-1999, titled "Army coup outcome of Nawaz Sharif's mistake".

Statement of Gen.(Retd.) Mirza Aslam Beg, published in News Islamabad dated 6-12-1999, with the heading "politicians responsible for army take-over.

Interview of Aftab Ahmed Sheikh of MQM published in Takbeer Weekly dated 8-12-1999 titled "Nawaz Sharif. himself invited Army".

Statement of Qazi Hussain, Ahmed published in News Islamabad dated 12-12-1999, with the title "only-Nawaz Sharif responsible for military coup."

Statement of M. Azam Khan Hoti of ANP published in daily Frontier Post dated 27-12-1999, titled "Nawaz still conspiring against army".

NECESSITY FOR TAKE OVER

Article by Amir Mir published .in daily news Islamabad, dated 13-10-1999 titled "Military Take-over legal under law of necessity according to Supreme Court ruling."

Radio Monitoring Report of BBC dated 14-10-1999, titled "Musharraf terms military intervention as last resort".

112. The learned Attorney-General submitted that the Proclamation of Emergency and the PCO are legislative instruments of extra-constitutional character, which fall within the ambit of doctrine of necessity, particularly in view of the question of State survival being involved in the present case, and as such the same are not open to judicial review. However, the status of all other acts and actions of the Chief Executive may stand on different footing in terms of the law laid down by this Court in Nusrat Bhutto's case (supra), in particular the observations at pages 715, 720 and 721 of the report. He reiterated that prime object of the Chief Executive is to hold fresh elections after cleansing the system as soon as practicable and possible.

113. At the conclusion of his arguments, while making certain clarifications, the learned Attorney-General filed written submissions for the sake of precision and clarity so as to avoid misunderstanding and misgivings. His submissions were: -

SUBMISSIONS ON BEHALF OF THE FEDERATION

1. In deference to observations of the Hon'ble Court on 5-5-2000, regarding the dates of transfer of properties at Raiwind, the Respondent Federation submits herewith the authenticated Revenue Extracts showing the dates of mutation/purchase of properties at Raiwind (8 pages) from 31-1-1984 to 24-9-1999 alongwith the letter dated 6-5-2000 of the Deputy Commissioner, Lahore.

2. It is submitted on behalf of Respondent Federation before this Honourable Court that the contents of the documents produced at pp.13 to 135 in Volume-X of Respondent along with the Written Statement in compliance with observations and directions of the Hon'ble Court were verified by NAB from the Election Commission and Central Board of Revenue and concerned authorities before being supplied by the Government of Pakistan through NAB and each page bears the signature of an authorised officer of NAB. The documents are filed on behalf of and under instructions of the Federation and the - said documents contain information and declarations of the former Parliamentarians and Members of the Provincial Assemblies themselves before the Chief, Election Commissioner and Income Tax Authorities. NAB has prepared the documents on the basis of the declarations made before the said authorities. The said documents are produced for the purpose of showing discrepancies in the respective declarations for the same period, before the Election Commission arid the Wealth and Income Tax Authorities.

3. The Attorney-General is appearing, before the Hon'ble Court as a part of his duty on behalf of the Federation and in response to notice from the Hon'ble Court, and not in his personal capacity. The Federation has filed separate lists of (a) loan defaulters (b) for misdeclaration of assets before

the Election Commissioner and Tax authorities and (c) persons whose telephones were taped. Certain press reports appearing on 6-5-2000 have mixed up the names of one list with the other resulting in misunderstanding. The statements of some politicians on the basis of such reports as appearing in the press on 7-5-2000 imputing allegations against the Attorney-General are misleading, unjustified, motivated and denied as all facts and documents produced before the Hon'ble Court as per lists were based on instructions, verified record provided by NAB and the Federation. The above is respectfully brought to the notice of the Hon'ble Court so that there is no further interference with the course of justice.

4. Volume-X similarly contains among others at pages 1 to 7 statement of expenditure in connection with expenses in the General Elections of 1985, 1988, 1990, 1993 and 1997, the last of which caused to the national exchequer a sum of Rs.1,054,495,101 as certified on 2-3-2000 by the Election Commission, Pages 1 to 7 disclose such expenditure as well as the total expenditure incurred by the MNAs in the General Elections of 1997 as well as the outstanding dues against the Members of the Parliament on account of room rent, utility bills etc. outstanding against former Parliamentarians as on 1-3-2000 (pages 8 to 14) as supplied by C.D.A.

5. Volume-II page 14 contains the statement of the Governor of State Bank of Pakistan that Rs.356 billion are payable as on 12-10-1999 by the Bank Defaulters to the various Banks. Some of the prominent names of Bank defaulters who are liable to pay Rs.100 Millions and above as on 31-10-1999, are mentioned at pages 167 to 182 of. Volume-IV and p. 111 and p.140 of Volume-VIII.

6. Volume-III contains the order of the High Court of Justice Queen's Bench Division, London dated 5-11-1999 at page 1 and Judgment, dated 16th March, 1999 disclosing the Suit filed by Al-Towfeek Company against (1) Hudaibiya Paper Mills, (2) Mian Muhammad Shehbaz Sharif, (3) Mian Muhammad Sharif, and (4) Mian Muhammad Abbas Sharif ordering the said defendants therein to pay a total sum of over US$ 32 Million to the Plaintiff Bank Al Towfeek Company for -loan advanced by the said Company to Hudaibiya Paper Mills owned by the Sharif family. At page 3, four flats at Park Lane are mentioned as belonging to Sharif family which were ordered to be attached in the said suit. At page 5, the Written Statement of Mr. Shezi Nackvi of the Plaintiff company before the Hon'ble Court of Justice at London sets out the details and the amounts payable by the Sharif family. The properties of the family are mentioned at page 7. At page 20, is the Judgment delivered on 16th of March, 1999 for payment of over US$ 14 millions as the first instalment. At page 23 a list of Directors of Hudaibiya as filed in the Court at London has been filed which shows the names of Members of the Sharif family as Directors. Pages 24 and 26 contain the signatures of Hussain Nawaz. Volume III contains those documents which were actually produced in the High Court of London including Bank Statements/cheques of foreign accounts held by the family of the former Prime Minister. The cheques are mentioned at page 106 onwards. All this information has been suppressed and not disclosed to concerned authorities in Pakistan, nor to this Hon'ble Court.

7. On the basis of this, the High Court of London passed a Decree/Order, dated 5-11-1999 for execution of the Decree, of nearly US $ 32 Million as stated above out of which the Sharif family has paid to the plaintiffs a sum of approximately US$ 9 Million on March, 2000 as first instalment in part payment. This fact has also been suppressed and on the other hand shows the assets of the family abroad which, remain undisclosed to a substantial extent.

8. Volume-VII of the respondent contains the affidavits of Lt. Gen. (Retd.) Nasirullah Babar and Lt. Gen. Asad Durrani in H.R.C. No. 19 of 1996 filed by Air Marshal (Retd.) Asghar Khan pending in this Hon'ble Court setting out therein the fact of payment of a sum of Rs. 140 million to the various politicians including IJI. This shown that the electoral mandate was obtained by corrupt practices.

9. Volume-VIII at pages 140 to 155 shows a sum of Rs. 6,146 Million borrowed by Mian Nawaz Sharif Family and business concerns from 31-Banks/DFIs (p.141) which remain to be cleared. Volume VIII at p.69 to 106 and p.156 to p.I90 contains detailed list of properties including those held in Chunian which after purchase was declared as Tax Free Zone and Industrial Area for illegal gain. At pA66 of Volume-VIII the names of 5 Industrial Units of the Sharif Family are mentioned as located in Tax Free Zone. The' map showing the zone is at p.190.

10. At pages 136 and 137 of Volume-X is the tabulation of the statements of 37 Banks/DFIs in respect of withdrawal of Foreign Exchange of over 171 Million US Dollars, from 11-5-1998 to 28-5-1998 showing mismanagement and misgovernance.

11. House at Raiwind Farm was declared as official residence of the former Prime Minister and Pak PWD was assigned responsibility of its maintenance (P.152 of Volume-X)

12. The Respondent Federation submits that the Proclamation dated 14-10--1999, the Provisional Constitution Order of the same date and any other Order made by the Chief Executive pursuant to the said proclamation are valid and cannot be called, its question on the basis of the Judgment delivered in Begum Nusrat Bhutto's case reported in PLD 1977 SC 657 at pages 721-722 and further reaffirmed by this Hon'ble Court in the case of Mehmood Khan Achakzai reported as PLD 1997 SC 426 at page 472, para. 45 on the ground of State necessity and State survival.

"It is further submitted, however, that the Proclamation dated 14-10-1999 cannot form the subject-matter of judicial review based as it is upon the doctrine of necessity and State survival and accordingly the Chief Executive is fully competent to perform all such acts and promulgate and take all legislative measures which have been recognized by judicial authorities as falling within the scope of the doctrine of necessity as held and declared at pages 715 and 716 inter alia in paragraphs (iii) (a) (b) (c) (d), (iv) and (v) thereof, and paragraphs (i) to (vii) at pages 721 and 722 in the judgment of Begum Nusrat Bhutto's case and reaffirmed in the case of Mehmood Khan Achakzai by this Hon'ble Court on the grounds of State Necessity and State survival, and-for orderly running of the State.

"Without prejudice to the contents of the Statement of the Federation and documents already on record, it is submitted, that the petitions are accordingly liable to be dismissed by this Hon'ble Court."

ARGUMENTS OF MR. KHALID ANWAR IN REBUTTAL

114. Rebutting the arguments advanced by Syed Sharifuddin Pirzada, learned Senior ASC and Mr. Aziz A. Munshi, learned Attorney-General for Pakistan, Mr Khalid Anwar submitted that in the opening session, Syed Sharifuddin Pirzada admitted the fact that the Supreme Court has full power of judicial review and notwithstanding the Proclamation of Emergency and the PCO, this Court retained its jurisdiction and power of judicial review and further that the new oath under the Oath of Office (Judges) Order No. 1 of 2000, has in no way affected the ability of the Judges of this Court to decide the validity, legal effectiveness and operation of the above instruments. He added that there is a consensus statement of the lawyers of the petitioners and the respondents on this point. He further clarified that though the Constitution in a technical sense has been suspended but it still rules indirectly because jurisdiction is conferred upon this Court by the Constitution and not the Proclamation of Emergency or the PCO, therefore, the power of judicial review of this Court is still intact. He argued that in the present scenario it is only the Supreme Court and no other institution or authority, which can validate the Proclamation of Emergency and the PCO and thereby grant legitimacy to the present Government, which is the relief they are seeking from this Court. He drew attention of the Court to the concise statement of Syed Sharifuddin Pirzada whereby he has only sought validation of the action of 12th October, 1999 by this Court and made no prayer seeking powers to amend the Constitution or carrying out economic, political or social reforms in the society. He then read out a part of the speech delivered by the Chief Executive on 13th October, 1999 to contend that the sole purpose of the Army take-over on 12-10-1999 was to prevent any further destabilization of the country and that the situation was perfectly calm and under control. . He contended that the Chief Executive in his above speech further appealed to the people to remain calm and support the Army in the re-establishment of order, which meant that he did not seek to create a new order through changes in the Constitution or laws.

115. Mr Khalid Anwar submitted that he would rely on material cited on behalf of the respondents because their own material supported his view. He thereafter dealt with each item of the case law relied upon by Syed Sharifuddin Pirzada. He argued that "65-Corpus Juris Secundum" (page 389), sub-heading "Public Necessity", relied upon by Syed Sharifuddin Pirzada, makes it clear that the existence of public necessity would be decided by the legislature and no one else. Relevant portion reads thus:'

"Public necessity. A relative term meaning urgent public convenience; in this connection inconvenience may be so great as to amount to necessity."

"With reference to legislative action, that, urgent, immediate public need arising from existing conditions which, in the judgment of the legislature, justifies a disturbance of private rights which otherwise might be legally exempt from such interference. It does not necessarily mean public benefit. The term is employed to designate the requirement of what is needed for reasonable convenience, facility, and completeness in accomplishing a public purpose."

He referred to "Judicial Review on Administration Action" by De Smith, wherein it was observed at page 544 as under:

"A person who is subject to disqualification at common law may be required to decide the matter if there is no other competent tribunal or if a quorum cannot be formed without him. Here the doctrine of necessity is applied to prevent a failure of justice. So, if proceedings were brought against all the superior Judges, they would have to sit as Judges in their own cause..."

116. His precise plea was that the respondents had mixed up the "doctrine of necessity" and "doctrine of State necessity", in that a wide range of case law referred to by Syed Sharifuddin Pirzada deals with application of "doctrine of necessity" in criminal law, in order to save life and not "doctrine of State necessity" with which we are concerned in the present case. . While dealing with the "doctrine of proportionality" he referred to page 595 of the report, wherein three tests are laid down by the European Courts of Justice in relation to the context of "doctrine of proportionality" viz.

(i) The balancing test requires a balancing of the ends which an official decision attempts to achieve against the means applied `to achieve them. .

(ii) The necessity test requires that, where a particular objective can be achieved by more than one available means, the least harmful of these means should be adopted to achieve a particular objective.

(iii) The suitability test requires authorities to employ means which are .appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful. "

and contended that the remedy should be proportional to the disease. He asserted that both America and Europe are one on the selection of least harmful means in order to achieve the objective, which, according to the Chief Executive, is re-establishment of order in the country on 12th October, 2000.

117. He then reverted to Farzand Ali's case,(supra) and contended that no reliance can be placed on the de facto doctrine by the Government on the basis of this case, inasmuch as, the finding in the above case was that if a person is holding an office illegally, no one can challenge the validity of his acts in a collateral proceedings for the sake of order and regularity except by direct proceedings instituted by the State or by someone claiming the office de jure. He argued that since the present proceedings were resorted to by the parliamentarians directly claiming to hold the office of members of National Assembly, Senate and Provincial Assemblies, they are entitled to challenge the same.

118. As to the case titled "Mokotso v. H.M. King Moshoehoe II (1989 LRC (Const.) 24), referred to by Mr Pirzada, Mr Khalid Anwar submitted that this was a case of coup d'etat and could not be a model for Pakistan. Then he proceeded to deal with the case of Mitchell v. Director of Public Prosecutions (1986 LRC (Const.) 35). and contended that the said case is similar to that of Mahmood Khan Achakzai in which the 8th Amendment was ultimately approved and upheld by the Supreme Court, in that, in the former case, the Grenada Courts held that because Constitutional Government has been restored, it is the action of the Constitutional Government, which has conferred validity and legitimacy on the Martial Law. Mr Khalid Anwar argued that this case goes against the arguments of Mr Pirzada because principles of International Law have nothing to do with it.

119. Adverting to the case of The Attorney General of Republic v. Mustafa Ibrahim, Mr. Khalid Anwar contended that an impression was sought to be created that in France, Germany, Italy, etc. there have been martial laws or military coups d'etat and surely this Court can take judicial notice of all these things but it was all about "doctrine of necessity" and not of "doctrine of State necessity", therefore, it does not advance the case of the respondents. He contended that it was common ground in Begum Nusrat Bhutto's case that Martial Law had been imposed in the country whereas in the present case it has been argued by Syed Shariffuddin Pirzada that this is not Martial Law, therefore, the ratio decidendi of Nusrat Bhutto's case is not applicable to this case.

120. Mr. Khalid Anwar then took up Volume "B" filed by Mr. Pirzada and referring to the case of Fred Toyosaburo Korematsu v. United States of America at page 132 thereof, contended that it again relates to "public necessity" and not "State necessity" and that this judgment was criticized in volume `G' filed by him, page 77, footnote 5 and also page 83. He next referred to a report namely "States of Emergency" - A study prepared by the International Commission of Jurists, which was read out by Syed Sharifuddin Pirzada at some length from page 14 onwards. Mr. Khalid Anwar referred to its criticism at pages 17,18,21-23.

121. Mr. Khalid Anwar submitted that if reliance can be placed on the Commonwealth Finance Ministers Meeting about corruption, then surely, reliance can be placed on the Commonwealth Prime Ministers Conference in which Pakistan was suspended from the Commonwealth for having an undemocratic Government.

122. According to Mr. Khalid Anwar, the only question before the Court today is as to which of Mr. Pirzada's view in his capacity as (i) Counsel; and (ii) Legal Scholar has to be referred as the views expressed by him as a writer are his true views, therefore, he accepts them in toto in so far as they relate to the present controversy.

123. He referred to Article 260 of the proposed Constitution of Pakistan, which, according to Mr Pirzada was drafted by Justice A.R. Cornelius, who was then Law Minister and contended that firstly, this Constitution never came into force and secondly, the responsibility rested on General Yahya Khan and that surely this was the action of General Yahya Khan, the then Chief Martial Law Administrator, who is not considered as a model today. Instead, he was the man who was responsible for the dismemberment of Pakistan.

124. Mr. Khalid Anwar argued that there is a saying, "Power corrupts and absolute power corrupts absolutely" and if that be true then the Supreme Court should not confer absolute power on the

Chief Executive to get rid of the legislature and authorise him to exercise all powers by validating the impugned action of 12th October, 1999. ,

125. Mr Khalid Anwar further contended "Constitutional and Administrative Law" by Hilaire Barnett and "Constitutional and Administrative Law" by Stanley De Smith and Rodney Brazier relied upon , by Mr. Pirzada talked about the doctrine of necessity and not state necessity.

126. As regards the arguments, of Mr. Aziz A. Munshi, the learned, Attorney-General for Pakistan, Mr Khalid Anwar submitted that in regard to facts and figures about turnover in the last four general elections, held in 1988, 1990, 1993 and 1997, it is interesting to observe that in 1997 general election, no party in the history of Pakistan got more seats than the Pakistan Muslim League. He further submitted that in 1993, the PPP got 7.8 million votes while in 1997 it came down 4.2 Million. In 1993 Muslim League got a major chunk of 8.2 million votes. He argued that what had happened was that people who were loyal to the PPP by and large did not vote for the Muslim League and stayed away. Regarding Al-Towfeeq & Co., it was argued that Nawaz Sharif was not a party to this case and a wrong impression was sought to be created that the same proved default against Nawaz Sharif.

127. Mr Khalid Anwar referred to the submission of the learned Attorney-General relating to fake foreign currency accounts of one Salman Zia allegedly sponsored by Mian Nawaz Sharif's family and submitted that this entire transaction forms subject-matter of a Full Bench judgment and Division Bench judgment of the Lahore High Court respectively reported as Hamza Shehbaz Sharif v. Federation of Pakistan (NLR 1998 (Crl.) 103) and Huddaibia Engineering v. Pakistan (PLD 1998 Lahore 90). He referred to paragraphs 5 and 6 of the latter report to contend that these . cases were quashed:

"5. On 8-11-1994 the appellant filed the Constitutional Petition (W. P. No. 14532/94) seeking a direction ~ to the Federal Investigation Agency to refrain from taking any proceedings under the F.I.R. This petition was dismissed by the learned single Judge on 19-12-1994 who was of the view that immunity and protection granted by section 5 of the Protection of Economic Reforms Act, 1992 only extended to those transactions in foreign currency accounts which were bona fide. It was observed that sections 5 and 9 of the Act have to be read together and as section 9 protects only bona fide banking transactions the immunity granted by section 5 of the Act was not pervasive but limited to transactions which are bona fide and not otherwise."

"6. During the pendency of this appeal, certain developments took place of which notice must be taken. After investigation of the case, Federal Investigation Agency had submitted challan to the Special Court constituted under the Offences in respect of Banks (Special Courts) Ordinance, 1984 under section 419/420/468/471 read with section 109, P.P.C. The other offences mentioned in the F.I.R. namely section 5 of the Prevention of Corruption Act, 1947 and Article 3 of the Presidential Order 16 of 1997 seeking quashment of the challans submitted to the Special Court were filed by Mukhtar Hussain and.Hamza Shehbaz. A Full Bench of this Court has since allowed these two petitions holding that the case had been registered by the F.I.A. without any lawful authority and even on merits no case was made out on the face of record and the continuous prosecution would be an abuse of the process of the Court. However, while disposing of those Constitutional petitions, the question as to the effect and scope of Protection of Economic Reforms Act, 1992 was not gone into by that Bench and was left to be determined in this appeal by observing that:-

"As regards the Intra-Court Appeal presently pending, his submission is that it would be pressed only to the extent of the decision of the learned single Judge with regard to the interpretation placed by him on the relevant law, regarding the immunity available to the foreign exchange accounts under Economic Reforms Act XII of 1992."

128. He next submitted that the only reference actually filed against Mian Nawaz Sharif is the helicopter case in which it was alleged that though he used the helicopter during his election campaign but did not declare it as a part of his asset.

129. Mr. Khalid Anwar argued that since Mian Nawaz Sharif is neither a petitioner nor a respondent, no observation should be made by this Court regarding his conduct. He added that this is especially true when criminal cases are pending -against him which will ultimately come in appeal before this Court, therefore, it would be most improper for the Government to bring his conduct under the subject-matter of the present litigation. To support this point, he referred to the case of Mushtaq Ahmed Gormani v. State (PLD 1958 SC 333), wherein certain observations were made against the then Prime Minister, Malik Feroz Khan Noon, which were ultimately expunged by the Supreme Court because he was not a party to the proceedings. Reliance was also placed on Amanullah Khan v. Federal Government of Pakistan (PLD 1990 SC 1092) for the same proposition.

130. Referring to the allegation made by the learned Attorney-General that Chunian Estate in Kasur was purchased just before the issuance of Notification in 1987 creating an Industrial Estate there by the CBR and, thus, derived benefits, Mr Khalid Anwar contended that the alleged estate was purchased by Nawaz Sharif family in 1984, much prior to the issuance of the above

notification and that in 1987 Military Government was in power, therefore, if any corruption was committed, the blame would rest on the then Military Government.

131. Regarding allegation of misdeclaration of assets before the Election Commission and the Wealth Tax Authorities, Mr Khalid Anwar contended that there was no real misdeclaration of assets, in that, under the Wealth Tax, one declares the cost of property or market price and under the Election laws one declares the value which is artificially calculated to represent 10 years' annual letting value. Referring to the alleged misdeclaration of pension of $ 20,000 per annum received by Mr. Sartaj Aziz from United Nations, he contended that pension is like salary and not an asset. He also pointed out that under the Wealth Tax Act, dollars are not taxable.

132. Further dealing with the argument advanced by the learned Attorney-General that the references filed in the Accountability Courts under the NAB Ordinance have established corruption of the politicians, Mr Khalid Anwar contended that the list of References included names of Air Vice Marshal Waqar Azim, several businessmen and some politicians, who are not party to the present proceedings and, therefore, no comments could be made about them.

133. He submitted that in the budget for the years 1997, 1998 and 1999, civil departments of the Government were allocated Rs. 69 billion only, whereas defence department of Pakistan was allocated Rs. 145 billion i.e. just one department of the Government incurs double expenditure. The argument was that military officers are outside the ambit of accountability and they have been excluded from accountability despite the fact that there is a serving General, who is head of the NAB, which fact negates the plea of across the board accountability.

134. He further contended that in 1977 according to Begum Nusrat. Bhutto's cast, the military government wanted time to carry out accountability before elections. He argued that ninety days became ninety months but no accountability was carried out and that corruption at the end of the latter period had in fact multiplied.

135. Mr Khalid Anwar also referred to the submission regarding Mehran Bank Scandal on which the learned Attorney-General had laid great emphasis to show corruption of politicians and contended that Mirza Aslam Baig former Chief of Army Staff obtained Rs. 14 crores from Younis Habib. Chairman of Mehran Bank for disbursement to various politicians and all those payments were made by Lt. Col. Mir Akbar Ali Khan, Rawalpindi Headquarters.

136. Regarding telephone tapping by the former Government of Mian Nawaz Sharif, Mr. Khalid Anwar condemned tapping of the telephones of Chief Justice of Pakistan and other Judges of the superior Judiciary and called it a shameful act.

137. As to the judgment of Anti-Terrorist Court in the plane hijacking case against Mian Nawaz Sharif, Mr. Khalid Anwar submitted that reference to the case in these proceedings is not appropriate in that an appeal is pending in the High Court and the matter is likely to come before this Court.

138. Mr. Khalid Anwar denied the allegation that 15th Constitutional Amendment bill was intended to be introduced with a view to grabbing more powers by the Prime Minister.

139. Mr. Khalid Anwar further argued that the reaction of the people in welcoming the Military take-over is of no consequence in that the political parties which earlier welcomed the impugned action of the Chief Executive are now stressing for early restoration of democratic rule. He also referred to a book titled ""Public Opinion" and Political Developments in Pakistan by Inamur Rehman to contend that public opinion is transient in nature. He further argued that charges of corruption and corrupt practices against the previous Government are of no consequence in that there is corruption in many other countries of the world including Germany, England, Italy, Japan, etc.

140. Mr. Khalid Anwar further submitted that the mere fact that the decision of Army take-over was allegedly made by the Corps Commanders and the Principal Staff Officers as contended by the learned Attorney-General is of no legal consequence in that none of the above officers has any constitutional role to do so. He reiterated his submission that Begum Nusrat Bhutto's case warranted revisiting. He vehemently contended that- the Elections of 1997 were fair and transparent.

ARGUMENTS OF S. M. ZAFAR, LEARNED AMICUS CURIAE

141. Mr. S.M. Zafar, learned amicus curiae submitted that whenever there is a constitutional breakdown, coup detat or otherwise, Judges are invariably confronted with an ethical dilemma on each occasion for which law prescribed no solution. He submitted that every Judge makes up his own mind either to resign or to continue as a Judge under the new dispensation. Those who opt to

continue in office, as the Judges of this Court have done, they take upon themselves a very important historical burden of maintaining national legal order in the face of unconstitutional or extra-constitutional takeovers.

142. Mr. S.M. Zafar next submitted that since its inception, Pakistan has actually struggled with various Constitutions as well as couple of forms of Government i.e. Presidential, Parliamentary or abrupt political changes not contemplated by the Constitution. He submitted that in this milieu of changes, it is significant to note that whatever the nature or magnitude of a change, the Judiciary has continued to survive, inasmuch as, there has been no institutional interruption or discontinuity of Judiciary as such. He then proceeded to narrate a brief history of Judiciary to show as to why there has been no institutional interruption. ,

143. He submitted that on independence, Pakistan inherited a reconstituted faction or part of Federal Court of India as the Federal Court of Pakistan by virtue of the Government of India Act, 1935 and more importantly by virtue of PCO 1947. On 24th of October, the then Governor-General Malik Ghulam Muhammad dissolved the Constituent Assembly, but Judiciary continued and it not only continued, but it was finally able to decide the issue of dissolution of the Constituent Assembly. That was the first interruption that took place. On .23-3-1956 the first Constitution was passed. It did change the nomenclature of the Court from Federal Court to Supreme Court of Pakistan under Articles 148 and 227(3) of 1956 Constitution:

" 148. There shall be a Supreme Court of Pakistan consisting of a Chief Justice, to be known as the Chief Justice of Pakistan, and not more than six other Judges:

Provided that Parliament may by Act increase the number of other Judges beyond six."

"227(3).- All legal proceedings pending in the Federal Court, immediately before the Constitution Day, shall, on such day, stand transferred to, and be deemed to be pending before, the Supreme Court for determination; and any judgment or order of the Federal Court delivered or made before the Constitution Day shall have the same force and effect as if it had been delivered or made by the Supreme Court.

144. He next submitted that first Martial Law was imposed in October 1958 abrogating the Contitution of 1956, but paragraph (ii) of the Laws (Continuance in Force) Order, 1958 maintained

and continued the Supreme court and all other Courts in existence before the promulgation of Martial Law. On 8-6-1962 the Constitution of 1962 was enforced. It changed the form of Government from parliamentary to presidential, but under Article 49 read with Articles 227 and 234 of the 1962 Constitution the Courts continued to exisat to exercise theire jurisdiction as before. The 1962 Constitution was abrogated on 25-3-1969 but, under paragraph 6 (ii) of the PCO, 1969, the Supreme Court and all other Courts continued to function as before as also to exercise their jurisdiction as before. On 24-4-1972, Interim Constitution of 1972 was enforced. Article 171 read with Articles 285 and 295 maintained the continuity of the judiciary as an institution without any interruption. On 14-8-1973 the Constitution of 1973 was promulgated. Article 175 read with Article 275(2)(4) ensured the continuity, of the Judiciary. He submitted that on 5-7-1977, General Ziaul Haq held the Constitution in abeyance and proclaimed Martial Law but by paragraph 2 of the Laws (Continuance in Force) Order, 1977, the Judiciary as such was continued and finally on 31-12-1985 the Constitution was revived again. Lastly, on 12-10-1999 through Proclamation of Emergency, the Constitution of 1973 has been kept in abeyance for the second time, but under the PCO 1 of 1999 paragraph (ii), Judiciary as an institution has been preserved and continued. His formulation was that the Superior Judiciary, as history indicates, structured since 1947 and established as Supreme Court and High Courts of various Provinces under the Constitution of 1956 have been jealously maintained intact in spite of successive constitutional changes. He referred to the case of M. Inayat Khan v. M. Anwar and 2 others (PLD 1976 SC 354), wherein at pages 369, 371, 372, 374 and 375, it was observed:

"Now, in the present case, Mr. M. Anwar had himself filed an appeal in the Supreme Court in Asma Jillani's case against the original judgment of the Lahore High Court. The hearing of the appeal was scheduled to commence on the 16th of March, 1972, whereas Mr. Anwar's interview was published in the weekly 'Kahani' bearing the date 10th March, 1972. In this interview he had expressed himself strongly against the decision of the Supreme Court in Dosso's case, and this was also his main stand in the appeal filed by him. We have already seen that in his interview Mr. Anwar had not only questioned the correctness of the judgment in that case but had also attributed motives to the. learned Chief Justice who delivered the leading judgment and had also indicated in no mild terms, the other judges of the Supreme Court who had concurred with the learned Chief Justice. Even if we may not go along all the way with the learned Attorney-General in thinking that the publication of the interview, a few days before the commencement of the hearing of the appeal in Asma Jillani's case, was intended to "brow-beat and blackmail" the Judges of this Court, it is clear that the publication was indeed calculated to influencing the mind of the Judges against endorsing the view taken in Dosso's case. It is irrelevant whether this was the intention of the respondents in publishing the interview or whether it has to be seen is whether the publication had the tendency to prejudice their minds in the matter. We consider, therefore, that the publication in question also amounts to contempt of Court as it had the tendency to prejudice the determination of a matter pending before this Court.

"The fact that, while deciding Asma Jillani's case, the Supreme Court did ultimately accept the position canvassed by Mr. Anwar against the doctrine expounded in Dosso's case, and expressed

itself rather strongly in this behalf, has, however, no bearing on the nature of the publication we are considering here. It is axiomatic that the Court is bound to decide a pending cause in the view expressed in the offending publication, cannot in any manner detract from its pernicious tendency to prejudice the determination of the cause when it was still pending. At best such judicial endorsement might be urged was a mitigating circumstance in the matter of punishment for the contemner.

"A reference to the terms of this Article does indeed show that it is not in the nature of a provision for the continued existence and functioning of the President or the Chief Justices, and Judges holding office under the previous Constitutional Order; but it does, nevertheless, indicate a sense of continuity by providing that, for the purposes of this Constitution, in relation to a period prior to the commencing day, any reference to the holders of these offices shall be construed as a reference to the incumbents in office immediately before the commencing day.

"However, it is difficult to place this meaning on this clause for the reason that the Supreme Court has generally not been regarded as falling in the category of a civil, criminal or revenue Court, nor have the Chief Justice and Judges been described as judicial officers. The Court as well as the Chief Justice and the Judges fall in a distinct category created by the Constitution, and different from civil, criminal and revenue Courts and the Presiding Officers thereof. We consider, therefore, that irrespective of the entry appearing in the index to the 1962 Constitution, clause (5) of Article 234 has no application to the Supreme Court and the Chief Justice and Judges thereof.

"The combined effect of these provision was that all pending proceedings in the Supreme Court as well as the other Courts in the country were to continue in accordance with the law under which they were commenced or instituted. It also followed that such proceedings would be continued in the same forum in which they were commenced, unless the Constitution expressly provided to the contrary. As a result, the Supreme Court established under the 1962 Constitution automatically assumed jurisdiction in all matter which were pending before the Supreme Court immediately before the commencing day. This position was not altered in any manner by the fact that the 1962 Constitution may have varied the jurisdiction of the Supreme Court as compared to the one available under the 1956 Constitution.

"For all these reasons, we have no doubt in our mind that the Supreme Court as established under the 1956 Constitution itself was abrogated in 1958 on the proclamation of Martial Law, and the Laws (Continuance in Force) Order, 1958, was in turn repealed by Article 225 of the 1962 Constitution, which provided for the establishment of a Supreme Court, and at the same time contemplated that the Chief Justice and the Judges in office immediately before the commencing day shall continue to hold their respective offices, but take a new oath of office and allegiance to.

the new Constitution as soon as practicable after the commencing day. Such being the case, the Supreme Court functioning under the 1962 Constitution would by fully competent to punish any contempt relating to the Supreme Court of Pakistan or any of its Judges as constituted in 1958.

"The present proceedings before us were instituted on 17-3-1972 under Article 123 of the 1962 Constitution. As is well-known, the 1962 Constitution was abrogated on the 25th of March, 1969 on the proclamation of the second Martial Law, but under paragraph 6(2) of the Provisional Constitution Order, 1969, the Supreme Court, the High Courts and all other Courts and tribunals were enabled to exercise the same powers and jurisdiction as they had immediately before the issuance of the proclamation. Accordingly, the Supreme Court had the Jurisdiction to deal with this matter under Article 123 of the 1962 Constitution at the time it was initiated.

"The provisions contained in the Interim Constitution of 1972 as well as in the Permanent Constitution of 1973 follow the same pattern as was adopted in the 1962 Constitution to ensure the continuity of the legal order, the functioning of institutions like the Supreme Court, the High Courts and other civil, revenue and criminal Courts, and the continuance in office of the Chief Justice and Judges of the Supreme Court and the High Courts, as well as of all other persons in the service of Pakistan. It follows, therefore, that it is a misconception to think that the present Supreme Court, or the Supreme Court constituted under the 1962 Constitution, was, in any manner, a new or a different institution. The correct position appears to be that the Supreme Court and the High Courts established under the 1956 Constitution have been assiduously maintained intact in spite of successive constitutional changes; and their continuity is reflected .not only by the fact that their Chief Justices and the Judges have been continued in office, but also by the fact that all pending proceedings have been continued by the respective Courts under the laws under which they were initiated or continue to be competent to punish any acts amounting to contempt even though they relate to the functioning of these Courts or these Judges as constituted under earlier constitutional instruments.

It will be seen from the authorities, to which we have already referred in an earlier part of-this judgment, while considering the question whether the offending Article constitutes contempt or not, as well as from the terms of clause (2) of Article 123 of the 1962 Constitution, that the offence of contempt of Court is committed if there is interference with or obstruction of the process of the Court; or scandalisation of the Court or nay Judge of the Court such as is calculated to diminish the dignity or authority of the Court and to impair public confidence in its independence, impartiality, and integrity. As observed in the cage of Fakhre Alam v. State (1), the object of contempt proceedings is not the vindication of the character or conduct of an individual Judge, but to protect the Court from attack and calumny, so as to keep the fount of justice pure and unsullied and to maintain public confidence in the ability and power of the Courts to administer justice.

Reference was also made to a passage from Nusrat Bhutto's case at ?age 717:

"Next, even if for any reason the principle or power of judicial review embodied in the relevant provisions of the 1973 Constitution be held not to be available under the new dispensation the fact remains that the ideology of Pakistan embodying the doctrine that sovereignty belongs to Allah and is to be exercised on his behalf as a sacred trust by the chosen representatives of the people, strongly militates against placing the ruler for the time being above the law, and not accountable to any one in the realm. Muslim rulers have always regarded themselves as being accountable to the Courts of the land for all their actions and have never claimed exemption even from personal appearance in the Courts. The Courts of Justice are an embodiment and a symbol of the conscience of the Millat (Muslim community), and provided an effective safeguard for the rights of the subjects. On this principle as well, the power of judicial review for judging the validity of the actions of the Martial Law Authorities must continue to remain in the superior Courts."

"Lastly, the Court is bound to take note of the fact that already several instances have been brought to its notice where the ordinary civil rights of the people are being interfered with by the subordinate Martial Law Authorities even though the laws of the land, which have been kept alive under the Laws (Continuance in Force) Order, 1977, m;kke full provision for their adjudication. In some cases, interference has occurred even when the contending parties had already been litigating in the civil Courts regarding the same disputes. The necessity which justified the Proclamation of Martial Law did not arise owing to the failure of the Courts to adjudicate on these matters. Such matters must, therefore, continue to fall outside the purview of the Martial Law Authorities, and the only remedy to the citizens against any such encroachment can be by way of judicial review in the superior Courts. "

145. The learned amicus curiae referred to certain passages from the book titled "Pakistan in the 80s law and Constitution" Edited by Wolfgang Peter Zingel Stephanie Zingel Ave Lalemant:

"IN DEFENCE OF THE CONTINUITY OF LAW PAKISTAN'S COURTS IN CRISES OF STATE by Dieter Conrad which say:-

1. An uphill task

"Repeatedly, the Courts have been involved in the paradoxical task of delineating, from first principles, some constitutional contours of extra-constitutional action. They have, thus, produced a whole series of judicial pronouncements dealing at explicit length with the validity of extra-constitutional emergency measures and of revolutionary changes."

2. Two prototypes of constitutional crisis

"The pivotal practical question in this context, as to how the law Courts should re-act to suspension of, and revolutionary changes in, the Constitution, has been discussed more than once. It is the underlying question in the recent study on the `doctrine of necessity'.

"It appears from this analysis, with convincing clarity, that there are two basic types of Court responses to constitutional break-down classed by him as `necessity' cases and "Kelsen" cases respectively."

"It seems to me that the two types of judgments should be viewed in relation to two different types of political situation, and that a Court's re-action might reasonably differ in the two."

"These two types of extra-constitutional action may conveniently be characterized by drawing on a distinction from German doctrinal discussion, namely of commissarial and sovereign dictatorship."

"…….The difference is that the commissarial dictator is ultimately bound to, though not presently restricted by, the existing Constitution, while the sovereign dictator justifying his actions from the future order is not measured by any precise constitutional yardstick. "

5. Alternatives of judicial policy

“The upshot of this brief recapitulation is that the Pakistan Court has resorted to the doctrine of necessity in situations offering a reasonable prospect that extra-constitutional action might be kept within the bounds of commissarial dictatorship;”

“A change of the Constitution, revolutionary or otherwise, need not imply a-change of the total legal order; the fiction of a total change is inappropriate to describe what actually is nothing but a change of the power to effect changes in the legal order. If all existing law becomes subordinate to a new law creating authority, it does not follow that its continued validity derives from it: valid law simply remains valid unless or until altered by the law creating organ. Constitutional provisions expressly keeping in force the bulk of existing law (Laws Continuance in Force Orders) have primarily a declaratory, or perhaps clarificatory, effect.”

“It is plain to see that a principle of minimal recognition with respect to illegal constitutional change, or, the endeavour to limit legal effects of political changes to the narrow political sphere under the doctrine of implied mandate, would easily fit into this general conception. “

“the difference between a legal system’s apex norm, and the Constitution, stands out more clearly. We have to perceive the Constitution not as the foundation of a legal system, but as itself founded in it.”

“The significance of Pakistan’s great constitutional cases lies in the fact that the Courts have constantly assumed the power `to say whether what had happened, was legal or illegal’ i.e. to Judge the validity of constitutional enactments.”

“There are no convincing reasons, why Courts should be any less entitled than the executive to claim extraordinary powers under State Necessity in order to overcome legal chaos and effect an ordered transition to legality. Thus, necessity can be invoked as an independent basis of jurisdiction, if no other remedy is left; this has been held in the Cyprus case of A.G. v. Mustafa Ibrahim.”

“for an oath to administer law in accordance with such a Constitution could be legally imposed on a Judge only in so far as that constitution is `law’ itself, i.e. legally valid. A political oath could, therefore, not restrain a Court of law from exercising its inherent judicial power to inquire into the legal validity of a Constitution, even if its own jurisdiction is conferred by it.”

146. He submitted that the survival and continuation of the Judiciary is relatable to the fact that in each constitutional interruption, there was no allegation of malfunctioning of the Judiciary, rather it was the failure of the political organ of the State which was made the cause of constitutional interruption. Thus, Judiciary stands acquitted in history, but this is not a free acquittal. It is burdened simultaneously with the responsibility to adjudicate and pronounce upon the nature and merits of the change and more importantly the quantum of its legislative capacity. He submitted that the Judiciary must adjudicate all the controversial/thorny issues and the reason is that if the Judiciary were to decline to adjudicate, it may open itself to the charge that although the coup makers did not interfere with the Judiciary, yet it renounced its powers and became dis functional, therefore, judicial abdication will be self-condemnatory and destructive. He submitted that the Judiciary survived in history and must continue to exercise its judicial powers and thereby control, in a significant way, the possible recklessness of the use of the legislative power that has come to vest in the new regime on account of the attending circumstances leading to the change in question. He submitted that since the respondents are claiming legislative power, it is the duty of this Court to place checks on it, inasmuch as,, in the absence of appropriate representative institutions, such power shall remain uncontrolled, unaccountable and, thus, may become arbitrary.

147. He submitted that another somewhat similar but a priori reason why Judiciary must tie or untie the Gordian knot is that in most societies and particularly. in Pakistan, it is the only forum recognized by both the rulers and the ruled where questions of validity and legitimacy are capable of being resolved finally, controlling the recklessness of the new regime and declining to resolve it would be self-condemnation, self-destructive and betrayal of the trust of the people of Pakistan.

148. He submitted that any form of oath taken by or administered to the post-coup d'etat Judges can neither restrict the judicial power nor derogate from the legal position that the Courts, as final arbiters in any constitutional controversy, retain their right and jurisdiction to say as to what a particular provision of the Constitution means or does not mean even if that particular provision is one seeking to oust the jurisdiction of the Court itself. He submitted that any attempt to control or circumscribe the judicial power of the Superior Courts with a view to denying them the right to decide the validity and the quantum of legislative power of the new regime, would be an exercise in futility and that let it be known that changing the form of oath will not take away the inherent jurisdiction of this Court to say what a particular provision of the Constitution means or does not mean. He emphasised that notwithstanding the new oath or its language the Courts shall continue to have jurisdiction to decide the question whether the new oath and the "new constitutional document" under which the oath is administered, have any effect on the jurisdiction and power of the Court.

149. Mr. S.M. Zafar further submitted that learning from the previous change overs, although the draftsman has, in the new prescription of oath, substituted "upholding the 1973 Constitution" with "upholding the PCO" with a view to barring and restricting the Court's jurisdiction yet there is nothing in the oath or inherent in the conditions prevalent today to derogate from the legal position that the validity of the provisions pertaining to the jurisdiction of the Court can be and shall be finally adjudicated upon by the Court. The changes in the language of the oath are merely declaratory and mere recognition of the fact that on October 12, 1999 some transformation did take place. Thus, if the Judges are continuing in office all the time, then any form of oath, any device, any language, any new or different situation will make no difference. It will be an exercise in futility and the final question would be whether the one who prescribed the oath, had the jurisdiction to prescribe it?

150. He submitted that the Judges of the Superior Courts follow the Code of Conduct for the Judges and inherently owe allegiance to the State of Pakistan, which requires this Court to decide the issue of validity of the new regime under which the Judges are being asked to take new oath, inasmuch as, such allegiance cannot be undone. However, oath administered under the Constitution is something different. According to him, such oath has to be respected because it draws its authority from the people of Pakistan.

151. He drew a distinction between `revolution' and `coup d'etat'. He referred to the definition of the term `coup d'etat' given in Black's Law Dictionary, which is as under:

"Coup d'etat.---Political move to overthrow existing Government by force.

"Revolution.-A complete overthrow of the established Government in any country or State by those who were previously subject to it. The word in its broadest significance is generally used to designate a sweeping change as applied to political change, it denotes a change in a method or system of Government, or of the power which controls the Government. It is frequently accomplished by or accompanied by violent acts, but it need not be violent in its methods and it does not necessarily denote force or violence.

He also referred to certain passages from the book titled "A HISTORY OF MILITARISM" CIVILIAN AND MILITARY by Alfred Vagts, to explain the meaning of the term `revolution'.

He submitted that coup d'etat and revolution may be distinguished and differentiated as under:

(i) "A coup d'etat is a sudden seizure of state power by a small segment of the people. Whereas a revolution is preceded by a long gestation/preparation and a sizeable portion of the people participates in the struggle.

(ii) A revolution is aimed at and proclaimed to cause far reaching changes both in the social system and the national legal order. The coup d'etat is respectful and conservative towards the existing national order and seeks to remove certain deficiencies to improve its working.

(iii) A revolution creates new structure out of the ashes of the old one; a coup d'etat subverts that .part of the Constitution which relates to the formation of the political organ with a view to reform it.

(iv) A revolutionary asserts the right to stay, the coup d'etat leadership promises to return the trust to the political sovereign, the people, as soon as possible, and retains the functional framework of the State as well as the judicial branch.

(v) In case of coup d'etat the legitimacy of the new regime is not completely autonomous/independent of pre-existing processes and institutions. The revolution is autonomous and disrespectful towards existing national order and attempts to transform the society altogether.

(vi) Only one common thing which happens historically in the case of both is that an unsuccessful coup as well as unsuccessful revolution is treated as treason."

152. The learned amicus curiae referred to the cases of Ex-Major General Akbar Khan v. The Crown (PLD 1954 FC 87), F. B. Ali v. The State (PLD 1975 SC 506) and Shahida Zahir Abbasi v. President of Pakistan (PLD 1996 SC 632), to contend that in all these cases the Supreme Court merely examined the trial procedure to ensure due process. He stated that the greatest mistake in Dosso's case was that no distinction was made between revolution and coup d'etat and further that Kelsen's theory of revolutionary legality was misunderstood/misapplied.

He also referred to para. 19 of the statement dated 2-5-2000 of Syed Sharifuddin Pirzada, learned Senior ASC, which reads thus

" 19. The intervention is not of a permanent nature, but for a limited period and is of a temporary character to enable the country to return to a true democratic way of life as soon as possible."

Mr. S.M. Zafar, the learned amicus curiae concluded that what happened on 12th October, 1999 was a coup d'etat and not a revolution.

153. He submitted that the issue of recognition or otherwise cannot be resolved on the basis of recognition accorded by the International community but is to be determined under the Municipal Law. In support of his contention; reliance was placed on Asma Jillani's case (supra).

154. Reference was also made to the book titled "Recognition of Governments in International Law"-With Particular Reference to governments in Exile by Stefan Talmon wherein it was observed that recognition of governments denotes the act through which it becomes apparent that a State is willing to enter into certain relations with an authority as the Government of a State and/or that, in the opinion of the State, the authority qualifies as a Government in international law.

155. He submitted that the change on 12th October, 1999, does not claim to be based on the principle of revolutionary legality, hence the principle of Dosso's case is not relevant and Kelsen's theory is not applicable to the facts and circumstances of the present case. The logical conclusion is that the new regime, if it is not a revolutionary regime, cannot claim to be the law giving source and its legislative powers are to be spelt out by the Courts.

156. He submitted a brief account of the chequered political history of the nation by stating that the country had its legal birth and freedom with the adoption of Government of India Act, 1935 as the Interim Constitution along with the Indian Independence Act, 1947. After nine years, the 1956 Constitution was drafted and promulgated but it was a short lived document as it was abrogated on 7-10-1958. This was followed by the promulgation of the 1962 Constitution on 1-3-1962 which provided for Presidential form of Government. Seven years later, however, this Constitution was also abrogated and was followed by the Laws (Continuance in Force) Order, 1969 as well as the

Legal Framework Order, 1970. Later, Interim Constitution of 1972 came into force which was succeeded by a permanent Constitution i.e. the Constitution of 1973 which came into force on 14-8-1973. This was a consensus document and, therefore, the Laws (Continuance in Force) Order, 1977 as well as Proclamation of Emergency and PCO 1 of 1999 merely held it in abeyance. He stated that every time there was a constitutional debacle, the Courts provided an appropriate solution through the application of doctrine of necessity or other formula in order to ensure continuity of the legal system.

In doing so, the judgments of the Court may be divided into two categories, (i) cases in which necessity was pleaded within the framework of an existing Constitution, and (ii) cases in which necessity was pleaded by an intervenor who acted extra-constitutionally. In the first category, the relevant case is that of Muhammad Umar Khan v. The Crown (PLD 1953 Lah. 528) in which military necessity was recognized, while in the second category the Reference by His Excellency the Governor-General (PLD 1955 FC 435) may be referred where civil necessity was spelt out as part of every written Constitution of a civilised people.

He also referred to the Reference. by the President of Pakistan under Article 162 of the Constitution of Islamic Republic of Pakistan (PLD 1957 SC [Pak] 219), which was rejected by the Court. He also referred to the case of Darwesh M.Arbey v. Federation of Pakistan (PLD 1980 Lahore 206) wherein the military necessity was rejected on the touchstone of 1973 Constitution. He referred to the case of Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504) in which both the civil and military necessity were not allowed to be pleaded in violation of the Constitution.

157. He submitted that notwithstanding the negative comments, received by the Reference by His Excellency the Governor-General (PLD 1955 FC 435), this Court, inter alia, decided that the doctrine of necessity can be validly used only in defence of and for preservation of the Constitution and that only if a Constitutional authority i.e. Governor-General in that case, did something for preservation of the Constitution could plead for its validation under the doctrine of necessity. Quoting the history of constitutional developments in 50s he clarified that on 21-3-1955 in the case of Federation of Pakistan v. Moulvi Tamizuddin Khan (PLD 1955 FC 240) the Federal Court held that a law not assented to by the Governor-General was invalid. This ruling resulted in the invalidation of several Acts of the Legislature. So, the Governor-General on 27-3-1955 issued Emergency Powers Ordinance (IX of 1955) to retrospectively validate all those laws. But the Federal Court, in Usif Patel v. The Crown (PLD 1955 FC 387) decided on 12-4-1955, held the said Ordinance void on the ground tat the Governor-General could not exercise legislative powers nor could he delegate such powers in the absence: of Constituent Assembly. Subsequently, the Governor-General on 15-4-1955 called a meeting of the Constituent Assembly on 10-5-1955. It was only after the meeting of the Constituent Assembly had been called that on 16-4-1955 the Governor-General issued the Emergency Powers Ordinance (IX of 1955) again and also sent a Reference to this effect to the Federal Court. Thereafter, the Federal Court, on the doctrine of

necessity, permitted validation for a limited period i.e. till the time the Constituent Assembly examines such laws. He submitted that following conclusions can be drawn from the dicta in Reference by His Excellency the Governor-General (supra):

(i) One man cannot act legitimately to amend the Constitution or the law in the absence of Legislature;

(ii) The doctrine of necessity may be applied only to preserve the Constitution;

(iii) There should be a manifest assurance that the Legislative body will soon come into existence;

(iv) That ultimate validation could be conferred by the Legislature and not the Court.

He also referred to the following observations made in the Reference by the President of Pakistan under Article 162 of the Constitution of Islamic Republic of Pakistan (PLD 1957 SC 3 [Pak] 219 at 239):

"And then there is the point, and it is an important point, that if the power to dissolve an interim Provincial Assembly vests in the Governor, a similar power must be conceded to the President in respect of the National Assembly functioning under Article 223. For, a dictatorially minded President, there could be nothing easier than to dissolve the present National Assembly and constitute a new ad hoc Assembly consisting of members of his own way of thinking who by a two-third majority could repeal the whole Constitution and frame a new Constitution to serve their own ends. A legislature returned after an ordinary general election often has a different outlook and legislative bias and a gerrymandered election can certainly produce a completely subservient body. We are not suggesting that any President will act in that manner, but there can be no doubt that on Mr.Manzur Qadir's interpretation of the Constitution such possibility would undoubtedly exist in law."

‘158. He further submitted that in the case of Darwesh M. Arbey v. Federation of Pakistan (PLD 1980 Lahore 206) the Lahore High Court rejected the plea of necessity, the same being contrary to the constitutional provisions.

159. He stated that the case of The Attorney General of the Republic v. Mustafa Ibrahim and others (1964 Cyprus law Reports 195) brought about a distinction between necessity in the case of constitutional breakdown and necessity in the case of overthrow of a constitutional Government. He clarified that in case of breakdown the purpose is to fill in the vacuum arising within the constitutional parameters whereas in the case of overthrow the purpose is to have the Constitution functioning within the national legal order. He added that in case of constitutional breakdown the use of doctrine of necessity within the framework of the Constitution is minimal and. temporary and the Courts in Pakistan have not permitted its use to undermine any provision of the Constitution.

160. Coming to the constitutional overthrow, he submitted that there is only one case of Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan (PLD 1977 SC 657), wherein the doctrine of necessity was pleaded and this Court accepted the same by holding that the extra-constitutional action was a deviation dictated by the highest consideration of the State necessity and the welfare of the people. Then the learned Judges proceeded to determine the quantum of the legislative power of the Military regime and while delegating power, they included the power to amend the Constitution. Having done that, this Court further decided to have a supervisory jurisdiction over every action including legislative measures on the premises that the Court would test all of them on the basis of the doctrine of necessity, meaning thereby that the doctrine of necessity would not apply at the initial stage alone, but it will continue to apply as ‘long as the necessity persists. Thus, this Court broadened the 1955 ruling in the Governor-General’s Reference relating to the State necessity and extended it to an extra-constitutional measure and permitted amendment in the Constitution, which could be interpreted as a licence to change the Constitution according to the whims of the new regime.

161. He submitted that the case of Nusrat Bhutto (supra) came up for discussion and was approved in the case of Mahmood Khan Achakzia v. Federation of Pakistan (PLD 1997 SC 426) by majority. The learned amicus curiae argued that Mahmood Khan Achakzai’s case highlighted two aspects: (i) that the power of amendment was not extensive and it was deviated from by the then regime, and (ii) that the issue of time-frame was reviewable. He submitted that the above two flaws pinpointed in Mahmood Khan Achakzai’s case need to be rectified by this Court.

162. He submitted that the doctrine of necessity applied in Governor-General’s Reference (supra) insisted on a call to the electorate and that too in a very limited time-frame’ i.e. one and a half

month whereas in Nusrat Bhutto's case it was left to expectations, therefore, in case validation is granted in this case, a realistic time-schedule may be obtained from .the Government through the Attorney-General and determined and/or finalised by the Court itself. He emphasised that in the light of the past experience, particularly in the aftermath of Begum Nusrat Bhutto's case when the time frame was stretched to unusual limits, the issue should not be left to mere commitments. He added that in case a time-frame is not determined, injustice will be done to national legal order, therefore, in view of the law laid down in the cases of Fauji Foundation, Asma Jilani, Begum Nusrat Bhutto and Mehmood Khan Achakzai (supra), it is the duty of this Court to see that national legal order is disturbed the least.

163. Regarding causes of military intervention in a country, the learned amicus curiae referred to the following passages of the book titled `The Man on Horseback' The Role of the Military in Politics by S.E. Finer wherein it has been said:

"The causes which produce military intervention in politics ....lie not in the nature of the group but in the structure of society. In particular, they lie in the absence or weakness of effective political institutions in the society."

THE PERFORMANCE FAILURES OF CIVILIAN GOVERNMENTS

"Praetorians invariably charge the civilian Governments whom they have overthrown with serious performance failures. Unconstitutional and illegal behaviour (especially widespread political corruption), responsibility for economic downturns or inflationary spirals, and an inability to handle political opposition and discontent without their erupting into disorderly and violent actions-these are the three most frequent performance failures used to justify the overthrow of civilian Governments. These charges commonly correspond to the reality of the situation, thereby making it all the easier for the praetorians to rationalise and justify their actions on behalf of Constitution and nation."

"With regard to the first type of performance failure, the praetorians charge the civilian incumbents with various unconstitutional and illegal acts. These include the arbitrary application of the laws, the extension of their powers into areas that are prohibited by the .Constitution, the retention of their offices beyond the constitutionally prescribed limits, and by far the most frequent accusation, the flouting of legality in permitting or engaging in widespread corruption. Higher and lower governmental officials are charged with the outright pilfering of public funds, the granting of benefits and exemptions to political supporters, the sale of favours, and the acceptance-of

kickbacks from contractors. The illegally acquired funds are used not only to enrich those who already have official positions but also to help ensure their continuation in office by financing party activities, patronage networks, and electoral campaigns. Since accusations of corruption are made far more often than other charges of unconstitutional and illegal behaviour, we shall concentrate on the connections between these and military intervention."

"According to the praetorians themselves, their coups are inspired by the goal of political regeneration, eliminating venal practices and guaranteeing adherence to high standards of public honesty. Several; writers on the non-Western military have referred to its "puritanical" outlook and ascetic standards. "The military demands these qualities not only for itself, but for society as a whole, and it sets itself up as a standard-bearer of hard work and unflinching dedication" (Janowitz, 1964, p.64; Shils, p.24; Shils, p.24; Pauker, p.339). Luckham agrees with this generalization and suggests that the puritan ethic was of some importance in motivating the majors to carry out the first Nigerian coup (Luckham, pp.230, 282-83). Under civilian rule Nigeria certainly exhibited an inordinate amount of political corruption, whether gauged in terms of the diversity of corrupt practices, the number of politicians who engaged them, or the high offices that they occupied. The politicians regarded the illegal translation of authority into profit, power, and party advantage as acceptable perquisites of public office."

"Although soldiers are occasionally motivated to overthrow civilian governments because their poor economic performance has adverse consequences for the middle class, there are two other connections between this kind of performance failure and intervention that have a more frequent and greater impact upon the decision to intervene. Economic performance failures can only solidify and intensify the military's disrespect for the incumbents, heightened further by the belief that as highly competent professional officers, they could turn in a far better performance as economic decision makers. And the notable impact of economic performance failures upon the loss of governmental legitimacy goes a long way in facilitating the ' translation of motives into coup attempts."

164. The learned amicus curiae submitted that in the case of Mian Nawaz Sharif (supra), corruption was not held to be a good ground for dissolution of the Assemblies and dismissal of the Government but, in Benazir Bhutto's case (supra), it was accepted as a good ground. He submitted that corruption is of different kinds and, in this country, it has pervaded the society from generation to generation. He then referred to the following passages from Machiavelli On Modern Leadership by Michael A. Ledeen, wherein the author under the heading "corruption" lays the blame on corrupt leaders and then ultimately on the people themselves:

"CORRUPTION"

"If the spirit of liberty is so strong, why do free nations and enterprises fall, and dictators arise from their ruin? Machiavelli lays the blame on corrupt leaders, and then the corruption of the people themselves. "To usurp supreme and absolute authority ....in a free state, and subject it to tyranny, the people must have already become corrupt by gradual steps from generation to generation." Once that has happened, the enterprise is probably doomed. Free societies depend upon the virtue of the people; there is a symbiotic relationship between the good laws and institutions upon which the enterprise rests, and the virtuous behavior of the citizens. Just as "good laws are necessary to maintain good customs, so good customs are necessary for good laws to be observed."

"Weaken the one, and the other slides down into corruption, with terrible consequences: the indolence and selfishness that destroys even the greatest human achievements. Once the rot sets in even the finest institutions are useless. "Neither laws nor constitutional systems are sufficient to rein in a general corruption."

The learned amicus curiae also referred to the following passages of his own book titled "THROUGH THE CRISIS":

"MAN ON HORSEBACK"

"The Military in a country only intervenes in political crisis according to the occasion and its disposition. Its dispostion is inhibited by many factors, the foremost factor being the explicit and well accepted principle that the supremacy of the civil aspect of the government should be always observed. In fact many times that the Army had interfered in civil affairs, they had found that they were inadequately equipped for running a civil Government and this experience has been accepted over a long period as the reason for not taking over the civil Government by the Military."

"Secondly, the professionalism of the Army is a vitally inhibiting factor."

"Reverting to the disposition and the occasion for interference, the situation in the country as a whole at any particular time may determine the disposition. The lowering of international prestige of a nation or the fear that the country would face serious law and order problem have been the

causes of moving the Army towards internal action: the power vacuum in the country, like the absence of political organizations have also been a cause of providing opportunity to interfere, particularly when the intervention is provided by the civilians."

"Let me make it very clear that so long as there is a political vacuum in the country and institutions do not start functioning, in spite of the .natural inhibition of Armed Forces to interfere in the affairs of the country, the occasions for it to interfere in civil Government may arise again and again."

165. Mr. S. M. Zafar, learned amicus curiae submitted that in case validation is given to October 12, 1999 action, then except for the Proclamation all other subsequent instruments including the PCO should be made subject to judicial review. '

166. Finally, he summed up his arguments as follows:

(i)- The doctrine of necessity was earlier allowed only for the purpose of preservation of the Constitution for a very limited time and only on being assured that there will be representative assembly. If it is to be extended, it should be on positive assurance, programme, formula for the earliest possible.

(ii) The Proclamation of Emergency alone can be justified under the doctrine of necessity, but not the subsequent PCOs.

(iii) The new oath of the Judges under the PCO does not curtail jurisdiction of this Court to determine the validity of the PCO.

(iv) Whatever be the social causes for the military to come, the Armed Forces should go back to their professionalism and defend the borders of the country. The loopholes in Begum Nusrat Bhutto's case as have been pointed out in Mahmood Khan Achakzai's case should be plugged.

SUBMISSIONS OF THE ADVOCATES GENERAL OF THE PROVINCES

167. The learned Advocate-General Punjab adopted the arguments addressed by the learned Attorney-General and further submitted that appropriate changes in the Constitution/laws should be brought about so as to avoid frequent recurrence of Military intervention and that the present ,Government should be facilitated to achieve its declared objectives.

168. The learned Advocates-General of N.-W.F.P., Sindh and Balochistan also adopted the arguments of the learned Attorney-General.

SUBMISSIONS OF MR. KADIR BAKHSH BHUTTO, VICE-CHAIRMAN, PAKISTAN BAR COUNCIL

169. Mr. Kadir Bakhsh Bhutto, Vice-Chairman, Pakistan Bar Council submitted that this Court has got the power of judicial review and the new oath cannot debar it from exercising that power. He further submitted that this Court should give a direction to the Government to hold elections at the earliest.

SUBMISSIONS OF MR. ABDUL HALEEM PIRZADA, PRESIDENT, SUPREME COURT BAR ASSOCIATION.

170. Mr. Abdul Haleem Pirzada, President, Supreme Court Bar Association submitted that this country is facing this dilemma for the fourth time. Judiciary-has always been put to test in these cases, the reason being that this is the only institution which has not been affected by all adventures. The Federation has been justifying the action from the facts that on that particular date, i.e. 12th of October, 1999 the Chief of Army Staff was coming back from Sri Lanka; his plane was directed to land either in India or get crashed. It was contended that the above assertion is incorrect. lie argued that the impugned action was resorted to only when the Chief of the Army Staff was removed but this is not a valid ground for the take-over.

171. He submitted that the nation has already suffered a lot on account of Military adventurism and it is for this Court to guard the country against it. He pleaded that the people have confidence in this Court and they hope that it will save them from this malady. He submitted that the charge of corruption against few people cannot deprive the people of Pakistan from their legitimate right

to rule themselves through their elected representatives. He submitted that the people do make mistakes but, for-the mistake of few, the entire nation should not be punished. He submitted that though it may not be wholly possible to find ‘out any formula against Army intervention in a situation like the present one but an endeavour must be made by taking a step with a view, to forestalling its recurrence.

172. He submitted that corruption is rampant but such situation hardly constitutes a valid ground for intervention.

173. He further, submitted that it is a sad commentary that previous Governments, both Civil and Military, had taken the apex Court as a parallel government and hoped that the present regime does not commit such a mistake. He submitted that democracy must be restored at the earliest and the Armed Forces-should be made to go to the Barracks within a year from now. He further argued that the case of Moulvi Tamizuddin was not decided by the Federal Court on correct premises.

174. Mr. Haleem Pirzada submitted that the Judges of this Court who have taken oath have a greater responsibility. Those who did not take the responsibility, have nothing to worry and the entire burden is on this Court to discharge its duties and perform its functions in accordance with the Constitution and the law. He argued that the Constitution is not a limb of the body but a soul which must survive.

175. Mr. Haleem Pirzada strenuously criticised the submission made on behalf of the Federation that if the Army thought that there were reasonable basis for concluding that the existence of the State and its sovereignty were at stake, the Court would not substitute their judgment for that of the Army. He argued ‘that this Court, saddled with the power of judicial review, is the only and proper forum where such questions can be raised and adjudicated upon. He submitted that Mr. Sharifuddin Pirzada was clear on this aspect of the case and, was right in saying that this Court has the power of judicial review.

176. On the doctrine of State necessity, Mr. Haleem Pirzada argued that if it is not dead, it should be made to die and buried so deep that it should not come up again because the country has suffered a lot on that account. He submitted that State necessities are always there; but to justify Army take over under this doctrine will not be justifiable and this should be stopped for all times to come.

177. He submitted that there are two groups of Judges; (i) who have not taken oath and (ii) who have taken oath. Those who have not taken the oath, they are sitting in their homes. Now it is for the Judges of this Court to lay down and make the common man understand that it was in the larger. interest of the country that they took oath according to their conscience to save the country from further collapse and to save its political structure. He argued that 'Adl' is the corner stone in Islam and the hallmark of Islamic society is fiercely independent Judiciary.

178. Before concluding his arguments, he reiterated that the Court may consider to allow twelve months' time to the Armed Forces from now so that they can do the cleansing and go back to their Barracks.

DR. FAROOQ HASAN, BAR-AT-LAW, LAHORE HIGH COURT BAR ASSOCIATION

179. Dr. Farooq Hassan, learned Senior ASC outlined his submissions by stating that the case of both the parties could be summarized as below:-

Petitioner had contended that (a) 12th October, 1999, Army takeover had destroyed the democratic system in the country, and (b) that the Proclamation of Emergency and the Provisional Constitutional Order of 14-10-1999 were ultra vires of the Constitution.

On the other hand the' Respondent Federation had responded by asserting that (a) there was no genuine democracy in the country prior to 12-10-1999, (b) the Armed Forces had acted to save the people and the country from further damage of great proportions of immense damage as the major-institutions of the Republic had been systematically destroyed by the former Prime Minister by altering the Constitution, and (c) in the circumstances the Court may adopt the 1971 ratio of the Nusrat Bhutto's case and validate the said army action of 12-10-1999.

180. He has articulated four main formulations as under:-

1. There was increasing disillusionment with the feigned democracy that was established after 1985. Hence, there was genuine public acceptance of the change that emerged on 12-10-1999. Neither there was any public mourning nor protests at the ouster of the previous regime to manifest substantial opposition from the people of the country.

2. Clearly the Proclamation of Emergency was in violation of the Constitution of 1973. The question is, therefore, can it be conditionally validated as was done by this Court in 1977, or is it that such validation must be further subjected to the criteria laid down by this Court in later decision in 1997 and 1999 ?

3. Whether apart from the perspective of established precedents in this field by our Courts, there are well recognized realities and guidelines from similar situations which have undergone coups d'etat?

4. Given the current state of realities, what. is the "best" possible solution with which the Court can provide the country with much needed guidance for future in its judgment?

181. There have been 5 general elections in 12 years. In 1985 merely 54 % of the country's population participated in the general elections and by 1997 the figure had fallen to 35 % . This would mean that the people have lost faith in elections, they are not interested because as has been held in Nawaz Khokhar's case, the four Governments were accused of corruption and that without accountability of public office holders, there is no question of responsibility.

182. It was argued on behalf of the petitioners that for the fault of Nawaz Sharif, the Senate and the Assemblies should not be punished. The argument is totally misplaced because in parliamentary democracy the leader of the House, the Prime Minister, commands the majority of the National Assembly, therefore, if the Prime Minister is corrupt, it cannot be said that his colleagues are divorced from it.

183. In relation to the question, why do Martial Laws come, the following factors have a direct bearing on the issue: -

i) Political instability;

ii) Economic factor;

iii) Lack of education;

iv) Absence of means of redress;

v) Lack of general confidence in the welfare of the country;

vi) Absence of sense of belonging.

184. He submitted that what we have in Pakistan, is not democracy, it is only oligarchy. There are 787 members in the elected chambers. If a list of their assets were to be published, they will probably control the whole of Pakistan. This is the perpetuation of oligarchy. If elections are held, the same gentlemen will walk in. Therefore, there should be first cleansing of these 787 plus 2000 sitting under their wings.

185. He disagreed with the distinction made by Mr. S.M. Zafar between `coup d'etat' and `revolution' and argued that 'coup d'etat' is a French term, which means, cutting of the State. It is a change over from one legal order to another. He referred to an Article titled, "Juridical critique of successful treason" published in the "Stanford Journal of International Law", . relevant passages whereof are given below:-

"Coup d'etat: Definition and Concept

"Illegal leadership change may or may not be accompanied by, or be the result of, a use of force by the new leaders against the incumbents they replaced. When governmental change through the use of force takes place a "revolution" or "coup d'etat" is said to occur. However, for the purpose of this paper, coups d'etat are to be distinguished from revolutions. The distinction will be observed because the cases to be analyzed hereinafter involved a change of governmental authority without bloodshed. The phrase "coup d'etat" better describes such occurrences. 'Revolution ...involves the rapid, tearing down of existing political institutions and building them anew on different foundations." This definition clearly implies that existing institutions are rapidly

and forcibly substituted one for another. Thus, upheaval in the social order of that particular state is quick and violent, much like a civil war. The bloodshed and violence envisaged in such a metamorphosis and transformation is broad and affects the entire state.

"Our attention, on the other hand, is on the political change which is narrowly confined, and ususally very swift. One social scientist, Hannah Arendt, underscored this distinction when she said:

"Coups d'etat and palace revolutions, where power changes from one man to another, from one clique to another, depending upon on the form of government in which the coup d'etat occurs have been less feared because of the change they bring about is circumcised to the sphere of Government itself and carries a minimum of unquiet to the people at large"

"By defining coup d'etat in this manner, Arendt points out that the change is not to the society as a whole, but merely a change in the leadership of the Central Government. Implicit in this definition is the notion that violence and bloodshed are absent or miniscule when power is exchanged by the mechanism of a coup d'etat. Therefore, coups d'etat do not usually bring about the broad changes associated with revolutions, and the existing institutions of the Government and of that society in general normally are left untouched."

He concluded that the two terms, `coup d'etat' and `revolution' are interchangeable.

186. As to the action of the respondents on 12th October, he argued that there is no ouster of jurisdiction and this Court has the power of judicial review to determine the validity/scope thereof.

He submitted that there is not a single case in which the Court sent the regime back and that some of the Latin American systems even do not allow the Courts to adjudicate upon such controversies. He concluded that the action of 12th October is covered by the pronouncement of 1977 plus other cases decided by this Court.

ARGUMENTS OF MR. SHAHID ORAKZAI

187. Mr. Shahid Orakzai submitted that the action of removal of General Pervez Musharraf, Chief of the Army Staff and the Chairman, Joint Chiefs of Staff Committee, was whimsical and it was not within the contemplation of .the Constitution. inasmuch as; the order of removal was made by the former Prime Minister alone and not the Cabinet and that the President should have referred the case back for reconsideration by the Cabinet. He emphasised that before considering the reaction, the Court should also go into the causes and legality of the action of 12th October, 1999, namely the illegal removal of the Chief. of the Army Staff. He stated that a combined reading of Article 90 (both old and its amended form) and Article 46, does not empower the Prime Minister to substitute the Cabinet and, therefore, his decision of removal of the Chief of Army Staff was unconstitutional. lie also referred to those Articles of the Constitution which deal with the removal of the President, Prime Minister, Speaker, Deputy Speaker, National Assembly, Federal Ministers, Governors, Chief Ministers, Provincial Ministers, Judges of the Superior Courts, etc. He submitted that since the Constitution contains a provision for the appointment of the Chiefs of Armed Forces as stipulated under Article 243 of the Constitution, therefore, the power of removal may also be inferred through interpretation of the Constitution. He concluded that removal of the Chief of Army Staff was violative of the Constitution and the law.

At the end of his arguments, Mr. Shahid Orakzai gave his formulations, which are as under:-

FORMULATIONS OF SHAHID ORAKZAI

1. A dispute between any two persons professedly acting under their Constitutional oaths cannot be resolved without a ruling first as to which one of them acted in accordance with or otherwise of the Constitution.

2. Anyone guilty of violating the Constitution/Oath is not entitled to any relief before being penalized for the same. In principle, relief is always due to the one who has suffered.

3. Though the derailment of the Constitution was caused by a conflict, apparently, within the Federal Executive, the National Assembly, being the mother House of the Federal Executive, is very much a party to the dispute. Therefore, the collective conduct of the National Assembly ought to be examined by this Court before granting any relief to any of its members.

4. Any interpretation of Article 63(1)(a) of the Constitution that gives total control to the leadership of a party, ruling the Federation, over a Provincial Executive of the same party, would contravene the federal structure of the Islamic Republic of Pakistan. In view of the above, any Provincial Assembly that failed to check the unconstitutional Federal interference/negative influence over the Provincial Executive, too, is not entitled to any relief. By the Constitution, any legislature to which a cabinet is collectively responsible is legally inseparable from a dispute involving the conduct/misconduct of the cabinet. A mother willfully ignoring the constant misbehavior of her child must ultimately face the music.

5. The Constitution of Pakistan is flexible enough to contain the prevalent crisis and, therefore, the Provisional Constitution Order, a bypass opted in rush by the Chairman Joint Chiefs of Staff Committee just after the mishap, is unnecessary.

6. The plan for the restoration of the Constitution, to be evolved in these proceedings should involve the suspension of minimum provisions of the document, preserve/maintain Constitutional contingencies, stand as close as possible to the Emergency Provisions spelt out- in Part X and adhere to the fundamental principles of the Constitution in the transitional period than attempting to restore the full document by a single stroke of pen in the shortest possible time. A correct diagnosis and a gradual recovery, through a time consuming therapy that uproots a disease, is better than the fastest painkiller.

CONSTITUTION PETITION NO. 3 OF 2000

188. Mr. Fazal Elahi Siddiqui, learned ASC, petitioner argued with vehemence that Army had no locus to dislodge Civil Rule thrice, including the present take-over. He sought to draw a distinction between the role of the Armed Forces of Pakistan and those of India, who have much in common. In this connection, he placed reliance on 2-Books titled ‘The Indian Army’ and `The Pakistan Army’ written by Stephen P. Kohento contend that eversince partition of the sub-continent, the Indian Army has remained within its bounds and has not interfered with the affairs of the Government. According to him, this comparative situation is in itself sufficient for withholding validation of Army take-over on 12-10-1999.

189. He contended that the doctrine of necessity is not applicable to the facts and circumstances of this case and the new oath impinges on the independence of Judiciary.

SPED ZAFAR ALI SHAH. ASC

PETITIONER IN CONSTITUTIONAL PETITION N0.62 OF 1999

190. Syed Zafar Ali Shah, petitioner submitted in rebuttal that the Court is dealing with two philosophies, two different thoughts and two old litigants namely political democracy and Military authoritarianism. According to him, during arguments much has been said against the democracy, particularly against politicians as also the Parliament. Being a sitting Member of Parliament he had the privilege to move the motion against Article 58(2)(b) of the Constitution. It has been argued by the learned Attorney-General that 13th Amendment was passed in 13-minutes. This assertion is not correct. In fact it took more than 13 years to get rid of 8th Amendment which was passed in 1985.

191. He further submitted that same is the position with regard to 14th Amendment which was brought about with a view to putting an end to floor crossing/Lota'ism. Further, there is no substance in the allegation that the former Prime Minister stood to gain from it in that the power conferred by the amendment vests in the leader of the political party concerned.

MR. IOBAL HAIDER, PETITIONER

192. Syed Iqbal Haider, petitioner in Constitution Petition No. 57 of 1999, submitted that the Proclamation of Emergency and PCO 1. of 1999 are not extra-constitutional steps, in that, they are in accordance with the Constitution in the light of Article 2-A thereof. Reliance is placed on Ziaur Rehman's case (PLD 1973 SC 49 at 71). He further submitted that this Court has inherent powers of judicial review under the Islamic Injunctions as laid down in the case of Mrs. Benazir Bhutto (PLD 1988 SC 416 at 522-UU).

193. On the question of applicability or otherwise of the doctrine of necessity he referred to the cases of Asma Jillani, Nusrat Bhutto and Liaqat Hussain (supra) wherein the parameters of this doctrine have been laid down.

194. He submitted that the parliamentarians who made contemptuous speeches in the National Assembly against the Judges of the Superior Courts violated the provisions of the Constitution specifically prohibiting discussion with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties and that they ignored the decisions of the Supreme Court in this regard despite the fact that certain members pointed out those decisions at the floor of the House. He referred to PLD 1989 SC 166 at 184, wherein this Court considered the debate of Parliament while interpreting the Constitution.

195. Mr. Iqbal Haider contended that new oath under Oath of Office (Judges) Order No. 1 of 2000 has not been taken by the Judges to accept the change of Government, rather it relates to the change of legal order.

196. He submitted that the deletion of Article 58(2)(b) is against the spirit of the Constitution, which should be revived so that checks and balances are provided in the Constitution for its successful working. In this behalf he placed reliance on PLD 1998 SC 1263 at 1310 H, 1356.

197. He submitted that the quota system is against the Injunctions of Islam and with the passing of the 16th Amendment, the members have become disqualified for violating the Injunctions of Islam under Article 63(1)(g). Reliance is placed on 1997 SCMR 1043 at 1057 and 1059:

198. He submitted that the allegation' that all the Elected Members had been reduced to rubber stamps by the former Prime Minister is against the Parliament and not against the Provincial Assemblies and in particular the Provincial Assembly of Sindh, which had been allowed to perform to its legislative functions in -the case reported as Jalal Mahmood Shah (supra). He therefore,, prayed that the Provincial Assembly of Sindh merits restoration.

MR. IMTIAZ HUSSAIN BOKHARI

199: Mr. Imtiaz Hussain Bokhari, petitioner in 66 of 1999, submitted that the impugned action of 12th October, 1999 is the result of tussel between two individuals viz. General Pervez Musharraf and Mian Nawaz Sharif and does not relate to the whole of the Armed Forces of Pakistan, inasmuch as, the former was retired by the latter.

200. He submitted that all the four military leaders, Ayub Khan, Yahya Khan, Ziaul Haq and Pervaiz Musharraf used the same pretext for usurping power as is obvious from the terminology employed in their respective first addresses to the nation.,

201. On the question of power of the Prime Minister to order retirement of the Chief of Army Staff, he relied on the instances of removal of Khalid Bin Walid and Muhammad Bin Qasim to contend that the order retiring Gen. Pervaiz Musharraf is not open to exception on the touchstone of the Constitution as well as the above historical instances.

202. He pleaded that Gen. Pervaiz Musharraf has committed high treason and is liable to be proceeded against in the light of provisions of Article 6 of the Constitution.

INDEPENDENCE OF JUDICIARY

AND

POWER OF JUDICIAL REVIEW

203. Before we embark upon the task of dealing with the merits of the case in the light of the arguments advanced on behalf of the parties, it would be appropriate to dilate on the question of jurisdiction of this Court especially in view of the fact that the Judges of the Superior Courts have taken new oath of their offices under the Order No. 1 of 2000 promulgated by the Chief Executive under the PCO 1 of 1999. The basic question, which needs to be resolved is whether the restriction imposed by the PCO 1 of 1999 on the jurisdiction of this Court does in any way restrict the power of judicial review of this Court whereunder it has an inherent power to A interpret any provision of the Constitution or any other legislative instrument or law, even if that particular provision' is a provision which seeks to oust the jurisdiction of this Court.

204. M/s. Khalid Anwar and Ch. Muhammad Farooq, learned counsel for the petitioners in C. Ps. Nos. 63 and 62 of 1999 respectively addressed exhaustive arguments on the power of judicial review as well as on the question of maintainability of the petitions. Mr. Habib-ul-Wahab-ul-Khairi's arguments mainly related to the maintenance and upholding of independence of Judiciary.

Syed Sharifuddin Pirzada, learned Senior ASC for the Federation candidly conceded that the power of judicial review is intact notwithstanding the ouster clauses in the impugned instruments. Mr. S.M. Zafar, learned amicus curiae also contended that all the legislative instruments promulgated by the Chief Executive are subject to scrutiny by this Court for determination of the present controversy. Likewise, Mr. Haleem Pirzada, President, Supreme Court Bar Association advocated the independence of Judiciary and the power of judicial review. On this aspect of the case similar stance was presented by Dr. Farooq Hasan, representing the Lahore High Court Bar Association. However, Mr. Aziz A. Munshi, learned Attorney-General for Pakistan, expressed his reservations about the maintainability of the petitions and pleaded ouster of jurisdiction of this Court by means of the Proclamation of Emergency as also the PCO 1 of 1999.

205. We have examined the scope of the power of judicial review and the question of maintainability of the petitions in the light of the arguments addressed by the petitioners themselves, the learned counsel for the parties and the other learned counsel appearing in the case. Judiciary is the only forum recognized by both the rulers and the ruled where: (1) questions of validity and legitimacy are capable of being resolved finally with a view to controlling the recklessness of the Government in power and where (2) declining to resolve it would tantamount to self-condemnation, self destruction and betrayal of the trust of the people of Pakistan. It is the unanimous stand of the learned counsel for the parties and we also endorse it that no form of oath taken by or administered to the Judges of the Superior Courts can restrict the judicial power and derogate from the legal position that the Courts, as final arbiters in any constitutional controversy, retain their power and jurisdiction to say as to what a particular provision of the Constitution or the law means or does not mean even if that particular provision is one seeking to oust such jurisdiction of the Court. An analysis of the case law relating to ouster of jurisdiction of this Court shows that any attempt to control or circumscribe the judicial power of the superior Courts with a view to denying them the right to decide the validity and the quantum of legislative power of the new regime, would be an exercise in futility. We are of the considered view that changing the form of oath will neither take away power of judicial review nor the jurisdiction of this Court. Notwithstanding the new oath or its language, the Courts shall continue to have jurisdiction to decide the controversy involved as if the new oath and the "new constitutional documents" under which the oath is administered, do not adversely affect the jurisdiction and power of the Court. It is pertinent to note that the Superior Courts follow the Code of Conduct prescribed for the Judges and inherently owe allegiance to the State of Pakistan, which requires this Court to decide the issue of validity of the new regime under which the Judges are being asked to take new oath inasmuch as such allegiance cannot be taken away. Mr S.M. Zafar rightly pointed out that the oath administered under the Constitution has to be respected because that draws its authority from the people of Pakistan whereas the oath under the Constitution to defend the same has a different meaning than an oath administered under a document, validity whereof is yet to be determined and thus the two are incomparable.

206. The Objectives Resolution contained in the Preamble to the Constitution, which now. forms substantive part thereof by virtue of Article 2A as well as declaration of Quaid-e-Azam about democratic set-up and social justice, envisage independence of Judiciary.

207. First of all, reference may be made to Sura Al-Nisa, Verses 135136 English rendering whereof by Allama Abdullah Yousaf Ali reads thus:-

"O Ye who believe!

Stand out firmly

For justice, as witnesses

To Allah, even as against

Yourselves, or your parents,

Or your kin, and whether

It be (against) rich or poor;

For Allah can best protect both

Follow not the lusts

(Of your hearts), lest ye

Swerve, and if ye

Distort (justice) or decline

To do justice, verily

Allah is well-acquainted

With all that ye do."

The footnote to the above translation is as under:

"Justice is God's attribute, and to stand firth for justice is to be a witness to God, even if it is detrimental to our own interests (as we conceive them) or the interests of those who are near and dear to us. According to the Latin saying, "Let justice be done though heaven should fall."

"But Islamic justice is something higher than the formal justice of Roman Law or any other human law. It is even more penetrative than the subtler justice in the speculations of the Greek philosophers. It searches out the innermost motives, because we are to act as in the presence of God to Whom all things, acts, and motives are known."

208. On the question of jurisdiction and power of this Court, we would like to observe that we have to decide the present controversy according to our conscience and the law. It would be pertinent to quote the following extracts from a letter sent by Hazrat Umar to Abu Musa AI-ash'ari, Governor Basra/Chief Qazi:-

"Administration of Justice is a decisive ordinance of God and (of the Prophet (p.b.u.h.) which must be followed."

"Decide after careful consideration (and execute it), if a suit is filed before you; for the announcement of a rightful judgment without its execution is useless."

"Use your brain about matters that perplex you and to which neither the Qur'an nor the Sunnah of the Holy Prophet (p.b.u.h.) seem to apply. Study similar and analogous cases and evaluate the situation through analogy and adopt the judgment which is most pleasant to God and most in conformity with justice so far as you can see."

209. The basic functions of the Judiciary are to promote the administration of justice, to protect Human Rights and to maintain Rule of D Law in the country. The 6th Conference of Chief Justices of Asia and the Pacific held at Beijing on 19th August, 1995 adopted the `Beijing Statement of Principles of the Independence of Judiciary in the LAWASIA Region' as follows:

"1. The Judiciary is an institution of the highest value in every society.

2. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1) proclaim that every one should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent Judiciary is indispensable to the implementation of this right.

3. Independence of the Judiciary requires that;

(a) the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and

(b) the Judiciary has jurisdiction,, directly or by way of review, overall issues of a justiciable nature.

"33. The Judiciary must have jurisdiction overall issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

34. The jurisdiction of the highest Court in a society should not be limited or restricted without the consent of the members of the court." (The underlining is by way of emphasis)

210. The independence of Judiciary is a basic principle of the constitutional system of governance in Pakistan. The Constitution of Pakistan contains specific and categorical provisions for the independence of Judiciary. The Preamble and Article 2A state that "the independence of Judiciary shall be fully secured"; and with a view to achieve .this objective. Article 175 provides that "the Judiciary shall be separated progressively from the executive". The rulings of the Supreme Court in the cases of Government of Sindh v. Sharaf Faridi (PLD 1994 SC 105, Al-Jehad Trust (supra) and Malik Asad Ali v. Federation of Pakistan (PLD 1998 SC 161), indeed, clarified the constitutional provisions and thereby further strengthened the principle of the independence of Judiciary, by providing for the separation of Judiciary from the executive, clarifying the qualifications for appointment of Judges of the High Courts, prescribing the procedure and the time frame for appointment of Judges, appointment of Chief Justices and the transfer of a Judge from a High Court to the Federal Shariat Court. Furthermore, the Supreme Court judgments in the cases of Mehram Ali and Liaquat Hussain (supra) are also in line with the above rulings, in as much as, they elaborated and reiterated the principle of judicial independence and the separation of Judiciary from the executive.

211. In a system of constitutional governance, guaranteeing Fundamental Rights, and based on principle of trichotomy of powers, such as ours, the Judiciary plays a crucial role of interpreting and applying the law and adjudicating upon disputes arising among governments or between State and citizens or citizens' inter se. The Judiciary is entrusted with the responsibility for enforcement of Fundamental Rights. This calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society.

212. The Constitution makes it the exclusive power/responsibility of the Judiciary to ensure the sustenance of system of "separation of powers" based on checks and balances. This is a legal

obligation assigned to the Judiciary. It is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals, To do so, the Judiciary has to be properly organized and effective and efficient enough to quickly address and resolve public claims and grievances; and also has to be strong and independent enough to dispense justice fairly and impartially. It is such an efficient and independent Judiciary which can foster an appropriate legal and judicial environment where there is peace and security in the society, safety of life, protection of property and guarantee of essential human rights and fundamental freedoms for all individuals and groups, irrespective of any distinction or discrimination on the basis of cast; creed, colour, culture, gender or place of origin, etc. It is indeed such a legal and judicial environment, which is conducive to economic growth and social development.

213. During the course of arguments on the question of judicial review, Syed Sharifuddin Pirzada. respectfully adopted the observations made by one of us (Irshad Hasan Khan, CJ) while delivering the inaugural address to the Conference of Board of Directors, Asian Ombudsmen Association held at Islamabad on 22nd February, 2000, which reads thus:

"The independence of Judiciary requires that the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source. The Judiciary in Pakistan is independent. It claims and has always claimed that it has the right to interpret the Constitution and any legislative instrument and to say as to what a particular provision of the Constitution or a legislative instrument means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of the Supreme Court.".

214. At this juncture, it would be advantageous to refer to the following passages from the book titled "The Federalist Papers" by Alexander Hamilton-James Madison-John Jay: -

"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 the like. Limitations of this kind can be preserved in practice no other way than through the medium of Courts of justice, whose duty must be to declare all acts contrary to the manifesto tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

"This independence of the Judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arks of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have tendency, in the meantime, to occasion dangerous innovations in the government; and serious. oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they' find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people; whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the Courts would be under a greater obligation to connive at infractions in this shape than when they had' proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the Judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."

215. As rightly pointed out by Syed Sharifuddin Pirzada, the power of judicial. review should be exercised with caution. In this regard reference may be made to the case of Brig. (Retd.) Imtiaz Ahmad v. Government of Pakistan through Secretary, Interior Division (1994 SCMR 2142), paragraph 12 placitum-B whereof reads thus:-

"Judicial review, must, therefore, remain strictly judicial and in its exercise, Judges must take care not to intrude upon the domain of the other branches of Government. "

216. Judicial power means that the Superior Courts can strike down a law on the touchstone of the Constitution, as this Court did in Mehram Ali's and Sh. Liaquat Hussain's cases. The nature of judicial power and its relationship to jurisdiction are all allied concepts and the same cannot be taken away. The concept of judicial review was laid down in the United States by Chief Justice John Marshal in the case William Marbury v. James Medison (2 Law Ed. 60), ruling that it was inherent in the nature of judicial power that the Constitution is regarded as the supreme law and any law or act contrary to it or infringing its provisions is to be struck down by the Court in that the duty and function of the Court is to enforce the Constitution. The concept of judicial review did not exist in England because the supreme law in England was that the Queen-in-Parliament can do anything and that once an Act of Parliament has been passed, the Courts were to follow it. The Founding Fathers of the United States Constitution, however, deviated from it and in doing

so followed the view expounded by Montesquieu in his treatise "Spirit of Law", which enumerates the concept of Separation of Powers: the judicial, the legislative and the executive powers. Montesquieu based his opinion on the practice but not the law of England, in that, in practice there was Separation of Powers in England but not in theory. Unlike the Constitution of Pakistan, the Constitution of United States does not confer any power on the Supreme Court to strike down laws but the Supreme Court , of United States ruled so in the case of William Marbury v. James Medison (supra).

217. We have examined the contention of the learned Attorney-General that after having taken oaths of their offices under the PCO as amended, the Judges of the Superior Courts are bound to defend the Proclamation of Emergency and the PCO as amended, in that, the old Constitution has been replaced by a new revolutionary order on the basis of the verdict earlier given by this Court in the case of Begum Nusrat Bhutto (supra). We are afraid the contention is totally misconceived in that it was clearly stated in the above judgment that on no principle of necessity could powers of the judicial review vested in the Superior Courts under 1973 Constitution be taken away. It was further observed that the old order has not been replaced k by a new order but it was merely a case of constitutional deviation for a temporary period to enable the Chief Martial Law Administrator to restore democratic institutions and hold elections at the earliest.

218, Reference may also be made to the book titled "Principles of Revolutionary Legality" by J.M. Eekelaar wherein the author observed that the Court must take into account before determining the legitimacy of a revolutionary regime, the two oblique arguments, which would attempt to undermine it: one relating to collapse of its jurisdiction with the disappearance of the old Constitution; and the other relating to subservience of the Judiciary to the new regime. It would be advantageous to quote the relevant passages from the aforesaid book, which read thus:

Authority of the Court

"In concluding the defence of the proposition that principles of the kind enumerated above may properly be taken into account by a Court in order to determine whether or not to uphold the legitimacy of a revolutionary regime, it is necessary to consider two oblique arguments which would attempt to undermine it. One is to take theoretical objection to the jurisdiction of a Court which indulges in the exercise. The claim is that, as the Court acquired its authority to determine disputes by virtue of jurisdiction conferred on it by the old Constitution, the disappearance of that Constitution implies the collapse of the Court's own authority. The other argument is the severely practical one that, whatever the legal theorist or the Judges may say, any court making a finding adverse to a revolutionary regime is certain to be disbanded so that in reality a judiciary will be allowed to function only if it is subservient to the new regime.

"The second questionable premises is that by suffering the Court to continue to function, the new executive thereby assimilates the court into its own revolutionary order and that this compels the de jure recognition of the Government. But against this it might be urged that the very submission by the revolutionaries to litigation before the Court concerning their own legitimacy suggests that the Court may have an inherent authority arising from the submission of both parties, rulers and ruled, to its jurisdiction.

"The dismissal of Judges is an extreme step which might have dangerous domestic and international consequences for a revolutionary executive. Nor should it be too readily assumed that a regime which takes this step will easily find a replacement judiciary without leaving itself open to ridicule……Had the Rhodesian Court, for example, held, that the revolutionary regime could be considered lawful only if confirmed in office by the electorate which had elected them under the old Constitution and if some satisfactory evidence was produced that the new Constitution was broadly acceptable to the majority of the population (in accordance with principles 7 and 8 listed above) is it inconceivable that the regime might have preferred to attempt to comply with that finding rather than to dismiss the Judges? The opportunities open to the judiciary to influence the course of events should not be dismissed out of hand. It may be that this is unaccustomed territory for the judiciary to enter. But this is true for many areas of law in modern times, especially with respect to the interaction between the executive and the citizen. It is hard to believe that our legal and cultural tradition is too weak to develop sound and acceptable principles in this new context: But in order that they may take root, it is necessary to rid ourselves of the conceptual block which would forever bar the entry of juristic thought into this domain. "

219. While going through the case-law of Great Britain, we came across the view expounded by Chief Justice Coke, whose writings are regarded as an important source of Common Law, to the effect that the Bench should be independent of the Crown and arbiter of the Constitution to decide all disputed questions whereas Bacon took the view that the Court is under the King but then following the Plato's theory he (Bacon) wanted the King to be a philosopher. The evolution of judicial power is coterminus with the evolution of civilization and this is so because judicial power has to check the arbitrary exercise of powers by any organ or authority. On examination of the PCO, we find that it purports to suspend the Constitution on the one hand and, on the other, it says that .the country will be governed in accordance with the provisions of the Constitution as nearly as possible. What emerges from this is that the Fundamental Rights are left intact except those which had been suspended by the earlier Proclamation of Emergency dated 28-5-1999 i.e. Articles 15 to 19 and 24 of the Constitution. The Objectives Resolution recognises the `Islamic doctrine of sovereignty' as expounded in the Holy Book, that sovereignty belongs neither to the ruler nor the ruled but Almighty Allah alone which is to be exercised by the people of Pakistan through their chosen representatives. The Objectives Resolution also envisages that the independence of Judiciary is to be fully secured. It is a fundamental principle of jurisprudence that Courts must always endeavour to expand their jurisdiction so that the rights of the people are guarded against

arbitrary violations by the executive. It was rightly contended by Mr. Khalid Anwar that the orders of the Chief Executive are subject to the jurisdiction of the Constitutional Courts of the land. By including paragraphs 2(b) and 7 in the PCO, it has been recognized that the Superior Courts, which are respected by the people being an embodiment of the ideals of justice and guardian of the rights of the people are not merely entitled to continue but have, in fact, done so in the past as well. The Oath of Office (Judges) Order, 2000 (Order 1 of 2000), dated 25th January, 2000 allows all the Courts to continue to function and exercise powers, which is a reiteration of what was earlier stated by the Oath of Office (Judges) Order, 1999 (Order 10 of 1999), paragraph 3 whereof states that Order I of 2000 shall apply to: (1) newly appointed Judges; (2) that Oath shall be made before the Constitutional authority; and (3) that it would be in accordance with the appropriate form set out in the third schedule to the Constitution. This required the newly appointed Judges to take oath before the constitutionally designated authority and as per the procedure prescribed by the Constitution and not by the Order 1 of 2000. Mr. Khairi was right in contending that any provision purporting to restrain the power of judicial review of the Superior Courts is to be ignored altogether. Mr. Khalid Anwar was also right in contending that a Judge acting in his conscience and in good faith may decide to resign or he may decide that in the higher public interest he would retain office as has been done by the Judges of this Court and other Judges of the Superior Judiciary. We may refer to the book titled I "Constitutional Legitimacy" `A Study of the Doctrine of Necessity' authored by Leslie Wolf-Phillips, wherein the following passage occurs:---

"A former member of the Argentine Supreme Court has justified the role of the Court as `the beneficial expression of a laudable political realism'. He saw choices before the Court in a revolutionary situation as irresponsible resignation, acceptance of the situation; an attempt to save what 'institutional values' remained to be saved:

It has exercised a function of institutional salvation by guarding human rights and the independence of the judiciary. It has been as if they said to the military men... we recognise the practical power that you exercise, because otherwise there would be chaos instead of order and authority in the country..."

Reference may be made to a famous statement of Thomas Jefferson who while asserting that the Courts always possessed judicial power since that alone assured the retention and exercise of the fundamental rights of the citizens:

"In the arguments in favour of a declaration of rights, you omit one which has great weight with me, the legal check which it puts in the hands of the judiciary. This is a body, which if rendered independent, and kept to its department, merits great confidence for their learning and integrity

(cited by Professor John Agresto in his book "The Supreme Court and Constitutional Democracy, p 19).

The same author, Professor Agresto further says:

"On one side there is the venerable argument that looks on the Court as the Founders' protective barrier against unconstitutional acts, our security against political usurpation. The Justices in this account, stand as defensores fidei, as the watchmen in the constitutional edifice. (id. p 21)

Still further the same author says:

"On that level Judges become officials of goodwill who can read well. At this extreme it is their judicial dispassion that makes us rest easy in their guardianship…….John, Marshall began more convincingly: it was. in fact the very passion for the judicial branch, its passion for rule of law, that made the Court the proper Guardian of the Constitution. (id. p. 21)

220. It seems quite clear that the Army takeover of 12th October, 1999 was extra-constitutional. The Superior Courts of Pakistan have laid down that they retain the power of judicial review despite the ouster of jurisdiction which came either from within the Constitution, or by virtue of Martial Law Orders or by legislation. Even non obstante clauses in these cases had failed I O to prevent such objectives of the incumbent administrations.

Thus visualised, the purported ouster in the Proclamation and the PCO 1 of 1999 of the jurisdiction of the Superior Courts is an exercise in futility and the power of judicial review remains intact. Both under Islamic doctrines as well as under its constitutional/juridical personality, the Superior Courts would continue to exercise this power.

INTERVENTION BY THE ARMED FORCES

221: Let us now examine the circumstances which paved the way for the impugned action of the Armed Forces, the issuance of the Proclamation of Emergency and promulgation of PCO 1 of 1999 in the country. It is alleged that on 12th October, 1999, the former Prime Minister Mian Nawaz Sharif retired General Pervez Musharraf, Chief of Army Staff/Chairman, Joint Chiefs of Staff Committee from his office, when the latter was out of Pakistan on official visit to Colombo, Sri Lanka and appointed Lt. General Ziauddin, the then Director-General, ISI, as the Chief of Army Staff. Announcement to this effect was relayed on the electronic media. It is further alleged that since an illegal order had been passed by the Prime Minister whereby an' attempt was made to create dissension among the Armed Forces and integrity and sovereignty of the country was threatened, the Armed Forces proceeded to take over the affairs of the country as a last resort in order to avoid further disintegration. . It is also alleged that a criminal conspiracy was hatched by the former Prime Minister and his associates and co-conspirators both at Islamabad and at Karachi to commit serious offences of hijacking of Flight PK-805 carrying on board the Chief of the Army Staff, General Pervaiz Musharraf and 197 persons.

222. In support of its case the Federation has relied upon, in particular, the following portions of the speech of 13th October, 1999, delivered by the Chief Executive:

"You are all aware of the kind of turmoil and uncertainty that our country has gone through in recent times. Not only have all the institutions been played around with, and systematically destroyed, the economy too is in a state of collapse. We are also aware of the self-serving policies being followed, which have rocked the very foundation of the Federation of Pakistan."

"Our concerns again were conveyed in no uncertain terms but the Government of Mr Nawaz Sharif chose to ignore all these and tried to politicize the army, destabilize it and tried to create dissension within its tanks."

"I was in Sri Lanka on an official visit. On my way back the PIA commercial flight was not allowed to land at Karachi but was ordered to be diverted to any where outside Pakistan. despite acute shortage of fuel, imperilling the life of all the passengers. Thanks to Allah, this evil design was thwarted through speedy army action "

The learned Attorney-General has placed on record an article by Kamran Khan of News Intelligence Unit, published in the daily "The News" dated 14-10-1999, titled "Ambitious Ziauddin Butt steered Nawaz to political disaster" , relevant portion of which reads as under:

“Within half an hour of his surreptitious climb to the post of the Chief of Army Staff on Tuesday afternoon, the former Inter Services Intelligence Chief, General Khawaja Ziauddin knew that the Army he was supposed to lead was not prepared to accept his command.”

“The News Intelligence Unit (NIU), has gathered, that all of Ziauddin’s phone calls to the Corps Commanders and the Chief of General Staff that placed from the Prime Minister’s House in Islamabad on Tuesday-drew a blank, a reaction that almost instantly drew down the curtains on former Prime Minister Nawaz Sharif’s second term in office.”

“Debriefing sessions with detained aides of the Nawaz administration by security officials here have disclosed that the former ISI Chief -led operation to stage an in-house coup in the Army was driven by his personal ambitions ignoring the actual situation on the ground.”

“Even a layman in Pakistan is aware that any operation of this sort can never be completed without the active support of the troops and commanders posted in the cities of Islamabad and Rawalpindi,” an army official commented.”

“It has now become clear that Lt. General. Ziauddin was the architect of the secret operation that envisioned the official announcement of his promotion to the post of COAS once General Pervez Musharraf boarded PIA Flight PK 805 in Colombo for a journey that severed his contact with the GHQ for a good 200 minutes.”

“It was also Lt. Gen. Ziauddain who, alongwith the former Principal Secretary Saeed Mehdi, had suggested to Nawaz Sharif that General Pervez Musharraf’s plane must not be allowed to land at Karachi so that he could be arrested at any other less busy airports in Sindh.”

Clearly, in view of the reasons given in the Short Order coupled with the circumstances and observations stated in this judgment, intervention by the Armed Forces warrants validation on the basis of the doctrine of `State necessity’ and the principle of salus populi supremo lex.

CORRUPTION

223. It has been alleged that the former Prime Minister and his chosen few in the Parliament plundered the national wealth and amassed personal wealth by engineering bank defaults of Rs. 356 billion and thereby indulged in acts of corruption and corrupt practices, which destroyed the national economy. On account of such massive corruption and corrupt practices in the administration of the affairs of the Government and its various bodies, authorities and corporations, the orderly functioning of the Government in accordance with the provisions of the Constitution and the law had lost its meaning. It is alleged that public faith in the integrity and honesty of the government had disappeared, in that, the members of the Government were either directly or indirectly involved in such corruption and corrupt practices. It is alleged that Mian Nawaz Sharif's constitutional and moral authority stood completely eroded and that the situation was somewhat similar to the situation that was prevalent in July, 1977.

224. Regarding petitioners' plea that the politicians/parliamentarians have been condemned as a class for indulging in corruption and corrupt practices, it has been averred in the written statement that the charges are neither vague nor general nor undefined. It is pleaded that the systematic manner in which the entire governmental process was undermined and subverted and the way self-serving policies were followed by the previous government, do provide sufficient proof of the above allegations. It is further pleaded that since the government was being run contrary to the provisions of the Constitution and since there were massive and widespread violations of the Constitution and the law, the Armed Forces were compelled to move in as a last resort to prevent any further destabilization, to cleanse the system and ultimately restore true democracy. On behalf of the Federation, voluminous record spreading over dozens of paper books has been filed in support of the allegations of corruption and corrupt practices by the former Prime Minister as well as other members of his government. We would suffice by giving few instances in that behalf.

Reference may first be made to a press clipping published in Daily 'Dawn' dated 24th October, 1999 under the Heading "Rs 211 billion non performing, Rs 145 billion defaulted. Defaulters owe total of Rs. 356 billion", says Yaqub:-

"Speaking in a television programme he said that non-performing loans amounted to Rs. 211 billion and defaulted loans stood at Rs.145 billion."

"Dr Yaqub added that a major chunk of Rs 100 billion of the defaulted loans was owed by 322 families or groups he said in all 100 groups or families owed Rs 64 billion. A sum of Rs. 30 billion was due from only 25 groups or families.

"The SBP Chief clarified that a loan was categorized as non performing when repayment of its instalments got stopped due to one reason or the other, If instalments are not paid for one year, the loan becomes defaulted."

"The SBP Governor said the new government was determined to pursue loan defaulters and unlike past the defaulters should take the deadline seriously."

"He said cases of all loan defaulters, including bankers, businessmen, politicians, agriculturists would be pursued without any discrimination."

"Dr. Yaqub said 322 families and conglomerates owed Rs.100 billion of the national wealth out of which only 25 families owed Rs. 30 billion."

"The defaulters owe Rs 145 billion to the financial institutions while Rs.211 billion are payable in the category of non-performing loans. "

Reference may also be made to Daily Dawn, dated 15th November, 1999, publishing a news item under the Heading "Two more cases against Sharifs sent to NAB°, relevant portion whereof reads thus:

"Two more cases have been sent against the deposed prime minister, Nawaz Sharif, and his brother and former Punjab Chief Minister Shehbaz Sharif to the National Accountability Bureau (NAB) for investigations."

"One case is that they exported huge quantities of sugar to India and received heavy amounts in rebates."

"The other case is based on a complaint filed by PPP Chairperson Benazir Bhutto alleging that the Sharifs owned Cayman Island, an offshore company, through Al-Towfeek Company."

225. Reference may be made to a summary of Legal References filed against Muhammad Nawaz Sharif and others for corruption and abuse of office by the Pakistan People's Party before the Chief Ehtesab Commissioner, Islamabad, on November 30, 1998, containing the following contents:-

1. "Hotel Holiday Inn Scandal

2. Loan Scandal

3. Helicopter Scandal

4. Wheat Scandal

5. BMW Cars Scandal

6. Murree Land Scandal

7. BOI State Land Scandal

8. Redco Loans Scandal

9. Illegal Appointments

10. Tax Evasion Reference

11. Muhammad Sharif's Promotion Reference

12. Kohinoor Energy Scandal

13. Raiwind Mahal Scandal

14. Black Money Scandal

15. Luxury Cars Scandal

16. Dollars Scandal

17. Illegal Appointments in PIA"

226. Certain documents relating to the land owned by Sharif Family measuring 20,856 Kanals, 1 Marla and 224 Sq. feet in the Districts of Lahore, Sheikhupura and Rawalpindi valuing Rs. 34,16,38,851/- were also referred, a chart whereof is reproduced below:

GRAND TOTALS OF LAND/PROPERTIES IN THE NAME OF NAWAZ SHARIF AND HIS RELATIVES

S.No

NAME OF OWNER

LAND

K.

M.

SFT.

COST (IN RUPEES)

1

Total Property in the Name of Nawaz sharif Father, Mother, Wife and Brothers.

5684

12

75

16,08,75,338

2

Total Property in the Name of Uncles Cousins and In-laws.

12705

13

13

8,58,73,078

Total:

18390

6

88

24,67,48,416

3

Total Land in the Name of Industries.

2465

15

136

9,48,90,435

GRAND TOTAL:

20856

1

224

34,16,38,851

A Reference had also been filed under Ehtesab Act, 1997 against former Prime Minister Muhammad Nawaz Sharif, Chief Minister Punjab Mr. Shehbaz Sharif and others for misusing the official resources and causing loss to the National Exchequer to the tune of Rs. 620 million, on 17-6-1998 which is still pending. Detail of which is as follows:-

"1.- After assuming the power as Prime Minister, the private residence at Raiwind of Muhammad Nawaz Sharif was declared as Prime Minister's Camp Office and its entire maintenance was executed by the Federal Government Department, PWD. PWD not only maintained the P.M. Camp Office but also the residential portions of other Sharif family members. So, a huge amount of Rs.80 million was approved by the concerned quarters and was spent on the residence of Sharif Family.

2. A sum of Rs. 70 million was spent by the Sui Northern Gas Pipelines for providing the Gas facility to the Raiwind Farm owned by the Sharif Family.

3. Rs. 320 million was spent by the District Council Lahore to build a new carpeted 20-feet wide road on both sides of the canal from Adda plot to the Sharif Farm and connecting the Sharif Farm with the Main Raiwind Road.

4. Rs. 80 million cost for lining up the part of Bucher Khana canal which passes through the Sharif Farm.

5. WAPDA also spent an amount of Rs. 50 million for laying special line for the Sharif Farm house on the direction of the former Prime Minister.

6. P.M. Nawaz Sharif also directed the Tele Communication Corporation to set up a 200-Lines Telephone Exchange near the farm for the exclusive use of the Sharif family, thus, a sum of Rs. 20 million was spent for the purpose."

ILLEGAL EXTRACTION OF HEAVY AMOUNT BY MIANNAWAZ SHARIF, SHEHBAZ SHARIF AND HIS FAMILY MEMBERS FOR THE FOLLOWING UNITS OWNED BY THEM.

Sr. NO.

NAME OF UNIT OUTSTANDING

LIABILITY

(In Millions)

1.

Ittefaq Foundries Ltd.

1,556

2.

Ramzan Sugar Mills

Ltd.

623

3.

Haseeb Waqas Sugar

Mill Ltd.

543

4.

Mehran Ramzan

Textile Mill

455

5.

Ramzan Bukhsh

Textile Mill

373

6.

Brothers Sugar Mills

Ltd.

351

7.

Ch. Sugar Mills Ltd.

339

8.

Ittefaq Sugar Mills

Ltd.

313

9.

Ittefaq Brother Ltd.

226

10.

Sandalbar Textile Mills

Ltd.

205

11.

Khalid Siraj Textile

Mills Ltd

191

12.

Hudabiya Engineering

Co Ltd.

182

13.

Brothers Textile Mills

Ltd.

174

14.

Ittefaq Textile Mills

Ltd.

164

15.

Brothers Steel Ltd.

159

16.

Hamza Board Mulls Ltd.

153

17.

Hudbiya Paper Mills

Ltd

134

18.

Ilyas Enterprised Ltd

3

19.

Ittefaq Hospital Trust

2

Total:

6,146

TRANSCRIPT OF BBC TELEVISION'S DOCUMENTARY ON CORRUPTION IN PAKISTAN

"Najam Sethi's interview.---I will just give you a short story. (As advisor on accountability in interim government of Meraj Khalid) I asked the Chairman of the Central Board of Revenue to give me a brief about who is corrupt and who is not in terms of who has paid income tax and who has not. He brought a truck load of files. I was struck. He said where you want to start because everybody is corrupt from the top to the bottom.

Background commentary.---They say there is corruption everywhere in Pakistan. People may trust the traders in the Sunday market but when they deal with government officials people expect of Pakistan (Irshad Hasan Khan, C J) to be ripped of. And politicians talk politics, they say and you are talking cheating big time.

Interview of Sajjad Ali Shah.---Corruption is now not considered as a bad thing and it has become a norm of life. People have started expecting it. Now it has become part of the system, as if it is accepted and nobody considers it a bad thing so I think it is eroding the fabric of the society.

Background commentary.---In every original affidavit submitted to the Court, the intelligence officer who allegedly acted as go between, listed Nawaz Sharif as having received Rs. 3.5 million.

Nawaz Sharif shown addressing a public rally.

Background commentary. ---What Mr. Nawaz Sharif is selling is a vision. Vision of an impoverished country to transform into a world power. His monument is likely to be the 170-mile motorway from Lahore to Islamabad along cherished ambition, which almost cost a billion dollars. His critics though say that the country cannot simply afford such grandeur projects. The motorway is not so much used by traffic, is haunted.

Mr Najam Sethi interviewed on Nawaz Sharif's grandeur projects.

Najam Sethi.---Nawaz Sharif has always fancied himself as a Mughal Emperor. And the Mughal Emperors were great builders. They are remembered for having built great monuments. And story goes that the Finance Minister once said to the Prime Minister that we can't build this motorway because we will run into awful fiscal deficit problem as we don't have that much money. And the (Nawaz Sharif) said to him "forget the fiscal deficit. Sher Shah Suri, who built the Great Grand Trunk Road, is remembered not for the fiscal deficit that he ran into but for the great motorway that he built". This is Nawaz Sharif's case --- elemental Mughal splendour.

The programme shows Rehman Malik as telling reporters in Islamabad during his tenure as additional DG FIA, that the focus of the investigations were accounts of Salman Zia and Qazi family.

Background commentary. ---What Malik investigated and put before the Court were allegations that the family having moved money out of Pakistan during good times were now bringing it back. His case began with the bank account of Mr. Salman Zia, a name that became central to his investigations down town in Lahore where Mr Zia's accounts was opened in Habib Bank A.G. Zprich, in 1992. Malik's inquiries showed mysterious deposits of hundreds of thousands dollars paid into this account in traveller's cheques.

Rehman Malik.---During investigations we found that heavy transactions from abroad have come to Salman Zia's account. When further details were examined, we found that travellers cheques amounting to 700,000 dollars came in. That made us suspicious that it is money-laundering.

Background Commentary.---Bank records obtained by Mr Malik show that during short period, Salman Zia had traveller's cheques worth 1.5 million dollars paid into his account. It seemed that mysterious millionaire Mr Zia was getting richer by the day. Malik also discovered that hundreds of thousands of dollars have been paid into his accounts from American and Swiss Banks.

General Babar.---The bank account application was astounding. It just said Salman Zia son of Muhammad Zia, agriculturist, Main Bazar, Sahiwal, which is a minimum of address and to cap it all it is a "no correspondence" and the fact that millions of dollars have been transacted through this account.

Rehman Malik.---Salman Zia? He is a fake man. He does not exist. The focus of the investigation is that Salman Zia doesn't exist. He is shown as an agriculturist. He is a poor man, having transactions of millions of dollars.

Background commentary. ---From Salman Zia's accounts, Malik then told the Court that the trail led to London. Malik claims that millions of dollars issued from Zia and other fake accounts were being paid into the accounts opened back in Pakistan in the names of a London family --- the family known as Qazis. Unlike the mysterious Salman Zia, Malik believed that Qazis really existed.

They had passports. But the passports were British. Malik says that he found that not only the family had been in Pakistan when the accounts were opened there in their names.

Background Commentary.---So, where were the mysterious Qazi family, Malik discovered they live in the east side of London. May be the Qazis were city brokers. After all their accounts said there were millions of pounds in them. But the fact is that the trial of the Qazis led past the city, well past it. It led to Ilford in Essex, The town not associated with huge bank deposits. The trail led on to the Pioneer Market in Ilford area to a fashion boutique shop there. It is called "Utter Nutter". It is a modest business run by Kashif Qazi (youngest son of Masood Qazi). Mr Qazi sells jeans, designer clothes, and fashion accessories. The Qazis home is off the Ilford Lane. To the family's amusement, letters started dropping through their letter box from banks in Pakistan. The good news for the Qazi family was that accounts opened in their. names had millions of dollars in them. The bad news, that it were being used as guaranteeing loans to Pakistani companies --- companies connected to the family of the Prime Minister of Pakistan. One day Kashif Qazi opened a letter that said he had over 2.0 million dollars but it had been used for loan to Hudabiya engineering, the Sharif family company which had not paid any of its dues. Kashif Qazi was now being asked to "please arrange the payment". His brother Talat found, he also had 2.0 million dollars. This money was too used to help guarantee loans but the interest on the loans was not being paid so the bank threatened to sell his US dollar deposit in the event of any breach of financial agreement. Another worrying letter said that in spite of the bank's repeated reminders and constant follow up, they did not receive any payment from the Sharif Company, to which the money had been lent to.

Background commentary. ---The Qazis deny any involvement up of Lahore accounts. It was a puzzle why their names should appear in the name trail. So, was there any connection between them and the Sharifs? Speculation -in Pakistan has centred around a mutual friend. He is a man, who in the 70s, was a paying guest of the Qazis when he was studying in London --- Mr.Ishaq Dar. Today Mr. Dar is Nawaz Sharif's Finance Minister. He categorically denies any involvement. Mr Dar was unavailable for interview but he did write to us. He said the Qazis are the friend for himself and the Sharifs. But he blamed press speculations on Rehman Malik for floating all sorts of stories. The Qazis were furious, when on a visit to Pakistan in last October, they were photographed a; the airport and local newspapers seized the chance to stir the controversy. The Qazis were treated not just like friends, it was suggested, but like official state guests. In fact we have seen a state official, in-charge of Protocol, referred to the Qazis as the Prime Minister's guests and requested them appropriate reception at the airport, accommodation in state guest house and chauffeur driven vehicle in good condition. We had arranged an interview with Kashif Qazi, but when we arrived at his home, we were told he had - gone to a Paris fashion show. When we went to film his shop, (close to the house), we found Kashif Qazi behind the counter.

Background commentary. ---But Mr. Sharif's critics say that he has tried to interfere with the Court's independence. (Scenes of Muslim League workers attacking the Supreme Court are shown). For example they say take the dispute he had with the Supreme Court Chief Justice soon after he was re-elected.

Interview of Former Chief Justice Sajjad Ali Shah.---It (relationship) was not very cordial, of course. There were several complaints and several cases (against the prime minister) which were being heard and the prime minister did not want me to hear those cases. He was under the impression that as prime minister he was exempted from the proceedings in the court and the court should not hear cases. So, this was the point of difference. I told him that this was not the correct view because there is no discrimination in the eyes of law.

Background commentary.---The Chief Justice's felt his fears were justified when pro-Sharif demonstrators stormed the Supreme Court and the police stood aside.

Sajjad Ali Shah.---They were raising slogans against me, and accusing me. They had burnt my effigy outside and holding banners against me. I think they were saying that I am the enemy of the prime minister.

Background commentary.---A case that could have led to the Prime Minister's dismissal was abandoned. The Chief Justice claimed that the mob, which included members of the parliament, was politically organised.

Interview, of Solicitor Robert Kearns.---My clients provided security of that investment through personal guarantees which were offered by three members of the Sharif Family in Pakistan. We obtained a judgment in respect of those guarantees. It is against the Prime Minister's brother, which is in excess of $ 17.0 million and Prime Minister's father which is in excess of $ 14.0 million. We would like the judgment to be implemented... they should come to this country and explain what assets they have here and abroad which could set aside that debt. My clients are interested in any assets. It's -a substantial amount of money and quite understandably they want the payment.

Background commentary.---Now the vendettas are becoming more personalised and claiming more victims, including those who really report those accusation. (Pictures of Lahore journalists protesting against the arrest of Friday Times Editor Najam Sethi, are shown) Sethi, was arrested

soon after our interview. He was held in solitary confinement for 27 days, till his release without any charge a few days ago. His detention was widely condemned as an attempt to intimidate those who ask awkward questions about Pakistan's rulers, including Nawaz Sharif."

227. Reference in particular was made'to a recent debate in the House of Lords on Military Intervention *in Pakistan, wherein both the major parties i.e. Pakistan Muslim League and Pakistan People's Party have been termed corrupt, incompetent, unpopular and highly damaging to the welfare of the people in Pakistan". Daily "The News" in its publication dated 21st March, 2000 has reported the above debate, which reads thus:-

"The House of Lords described the two major political parties of Pakistan as "corrupt, incompetent, unpopular and highly damaging to the welfare of the people in Pakistan" and observed that it was "kleptocracy which was ripping millions of rupees away from the public exchequer."

"The British House of Lords in its recent two hours and 48 minutes long exclusive debate on Pakistan pledged that "we want the best for Pakistan and its, people, a strong and resilient democracy that can guarantee political and economic security for its citizens, and work for peace in the region." Eighteen peers who spoke, in the House, agreed on the motion on Pakistan. It is reported that Lord Paul said "Corruption was the downfall of previous Pakistan governments. We must, of course, strongly condemn corruption wherever it exists, in Pakistan or elsewhere. It eats into the heart of any society, particularly a society that has few resources and great developmental demands. Let us make sure that economically developed countries do not, inadvertently or otherwise, facilitate corruption in other regions..."

"Baroness Strange, briefly expressing her point of view regarding the situation in Pakistan said: "General Musharraf has arrived there in rather an undemocratic way. The regime that he replaced, although democratically elected in the first place, had turned out to be not very democratic in practice, difficult to dislodge and gradually becoming more and more corrupt. General Musharraf has said that as soon as the country resettles itself, he will re-initiate democracy. Naturally, we are very anxious to see this happen. We are also anxious to see the lessening of tension towards Kashmir and other neighbours and a cessation of nuclear testing. I should like to emphasise our close ties with Pakistan, both now and historically. We wish her and her new government well.

"The Government of General Musharraf evidently has the support of the vast majority of the people of Pakistan for the first item of his agenda to punish those who had stolen the country's money. Under Nawaz Sharif, Pakistan was sliding into bankruptcy, but his predecessor (Benazir

Bhutto) had also allowed her cronies, and especially her husband, to profit from their hold on the reins of government," Lord Allon said."

"Lord Sandberg taking floor said, "We were only aware of the deep corruption of successive governments over too many years." He said that the low turnout was influenced by the fear that both parties were almost equally corrupt. "That fear turned out to be only too true. Almost immediately, Sharif and his colleagues started to feed at the same trough as their predecessors. The reaction in the streets in Pakistan to the army's action told its own story. There were almost universal relief and rejoicing and the grassroots support has continued. Since. then the stock exchange index in Karachi has risen from about 1, 130 to 1,700 points, an indication of the greater confidence investors have in the new administration. "

"Lord Sandberg said that he made these points because those with perhaps little understanding of Pakistan were quick to criticise the move by General Musharraf. "Perhaps with more thoughts it might have been seen as an almost inevitable event when one takes into account the fact that the political and economic situations were at such a low ebb." He said: "General Musharraf has refrained from martial law or any of the other extremes that we have come to fear after a military coup. Indeed, we understand that the Courts and judiciary are functioning normally. There appears to be a free press." He questioned the suspension of Pakistan from the Commonwealth and said, it was somewhat premature and a little hasty decision."

"Lord Ahmed while speaking on the motion said that in recent years Pakistan had become a dysfunctional and sham democracy, had in fact become a kleptocracy as described by Lord Weatherill, earlier. "

"He said that General Musharraf had announced that there would be local and district elections this year. "That will pave way for true, genuine and lasting democracy in Pakistan. General Musharraf's action was clearly in Pakistan's national interest. The people of Pakistan have accepted and welcomed the removal of the previous Government arid that is perhaps why there was no violence or bloodshed and 80 per cent of the public supported the change."

While concluding his submissions as to the allegation of corruption and corrupt practices, the learned Attorney-General made a statement in Court by way of clarification that some of the politicians/parliamentarians are not included in the list of persons accused of corruption and corrupt practices, namely, Raja Zafarul Haq, Mr. Wasim Sajjad and Ch. Shujaat Hussain. He also stated that allegation of misdeclaration of assets against Mr. Elahi Bakhsh Soomro is incorrect.

228. Syed Sharifuddin Pirzada, learned Senior ASC was right in contending that there were serious allegations of corruption, nepotism, lack of transparency and no accountability and that where there is corruption, there is no good Government, which fact has been recognised by this Court by observing that corruption by. itself is a ground for imposition of Martial Law or Proclamation of Emergencies.

229. Reference may be made to a study on "Corruption and Government, Causes, Consequences, and Reform" by Susan Rose Ackerman from Cambridge University, wherein the modes of corruption resorted to by various rulers have been explained and examples of certain countries such as Paraguay, Zimbabwe, etc. have been given, in which corrupt means were adopted. It is also stated that the process of privatization can reduce corruption by removing certain assets from State control to the private sector, though the process of transferring assets to private ownership is fraught with corrupt opportunities. The writer further states that corruption involves top-level-officials which can produce serious distortions in the way Government and society operate and that these corrupt officials distort public sector choices to generate large rents for themselves and to produce inefficient and inequitable public policies with the result that many wrong kinds of projects are initiated. The author, therefore, suggests that the Government should consider promulgating statutes that protect and reward those who report wrong doings. It would be advantageous to reproduce the relevant portion of the above study, which reads thus:

"Grand corruption" occurs at the highest levels of Government and involves major Government projects and programs (Moody-Stewart 1997). Governments frequently transfer large financial benefits to private firms through procurement contracts and the award of concessions. Bribes transfer monopoly rents to private investors with a share to the corrupted officials. Privatization processes are vulnerable to corrupt insider deals".

"In Paraguay corruption in the award of international construction contracts during the regime of President . Alfredo Storeowner (1954-1989) typically ranged from 10 to 20 percent. Corruption helped inflate the cost of the Utopia dam on the Brazilian border and led to the construction of projects that exceeded domestic needs (Nicks 1996: 244-245). In Indonesia in the 1970s two German companies reportedly paid bribes to 20 per cent. of the state-owned oil company (Schwarz 1994: 138)".

"In Zimbabwe collusion between senior ministers in Posts and Telecommunications and a Swedish telecommunications company may have circumvented local tender board procedures. Kickbacks were reported to be as high as $ 7.1 million. In an airplane deal in South Korea several United

States companies allegedly paid bribes to President Oh Tae Woo. Multinational suppliers were questioned, but denied involvement. In another arms deal Oh Tae Woo's national security advisor acknowledged receiving payments that may have been as high as $ 300,000. A major scandal in Singapore involved several multinational firms and a senior official of the Public Utility Board. The official was paid to reveal confidential information about tenders. The case led to the blacklisting of five major multinationals implicated in the scandal. The official received a fourteen-year jail term".

"Corrupt rulers favour capital-intensive public projects over other types of public expenditures and favour public investment over private investment. They will frequently support "white elephant" projects with little value in promoting economic development."

"Privatization can reduce corruption by removing certain assets from state control and converting discretionary official actions into private, market-driven choices. However, the process of transferring assets to private ownership is fraught with corrupt opportunities. Many corrupt incentives are comparable to those that arise in the award of contracts and concessions".

"Corruption that involves top-level officials can produce serious distortions in the way Government and society operate. The State pays too much for large-scale procurements and receives too little from privatizations and the award of concessions. Corrupt officials distort public sector choices to generate large rents for themselves and to produce inefficient and inequitable public policies Government produces too many of the wrong kind of projects and overspends even on projects that are fundamentally sound. Corruption reduces the revenue-raising benefits of privatization and the award of concessions."

"Thus Governments should' consider promulgating statutes that project and reward those who report malfeasance (Pope 1996: 59-61). The United States, for example, has two statutes. The False Claims Act rewards those who report irregularities in Government contracts 'and protects private sector whistleblowers from reprisals (31 U.S.C. ss 13729-3731; Howse and Daniels 1995; Kovacic 1996). The second protects whistleblowers inside Government Agencies from retaliation (Whistleblower Protection Act, Pub. L.No. 101-12,5 U.S.C. s 2302 (b) (8)."

"In a system where government is publicly accountable, favoritism would not be possible if the specifications were made public. Too great an intertwining of contractors and public officials invites corruption. Systems that are more transparent and accountable can afford to give procurement officers more discretion than others with less accountability.

“The criminal law is the second basic part of a comprehensive strategy.”

230. Our attention was also drawn to stance taken in “Commonwealth Finance Ministers Meeting” held on 21-23rd September, 1999 at Grand Cayman, Cayman Islands, which reads thus:

“Good governance is not a luxury but a basic requirement for development. Corruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly.

“2. Corruption is always a two-way transaction with a supply and a demand side. It occurs in poor, emerging, and developed nations, regardless of the level of social and economic development and in countries with varying forms of Government ranging from dictatorships to established democracies.

“3. Corruption, which is multi-dimensional, generally occurs at the nexus between the public and private sectors, with actors in the private sector interacting with holders of offices of trust in the public sector. Some aspects of corruption such as fraud and the misappropriation of assets or funds can occur entirely within the private or public sectors. However, with increasing privatisation of public utilities and service, the distinction between the public and private sectors is becoming less relevant in some areas.

“4. Corruption is generally defined as the abuse of public office for private gain. As the scope of corruption has widened, this definition has been enlarged to cover the abuse of all offices of trust for private gain. There are many types and levels of corruption including “grand corruption”, which involves huge sums paid by major businesses to high-level politicians and/or Government officials, widespread systemic corruption which may take the form of substantial bribes to public officials to obtain. for example licences/permits or to by-pass regulations; and petty corruption ‘‘which involves modest but recurring payments to avoid delays. jump queues or to obtain goods in controlled markets. All forms of corruption entail high economic and social costs; transaction costs are increased; public revenues are reduced; resource allocation is distorted; investment and economic growth is retarded; and the rule of law is weakened.

"5. The. Commonwealth should firmly commit itself to the policy of "zero tolerance" of all types of corruption. This policy must permeate national political cultures, governance, legal systems and administration. Where corruption is ingrained and pervasive, especially at the highest political levels, its eradication may require a sustained effort over a protracted period of time. However, the policy of "zero tolerance" should be adopted from the outset, demonstrating a serious commitment to pursue the fight against corruption. The Commonwealth should remain firm in its determination that the high standards and goals enunciated in the 1991 Harare Declaration are upheld and enhanced. Creating an environment which is corruption-free will require vigorous actions at the national and international levels, and within the Commonwealth itself. These actions should encompass the prevention of corruption, the enforcement of laws against it and the mobilization of public support for anti-corruption strategies.".

Reference was also made to Federation of Pakistan v. M. Nawaz Khokhar (PLD 2000 SC 26), wherein at page 35 of the report it was observed:

"At this stage, we may also mention that at least on two previous occasions, the justification for imposition of Martial Law and deviation from the Constitutional Rule in the country was sought to be justified on the plane of rampant corruption of the politicians. It is also not without significance that four previous elected Civilian Governments were also dismissed before completion of their tenure under the Constitution on allegations of corruption besides other allegations. In this backdrop, when the second Benazir Bhutto's elected Government was dismissed under Article 58(2)(b) of the Constitution in November, '1996, there was a public outcry for a severe accountability of the holders of public offices. The caretaker set-up which came into existence as a result of dismissal of elected Government of Benazir Bhutto, therefore, promulgated- Ehtesab Ordinance CXI of 1996, which was later amended through Ordinance CXXIII, Ordinance VII and Ordinance XI; before it was repealed and replaced by Ordinance XX of 1997. Nawaz Sharif's Government which came into power as a result of general elections in the country held in February, 1997, promulgated the Act which repealed Ordinance XX of 1997. In the light of the preceding discussion, we now proceed to consider the above contentions of the parties."

231. It will be instructive to refer to the concern of the international community on money laundering as- expressed in the book titled `Money Laundering' A Practical Guide to New Legislation by Rowan Bosworth Davies and Graham Saltmarsh, 1994 Edition. Relevant portion reads thus:.

"We are beginning to see a far greater degree of willingness exhibited by all civilized Governments to share criminal information and assist and facilitate enquiries undertaken by other countries into the activities of criminals who commit offences within their own boundaries, but whose egregious behaviour affects persons or institutions in foreign jurisdictions. Concerted action against transnational criminality is now a well-established principle in international law and one method of ensuring that those activities are coordinated is by the drafting of legislation which is acceptable

to those countries who have agreed to provide mutual assistance to each other to combat specific criminal phenomena, money laundering being one such example

All parties are obliged to provide the widest degree of investigative cooperation and to facilitate all proceedings aimed. at confiscation. Each party is required to assist in the confiscation of specific items of property representing the proceeds of criminality as well as such sums of money which correspond to the value of proceeds. Upon request from any other signatory, each country is bound to provide all investigative assistance and to take provisional measures, such as, the freezing of a bank account or the seizure of property, and upon request, execute a foreign confiscation order or institute its own proceedings leading to confiscation as requested. Bank secrecy may not be invoked as a ground for refusal of cooperation, although all signatories are bound to respect the rights of bona fide third parties and to provide then with legal remedies. As 'Levi identifies:

In short, a substantial amount of legal movement is taking place in Europe and elsewhere in the field of international mutual assistance in relation to money laundering and the freezing and seizing of assets. The moral and political pressure is so great that it is hard for countries to resist agreement. How the format rules work out in practice is another question (Levi, 1992)."

232. Now we come to the question whether corruption can be made a ground for justifying intervention by the Armed Forces. We would be examining this question in a slightly different perspective, inasmuch as, the world community is committed to the policy of showing "zero tolerance" to all types of corruption. It is a sad state of affairs that no conceivable steps were initiated to curb the systematic corruption because of lack of transparent accountability during the tenure of the previous Government. The material placed before us indicates that the former government had shown little interest in eradicating corruption from the society.

233. `Corruption' is generally defined as the abuse of public office for private gain. In view of the fact that scope of corruption has widened, this definition would include the abuse of all offices of trust. It has diverse meanings and far-reaching effects on society, government and the people. Of late, the culture of corruption and bribe has embedded in. our society to the extent that even routine works which should be done without any approach or influence are commonly known to be done only on some such consideration. This bribe culture has plagued the society to the extent that it has become a way of life. In Anatulay VIII (1988) 2 SCC 602 where Abdul IP Rahman Anatulay, Chief Minister of Maharashtra was prosecuted for, corruption Sabyasachi Mukharji, J. lamented as follows-.-

"Values in public life and perspective of values in public life, have undergone serious changes and erosion during the last few decades. What was unheard before is commonplace today. A new value orientation is being undergone in our life and culture. We are at the threshold of the cross-roads of values. It is for the sovereign people of this country to settle these conflicts yet the Courts have a vital role to play in these matters."

234. Although we are dealing with a case of intervention by the Armed Forces, yet it would be advantageous to allude to the ground of corruption, which came up for consideration in the cases of Kh. Ahmed Tariq Rahim (PLD 1992 SC 646), Mian Muhammad Nawaz Sharif (PLD 1993 SC 473) and Benazir Bhutto (PLD 1998 SC 388) (supra). In the first case, it was observed by Shafiur Rehman, J. that corruption may not have been independently sufficient to warrant such an action, but it can be invoked, referred to and made use of alongwith other more relevant grounds, which are by themselves sufficient to justify the action taken. In Mian Muhammad Nawaz Sharif's case (supra), it was observed that "if the corruption, nepotism and favouritism are of such a large scale that they have resulted in the breakdown of the constitutional machinery completely, it may have nexus with the above provision". In the third case of Benazir Bhutto, this . Court took notice of enormous corruption and treated it as an independent round on the basis of which an Assembly could be dissolved (Underlining is by way of emphasis). Once corruption pervades in the body politic and official circles, then the entire Government/administration becomes completely crippled and paralyzed. Recounting the instances of alleged corruption the Federation has pointed out Sharifs' ownership of Cayman Island, an offshore company through Al-Towfeek Co.. and the case of. huge quantity sugar export to India receiving heavy amounts in rebate. When corruption permeates in the social, political and financial transactions to such an extent that even proper and honest orders and transactions are suspected to the point of belief being a result of corruption, one is compelled to infer all is not well and corruption has gone deep in the roots. No doubt, this is an age of "corruption eruption", but during the last few years there have been large scale prosecutions of former world leaders .in various countries on the charges of corruption and corrupt practices, in some cases leading to convictions, which phenomenon must not be taken lightly and the issue must be addressed adequately and effectively through transparent institutionalized processes.

235. The observations made herein and in the Short Order are not intended to condemn en bloc the politicians and parliamentarians as a class. Undoubtedly, there are good, honest and upright as well as corrupt people in every group; of persons. These observations are confined only to the situation which is being attended to in these cases. Any proceedings commenced against any person including the parliamentarians or politicians or members from the general public under the laws of the country will, no doubt, be decided on their own merits in accordance with law and on the basis of the legally admissible material brought before the concerned fora in those proceedings without being influenced by any observations made in this T judgment. Put differently, it will be only after the finalisation of the proceedings as. above that the country will be geared up for resort to democratic principles and corruption-free society which are prerequisite for good governance. This situation has also been recognized by the Commonwealth Finance Ministers Meeting held on 21-23rd September, 1999 at Grand Cayman, Cayman Islands.

236. The Federation has also alleged that most of the politicians/parliamentarians have misdeclared their assets both before the Wealth Tax Authorities as well as the Election Commission including the former Prime Minister, who. admittedly despite owning a helicopter, did not declare the same in his declaration of assets. It has been pleaded on behalf of the Federation that although misdelcaration of assets was a matter of record, yet the Constitutional authorities failed to file references against them before the concerned fora. Thus, all such politicians/parliamentarians through their acts of commission and omission have rendered themselves ineligible for being members of the representative bodies. In order to substantiate the above allegations, the learned Attorney-General has filed voluminous record wherein specific instances of misdelcaration of assets have been given. We have- examined the relevant record only for the purposes of the present controversy and find that sufficient material exists showing, prima facie, that a large 'number of politicians indulged in misdeclaration of assets, which factor has a bearing on the issue in hand.. We may clarify that misdeclaration of assets , or" any discrepancy as to declaration of assets before the Wealth Tax Authorities qua the Election Commission may not by itself be a ground for intervention of the Armed Forces on 12th October,, 1999 but this aspect of the matter when viewed in the overall context and with particular reference to the alleged massive corruption and corrupt practices becomes a relevant factor.

COLLAPSE OF ECONOMY'

237. We now take up another allied issue relating to economic condition of the country. It was alleged on behalf of the Federation that the former Prime Minister and his business associates exported sugar produced in their sugar trills to India by rail and earned millions of rupees as profit. It was pointed out that several, SROs were promulgated by the then Government to claim export rebate on sugar and thereby the former Prime Minister and his predecessor committed breach of faith with Pakistani banks/overseas and resident Pakistanis by removing 11 billion dollars lying in their accounts in the banks in Pakistan without their consent and utilized the same for unauthorized purposes, which remain unexplained till today. It was further stated that the former government froze the FEBC accounts and misappropriated the foreign exchange belonging to resident and non-resident Pakistanis, which not only brought bad name to the Pakistani banks but also to Pakistan as a country and the responsibility of this huge fraud lies heavily on the former Prime Minister. It was pleaded that this misconduct was further compounded by unlawful transfer of a huge sum of, nearly 500 million dollars by the former Prime Minister and his associates between 6-5-1998 to 28-5-1998, to the detriment of the country. Even after the decision to freeze the foreign currency accounts the former Prime Minister and his associates removed huge amounts. of foreign currency after banking hours. In this process the then Director-General, F-LA. stopped Mr Mujeeb-ur-Rehman, the brother of Senator Saifur Rehman from removing large amount of foreign exchange in cash at the Islamabad Airport. as a result of which Major General (Retd.) Inayatullah Niazi, the Director General, F.I.A. was illegally removed by the former Prime Minister. Our attention was also drawn to the "Qarz Utaro Mulk Sanwaro" Scheme to demonstrate that it was designed to

deprive the Overseas Pakistanis of their hard earned money in the name of debt retirement.. It was pleaded that the former Prime Minister and his family established a Sugar Mill in Kenya which caused great ,public discontent. It was also pleaded that the former Prime Minister and his associates did inuldge in money laundering at a large scale and acquired four flats in Park Lane, London as also an area of about 400-Acres in Raiwind etc. The learned Attorney-General also contended that the former Prime Minister installed party MNAs and Senators and favourites as heads of statutory bodies like Ehtesab Bureau, Privatization Commission, Board of Investment, PTV, banks, financial institutions, etc. for wrongful gains, which went a long way in further deteriorating the Economic Position.

238- We have gone through the material placed by the Federation on the above issue. While this Court has already lamented over the decision of the former Prime Minister freezing foreign currency accounts in the case reported as Federation of Pakistan v. Shaukat Ali Mian (PLD 1999 SC 1026), the fact remains that this step of the deposed Prime Minister shattered the confidence of the overseas Pakistanis, who had deposited their savings in Pakistan in preference to banks abroad for the benefit of the nation. After hearing the learned counsel for the parties and going through the record, we have gathered that the combined effect of the overall policies and methodology adopted by the former Government was the total collapse of the country's economy inasmuch as GDP growth during the past three years had hardly kept pace with the growth of population and Pakistan has a debt burden which equals the country's entire. national income. We also take judicial notice of the fact that the trade imbalance was persistent and due to defective economic policies and lack of economic discipline .by the previous regime, the industrial sector had suffered a great setback.

ROLE OF PUBLIC REPRESENTATIVES

239. We now advert to the plea raised by Mr. Khalid Anwar on behalf of the petitioners that various allegations of mismanagement, corruption and even hijacking (though sub judice), levelled against Mian Nawaz Sharif, the former Prime Minister, who is not even a petitioner herein do not justify that the Constitution should be condemned and the popularly elected bodies should be disbanded. The learned Attorney-General submitted that the petitioners were not entitled to seek relief of restoration of the former government, the Parliament and the Provincial Assemblies because such reliefs were being sought to perpetuate dictatorship and misgovernance in the country by the former Prime Minister and his associates in that there were no checks and balances on the exercise of power by them. He further submitted that the Parliament had been reduced to a mere rubber-stamp, inasmuch as, whenever it assembled it had hardly the requisite quorum and thus, failed to function and discharge its constitutional duties of legislation and were being used as instruments to establish despotism at the whims and caprices of the former Prime Minister. He submitted that the Government was being run through Ordinances though some of which had lapsed. Even When some Bills were moved before the National Assembly or the Senate, they were hurriedly passed

without proper debate about its pros and cons. The learned Attorney-General submitted that the Provincial Assemblies equally failed to discharge their constitutional duties and obligations. He submitted that in reality all the parliamentarians, the Chief Ministers of the Provinces and the Members of the Provincial Assemblies were either associates and cronies of the. former Prime Minister or had become too helpless and ineffective to perform their functions in accordance with the dictates of the Constitution, the law and their conscience and were not in a position to object to any action, which had the blessings of the former Prime Minister. He submitted that democratic norms and polity require that government should be run by responsible and honest representatives of the people, who should be able to steer the governance of the country whereby the mandate of the people within the limits of the Constitution could be accomplished. The learned Attorney-General further submitted that the representatives of the people plundered the public wealth, acted irresponsibly and were nothing but privy to the one man rule in the country. The learned Attorney-General relied on an interview of Mr. Khalid Anwar, former law minister, given to the media, published in Daily Khabrain dated 25-3-2000 wherein he observed:

He also referred to an interview of Mr. Majeed Nizami, Chief Editor of the Daily `Nawa-e-Waqt' and `The. Nation' given to Pakistan Digest, published in the. Daily Nawa-e-Waqt, Rawalpindi, dated 30-4-2000 wherein he stated:

While substantiating the above allegations against the members of the former Government, the learned Attorney General contended that the. actions of the former Government were not in conformity with the maintenance of sovereignty, integrity, well being and prosperity of Pakistan because when the Chief of Army Staff -was attempted to be handed over to an enemy country and he was exposed to physical annihilation and further fen it tried to create dissension in the ranks of the Armed Forces, it was not safeguarding or maintaining the sovereignty of Pakistan, rather the sovereignty and integrity of the country were seriously endangered because it is the only institution, which is capable of safeguarding the integrity of Pakistan. On the question of well-being, the learned Attorney-General stated that the well being of the. people is a reflection of the combined effect-of sovereignty, integrity and solidarity and there can be no well being without either of sovereignty, integrity, solidarity and prosperity. Likewise, prosperity again embodies all these ingredients and also extends to the economic prosperity of the people of Pakistan.

240. We have examined this aspect of the case with greater caution as we are. not dealing with a case of dissolution of Assembly, but here the Court is faced with a situation not visualized by the Constitution. On an objective assessment of the material placed on record and in view of the arguments advanced by the parties, we find that the very purposes for which the representative institutions were established under the Constitution stand defeated either directly or indirectly. No one could disagree that we must have democracy and any obstacles in respect of achieving that goal must be overcome. But the real question is whether there was "democracy" in its generally accepted' sense on 12th October, 1999 when the Army takeover occurred? What regretfully

existed in Pakistan on that day and for years prior to that time was merely a feigned appearance of what we can call a form of "oligarchy" as submitted by Dr. Farooq Hasan.

241. Democracy can be defined in a variety of ways. But its most fundamental and cherished ingredient is the notion of "responsibility" of the rulers to the ruled. The meanings of this concept are given in the New Dictionary of American Politics, by Smith & Zucher (First edition) wherein at page 114 it is defined:

"Rule by the people. In practice this means that power to determine the major, issues of public policy must reside in the majority of the community and that in making such decisions, the vote and voice of each individual should count. Hence democracy can be defined as government by consent. The people may exercise such power ……to enforce responsibility upon those to whom authority is entrusted."

In another leading work, "The Politics of American Democracy", by M. Irish, (Third Edition) at pages 52 to 81, the following main ingredients of this method of governance are summed up as follows:

(1) "Just what do we mean by democracy" There is no simple answer. However, there must be present notions of "equality", "humanitarianism" and notions of "individualism and progress" for those who are ruled by those who are entrusted with the task of governance (pages 52-53).

(2) "Democracy requires that those vested with power be responsible to the people" (Page 72).

(3) That under the guise of democracy we must be watchful of "champions of Oligarchy". For besides the government of selected powerful groups we also have similar notions advocated for both "fascism" and "communism" which superficially may look like democracies but are in fact the very antithesis of it (pages 72-73).

(4) The learned author sums up the essential ingredients of democracy stating that : "certain conditions seem to be necessary before democracy arises. : (1) a relatively high level of literacy,

(2) some f minimum measure of economic security, and (3) an acceptance of the dignity of human life."

It is, thus, to be seen that simply by casting periodic ballots, people do not get a democratic society. Instead they may well-create, what is the case in Pakistan, particularly since 1985, a terrible form of fascism of a group of powerful people. This form of Government, although superficially, elected; actually creates an "oligarchy". In the work already cited above by Smith & Zucher, oligarchy had come to exist in Pakistan prior to 12th October, 1999. . The above- form of Government has been defined in the above cited books as follows: '

"A Government in which the authority constitutionally reposes in a few individuals and families. ' A small coterie of individuals who, because of economic and other power, can influence measurably the policy of the Government. " (page 272).

242. We have gone through the figures of the past five general elections released by the Election Commission of Pakistan in the publication titled lections, 1997 which show the percentage of turn out of the voters,, as under:

Election

National Assembly

Provincial

Assembly

1985

53.69%

57.37%

1988

43.69%

43.20%

1990

45.07%

46.10%

1993

40.32%

42.76%

1997

35.90%

35.69%

On the basis of these figures it was argued that there had been an alarming loss of interest by the people of Pakistan in the electoral process. We are not inclined to the view that anything will turn on the alleged turn out of voters during the past elections in so far as these cases are concerned. However, the general apathy and indifference is discernible and has a direct nexus with the unenviable performance of the former governments. Had appropriate steps been taken by the governments in the past to undo the damage done to the general thinking of the people as above, the things would have been totally different. Viewed in this perspective it cannot be lost sight of that the proportions which the misrule had taken beginning before the 12th of October. 1999 were to the discredit of all concerned.

243. In Parliamentary System there is the principle of joint and ministerial responsibility. Many leading authorities on the British Constitutional Law support this position and it finds express

mention in Article 91 (4) and (5) of the Constitution. As such, under this principle of great authority the rest of the Members cannot be .absolved of their responsibility if despite wrong doings by the Cabinet, they remain silent spectators. Thus, visualized, the suspension of the Assemblies and the Senate through extra-constitutional measure taken by the Chief of Army Staff, warrants validation on the ground of State necessity and State survival.

CHECKS AND BALANCES/ARTICLE 58(2)(b)

244. It was contended that the 8th Amendment including power of the -President under Article 58 (2)(b) of the Constitution provided sufficient checks and balances in the exercise of executive authority of the Federation by the President and the Prime Minister but with the deletion; of Article 58(2)(b) through the 13th Amendment the balance of power was disturbed and resultantly all the powers stood concentrated in the hands of the Prime Minister. Repelling the above plea M/s Khalid Anwar and Ch.

Muhammad Farooq contended that the 13th Amendment was passed by the Parliament unanimously because it was in the exercise of this arbitrary power by the President that all the four elected governments were sacked and in fact none of them was allowed to complete its tenure. Since for the successful working of a parliamentary form of Government the system of checks and balances has great importance, we would like to examine this aspect of the case in some detail in the light of case law and excerpts from various treatises.

245. To begin with, reference may be made to the suggestion given by Justice Hamoodur Rehman regarding amendment of the Constitution in respect of powers of the President, who had expressed the following views:

“In the light of our discussions on the 18th instant I have examined the provisions of the 1973 Constitution and have made a number of suggestions for your consideration. They are enclosed herewith (five sheets).”

“No suggestions with regard to the Judiciary have been made as you have already done what I was proposing to suggest. I compliment you for the same.”

"My introductory note prefacing the suggestions is self-explanatory but if any further elucidation is necessary I shall be happy to furnish the same."

"May Allah crown your efforts with success and guide you on the right path is my earnest prayer."

Yours sincerely

(Sd.)

(Hamoodur Rehman)"

"My examination of the said Constitution reveals that although it is substantially a copy of the 1956 Constitution a deliberate departure has been made therefrom in order to render the President ineffective and vest the Prime Minister with absolute powers. This was ostensibly done to prevent a recurrence of the events, which took place during the Governor-General ship of Mr. Ghulam Muhammad and Lt.-Gen. Iskander Mirza but the teal purpose, as it now appears, was otherwise."

"Be that as it may the result achieved is that the President has been reduced to the position of a mere rubber-stamp while the Prime Minister has become all powerful with no one to check his whims and caprices. Recent events do also disclose that a Prime Minister with such vast powers can be more dangerous and far more ruthless, particularly, where there is no effective opposition in the legislature and the Civil Servants, without any Constitutional protection or security of service, are mere tools in the hands of the Prime Minister. If on top of this the Judiciary is also made ineffective as has been done by the 4th, 5th and 6th Amendments made in the Constitution, then the Prime Minister is nothing short of an absolute dictator."

"This is by no means a satisfactory situation. I am, Therefore, of the opinion that constitutional checks and balances are essential for the functioning of any Democratic system under a written Constitution, as under such a system there is no Crown with Prerogative powers to intervene."

"Power", it is said, "corrupts and absolute power corrupts absolutely", as has now been amply demonstrated by the revelations now being made of the misdeeds of the previous Government. Some changes are in my view, necessary to remove the imbalance between the powers of the President and Governor and the Prime Minister and Chief Minister in order to make the Heads of the Executive effective and to restore to them the prestige and dignity that should normally attach to such high offices without providing them with any incentive for aspiring to become dictators or to act in violation of the Constitution."

"I am also of the opinion that some provisions should be incorporated in the Constitution to ensure fair elections and to prevent the possibility of any large scale rigging of elections, as was witnessed in the recent past. The security of service of Public Servants should also be restored and the independence of the judiciary re-established."

"No suggestion with regard to Martial Law has been made but if so desired a new Article 258-A can be added on the lines of the Turkish pattern giving the President powers to impose Martial Law for a limited period which can only be extended by the National Assembly for a maximum period of say Six months."

Thus, Justice Hamoodur Rehman made suggestion for promulgation of Martial Law by the President for a limited period which could only be extended by the National Assembly for a maximum period of say six months and had also opined that such amendment was necessary so that Prime Minister does not become dictator, which ultimately led to the insertion of Article ~58(2)(b) in the Constitution by means of the 8th Amendment. However, 13th Amendment was adopted and all the powers vesting in the President by virtue of the 8th Amendment were deleted and the President was reduced to a mere cipher. The circumstances leading to 12th October, 1999 action prove that if that power continued to remain with the President, possibly the situation could have been averted.

246. We may also refer to Article 260 of the Draft Constitution of 1971, proposed to be promulgated by President Yahya Khan, wherein he had kept the power of imposing Martial Law and abrogating the Constitution, which reads thus:-

260.-(1) Martial Law shall be declared in the whole or any part of Pakistan only in the most compelling circumstances, namely, when-

(a) the country is under attack or invasion by a foreign power, or is faced with imminent danger thereof; or

(b) through serious and active uprising or otherwise the maintenance of law and order is placed in grave jeopardy, which the ordinary agencies are unable to deal with; or

(c) a serious general problem affecting the whole, or any substantial part of the population, of the country or any Province, including a problem in relation to this Constitution, has arisen, which has proved incapable of resolution through constitutional, political or administrative agencies.

(2) Where any of the circumstances enumerated in clause (1) of this Article are seen to exist, the Commander-in-Chief of the Pakistan Army, may at the request of the President, or of his own motion, but only after consultation with the President, declare, by order, that the whole or any part of Pakistan specified in the order shall be placed under Martial Law.

(3) A declaration of Martial Law, whether made before or after the coming into force of this Constitution, shall be revoked only by the Commander-in-Chief of the Pakistan Army, who shall, before making the order of revocation, consult the President in that behalf.

(4) It shall be within the power of the Commander-in-Chief of the Pakistan Army, who shall be the Chief Martial Law Administrator, to suspend for the duration of the Martial Law, or any shorter period as may be specified, the operation of specified provisions of this Constitution, but he shall not have power to abrogate this Constitution.

(5) Subject to the provisions of clause (4) of this Article, the Chief Martial Law Administrator shall have power to promulgate necessary Martial Law Regulations and Orders during the period of continuance of Martial Law, and any Martial Law regulation may provide for the delegation by the Chief Martial Law Administrator of the power of making Martial Law Orders thereunder, to a subordinate Martial Law Authority.

(6) Upon the revocation of a declaration of Martial Law, all Martial Law Regulations and Orders made during the continuance of such Martial Law shall cease to have effect, but the Chief

Martial Law Administrator, after consultation with the President, may before such revocation declare that any specified Martial Law Regulation or Martial Law Order shall continue to have effect, notwithstanding the revocation of Martial Law, as a law of the appropriate Legislature, and such Martial Law Regulation or Martial Law Order shall continue to have effect accordingly.

247. This question was discussed in great detail in the case of Mahmood Khan Achakzai v. Federation of Pakistan (PLD 1997 SC 426 at 469). It would be illuminating to refer to the relevant observations which are as under:

"43. It is noteworthy that when in 1977 this Court was hearing the case of Begum Nusrat Bhutto Constitution of 1973 was in the field in which Article 58 was there in its original form without addition of sub-Article (2)(a)(b). Under Article 58 at that time President could dissolve National Assembly only when he was so advised by the Prime Minister. In such circumstances, the Court had to keep the factual background in view in connection with position enunciated in the Constitution particularly when there was no remedy provided to meet such an unforeseen situation with which the country and the Court were confronted. After a very careful and long hearing and examination of case-law on the subject and consideration of arguments advanced by both sides, this Court came to the conclusion which is succinctly summarised in the leading judgment of the learned Chief Justice at page 721 of the report which is reproduced as under:--

"The final position as emerging from this somewhat lengthy discussion of the various questions arising in this case may briefly be summed up as follows:

(i) That the legal character and validity, of any abrupt political change, brought about in a manner not contemplated by the pre-existing Constitution or Legal Order, cannot be judged by the sole criterion, of its success or effectiveness, as contemplated by Kelsen's pure theory of law. Not only has this theory not been universally accepted, or applied, it is also open to serious criticism on the ground that, by making effectiveness of the political change as the sole condition or criterion of its legality, it excludes from consideration sociological factors or morality and justice which contribute to the acceptance or effectiveness of the new Legal Order. The legal consequences of such a change must, therefore, be determined by a consideration of the total, milieu in which the change is brought about, including the motivation of those responsible for the change, and the extent to which the old Legal Order is sought to be preserved or suppressed.

(ii) That in any case the theory of revolutionary legality can have no application or relevance to a situation where the breach of legal continuity is a purely temporary nature and for a specified limited purpose. Such a phenomenon can more appropriately be described as one of Constitutional deviation rather than of revolution.

(iii) That examined in this light, the Proclamation of Martial Law on the 5th of July, 1977, appears to be an extra-Constitutional step necessitated by the complete break-down and erosion of the Constitutional and moral authority of the Government of Mr. Z.A. Bhutto, as a result of the unprecedented protest movement launched by the Pakistan National Alliance against the alleged massive rigging of elections to the National Assembly, held on the 7th of March, 1977. It was a situation for which the Constitution provided no solution, and the Armed Forces had, therefore, to intervene to save the country from further chaos and bloodshed to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster.

(iv) That the imposition of Martial Law, therefore, stands validated on the doctrine of necessity, and the Chief Martial Law Administrator is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity.

(v) That it has also become clear from a review of the events resulting in the culmination of Martial Law, and the declaration of intent made by the Chief Martial Law Administrator, that the 1973 Constitution still remains the supreme law, subject to the condition that certain parts thereof have been held in abeyance on account of State necessity; and the President of Pakistan as well as the Superior Courts continue to function under this Constitution. In other words, this is not a case where the old Legal Order has been completely suppressed or destroyed, but merely a case of Constitutional deviation for a temporary period and for a specified and limited objective, namely, the restoration of law and order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of the restoration of democratic institutions under the 1973 Constitution.

(vi) That, accordingly the superior courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities if challenged in the light of the principles underlying the law of necessity as set out in this judgment. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Order, Presidential Order or Ordinance; and

(vii) That the provisions contained in clause (3) of Article 2 of the Laws (Continuance in Force) Order, 1977, suspending the right to enforce Fundamental Rights are valid for the reason that the situation prevailing in the country was obviously of such a nature as to amount to an emergency

contemplated by clause (1) of Article 232 of the Constitution, and the right to enforce Fundamental Rights could, therefore, be legitimately suspended by an order of the kind which could have been made under clause (2) of Article 233 of the Constitution."

"44. It, therefore, follows from what is stated above that this Court in Begum Nusrat Bhutto's case held that imposition of Martial Law and promulgation of the Laws (Continuance in Force) Order were extra-Constitutional steps validated on the basis of doctrine of necessity in light of the fact that 1973 Constitution still remained the supreme law which was held in abeyance and not abrogated on account of State necessity. This arrangement was to last for a short time to enable the Government to hold elections as soon as possible. Superior Courts continued to have power of judicial review to judge the validity of any act or action of Martial Law Authorities if challenged in the light of principles underlying the law of necessity ……The question of oath also came up for consideration in the case of Begum Nusrat Bhutto and it was held with the consent of all the counsel appearing in the case that oath was not an obstacle in the way of Judges who were hearing that case. Discussion on this point is in the judgment of this case at page 674 of the report, which shows that both Mr. A.K. Brohi and Mr. Sharifuddin Pirzada were of the view that the new oath had not in any manner restricted the independence of the superior judiciary nor affected their obligation to perform their judicial functions according to law and it only indicated that superior judiciary, like rest of the country, had accepted the fact, which was even otherwise also evident that on 5th of July, 1977 a radical transformation took place in the pre-existing legal order. Mr. Yahya Bakhtiar, learned counsel for the petitioner in that case also joined the other two counsel and submitted that the oath did not in any way precluded the Judges from examining the question of the validity of the new legal order which could be decided in accordance with their conscience and the law."

"46. In the case of Begum Nusrat Bhutto Martial Law has been justified arid validated on the basis of doctrine of State necessity and actions taken by C.M.L.A. have been declared to be extra-Constitutional steps which have been given validation. Since there was deadlock between the Government and the Opposition parties and a situation had arisen in which no solution was in sight and the Constitution was also silent not providing for any remedy, in such circumstances there was no other way out except what was done by the Chief of the Army Staff who took over as C.M.L.A. and imposed Martial Law. This third Martial Law in the case of Begum Nusrat Bhutto was different from the two other Martial Laws as has been very ably pointed out by Mr. Justice Dr. Nasim Hasan Shah (as he then was) in his judgment in Begum Nusrat Bhutto's case that in the previous two Martial Laws the intervention was not only to suppress the exiting Constitutions which were abrogated but to replace them by .new Constitutions. Hence old legal order was replaced by new legal order but Martial Law in the case of Begum Nusrat Bhutto was intervention specifically providing that Constitution was not abrogated but held in abeyance and further expressing intention that elections would be held and Constitution would be revived. Relevant portion from his judgment at page 753 of the report is reproduced as under:

"In view of the break-down of the normal Constitutional machinery and to fill the vacuum, the Armed Forces were obliged to take an extra-Constitutional step. Martial Law was imposed, in the picturesque words used in the written statement filed by Mr. Brohi, not in order to disable the Constitutional authority but .in order to provide bridge to enable the country to return to the path of Constitutional rule. In the felicitous phrase of my Lord the Chief Justice, the act was more in the nature of a `Constitutional deviation' rather than an overthrow of the - Constitution. the Constitution of 1973 is not buried but merely suspended. It however, continues to be the governing instrument subject to the provisions of the Laws (Continuance in Force) Order, 1977. In these circumstances, neither the ratio decidendi of Dosso v. State nor that of Asma Jillani v. Punjab Government is strictly applicable to the present case."

"47. With regard to the objection that in the case, of Begum Nusrat Bhutto power was given to C.M.L.A. as one man to amend the Constitution which should not have been done. It appears that Chief of the Army Staff had taken over the governance. in his own hands as one man and imposed Martial Law. He could have abrogated the Constitution but he did not do so and instead held in abeyance and provided in the Laws (Continuance in Force) Order, 1977 that country would be governed as nearly as may be in accordance with the Constitution. His de facto status as such was later recognized by the Supreme Court ,in the judgment in the case of Begum Nusrat Bhutto as de jure and his actions were justified on the doctrine of State necessity and were treated as extra-Constitutional measures or Constitutional deviations. In fact he had amended the Constitution before final adjudication could be given by the Supreme Court in respect of validity of Martial Law. The situation was such that there was no Parliament and reins of the governance were in the hands of C.M.L.A. as one man. In such circumstances at the time of validation this Court allowed him the power to amend the Constitution on the basis of doctrine of State necessity as in any case Constitutional amendments, if any, made by him Would have to be approved and validated by the Legislature. This was done more or less on the same lines as allowed by the Federal Court of Pakistan in Reference No. l of 1955 (PLD 1955 FC 435). In that case it was held that issue raised referred to extraordinary powers of the Governor-General during normal times when the vital organ of the Constitution, namely, the Legislature was functioning and the question that had to be considered was whether there was any provision in the Constitution governing such a situation or any other legal principle within outside or above the Constitution Act which entitled the Governor-General to act in case of necessity of such a nature.

"48. Objection was also raised that in the case of Begum Nusrat Bhutto time-frame was not provided for holding the elections as promised by C.M.L.A. to the nation on the basis of which his take-over and Martial Law were justified as extra-Constitutional steps. This issue is adverted to by this Court in that judgment at pages 722 and 723 of the report. Mr. Yahya Bakhtiar, learned counsel for the petitioner, had expressed apprehension on the postponement of election schedule to be held on 18th October, 1977. Mr. A.K. Brohi, learned counsel for the respondent, Federal Government, while responding informed the Court that C:M.L.A. intended to hold election as soon as process of accountability of the holders of the public offices was completed and the time factor depended upon the speed with which those cases were disposed of by the Civil Courts. Mr. Sharifuddin

Pirzada, the learned Attorney-General stated at the Bar that in his opinion a period of about six months was needed for the purpose and thereafter it would be possible to hold elections within two months. It was held by the Court that it did not consider appropriate to issue any directions as to a definite time-table for holding of elections but made observation that the Court had found possible to validate the extra-Constitutional actions of C.M.L.A not only for the reason that he stepped in to save the country at. the time of grave national crisis and Constitutional breakdown but also because of the solemn pledge given by him that the period of Constitutional deviation shall be of as a short duration possible and during that period all his energies shall be directed towards creating conditions conducive to the holding of free and fair elections leading to the restoration of democratic rule in accordance with the dictates of the Constitution. The Court therefore expected the Chief Martial Law Administrator to redeem his pledge which had to be construed in the nature of mandate from the people of Pakistan, he had by and large willingly accepted his administration as the interim Government of Pakistan. This judgment was announced on 10-11-1977 after which many developments took place and if there .was any grievance on account of this fact that elections were not held within a reasonable time as observed by this Court then the record shows that no review was filed agitating that judgment.

"49. During the hearing of cases under consideration question was raised that there is no discussion in the judgment with regard to the power of amendment of Constitution conferred on C.M.L.A. and in that connection it has been pointed out that in the leading judgment in the findings summarised at page 721 of the report under the heading of "final position" under 'sub-heading (iv) it is mentioned that Chief Martial Law Administrator is entitled to perform all such acts and promulgate all legislative measures which have been consistently 'recognized by judicial authorities as fallen within the scope of law of necessity. In this sub heading (iv) words "to amend the Constitution" are not mentioned which are mentioned specifically at page 716 of the report under the sub-heading (iii) (a) which are also findings mentioned at page 715 of the report under the heading of "the true legal position which, therefore, emerges". In this connection, it was further stated before us that the original record shows that colour of typed pages 94 to 100 is different from the remaining pages. We have checked the original record which shows that pages 94 to 100 are of brighter white colour than remaining pages which are off white. Then again pages 102 and 103 are also of brighter white colour and likewise page 108 is also of brighter white colour. Now, this change in the colour of few pages in the original judgment does not show that these pages were replaced as it can so happen in the ordinary course as well. We have seen judgments of other learned Judges in the main original file which show that both kinds of paper, as mentioned above, have been used.

Each page of leading judgment is, initialed by the late Chief Justice. Mr. Sharifuddin Pirzada, who was Attorney-General at the-relevant time and appeared before the Court, on our query stated that question with regard to the power of C.M.L.A. to amend the constitution was raised and discussed before the Court. We are also of the' view that it must have been discussed because during the pendency of Constitutional petition before this Court amendment was made, in the Constitution - by the C.M.L.A. in consequence whereof Chief Justice Muhammad Yaqub Ali had to retire. Out

of nine learned Judges who heard that case five learned Judges had contributed long judgments and the remaining Judges as well have appended short notes agreeing with the judgment of the Chief Justice or other Judges. No other Judge had said that this question with regard to the power to C.M.L.A. to amend the Constitution was not agitated and discussed before the Bench in the Court. We are completely satisfied that this question was raised and answered in an appropriate manner and change in the colour of papers in the judgment does not indicate anything which is unusual and not proper.

"50. Now we come to post judgment developments which took place after the announcement of judgment in the case of Begum Nusrat Bhutto leading to the Eighth Amendment which has been called in question before us. Judgment in the case was announced on 10-11-1977 after which Provisional Constitution .Order was promulgated on 24-3-1981. his is also called PCO in short form. This Order on perusal shows that at the beginning it has explanatory statement manifesting intention behind asking such Order. It mentions that 1973 Constitution was in force and on 5th July, 1977, Martial Law was imposed and that Constitution was held in abeyance. It also says that C.M.L.A. has announced that democracy and representative institutions shall be restored as soon as possible and until then interim measures were being adopted. It also speaks about the fact that the Laws (Continuance in Force) Order, 1977 was made by C.M.L.A. on the same day when Martial Law was proclaimed but some doubts had arisen as to the effect of the said Order as regards the power and jurisdiction of the Superior Courts hence for that reason and also for the reason that integrity and sovereignty of Pakistan and its Islamic Ideology were threatened hence need was felt to promulgate this PCO.

"51. It. is already held in the judgment in the case of Begum Nusrat Bhutto that taking of oath does not detract Judge from performing his duties and functions as a Judge. Contents of PCO does not show that Constitution of 1973 is buried or forgotten for ever and a new grund norm had started.

"58. We are, therefore, of considered view that Eighth Amendment including Article 58(2)(b) has come to stay in the Constitution as permanent feature. It is open to the Parliament to make amendment to the Constitution of any provision of the Eighth Amendment as contemplated under Article 239 as long as basic characteristics of federalism, parliamentary democracy and Islamic provisions as envisaged in the Objectives Resolution/Preamble to the Constitution of 1973 which now stands as substantive part of the Constitution in the shape of Article 2A are not touched.

At page 499 of the report, it was observed:

“Mr. Syed SharifuddinPirzada has referred to the. book `Politics in Pakistan The nature and Direction of Change’ by Khalid B. Sayeed in which the following comment on the basic aspect of the Constitution of 1973 has been made: -

“All this clearly indicated that the Prime Minister could neither be controlled. by the President nor challenged by the Assembly. The latter feature was extraordinary because the essence of Parliamentary Government was that a Prime Minister was both accountable to arid removable by the Assembly. As suggested in Chapter 3, and as it has often been remarked the Government of Pakistan under Ayub was that of the President, by the President and for the President. Could it be said that in the Bhutto regime the Prime Minister’s position was equally dominant?

“It. seemed that Bhutto was not satisfied even with the power of the Prime Minister that was available to him through the Constitution. During 1975-76, he had started thinking of bringing the Parliamentary system under still greater control of the Prime Minister so that he could push certain pieces of legislation through the Parliament with practically no delay or obstruction. This was disclosed to the author by Leslie Wolf Phillips of the Department of Government, London School of Economics and Political Science, who had been invited by the Prime Minister to advise him on how to change the Constitution along these lines.

In January 1976, the Prime Minister told Wolf-Phillips that he had made up his, mind about converting the .present system into a Presidential system. However, he expected that this would be brought about after the election. It may be noted that there was some speculation in Pakistan during the National Assembly Elections of 1977 that Bhutto was eager to win these elections by a landslide because he wanted a two-third majority in the Assembly for the purpose of amending the Constitution along Presidential lines.

One of the provisions discussed and explored by Wolf-Phillips related to a clause being inserted in the Constitution under which a candidate standing for. National Assembly Election would have to announce his intention of supporting a particular candidate for the presidency. According to Wolf-Phillips, the report that he submitted to the Prime Minister was interpreted by the Prime Minister as one not very helpful to his contemplated efforts to convert the Constitution into a Presidential form.’

Similar view has been expressed by Stanely Wolpert in his book `Zulfi Bhutto of Pakistan - His Life and Times’ and Mr. Altaf Gauhar in his Article ‘Bhutto and Parliamentary Democracy-’ published in. the `Nation’ dated 6.12.1996.

28. The Constitution as framed in 1973 was Parliamentary in form but it was Prime Ministerial in character. The turbulent Constitutional history of Pakistan has not built any basic structure. The principles of democracy, rule of law, equality and justice as- propounded in Objectives Resolution have been advocated, propagated and, utilized for achieving political power equally by the politicians, Army rulers and even representatives of the people as well."

At page 518 of the above report, it was observed:

"51. Mr. Syed Sharifuddin Pirzada has contended that the Eighth Amendment has introduced checks and balances between the power of the President and the Prime Minister. As discussed above, the Constitution of 1973 had vested- supreme power to the Prime Minister and though democratic in form it was Prime Minister in character. Amendments made in Articles 48, 58, 91 and 92 have curtailed the power of the Prime Minister and have strengthened the hand of the President. In a democratic system check and balance is provided to avoid autocratic rule and to provide balance of power for a proper functioning of the Government according to the Constitution. No doubt the amendments particularly Article 58(2)(b) have titled the balance in favour of the President, yet this Court has structured and circumscribed the discretionary power of dissolution. One reason given in favour of Article 58(2)(b) is that it prevents Constitutional deviation. This seems to be plausible because when Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary, the President may exercise his power before any person, agency or authority taking advantage of such situation strikes not at the Assembly but at the Constitution. One may comment `that to save the Constitution, Assembly is dissolved. The exercise of power under Article 58(2)(b) or Constitutional deviation can be avoided not by the letters of the Constitution but by political ethic, morality and maturity. Unless a responsible Government exists which has respect for law, opportunity shall continue to be provided for Constitutional strike."

53. It has also been pointed out that the controversy involves political question which the Courts should avoid to decide. The contention is more relevant with reference to the balance of power between the President and the Prime Minister. Such question is a political question to be decided by the Constituent Power. It therefore, requires determination of what is a political question. A political question is one which because of its political sensitivity is not fit for adjudication by the Court or the Constitution requires it to be determined finally by any other organ of the State. This `political question doctrine' is based on the respect for the Constitutional provisions relating to separation of power among the organs of the State. But where. in a case the Court has jurisdiction to exercise power of judicial review, the fact that it involves political question, cannot compel the Court to refuse its determination."

"54. For the foregoing reasons, the appeals and petitions were dismissed by the following short order, which forms part of this Judgment :-

For reasons to be recorded later, we pass following short order;

(2) What is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality but it can be said that the prominent characteristics of the Constitution are amply. reflected in the Objectives Resolution which is now substantive part of the Constitution as Article 2A inserted by the Eighth Amendment.

(3) The Objective Resolution was Preamble of the Constitutions made and promulgated in our country in 1956, 1962 and 1973. Perusal of the Objectives Resolution shows that for scheme of governance the main features envisaged are Federalism and Parliamentary Form of Government blended with Islamic provisions. The Eighth Amendment was inserted in the Constitution in 1985, after which three elections were held on party-basis and the resultant Parliaments did not touch this Amendment, which demonstrates amply that this Amendment is ratified by implications and has come to stay in the Constitution unless amended in the manner prescribed in the Constitution as contemplated under Article 239. Article 58(2)(b) brought in the Constitution by the Eighth Amendment,. which maintains Parliamentary Form of Government has provided checks and balances between the powers of the President and the Prime Minister to let the system work without let or hindrance to forestall a situation in which martial law could be imposed. "

248. It was submitted on behalf of the Federation that in Britain there is no written Constitution and though Prime Minister appears to be powerful but the Queen discreetly controls and that is how the system works. He submitted that in such a situation confidence is a crucial ingredient and the key pint, which holds the entire structure together. Reference may be made to the Code of Conduct for the Ministers framed by Britain, which reads thus:

"Ministers of the Crown are expected to behave according to the highest standards of constitutional and personal conduct. In particular they must observe the following principles of ministerial conduct:

(i) Ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests;

(ii) Ministers must not mislead Parliament.. They must be as open as possible with Parliament and the public;

(iii) Ministers are accountable to Parliament for the policies and operations of their departments and agencies;

(iv) Ministers should avoid accepting any gift. or hospitality- which might, or might appear to compromise their judgment or place them under an improper obligation;

(v) Ministers in the House of Commons trust keep separate their rules as Minister and constituency Member; ‘

(vi) Ministers must keep their party and ministerial rules separate. They must not ask civil servants to carry out party political duties or to act in any other way that would conflict with the Civil Service Code.

Reference may also be made to the book titled “The Hidden Wiring” Unearthing the British Constitution by Peter Hennessy, wherein at pages 35 and 37 of the book, it is observed:-

“This paragraph is by any standards more than `tips for beginners’ or `etiquette’. Accountability plus responsibility plus openness is-or should be-an absolutely fundamental constitutional requirement, especially as under British arrangements the executive and the legislature are fused in such a fashion that the balance of power is heavily tilted in favour of the executive, not least in the interpretation of the rules of the game (i.e. the constitution).”

“Indeed,, procedure is all the Constitution the poor Briton has, now that any Government which command [sic] 51 per cent of the House can at any moment do anything they like, with retrospective or prospective intention. This in itself was an intriguing pre-echo of Lord Hailsham’s `elective dictatorship’ theory some sixteen years ahead of its actual expression.”.

“In a nation without a written constitution and bereft of formal checks and .balances, confidence is a crucial ingredient, one of the key bonding agents that holds (or should hold) the entire stricture together. Another, as we have seen, is the notion of the Crown. Though monarchy outstrips all the other sides to our golden pentagon, it is only in terms of a relative back of tarnish, not an abundance of sheen. And it is to this, the most ancient institution of state, that I shall turn first.”

Also refer to the following passages from the book "Arthur Berriedale Keith" The Chief - Ornament Of Scottish Learning" by Ridgway F. Shinn Jr. :-

"The Constitution under Strain"

"In 1942, Keith brought-out a pamphlet in which he stated his views about why and how the constitution was threatened. Iii this, The Constitution under Strain: Its Working from the Crisis of 1938 down to the Present Time, he built upon and expanded, the final chapter which he had written in 1939 for his book on the British cabinet. Certainly, the title he chose reflected one theme which he saw as of primary concern in these years, that is, the ways in which, under successive leaders, the constitution had been twisted and turned in what he thought were- dangerous new ways.

"A Government with so much power in its hands and led, in his view, by a discredited Prime Minister, was likely to order the business of the day in a manner which precluded careful consideration of various aspects of legislation. Why should such a ministry bother to take time for debate? Keith felt that, in softie senses, such unrestrained power in the hands of the National Government was almost as dangerous to Constitutional Government in Britain as Hitler's absolute control of the machinery of the Weimar Republic was to German democracy.

"If there had' been, effective Opposition, Keith felt that some egregious blunders must certainly have been avoided; in the absence of such constitutional balance, the Government could make serious mistakes and survive, and it did."

Reference be also made to the following passages from the book titled "The English Constitution" by Walter Bagehot :

"With the coming of Prime-Ministerial Government, the Cabinet, in obedience to the law that Bagehot discovered, joins the other dignified elements in the Constitution. Of course, like the Monarchy, the House of Lords and the Commons, it retains very real reserve powers which can on occasion be suddenly and dramatically used for good or for ill. A Prime Minister, for instance, can be unseated by his colleagues; and it this fact with which the constitutional purists seek to justify the distinction they still make between Presidential and Prime Ministerial Government. A

President, we are told, cannot be removed before the end of his term of office; a Prime Minister can be.

"The distinction is valid, provided we observe that a British party leader exerts such power and patronage within the machine that he can never be removed in real life by public, constitutional procedure. The method employed must. always be that of undercover intrigue and sudden unpredicted coup d'etat. The intra-party struggle for power that is fought in the secret committees, and in the lobbies, may suddenly flare up round the Cabinet table. But if it does, the proceedings there will only be a ritual, and the real fight will have finished before they begin."

249. After careful analysis of the above material, we are of the view that it is never safe to confer unfettered powers on a person who is holding the reins of the affairs of the country as is embedded in the saying, `power corrupts and absolute power corrupts absolutely'., Accordingly, while upholding the judgment in Mehmood Achakzai's case (supra) we would like A to observe that probably the situation could have been avoided if checks and balances governing the powers of the President and the Prime Minister had been in the field by means of Article 58(2)(b).

RIDICULING THE JUDICIARY

250. The debates of the Parliament for the relevant period clearly demonstrate that the integrity and independence of the Judiciary of. Pakistan were. challenged which had the effect of defaming and bringing the Judges into ridicule. The observations made in the Short Order to the effect that "where the Judiciary was ridiculed, leaving no stone unturned to disparage and malign it by making derogatory and contemptuous speeches by some of B the members of the previous ruling party inside and outside the Parliament B and no Reference was made to the" Chief Election Commissioner for their disqualification as` members of the Parliament under Article 63 (2) of the Constitution; where the disparaging remarks against the Judiciary crossed all limits with the rendering of judgment by this Court in the case of Sh. Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504, declaring the establishment of Military Courts as ultra vires the Constitution, which resulted into a slanderous campaign against the Judiciary launched by the former Prime Minister registering his helplessness in the face of the Judiciary not allowing him the establishment of Military Courts as a mode of speedy justice; where the image of the Judiciary was tarnished under a well-conceived design" are fully supported by the material on record which we have carefully scanned.

251. We also take judicial notice of the fact that I the decision of this Court in Liaqat Hussain's case was. treated by the former Prime Minister, his government and supporters as a stumbling block in their way and consequently the Judiciary was maligned all over again through electronic media under the control of the Prime Minister. The Pakistan Television often showed bereaved old women pleading delay in justice and discontentment with the judicial system of the country whereby the image of the Judiciary was attempted to be tarnished under a well-conceived design.

The statements made by the former Prime Minister and the members of his Government in and outside the Parliament hardly support the plea of Mr. Khalid Anwar that the former Government had great regard for the Judiciary. We have also seen the material placed on record relating to tapping of telephones and eavesdropping which clearly establishes that the telephones of the Judges of the Superior Courts and other personalities were tapped. It is indeed very shocking particularly, because this Court in the case of Mohtarma Benazir Bhutto (supra) declared such acts as most detestable, immoral, illegal and unconstitutional.

DOCTRINE OF NECESSITY

252. After perusing the voluminous record and after considering the submissions made by the parties, we are of the view that the machinery of the Government at the Centre and the Provinces had completely broken down and the Constitution had been rendered unworkable. A situation arose for which the Constitution provided no solution and the Armed Forces had to intervene to save the State from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of State necessity and welfare of the people. The impugned action was spontaneously welcomed by all sections of the society.

253. We see no force in the submission of Mr. Khalid Anwar that the `doctrine of necessity' has since been buried long ago by the British Courts, there was no justification for its resurrection as done in Special Reference No. 1 of 195> (supra) and m the case of Begum Nusrat Bhutto (supra). Suffice it to say that the precedents from foreign jurisdiction. though entitled to reverence and respect but are not ipso facto applicable to the facts and circumstances prevailing on 12th October, 1999. In such matters of extra constitutional nature, in order to save and maintain the integrity, sovereignty and stability of the country and having regard to the welfare of the people which is of paramount consideration for the Judiciary, while interpreting the impugned legislative instruments we have to make every attempt to save "what institutional values remained to be saved" with a view to maintaining and upholding the independence of Judiciary which in turn would protect the State fabric and guarantee Human/Fundamental Rights. We are also not inclined to agree with M/s. Anwar and Farooq that the `doctrine of necessity' was rejected in the case of Liaquat Hussain

(supra). As a matter of fact this question was not directly in issue. It was only obliquely referred to in the context of establishment of Military Courts in terms of Article 245(1) of the Constitution. It was not a case where the vires of any extra constitutional measure resulting in the change of the government's structure were involved. Be that as it may, one of us (Irshad Hasan Khan, J. as he then was) (now the Chief Justice), specifically took the view that the prerequisites for the application of `doctrine of necessity' were not satisfied in upholding the establishment of Military Courts in the purported exercise of power under Article 245 (1) of the Constitution even for a limited period. it was also observed that the prerequisites of the `doctrine of necessity' have been laid down in the cases of Mustafa Ibrahim as well as Begum Nusrat Bhutto (supra). For facility of reference the following passages from the case of Liaquat Hussain (supra) may be reproduced as under:

"58. The plea raised on behalf of the learned Attorney-General that the Doctrine of Necessity is not outdated and can be invoked in the present case for a `limited purpose' cannot be countenanced, for, if .it is approved of, it may, very frequently be resorted to at the incidence of a situation presently prevailing in the country, by the Executive. In tact, such approval whereby the Executive is allowed to cross the barriers of Constitutional provisions at its whim, would turn a democratic rule into a despotic one. Clearly, any deviation from the Constitution may lead to anarchy. It is true that the take over by the Chief of the Army Staff as Martial Law Administrator was validated by this Court in Begum Nusrat Bhutto's case PLD 1977 SC 657 wherein it was inter alia observed:-

`On no principles of necessity could power of judicial review vested in the Superior Courts under the 1973 Constitution, be taken away' (p.716 last para. extending to page 717).

"However, in the case of Asma Jilani (supra), this Court took the view that the acts of usurper may be condoned and/or validated by the application of the law of necessity. Viewed from this angle, the impugned Ordinance being ultra vires the Constitution cannot be validated even on the touchstone of State necessity. Additionally, in view of the plea raised by the learned Attorney-General that the establishment of Military Courts is spelt out from the power vesting in the Federal Government under Article 245 is contradictory with the theory of State necessity, inasmuch as, the concept of law of necessity, would arise only if an act which would otherwise be illegal becomes legal if it is done bona fide, in view of State necessity, with a view to preserving the State or the society from destruction ……..In the instant case, we have no doubt that the impugned Ordinance was issued bona fide with a view to suppress the menace of terrorism. Nevertheless, the constitutionality of the Ordinance is not to be judged on the question of bona fides of the Federal Government simpliciter but on the touchstone of the Constitutional provisions. Here, impugned legislation is ultra vires the Constitution in so far as it takes away the functions of the Courts in determining the guilt or innocence of an accused. Be that as it may, the prerequisites for the application of Doctrine of Necessity are not satisfied in the instant case for upholding the impugned legislation, even for a limited period. The prerequisites, as laid down in the case of

Attorney-General of Republic v. Mustafa Ibrahim 1964 CLR 195, which was also referred in the Begum Nusrat Bhutto's case (supra), are:-

(a) An imperative and inevitable necessity or exceptional circumstances;

(b) no other remedy to apply;

(c) the measure taken must be proportionate to the necessity; and

(d) it must be of a temporary character limited to the duration of the exceptional circumstance-
'

"In the instant case, the Courts are functioning and the question of backlog and expeditious disposal of terrorists' case can be remedied by taking effective measures, in the light of the guidelines provided by this Court in the short order as well as the recommendations in the concluding paragraphs of this note. The Courts are functioning properly and administering justice according to the Constitution and the law.'

A perusal of the above quoted passages shows that in the circumstances of the case and having regard to the provisions of the Constitution and in view of the situation then prevailing, doctrine of necessity was not. attracted and that in this view of the matter Ordinance under. which the Military Courts were set up, being a sub-constitutional legislation could not be saved and was, therefore, declared ultra vires the Constitution. Contrary to the above case, the Court is here faced with an extra-constitutional situation and all the elements described by this Court in the aforesaid case viz., inevitable necessity, exceptional circumstances, no other remedy to apply, measure taken must be proportionate to the necessity and it must be of temporary character, limited to the duration of exceptional circumstances, are present, inasmuch as, the Constitution provided no F solution to meet the extraordinary situation prevailing on 12th October, F 1999. As such, the above case is no hurdle.

254. As to the plea raised by Mr. Khalid Anwar that the `doctrine of necessity' is accepted as a defence in criminal prosecution and tortuous acts which concept is different from that of `State

necessity', suffice it to say that this Court in the case of Begum Nusrat Bhutto (supra) approved the `doctrine of State necessity' and laid down the conditions precedent for invoking the same. Therefore, the distinction pointed out by Mr. Khalid Anwar regarding the concept of `doctrine of necessity' and that of `State necessity' is immaterial. The fact remains that this Court is of the considered view that intervention by the Armed Forces on 12th October, 1999 was an imperative and inevitable necessity in view of the exceptional G circumstances prevailing at that- time and, therefore, there is no valid G justification for not validating the extra constitutional measure of the Armed Forces on the technical distinction between `doctrine of necessity' and the `doctrine of State necessity'.

255. It would be instructive to refer to the following passages from the book titled The Classics of International Law, by Hugo Grotius:

"What view is to be taken in case of extreme and in other respects unavoidable necessity.

1. "More serious is the question whether the law of non-resistance should bind us in case of extreme and imminent peril. Even some laws of God, although stated in general terms, carry a tacit exception in case of extreme necessity. Such a limitation was put upon the law of the Sabbath by learned men in the time of the Maccabees; hence the well-known saying: `Danger to life breaks the Sabbath. In Synesius, again, a Jew presents this excuse for having violated the law of the' Sabbath: `We were exposed to imminent danger of death.'

"This exception was approved by Christ, as also an exception in the case of another law, which forbade the eating of shewbread. The Jewish rabbis, in accordance with an ancient tradition, admit a similar exception in the case of the law forbidding the use of certain articles of food, and in some other cases; and rightly so. This does not mean that God has not the right to oblige us to submit ourselves to certain death; it does mean that since these are some laws of such a nature, we are not to believe that they were given with so inflexible an intent. The same principle holds even more manifestly in the case of human laws.

"2. I do not deny that even according to human law certain acts of a moral nature can be ordered which expose one to a sure danger of death; an example is the order not to leave one's post. We are not, however, rashly to 'assume that such was the purpose of him who laid down the law; and it is apparent that men would not have received so drastic a law applying to themselves and others except as constrained by extreme necessity. For laws are formulated by men and ought to be formulated with an- appreciation of human frailty."

"Now this law which we are discussing-the law of nonresistance-seems to draw its validity from the will of those who associate themselves together in the first place to form a civil society; from the same source, furthermore, derives the right which passes into the hands of those who govern. If these men could be asked whether they purposed to impose upon all persons the obligation to prefer death rather than under any circumstances to take up arms in order to ward off the violence of those having superior authority, I do not know whether they would answer in the affirmative, unless, perhaps, with this qualification, in case resistance could not be made without a very great disturbance in the state, and without the destruction of a great many innocent people. I do not doubt that to human law also there can be applied what love under such circumstances would commend."

"3. Some one may say that this strict obligation, to suffer death rather than at any time to ward off any kind of wrong-doing on he part of those possessing superior authority, has its origin not in human but in divine law. It must be noted, however, that in the first instance men joined themselves together to form a civil society not by command of God, but of their own free-will, being influenced by their experience of the weakness of isolated households against attack. From this origin the civil power is derived, and so Peter calls this an ordinance of man. Elsewhere, however, it is also called a divine ordinance, because God approved an institution which was beneficial to mankind. God is to be thought of as approving a human law, however, only as human and imposed after the manner of men."

"4. Barclay, though a very' staunch Advocate of kingly authority, nevertheless comes down to this point, that he concedes to the people, and to a notable portion of the people, the right of self-defence against atrocious cruelty, despite the fact that he admits that the entire people is subject to the king. I readily understand that in proportion as that which is preserved is of greater importance, the equity of admitting an exception to the letter of a law is increased. But on the other hand I should hardly dare indiscriminately to condemn either individuals, or a minority which at length availed itself of the last resource of necessity in such a way as meanwhile not to abandon consideration of the common good. "

"That the right to make war may be conceded against him who has the chief authority among a free people.

"First, then, if rulers responsible to the people, whether such power was conferred at the beginning or under a later arrangement as at Sparta-if such rulers transgress against the laws and the state, not only can they be resisted by force, but, in case of necessity, they can be punished with death. An example is the case of Pausanias, king of the Lacedaemonians. And since the earliest kingships

of Italy were of this character, it. is surprising that, after narrating the exceedingly dreadful crimes of Mezentius, Virgil adds:

Then all Etruria in just anger rose;

'The punishment of death forthwith demand

They for their king."

"That in case of necessity men have the right to use things which have become the property of another, and whence this right comes

"1. Now let us see whether men in general possess any right over things which have already become the property of another. Some perchance may think it strange that this question should be raised, since the right of private ownership seems completely to have absorbed the right which had its origin in a state of community of property. Such, however, is not the case. We must, in fact, consider what the intention was of those who first introduced individual ownership; and we are forced to believe that it was their intention to depart as little as possible from natural equity For as in this sense even written laws are to be interpreted, much more should such a -point of view prevail in the interpretation of usages which are not held to exact statement by the limitations of a written form. "

"2. Hence it follows, first, that in direst need the primitive right of user revives, as if community of ownership had remained, since in respect to all human laws-the law of ownership included-supreme necessity seems to have been excepted.

"3. Hence it follows, again, that on a voyage, if provisions fail, whatever each person has ought to be contributed to the common stock. Thus, again, if fire has broken out, in order - to protect a building belonging to me I can destroy a building of my neighbour. I can, furthermore, cut the ropes or nets in which my ship has been caught, if it cannot otherwise be freed. None of these rules was introduced by the civil law, but they have all come into existence through interpretations of it."

“4. Even among the theologians the principles has been accepted that, if a man under stress of such necessity takes from the property of another what is necessary to preserve his own life, he does not commit a theft.”

“The reason which lies back of this principle is not, as some allege, that the owner of a thing is bound by the rule of love to give to him who lacks; it is, rather, that all things seem to have been distributed to individual owners with a benign reservation in favour of the primitive right. For it those who made the original distribution had been asked what they thought about this matter they would have given the same answer that we do. `Necessity,’ says Seneca the father, `the great resource of human weakness, breaks every law. meaning, of course, human law, or law constituted after the fashion of human law. Cicero in his eleventh Philippic averred: `Cassius has set out for Syria, a province belonging to another, if men observed written laws; but since these have been suppressed, it becomes his province by the law of nature.’ In Curtius we read: `In a common disaster each man has whatever falls to his lot.’

“That the right, in case of necessity, to use things belonging to others, holds when the necessity is in no way avoidable.

“Administrations, however, must be kept in mind, that this permission to use property belonging to another may not be carried beyond proper limits.”

“The first is, that every effort should be made to see whether the necessity can be avoided in any other way, as. for example, by appealing to a Magistrate, or even by trying through entreaties to obtain the use of the thing from the owner. Plato authorizes the taking of water from a neighbour’s well only in case one in search of water has dug on his own land clear to the underlying stratum of chalk. Solon gives such authorization only in case one has dug on his own land to a depth of forty cubits; in regard to Solon’s rule Plutarch adds: `He thought to minister to need, not to show indulgence to laziness.’ In his answer to the people of Sinope Xenophon said: `Wherever the right to purchase is not granted to us, whether on Greek or on barbarian soil, we take what we have need of, not from lawlessness but from necessity.’

“That the right, in case of necessity, to use things belonging to another, holds except when the possessor has equal need.

“In the second place, this right cannot be conceded if the owner himself is under an equal necessity; for in like circumstances the position of the owner gives him the preference. `He is not foolish’, says Lactantius, `who has not, even for his own safety, pushed a shipwrecked man from his plank, or a wounded man from his horse; for he has kept himself from the inflicting of an injury, which would be a sin and to avoid such a sin is wisdom.’ Cicero had said in his third book On Duties: `should not the wise .man, therefore, if he is exhausted with hunger, take food away from another man who is of no account? By no means. For my life is no more precious to me than the possession of such a spirit that I would not harm any one for the sake of my own advantage? In Curtius we read: `The man who will not part with his own has a better case than the man who demands what belongs to another.’

“That there is, further, an obligation to restore the things of another used in case of necessity, whenever restoration shall be possible

“In the third place, restitution of another’s property which has been used in case of necessity must be made whenever this can be done.”

“There are some who hold a different opinion. Their plea is, that the man who has availed himself of his own right is not bound to make restitution. But it is nearer the truth to say, that the right here was not absolute, but was- restricted by the burden of making restitution, where necessity allowed. Such a right is adequate to maintain natural. equity against any hardship occasioned by private ownership. “

“Application of this right in the case of wars.

“From what has been said we can understand how it is permissible for one who is waging a just war to take possession of a place situated in a country free from hostilities. Such procedure, of course, implies these conditions, that there is not an imaginary but a real danger that the enemy will seize the place and cause irreparable damage; further, that nothing be taken except what is necessary for protection, such as the mere guarding of the place, the legal jurisdiction and revenues being left to the rightful owner; and, finally, that possession be had with the intention of restoring the place as soon as the necessity has ceased.”

`Henna was retained by an act either culpable, or justified by necessity,' says Livy; for whatever departs in the least degree from necessity is culpable. When the Greeks who were with Xenophon were in pressing need of ships, on the advice of Xenophon himself they seized the vessels that were passing by, yet took possession in such a way that they kept the cargoes unharmed for the owners, furnished provisions also to the sailors, and paid passage money."

"The first right then that, since the establishment of private ownership, still remains over from the old community of property, that which we have called the right of necessity."

"That men possess the right to use things which have become the property of another, for a purpose which involves no detriment to the owner.

"A second right is that of innocent use.

`Why,' says Cicero, `when a man can do so without loss to himself, should he not share with another things that are useful to the recipient and can be spared without annoyance to the give?' Thus Seneca declares that opportunity to get a light for a fire is not to be considered a favour. In Plutarch we read the following, in the seventh book of his symposiacs: `It is not right for us to destroy food, when we ourselves have more than enough; or to stop up or conceal, a spring, when we have drunk all we wanted; or to obliterate the signs which mark the route for ships, or signs on land which have been useful to us.'

"Hence the right to the use of running water.

"Thus, a river, viewed as a stream, is the property of the people through whose territory if flows, or of the ruler under whose sway that people is. It is permissible for the people or king to run a pier out into it, and to them all things produced in the river belong. But the same river, viewed as running water, has remained common property, so that any one may drink or draw water from it."

Who would forbid from lighted torch alight

To take, and guarded hold in hollow sea

The waters vast?

Says Ovid. In the same author Latona, thus, addresses the Lycians:

Why water, me deny? Common to all. The use of water is.

"There also he calls the waves a public blessing, that is a blessing common to mankind, using a less appropriate meaning of the word `public'. In that sense certain things are said to be public by the law of nations; and with this meaning Virgil referred to the wave as open to all men."

256. In the book titled A Treatise On The Law Of The Prerogative Of The Crown and the Relative Duties and Rights of the Subject by Joseph Chitty, it was observed:

"There are indeed two memorable instances on record, in which Parliament have assembled without the authority of the King; and have, when so assembled, effected most momentous revolutions in the Government. I allude to the Parliament which restored Charles 2; and the Parliament of 1688 which .disposed of the British Crown to William III. But in both these instances the necessity. of the case rendered it necessary for the Parliament to meet as they did, there being no King to call them together, and necessity supersedes all law. Nor is it an exception to this rule, that by some modern statutes (b) on the demise of the King or Queen (which at common law dissolved the Parliament, because it could no longer consult with him who called it) (c), the Parliament then in being or otherwise the last Parliament shall revive or sit, and continue for six months after such demise, unless sooner prorogued or dissolved by the successor; that is, if the Parliament be at the time of the King's death separated by adjournment or prorogation, it shall notwithstanding assemble immediately; or, if no parliament be then in being, the members of the last Parliament shall assemble and be again a Parliament. For in such case, the revived Parliament must have been originally summoned by the Crown."

257. In a case concerning "The Gabcikovo-Nagymaros Project", decided by International Court of -Justice and heavily relied upon by Syed Sharifuddin Pirzada, it was held:

“49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted. Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance -with the 1977 Treaty and related instruments.

“50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows : .

Article 33. State of Necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that ‘ State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed. .

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the art of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in. conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity." (Yearbook of the International Law Commission, 1980, Vo1.lI, Part 2, p.34)

In its Commentary, the Commission defined the `state of necessity' as being

`that situation of a State whose means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State" (ibid, para. l).

It concluded that `the notion of state of -necessity is. . . deeply rooted in general legal thinking' (ibid, p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft.

`in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception-and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness..."(ibid.; p.5l para. 40)

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly, defined conditions which must be cumulatively satisfied; and the State concerned is not the sole Judge of whether those conditions have been met."

"52. In the present case, the following basic conditions set forth in draft Article 33 are relevant: It must have been occasioned' by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impaired an essential interest" of the State towards which the obligation existed; and the State which is author of that act must not have "contributed to the occurrence of the State of necessity". Those conditions reflect customary international law:"

54. The verification of the existence, 1989, of the `peril' invoked by Hungary, of its `grave and imminent' nature, as well as of the absence of any `means' to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes."

258. In Corpus Juris Secundum. Volume-65 (page 387) word "Necessity" has been defined as under:--

"Necessity.---The word "necessity" does not have a fixed character. It is relative and elastic, rather than absolute, and it is without any distinct or definite signification.

"It has varying degrees of meaning which the Courts recognized, and may connote different degrees on necessity. Thus, it may mean a necessity which is unavoidable, and it may mean a necessity which is merely a matter of convenience, the word being frequently used in connection with other words which increase or diminish. the urgency implied: It should be construed with reference to existing conditions.

"The word "necessity" is not always used in its lexicographical sense of indispensably or essentially requisite, or as meaning an absolute or indispensable need or the imaginary need of whimsy, caprice, or mere convenience. Sometimes it does mean .indispensable, but not always, and it may not mean that which is ,indispensable or requisite, for it is not restricted in law to that which is absolutely essential to existence."

"It does not mean an absolute, unavoidable, physical necessity; but it may mean a practical, or reasonable, or an economic and moral, necessity, and it may be used as meaning appropriate or

fitting to the particular instance; a substantial or obvious need in view of the disclosed relevant circumstances."

"While the term "necessity" is elastic, as stated ante, -the elasticity should not be extended to cover that which is merely, desirable arid I not reasonably essential.. A necessity is a requirement, and necessity is something quite different from mere. convenience. A thing which is expedient is a necessity, and a strong or urgent reason why a thing should be done creates a necessity for doing it. Necessity usually imports negation of freedom."

`The term is variously defined as meaning the quality or state of being necessity; needful; conducive; requisite; indispensably requisite; urgent need, unavoidable; a state or condition imperatively demanding relief or assistance; inevitableness; indispensableness; inevitable consequence; irresistible force.

"In its primary sense it signifies that which is unavoidable; inevitable, or indispensable; that which makes an act or event unavoidable; offering no other course; that which is needed; that which is essentially requisite; something that is necessary; something which must be accomplished to attain a desired result; the occasion, or that which gives rise to something else.

"With reference to public-matters and legislative usage in general, necessity means great or urgent public convenience."

"Necessity" has been held to be synonymous with, or equivalent to, "emergency" see, the C.J.S. definition Emergency, and "requirement." ,

"The power of condemnation may in some instances be exercised only where it is established that there is a necessity for the taking of the particular property, and in this connection the meaning of the word "necessity" has frequently been adjudicated..."

"Public necessity.---A relative term meaning urgent public convenience; in-this connection inconvenience tray be so great as to amount to necessity."

259. In, “Constitutional and Administrative Law” by Stanley De Smith and Rodney Brazier, 8th Edition, 1998, under the sub-heading, `Ultimate Authority in Constitutional Law’, it was observed:

“The Convention of Lords and `Commons’ met in January, 1689, and next month offered the Crown to William and Mary jointly, subject to conditions set out in a Declaration of Right. The offer having been accepted,- the Convention passed an Act asserting that it Was Parliament, and then enacted the Bill of Rights, incorporating the Declaration of Right. Clearly, the Convention, `Parliament’ had been irregularly summoned; its affirmation of its own legal authority carried the matter no farther; there had been no King from December, 1688 (assuming that James II was deemed to have abdicated or to have forfeited the Crown) till February,. 1689; William III had no hereditary legal title to the throne and, therefore, had no authority to assent to Bills. Has every purported Act of Parliament since 1688 been a nullity? Is a .Stuart still the rightful King?

Once questions such as these are asked, one must acknowledge that in certain circumstances a breach of legal continuity, be it peaceful or accompanied by coercion and violence, may have to be treated as superseding the constitutional and legal order and replacing it by a new one. Legal theorists have no option but to accommodate their concepts to the facts of political life. Successful revolution sooner or, later begets its own legality. If, as Hans Kelsen has postulated, the basic norm or ultimate principle underlying a constitutional order ‘is that the constitution ought to be obeyed, then the disappearance of that order, followed by acquiescence on the part of officials, judges and the general public in law, rules and orders issued by the new holders of power, will displace the old basic norm or ultimate principle and give rise to a new one. Thus, might becomes right in the eye of the law.”

“The argument can be summarized in this way: sooner or later a breach of legal continuity will be treated as laying down legitimate foundations for a new constitutional order, provided that the `revolution’ is successful; there is, however, no neat rule of thumb available to’ judges during or immediately after the `revolution’ for the purpose of determining whether the old order survives wholly, in part or not at all. It so happened that the Revolution of 1688 gave a clear pointer to the Judiciary. There was a suspension of business in the Courts, and after the throne had become vacant new judges had to be appointed because of a `demise of the Crown’. These appointees were not at all likely to call the validity of the regime in question. After a while (at the latest, after the failure of the Jacobite revolt in 1715] it would have been merely silly for a judge or commentator to deny that the Bill of Rights, 1689 and other legislation passed after the Revolution were valid.. Efficacy and acquiescence had established a new basis for legality. The particular circumstances in which the Revolution of 1688 took place, and its immediate practical consequences, laid a secure foundation, moreover, for judicial acceptance of the doctrine of absolute parliamentary sovereignty.

The doctrine grew out of a particular state of affairs. A fundamental change of .a political nature may bring about a fundamental change in legal doctrine. “

Under the sub-heading `The Concept of Necessity’, in the same book, it was observed:-

“One other comment must be made. In some situations where unconstitutional action has been taken by persons wielding effective political power, it-is open to ‘a judge to steer a middle course. He may find it possible task that the framework of the pre-existing order survives but the deviation from these norms can be justified on the grounds of necessity. The principle of necessity, rendering lawful what would otherwise-be unlawful is not unknown to English Law; there is a defence of necessity, (albeit of uncertain scope), in criminal law and in Constitutional law, the application of martial law is but an extended application of this concept. But the necessity -must be proportionate to the evil to be averted, and acceptance of the principle does not normally imply total abdication from judicial review or acquiescence in the suppression of the Legal order; it is essentially a transient phenomenon. State necessity has been judicially accepted as a legal justification for ostensibly unconstitutional, action to fill a vacuum arising within the constitutional order in Pakistan……..”

260. In the case from Lesotho reported as Makenete v. Lekhanya and others [1993] 3 LRC, the Lesotho Court dealt with the law laid down on the touchstone of necessity in the case of Nusrat Bhutto PLD 1977 SC 657 in the following terms: -

“Anxious consideration must of course be given to deciding whether events constitute a coup d’etat or merely a `constitutional deviation’. It is in this context that the following observations of Haq, C J in Bhutto PLD 1977 SC 657 at 721-722 (relied upon in appellant’s heads of argument) are appropriate:

`That in any case the theory of revolutionary legality can have no application or relevance to a situation where the breach of legal continuity is of a purely temporary nature and for a specified limited purpose. Such a phenomenon can more appropriately be described as one of constitutional deviation rather, than of revolution.’

“I have earlier adverted to aspects of the appellant’s argument that what occurred in the present case was merely such a `constitutional deviation’. It was further argued that the High Court erred in concluding that the events in the present case constituted a coup d’etat because this was not a case of competing governments, nor one dealing with the status of a new regime, nor an issue of whether the government was lawful. The issue rather was whether what was done by the first respondent was within his powers or not.

I am unable to agree. The absence of competing governments by no means indicates that a coup d'etat has not taken place. If other conditions are satisfied (including for example) the requirement that the old legal order is replaced by a new legal order in a way not provided for or contemplated in the old order) then it is irrelevant that there are not (or have not been) competing governments. It is quite possible for a person or group of persons who were in power and constituted the Government to effect a revolution if it replaces one legal order by another in a manner not provided for by the old order. It is the fundamental unlawfulness of the change and substantial nature of the change which is relevant, not the precise mechanisms bringing it about. In fact the absence of `competing' governments may be an indication that the revolution has been successful.."

"In the result, and bearing in mind the necessity for considering the `total milieu in which the change is brought about', one cannot escape the conclusion that at some point a new order, brought about by revolution and in particular is capable of achieving legitimacy and I would, subject to the same qualification accept the test as formulated by the Chief Justice in Mokotso (1989) LRC (Const.) 24 at 133 (and by implication applied by him in the present case), namely:

"A Court may hold a revolutionary Government to be lawful, and its legislation to have been legitimated ab initio, where it is satisfied that (a) the Government is firmly established, there being no other government in opposition thereto; and (b) the government's administration is effective, in that the majority of the people. are behaving, by and large, in conformity therewith.

"On this part of the case I am well-satisfied that the events of 20 February 1990 and thereafter, did in fact constitute a coup d'etat and not merely a constitutional deviation from the previous dispensation. Unless there are good reasons for not doing so it is my considered view that the learned Chief Justice cannot be faulted for holding that `the present Government is the lawful Government of the Kingdom of Lesotho and that its legislation has been legitimated ab initio, that is, with effect from 19th February, 1990; particularly in the light of his unchallenged findings regarding the high degree to which the new Government is established, effective and finds popular support amongst the people as a whole."

"There is ample authority for the submission on the appellant's behalf that the constitutional role of the courts of law, even in times of crises, is to administer justice 'to those who seek it, to serve as a buttress between the executive and the subject, to protect the citizen when the legislature exceeds its Constitutional powers and to do so without fear, favour or prejudice, and independently of the' consequences which ensue.

"I would suggest that this is the construction to be placed on those judgments criticising 'effectiveness' as the sole criterion for the legality of the revolutionary Government.

"In Bhutto's case for example, Anwarul Haq, CJ observed: .

'by making effectiveness of the political as the sole condition of criterion of its legality it excludes from consideration sociological factors of morality and justice which contribute to the acceptance or if effectiveness of the new legal order.'."

261. Reference be also made to the case of The Attorney-General of the Republic v. Mustafa Ibrahim (Criminal Appeals Nos.2729, 2734, 2735) (Cypress Law Reports 105). The background of this case is that the Court could not function because Muslim Judges of the Turkish part refused to come and assemble in the Court and for that reason two from this side and two from the Greek side were divided and even the President, who was a German, also resigned. So, justice was suffering and access to justice being essential, they had to pass certain laws, which were justified on the ground of necessity. The following passages of the report are instructive, wherein it was observed:

"The Attorney-General, on the other hand, blamed the insurgents, and the conditions created by their prolonged activity; and submitted upon a well-supported argument, that the new Law was enacted on sound legal foundation; the generally accepted principle of the law. of necessity for the preservation of fundamental services in the State. The preservation of the administration of Justice itself, in this case."

"The existence, the validity, and the force of the Constitution, are not in question. That the new law has not been promulgated, or published according to the written text of the relative part of the Constitution, has not been contested. That it is not in accordance with certain constitutional provisions, especially Articles 133.1 and 153.1; in material particulars, there can be no doubt. And the fact that the Attorney-General of the Republic defends this new Law, by the defence of necessity, points, I think, in the direction that its validity cannot otherwise be defended. The reasonable inference is that had it not been for "the necessity" which caused its enactment, the new Law, probably, would not have been enacted; and if enacted, it might well be challenged as unconstitutional. This is the position in which I see the question for consideration in the light of the submissions before us. And it seems to me that the onus of establishing this "defence of necessity", lies upon the side which invokes it. "

"Opening his article on the subject, in the sixth volume of the publications of the Faculty of Laws, of the University College, London, Current Legal Problems, (1953), at page 216-(referred to by the learned Attorney-General)-Professor Glanville Williams says: .

"The defence of necessity is not so much a current as a perennial legal problem" "When I started to prepare this lecture-he writes at p.217 I thought of necessity as .a definite kind of defence, occupying its own niche in the law. But the authorities led me, into unexpected paths."

"The learned Attorney-General, in his able and most helpful address, referred us to reports of superior judicial authorities, and to writings of eminent jurists showing how this doctrine of necessity has long been accepted and applied in France, Germany, Italy, Greece, and how it is also found in that treasure of practical legal wisdom, the Mejelle, (Articles 17, 18, 21 and 22) which the elder of us, still remember with profound respect. I would have to go into great lengths in this judgment, if I were to cite the guidance and assistance which I found in all those sources of legal knowledge, in considering the problem in hand."

"It has been argued by counsel for respondents that the Court cannot take official cognizance of the existing emergency because the Council of Ministers has not issued a Proclamation of Emergency under Article 183 of the Constitution. In my opinion, the Court cannot close its eyes to notorious relevant facts in deciding these cases. Article 183 is a provision enabling an emergency to be declared for certain limited purposes and through a specified procedure. The fact that in spite of what has been going on in Cyprus since December, '1963, no proclamation of Emergency has been issued under Article 183, ' rather than indicating, contrary to glaring fact, that no such emergency exists, strongly indicates that the present emergency is one which could not be met within the express provisions of the Constitution. At a time when by a resolution, dated 4th March, 1964, of the Security Council of the United Nations an International Force has been dispatched to Cyprus to assist in the return to normality and a U.N. Mediator has been assigned to try and work out a solution of the Cyprus Problem, it would be an. abdication of responsibility on the part of this court to close its eyes to the realities of the situation, because, for any reason, no Proclamation of Emergency has been made under Article 183, and to hold that everything is normal in Cyprus. To pretend that the administration of justice could have functioned unhindered as envisaged under the Constitution, because a measure that could have been taken under a provision of limited application, such as Article 183, has not in fact been taken, would be unreasonable. I pass no censure on counsel for respondents who has raised the point; he has done so in the discharge of his duties to his clients, as, on its own part, the Court has also to discharge its duty to all persons in Cyprus for the sake of all of them."

"Granted that an emergency, as already described, exists the next thing to be examined is its relation to the basic theme of the constitutional structure.

"It cannot, of course, be argued that, because of such an emergency, constitutional deadlock or other internal difficulties, it is possible to question the existence of Cyprus as an independent State. The existence of a State cannot be deemed to be dependant on the fate or operation of its Constitution; otherwise, every time that any Constitution were upset in a country then such State would have ceased to exist, and this is not so. The existence of a State is a matter governed by accepted criteria of international law and in particular it is related to the application of the principle of recognition by other States."

"Organs of Government set up under a Constitution are vested expressly with the competence granted to them by such Constitution, but they have always an implied duty to govern too. It would be absurd to accept that if, for one reason or other, an emergency arises, Which cannot be met within the express letter of the Constitution, then such organs need not take the necessary measures in the matter, and that they would be entitled to abdicate their responsibilities and watch helplessly the disintegration of the country or an essential function of the State, such as the administration of justice…….As it has been accepted by the Council of State in Greece, in time of emergency it ' is the, responsibility of the Government to ensure the proper functioning of public services and of generally the machinery of the State (Decision 566/1936)"

"Having considered the jurisprudence and authoritative writings of other countries to which this Court has been referred, as well as some others, I am of the opinion that the doctrine of necessity in public law is in reality the acceptance of necessity as a source of authority for acting in a manner not regulated by-law but required, in prevailing circumstances, by supreme public interest, for the salvation of the State and its people."

(ii) that a Court in interpreting and applying a Constitution has to adopt, as much as possible, an experiential approach."

"I am. of the opinion that Article 179 is to be applied subject to the proposition .that where it is not possible for a basic function of the State to be discharged properly, as provided for in the Constitution, or where a situation has arisen which cannot be adequately met under the provisions of the Constitution then the appropriate organ may take such steps within the nature of its competence as are required to meet the necessity."

“Even though the Constitution is deemed to be a supreme law limiting the sovereignty of the legislature, nevertheless, where the Constitution itself cannot measure up to a situation which has arisen, especially where such situation is contrary to its fundamental theme, or where an organ set up under the Constitution cannot function and where, furthermore, in view of the nature of the Constitution it is not possible for the sovereign will of the people to manifest itself, through an amendment of the Constitution, in redressing the position, then, in my opinion according to the doctrine of necessity the legislative power, under Article 61, remains unhindered by Article 179, and not only it can, but it must, be exercised for the benefit of the people.”

“Then it cannot be said to be a case of legislation repugnant to, or inconsistent with, the provisions of the supreme law, in contravention of Article 179, because it is legislation to meet a situation to which the supreme law itself is not, in view of its nature and provisions, applicable, and it cannot be made applicable to meet it; there can, thus, be no question of the legislature exercising sovereignty in a field where the sovereignty of fundamental law is already established, by means of the Constitution. And with the Cyprus Constitution, in view of its origins and nature, it is all the more proper and necessary for the legislature to exercise its own powers, on behalf of the people, in matters of necessity.”

“I am of the opinion that because of the “recent events” mentioned in the preamble to Law 33/64, and described already in an earlier part of this Judgment, a public necessity of the first magnitude had arisen for the judiciary to be enabled to function urgently, properly and adequately.”

“That the proper discharge of the administration of justice constitutes a necessity, especially in times of upheaval, such as the present,, cannot be reasonably disputed. It has been so aptly put in Decision 1601 of 1945 of the Greek Council of State where it was held that the situation under consideration (“ ....constituted an obvious, imperative and unavoidable necessity, making it necessary that, in priority to all else, order had to be restored from both the moral and service aspects in the functioning of judicial services, which contribute fundamentally to the restoration of order and security and to the strengthening of the confidence of the citizens in the rule of law, and, therefore, the creation of the indispensable conditions for a return of the country to normal political life through. free elections .... “) And this proposition was re-affirmed in Decision. 624 of 1945 of the Greek Council of State, in identical terms. “

“Law of Necessity. ---I shall now deal with the “law of necessity” as understood and applied in other countries. The classical writers abound in maxims upholding the concept of necessity. This is mainly based on the maxim “salus populi est supremo lex “. Judicial decisions in various

countries have acknowledged that in abnormal conditions exceptional circumstances impose on those exercising the power of the State the duty to take exceptional measures for the salvation of the country on the strength of the above-maxim."

"In -Italy the law of necessity has been accepted long ago as forming part of the law of the country. Eminent writers on Public Law adopt the principle that necessity constitutes an original source of law independently of the case where it is a prerequisite for the application of certain constitutional provisions for a state of emergency: See e.g. C. Mortati, Professor in the University of Rome: "Diritto Pubblico" 1(1962), 6th edition, page 174; and R. Alessi, Professor of Administrative Law in the University of Bologna: "Diritto Amministrativo Italiano" (1960), 3rd edition, page 218."

"This is what Professor Mortati has to say on this point (ubi supra, at page 174)":

"While necessity, in a third meaning, which is that considered here, presents itself as a fact of autonomous juridical product, when it operates outside or even contrary to law, appearing by itself capable of legalising the act, otherwise illegal. Naturally for the production of that effect, necessity must have an institutional character, that is to say it must be deduced from the exigencies of life, from the purpose the political institution of the state is aiming at,. that is to. say of the juridical order to which appertains the organ operating on the basis of such source ("fonte")

"In Germany the law of necessity has been accepted by famous writers on Public law like Laband and W.Jellines and was embodied in Article 48 of the Weimar Constitution (see Jellinck, "Gesetz and Verordung", 1887, page 376."

"In the light of the principles of the law of necessity as applied in other countries and having regard to, the provisions of the constitution of the Republic of Cyprus (including the provisions of Articles 179, 182 and 183), 1 interpret our Constitution to include the doctrine of necessity in exceptional circumstances, which is an implied exception to particular provisions of the Constitution; and this in order to ensure the very existence of the State. The following prerequisites must be satisfied before the doctrine may become applicable:

(a) an imperative and inevitable necessity or exceptional circumstances;

(b) no other remedy to apply;

(c) the measure taken must be proportionate to the necessity; and

(d) it must be of a temporary character limited to the duration of the exceptional circumstances.

"A law, thus, enacted is subject to the control of this Court to decide whether the aforesaid prerequisites are satisfied, i.e. whether there exists such a necessity and whether the measures taken were necessary to meet it."

262. Reference may also be made to the following passages from the case of Mitchell and others v. Director of Public Prosecutions and another 1986 LRC (Grenada):

"The Chief Justice, Muhammad Munir, opened his judgment with a discussion of the theoretical assumptions to be adopted in the case:

"As we will have to interpret some of the provisions of this Order, it is necessary to appraise the existing constitutional position in the light of the juristic principles which, determine the validity or otherwise of law creating organs in modern States which being members of the comity of nations are governed by international Law. In judging the validity of laws at a given time, one of the basic doctrines of legal positivism, on which the whole science of modern jurisprudence rests, requires a jurist to presuppose the validity of historically the first Constitution whether it was given by an internal usurper, an external invader or a national hero or by a popular or other assembly of persons. Subsequent alterations in the Constitution and the validity of all laws made thereunder is determined by the first Constitution. Where a Constitution presents such continuity, a law once made continues in force until it is repealed, altered or amended in accordance with the Constitution. It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order. A revolution is generally associated with public tumult, mutiny, violence and bloodshed but from a juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change may be attended by violence or it may be perfectly peaceful. It may take the form of a coup d'etat by a political adventurer or it may be effected by persons already in public positions. Equally irrelevant

in law is the motive for a revolution, inasmuch as a destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends. For the purposes of the doctrine here explained a change is, in law, a revolution if it annuls the Constitution and the annulment is effective. If the attempt to break the Constitution fails those who sponsor or organize it are judged by the existing Constitution as guilty of the crime of treason. But if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. Thus, the essential condition to determine whether a Constitution has been annulled is the efficacy of the change. In the circumstances supposed no new State is brought into existence though Aristotle thought otherwise. If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus- or international entity of the State and the revolutionary Government and the new Constitution are according to International Law, the legitimate Government and the valid constitution of the State. Thus, a victorious revolution or a successful coup d'etat is an internationally recognized legal method of changing a Constitution. " (Italics added)"

"His Lordship then proceeded to cite with obvious approval from Salmond on Jurisprudence (11th ed. by Glanville Williams), at p.101 a passage which reads thus:

"Every constitution has an extra legal origin, the best illustration being the United States of America which in open and forcible defiance of English Law broke away from England and set up new states and a Constitution the origin of which was hot merely extra legal but was illegal."

"Yet, so soon as those constitutions succeeded in obtaining de facto establishment in the rebellious colonies they received recognition as legally valid from the Courts of the colonies. Constitutional law followed hard upon the heels of constitutional facts."

"Then His Lordship went on to say ([1968] 3 All ER 561 at p.574):

"It is a historical fact that in many countries - and. indeed in many countries which are or have been under British sovereignty there are now regimes which are universally recognized as lawful but which derive their origins from revolutions or coups d'etat. The law must take account of that fact. ' So, there may be a question how or at what stage the new regime became lawful."

"Assuming for the moment that is so, we have reached the position where The State v Dosso has received support from the highest judicial pinnacle. And 'so we cannot just brush it aside because the same Court decided differently thirteen years later. But I doubt that this is so. I am inclined to .the view that His Lordship was there and then just noting the tests of revolutionary legality applied in these two cases by the Courts."

"S.K. Date-Bah in an article "Jurisprudence's Day in Court in Ghana" (1971) 20 ICLQ 315 suggested that the Court of Appeal should not have dismissed - Kelsen so casually without a more serious and analytical consideration of his work. This was perhaps the first reported positive Commonwealth judicial rejection. of a basic Kelsenite principle outside of Pakistan. And I agree with. their conclusion and its ratio decidendi. Doubts had been raised in a few cases in Pakistan itself by both Bench and Bar about the correctness of the actual decision in The State v Dosso, Jilani v The Government of the Punjab involved full judicial scrutiny of alleged fallacies inherent in the application of Kelsen's theory of revolution and legal discontinuity which had become somewhat popular in Commonwealth Courts since The State v Dosso. A full bench of 5 judges decided on 20th April, 1972 that Dosso was wrong and it was overruled. Dosso's case was to be rejected, not only because the Supreme Court there had been wholly premature in finding that President ' Iskander Mirza had effectively abrogated the 1956 Constitution, but also because Kelsen's doctrine of the law annulling effect of revolutions and coups d'etat is not a rule or principle of law to be applied by Courts and Judges, but merely a theory about law and a controverted one at that PLD 1972 SC, 139.

"The Chief Justice referred extensively to Kelsen in an endeavour to show that the jurist had been misunderstood in Dosso. He said (pp.179,180):

"Kelsen... continues to be grievously misunderstood. He was only trying to lay down a pure theory of law as a rule of normative science consisting of `an aggregate or system of norms.' He was propounding a theory of law as a `mere jurist's proposition about law.' He was not attempting to lay down any legal norm or norms which are the daily concern of Judges, legal practitioners and administrator. His purpose was to recognize that such things as revolutions do also happen but even when they are successful they do not acquire any authority to (revoke) or annul the previous `general norm' until they have themselves become a legal order by habitual obedience by the citizens of the country. It is not the success of the revolution, therefore, that gives it legal validity but the effectiveness it acquires by habitual submission to it from the citizens. " (Italics added)

And Yaqoob Ali, J., stressed (at p.220) that:

“It must be remembered in this connection that, however, effective the Government or usurper may be, it does not within the national legal order lacquer legitimacy unless the Courts recognize the Government as de jure. “

“Unless and until this takes place, the status of the Government remains undetermined. The criticisms of Kelsen are too lengthy to discuss. It must suffice to state that, mostly, I agree with them. And I too think The State v Dosso was wrongly decided.”

“In Bhutto v The Chief of Staff, Pakistan Army and the Federation of Pakistan PLD 1977 SC 670 Dosso’s case came up again. On 17th March 1977 general elections were held ‘ in Pakistan. The Pakistan People’s Party, led by Prime Minister Zulfikar Ali Bhutto, was credited with 155 of the 200 elected seats in the National Assembly. The extent o: the victory was much more than was generally expected. The Opposition immediately denounced the elections as “rigged”. Protest demonstrations and strikes gradually built up to widespread rioting in which the deaths of over 300 people were reported.”

“So, the Supreme Court, on this point, expressed the view that the validity or legality of a new revolutionary regime cannot be judged by the sole criterion of its success or effectiveness, as contemplated by Kelsen’s pure theory of law “because by making effectiveness of the political change the sole condition or criterion of its legality, it excludes from consideration sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new legal order,” Their Honours concluded that “The legal consequences of such a change must, therefore, be determined by a consideration of the total milieu in which the change is brought about, including the motivation of those responsible for the change and the extent to which the old legal order is sought to be preserved or suppressed.”

“I read this to mean that, in such cases, the Court called upon to decide the question should take into consideration both the reason why the old constitutional Government was overthrown and the nature and character of the new legal order. Was the motivation mere power grabbing or was it a rebellion or example against oppression or corruption or ineptitude? And is the new legal order a just one? It does not appear that this case was cited in Controller of Taxes v. Valabhaji, Civil Appeal No. 111 of 1981 was judgment of the Court of Appeal of the Seychelles, delivered on 11th August 1981. The appeal was against the dismissal of an application to set aside a judgment for the payment of arrears of income tax.”

"Hogan P., in a careful judgment, considered helpfully the question Lord Reid referred to in Madzimbamuto v Lardner-Burke, how or at what stage a (revolutionary) unconstitutional regime becomes lawful? Be it noted, I digress to remark, that the question was and is not "if" this can happen, but "how" and "when" does it happen?"

"The learned President considered a passage in a citation from Professor S.A. de Smith's Constitutional and Administrative Law, 3rd edn., where, at p.66 the author having said "to assert that all Constitutions or Constitutional amendments procured in a manner inconsistent with, pre-existing legal order are legally invalid will land one in a morass of absurd and insoluble difficulties," continued"-

"...One must acknowledge that in certain circumstances a breach of legal continuity, be it peaceful or accompanied by a coercion and violence, may have to be treated as superseding the constitutional and- legal order and replacing it by a new one. Legal theorists have no option but to accommodate their concepts to the facts of political life. Successful revolution sooner or later begets its own legality..."

"and to Artistides M. Liasi v The Attorney-General (1975) 3 Cyprus LIZ 568 where Loizou, J., had carried his researches back to the Roman Lex Barbarius Philippus, said, when dealing with the aftermath of the short-lived elevation of Nicolaos Sampson (p.573):-

"According to the case law and legal theories, two are the basic tests whereby a coup d'etat is legalized. .The first, the substantial test, is popular acceptance, even if a tacit one, of the change and legal, values thereby invoked, and the second, the formal test, is the legalization of the `coup d'etat Government' through the recognition of its actions by the next lawful Government." (Italics added)

And then His Lordship went on to deal with the aspect of the timing of such legitimacy or validity. The Court asked: "But what about the interval if any, before it is firmly established and is merely en route to that position", and in answer said:

"Roscoe Pound in his work on Jurisprudence (Vol.1I, Pt.3, p.30) refers to the important decision of the United States Supreme Court in Williams v Bruffy 96 US 176, 186-191 for the proposition:-
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`in the case of an ultimately successful insurrection the Courts deriving from it would uphold acts of insurgents from the beginning and courts of other countries would do the same.'"

a conclusion which appeared to be amply justified by, inter alia, the passage in the judgment where the Court, having referred to a rebellion in part of a State, continued:-

"The validity of its acts, both against the parent State and its citizens or subjects, depends entirely on its ultimate success ...such was the case of the State Governments under the old confederation on their separation from the British Crown. Having made good their declaration of independence everything they did from that date was as valid as if their independence had been at once acknowledged. "

"May be so, but study of these cases from 1958 to 1981 mentioned above can and should be able to guide Caribbean judges in the formation of principles of revolutionary legality judicially sound and at the same time consistent with our political democratic ideology. And we must bear in mind what Triantaphyllides, J., said in Attorney-General of the Republic v. Ibrahim (1964) Cyprus LR 195, 231, that "the mission of the supreme judicial organ in any State is to lay down authoritatively its own law and not (automatically) to apply the law of any other state, though past precedents anywhere are always of great help."

"The respondents do not deny its 'unconstitutionality vis-a-vis the Constitution of 1973. But, they contended, when the new High Court was constituted; it had validity on the legal foundation of the law of necessity, and much reliance was placed on Attorney-General of the Republic of Cyprus v Ibrahim (1964) Cyprus LR 195."

"Salmond on Jurisprudence, 12th eel. (1966) para. 94 reads:- "We shall conclude our examination of the theory of wilful wrongdoing by considering a special case in which motive operates as a ground of excuse. This is the case of the jus necessitatus. So far as the abstract theory of responsibility is concerned, and act- which is necessary is not wrongful, even though done with full and deliberate intention." It is a familiar proverb that necessity knows no law -Necessitatus no habet legem is obviously too wide a proposition to be acceptable today. And S.A. de Smith's Constitutional and Administrative Law, 4th ed. (1973), pp. 78-9 has this statement:--

"The principle of necessity, rendering lawful what would otherwise be unlawful, is not unknown to English law; there is a defence of necessity (albeit of uncertain scope) in criminal law, and in Constitutional law the application of martial law is but an extended application of this concept. But the necessity must be proportionate to the evil to. be averted, arid acceptance of the. principle does not normally imply total abdication from judicial review or acquiescence in the supersession of the legal order; it is essentially a transient phenomenon. State necessity has been judicially accepted in recent years as a legal justification for ostensibly unconstitutional action to fill a vacuum arising within the constitutional order in Pakistan, Cyprus, Rhodesia and Nigeria. To this extent it has been recognised as an implied exception to the letter of the Constitution. And perhaps -it can be stretched far enough to bridge the gap between the old legal order and its successor."

"Then there was the summation of Lord Mansfield in R v. Stratton and others (1779) 21 St Tr 1046, an information for a misdemeanour in arresting, imprisoning. and deposing Lord Pigot, Commander-in-Chief of the Forces in Fort St. George and President and Governor of the Settlement of Madras in the East Indies. The defence was that Lord Pigot had violated the Constitution of the Government of 'Madras with regard to the Governor and council in whom the whole power was vested by the East India Company and that the defendants had acted under necessity in order to preserve the Constitution.

"I turn to the "law of necessity" as understood and applied in other countries. Judicial decisions in several European countries have acknowledged that in abnormal conditions exceptional circumstances impose on those exercising the powers of the State the duty to take exceptional measures for the salvation of the country on the strength of the maxim salus populi suprema lex.

"In my view all this learning justifies this Court in adopting and adapting the law or ,doctrine of necessity for use in public law as a principle of revolutionary legality in fit cases. It was so used by the Federal Court of Pakistan in Reference by H E The Governor General No. l of 1955 PLD 1955 FC 435: by the Supreme Court of Pakistan in Jilani v. The Government of the Punjab (Supra) and in Bhutto v The Chief of Staff, Pakistan Army and Federatiori of Pakistan (supra); by the General and- Appellate Divisions of the High Court of Rhodesia and by Lord Pearce (in dissent) in the Privy Council; and very recently by the Constitutional Court of Malta in Archbishop Joseph v The Prime Minister, 22nd October 1984.

"On this basis the Court applied the law of necessity to found their conclusions that: ,

"this was not a case where the old legal order had been completely suppressed or destroyed, but merely a case of a constitutional deviation for a temporary period and for a specified and limited objective namely, the restoration of law and order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution";

"It was a situation for which the Constitution provided no solution and the Armed Forces had, therefore, to intervene to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty, and to separate the warring factions which had brought the country to the brink of disaster"; and that, in the circumstances,

"the imposition of Martial Law, therefore, stood validated on the doctrine of necessity, and the Chief Martial Law Administrator was entitled to perform all such acts and promulgated all legislative measures which have been consistently recognised by judicial, authorities as falling within the scope of the law of necessity.

"The Attorney-General of the Republic of Cyprus v Ibrahim-et al must be dealt with in more detail. It is the nearest case to this one. The Cyprus Constitution of 1960 gave to the 18 per cent Turkish community the right to participate in all important matters of State, executive, legislative and judicial.

"In this judgment Triantafyllides, J., held that "the legal doctrine of necessity . . . should be read into the provisions of the written Constitution . . . and must be deemed to be part of the scheme of the constitutional order in Cyprus so as to enable the interests of the country to be met where the Constitution . . . does not contain adequate express provision for the purpose."

"I am of the opinion that the doctrine of necessity in public law is in reality the acceptance of necessity as a source of authority for acting in a manner not regulated by law but required, in prevailing circumstances, by supreme public interest,, for the salvation of the State' land its people. In such cases salus populi becomes suprema lex. That being so, the doctrine of necessity has developed in accordance with, the situations which have given rise to its being propounded or resorted to"; and later:

"I interpret our Constitution to include the doctrine of necessity in exceptional circumstances, which is an implied exception to particular provisions of the Constitution; and this in order to ensure the very existence of the State."

"Archbishop Joseph v The Prime Minister (Commonwealth Law Bulletin, Vol. l1, No. 1, January 1985 p.44) is a case from Malta.

"These instances cannot be taken to comprise an exhaustive list of the extra constitutional situations to which the doctrine may be applied. If so, then a fortiori it should be capable of application to validate unconstitutional legislation by a constitutional representative Government in Parliament if the requisite conditions are satisfied."

(3) "I would lay down the requisite conditions to be that:

(i) an imperative necessity must arise because of the existence of exceptional circumstances not provided for in the Constitution, -for immediate action to be taken to protect or preserve some vital function to the State;

(ii) there must be no other course of action reasonable available;

(iii) any such action must be reasonable necessary in the interest of peace, order, and good Government; but it must not do more than is necessary or legislate beyond that;

(iv) it must not impair the just rights of citizens under the Constitution,

(v) It must not one the sole effect and intention of which is to consolidate or strengthen the revolution as such.

(4) It is for this Court to pronounce on the validity (if so) of any unconstitutional action on the basis of necessity, after determining as question of fact, whether or not the above conditions exist. But it is for the party requiring. the Court to do so to ensure that proof of this is on the record.

(5) Such validation will not be a once-for-all validation, so to speak, it will be a temporary cue, being effective only during the existence of the necessity. If and when this ends, the right constitutional steps must be taken forthwith, that is, within a reasonable time."

"The Chief Justice justified the validation on the basis that it was not the act of the revolutionary Government that caused it. But even if it was, the stark situation was not unlike that in Rhodesia (if not less undeserving), in relation to which Lord Pearce held that "the principle of necessity or implied mandate applied to the present circumstances in Rhodesia."

"It is my intention to do so . .

In arriving at a decision I am conscious of the exhortation of Vassiliades, J., in The Attorney-General of the Republic v Ibrahim (1964) Cyprus LR 195 in which he states that a Court, in arriving a decision in those circumstances, must not only apply the law in well-balanced form and in accordance with the conditions prevailing at the time but must also be conscious of its important and, responsible function of transforming legal theory into living law as applied to the facts of daily life."

"In my view when a Government in power has effective control with the support of a majority of the people and is able to govern efficiently, that Government should be recognised as legal. This approach seems to be recognised in S.A. de Smith's Constitutional and Administrative Law (3rd ed.), p.66, where he states:-

"Legal theorists have no option but to accommodate their concepts to the facts of political life. Sooner or later a breach of legal continuity will be treated as laying down legitimate foundations for a new constitutional order, provided that the revolution is successful. "

"And J. Bryce in his book Studies in History and Jurisprudence (1901),Vol.2, p.64 states that:-

"Sovereignty de facto, when it has lasted for a certain time and shown itself stable, ripens into sovereignty de jure".

"I am of the view that sovereignty, or revolutionary legality, or de jure status, by whatever name it is called, ultimately depends on consent or acceptance by the people in the particular country under consideration .which is manifested by the obedience to the precepts of those claiming to exercise authority over them. Once this is firmly established, it is trite law that in the case of a successful revolution. The validity of the new Government's laws date back to the day when the revolution first broke out."

263. We are also in agreement with the submission of Syed Sharifuddin Pirzada that in international system of emergencies the Governments take steps to ensure that the Fundamental Rights of citizens are not affected and that the derogation must be proportionate to the emergency, while adopting constitutional as well as extra-constitutional means. It is also correct that emergencies are promulgated all over the world, especially in Asia, Africa and Latin America but their efforts have been to minimize them and to induce the authorities concerned to respect the Fundamental Rights. . In numerous books of distinguished jurists, the term "state of emergency" was interpreted widely to include "regimes of exception", i.e. regimes that had overthrown and not merely suspended the previous constitutional order and had assumed. legislative and executive powers analogous to those under a formal state of emergency.

Reference may be made to the book titled "States of Emergency" Their impact on Human Rights. A brief background which resulted into creation of this book is that the International Commission of Jurists undertook a study of states of emergency. Over 15 countries were selected which had experienced states of emergency in the 1960's and 1970's. The selection covers different kinds of emergency under different regimes and in different regions. It was found that States of emergency are encountered with surprising frequency throughout the world. The chapters on states of emergency in India, Malaysia and Thailand might have been followed by chapters on states of emergency in Bangladesh, Pakistan, Philippines, Singapore, South Korea, Sri Lanka and Taiwan. In Africa, states of emergency have been reported recently in Kenya, Liberia, Madagascar, Namibia, Sierra Leone, Somalia, Sudan, Zambia, Zimbabwe and parts of South Africa, in addition to Ghana and Zaire; in the Middle East in Egypt, Israel, Iran Jordan, Oman and North Yemen, as well as Syria. The frequent recourse to states of emergency in Latin America is well-known to the point where it is sometimes mistakenly thought of as a peculiarly Latin American problem. The chapter on Eastern Europe-makes a special contribution to the literature on this subject, being the first published summary of contemporary law and experience and historical roots of emergency powers in this region, which until recently had often been thought of as somehow exempt from

this phenomenon. It would be advantageous to reproduce the following passages from the above book from pages 413-416, which read thus:

"States of exception are defined as `extraordinary modes of governing provided for by the laws of the country and subject to such laws. for their declaration and implementation', while regimes of exception are defined as `de facto situations of a purely political nature', that is, declarations of a state of exception accompanying `interventions (in Government) which cannot be justified in terms of the constitution or previously established laws."

"On the other hand, a state of emergency need .not entail gross or excessive violations of human rights. The state of emergency is the counterpart in international law of self-defence in penal law. That it may be necessary to suspend respect for certain human rights in order to prevent the nation from falling into chaos is universally admitted. However, the very concept of necessity, when respected, prevents excessive infringements of rights, just as the codification, in accordance with the principle of necessity and proportionality, of a list of non-derogable rights serves to prevent gross violations of human rights. The problem; then, is to prevent abuse of states of emergency, and the formal declaration of ail emergency is a step in this direction."

"Several authors have also noted that, where the state of emergency was imposed during social unrest resulting from grave deterioration of the economic situation, the governments decision to treat the symptoms without treating the disease tends to perpetuate the crisis. "

"'In some cases, as in Thailand, excessive use of emergency powers may be explained in part by the persistence of ancient absolutist moral values and political habits. In others, as several authors have indicated, it is due to the emergence of a modern authoritarian political doctrine, the doctrine of national security. This doctrine, whose effects can be seen in the. chapters on Greece, Turkey and the four Latin American countries, can be summarised in the following terms:

" 1. The. world is divided into two blocs, the East and West, whose values and interests are irreconcilably opposed. .

2. The conflict between them- is not only military, but also `a struggle against the ideology, culture and traditions of the adversary' .

3. The conflict occurs not only internationally but also intra-nationally.

4. The duty of the military authorities to defend the nation, therefore, extends to the combat against any quasi-military, ideological, cultural or other manifestations of this enemy within the country, making whatever sacrifices in the rights of citizens or alterations in the structure of Government this may require.-

It would, therefore, be seen that recurrence of phenomena of imposition of emergencies in extreme situations whether through constitutional or extra-constitutional means, has not been in Pakistan alone but in several other countries all over the world, which has been validated by the Courts depending upon the peculiar circumstances in each case.

264. In the book titled "From Military to Civilian Rule" edited by Constantine P. Danopoulos, the writer has dealt with the history, of many countries including three European countries namely France, Greece and Spain. A large number of countries have been surveyed, with particular reference to the role of military in establishing and sustaining long-term military disengagement from politics; the role of forces lying outside national boundaries on military intervention; establishing and maintaining civilian control of the military. After such survey, the view expressed was that dictatorships (military or otherwise) may be strategically beneficial in the short term but run the risk of damaging the long-term interests of influential nations.

265. Refer Democracy, the Rule of Law and Islam, edited by Eugene Cotran and Adel Omar Sherif , wherein the author extensively dealt with Human Rights abuses and the protection of democracy during states of emergency; states. of emergency in civil and common law. jurisdictions; the current regime in International Human Rights law; the procedural principles of declaration and notification; the substantive principles of exceptional threat, proportionality, non-derogability, non-discrimination and compatibility; deficiencies in international monitoring and control; expanded standards and a new approach to the assessment of states of emergency and came to the conclusion that the framework of the type permits a huge range of variation in the assessment of the situation in individual states" or countries and, thus, of the legitimacy of the emergency powers which have been adopted. In assessing the legitimacy of state action under international human rights law, an understanding of the complexity of the interrelationship between facts on the ground and the relevant human rights norms may be snore valuable. So, too may an understanding of the relationship, the control and eventual elimination of human rights violations, finding a satisfactory political solution to the underlying problem and achieving a full restoration of democracy. The overall objective should be to link the assessment of the legitimacy of national emergency regimes

under international human rights law with the kinds of international action for the prevention and resolution of internal conflicts which have been proposed within the United Nations by .Dr. Boutros Ghali and by others involved in the work of conflict resolution. It would be advantageous to reproduce the following passages at pages 113-1,14 of the above book, under sub-heading "States of Emergency in Civil and Common Law Jurisdiction" which read thus:

"A further important feature of national regimes in respect of emergency powers in both civil and common law is the absence of any effective internal legislative or judicial, control. Though in many states there is a constitutional provision requiring immediate confirmation by the legislature of any declaration of a state of emergency, in practice this gives little protection. States of emergency often arise out of unrest or terrorism on the part of members of a disadvantaged or oppressed minority and in such cases the Government will rarely have any difficulty in securing majority approval for the most repressive measures. And where the executive Government does not control a majority in the legislature, as in the aftermath of most military coups, it is usual for the legislature to be dissolved and for new elections to be promised. Any such elections, however, are likely to be repeatedly delayed and if they do eventually take place the military rulers will often have imposed a new constitutional order under which they hope to secure the support of any newly elected legislature."

266. It will be seen that the `doctrine of necessity' is not restricted to criminal prosecution alone. However, the invocation of the doctrine of State necessity depends upon the peculiar and extraordinary facts and circumstances of a particular situation. ' It is for the Superior Courts alone to decide whether any given peculiar and extraordinary. circumstances warrant the application of the above doctrine or not. This dependence has a direct nexus with what preceded the action itself. The material available on record generally will be treated at par with the "necessity/State necessity/continuity of State" for the purposes of attaining the proportions justifying its own scope as also the future and expected course of action leading to restoration of democracy. It was in this context that the arguments were addressed on behalf of the petitioners, except Mr. Shahid Orakzai, Syed Iqbal Haider and Mr. Habib-ul-Wahab-ul-Khairi to the effect that only the ex-Prime Minister was responsible for the present situation. However that meets the eye is that all the Parliamentarians, the chief Ministers of the Provinces and the Members of the Provincial Assemblies were not in a position to object to any action, which had the blessings of the former Prime Minister

DE FACTO DOCTRINE

267. Mr. Khalid Anwar contended that status of the present Government is not and cannot be that of a de jure government and at best it is that of a de facto government. The validity of the acts done

by officers acting de facto as also de facto regimes has been the subject-matter of various decisions both from Pakistani as well as foreign jurisdictions. It would be advantageous to survey the relevant case law on the subject in order to arrive at proper conclusion.

In the case of Edwin Ward Scadding vm Louis Lorant (10 ER 164), dilating on the scope of de facto and de jure authority, the House of Lords, after consulting all the Judges came to the conclusion that a rate for the relief of the poor, which was lawfully made in other respects, could not be rendered invalid by the circumstance that some of the vestrymen, who concurred in making it, were vestrymen only de facto, and not de jure. Lord Chancellor St. Leonards enunciated the principle thus:

"With regard to the competence of the vestrymen, who were vestrymen de facto but not vestrymen de jure, to make the rate, your lordships will see at once the importance of that objection, when you consider how many public offices and persons there are who are charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create' uncertainty with, respect to the obedience to public officers, and it might also lead to persons, instead of resorting to the ordinary legal remedies to set right anything done by the officers, taking the law into their own hands.

I think, therefore, that the principle laid down by the learned Judges, as the principle of law, is one that is in conformity with public convenience, with reference to the discharge of the duties connected with the office."

In the case of Toronto R. Co. and City of Toronto (46 DLR 547), the Ontario Supreme Court, after reviewing a' large number of decisions both American and English, came to the conclusion: -

"That it is not open to attack, in a collateral proceeding, the status of a de facto Judge, having at least a colourable title to the office, and that his acts are valid, is clear, I think, on principle and on authority, and it is also clear that the proper proceeding to question his right to the office is by quo warranto information."

Colley in his book on `Constitutional Limitations', Eighth Edition, Volume 2, page 1357, dealing with the subject, says as follows:

"No one is under obligation to recognize or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent confusion in the conduct of public business and insecurity and private rights, the acts of officers de facto are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by someone claiming the office de jure, or except when the person himself attempts to build up some 'right, or claim some privilege or emolument by reason of being the officer which he claims t0 be. In all other cases the acts of an officer de facto are as valid and effectual, while he is suffered to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. This is an important principle which finds concise expression in the legal maxim that the acts of officers de facto cannot be questioned collaterally."

An officer de facto is defined by Colley in his above book at page 1353 as:

"One who by some colour of right is in possession of an office and for the time being performs its duties with public acquiescence though having no right in fact."

'In the case of Farzand Ali v. Province of West Pakistan PLD 1970 SC 98, this Court after considering the above cases came to the following conclusion: -

"This de facto doctrine is a doctrine of necessity, to bring about regularity and prevent confusion in. the conduct of public business and promote security of private rights."

In the book titled "Oxford Essays in Jurisprudence", compiled by J.M. Eekelaar, the Principles of Revolutionary Legality have-been given in Chapter II thereof. The relevant extracts from pages 29 and 39 to 43 have been reproduced in paragraph 40 ante.

After going through the record, we are inclined to hold that though initially the status of the present Government was de facto, but in view of J the validation accorded through the Short Order, it has attained the status of a, de jure Government.

VALIDATION OF THE PROCLAMATION, THE PCO 1 OF 1999 AND ORDER 1 OF 2000

268. The validity of the Proclamation, dated 14th October, 1999 and other succeeding documents falling in the same category depends upon a tentative assessment of the situation to be made with a view to giving effect to the attending circumstances. It is common ground between the petitioners, who have appeared in person, the learned counsel appearing on behalf of some of the petitioners, Syed Sharifuddin Pirzada, learned Sr. ASC, -as well as. the learned Attorney-General for Pakistan appearing on behalf of the - Federation, Dr. Farooq Hasan, appearing on behalf of the Lahore High Court Bar Association as also Mr. S.M. Zafar, learned Sr.ASC appearing as amicus cunae, that the situation created and/or which preceded the Proclamation dated 12th October, 1999 is the basis for the extra constitutional measure. However, M/s. Shahid Orakzai and Syed Iqbal Haider were of the view that the Proclamation and the other instruments issued by the Chief Executive are in accordance with the Constitution. It is not necessary to deal with the latter contention of M/s. Orakzai and Syed Iqbal Haider, which is ex facie untenable. Mr. Khairi's contention was that the Proclamation to the extent it impinges on the independence of Judiciary is not valid. We are also inclined to the same view.

269. The main thrust of the arguments of Ch. Muhammad Farooq, learned Sr. ASC, appearing on behalf of the petitioner in Constitutional Petition No.62 of 1999 was that the jurisdiction of the Courts cannot be ousted, civil liberties cannot be curtailed, principle of trichotomy of powers cannot be disturbed, the doctrine of State. necessity is outdated and even if it is allowed to be invoked, it should be for a limited period as contemplated in Sh. Liaqat Hussain's case (supra), emergency having already been proclaimed under Article 232 of the Constitution, there was no warrant for Proclamation all over again, the Armed Forces under Article 245 of the Constitution are required to work under the control and command of the Federal Government as mandated by the Constitution and not by superseding them, the Prime Minister and his cabinet colleagues were responsible only to the National Assembly under Article 91(4) of the Constitution and not to the Armed Forces, therefore, it was argued that the Proclamation of Emergency/PCO and the entire superstructure thereon is outside the contemplation of the Constitution.

270. There is no cavil with the proposition advanced by Ch. Muhammad Farooq regarding the constitutional position as also the role of the Army and the functions which the Armed Forces, the Prime Minister and Parliament/Assemblies perform under the Constitution. Be that as it may, admittedly the impugned action has not been taken under any constitutional provision, but is the

result of an extra-constitutional measure and, therefore, reference to the above constitutional provisions is of no consequence. The sole question for consideration is whether the extra-constitutional measure taken by the Armed Forces could be validated on any ground or not. Recognition of a situation of whatever magnitude does call for remedial measures to be considered/contemplated with a view to purging the situation on the ground. All that is required to be considered is that the action should have a nexus with the facts on the ground. Such consideration can be undertaken only by the Superior Courts in the exercise of their powers under Articles 199 and 184 of the Constitution. It is the duty of the Superior Courts that they recognize the evil, suggest remedial measures therefor and lay down infrastructure for a journey leading to the restoration of the democratic processes/institutions as expeditiously as possible. If those responsible for achieving these objectives fall short of the measure within the contemplation of the law during their tenures respectively, then the remedy lies in identifying the facts on the ground and taking remedial measures 'to suppress the evil. The action of 12th October, 1999 being what it is, qualifies for validation on the ground of State necessity/survival. It is for the representatives of the people to see to it that everything is in order and nobody can raise his little finger when their actions are in line with the fundamentals of the Constitution. No rule except that by the representatives of the people within the contemplation of the Constitution and the law has the support of the Superior Judiciary. We are firmly committed to the governance of the country by the people's representatives and we reiterate the definition of the term `democracy' to the effect that "it is Government of the people, by the people and for the people" and not by the Army rule for- an indefinite period. It has already been emphasized in the Short Order that prolonged .involvement of the Army in civil affairs runs a g-rive risk of politicizing- it, which would not be in national interest and that civilian rule in the country must be restored within the K shortest possible time after achieving the declared objectives as reflected in the speeches of the Chief Executive, dated 13th and 17th October, 1999, which necessitated the military takeover. (Underlining is by way of emphasis)

271. An overall view of the whole spectrum of circumstances prevalent on or before 12th October, 1999 reveals that the representatives of the people who were responsible for running the affairs of the State were accused of corruption and corrupt practices and failed to establish good governance in the country as a result whereof a large number of references have been filed against the former Prime Minister, Ministers. Parliamentarians and members of the Provincial Assemblies for their disqualification on account thereof. The process of accountability carried out by the former Government was shady, inasmuch as, either it was directed against the political rivals or it was not being pursued with due diligence. We have also noted with concern that all institutions of the State including L Judiciary were being systematically-destroyed in the pursuit of self-serving policies. We uphold the plea raised on behalf of the Federation that the democratic institutions were not functioning in accordance with the Constitution, they had become privy to the one man rule and the very purposes for which they were established stood defeated by their passive conduct.

272. We see no ground to disbelieve the statement made by the Chief of Army Staff/Chief Executive that attempts were made to politicise the army, destabilise it and create dissension within

its ranks. Had the former Prime Minister been successful in his designs, there would have been chaos and anarchy rather a situation of civil war where some factions of Armed Forces were fighting against others.

273. There is no force in the submission of Mr. Shahid Orakzai that the impugned action of the Armed Forces was within the contemplation of the Constitution as envisaged by Articles 46, 48., 90 and 99 of the Constitution. Suffice it to say that extra constitutional nature of the situation did not have any nexus/connection with the provisions of the Constitution relating to the working of the Federal Government in line with the provisions for its continuation in office in the event of its dismissal "within the contemplation of the Constitution". Put differently, the action dated 12-10-1999 is in itself sufficient to be equated with something beyond the contemplation of the Constitution and, therefore, no question regarding the same being attended to by the Courts for resolution by treating it as having been taken under the Constitution arises. Viewed in this context, the reference to Articles 46, 48, 90 and 99 of the Constitution by Mr. Shahid Orakzai is wholly irrelevant. The above Articles do not provide a solution regarding the circumstances prevalent on 12th October, 1999.

IMPORT OF THE TERM `CHIEF EXECUTIVE'

274. In the course of hearing of these petitions, some criticism was made in respect of expression "Chief Executive". It may be observed that this expression is well-recognised in Constitutional law, inasmuch as, the term "Chief Executive" means President where there is a Presidential form of Government and Prime Minister in a Parliamentary form of Government. In "Indian Constitutional Law" 4th Edition, at page 20 thereof, H.M. Seervai, treats the President of India as the `Chief Executive'. In the case of Fazalul Qadir Chaudhry PLD 1963 SC 486 this Court treated the President as Chief Executive. Similarly, in American Constitutional Law, 1995 Edition, at M page 204, President of America is described as `Chief Executive'. The Constitution of 1973 envisages parliamentary form of Government where the Prime Minister acts as the Chief Executive of the country. By means of the Proclamation of Emergency as also the PCO 1 of 1999, the Constitution has only been held, in abeyance and the country is to be run as nearly as may be in accordance with the Constitution, therefore, General Pervez Musharraf while taking over the affairs of the country assumed to himself the title of "Chief Executive". Since practically, he is performing the functions of the Prime Minister, he holds the position of Chief Executive in the scheme of the-Constitution and the criticism on this aspect is uncalled for.

AMENDMENT OF THE CONSTITUTION

275. After having validated the ,action of l2th October, 1999 on the touchstone of the doctrine of State Necessity, it is necessary to consider the next very important and allied question as to whether the Chief Executive should be given the power to amend the Constitution and if so, to what extent? We have taken pains to examine the pros and cons of this issue, which is definitely ,of far reaching consequences. Mr. Khalid Anwar vehemently opposed the conferment of such a power on the Chief Executive on the ground that it is opposed to the doctrine of separation of powers, which has evolved. through the history of civilization. He submitted that all men, be they wise such as Socrates, the most knowledgeable such as Aristotle and the most virtuous such as Imam Abu Hanifa, need be subject to the limits of checks and balances to prevent tyranny. He submitted that the Chief Executive himself has pledged to preserve the Constitution, inasmuch as it -is the case of the Government itself that they. have not proclaimed Martial Law and only Emergency has been proclaimed for a transitional period to save the system and, thus, the Court should restrict him within the legal/constitutional limits.

276. Mr. S.M. Zafar, after drawing a distinction between a coup d'etat and a revolution submitted that the change on 12th October, 1999, does not claim to be based on the principle of revolutionary legality, hence the principle of Dosso's case is not relevant and Kelsen's theory is not applicable to the facts and circumstances of the present case. The logical conclusion in view thereof is that the new regime, if it is not a revolutionary regime, cannot claim to be the law giving source and its legislative powers are to be spelt out by the Courts. The case of the Government on the other hand is that once it is found that the prevailing situation did warrant an abrupt change and there was no remedy available under the prevailing Legal Order, the persons responsible for the change are fully competent to bring about such change in law, including the Constitution, which intends to correct the flawed Old Legal Order for preservation of the State as well as welfare of the people as held in Begum Nusrat Bhutto's case (supra). The learned Attorney-General further submitted that revolutionary political change is not in derogation of the Objectives Resolution under Article 2A of the Constitution, as ultimately the method of Governance shall be through chosen representatives of the people.

277. Lord Pearce in the Privy Council decision of Madzimbuto v. Lardner Burke (1968) 3 AER 561, on the question of change of basic Order of State held as under:-

"It required the recognition of some acts of the illegal revolutionary Government. If one disregards all illegal provisions for the needs of the country, there is a vacuum in the law and chaos" (at p. 736)

In the leading American case, Texas v. White, 74 US (7 Wall) 700 (at p.733), 1868, the Court allowed recognition and allowance for "all acts to be validly performed which are necessary to

peace and good order among citizens." Thus, all actions and acts necessary for the running of the State are naturally to be performed.

In Madzimbuto v. Lardner Burke, 1966 Rhodesian L.Rep. 228 (General Division) Justice Lewis said:

"In circumstances wherein a Unilateral Declaration of Independence has taken place, there are measures by the Government which is in effective control which must of necessity receive recognition from the Courts on the simple basis that one cannot have a complete vacuum in the Law, and all such measures as are necessary for the purposes of ordinary good Government, and maintenance of law and order should receive recognition from Courts. (at p. 233).

278. Mr.S.M.Zafar has tried to distinguish between coup d'etat and revolution with reference to the nature of powers that may be conferred on the incumbent in presenti. He was of the view that the present change of government in the country was in the nature of coup d'etat and not revolution and, therefore, minimum and limited powers to run the affairs of the state should be conceded to the Chief Executive for the transitional period to enable him to restore the democratic process in the country at the earliest. In the context of the submission made by Mr.S.M.Zafar reference .may be made to a leading work on Revolution and Political Change. by C. Welch & Bunker Taintor, who say : "Revolution involves the rapid tearing down of existing .political institutions and building them anew on different foundations. On Revolutions, by H. Arendt it is said:

"Coups d'etat and palace revolutions, where power changes from one man to another, from one clique to another, depending upon on the form of Government in which the coup d'etat occurs have been less feared because of the change they bring about is circumcised to the sphere of Government itself and carries a minimum of unquiet to the people at large. "

279. Professor de Smith while discussing the Cyprus case of Attorney General v. Mustafa Ibrahim, 1964 Cyprus L.R. 195 Sup Ct. observed that four concrete requisite elements of practical realism greatly influence a Court in such a situation. These are:-

(1) The existence of imperative inevitability or exceptional circumstances when the coup occurred.

(2) No other remedy was available in that system to meet the exceptional emergency.

(3) The measures taken by the taking over military authority or group is both proportionate and necessary.

(4) The alteration by the usurper must be of admittedly a temporary nature. (See de Smith, Constitutional Lawyers in Revolutionary Situations, 7 W. Ont. L.R., 1968, 24 at 100).

280. We are of the view that the above question is hyper-technical in nature and no tangible consequences will result by particularly using one or the other term. In coup d'etat as well in revolution, power changes from one man to another from one clique to another depending upon the facts and circumstances of each case. Coup d'etat is generally undertaken to achieve a particular objective motivated by various considerations. Leading Oxford Professor A.Honore, in his work while discussing the cases of Pakistan, Uganda and Rhodesia under the caption "Revolutions" published in the Irish Jurist, 1977 also took the same view. We are, therefore, of the view that in the context of the present case the terms. coup d'etat and revolution are interchangeable and, nothing substantial would, turn on considering it from one angel and another.

281. The question arises whether the Chief Executive can be granted unfettered powers to amend the Constitution. Mr. Khalid Anwar emphasised that in case the Army action is condoned/validated this Court must succinctly state whether the Chief Executive has power to amend the Constitution and if so, subject to what limitations. He emphasised that in the first instance power to amend the Constitution should not be conceded to the Chief Executive and Begum Nusrat Bhutto's case (supra) should be revisited. In case this Court follows the dictum of Begum Bhutto's case (supra), the power to amend the Constitution by the Chief Executive must be stated with particularity and the fields which are not to be touched should be specifically stated. Mr. -S. Sharifuddin Pirzada argued that once the Army action through extra-constitutional measure is validated, the Chief Executive should be given the power to amend the Constitution. Same view was expressed by the learned Attorney-General and Dr. Farooq Hassan. We are y of the -considered view that if the Parliament cannot alter the basic features of the Constitution, as held by this Court in Achakzai's case (supra), power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by the Parliament. Clearly, unbridled powers to amend the Constitution cannot be given to he Chief Executive even during the transitional period even on the touchstone of `State necessity'. We have stated in unambiguous terms in the Short Order that the Constitution of Pakistan is the supreme law of the land and its basic features i.e independence of Judiciary, .federalism and parliamentary form of government blended with

Islamic Provision cannot be altered even by the Parliament. Resultantly, the power of the Chief Executive to amend the Constitution is strictly circumscribed by the limitations laid down in the Short Order vide sub-paragraphs (i) to (vii) of paragraph 6.

282. We have held in the Short Order that the cases of learned former I Chief Justice and Judges of the Supreme Court, who had not taken oath under the Oath of Office (Judges) Order, 2000 (Order 1 of 2000), and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High Court, who were not given oath, cannot be reopened, being hit by the doctrine of past and closed transaction.

283. The practical effect of the above observation is that the action of the Chief Executive in this behalf has been validated. It is a well-settled principle that in such situations the Court may, refuse relief in respect of a particular decision, but go on to determine the general question of law or interpretation that the case raises. Clearly, the Judges of the Superior Judiciary enjoy constitutional guarantee against arbitrary removal. They can be removed only by following the procedure laid down in Article 209 of the Constitution by filing an appropriate reference before the Supreme .Judicial Council and not otherwise. The validity of the action of the Chief Executive was open to question on the touchstone of Article 209 of the Constitution. But none of the Judges took any remedial steps and accepted pension as also the right-to practice law and thereby acquiesced in the action. Furthermore, the appropriate course of action for this Court in these proceedings would be to declare the law to avoid the recurrence in future, but not to upset earlier actions or decisions taken in this behalf by the Chief Executive, these being past and closed transactions. The principle is well-settled that the Courts can refuse relief in individual cases even though the action is flawed, depending upon the facts and circumstances of each case. The action of Chief Executive in the context given above has not encroached on the judicial power or impaired it in the process. However, the observations made herein as to the declaration of law under Article 209 of the Constitution would not entitle the relevant authorities or this Court to reopen the cases of the above Judges which have become final. On the question of legislative power in relation to Court's declaration of law, the matter stands concluded by the judgment of this Court in Muhammad Yusuf v. The Chief Settlement and Rehabilitation Commissioner Pakistan, Lahore and another PLD 1968 SC 101 in the following terms:

"This judgment was delivered on the 2nd November, 1964, and its consequence was that as from that date all Courts subordinate to the Supreme Court and all executive and quasi-judicial authorities were obliged by virtue of the Constitution to apply the rule as laid down by the Supreme Court in cases coming up before them for decision. It did not have, and it cannot be contended that it had, the effect of altering the law as from the commencement of the Act so as to render void of its own force all relevant orders of the Settlement Authorities or of the High Court made in the light of the earlier interpretation which was that the exercise of the delegated power was subject to the provisions in Chapter VI of the Act."

284. We; therefore, declare that the Judges of the Supreme Court and High Courts cannot be removed without resorting to the procedure prescribed in Article 209 of the Constitution, but the cases of Judges who S ceased to be Judges of the Supreme Court and High Courts by virtue of Oath S of Office (Judges) Order, 2000 (Order 1 of 2000) is hit by the doctrine of past and closed transaction and cannot be reopened.

285. Towards the close of his arguments, Mr. Khalid Anwar submitted that this Court should lay down a roadmap with a timetable for the return of Constitutional governance. Mr. Haleem Pirzada, President, Supreme Court Bar Association submitted that 12 months' time from now may be provided to the Armed Forces so that they do the cleansing and go back. During the course of his arguments, Mr. S.M. Zafar, amicus curiae stated that prolonged stay of the Armed Forces in the political arena would damage its professionalism, hence they should retreat to their Barracks as early as possible. On this issue, the learned Attorney-General made the following statement:

"That the Federation -intends to restore true representative democracy in the country as early as possible. It is, however, not possible to give specific timeframe for the above among others for the reasons that the authorities/Government require time for:

(a) Revival of country's economy, which stands ruined, as submitted before this Court;

(b) For completion of the process of accountability;

(c) Recovery of huge plundered national wealth including bank loans running into billions of rupees and foreign exchange abroad worth billions of US dollars;

(d) The task of unavoidable electoral reforms including preparation of fresh electoral rolls;

(e) To ensure harmonious and efficient working of the important organs of the State, stable and good governance including maintenance of law and order, to prevent abuse of power, and to ensure and safeguard smooth functioning and enjoyment of democracy by the people."

286. We are not in favour of an Army rule in preference to a democratic rule. There were, however, evils of grave magnitude with the effect that the civilian governments could not continue to run the affairs of the country in the face of complete breakdown. The remedy to the said evil was the holding of fair and impartial elections by the Chief Election Commissioner at the earliest possible time, but the same could not be achieved till the electoral rolls are updated. Ordinarily, we would have allowed minimum time for holding of fresh elections as contemplated under the Constitution, but the learned Attorney-General made a statement at the Bar that as per report of the Chief Election Commissioner, updating of the electoral rolls could not be done before two years and thereafter objections and delimitation process etc. were to be attended to. Mr.Sartaj Aziz, Senator, and the M:Q.M. in their respective Petitions Nos.i5 and 53 of 1996 had also taken the stand that in the absence of proper and authentic electoral rolls, millions of people will be disenfranchised. This statement of the learned Attorney-General was not rebutted. This being so, there is no choice but to grant reasonable time to enable the Chief Executive to restore the democratic institutions to the rightful holders of the Office of public representatives under the Constitution.

287. The above are the reasons in support of the Short Order, dated 12th May. 2000, whereby the above Constitution Petitions were disposed of in the terms mentioned in it. The Short Order reads thus: -

SHORT ORDER

For detailed reasons to be recorded later, we intend to dispose of the above petitions under Article 184(3) of the Constitution, directed against the Army take-over of 12th October, 1999, the Proclamation of Emergency dated 14th October, 1999, the Provisional Constitution Order No. 1 of 1999 and the Oath Of Office (Judges) Order No. 1 of 2000, in the following terms:-

INDEPENDENCE OF JUDICIARY

Stability in the system, success of the Government, democracy, good governance, economic stability, prosperity of the people, tranquillity, peace and maintenance of law and order depend to a considerable degree on the interpretation of Constitution and legislative instruments by the Superior Courts. ‘ It is, therefore, of utmost importance that the Judiciary is independent and no restraints are placed on its performance and operation. It claims and has always claimed that it has the right to interpret the Constitution or any legislative .instrument and to say as to what a particular provision of the Constitution or a legislative instrument means or does not mean, even if that particular provision is a provision seeking to oust the jurisdiction of this Court. Under the mandate

of the Constitution, the Courts exercise their jurisdiction as conferred upon them by the Constitution or the law. Therefore, so long as the Superior Courts exist, they shall continue to exercise powers and functions within the domain of their jurisdiction and shall also continue to exercise power of judicial review in respect of any law or provision of law, which comes for examination before the Superior Courts to ensure that all persons are able to live securely under the rule of law; to, promote, within the proper limits of judicial functions, the observance and the attainment of human and Fundamental Rights; and to administer justice. impartially among persons and between the persons and the State, which is a sine qua non for the maintenance of independence of Judiciary and encouragement of public confidence, in the judicial system.

TAKING OF OATH UNDER PCO NO. 1 OF 1999

Fresh oath under Oath of Office (Judges) Order No. 1 of 2000, does not in any way preclude the Judges of this Court from examining the questions raised in the above petitions, which have to be decided in accordance with their conscience and law so as to resolve the grave crises and avoid disaster by preventing imposition of Martial Law for which the Constitution does not provide any remedy.

New oath of office ‘was taken by the Judges of this Court under PCO No. 1 of 1999 read with Oath of Office (Judges) Order No. 1 of 2000 with a view to reiterating the well-established principle that the first and the foremost duty of the Judges of the Superior Courts is to save the judicial organ of the State. This was exactly what was done. By Virtue of PCO No. 1 of 1999, the Constitution has not lost its effect in its entirety although its observance as a whole has been interrupted for a transitional period. The activity launched by the Armed Forces through an extra .constitutional measure, involves the violation of “some of the rights” protected by the Constitution, which still. holds the field but some of its provisions have been held in abeyance. A duty is cast upon the Superior Judiciary to offer some recompense for those rights which were purportedly violated in view of the promulgation of PCO No. 1 of 1999. This could be achieved only by taking ‘ the Oath and not by declining to do so and thereby becoming a party to the closure of the Courts, which would not have solved any problem whatsoever but would have resulted in chaos, anarchy and disruption of peaceful life. Independence of Judiciary does not mean that Judges should quit their jobs and become instrumental in the closure of the Courts. Indeed, the latter course would have been the most detestable thing to happen. Independence of Judiciary means that the contentious matters, of whatever magnitude they may be, should be decided/resolved by the Judges of the Superior Courts according to their conscience. This Court, while performing its role as “the beneficial expression of a laudable political realism”, had three options open to it in relation to the situation arising out of the military take-over on Twelfth day of October, 1999: firstly, it could tender resignation en bloc, which most certainly could be equated with sanctifying (a) chaos/anarchy and (b) denial of access to justice to every citizen of Pakistan wherever he may be; secondly, a complete surrender to the present regime by dismissing these

petitions for lack of jurisdiction in view of the purported ouster of its jurisdiction under PCO No. 1 of 1999 and thirdly, acceptance of the situation as it is, in an attempt to save what "institutional values remained to be saved". This Court, after conscious deliberations and in an endeavour to defend and preserve the national independence, the security and stability of Pakistan, sovereignty and honour of the country and to safeguard the interest of the community as a whole, decided to maintain and uphold the independence of Judiciary, which, in its turn, would protect the State fabric and guarantee human rights/Fundamental Rights. It took the Oath under PCO . No. 1 of 1999 so as to secure the enforcement of law, extend help to the law enforcing agencies for maintenance of public order and with `a view to restoring democratic institutions, achieving their stability and guaranteeing constitutional rights to the people of Pakistan.

Oath of Office prescribed under Articles 178 and 194 of the Constitution for the Judges of the Superior Courts contains a specific provision that a Judge shall abide by the Code of Conduct issued by the Supreme Judicial Council. Same is the position with regard to the provisions regarding Oath of Office (Judges) Order No. 1 of 2000. The precise provisions in the Oath of Office (Judges) Order, 2000 are that a Judge, to whom oath is administered, shall abide by the provisions of Proclamation of Emergency of Fourteenth day of October, 1999, PCO No. 1 of 1999, as amended, and the Code of Conduct issued by the Supreme Judicial Council. But there is specific omission of words, "to preserve and defend the Constitution". Adherence to the Code of Conduct has not been subjected to any pre-conditions and there can be no deviation from it by a Judge who takes oath either under the Constitution or PCO No. 1 of 1999 or Oath of Office (Judges) Order No. 1 of 2000. One of the requirements of the Code of Conduct is that the oath of a Judge implies complete submission to the Constitution, -and under the Constitution to the law. Subject to these governing obligations, his function of interpretation and application of the Constitution and the law is to be discharged for the maintenance of the Rule of Law over the whole range of human activities within the nation. Thus, the new Oath merely indicates that the Superior Judiciary, like the rest of the country had accepted the fact that on 12th October, 1999, a radical transformation took place.

MAINTAINABILITY OF PETITIONS

Notwithstanding anything contained in the Proclamation of Emergency of the Fourteenth day of October, 1999, the Provisional Constitution Order No. 1 of 1999, as amended and the Oath of Office (Judges) Order No. 1 of 2000, all of which purportedly restrained this Court from calling in question or permitting to call in question the validity of any of the provisions thereof, this Court, in the exercise of its inherent powers of judicial review has the right to examine the validity of the aforesaid instruments. Additionally, submission of the Federation in response to the Court's notice concerning its own legitimacy also suggests that this Court has an inherent authority, arising from the submission of both the parties to its jurisdiction, notwithstanding. the preliminary objection raised in the written statement as to the maintainability of the above petitions. In the exercise of

its right to interpret the law, this Court has to decide the precise nature of the ouster clause in the above instruments and the extent to which the jurisdiction of the Courts has been ousted, in conformity with the well-established principles. that the provisions seeking to oust the jurisdiction of the Superior Courts are to be construed strictly with a pronounced leaning against ouster. The Constitution Petitions filed by the petitioners under Article 184(3) of the Constitution are, therefore, maintainable.

INTERVENTION BY ARMED FORCES

National Assembly is the highest representative body, which reflects the will and aspirations of the people of Pakistan. Similar is the status of a Provincial Assembly in a Province. Senate, being a symbol of unity of the federating units has its own utility for the country as a whole. It is, therefore, of utmost importance that the impugned suspension of the above democratic institutions is examined with great care and caution, otherwise it would adversely affect the democratic processes in the country, which may cause instability, impair the economic growth and resultantly ‘ prove detrimental to the general well-being of the people. However, where the representatives of the people, who are responsible for running the affairs of the State are themselves accused of massive corruption and corrupt practices and in the public as well as private sectors are benefiting therefrom and resist establishing good governance; where a large number of references have been filed against the former Prime Minister, Ministers, Parliamentarians and members of the Provincial Assemblies for their disqualification on account of corruption and corrupt practices; where there is a general perception that corruption is being practised by diversified strata including politicians. parliamentarians public officials and ordinary citizens and that a number of Parliamentarians and members of the Provincial Assemblies misdeclared their assets before Election Commission and Tax Authorities; where there was no political and economic stability and bank loan defaults were rampant and that as per report of Governor, State Bank of Pakistan Rs. 356 billion are payable by the, bank defaulters up to 12-10-1999. having no accountability and transparency; where economic stability in Pakistan was highly precarious and there was an overall economic slowdown as GDP growth during the past three years had hardly kept pace with the growth of population; where Pakistan has a debt’ burden, which equals the country’s entire national income; where all the institutions of the State were being systematically destroyed and the economy was in a state of collapse due to. self-serving policies of the previous government, which had threatened the existence, security, economic life, financial stability and credit of Pakistan; where a situation had arisen under which the democratic institutions were not functioning in accordance with the provisions of the Constitution, inasmuch as, the Senate and the National and Provincial Assemblies were closely associated with the former Prime Minister and there was no real democracy because the country was, by and large, under one man rule; where an attempt was made to politicize the Army, destabilize it and create dissension within its ranks and where the Judiciary was ridiculed, leaving no stone unturned to disparage and malign it by making derogatory and contemptuous speeches by some of the members of the previous ruling party inside and outside the Parliament and no. Reference was made tar the Chief Election Commissioner for their, disqualification as members of the Parliament under Article 63 (2) of the Constitution; where the disparaging remarks

against the Judiciary crossed all limits with the rendering of judgment by this Court in the case of Sh. Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504, declaring the establishment of Military Courts as ultra vires the Constitution, which resulted into a slanderous campaign against the Judiciary launched by the former Prime Minister registering his helplessness in. the face of the Judiciary not allowing him the establishment of Military Courts as a mode of speedy justice; where the image of the Judiciary was tarnished under a well conceived design; where the telephones of the Judges of the Superior Courts and other personalities were tapped in spite of the law laid down by this i Court in the case of Mohtarma Benazir Rhutto v. President of Pakistan PLD 1998 SC 388, that tapping of telephones and eavesdropping was immoral, illegal and unconstitutional; where storming of the Supreme Court was resorted to allegedly by some of the leaders and activists of the Pakistan Muslim League which ultimately led to the issuance of contempt notices against them/contemners by the Full Bench of this Court in a pending appeal; where Mian Nawaz Sharif's constitutional and moral authority stood completely eroded and where situation was somewhat similar and analogous to the situation that was prevalent in July, 1977, the extra constitutional step of taking over the affairs of the country by the Armed Forces for a transitional period to prevent any further destabilization, to create corruption free atmosphere at national level through transparent accountability and revive the economy before restoration of democratic institutions under the Constitution, is validated, in that Constitution offered no solution to the present crisis.

In the Commonwealth Finance Ministers Meeting, held on 21-23rd September, 1999, commenting on the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption, it was, inter alia, observed that; "Good governance is not a luxury but a basic requirement for development. Corruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly ."……..The Commonwealth should firmly commit itself to the policy of "zero tolerance" of all types of corruption. This policy must permeate national political cultures, governance, legal systems and administration. Where corruption is ingrained and pervasive, especially at the highest political levels, its eradication may require a sustained effort over a protracted period of time. However, the policy of "zero tolerance" should be adopted froth the outset, demonstrating a serious commitment to pursue the fight against corruption. The Commonwealth should remain firm inns determination that the high standards and goals enunciated in the 1991 Harare Declaration are upheld and enhanced. Creating an environment, which is corruption-free will require vigorous actions at the national and international levels, and within the Commonwealth itself. These actions should encompass the prevention of corruption, the enforcement of laws against it and the mobilization of public support for anti-corruption strategies".

Probably, the situation could have been avoided if Article 58(2)(b) ; of the Constitution had been .in the field, which maintained parliamentary form of Government and had provided checks and balances between the powers of the President and the Prime Minister to let the system run without any let or hindrance to forestall the situation in which Martial Law can be imposed. With the repeal of Article 58(2)(b) of the Constitution, there was no remedy provided in the Constitution

to meet the situation like the present one with which the country was confronted, therefore, constitutional deviation made by the Chief of the Army Staff, General Pervez Musharraf for the welfare of the people rather than abrogating the Constitution or imposing Martial Law by means of an extra constitutional measure is validated for a transitional period on ground of State necessity and on the principle that it is in public interest to accord legal recognition to the present regime with a view to achieving his declared objectives and that it is in the interest of the community that order be preserved. Legal recognition/ legitimacy can be accorded to the present regime also on the principle that the Government should be by the consent of the governed, whether voters or no; Here there is an implied consent of the governed i.e. the people of Pakistani in general including politicians/parliamentarians, etc. to the army take-over, in that no protests worth the name or agitations have been launched against the army take-over and/or its continuance. The Court can take judicial notice of the fact that the people of Pakistan have generally welcomed the army take-over due to their avowed intention' to initiate the process of across the board and transparent accountability against those, alleged of corruption in every walk of life, of abuse of national wealth and A of not taking appropriate measures for stabilizing the economy and democratic institutions. Another principle, which is attracted is that since an extra-constitutional action has been taken by General Pervez Musharraf wielding effective political power, it is open to the Court to steer a middle course so as to ensure that the frame-work of the pre-existing Order survives but the constitutional deviation therefrom be justified on the principle of necessity, rendering lawful what would otherwise be unlawful. However, prolonged involvement of the Army in civil affairs runs a grave risk of politicizing it, which would not be in national interest, therefore, civilian rule in the country must be restored within the shortest possible time after achieving the declared objectives, which necessitated the military take over and Proclamation of Emergency as spelt out from the speeches of the Chief Executive, dated 13th and 17th October, 1999. The acceptance of the above principles do not imply abdication from judicial review in the transient. suspension of the previous legal order.

We accordingly hold as under:-

1. On 12th October, 1999 a situation arose for which the Constitution provided no solution and the intervention by the Armed Forces through an extra constitutional measure became inevitable, which is hereby validated on the basis of the doctrine of State necessity and the principle of salus populi suprema lex as embodied in Begum Nusrat Bhutto's case. The doctrine of State necessity is recognised not only in Islam and other religions of the world but also accepted by the eminent international jurists including Hugo, Grotius, Chitty and De Smith and some Superior Courts from foreign jurisdiction to fill a political vacuum and bridge the gap.

2. Sufficient corroborative and confirmatory material has been produced by the Federal Government in support of the intervention by the Armed Forces through extra-constitutional measure. The material consisting of newspaper clippings, writings, etc. in support of the impugned

intervention is relevant and has been taken into consideration as admissible material on the basis of which a person of ordinary prudence would conclude that the matters and events narrated therein did occur. The findings recorded herein are confined to the controversies involved in these cases alone.

3. All past and closed transactions, as well as such executive actions as were required for the orderly running of the State and all acts, which tended to advance or promote the good of the people, are also validated.

4. That the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held to abeyance on account of State necessity;

5. That the Superior Courts continue to function under the Constitution. The mere fact that the Judges of the Superior Courts have taken a new oath under the Oath of Office (Judges) Order No.l of 2000, does not in any manner derogate from this position, as the Courts had been originally established under the 1973. Constitution, and have continued in their functions in spite of the Proclamation of Emergency and PCO No. 1 of 1999 and other legislative instruments issued by the Chief Executive from time to time;

6(i) That General Pervez Musharraf, Chairman, Joint Chiefs of Staff Committee and Chief of Army Staff through Proclamation of Emergency, dated the 14th October, 1999, followed by PCO 1 of 1999, whereby he has been described as Chief Executive, having validly assumed power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures as enumerated hereinafter, namely:-

(a) All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it;

(b) All acts which tend to advance or promote the good of the people;

(c) All acts required to be done for the ordinary orderly running of the State; and

(d) All such measures as would establish or lead to the establishment of the declared objectives of the Chief Executive.

(ii) That Constitutional Amendments by the Chief Executive can be resorted to only if the Constitution fails to provide a solution; for attainment of his declared objectives and further that the power to amend the Constitution by virtue of clause (6) subclause (i) (a) ibid is controlled by sub-clauses (b)(c) and (d) in the same clause.

(iii) That no amendment shall be made in the salient features of the Constitution i.e. independence of Judiciary, federalism, parliamentary form of Government blended with Islamic provisions.

(iv) That Fundamental Rights provided in Part II, Chapter 1 of the Constitution shall continue to hold the field but the State will be authorized to make any law or take any executive action in deviation of Articles 15, 16, 17, 18, 19 and 24 as contemplated by Article 233 (1) of the Constitution, keeping in view the language of Articles 10, 23 and 25 thereof.

(v) That these acts, or any of them, may be performed or carried out by means of orders issued by the Chief Executive or through Ordinances on his advice;

(vi) That the Superior Courts continue to have the power of judicial review, to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of State necessity as stated above. Their powers under; Article 199 of the Constitution, thus, remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf.

(vii) That the Courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches, dated 13th and 17th October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and

acts done including the legislative measures, shall also be subject to judicial review by the Superior Courts.

6. That the previous Proclamation of Emergency of 28th May, 1998 was issued under Article 232(1) of the Constitution whereas the present Emergency of 14th October, 1999 was proclaimed by way of an extra-Constitutional step as a follow up of the Army take-over which also stands validated notwithstanding the continuance of the previous Emergency which still holds the field.

7. That the validity of the National Accountability Bureau Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage.

8. That the cases of learned former Chief Justice and Judges of the Supreme Court, who had not taken oath under the Oath of Office (Judges) Order, 2000 (Order 1 of 2000), and those Judges of the Lahore High Court, High Court of Sindh and Peshawar High Court; who were not given oath, cannot be re-opened being hit by the doctrine of past and closed transaction.

9. That the Government shall accelerate the process of accountability I, in a coherent and transparent manner justly; fairly equitably and in accordance with law.

10. That the Judges of the Superior Courts are also subject to accountability in accordance with the methodology laid down in Article 209 of the Constitution.

11. General Pervez Musharraf, Chief of the Army Staff and Chairman Joint Chiefs of Staff Committee is a holder of Constitutional post. His purported arbitrary removal in violation of the principle of audi alteram partem was ab initio void and of no legal effect.

12. That this order will not affect the trials conducted and convictions recorded including proceedings for accountability pursuant to various orders made and Orders/laws promulgated by the Chief Executive or any person exercising powers or jurisdiction under his authority and the pending trials/proceedings may continue subject to this order.

13. This is not a case where old legal order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a transitional period so as to enable the Chief Executive to achieve his declared objectives.

14. That the current electoral rolls are out-dated. Fresh elections cannot be held without updating the electoral rolls. The learned Attorney-General states that as per report of the Chief Election Commissioner this process will take two years. Obviously, after preparation of the electoral rolls some time is required for delimitation of constituencies and disposal of objections, etc.

15. That .we take judicial notice of the fact that ex-Senator Mr. Sartaj Aziz moved a Constitution Petition ' No. 15 of 1996, seeking a mandamus to the concerned authorities for preparation of fresh electoral rolls as, according to Mr. Khalid Anwar, through whom, the above petition was filed, the position to the contrary was tantamount to perpetuating disenfranchisement of millions of people of Pakistan in violation of Articles 17 and 19 of the Constitution. Even MQM also resorted to a similar Constitution Petition bearing No. 53 of 1996 seeking the same relief. However, for reasons best known to the petitioners in both the petitions, the same were not pursued any further.

16. That having regard to all the relevant factors involved in the case including the one detailed in paragraphs 14 and 15 above three years period is allowed to the Chief Executive with effect from the ' date of the Army take-over i.e. 12th October, 1999 for achieving his declared objectives.

17. That the Chief Executive shall appoint a date, not later than 90-days before the expiry of the aforesaid period of three years, for holding of a general election to- the National Assembly and the Provincial Assemblies and the Senate of Pakistan.

8. That this Court has jurisdiction to review/re-examine the continuation of the Proclamation of Emergency, dated 12th October, 1999 at any stage if the circumstances so warrant as held by this Court in the case of Sardar Farooq Ahmed Khan Leghari v. Federation of Pakistan PLD 1999 SC 57.

Before parting with this judgment we would like to record our deep appreciation for the valuable assistance rendered by the learned counsel appearing on behalf of both the parties as also the

learned amicus curiae all of whom had put forward their view point in the most illuminating manner enabling us to reach the conclusions we did in this judgment.

Case 8
NAB Ordinance Vires Case

Supreme Court of Pakistan

Judge(s)

Irshad Hasan Khan (C.J), Muhammad Bashir Jehangiri, Muhammad Arif, Qazi Muhammad Farooq,

Khan Asfandyar Wali And Others

VS

Federation Of Pakistan Through Cabinet Division, Islamabad And Others

Constitutional Petitions Nos. 13, 10, 27, 15, 16,17, 28, 24, 26, 01, 14, 19, 20, 32 and 33 of 2000
24/04/2001
Reported As [PLD 2001 Supreme Court 607]
Result: Order accordingly

Practice Area: Administrative Law, Anti Corruption, Anti Terrorism, Army, Banking, Civil Law, Civil Procedure, Civil servants, Company Law, Constitutional Law, Contract Law, Corporate Law, Court Laws, Criminal Law, Criminal Procedure, Drugs, Emigration, Evidence, Family Law, Federal Investigation Agency, Foreign Exchange, General Clauses, Human Rights, India, Indian Penal Code, Labour, Service and Employment, Limitation, Merchant Shipping, Narcotics, Nationalisation, Penal Code
Tagged Statutes: PREVENTION OF CORRUPTION ACT (WEST PAKISTAN EXTENSION) ORDINANCE, 1958 [], The Code of Criminal Procedure (Sind Amendment) Act, 1950 [], The Code Of Criminal Procedure (west Pakistan Amendment) Act, 1963 [], Code of Criminal Procedure (West Pakistan Amendment) Act, 1964 [], The Code Of Criminal Procedure (west Pakistan Amendment) Act, 1968 [], Anti Narcotics Force Act, 1997 [], Banking Companies Ordinance, 1962 [], Banks (Nationalization) Act, 1974 [], Central Law Officers Ordinance, 1970 [], Civil Servants Act, 1973 [], Code of Civil Procedure, 1908 [], Code of Criminal Procedure, 1898 [Section, Section (6), Section 170, Section 177, Section 178, Section 182, Section 344, Section 6], Code of Criminal Procedure, 1898 [Section, Section (6), Section 170, Section 177, Section 178, Section 182, Section 344, Section 6], Companies Ordinance, 1984 [], Conciliation Courts Ordinance, 1961 [], Constitution of Pakistan, 1973 [Article, Article (12), Article (2A), Article (4), Article 04, Article 12, Article 175, Article 176, Article 18, Article 184, Article 184 (3), Article 184(3), Article 199, Article 199*, Article 202, Article 203, Article 209, Article 225, Article 25, Article 2A, Article 4], Constitution of Pakistan, 1973 [Article, Article (12), Article (2A), Article (4), Article 04, Article 12, Article 175, Article 176, Article 18, Article 184, Article 184 (3), Article 184(3), Article 199, Article 199*, Article 202, Article 203, Article 209, Article 225, Article 25, Article 2A, Article 4], Contract Act, 1872 [], Control of Narcotic Substances Act, 1997 [], Drugs Act, 1976 [], Emigration Ordinance, 1979 [], Employment of Children Act, 1991 [], Federal Investigation Agency Act, 1974 [], Foreign Exchange Regulation Act, 1947 [], General Clauses Act, 1897 [], Limitation Act, 1908 [], National

Accountability Bureau Ordinance, 1999 [Section, Section (a), Section (d), Section (i), Section (ii), Section (m), Section (r), Section 1, Section 12, Section 13, Section 13(c), Section 14, Section 14(d), Section 15, Section 15(a), Section 16, Section 16(a), Section 16(c), Section 16-A, Section 16-A(b), Section 17, Section 17(c), Section 18, Section 18(g), Section 22, Section 23, Section 24, Section 24(d), Section 25, Section 25(a), Section 25-A, Section 25-A(e), Section 25], Section 28, Section 28(d), Section 32, Section 5, Section 5(g), Section 7, Section 8, Section 9, Section 9(c)], National Accountability Bureau Ordinance, 1999 [Section, Section (a), Section (d), Section (i), Section (ii), Section (m), Section (r), Section 1, Section 12, Section 13, Section 13(c), Section 14, Section 14(d), Section 15, Section 15(a), Section 16, Section 16(a), Section 16(c), Section 16-A, Section 16-A(b), Section 17, Section 17(c), Section 18, Section 18(g), Section 22, Section 23, Section 24, Section 24(d), Section 25, Section 25(a), Section 25-A, Section 25-A(e), Section 25], Section 28, Section 28(d), Section 32, Section 5, Section 5(g), Section 7, Section 8, Section 9, Section 9(c)], Offences in Respect of Banks (Special Courts) Ordinance, 1984 [], Pakistan Army Act, 1952 [], Pakistan Criminal Law (Amendment) Act, 1958 [], Pakistan Penal Code, 1860 [], Prevention of Anti-National Activities Act, 1974 [], Prevention of Corruption Act, 1947 [], Qanun-e-Shahadat Order 1984 (Law of Evidence) [Article, Article 121], Service Tribunals Act, 1973 [], Terrorist Affected Areas (Special Courts) Act, 1992 [], Anti Terrorism Act, 1997 [], Ehtesab Ordinance, 1996 [], Government of India Act, 1935 [], Government Servants (Efficiency and Discipline) Rules, 1973 [], Holders of Representative Offices (Prevention of Misconduct) Act, 1976 [], Merchant Shipping Act, 1894 [], National Accountability Bureau (Amendment) Ordinance 2002 [], National Accountability Bureau (Second Amendment) Ordinance, 2000 [], Parliament And Provincial Assemblies (Disqualification For Membership) (Amendment) Act 1991 [], Parliament And Provincial Assemblies (Disqualification For Membership) Act 1976 [], Universal Declaration Of Human Rights, 1948 [], Constitution of Pakistan, 1956 [], Indian Constitution [], Evidence Act, 1872 [], Indian Penal Code, 1860 [], Ehtesab Act, 1997 [], Suppression of Terrorist Activities (Special Courts) Act, 1975 [], National Accountability Bureau Employees Terms and Conditions of Service Rules, 2002 [], National Accountability Bureau (Amendment) Ordinance, 2001 [], National Accountability Bureau Order, 1999 []

Cited In: 131Cited By: 460

JUDGMENT

IRSHAD HASAN KHAN, C.J.- This judgment shall dispose of Constitutional Petitions Nos. 13, 10, 27, 15, 16, 17, 28, 24, 26, 01, 14, 19, 20, 32 and 33 of 2000, which have been filed by the petitioners, under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution), challenging the vires of the National Accountability Bureau Ordinance, '1999 (XVIII of 1999) (hereinafter called the NAB Ordinance) (as amended by Ordinance XIX of 1999 and Ordinances IV and XXIV of 2000) on the grounds that the said Ordinance is ultra vires the Constitution, principles of separation of powers and independence of judiciary, in violation of Fundamental Rights of freedom of trade, business or profession, security of person, safeguard from illegal arrest and detention, protection against retrospective punishment, inviolable dignity of man, freedom of movement, equality of citizens and other rights guaranteed by the Constitution and that it purports to set up an arbitrary executive body to negate the rule of law.

2. Vide order dated 12th September, 2000, a Bench of this Court, admitted the above petitions to regular hearing, to consider the common points emerging from these petitions, which are in the following terms:

"(i) Whether the impugned Ordinance creates a parallel judicial system in disregard of the provisions of Articles 175, 202 and 203 of the Constitution and is violative of the law laid down by this Court in the case of Mehra Ali and others v. Federation and others (PLD 1998 Supreme Court 1445)?

(ii) Whether section 2 of the impugned Ordinance whereby it deems to have come into force with effect from 1-1-1985 being retrospective contravenes the Fundamental Right enshrined in. Article 12 of the Constitution in so far as it creates a new offence of 'wilful defaultwith retrospective effect?

(iii) Whether section 5(r) of the impugned Ordinance which defines 'wilful defaultnegates the freedom of trade, business or profession as contemplated by Article 18 of the Constitution, which guarantees that subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business?

(iv) Whether the power vesting in the Chairman NAB or the Court trying a person for any offence under the impugned Ordinance vide clause (a) of section 12 and by providing in clause (c) (iv) thereof that any such order shall remain in force for a period of up to thirty days is an unreasonable restraint and violative of Articles 4, 9, 23 and 24 of the Constitution?

(v) Whether clause (d) of section 14 of the impugned Ordinance whereby the burden of proof in respect of an offence under section 9(a)(vi) and (vii) has been placed on the accused and his conviction has been conferred validity, is violative of Articles 4 and 25 of the Constitution?

(vi) Whether section 16(d) of the impugned Ordinance which authorises the Chairman NAB to select the venue of the trial by filing a reference before any Accountability Court established anywhere in Pakistan suffers from excessive delegation?

(vii) Whether section 17(c) of the impugned Ordinance which enables the Accountability Court to dispense with any provision of the Code of Criminal Procedure, 1898, and follow such procedure as it may deem fit in the circumstances of the case is violative of Articles 4 and 25 of the Constitution?

(viii) Whether section 18 of the impugned Ordinance which prohibits the Accountability Court to take cognizance of any offence under the impugned Ordinance except on a reference made by Chairman NAB or an officer of the NAB duly authorised by him amounts to excessive delegation?

(ix) Whether section 24(d) of the impugned Ordinance which empowers the Chairman NAB to detain in his custody an accused person up to a period of ninety days after having produced him once before the Accountability Court, such power vesting in executive authority is contrary to the right of equal protection and also opposed to the spirit of Fundamental Rights contained in Clause (2) of Article 10 of the Constitution?

(x) Whether section 23 of the Ordinance in so far as it prohibits transfer of any right, title, interest or creation of charge on property after the Chairman NAB has initiated investigation into the offences under the impugned Ordinance, alleged to have been committed by an accused person, is violative of Articles 23 and 24 of the Constitution?

(xi) Whether section 24(a) of the impugned Ordinance empowering the Chairman NAB at any stage of the investigation under the impugned Ordinance, to direct that the accused, if not already arrested, shall be arrested, tantamounts to conferment of unbridled and unfettered powers of determining if an accused is to be arrested or not, is violative of Article .25 of the Constitution?

(xii) Whether in so far as section 24(c) of the impugned Ordinance which enjoins that the provision of clause (a) thereof shall also apply to cases which have already been referred to the Accountability Court, offends the provisions of Articles 4 and 25 of ,the Constitution on the ground of retrospectively in its operation?

(xiii) Whether the case of voluntary return (plea of bargaining) under section 25 of the impugned Ordinance is derogatory to the concept of independence of judiciary in so far as where the trial has commenced the Court cannot release the accused without 'consentof the Chairman NAB?

(xiv) Whether section 25A (e) and (g) give unfettered discretion to the Chairman NAB to reject the recommendations of a duly appointed committee and to refuse to recognise a settlement arrived at between a creditor and a debtor amounts to excessive delegation and restraint on the freedom of contract on the touchstone of Articles 4, 18 and 25 of the Constitution?

(xv) Whether section 32(d) of the im pugned Ordinance purports to oust the jurisdiction of the superior Courts from exercising their jurisdiction under Article 184(3) and Article 199 of the Constitution?

(xvi) Whether various provisions of the impugned Ordinance grant arbitrary and unfettered discretion to the Chairman NAB e.g.

(i) under section 9(c) of the impugned Ordinance to set whatever conditions he feels with respect to the release of an accused from custody,

(ii) under section 18(g) to refer or not to refer a case to an Accountability Court,

(iii) under section 25A(g) to refuse to recognise a settlement arrived at between a creditor and debtor.

(xvii) Whether to exclude the officers and staff of the NAB who have not been deputed to or posted to NAB from the Federation or a Province from the category of civil servants within the purview of section 2(b) of the Civil Servants Act, 1973, is violative of Article 25 of the Constitution?

(xviii) Whether the alleged violation of principles of Universal Declaration of Human Rights of 1948 and the Cairo Declaration on Human Rights in Islam are justiciable in these proceedings?

(xix) Whether the impugned Ordinance is liable to be struck down-on the ground that earlier Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this Court and therefore there is no necessity for enacting the same?

(xx) Whether the vires of the impugned Ordinance can be examined on the touchstone of Article 2A of the Constitution having regard to the law laid down by this Court in the case of Hakim Khan and 3 others versus Government of Pakistan through Secretary Interior and others (PLD 1992 SC 595)?

(xxi) Whether the provisions for appointment of Chairman and other officials in the NAB are discriminatory inasmuch 'as they do not lay. Down any qualifications in that regard or, methodology for their appointment?

(xxii) Whether the provisions relating to, transfer of cases qua the Provincial Courts within the territories of a Province and from one Province to another, suffer excessive delegation?

(xxiii) Whether in the absence of any provision in the impugned. Ordinance regarding special treatment to be meted out to women-accused is not violative of the mandate under Article 25(3) of the Constitution and section 167 of the Criminal Procedure Code?"

"4. The above questions are matters of first impression and of great public importance involving Fundamental Rights as ordained by Article 184(3) of the Constitution and as commented upon by this Court in the case of Syed Zafar Ali Shah and others versus General Pervez Mussharaf, Chief Executive of Pakistan and others (2000 SCMR 1137) wherein it was observed that: "The validity of National Accountability Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage." This is another circumstance for admitting these petitions to regular hearing."

"5. As observed at the outset of the hearing today that in these petitions the question of validity of the impugned Ordinance alone shall be examined and not individual grievances of the petitioners raised in some of the petitions either directly or indirectly. However, the petitioners shall not be debarred from raising their respective pleas available under the law through appropriate proceedings before appropriate fora in accordance with law. It is also clarified that admission of these petitions shall not operate as stay of proceedings before NAB, Accountability Courts or any other Court in relation to the matters arising out of the impugned Ordinance. Of course, such proceedings shall be decided on their own merit and in accordance with -law. It is further clarified that the petitioners herein or any accused whose cases are pending in Accountability Courts shall be at liberty if so advised, to approach the appropriate forum under the Ordinance for redress of their grievances in accordance with law."

3. Before we proceed further in the matter, it seems proper to refer to the history of laws governing accountability process in the country; detailed account of which has been given in the case of Federation of Pakistan v. M. Nawaz Khokhar (P L D 2000 Quetta 26) as under:

"After the establishment of the State of Pakistan, Public and Representative Offices (Disqualification) Act, 1949 PRODA) was passed by the Legislature which became effective from 15th August, 1947. This Act provided for debarring from public life persons judicially found guilty of misconduct in any public office for a suitable period. It remained enforced until 21st September, 1954 when it was repealed by Public and Representative Offices (Disqualification) (Repeal) Act, 1954. After its repeal, there was no special law on the statute book dealing with the accountability of holders of public offices between the period from 21st September, 1954 to 6th August, 1959. On 7th August, 1958 while the country was under Martial Law, Elective Bodies (Disqualification) Order, 1959 (President's Order No, 13 of

1959), commonly known as `EBDOwas promulgated which remained in force only until 31st December, 1960. The `EBDOprovided for disqualification of certain categories of persons from being a member or a candidate for the membership of any elective body until 31st December, 1966. It was amended by P.O. No, 7 of 1960 dated 10-2-1960; P.O. 9 of 1960 dated 5-3-1960; P.O. 27 of 1960 dated 28-11-1960 and P.O. 29 of 1960 dated 27-11-1960. On 7th January, 1963, Elective Bodies Disqualification (Removal and Remission) Ordinance, 1963 was promulgated which authorised the President to reduce the period of disqualification of a person disqualified under `EBDO'. Once again, after expiry of `EBDOon 31st December, 1960. No special law existed on the subject of accountability of holders of public offices until 8th of January, 1977. On 9th January, 1977, Holders of Representative Offices (Prevention of Misconduct) Act, 1976 (Act No, IV of 1977) and Parliament and Provincial Assemblies (Disqualification from Membership) Act, 1976 (Act No, V of 1977) were passed which provided for trial of offences of misconduct of holders of public offices before a Bench of the High Court consisting of not less than two Judges. On 13th November, 1977 Holders of Representative Offices (Punishment for Misconduct) Order (President's Post Proclamation) Order No, 16 of 1977 (PPPO-16) and Parliament and Provincial Assemblies (Disqualification for Membership) Order (President's Post Proclamation Order 17 of 1977 (PPPO-17) were promulgated. PPPOs-16 and 17 of 1977, however, did not repeal Holders of Representative Offices (Prevention of Misconduct) Act, 1976 and Parliament and Provincial Assemblies (Disqualification for Membership) Act, 1976 with the result that from 13-11-1977 onwards we had on the Statute Books Act No,IV of 1977, Act No, V of 1977, PPPO-16 of 1977 and PPPO-17 of 1977, all dealing

with punishment for misconduct and disqualification of the holders of public offices. The above Acts No, IV and V of 1977, PPPO-16 of 1977 were finally repealed by Parliament and Provincial Assemblies (Disqualification for Membership) (Amendment) Act, 1991 (Act No, VII of 1991) with effect from 6-8-1990, which was assented to by the President on 28-4-1991. PPPO-16 of 1977 was amended through PPPO-5 of 1978 dated. 17-1-1978 and President's Order 1 of 1981. Similarly, PPPO-17 was also amended by Ordinance IX of 1990 dated 15-10-1990 and Act VII of 1991 dated 28-4-1991.

"On 18th November, 1996, Ehtesab Ordinance CXI of 1996 was promulgated which repealed PPPO-16 and PPPO-17 of 1977. Ordinance No, CXI of 1996 was amended by Ordinance No, CXXIII of 1996, Ordinance VII of 1997 and Ordinance XI of 1997. Amended Ordinance No, CXI of 1996 was repealed and replaced by Ordinance No, XX of 1997, which was repealed by Act No, IX of 1997., Act No, IX of 1997 was amended through Ordinance No, H of 1998 on 4-2-1998 but this Ordinance lapsed on 3-6-1998 as it was not passed by the Parliament."

On 16th November, 1999, after the Military Takeover on 12th October, 1999, National Accountability Bureau Ordinance, 1999 (Ordinance No,XVIII of 1999) was promulgated, which has been thrice amended by Ordinance No, XIX of 1999 and Ordinances No, IV and XXIV of 2000. This Ordinance repealed the Ehtesab Act, 1997 (Act No, IX of 1997).

4. Here, it would be advantageous to refer to an observation made in M. Nawaz Khokhar (supra), which is to the following effect:

it may be stated that transparent, even-handed and across the board accountability of holders of all public offices, is the essence of Islamic polity and a democratic set-up. Presence of accountability process in a system of governance not only deters those who hold sway over

the populace from misusing and abusing the power and authority entrusted to them but it also ensures principles of good governance..... "

5. We have heard the learned counsel for the parties at quite some length and perused the case-law on the subject cited at the Bar as also the other material placed on record.

6. Mr. Aitzaz Ahsan, learned Sr. A.S.C., appearing in support of Constitutional Petitions Nos. 13 and 27 of 2000 filed on behalf of Asfandyar Wali and Mian Nawaz Sharif, submitted that the NAB Ordinance provides for a system and structure for the accountability of holders of public offices.

The learned counsel challenged the NAB Ordinance under four primary/main heads:

1. Physical treatment to the accused and his property, which mainly relate to pre-trial proceedings:

i) Section 9(b) and (c) deny the Courts the power to grant bail;

ii) Section 24 (b) invests the power in the executive or the Chairman NAB to detain a person for 90 days in executive custody without registration of F.I.R. ;

iii) Sections 12 and 23 authorize freezing of property;

iv) Section 12(f) denies the right of appeal against freezing of property;

v) Remand of women and, denial to them of statutory rights under section 167(5) Cr.P.C.

2. Nature of the offences created by the NAB Ordinance:

i) Sections 2, 5(r), 9(a) (vi), (vii) and (viii) relating to wilful default, misuse of powers, issuance of SROs, etc. Provide retrospective application of offences and punishments;

ii) Sections 5(r) and 9(a)(vi) fix strict liability of offences, which is ultra vires the Constitution because the requirement of mens rea is absent;

iii) Section 14 (c) provides reversal of burden of proof and ouster of presumption of innocence, which is one of the most fundamental con -pts of criminal law;

iv) Sections 5(r) - and 9 (a)(viii) provide criminal penalty for civil debt/contractual obligations.

3. Excessive power given to the Chairman NAB or the Government:

i) Clauses (a), (b) and (d) of section 16 provide for initial determination of venue of trial, inter-provincial transfers of trials and holding of trials in places like Attock Fort;

ii) Sections 25(a) and 25(c) give uncontrolled/unguided power to the Chairman NAB to 'accept settlement - amounts/plea bargaining';

iii) Section 25(a)(i) gives unguided power to the NAB to determine `plea bargainingbefore trial;

iv) Sections 12 (a) and 12 (f) read with section 32 deny the right of appeal to a non-accused whose property has been frozen. v) Section 9 (b) denies the appellate Court the power to suspend sentences, which is a major hurdle in the process of administration of justice.

According to Mr. Aitzaz Ahsan, the NAB Ordinance does not merely create a 'parallel judicial systembut a 'parallel systemenabling the executive to exercise judicial powers, which is beyond the authority of the present dispensation. His precise plea was that conferment of judicial powers on the executive cannot be countenanced in law and even a 'parallel judicial systemwas reduced enormously by this Court in Mehram Ali and others v. Federation of Pakistan and others (PLD 1998-SC 1445) and struck down in Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 Supreme Court 504).

7. He submitted that under the present dispensation the NAB Ordinance requires to be examined in the context of the decision in. Syed Zafar Ali Shah v. Gen. Pervez Musharraf (P L D 2000 SC 869), particularly in view of the following passage of the report: -

"Indeed, the latter course would have been the most detestable thing to happen.Independence of Judiciary means that the contentious matters, of whatever magnitude they may be, should be decided/resolved by the Judges of the Superior Courts according to their conscience. This Court, while performing its role as "the beneficial expression of a laudable political realism", had three options open to it in relation to the situation arising out of the military take-over on Twelfth day of October, 1999: firstly, it could tender resignation en bloc, which most certainly could be equated with sanctifying (a) chaos/anarchy and (b) denial of access to justice to every citizen of Pakistan wherever he may be; secondly, a complete surrender to the present regime by. Dismissing these petitions for lack of jurisdiction in view of the purported ouster of its jurisdiction under PCO No,1 of 1999 and thirdly, acceptance of the situation as it is, in an attempt to save what 'institutional values remained to be saved'."

8. It was further submitted that the NAB Ordinance requires to be examined in two other contexts, first: saving the institutional values that remain to be saved, particularly in this period of deviation (because otherwise the Constitution saves the institutional values); and secondly, everything including the legislation in this period has to have a nexus with the puipuses of the Emergency.. He referred to the observations of one of us (Irshad Hasan Khan, J. As he then was) (now CJ) in Sardar Farooq Ahmed Khan Leghari and others v. Federation of Pakistan and others (P L D 1999 Peshawar 57) at page 378, which read thus:

"Fundamental Rights provide Constitutional safeguards to civil liberties. These rights guaranteed by the Constitution are essential human rights which inherently belong to every citizen of a country governed in a civilized mode. Not one of these safeguards can, the President of Pakistan, the Parliament, the Executive or the Judiciary, disturb under the scheme of the Constitution, except those having reasonable nexus with the object of the Proclamation of Emergency during its continuance. This is essential to ensure so that the Government may not derogate from Fundamental Rights as conceded to the Government, during the period of Emergency, and without having any reasonable nexus with the object of proclamation, the dangers to human liberties are frightful to contemplate. Such a concession to the Government is likely to lead to despotism and anarchy, which cannot be countenanced by the Courts. I respectfully do not subscribe to the view taken, by the Indian Supreme Court

in the case of Muhammad Yaqub (supra) that it is open to the President to suspend the enforcement of any of the Fundamental Rights conferred under the Constitution during the continuance of emergency and wherever such suspension is made it is in the interest of the country and no further proof of it is necessary. In my humble view only such Fundamental Rights can be suspended which have nexus with the reason which led to the Proclamation of Emergency. A satisfactory solution can, therefore, be had only if the power available to the President under the Constitution to proclaim emergency is exercised with the last encroachment upon the rights and liberties of the citizens."

9. It was also submitted that main stay of the respondents in the written statement is that the NAB Ordinance was legislated bona fide to combat the menace of rampant corruption. According to him, the validity of the legislation is to be judged on the touchstone of the Constitutional provisions and not the bona fides of the lawmaker. In support of his contentioh, reliance was placed on the following observation by one of us (Irshad Hasan Khan J, as he then was) [now CJ] in Sh. Liaquat Hussain (supra):

"I am fully inclined to agree with the learned Attorney-General that the impugned Ordinance was promulgated bona fide with a view to restore peace and normalcy in the country and, particularly, in Sindh, but however bona fide an action may be in itself, it cannot be a touchstone for judging the constitutionality of the impugned Ordinance. Its validity is to be judged only on the touchstone of the Constitutional provisions. Reading Articles 175, 203 and 245 together and in the light of the judgment rendered by this Court in the case of Mehram Ali (supra), it indubitably leads to the conclusion that the Military Courts envisaged under the Constitution tantamount to establishment of parallel Courts for which there was no warrant. The bare reading of Article 245 would show that it does not contemplate declaration of Martial Law or Mini-Martial Law in any form whatsoever. It is not the case of the learned Attorney-General that the Courts are not functioning.He, however, argued that the Courts were not deciding the cases expeditiously on account of fear of the terrorists. If that is so, the proper course was to take appropriate measures by improving methods of investigation, expeditious submission of challan to the trial Courts, security of witnesses/litigants as well as the Presiding Officers of the Courts and to take long/short term measures including appropriate increase in the strength of Judges in the light of the various reports of the Law Commission."

10. He also argued that the NAB Ordinance requires to be examined in the context of the doctrine of proportionality as propounded in Farooq Ahmed Khan Leghari's case (supra). He submitted that the Ordinance is disproportionate to the mischief it seeks to remedy. He referred to page 191 of the report, which reads thus:

"It may also be pointed out that the above views run counter to the Fundamental Rights guaranteed by the Constitution and the aforesaid International Covenants of Civil and Political Rights, European Convention on Human Rights and American Convention on Human Rights. In my view, a distinction is to be made between an emergency which is imposed when a country is engaged in an actual war or is subjected to actual external aggression and when the same is imposed on account of imminent danger thereof for the purpose of suspension of fundamental rights and continuation of the emergency. In the former case, the above Latin maxim inter arma silent leges (i,e, when there is an armed conflict, the law remains silent) or that the national success in the war is to be ensured in order to escape from national plunder or enslavement even if the personal liberty and other rights of the citizen are sacrificed as observed by Lord Atkinson 9 in the case of King v.

Halliday (supra) would be applicable. But in the latter case the rule of proportionality is to be followed as propounded by some of the eminent authors and adopted under above Article 4 of the International Covenants of Civil and Political Rights. Article 15 of the European Convention of Human Rights, 1967 i,e, a public emergency permits a State to take derogatory measures in derogation of the covenants subject to the condition that the rule of proportionality is observed meaning thereby, that the derogatory steps/actions should be to the extent required by the exigencies of the situation provided such measures are not inconsistent with their other obligations under the international law. The above view is reinforced by the report of International Law. Association, 1986 referred to hereinabove in para 36 (xix) that while imposing emergency following factors should be considered:

(i) severity of cause defined generally as threatening the life of the nation;

(ii) good faith on the part of the imposing Government

(iii) proportionality (relating to geographic scope, duration, and choice of measures strictly required by the exigencies of the situation);

(iv) proclamation or notification;

(v) non-derogability of certain rights;

(vi) respect for other international obligations;

(vii) non-discrimination.

The rule of proportionality is also in consonance with the view obtaining in U.S.A and Australia etc. Namely, that a distinction has been drawn between the power of judicial review during actual war and after the cessation of hostilities already referred to hereinabove. Reference may again be made to the observation of Latham, C.J. In the case of Australia Communist Party (supra) that "the Court in its decisions applied a rule that there must be a real and substantial connection between the legislation and the defence situation so created in order that the legislation could be valid".

He submitted that the principle of proportionality has more pertinently been applied in the case of Syed Zafar Ali Shah (supra) wherein at page 119 (para 263) the following observation occurs:

"We are also in agreement with the submission of Syed Sharifuddin Pirzada that in international system of emergencies the Governments take steps to ensure that the Fundamental Rights of citizens are not affected and that the derogation must be proportionate to the emergency, while adopting Constitutional as well as extra-constitutional means."

He submitted that the NAB Ordinance finally requires to be examined in the context of those rights, which have Islamic source. Reliance was placed on the observations of one of us, (Muhammad Bashir Jehangiri, J) in the case of Farooq Ahmed Khan Leghari (supra) at page 386 of the report (para 16), which read thus: -

"It would, therefore, be noteworthy that the rights which have been conferred on human being under the Islamic Injunctions besides forming part of the Constitutional mandate, are

not only beyond the legislative restriction and enforceable through the Courts of land are without any exception, of fundamental nature. These rights which have the element of Islamic mandate are not amendable to any change or subject to any usurpation by way of suspension for days much less than for years together.

11. Another submission of the learned counsel was that the NAB Ordinance also requires to be examined in the context of the observations of this Court in Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan (PLD 1998 Supreme Court 1263) at 1308 regarding the basic structure theory. In this regard, he also referred to para 6 (iii) of the Short Order in Syed Zafar Ali Shah's case, which reads thus:

"That no amendment shall be made in the salient features of the Constitution i,e, independence of Judiciary, federalism, parliamentary form of Government blended with Islamic provisions. "

12. Mr. Aitzaz Ahsan further submitted that the determination of the question of grant or refusal of bail is a judicial function. The NAB Ordinance does not provide any judicial qualification for the Chairman NAB or the person acting on his behalf. He referred to Halsbury's Laws of England Volume 11, pages 112-113 (para 167) which reads as under: -

"In deciding questions relating to granting of bail, Justices act judicially and not ministerially."

In this context, he next placed reliance on the Corpus Juris Secundum, Volume 8, section 39, which reads thus: -

"Admitting to bail or allowing bail is an entirely different act from the taking, accepting or approving bail after its allowance. The former discussed section 41 infra is generally considered to be a judicial act to be performed by a Court or a judicial officer while the latter may be a ministerial function to be performed by an authorized officer."

The learned counsel also relied on Anwar Saifullah Khan v. The State (P L D 2000 Lahore 564 at 579) wherein it was held that the fixing of bail and the conditions for release are matters which require to be determined by a judicial officer. He referred to para 14 of the report, which is to the following effect: -

"Coming to Issue No,2 we find it necessary to say a few words about the concept of bail. Conceptually, 'bailmeans to procure release of one charged with an offence by ensuring his future appearance in Court and compelling him to remain within the hands of, the Court through sureties. The person, who is released on bail is known 'principalwhile the person who gives security is known as 'surety'. The security, to be furnished may be in the form of bond or cash. The criminal administration of justice has inherited this concept from times immemorial. During the era of the Normans Rule in England,- the whole community gave security for the appearance of an accused before the Court of trial. The community was treated as a property and served as a surety. This concept vanished with the march of time and in its place security of a third person was substituted. The concept of pre-trial release of the accused was developed on three presumptions: firstly, the accused was presumed to be innocent till he was found guilty; secondly, the accused should have a right to prepare his defence and prove his innocence before the Court of trial; and thirdly, the accused should not be punished before the finding of his conviction was rendered by the Court. These rules were

developed by the contribution of Jurists and Courts. There was/is a judicial consensus that a Court has no authority under sections 497 and 498 read with sections 513 and 514 of the. Code of Criminal Procedure to ask the accused to furnish cash security. However, various approaches to this issue were adopted in different countries in consonance with the ground realities faced by them. A Division Bench of this Court had an occasion to examine this issue in the context of the Ehtesab Act, 1997 (IX of 1997). While dealing with this aspect, the Division. Bench held in the case of the State v. Muhammad Hasham Babar P L D 1997 Lahore 605 as under:-

"6. Foregoing rule, in the context of new dispensation, does not conclude the issue. We are accordingly tempted to examine the various forms of security in bail system of other countries. We are attracted to examine specially the Illinois Laws of Bail. Article 110 of the Code of 1963 is pertinent. It shows that the accused can secure his pretrial release in following manner:-

(1) Under 110-2 he may be released on his personal recognizance.

(2) Under 110-7 he may execute a bail bond and deposite with the clerk, cash equal to only 10% of the bail or $25, which ever is the greater. When bail is made in this way and the conditions of the bond have been performed, the clerk returns to the accused 90% of the sum deposited. The remaining 10% (1% of the bail) is retained by the clerk 'as bail bond costs.'

(3) Under 110-8 he may execute a bail bond and secure it by a deposit with the clerk of the full amount of the bail in cash, or in stocks and bonds authorised for trust funds in Illinois, or by unencumbered non-exempt Illinois real worth double the amount of the bail. When bail is made in this way and the conditions of the bond have been performed, the clerk returns the deposit of cash or stocks or bonds, or release the real estate, as the case may be, without charge of retention of any amount".

In each case bail is fixed by a judicial officer. Article 110-5 prescribes factors to be considered in fixing the amount of bail. Under 110-6 either the State or the defendant may apply to the Court for an increase or for a reduction in the amount of bail or for alteration of the bond's conditions. The choice between 110-7 and 110-8 is reserved to the accused". The aforesaid methodology of cash security was challenged by one Schilb on Constitutional grounds, in case Schilb v. Kuebel (Supreme Court of the United States (1971) 404 U.S. 357, 92 S, Ct. 479, 30 L. Ed. 2d. 502). In this case "Jhon Schilb, the petitioner, was arrested and charged with (a) leaving the scene of an automobile accident, and (b) obstructing traffic. Bail was fixed at $500 of the first charge and at $250 on the second charge. In accordance with the Illinois Bail Statutes of 1963, petitioner deposited $75 in cash with the clerk of the Court. This amount was 10 per cent. Of aggregate bail. At his trial, Schilb was acquitted of the first charge and convicted of the second. When he paid his fine, the amount petitioner deposited was returned to him less $7.50 retained as "bail bond costs" pursuant to the bail statute. The amount returned was 1 per cent. Of the total bail and 10 per cent. Of the amount actually deposited. In a subsequent class action, Schilb challenged the Illinois bail system on Fourteenth Amendment due process and equal protection grounds. The Circuit Court of St. Clair County upheld the statute and dismissed the complaint. The Supreme ourt of Illinois affirmed, with two justices dissenting. Schilb appealed to the United States Supreme Court"

13. Mr. Aitzaz Ahsan also questioned the power of bail vested in the Chairman NAB or any person authorized by him on the touchstone of Article 10 of the Constitution, which reads thus: -

"10. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

14. According to him, although the Accountability Courts have been invested with the power to release an accused under section 24(d) by a written order, yet such power has never been exercised by any of these Courts at any point of time in view of the overriding effect of section 9(b) of the NAB Ordinance despite the fact that accused are arrested on suspicion, without registration of any case and are detained in custody for 90 days without any remand order from the competent Court. He relied on Nazir Ahmed v. The State (P L D 1987 Karachi 236) to contend that the power of discharging an accused from a case is inherent in section 167 Cr.P.C. The relevant portion in the report reads at page 241 as below: -

"When an Investigating Officer requires authority to detain an accused person in custody beyond the limits prescribed in section 61 of the Code of Criminal Procedure, he has to make an application therefore in accordance with the provision of section 167 of the said Code. If there are genuine grounds for continuing his detention, section 167 enables the Magistrate to pass an order extending the detention for a term not exceeding fifteen days in the. Whole. The Magistrate has a discretion to grant the remand. If the Magistrate finds that no case at all is made out against the accused he is justified in not granting the remand and discharging the accused from the case. The power of discharging an accused from a case is, therefore, inherent in section 167. If the Investigating Officer finds that the said accused is innocent or that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the said accused to a Magistrate for trial, there is nothing to prevent him from applying under section 167 of the Code, read with section 63 thereof, for his discharge from the case. Section 63 clearly states that no person who has been arrested by the Police Officer can be discharged except on his own personal bond or on bail, or under the special order of a Magistrate. Since the power of discharging an accused from a case during investigation is inherent in section 167 of the Code, an order under the said section can be passed on the report of a Police Officer praying for his discharge. Such an order would be the "special order of a Magistrate" as contemplated in section 63. The scheme of sections 167 to 173 of the Code, read with the Police Rules, gives the impression that all investigations must be undertaken and finalised within fifteen days, whereafter a challan or charge sheet should be filed, so that if later also the police want a remand of the accused, they may be able to secure the same under section 344 of the Code. If this be the view, any delay in the investigation over the fifteen days provided, should itself provide a ground for, the discharge of an accused from the case, if the police neither produce the accused nor apply for his fresh remand, but release him (See Dr. Niranjan v. Manipur Administration (PLD 1986 Lah. 256), or apply for his discharge from the case on the ground that there are no reasonable grounds to connect him with the commission of the offence".

On the Court's power to discharge an accused, the learned counsel also relied on J.C. Shah v. Ramswami (AIR 1969 S.C. 1014) wherein it was emphatically stated: -

"The point of appearing before the Magistrate is that an independent authority exercising judicial power may, without delay, apply its mind to the case."

Mr. Aitzaz Ahsan further relied on Ghulam Sarwar v. The State (1984 P.Crl.L.J. 2588) wherein a learned Single Judge of the Lahore High Court laid down the following 18 guidelines for the Magistrates in granting or refusing remand: -

"1. During first 15 days, the Magistrate may authorise the detention of the accused in judicial custody liberally but shall not authorise the detention in the custody of the police except on strong and exceptional grounds and that too for the shortest possible period;

1 The Magistrate shall record reasons for the grant of remand.

3. The Magistrate shall forward a copy of his order passed under section 167, Cr. P.C. To the Sessions Judge concerned.

4. After the expiry of 15 days, the Magistrate shall require the police to submit complete or incomplete challan and in case, the challan is not submitted, he shall refuse further detention of the accused and shall release him on bail with or without surety.

5. After the expiry of 15 days, no remand shall be granted unless the application is moved by the police for the grant of remand/adjournment.

6. The application moved by the prosecution/police after the expiry of 15 days of the arrest of the accused, be treated as an application for adjournment under section 344 Cr. P.C.

Before granting remand, the Magistrate shall assure that evidence sufficient to raise suspicion that the accused has committed the offence has been collected by the police and that further evidence will be obtained after the remand is granted.

8. The Magistrate shall not grant remand/adjournment in the absence of the accused.

9. The Magistrate should avoid giving remand/adjournment at his residence.

10. The Magistrate shall give opportunity to the accused to raise objection, if any, to the grant of adjournment/remand.

11. The Magistrate shall record objection which may be raised by an accused person and shall give reasons for the rejection of the same.

12. The Magistrate shall examine police file before deciding the question of remand.

13. If no investigation was conducted after having obtained remand, the Magistrate shall refuse to grant further remand/adjournment.

14. The Magistrate shall not allow remand/adjournment after 2 months (which is a reasonable time) of the arrest of the accused unless it is unavoidable.

15. In case, complete challan is not submitted, the Magistrate shall commence trial on the strength of incomplete challan and examine the witnesses given in the list of witnesses.

16. If the challan is not submitted within 2 months, the Magistrate shall report the matter to the Sessions Judge of the district and also bring the default of the police to the notice of Superintendent of Police of the district.

17, The Magistrate shall not grant remand mechanically for the sake of co-operation with the prosecution/police.

18. The Magistrate shall always give reasons for the grant of remand and adjournment."

15. On the issue of freezing of property under section 12 and determination of claims under section 13 of the NAB Ordinance, Mr. Aitzaz Ahsan contended that the provisions are anomalous inasmuch as the freezing continues until the decision of the appeal and the Court is deprived of the power to make any order at that stage. He elaborated his point by submitting that even in cases where the accused stands acquitted by the trial Court. The freezing of the property under section 12 of the NAB Ordinance continues till the decision of the appeal filed by the State against the acquittal order. Similarly, the learned counsel vehemently questioned the power of the NAB to freeze property in the possession of any relative, associate or person on behalf of the accused without giving him the opportunity to show his title. He also contended that the absence of right of appeal against the freezing order, as envisaged in section 13 (c), is also against the principles of natural justice. The learned counsel submitted that the above provisions of the NAB Ordinance are violative of Article 23 of the Constitution, which reads as under: -

"23. Every citizen shall have the right to acquire, hold and dispose of property in any apart of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest".

16. Mr. Aitzaz Ahsan referred to section 23 of the NAB Ordinance and contended that the rights of even third parties have been taken away and they have not been provided any right of appeal against the orders affecting their proprietary rights. He referred to M/S Chenab Cement Product (Pvt.) Ltd and others v. Banking Tribunal, Lahore (PLD .1996 Lahore 672) and Pakistan through Secretary, Ministry of Defence v. The General Public (P L D 1989 Peshawar 6) to contend that at least one right of appeal must be provided to an affected person.

17. The learned counsel next submitted that under the NAB Ordinance, the Chairman has unlimited powers of investigation of cases. According to him, in that regard even the person against whom the investigation is being conducted, may not be aware of the same. In support of his plea that such treatment to an accused is contrary to the "due process of law" he referred to following excerpt in U.S. v. James Danial Good Real Property (510 U.S. 43) and (126 Lawyers Edition II, p. 490):

"The practice of ex parte seizure creates an unacceptable risk of error since the proceeding affords little or no protection to an innocent owner."

On the concept of 'due process of law', the learned counsel also referred to Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri (P L D 1969 Supreme Court 14) wherein at page 31 the following passage appears:

"In my opinion the learned Advocate-General of East Pakistan is perhaps nearer the mark than the others. In my view the words "in an unlawful manner" in sub-clause (b) of Article 98(2) have been used deliberately to given meaning and content to the solemn declaration under Article 2 of the Constitution itself that it is the inalienable right of every citizen to be treated in accordance with law and only in accordance with law. To my mind, therefore in determining as to how and in what circumstances a detention would be detention in an unlawful manner one would inevitably have first to see whether the action is in accordance with law, if not, then it is action in an unlawful manner. Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time, to time by the Superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be, as has been suggested in some quarters, that in this sense it is as comprehensive as the American "due process" clause in a new garb. It is in this sense that an action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Action taken upon no ground at all or without proper application of the said of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner."

He also referred to the following passage from a judgment of this Court reported as New Jubilee Insurance Co. Ltd. v. National Bank of Pakistan (P L D 1999 Supreme Court 1126) :-

"It may be observed that there are certain basic norms of justice. One of the cardinal principles of above basic norms is that one cannot be a judge in his own cause. The breach of the above cardinal principle of jurisprudence will in fact be violative of the right of "access to justice to all" which is a well-recognised inviolable right enshrined in Article 4 of the Constitution. This right is equally founded in the doctrine of "due process of law". The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and the right to have an impartial Court or Tribunal. The term "due process of law" can be summarised as follows as held by this Court in the case of Aftab Shahban Mirani v. President of Pakistan (1998 SCMR 1863):-

"(1) A person shall have notice of proceedings which affect his rights.

(2) He shall be given reasonable opportunity to defend.

(3) That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality, and

(4) That it is a Court of competent jurisdiction.

Above are the basic requirements of the doctrine "due process of law" which is enshrined, inter alia, in Article 4 of the Constitution. It is intrinsically linked with the right to have access to justice which is Fundamental right. This right, inter alia, includes the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. A person cannot be

said to have been given a fair and proper trial unless he is provided a reasonable opportunity to defend the allegation made against him."

18. Mr.Aitzaz Ahsan referred to clause (d) of section 24, which reads thus:

"24.(d) Notwithstanding anything contained in the Code where the holder of a public office or any other person accused of an offence is arrested by NAB under this Ordinance NAB shall, as soon as may be inform him of the grounds and substance on the basis of which he has been arrested and produce him before the Court established under this Ordinance within a period of 24 hours of arrest excluding the necessary for the journey from the place of arrest to the Court and such persons shall having regard to the facts and circumstances of the case be liable to be detained in the custody of the NAB for the purposes of enquiry and investigation for a period not exceeding 90 days provided that no accused arrested under this Ordinance shall be released without the written order of the Chairman NAB or the order of the Court."

According to him, this provision does not make an exception in case of women as compared to subsection (5) of section 167 of the Cr.P.C. In the light of the intention and spirit of Article 25(3) of the Constitution.

19. The learned counsel referred to clause (r) of section 5 of the NAB Ordinance whereby the offence of 'wilful defaulthas been defined as follows:

"5.(r) "Wilful default" a person is said to commit an offence of wilful default under this Ordinance if he does not pay, or continues not to pay, or return or repay the amount to any bank, financial institution, cooperative society, or a Government department or a statutory body or an authority established or controlled by a Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations, instructions, issued or notified by the State Bank of Pakistan, or the bank, financial institution, cooperative society, Government Department, statutory body or an authority established or controlled by a Government, as the case may be, and a period of thirty days has expired thereafter:

Provided that it is not wilful default under this Ordinance if the accused was unable to pay, return or repay the amount as aforesaid on account of any wilful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution, cooperative society or a Government Department or a statutory body or an authority established or controlled by Government."

and argued that the word 'wilful defaultused in the title is not in the clause itself and that it is likely that a person who has not paid a small amount of his utility bills due to some reason may be covered by the above provision; the above provision contains a wide span and is vague in nature. He also referred to Mrs.Shahida Faisal v. Federation of Pakistan and 3 others (P L D 2000 Lahore 508) wherein the scope of the provision was dilated upon. Mr. Aitzaz further argued that with regard to clause (r) of section 5 ibid the intention appears to have been primarily to deal with cases of bank default, loan default and money taken but not repaid but it. Has been extended to default in payment of utility bills of domestic consumers and there were prosecutions going on although no element of mens rea has been provided in the above law, which is an essential ingredient of criminal jurisprudence.

20. The learned counsel next referred to section 9 of the NAB Ordinance, which reads as under :

(a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices-

(i) if he accepts or obtains from any person or offers any gratification directly or indirectly, other than legal remuneration, as a motive or reward such as is specified in section 161 of the Pakistan Penal Code (Act XLV of 1860) for doing or for bearing to do any official act, or for showing or for bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person; or

(ii) if he accepts or obtains or offers any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or likely to be, concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with his official functions or from any person whom he knows to be interested in or related to the person so concerned; or

(iii) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use, or for the use of any other person, any property entrusted to him, or under his control, or wilfully allows any other person so to do; or

(iv) if he by corrupt, dishonest, or illegal means, obtains or seeks to obtain for himself, or for his spouse and/or dependants or any other person, any property, valuable thing, or pecuniary advantage; or

(v) if he or any of his dependants or benamidars owns, possesses, or has acquired right or title in any movable or immovable property or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for; or

(vi) misuses his authority so as to gain any benefit or favour for himself or any other person, or to render or attempt to do so or wilfully fails to exercise his authority to prevent the grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority; or

(vii) if he has issued any directive, policy, or any SRO (Statutory Regulatory Order) or any other order which grants or enables any concession or benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or associate or a benamidar or any other person; or .

(viii) if he commits an offence of wilful default.

(b) All offences under this Ordinance shall be non-bailable and, notwithstanding anything contained in sections 426, 491, 497, 498 and 561-A or any other provision of the Code, or any other law for the time being in force no Court including the High Court shall have jurisdiction. To grant bail to any person accused of any offence under this Ordinance.

(c) Where the Chairman NAB decides to release from custody or detention a holder of a public office or any other person accused of an offence under this Ordinance, he shall do so

after considering the gravity of the charge against such person and the accruing quantum of loss involved in the offence alleged to have been committed and may impose any reasonable conditions for such release.

(d) The amount deposited by the accused with the NAB shall be transferred to the Federal Government or, as the case may be, a Provincial Government or the concerned bank or financial institution, etc., within one month from the date of such deposit."

He particularly referred to clause (a)(vi) above and to section 14(d) to contend that what is happening in practice is that all the evidence is in the possession of the prosecution, but the 'burden of proofis on the accused. He also referred to section 9 (a)(vii) above and relying on the general principle of law enshrined in Article 122 of the Qanun-e-Shahadat Order, 1984 that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him and argued that Article 122 ibid is an exception to Article 117 of the Qanun-e-Shahadat Order. The latter lays down a general rule that in a criminal case the burden of proof is on the prosecution. The precise submission was that in respect of issuance of SROs etc. The burden of proving that the accused issued the same bona fide without intending to cause any loss to the public exchequer could not be proved in that such SROs, orders, directives etc. As the case may be, spring from office noting, decisions etc. The relevant files are in the exclusive custody of the department concerned and without providing the accused an opportunity to have access to the said material, he cannot be condemned for failing to discharge the alleged burden. To reinforce his arguments Mr.Aitzaz referred to the following passage from the case of Sh. Liaquat Hussain and others v. Federation of Pakistan through Ministry of Law, 'Justice and Parliamentary Affairs, Islamabad and others (PLD 1999 Supreme Court 504 at 793)

"...Clearly, an accused charged of offences/an unconvicted person is presumed to be innocent and has a vested right to a fair trial before a Court or Tribunal validly established under Article 175(1) of the Constitution..."

Mr. Aitzaz also referred to the following observation in Jamat-i-Islami through Syed Munawar Hassan, Secretary-General v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs (P L D 2000 Supreme Court 111 at 161) :

"...Viewed from that angle section 7-A of the impugned Act to the extent indicated above is unconstitutional, in that, it infringes the presumption of innocence and does not meet the condition of reasonableness due to vagueness...."

21. Mr.Aitzaz argued that in the NAB Ordinance criminal punishment has been provided for civil debt. In this respect he referred to Article 11 of the International Covenant on Civil and Political Rights, which reads as under:

"ARTICLE 11

"No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."

He also referred to Article 1 of the European Convention on Human Rights which provides no imprisonment for civil debt. He next referred to Article 1 of the 4th Protocol of the European Convention on Human Rights which provides that no one shall be deprived of his

liberty merely on the ground of inability to pay his debt. He argued that a civil debt can be incurred for various reasons and therefore there should be no provision for imprisonment in that regard.

The learned counsel referred to Jolly George Varghese and another v. The Bank of Cochin (AIR 1980 SC 470 at 475) wherein in paragraph 11 it was observed :

"11 The words which hurt are 'or has had since the date of the decree, the means to pay the amount of the decree.This implies, superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of Article 11 (of the Covenant) and Article 21 (of the Constitution). The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by his construction, sauced law with justice, harmonised section 51 with the Covenant and the Constitution."

Mr. Aitzaz referred to section 16(d) of the NAB Ordinance which reads thus:

"16.(d) Notwithstanding anything contained in this section, if in respect of any case relating to an offence triable under this Ordinance, the Chairman Nab, having regard to the facts and circumstances of the case may file a reference before any Accountability Court established anywhere in Pakistan, and such Court shall have the jurisdiction to try the same."

22. He argued that in a case under the NAB Ordinance the former Mayor of Karachi having allegedly committed an offence in Karachi was tried in Attock Fort. He was not in a position to ask for change of venue of trial in that no such provision has been made in the NAB Ordinance. Here only the Chairman NAB can apply for transfer as provided in section 16 of the NAB Ordinance, which reads as below:

"16.(a) Notwithstanding anything contained in any other law for the time being in force, all persons, accused of a scheduled offence, shall be prosecuted for such offence by Court established pursuant to this Ordinance exclusively as constituted under section 5 (g) and the case shall be heard from day to day and disposed of within 30 days.

(b) The Court shall sit at such place or places as the Government may, by order, specify in this behalf.

(c) Where more Courts than one have been established for an area, the Chief Justice of the High Court of the Province concerned shall, keeping in view the seniority and status of the Judges of various Courts, designate a Judge of any such Court to be an Administrative Judge.

(d) Notwithstanding anything contained in this section, if in respect of any case relating to an offence triable under this Ordinance, the Chairman NAB, having regard to the facts and circumstances of the case may file a reference before any Accountability Court established anywhere in Pakistan, and such Court shall have the jurisdiction to try the same."

He contended that in the past particularly during the last five years starting from Al-Jehad Trust's case in March 1996, the concept of separation of the Judiciary from the Executive makes it imperative that this should be Within the purview of the Judiciary and not the Executive to fix the venue of trial. In this regard reference was also made to the following observation in Akhlaq Ahmad v. Government of Punjab and 2 others (1991 M L D 739 at 742)

"...Neither section 352 of the Criminal Procedure Code nor the rules on the subject empower the Government, the Home Secretary, or the District Magistrate to pass any order of their own directing the holding of trial at a place other than the Court-house. It is not difficult to understand the rationale as to why such a power has not been conferred upon the executive authorities. To allow them to determine the venue for holding Court would undermine the independence of the Judiciary."

He also referred to Mairaj Muhammad Khan v. The State (P L D 1978 Karachi 308) and Moslemuddin Sikdar v. The Chief Secretary, Government of East Pakistan and others (PLD 1957 Dacca 101), wherein it was observed:

"...If the trial had taken place in an ordinary Court, which are well known to the members of the public and which are haunts of lawyers and where all the members of the public have, in fact, free access, the case might have been different."

23. The learned counsel then referred to section 25A(g) of the NAB Ordinance which confers judicial powers on Chairman NAB which cannot be countenanced under the law. Section 25A(g) reads thus:

"25A(g) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, if the Chairman NAB is satisfied that any agreement entered into between a bank or a financial institution, a cooperative society and a lender is vitiated by the provisions of section 23 or any other provision of the Contract Act, 1872 (IX of 1872), or any other law or the same is collusive or is against public interest, he may refuse to take such agreement into consideration for the purposes of Conciliation Committee or the conclusion drawn by them."

24. He referred to various passages from The Hub Power Company Limited (HUBCO) through Chief Executive and another v. Pakistan WAPDA through Chairman and others (P L D 2000 Supreme Court 841 at 865) to contend that if an agreement prima facie had been obtained through fraud or bribe it would be sufficient to take it out of the pale of the arbitrariness as distinguished from a commercial dispute raised under a valid agreement and that according to the public policy it requires a finding about its alleged criminality and such document. Was not referable to arbitration, meaning thereby that it can only be determined by a Court. He argued that, therefore, the Chairman NAB alone should not be given the power to determine the validity of such agreements :

25. Mr. Aitzaz next referred to section 24(d) of the NAB Ordinance which reads thus :

"(d) Notwithstanding anything contained in the Code where the holder of a public office or any other person accused of an offence is arrested by NAB under this Ordinance NAB shall as soon as may be inform him of the grounds and substance on the basis of which he has been arrested and produce him before the Court established under this Ordinance within a period

of 24 hours of arrest excluding the necessary for the journey from the place of arrest to the Court and such persons shall having regard to the facts and circumstances of the case be liable to be detained in the custody of the NAB for the purposes of enquiry and investigation for a period not exceeding 90 days provided that no accused arrested under this Ordinance shall be released without the written order of the Chairman NAB or the order of the Court.

He contended that the above provision is being used as a weapon and virtually people are being arrested for ninety days with no F.I.R. Against them and plea bargaining is going on through misuse of this unguided discretion. The persons who are thus detained are under tremendous pressure. The Full Bench of the Lahore High Court had twice termed this law as draconian law. He referred to Anwar Saifullah Khan v. The State and 4 others (P L D 2000 Lahore 564 at 578), wherein it was held that "...The supreme purpose of this legislation is to effect recovery of defaulted amounts of lending institutions, money or gains, obtained through corrupt practices, misuse or abuse of powers, kick-backs, commissions and other like amounts. In Mrs. Shahida Fail v. Federation of Pakistan etc. (W.P.No,739 of 2000=P L D 2000 Lahore 508) the Full Bench of this Court has held "...That the powers conferred upon the Chairman, National Accountability Bureau are draconian in nature, nevertheless these are not incommensurate with the ground realities obtaining in our cherished State...."and Mrs.Shahida Faisal v. Federation of Pakistan and 3 others (P L D 2000 Lahore 508 at 540) wherein it was observed that "...The Chairman NAB is given extraordinary power to ignore any agreement entered into between the borrower and the lending institution subject to a condition that he comes to the conclusion that the agreement is violative of section 23 of the Contract Act or any of its provision or is opposed to public policy. Undoubtedly, this power appears to be highly exceptionable and at the first blush, seems to be draconian in nature."

26. Mr. Atizaz further argued that the NAB Ordinance denies the supervisory and appellate powers to the High Court. The High Court cannot set the course of the prosecution or the proceedings before the Court right from the beginning and at the intermediary stage as is apparent from the contents of section 32 of the NAB Ordinance, which reads thus :

"32.(a) Any person convicted or the Prosecutor General, Accountability, if so directed by NAB, aggrieved by the final judgment and order of the Court under this Ordinance may, within ten days of the final judgment and order of the Accountability Court prefer an appeal to the High Court of the Province where the Court is situated.

(b) All appeals against the final judgment filed before the High Court will be heard by a Bench of not less than two Judges constituted by the Chief Justice of the High Court and shall be fmally disposed of within thirty days of the filing of the appeal.

(c) Notwithstanding any other law for the time being in force or this Ordinance, no appeal against any interlocutory order of the Court during the proceedings pending before it under this Ordinance, shall lie and an appeal shall lie only against the final judgment of the Court.

(d) No stay of proceedings before the Court shall be granted by any Court on any ground whatsoever, nor proceedings thereof be suspended or stayed by any Court on any ground whatsoever."

27. Concluding his arguments, Mr.Aitzaz Ahsan submitted that the NAB Ordinance provides the authorities with a draconian means of dealing with an accused and his property, contrary to the due process of law and it creates a parallel judicial system in the country thereby

empowering the Executive to perform the judicial functions. The NAB Ordinance vests excessive and unguided authority in the Chairman NAB and the Government, and purports to deny supervisory and appellate powers to the Superior Courts. He argued that it was a law that must .Be struck down, particularly some of its features i,e,, in so far as it divests Courts from the powers to grant bail; allows inordinate detention period for an accused without an F.I.R.; enables seizure of property; purports to apply the offences of wilful default, misuse of authority and issuance of SROs with retrospective effect, places the.Burden of proof on the accused and provides for a criminal punishment for civil debt. He emphasized that empowering trial in places inaccessible to the general public and away from the normal seat of ordinary Courts, the NAB Ordinance impedes the exercise of Fundamental Rights of an accused by giving unbridled discretion to the Government in this and such other matters as rejecting settlements and plea bargaining. In. These respects the NAB Ordinance violates the institutional values as enshrined in a long history of the judicial system in Pakistan and its provisions are disproportionate to the mischief that they seek to eliminate.

28. Mr. Muhammad Akram Sheikh, learned Senior A.S.C. Appearing on behalf of the petitioners in Constitutional Petitions No, 15, 16 and 17 of 2000 vehemently argued that the National Accountability Bureau Ordinance, 1999 and all the amending Ordinances have been promulgated by the Federal Government without any legislative competence. He submitted that Article 175 of the Constitution speaks of establishment of Courts as well as their jurisdiction in the following words:

"175.(1) There shall be a Supreme Court of Pakistan, a High Court for each Province and such other Courts as may be established by law.

(2) No Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law."

He contended that while conferment of the jurisdiction is a subject regarding which Federal Legislature makes laws exceptio curtail the jurisdiction of the Supreme Court according to Item No, 55 of the Federal Legislative List, yet there is no mandate of the Constitution to the Federal Government to set up Courts in the territories of the Provinces. In support of his contention, he referred to Items No, 1 and 2 of the Provincial Legislative List-II of the Government of India Act, 1935, which read thus:

1 Public order (but not including the use of His Majesty's naval, military or air forces in aid of the civil power); the administration of justice; constitution and organization of all Courts, except the Federal Court, and fees taken therein; preventive detention for reasons connected with the maintenance of public order; persons subjected to such detention."

"2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts."

He also referred to Items No, 1 and 2 of the Provincial List of the 1956 Constitution which makes the following reading:

"1 Public order (but not including the use of naval, military or air forces, or any other armed forces of the Federation in aid of the civil power)."

"2 Administration of justice; constitution and organization of all Courts, except the Supreme Court; procedure in Rent and Revenue Courts; fees taken in all Courts, except the Supreme Court."

He next referred to. Articles 141 and 142 of the Constitution, which read as under:

"141. Subject to the Constitution, (Majlis-e-Shoora (Parliament) may make laws (including laws having extra-territorial operation) for whole or any part of Pakistan, and a Provincial Assembly may make laws for the Province or any part thereof."

"142. Subject to the Constitution -

(a) (Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List;

(b) (Majlis-e-Shoora (Parliament), and a Provincial Assembly also, shall have power to make laws with respect to any matter in the Concurrent Legislative List;

(c) a Provincial Assembly shall, and (Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in either the Federal Legislative List or the Concurrent Legislative List; and

(d) .....

He contended that all residual subjects have gone to the Provincial Legislature. The Constitution is a document which is a source of power distribution amongst all organs of the State as well as its federating units and this Court is not bnly the custodian of the Constitution but also of the `Provincial Autonomy', inasmuch as, it has the exclusive power to resolve disputes between the Provincial and the Federal Governments. He submitted that the present Government is not answerable to any elected Parliament and is only operating by virtue of the mandate given to it by this Court in Zafar Ali Shah v. Chief Executive, General Pervez Musharraf (P L D 2000 SC 869), therefore, two things have to be in existence: (i) that every executive action or legislative instrument has to strictly adhere to the framework of the Constitution and (ii) it has to have a nexus with the Proclamation of Emergency of 14th October, 1999. He further submitted that a legislative instrument cannot be promulgated merely because such facilities are available and the existing laws cannot be altered unless they have a nexus with the objects for which the Proclamation of Emergency has been reckoned. He contended that in India, until 42nd Constitutional Amendment, which took place on 3rd January, 1977, the position obtaining was very similar to that of Pakistan because the administration of justice and establishment of Courts was a State subject and was not a Union or Concurrent subject and unlike Pakistan India have all their residual subjects to the Centre. Thus, in the Constitutional dispensation we have greater part of autonomy for the Provincial Legislatures and the Provincial Governments for we have all residual subjects to our Provinces. He submitted that the position obtaining is that by virtue of 42nd Constitutional Amendment this subject was deleted from the State List so as to be made a residual subject and it was thereafter that certain Federal Courts were set up by the Federal Government. He contended that in Pakistan there are two other Federal Courts operating within the framework of the Constitution: (i) under Article 212 of the Constitution and (ii) Federal Shariat Court under Article 203A. In 1991, when the Government of Pakistan wanted to set up speedy Courts the proposition was examined by the consultants and the present

Attorney-General who was the Attorney-General in those days and, according to Mr. Akram Sheikh, it was the view of all concerned that the only way to set up a Court under the Federation is to amend the Constitution and therefore, a time-bound amendment was incorporated in Article 212 of the Constitution.

29. He next contended that the Federal Government may be competent to set up Courts in the Federal territory but not in the territories of the Provinces and that it is possible for the Federal Government to make laws conferring jurisdiction on already existing Courts under the control and superintendence of the High Courts. He contended that unlike the impugned Ordinance, Ehtesab Act, 1997 did not create its own Courts but it conferred jurisdiction on the High Courts and the Chief Justices of High Courts were to constitute Ehtesab Benches and relied upon Mohtarma Benazir Bhutto v. Federation of Pakitan (1999 SCMR 759)to contend that such Benches were held by this Court to be like any other Benches of High Court constituted to hear a particular category of cases. He contended that on the one hand the law has been promulgated without any legislative competence and on the other it has no nexus with the objectives on the basis of which the Emergency of 14th October, 1999 was proclaimed.

30. Mr. Akram Sheikh submitted that a Judge of a Special Court is subordinate to and under the superintending control of the High Court and that this Court has disapproved the situations where the above element is absent. He submitted that an Accountability Judge acts in complete derogation of the High Court, in that, the jurisdiction is being exercised not in subordination to the High Court but in replacement thereof. The learned counsel contended that Judges of the Accountability Courts have been given perks and privileges, which are equivalent to the ones given to the Judges of the High Courts and that such a course would create bias, which would paralyse the judicial faculties of the Judges, who will not be able to act impartially in the administration of justice.

31. Mr. Muhammad Akram Sheikh next contended that there is no security of tenure available to the Judges of the Accountability Courts. They only work during good behaviour, in that no guidelines whatsoever have been provided for removal of such Judges and the Court-houses are not regulated/controlled by the Judges instead they are controlled by the Armed Forces.

32. Mr. Akram Sheikh, argued that the Accountability Courts are not under the control and supervision of the High Courts in terms of Article 203 of the Constitution, therefore, their establishment is violative of the concept of independence of judiciary as envisaged under the scheme of the Constitution. He then placed on record copies of International Covenants and also relied on the following decisions/material relating to "Independence of Judiciary".

1. Written Constitutions A computerized Comparative Study of 142 Constitutions by Henc van Maarseveen. 1

Out of 142 countries 105 constitutions explicitly declare independence of central judicial organ. The Pakistan's Constitution proclaims that, independence of judiciary shall be fully secured.

(At page 2 of the Book.)

The independence and coordination of these powers is the basis of the Government. The functions of the public power, legislative, executive, and judicial, cannot be united is a single organ.

Does the constitution contain an explicit declaration regarding the independence of the central executive organ(s)?

1 Yes, it is explicitly declared to be an independent organ,

2. Yes, it is explicitly declared not to be an independent organ

3. No,

(At page 3 of the Book.)

Does the Constitution contain an explicit declaration on the independence of the Central Judicial Organ?

1. Yes, it is explicitly declared to be an independent organ

2. Yes, is explicitly declared not to be an independent organ

3. No,

The question was also answered affirmatively in cases where the judicial branch, the Courts or the Judges in general are declared to be independent:

"Wherein the independence of the judiciary shall be fully secured" (Preamble Pakistan).

Liaquat Hussain v. Federation of Pakistan (PLD 1999 Supreme Court 504) (At page 14 of the Book)

The Courts/Tribunals which are manned and run by the Executive Authorities, without being under the Control and Supervision of the High Court in terms of Article 203 of the Constitution could hardly meet the mandatory requirement of the Constitution and that in order to ensure independence of the judiciary any Court or Tribunal, which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit within the judicial framework of the Constitution. (p.844)

(At page 16 of the Book)

"The maximum period for the submission of challan is 14 days, which should be strictly adhered to. In appropriate cases, contempt proceedings may be initiated against the Investigating Officer who deliberately or negligently causes delay in submitting challan or deliberately distorts investigation with a view to favour or disfavour someone. Again, in appropriate cases, with a view to prevent delay in trial, challan may be submitted even if the report of medico-legal forensic or ballistic expert is awaited. Such reports may be submitted later in point of time. In cases triable by the Court of Session, the challan rather than being submitted to the Magistrate under section 190(3) of the Code should be sent directly to the Court of Session.

Mehram Ali v. Federation of Pakistan (PLD 1998 Supreme Court 1445)

(At page 24 of the Book)

The right of "access to justice to all" is a Fundamental Right, which right cannot be exercised, in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i,e, judicial hierarchy. The Courts/Tribunals which are manned and run by executive authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution, can hardly meet the mandatory requirement of the Constitution.

(At page 25 of the Book)

Article 2-A, Independence of Judiciary, Separation of Judiciary from Executive, Hallmark of, Constitution is that same envisages separation of the Judiciary from the Executive, Independence of judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and conditions.

(At page 36 of the Book)

The right of "access to justice to all" is a Fundamental Right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i,e, judicial hierarchy.

That the independence of judiciary is inextricably linked and connected with the process of appointment of Judges and security of their tenure and other terms and conditions.

(At page 37 of the Book)

(i) that equal protection of law does not envisage that every citizen is treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;

(ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;

(iii) that different laws can validly be enacted or different sexes, persons of different age groups, persons having different financial standard and persons accused of heinous crimes;

(iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;

(v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;

(vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;

(vii) that in order to make a classification reasonable, it should be based-

(a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;

(b) that the differentia must have rational nexus to the object sought to . Be achieved by such classification.

4 Government of Sindh v. Sharaf Faridi (P L D 1994 Supreme Court 105)

(At page 54 of the Book)

In our opinion, financial independence of the judiciary can be secured if the funds allocated to the Supreme Court and High Courts (by the Parliament and the Provincial Assemblies in their respective annual budgets) are allowed to be disbursed within the limits of the budget by the respective Chief Justices of these Courts without any interference by the Executive.

5 Mahmood Khan Achakzai v. Pakistan (PLD 1997 Supreme Court 426)

(At page.56 of the Book)

Kesavananda Bharati v. State of Kerala (AIR 1973 1461) (At page 58 of the Book)

In all the Constitutions, the Objectives Resolution has been the pervading spirit. It spells out broad principles for the governance of the country. The common factors throughout have been Federal democratic form of Government guaranteeing all the freedoms, equality, tolerance and social justice, as enunciated by Islam and fully securing the independence of Judiciary.

(At page 59 of the Book)

No enactment can be made in respect of the provisions of the Constitution relating to Judiciary by which its independence, and separation from Executive is undermined or compromised, for such are the in-limitations in the Constitution completely independent from political, morality and force of public opinion. [p. 511g.]

(At page 63 of the Book)

Significantly by, employing the words "any law" the intention of the Constitution seems to be that Article 8 will apply laws made by the Majlis-e-Shoora (Parliament) be it general or any law to amend the Constitution. Likewise no enactments can be made in respect of the provisions of the Constitution relating to judiciary by which its independence and separation from executive is undermined or compromised. These are in-built limitations in. The Constitution completely independent from political morality and force of public opinion.

6. Government of Balochistan v. Azizullah Memon (PLD 1993 Supreme Court 341)

(At page 69 of the Book)

Constitution is based on .The principle of trichotomy of power in which executive, legislature and judiciary have their own functions independent from each other. None of these three orgahs are dependent upon the other nor one can claim superiority over the other. In this context and background impose executive officers to carry out the judicial work .By ignoring the Courts established in that area by itself creates discrimination and negates the very concept of justice and violates Fundamental Rights. [p.

36638.

(At page 81 of the Book)

...The separation of the judiciary as contemplated in Article 175 of the Constitution and independence of the judiciary as envisaged in the Objectives Resolution cannot be achieved without having independent annual budget for the judiciary. In other words, the judiciary should generate its own annual income according to its annual requirements. In my view, this may not be practicable. I am inclined to hold requirements of above Article 175 will be met if the judiciary effective say in formulation of its annual demands. To differently, the executive should place annual funds requirements at the disposal of the judiciary for operating it being interfered with by any agency of the Executive. "

7. The Superior Courts of Pakistan by M.A. Mann=85 88

(At page 86 of the Book)

The Judges could only be removed for misbehaviour or infirmity of mind or body, reported by, the Judicial Committee of the Privy Council on a reference by His Majesty. The Government of India Act, 1935, Ss.200 and 201.

(At page 87 of the Book)

The Constitution of Pakistan, however, departed from the principle of parliamentary supremacy, which exists in England, and accepted the principle of judicial review found in the federal systems of Australia, Canada and the United States.

Independence of the judiciary was sought by incorporating similar provisions as were found in the Act of 1935.

(At page 88 of the Book)

Independence of the judiciary was preserved to a great extent, by the incorporation in the Constitution of the. Usual provisions understood to produce such results. The jurisdiction and powers of the Supreme Court were mentioned in detail by the Constitution, but in the case of the High Courts, less comprehensive provisions were made. Articles 170, 171, 176, 224 and 227 read together, as interpreted and applied by the Courts perhaps, gave more powers and wider.

8. Constitutional Law and Judicial Activism by B.R. Sharma (At page 91 of the Book)

Today the judiciary is not attracting the best legal talent because of discriminatory service conditions vis-a-vis the role of politics in the appointive process. Delay in Courts has become a common feature.

The judicial verdict in Minerva Mills case, however, affirms that the Court is not prepared to give a free hand to the Parliament in the implementation of all the directives except those contained in Article 39(b) and (c).

(At page 93 of the Book)

Constitutional Rights of Prisoners and Judicial Activism.

The International Covenant on Civil and Political Rights emphasized that "all persons deprived of their liberty shall be treated with human dignity and with respect for the inherent dignity of human person."

(At page 94 of the Book)

"the prison laws do not swallow up the fundamental rights of the legally unfree ... The Courts will guard the freedom behind the bars."

PrisonersRights and the Role of Judiciary. (At page 95 of the Book)

Where the Court held that conditions of detentions cannot be extended to deprivation of other fundamental rights consistent with the fact detention.

(At page 96 of the Book)

Till that time he was not a person under the sentence of death. The Court held that if solitary confinement was inflicted on a prisoner, it was a substantive in addition to the punishment awarded by the Court and that would violate Article 20(2).

"Where the rights of prisoners, either under the Constitution or under the law, are violated the writ. Power of the Court can and should run to his rescue. ... The Court has Constitutional responsibility to ensure that the Constitutional purpose of the deprivation is not defeated by the prison administration.

It was implicit in Article 21, as interpreted in Maneka Gandhi's case, namely, that no person should be deprived of his life or personal liberty except by a procedure which was "reasonable, fair and just." Bhagwati J. For himself and Koshal J. Held that right to an "expeditious trial" was an integral part of the fundamental rights.

(At page 98 of the Book)

A review of the foregoing discussion makes it clear that the judiciary has played a significant role in the development of prison jurisprudence in India. It has not only safeguarded prisoner's rights but has also pleaded for amelioration of prison conditions.

(At page 99 of the Book)

This judicial function can only be performed by an authoritative, independent and impartial judiciary.Hence, an independent judiciary is an indispensable requisite of a free society under the rule of law. Independence here means freedom from executive or legislative interference in judicial functions. This also means that the Judges must discharge their function without fear or favour.

(At page 100 of the Book)

The Committee expressed the view that "the appointment of Judges should not be left to the unfettered discretion of the executive".

(At page 101 of the Book)

The Judges have been given a special security of their tenure.

They cannot be removed from their office except on ground of proved misbehaviour and incapacity. This means that their tenure is not dependent upon the mere pleasure of the Government.

(At page 106 of the Book)

The Constitution guarantees them independence by stating that Judges are irremovable. This has been interpreted to mean that they cannot even by transferred without their consent to a higher position than the one they are holding.

(At page 109 of the Book)

The independence of the judiciary is a cardinal and basic feature of our Constitution.

It is in this context that the independence of the Judiciary becomes vital and of paramount importance. This independence of the judiciary must be protected if we want to maintain the essentials of a decent society governed by the rule of law.

(At page 120 of the Book)

He realized that a strong, bold and independent judiciary was a sine qua non for upholding the rule of law in a parliamentary democracy.

9. Law and Judiciary in Pakistan by Mr. Justice A.R.Cornelius 127

136

(At page 130 of the Book)

Judicial Control of Executive and Legislative Action.

Cornelius maintained that the power of the judiciary to control administrative and legislative action derives its force from the Law and the Constitution.

The provision of Fundamental Rights not only guaranteed basic human freedoms but also placed check on administrative lawlessness. Added to this was the power given to the Courts to pronounce upon the Constitutionality of all laws. Where a law was made in direct violation of a Fundamental Right or of any other positive provision in the Constitution, it was liable to be invalidated by the superior Courts.

By Article 6 of the Constitution, it is provided that any law or any custom or usage having the force of law, which is inconsistent with any of the Fundamental Rights referred to above, shall to the extent of such inconsistency be void, and the State is debarred from making any law which takes away or abridges the Fundamental Rights, it being declared that to the extent of such contravention a law so made shall be void.

10. Basic Principles on the independence of the Judiciary

Adopted by the 7th UN Congress on prevention of crimes through Resolution 40/32 on November 29, 1985.

(At page 138 of the Book) Independence of the judiciary

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence.

2. The judiciary shall decide matter before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the Courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary Courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary Courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

(At page 139 of the Book)

Conditions of Service and Tenure

11. The term of office of Judges, their independence, security, adequate remuneration, conditions of service, pensions Wand the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

(At page 141 of the Book)

In the performances of their duties, prosecutors shall:

(a) Carry out their functions impartially and avoid any political, social, religious, racial, cultural, sexual or any other kind of discrimination.

On the strength of the above material, he submitted that the objective of judicial independence is not achievable without neutralizing the role of prosecutor and that even in Kosovo and Yogoslavia, the countries which are torn by internal strife, the criteria of 'independent prosecutorsis adhered to. He contended that the prosecution, the Attorney-General and the Prosecutor General have to be different from the Chairman of the National Accountability Bureau and the Investigating Agency. Their role should be to independently assess as to whether a case worth presentation is made out or not.

33. The learned counsel submitted that the impugned Ordinance, which has replaced the Ehtesab Act, 1997, totally destroyed the values which were protected under the Ehtesab Act whereunder a former Judge of she Supreme Court was the Prosecutor General/the Chief Ehtesab Commissioner.

34. On the status of Accountability Ordinance vis-a-vis the Universal Declaration of Human Rights, the Cairo Declaration and Chapter on Fundamental Rights in the Constitution of Pakistan, he argued that Pakistan is a signatory to the above Declaration and that Universal Declaration of Human Rights was adhered to by this Court in the case of Al-Jehad Trust v. Federation of Pakistan (1999 SCMR 1379). He laid great emphasis on the following excerpts from the Report:

"Even under the Universal Declarations of Human Rights, to which Pakistan is signatory, human beings have some basic fundamental rights irrespective of their origin or status. In this behalf reference may be made to Articles, 1, 2, 3, 4, 5, 6, 7, 8, 9,10, 13, 15 and 21 of the Universal Declaration of Human, Rights."

"The Fundamental Rights enshrined in the Constitution in fact reflect what has been provided in some of the Articles of. Universal Declaration of Human Rights. Supreme Court, while construing the former, referred to the latter if there is no inconsistency between the two with the object to place liberal construction as to extend maximum benefits to the people and to have uniformity with the comity of nations."

Reliance was also placed on HUMAN RIGHTS CASES (1993 SCMR 2001) wherein at page 2006 Placitums-C and D, it was held as under:

"Another very important question of the contemporaneous support of law for passing any of the appropriate orders in any of these cases was also discussed with some of its deeper implications. It was pointed out that the "enforcement" of the fundamental right concerned being the object of the law as enacted in the Constitution, will itself, furnish the contemporaneous support for the appropriate orders. No further legal support might be necessary. It was also emphasized that although the scope is left very wide for the Supreme Court to pass "any" or "all" "appropriate orders" for the "enforcement" of fundamental rights; yet following the usual Rules of judicial restraint an effort would always be made in procedural matters to find and discover other statutory dispensation as well. Though, as already emphasized, strictly speaking it may not be needed at all."

It was pointed out; firstly, that the fundamental rights conferred in Chapter 1 of Part II are by and large very comprehensive and no internationally recognized. Human Right would ordinarily remain out of them. While trying to discover the connection of a Human Right which is not prima facie, conferred by Chapter 1 of Part II of the Constitution, the necessary next exercise would be done under another mandate of the Constitution; namely that contained in Article 2A thereof. It makes the principles and provisions of the Objectives Resolution as a substantive part of the Constitution and the Courts are obliged to give effect to it accordingly. There are such Human Rights in Islam which when properly analyzed and understood, definitely stand at a higher pedestal as compared to the internationally recognized Human Rights. For example, the right to obtain justice and the right to dignity of man are more pronounced in Islam than they are in any other system. When interpreting the Fundamental Rights and their scope as conferred by Chapter 1 in Part II, corresponding or extended rights in the Islamic Jurisprudence and philosophy as well as Islamic Law would obviously be kept in view. "

Reference was then made to Mst. Kaneez Fatima v. Wali Muhammad (P L D 1993 Supreme Court 901) wherein at page 910 it was observed:

"5 The self-executing provision not only confers a right but it provides for its protection and a further duty is cast to enforce it without the aid of legislative enactment. There may be supporting legislative enactments which may flow from such self-executing provisions of the Constitution, but they will not change the character of the self-executing provisions of the Constitution nor will they be dependent upon such supporting legislation. But where merely a "policy has been laid down or some &defines have been provided", they are dependent upon supporting legislations and enactments as in our Constitution, procedure is provided for enforcing or making such non-self-executing provisions operative. Therefore, in such circumstances, the non self-executing provisions of the Constitution serve as a beacon light for the enactment of laws by the legislature and also for making rules and regulations which have the force of law."

"6. Article 2A makes the Objectives Resolution a substantive part of the constitution. The Objectives Resolution inter alia provides that the sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust. The Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and the

Sunnah. It goes on to provide for making adequate provisions for guaranteeing fundamental rights, safeguarding the interests of minorities and backward and depressed classes, and ensures the independence of judiciary. "

WILFUL DEFAULT

35. As to 'defaultand 'wilful default', Mr. Akram Sheikh, argued that default would not embrace every failure by the defendant to perform his part of the contract unless prevented by superior force and if a 'defaultis committed intentionally or deliberatelyit is 'wilful default'. He submitted that 'wilful defaultmeans conscious failure to obey an order but a defaulter cannot be committed to prison in breach of a Constitutional obligation, which would tantamount to breach of Fundamental Rights to a fair trial. He referred to the definition of `defaultand 'wilful defaultas given in the following

1 Words and Phrases (Permanent Addition)

West Publishing Co. 1658 to date

Definition of default; Definition of wilful default (At page 3 of the Book)

"Default" is judicial admission of plaintiff's right to recover but, in an unliquidated damage case, not of the amount of recovery.

(At page 5 of the Book)

"Default" is the nonpayment of an obligation by the party bound, to pay, without the consent of the parties having the right to waive the payment. Therefore, when the party entitled to demand payment waives the same by extending the time for payment, either for a definite or indefinite period of time, the person bound by the obligation can not be said to be in "default." Arnot v. Union Salt Co., 79 N.E. 719, 721, 186 N.Y. 501, citing De Groot v. McCotter, 19 N.J. Eq.531; Thomson v. Poor, 42 N.E. 13, 147 N.Y. 402; Toplitz v. Bauer, 55 N.E.1059, 161 N.Y. 325, 333.

2. Stroud's Judicial Dictionary of Word and Phrases, Fifth Edition by John S. James London Sweet and Maxwell Limited (1986) Definition of default; Definition of wilful default

(At page 22 of the Book)

" 'Defaultwould seem to embrace every failure by the defendant to perform his contract unless prevented by superior force over which he had no control, such as stress of weather".

"Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances; not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction"

(At page 27 of the Book)

WILFUL DEFAULT. "Wilful default of the person in charge" of a ship (s.299), Merchant Shipping Act 1854 (c.104), and s.419(3), Merchant Shipping Act 1894 (c.60)), means "by the

default" of such person, whether intentional or negligent, and especially so in view of S.29, Act of 1862 (c.630).

Wilful default by a trustee is the wilfully not doing something which he ought to do, as distinguished from doing something which he ought not to do;

3 . Excellent Legal Word and Phrases Vol. III 1996 by Mian Muhibullah Kakakhel.

Definition of default; Definition of wilful default (At page 30-31 of the Book)

Wilful Default. -If the default is committed intentionally or deliberately it is wilful default regardless of the reason why the default was intended. The word 'wilfulmust be given full significance... "It is to be made clear that in order to be wilful, a default need not be habitual or continuous. A single default in the facts and circumstances of a particular case may be wilful." AIR 1968 Orissa 113.

Wilful default.-To make out "wilful default" three elements must concur, viz., (1) the doer or abstainer of the act or omission must be a free agent; (2) he must be conscious of what he is doing or not doing and the probable result which might arise from his act or omission, and (3) this default may range from a state of mind all the way from supine indifference to conscious violation as a result of deliberation. (1954 2 MLJ 763).

Wilful default is indicative of some misconduct in the transaction of business or in the discharge of duty of omitting to do something either deliberately or by reckless disregard of the fact whether the act or omission or was not a breach-of duty. AIR 1954 Madras 514).

(At page 33 of the Book)

Default means conscious failure to obey an order. If an order of restoration has been made behind the back of a tenant and without his knowledge, he cannot be said to have defaulted in obeying it, for he was not aware of his obligation to obey it and could not be penalized for it.

(At page 40 of the Book)

As per Ackermann, J. -The 'fair trialguarantee required that a person should be detained only after a hearing presided over or conducted by a Judicial Officer drawn from the judicial structure established by the Constitution. Persons drawn from the executive branch of the state could not discharge the function in the same way as a presiding officer who enjoyed the judicial independence which was foundational to, and indispensable for, discharge of the judicial function in a constitutional democracy based on the rule of law and which was expressly proclaimed, protected and promoted by section 165 of the 1996 Constitution. The singular importance of the judiciary as the protector of constitutional guarantees was a manifestation of the separation of powers doctrine. The power to commit a recalcitrant witness to prison was a power which had to be seated in the judiciary and could not be exercised by non-judicial officers.

(At page 4i of the Book)

As 'per Sachs J. There was a simple, profound and well-understood principle that only judicial officers should have the power to send people to prison. When such appointees were

not judicial officers, they should not be able to exercise what was a crucial power of the authority reserved in democratic states to the judiciary, namely the power to punish misconduct or penalize recalcitrance by means of incarceration in a state jail. The doctrine of the separation of powers prevented Parliament from entrusting such authority to persons who were not judicial officers performing Court functions as contemplated by section 165(1) of the Constitution.

4 . Chinamora V Angwa Furnishers (Pvt.) (1997 Law Reports of Commonwealth p. 149-169).

Judgment of Supreme Court of Zimbabwe (At page 116 of the Book)

Constitutional Law-Fundamental Rights-Protection from degrading treatment-Wilfully defaulting debtor-Civil imprisonment-Whether degrading treatment-Whether violative of right to protection of law-Constitution of Zimbabwe 1980.

(At page 125 of the Book)

(South Africa)

The gravamen of the decision was that the existing law did not adequately distinguish between the fundamentally different categories of judgement debtors: those unwilling to pay even though having the means to do so, and those who simply cannot pay but who failed to prove their inability to pay.

(England)

The intention and effect of the change to the law was that a fraudulent debtor should be punished, but that an honest debtor should not: see Marris v. Ingram (1879) 13 Ch D 338 at 343 and 2 Halsbury's Laws (3rd Edn.) para.1267.

(At page 127 of the Book) (India)

To be poor, in this land ... Is no crime and to "recover" debts by the procedure of putting one in prison is too flagrantly violative of Article 21 [of the Constitution which provides: "No person shall be deprived of his life and liberty except according to procedure established by law"] unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness ... There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree.'

(At page 131 of the Book)

Under 13(2)(c) two basic requirements must be met in order to justify the deprivation of personal liberty. First, the deprivation may only be sanctioned 'in execution of the order of a Court'. It follows that an Act of Parliament must provide for it. A term in an agreement of loan which makes civil imprisonment consequential upon non-payment by the debtor is, of

course, of no validity whatsoever. Section 27 of the Act authorities and empowers Magistrates to issue a decree of civil imprisonment against a judgment-debtor. It is not the creditor but the Court that makes the order. In execution thereof the judgment-debtor is arrested and detained in prison. Second, the decree can only be made to secure the fulfillment of 'an obligation imposed on him bylaw.

(At page 138 of the Book)

Public Accountant-Treasury contractor-Defaulter-Proceeded against to recover as "arrear of land revenue" amounts, representing "deficiencies" and "Shortages", in terms of Ss.66 & 69, Punjab Land Revenue Act (XVII of 1887) by warrant of arrest-Show-cause notice necessary, in spite of "conclusive" nature of the "certificate" under S.66 that amount is due-Supreme Court "prohibited" further proceedings where such notice was not given-Indifference from general policy of Act-Revenue Recovery Act (I of 1890), S.4 Constitution of Pakistan (1956), Art. 170- Writ of Prohibition.

7 International Covenant on Civil and Political Rights, 1976

(At page 150 of the Book)

Article 11. No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Discriminatory treatment amongst persons similarly placed to be avoided

36. He contended that this Court has never allowed discriminatory treatment amongst two alike and similarly placed persons. He submitted that instead of leaving a person at the caprice, arbitrariness or fancy of an individual to pick and choose whomsoever he wishes to as a wilful defaulter, a criteria should be laid down, a ceiling should be fixed or a class of persons from amongst the /defaulters be identified by way of intelligible differentia for being dealt with differently. He contended that a 'defaultis an adjudicated liability, therefore, unless the competing claims of the parties ripen into 'an amount dueas a consequence of a judicial determination, a person does not become a defaulter. He referred to Abdul. Latif v. Government of West Pakistan (PLD 1962 SC 382), to contend that before the process of recovery is initiated, the determination has to take place and the competing contentions cannot be taken as conclusive in making it a `determined liability'.

37. Mr. Akram Sheikh submitted that breach of a civil liability cannot lead to imprisonment and in this respect referred to Order XXXVIII of the C.P.C., which, according to him, is complete answer to the contrary result. He submitted that there are 11 statutes in the field on the subject of accountability in Pakistan. He submitted that it is not because there is a dearth of legislative instruments on accountability due to which corruption is uncontrollable but because of lack of will and selective approach of the administrators.

38. Mr. Akram Sheikh then took up the question relating to 'Burden of Proof and contended that a minimum threshold has to be crossed by the prosecution before a presumption could be reversed and/or before the burden of proof could be shifted onto the accused. In this behalf he referred to some documents from Vol. 4 in support of his contention. ON BAIL

39. He submitted that bail is a right of the accused but .The NAB Ordinance has put a clog on the power of the Court to grant bail. A Tribunal or Court is not free to determine tentatively or conclusively the facts which are placed before it. If there is any fetter on the power of the Court to tentatively assess the material before it then it does not qualify to be called a free Court. In support of his contention he relied on the following case law, from Pakistan and foreign jurisdiction, to highlight the principles of grant or refusal of bail that: a detainee must be informed of reasons for his detention; the Courts of law alone are entrusted with deciding the rights and duties of all the persons who are in the protection of Courts; it is right and proper that the Courts should exercise the power and the principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary and its enforcement lies at the very foundation of the administration of criminal law.

1 State v. Dlamini

(2000 Law Reports of the Commonwealth pp. 239-293)

Judgement of the Constitutional Court of South Africa by Chaskalson P

(At page 2 of the Book)

Constitutional Law-Separation of powers-Judicial Power -Bail proceedings-Statutory provisions-Accused entitled to release on bail unless Court finding detention to be in 'the interests of justice-Statute enumerating grounds whereby refusal of bail would be in 'the interests of justice- Whether such provisions an encroachment by legislature upon judicial functions-Whether in breach of doctrine of separation of powers -Whether unconstitutional - Criininal Procedure Act, 1977, Ss. 60(4)-(9)-Constitution of the Republic of South Africa, 1996

Constitutional Law-Fundamental Rights-Right to release from detention if 'the interests of justicepermit-Limitation Bail proceedings-Statutory provisions-Accused entitled to release on bail unless Court finding detention to be in 'the interests of justice'-Statute enumerating grounds whereby refusal of bail would be in 'the interests of justice'-Grounds including risk that accused would endanger public and that release of accused would cause public outrage-Whether statutory provisions . In breach of fundamental rights-Whether unconstitutional-Whether saved as reasonable and justifiable limitation-Criminal Procedure Act, 1977, Ss.60(4)(e), (8A), (11)-Constitution of the Republic of South Africa 1996, Ss.35(1)(f) & 36.

(At page 4 of the Book)

Subsections (4)-(9) of S.60 of the C.P.A. Were introduced by a 1995 amendment and amplified by the 1997 amendment (to accord with the corresponding provisions of the interim Constitution and the Constitution). Patently the interim of the legislature was not only to provide in meticulous detail how bail proceedings were to be conducted but also to provide judicial officers with clearly demarcated guidelines to be observed in the exercise of their adjudicative functions in relation to bail.

(At page 15 of the Book)

Everyone who is arrested for allegedly committing an offence has the right...(f),to be released from detention if the interests of justice permit, subject to reasonable conditions.

(At page 20 of the Book)

In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial Court. The Court hearing the bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail.

(At pages 54-55 of the Book) Summary

1. None of the provisions of the C.P.A. Impugned in the four cases before the Court infringes the Constitution on any of the grounds advanced here.

2 None of the provisions of the Constitution presents any major obstacle to the application of those impugned provisions.

3. Bail as an institution is well-known; so are its objectives and broad criteria. The advent of the Constitution and the adoption of the 1995 and 1997 amendments to section 60 of the C.P.A. Properly construed, have provided a norm and guided the evaluation process.

4. Section 35(1)(t) of the Constitution acknowledges that persons may be arrested and detained for allegedly having committed offences but such arrestees are entitled to be released on reasonable conditions if the interests of justice permit.

5. Deciding whether the interests of justice permit such release, and determining appropriate conditions, is an exercise to be performed judicially in accordance with the procedure laid down in section 60 of the C.P.A.

Although a bail application is a formal Court proceeding, it is relatively informal, inherently urgent and serves a uniquely interlocutory purpose distinct from that of the trial; the issue is not guilt but where the interests of justice lie in relation to bail.

In determining where the interests of justice lie, the essential exercise is to ascertain the relevant circumstances by using as a guide the checklist of relevant factors against the grant of bail provided in subsection (4), as particularised in subsections (5) to (8A), and of those for the grant of bail provided in subsection (9)

8. With regard to the factors both for and against the grant of bail, the checklist is not exhaustive, and the Court has to consider any other relevant factor.

9. In seeking to establish the presence of such factors the Court is to act as pro-actively and inquisitorially as may be necessary.

10. Having established all relevant factors, the Court must weigh up the pros and cons of bail judicially, keeping in mind the possibilities of using appropriate conditions to minimize possible risks.

11. Where the public peace is a factor, i,e, where subsections (4)(e) and (8A) are invoKed, the Court should proceed with great caution and establish that the requisite exceptional circumstances are indeed. Present.

12. Likewise, where subsection (11)(a) is involved, the. Court should be astute to ensure that the right to bail under section 35(1)(0 of the Constitution is not rendered illusory by the effect of subsection (14), the incidence of the onus and the need to adduce evidence. The accused is entitled to a reasonable opportunity to establish exceptional circumstances. The latter term holds, no hidden meaning and is to be applied judicially.

13. Although the accused's guilt may be relevant in a bail application, evidence thereon should be confined to the central issue whether the interests of justice permit the release of that accused on bail. Abuse by the prosecution of the right to cross-examine on the issue may result in the evidence being excluded at trial.

14. The record of bail proceedings is neither automatically excluded from nor included in the evidentiary material at trial. Whether or not it is to be excluded is governed by the principles of a fair trial.

15. Bail serves not only the liberty interests of the accused, but the public interest by reducing the high number of awaiting trial prisoners clogging our already overcrowded correctional system, and by reducing the number of families deprived of a breadwinner.

2 DPP V. Pete

(1991 Law Reports of the Commonwealth pp. 553-589)

Judgment of the Tanzania's Court Of Appeal

By. Nyalali, C.J.

(At page 58 of the Book)

Constitutional Law-Fundamental Rights-Personal Liberty-Bail Statutory provision precluding grant of bail for certain offences-Defendant denied bail of District Court pursuant to provision-Defendant applying to High Court for bail-Whether application raising constitutional issues-Whether Court having jurisdiction-Constitution of United Republic of Tanzania, Art. 30(3), (4)- Criminal Procedure Act 1985 (Act No 9 Of 1985) (as amended by Act No, 12 of 1987 and Act No, 10 of 1989), section 148 (4), (5)(e).

Constitutional Law-Fundamental Rights-Personal liberty -Bail-Statutory provision precluding grant of bail for certain offences-

Whether deprivation or denial of liberty under 'certain circumstancesand subject to a procedureboth 'prescribed by law' Whether provision Constitutional - Constitution of United Republic of Tanzania, Art. 15(2) -Criminal Procedure Act, 1985 (Act No 9 of 1985) (as amended by Act 'No,12 of 1987), S.148(5)(e)

Constitutional Law-Fundamental Rights-Personal Liberty-Bail Statutory provision precluding grant of bail for certain offences-Whether provision amounting to denial of Constitutional right to fair hearing-Whether amounting to treatment of person like convict before his guilt proved-Whether discriminatory-Constitution of United Republic of Tanzania, Art. 13(4), (5), (6)-Criminal Procedure Act'1985 (Act No, 9 of 1985), S. 148(5)(e).

(At page 59 of the Book)

In order to interpret the Constitution and the laws of the land correctly, there was a need to bear in mind certain basic concepts, principles and characteristics concerning the bill of rights and duties enshrined in the Constitution. First, the Constitution recognized and guaranteed not only basic Human Rights duties. This was symbolic and significant, expressing a Constitutionality recognized co-existence of the individual human being and society, as well as the co-existence of rights and duties of the individual and society. This view was .Supported by the principles underlying the African Charter on Human and PeoplesRights, adopted by the Organization of Africa Unity in 1981, which Tanzania signed in 1982 and ratified in 1984, and account of which should, therefore, be taken in interpreting the bill of Rights and Duties introduced into the Constitution of Tanzania in 1985. Second, the reality of the coexistence of the individual and society and the reality of the coexistence of rights and duties in the individual on one hand and the collective or communitarian rights and duties of society, and vice versa.

(At page 61 of the Book)

The Constitution of the United Republic of Tanzania provides by Article 13: `(6) For the purposes of ensuring equality before the law the state shall make provisions: (a) that every person, when his rights and obligations are being determined, be entitled to a fair hearing by the Court of law or other body concerned ... (b) every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty.'

By Article 15: '(1) Man's freedom is inviolable and every person is entitled to his personal freedom.

(2) For the purposes of protecting the right to personal freedom, no person shall be subject to arrest, restriction, detention, exile or deprivation of his liberty in any other manner save in the following cases: (a) in certain circumstances, and subject to a procedure, prescribed by law; ...

(At page 76 of the Book)

The question that arises is whether section 148(5)(e) fits into the provisions of Articles 30 or 31. The learned Judge dealt with this aspect of the case and stated:

"Therefore, if the Republic wants bail to be denied under the provisions of Article 30 of the Constitution on the ground that the provisions of section 148(4) and (5) of the C.P.A. Are in the public interests the said provisions of section 148(4) and (5) of the C.P.A. Must pass the proportionality test on a balance of probabilities. Similarly when the Republic wants the Court to refuse bail to the accused person under the provisions of Article 31 of the Constitution on the ground that the provisions of sections 148(4) and (5) were enacted on national security grounds the Republic has to prove and establish that these provisions of section 148(4) and (5) of the C.P.A. Are necessary and reasonably justifiable. If the Republic overcomes both these two hurdles only then may the Courts refuse bail, but after affording the accused person opportunity to challenge the Republic's statements and remarks.

(1987 Law Reports of the Commonwealth p. 567-585)

Judgment of the Zimbabwe's Supreme Court by Dumbutshena

(At page 96 of the Book)

Constitutional Law-Fundamental Rights -Reason for detention whether detainees had been "informed" of reasons-Whether sufficient factual or evidentiary foundation given - Emergency Powers (Maintenance of Law and Order) Regulations, 1983, section 17(2).

Administrative law-Judicial review -Detention -Whether judicial review excluded -Meaning of "if it appears to the minister"- Whether unreasonable exercise of discretion -Emergency Powers (Maintenance of Law and Order) Regulations 1983, section 17 (1).

(At page 113 of the Book)

It is necessary to say that cases of detention involve the liberty of the individual, no matter who that individual is I would like to repeat and thus, endorse what Leon, A.D.J.P., said in Hurely's case (supra) at p. 715C-J:

"This case raises matters of great Constitutional importance affecting the liberty of the subject, the security of the. State and the jurisdiction of the Courts. In dealing with this kind of legislation, Kotze, J. A., said the following in Union Government v. Fakir 1923 AD 466 at 471:

I should like, without attempting to dictate to the Legislature, to point out the great danger involved in departing from a well-known rule of Constitutional law in all civilized countries-namely, that the Courts of law alone are entrusted with deciding on the rights and duties of all persons who are within the protection of the Courts,.

Bull v. Minister of Home Affairs

(1987 Law Reports of the Commonwealth p. 547-566) Judgment of the Zimbabwe's High Court by Sansole, J. (At page 116 of the Book)

Constitutional Law-Fundamental Rights -Personal Liberty - Bail - Ministerial certificate prohibiting bail - Whether statutory power ultra vires the Constitution Appropriate Constitutional provision governing issue - Criminal Procedure and Evidence Act, Chap. 59, section 106(2).

Constitutional Law -Fundamental Rights Fair hearing -Judicial process -Bail -Pre-trial custody-Whether Constitutional right to bail -Constitution of Zimbabwe, sections 13(1), (2)(e) and (4) and 18(2) and (3).

Criminal procedure Accused on remand -Reasonable suspicion of commission of offence - Whether Court entitled to consider grounds of suspicion -Constitution of Zimbabwe, section 13(I)(e).

Section 13 of the constitution contemplated unqualified detention in the pre-trial period, subject to the limitation that that period was reasonable.

(At page 119 of the book)

"It is right and proper that the Courts should exercise this power. It is only through the Courts exercising their powers, fearlessly and impartially, that a proper balance can be achieved between the interest of the State in bringing alleged wrongdoers to justice. And the Courts in this country do so exercise these powers entirely free from any direct or indirect pressure or influence from the State, the Legislature or the executive branch of Government. So, basic is all this that the Courts will, in so far as they are legally able to do so, resist any attempts to lessen or minimize their powers and role in this regard."

(At pages 124-125 of the Book)

The relevant portions of section 13 of the Constitution of Zimbabwe are in the following terms:

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of these specified in subsection (2).

(2) The case referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorized by law

(a)

(b)

(c)

(d) for the purpose of bringing him before a Court in execution of the order of Court or an officer of a Court or before the Senate or the House of Assembly in execution of the order of the Senate or that House;

(e) upon reasonable suspicion of his having committed or being about to commit a criminal offence;

(f) .....

(g) .....

(h) .....

(i) .....

(3) ....

(4) Any person who is arrested or detained;

(a) for the purpose of bringing him before a Court in execution of the order of a Court or an officer of a Court; or

(b) upon reasonable suspicion of his having committed, or being about the commit, a criminal offence;

and who is not released, shall be brought without undue delay before a Court; and if any person arrested or detained upon a reasonable suspicion of his having committed, or being about to commit 'a criminal offence is not tired within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(At page 129 of the Book)

In Smith v. Attorney-General, Bophuthatswana 1984 (1) SA 196 (BS) at 200F, it was said:

"The universal method of safeguarding individual liberty is to entrust it to an independent judiciary operating in public and compelled to give reasons. Every man is entitled to 'due process of law'. This principle is so ancient that it can be traced back to the Magna Carta (1215)."

(At page 131 of the Book)

Pertinent and strong persuasive authority in support of this view is provided by the decision of the Privy Council 'in Attorney-General of the of The Gambia v. Momodou Jobe (1984) AC 689 (PC). It was contended in that case that a law of The Gambia that forbade the granting of bail, in the absence of certain defined special circumstances, to a person charged with an offence of dishonesty which affected public funds or public property, was invalid as being in conflict with section 15 of the Constitution of The Gambia. At p.697A-F Lord Diplock said:

"The relevant provisions of the Constitution relating to remand in custody and release on bail are to be found in section 15 of the Constitution and they are:

(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say:

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia...

(3) Any person who is arrested or detained:

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia;

and who is not released, shall be brought without undue delay before a Court.

(4) Where any person is brought before a Court in execution of the order orCourt in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings save upon an order of a Court.

(5) If any person arrested or detained as mentioned in subsection (3)(b) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.'

There is thus, nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained. Section 7(1) of the Act which prohibits release on bail, not totally, but subject to an exception if the Magistrate is satisfied that there are special circumstances warranting the granting of bail, cannot in their Lordshipsview be said to be in conflict with any provision of the Constitution."

(At page 134 of the Book)

Section 72(5) of the Constitution of Kenya Provides:

"If a person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions.

(At page 135 of the Book)

"Whereas section 72(5) of the Constitution makes release on bail mandatory only in certain prescribed circumstances, it is applicable to all offences. The amendments to section 123(3) have the effect of prohibiting the High Court from granting bail in cases of murder, treason, robbery with violence and attempted robbery with violence in any circumstances. Thus, where, for example, a person is accused of robbery with violence bail may not be granted even if he is not tried within a reasonable time."

5 Ruto v. Attorney-General and another

((1996) 1 Commonwealth Human Rights Law Digest pp. 124-125)

Judgment of the Nairobi's High Court by 0Kubasu (At page 137 of the Book)

Extension of non-bailable offences inconsistent with judicial powers;

The applicant was charged with unlawful possession of psychotropic substance and denied bail on the ground that, by virtue of a recent amendment to the Criminal Code, all drug-related offences had been made non-bailable. The applicant sought a declaration that the amending legislation was inconsistent with the Constitution in so for as it purported to limit the unlimited jurisdiction of the High Court in criminal matters and, in particular, the jurisdiction to grant bail for drug-related offences and infringed his right to personal liberty under section, 72(5).

As section 72(5) of the Constitution provided that all offences other than those punishable by death were liable, the amendment purporting to include drug-related offences alongside capital offences was inconsistent and void.

6. Imtiaz Ahmed v. State (P L D 1997 Supreme Court 545) (At page 139 of the Book)

S. 497-Constitution of Pakistan (1973), Art. 9-Bail, grant or refusal of, the principles-Approach of the Courts in view of the scenario prevailing in the country has to be reformation-oriented with the desire to suppress the mischieves-Courts, to achieve the said objective have to apply strictly the law which are designed and intended to eradicate the national evils but at the same time, they are duty-bound to ensure that the approach should not result in miscarriage of justice and provisions of Article 9 of the Constitution of Pakistan are not to be overlooked.

The Courts should be oblivious of the fact that the present country is confronted with many serious problems/difficulties of national and international magnitude, which cannot be resolved unless the whole nation as a united entity makes efforts. The desire to amass wealth by illegal means has penetrated in all walks of life. The people commit offences detrimental to the society and the country for money. Some of the holders of the public office commit or facilitate commission of offences for monetary consideration. In the above scenario the Courtsapproach should be reformation-oriented with the desire to suppress the above mischieves. To achieve the above objective, it is imperative that the Courts should apply strictly the laws which are designed and intended to eradicate the above national evils but at the same time, they are duty-bound to ensure that the above approach should not result in miscarriage of justice. It should not be overlooked that Article 9 of our Constitution , which relates to a Fundamental Right, guarantees life and liberty of every person. Life, inter alia, includes the right to have access to a fair and independent judicial forum for redress. A balance is to be stuck between national and individual interest/right. [p.22] F.

(At page 140 of the Book)

Bail, grant or refusal of-Principles.

A person accused of a bailable offence, is entitled as of right to be released on bail and grant of bail in such cases by the Court is not an act of grace or concession. Even in cases where a person is accused of non-bailable offence and the case does not fall within the prohibitory clause, meaning thereby that the punishment prescribed for the offence is neither death nor imprisonment for life nor 10 years, the grant of bail in such cases is a rule and refusal an exception. [p.557] L

Refusal of bail to a person in a case where he is entitled to its grant as of right, can only be justified on some statutory provision or on grounds strictly relatable to be holding of a just and fair trial. Such refusal cannot be justified on any high principles of ethics or morality. Both under the Anglo-Saxon concept of criminal jurisprudence as well as Islamic dispensation of criminal justice, the initial presumption of innocence of an accused charged with a criminal offence is not dislodged until he is proved guilty. Article 9 of the Constitution of Islamic Republic of Pakistan also provides that a person will not be deprived of his life and liberty except in accordance with the law. Therefore, bail cannot be refused in a case by way of punishment. [p.558] M

7 Government of Sindh v. Raees Farooq (1994 SCMR 1283)

(At page 146 of the Book)

Leave to appeal was granted to consider whether High Court was justified in allowing the Constitutional petition in terms of order granting bail to the detenus after having been informed that the detenus were allegedly involved in the criminal cases under the F.I.Rs, In the police stations; whether High Court was justified in dismissing the criminal miscellaneous application for cancellation of bail summarily without recording any finding; whether the allegation of prosecution that the detenus jumped the bail was correct or not.

(At page 147 of the Book)

Articles 199, 4, 9, 10 & 14-Provisions of Arts. 4, 9, 10 & 14 of the Constitution which confer fundamental rights on a citizen whenever violated and complaint is made to a High Court about that violation, High Court must step into investigate such facts under the discriminatory, jurisdiction conferred on it under Article 199 of the constitution and pass such order as may be found just, legal and equitable taking into consideration the facts and circumstances of each case.

Under Article 4 of the Constitution of Pakistan, 1973 citizen has an inalienable right to be treated in accordance with law and to enjoy the protection of law. Furthermore, under Article 9 of the Constitution no person shall be deprived of life or liberty save in accordance with law. Article 10 of the Constitution provides safeguards against arrest and detention. It provides that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest and every person who is arrested and detained in custody, shall be produced before a Magistrate within 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of nearest Magistrate and no such person shall be detained in the custody beyond the said period without the authority of a Magistrate. These. Provisions do not apply to preventive detention, but this is not the case here. Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. It in clear terms prohibits that no person shall be subject to torture for the purpose of extracting evidence. These provisions which confer Fundamental Rights on a citizen whenever violated and complaint is made to a High Court about their violation, the Court must step into investigate such facts under the discretionary jurisdiction conferred on it under Article 199 and pass such order as may be tbund just, legal and equitable taking into consideration the facts and circumstances of each case. [p.1291] C

Article 199-Arrest and detention-Constitutional jurisdiction of High Court-High Court has the jurisdiction to examine the facts and information laid before it to determine prima facie that it does not lack bona fides, is not a looked up or manipulated affair, the detenue has not been illegally detained without a proper and legal remand order where it is required and there appear reasonable grounds for believing that the detenue is involved in the crime charge with-Prosecution in such a situation is duty-bound to disclose the material upon which it has acted and High Court is to satisfy itself that such action is lawful and not in violation of law and Fundamental Rights.

(At page 148 of the Book)

Where the liberty of a citizen is involved, the action initiated by the Police/prosecution is found to be mala fide and intended to extract evidence or information form the detenue the superior Courts should not be reluctant to step in and grant relief to the citizens.

8. Mehram Ali v. Federation of Pakistan (PLD 1998 Supreme Court 1445)

9. Leading Constitutional Cases on Criminal Justice United States v. Salerno

(At page 166 of the Book)

The Bail Reform Act of 1984 allows a Federal Court to detain an arrestee pending trial if the Government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure ... The safety of any other person and the community." The United States Court of Appeals for the Second Circuit struck down this provision of the Act as facially unconstitutional, because, in that Court's words, this type of pretrial detention violates "substantive due process."

(At page 169 of the Book)

The Due Process Clause of the Fifth Amendment provides that "No person shall ... Be deprived of life, liberty, or property, without due process of law ..." This Court has held that the Due Process Clause protects individuals against two types of Government action. So-called "substantive due process" prevents the Government from engaging in conduct that "shocks the conscience," Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty," Palko v. Connecticut,

302 U.S. 319, 325-326 (1937). When Government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner .... This requirement has traditionally been referred to as "procedural" due process.

(At page 177 of the Book)

"The Principle that there is a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895). Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), and is established beyond legislative contravention in the Due Process Clause. ...

The statue now before us declares that persons who have been indicted may be detained if a judicial officer finds clear and convincing evidence that they pose a danger to individuals or to the community. The statute does not authorize the Government to imprison anyone it has evidence is dangerous; indictment is necessary. But let us suppose that a defendant is indicted and the Government shows by clear and convincing evidence that he is dangerous and should be detained pending a trial, at which trial the defendant is acquitted. May the Government continue to hold the defendant in detention based upon its showing that he is dangerous? The answer cannot be yes, for what would allow the Government to imprison someone for uncommitted crimes based upon "proof" not beyond a reasonable doubt. The result must, therefore, be that once the indictment has failed, detention cannot continue. But our

fundamental principles of justice declare that the defendant is an innocent on the day before his trial as he is on the morning after his acquittal. Under this statute an untried indictment somehow acts to permit a detention, based on other charges, which after an acquittal would be unconstitutional. The conclusion is inescapable that the indictment has been turned into evidence, if not that the defendant is guilty of the crime charged, then that left to his own devices he will soon be guilty of something else. " 'If it suffices to accuse, what will become of the innocent?" Coffin v. United States, (supra), at 455 (quoting Ammianus Marcellinus, rerum gestarum Libri Qui Supersunt, L. XVIII, C. 1, A.D. 359).

(At page 179 of the Book)

As Chief Justice Vinson wrote for the Court in Stack v. Boyle, (supra): "Unless the right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.".

40. He also referred to three statutes quoted by Mr. Abid Hsasan Minto in his written statement, namely, (i) Criminal Justice Act of 1988 of Great Britain; (ii) The Prevention of Corruption Act of Singapore and (iii) The Racketeer Influence and Corrupt Organization Statute (RICO) of USA to contend that in the first statute the power to grant bail is available even during remand; in the second statute the power to grant bail and compensation for wrongful detention is provided and the third one, according to him, though seems irrelevant but the right to grant bail is also available in that statute. He submitted that there is no concept of complete code without power to grant bail and that this Court would not countenance a half-cooked concept of 'Court System'.

41. Mr. Akram Sheikh also referred to some material on "Rights of Accused and Definition". He made particular reference to Article 21 of the "International Human Rights in Context" by Henry, J. Steiner, relating to right of accused, which reads thus:

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to Article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4 In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to

have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an International Tribunal;

(g) Not to be compelled to satisfy against himself or to confess guilt.

He also referred to book titled: "The Right of the Individual to Personal Security in Islam" by Osman Abd-el-Malek al-Saleh to highlight the right of individual security in Islamic Criminal Law; Personal Security in Islamic Theories of incrimination and penology; the principle of individual criminal responsibility and Quranic injunctions in regard thereto in the following verses:

(1) And the man hath only that for which he maketh effort.

(2) Whoso doth right, it is for his soul and whoso doth wrong, it is against it.

(3) Each soul earneth on its own account.

(4) No burden soul can bear another's burden.

(5) He who doth wrong will have the recompense thereof.

42. His precise plea was that from its very inception, Islamic Law has recognized the presumption of innocence as a right inherent to all people. Reference was also made to the case of Shahida Zahir Abbasi v. President of Pakistan (PLD 1996 SC 632), wherein at page 708, it was observed:

"27. A bare reading of the facts in the background of the case of Brig. Rtd. Imtiaz Ahmad (supra) would show that it would be fallacious to think that decisions of the executive including the Armed Forces to investigate serious charges against the accused officers are in the nature of 'acts of omission and commissionamenable to the judicial review of this Court under Article 183(3) of the Constitution when test of the law laid down in the cases of Zia-urRehman, Khalil-uz-Zaman and Malik Hayat (supra) cited in paras. 20 and 21 ante is applied, namely, that acts done being coram non judice or without jurisdiction or mala fide in the instant case.

43. Mr. Akram Sheikh also referred to the following case-law on 'remandto contend that remand to police custody cannot be granted under the Code of Criminal Procedure for a longer period than 15 days.

1 Azmat Ali Shah v. The State (PLD 1999 Peshawar 39). 1

(At page 1 of the Book)

Grant of adjournment and remand, is never to be taken in routine and it must be granted or refused by positive application of mind to the facts and circumstances of each case since that involved the liberty of a citizen whose each and every day of detention must be accounted for.

(At page 3 of the. Book)

Obviously, when an accused person is arrested, he is bound to be produced before the Magistrate within a period of 24 hours with reference to section 61 of the Cr.P.C. Beyond such period police cannot detained a person on its own authority and hence has to seek permission from a Magistrate under section 167, Cr.P.C. Such remand under section 167, Cr.P.C. Cannot be obtained for a period of more than 15 days. If after 15 days the investigation is not complete, the material is bound to be produced before the trial Court under section 344, Cr.P.C. To enable the Court to commence the enquiry.

(At page 4 of the Book)

In the state of affairs that prevails in our country, we observe quite frequently that laws are ignored and flouted in general and all the more flouted in certain specific cases. The liberties of citizens are now given secondary importance and at times the least importance. In such circumstances, it is necessary that the accused be physically produced before the Magistrate so that he is in a position every time to appreciate the plight of a detenu.

2 Hafeezur Rehman v. The State (P L D 1993 Peshawar 252) 6 9 (At page 6 of the Book)

Under section 167, Cr.P.C. a Magistrate can authorize the detention of an accused in custody for a term not exceeding 15 days in the whole while under section 344, Cr.P.C. An accused being in custody can be remanded for a term not exceeding 15 days at a time in case of absence of witnesses or any other reasonable cause necessary or advisable for the postponement or adjournment of an inquiry or trial.

(At page 7 of the Book)

Accused's detention for want of competent remand order would, no doubt, amount to illegal confinement and the same can be a valid ground to release him on bail.

3 Muhammad Siddiq v. Province of Sindh (P L D 1992 Karachi 358)

10 20

(At page 10 of the Book)

Detenus were arrested by the Police in investigation of one crime, kept in their custody under order of remand granted under section 167, Criminal Procedure Code by Magistrates and on expiry of maximum period of remand re-arrest in other cases and thus, continuously kept in custody of police without any limit of time by resorting to provision section 167, Criminal Procedure Code -Such practice clearly amounted to an abuse of power, by the police invested in them under the law.

A Magistrate is expected to act stringently in matters of grant of remand and it will always be in the interest of justice that remand of an accused person either to the police or judicial custody during the investigation is granted for the minimum possible time required for completing the investigating of a case expeditiously.

(At page 19 of Book)

It must be remembered that police and magistracy play a vital part at initial stages of administration of justice. In case these agencies fail to perform their duties in strict compliance of law people may lose faith in them. This will not only create a serious setback in the process of administration of justice but will also adversely affect the establishment of rule of law in the country.

4 Muhammad Sadiq umrani v. Government of Sindh (P L D 1993 Karachi 735)

(At page 21 of the Book)

Criminal Procedure Code (V of 1898), Ss.61, 167 & 154. Wrongful confinement without any remand order and without registration of any case by Law Enforcing Agency. Registration of cases by Police after such wrongful confinement on the basis of material supplied by the Agency. Constitutional petition seeking quashing of proceedings. Petitioners were taken in custody by the Law Enforcing Agency as distinct from being arrested in any fresh or pending case or cases against them-While the said persons remained in custody of the Agency, they were neither produced before any Magistrate nor any remand orders were obtained-Such detention of petitioners clearly amounted to illegal detention- Custody of the Petitioners after quite some time as subsequently handed over to Police by the Agency.

(At page 22 of the Book)

It is an admitted position that while the said persons remained in the custody of the Agency, they 'were neither produced before any Magistrate nor any remand orders were obtained as none has been produced. There is no law authorizing either the Agency or the Police to detain any person in their custody for an indefinite period as there are restrictions and conditions imposed by the Code of Criminal Procedure. In the normal course also if an accused is arrested by the Police, even then the Police cannot retain his custody beyond a period of twenty-four hours as provided by section 61, Cr.P.C. And thereafter, the police has to physically produce the accused before a Magistrate for remand either in police custody or judicial custody alongwith a proper remand report which indicates the number of F.I.R., the nature of offence committed, the date of arrest and the reasons for grant of remand. Only then the Magistrate 'concerned passes the necessary order under section 167, Cr.P.C. And this is done for regulating the custody.

Moreover, when the custody of the said persons was handed over to the Police by the Agency, the police officer taking the custody were obviously well-aware of the fact, that the said persons were in wrongful confinement of the Agency, as they only received their bare custody without any remand papers and neither any case was shown to have been registered against them nor they were required in any pending case.

Specially so, when the various reports lodged against the said persons by the concerned police officers, appear to be a managed affair under a pre-planned scheme. In the

circumstances, the said persons were kept in wrongful confinement without any remand order and without registration of any case.

(At page 27 of the Book)

There is no law authorizing either the Agency or the Police to detain any person in their custody for an indefinite period as there are restrictions and conditions imposed by the Code of Criminal Procedure. In the normal course also if an accused is arrested by the Police, even then the Police cannot retain his custody beyond a period of twenty-four hours as provided by section 61, Cr.P.C. And thereafter the police has to physically produce the accused before a Magistrate for remand either in police custody or judicial custody along with a proper remand report which indicates the number of F.I.R., the nature of offence committed, the date of arrest and the reasons for grant of remand. Only then the Magistrate concerned passes the necessary order under section 167, Cr.P.C. And this is done for regulating the custody.

Moreover, when the custody of the said persons was handed over to the Police by the Agency, the police officers taking the custody were obviously well aware of the fact, that the said persons were in wrongful confinement of the Agency, as they only received their bare custody without any remand papers and neither any case was shown to have been registered against them nor they were required in any pending case. As such the subsequent action taken by the police in arresting the said persons afresh and thereafter, lodging fresh report against them on hearsay evidence, is nothing but a colourful exercise of power, as in doing so, they have not only obliged the Agency by retaining their custody, but it also amounts to continuation of their wrongful confinement under a legal cover. Specially so, when the various reports lodged against the said persons by the concerned police officers, appear to be a managed affair under a pre-planned scheme. In the circumstances, the said persons were kept in wrongful confinement without any remand order and without registration of any case is well-founded.

5. Ghulam Sarwar v. State (1984 P Cr. L J 2588)

6. The State v. SamiuHalt Khan (PLD 1959 (W.P.) Karachi 157

35 38

(At. Page 35 of the Book)

Held, that in order to obtain remand under section 344, Cr.P.C. The following conditions require to be fulfilled.

(1) Some evidence should be adduced before the Court which should be sufficient to raise a suspicion of accused's guilt, and the Court should be assured that further evidence to strengthen suspicion into belief is expected to be collected.

(2) A police report in writing of facts constituting the offence must also be produced to enable the Court to take cognizance of the offence;

(3) If the nature of the case is such that no cognizance can be taken of the offence without previous sanction then such sanction should be produced to enable the Court to take cognizance of the offence. [p.161]A.

7 Bal Krishna v. Emperor (A.I.R. 1931 Lahore 99) 39 41

(At page 39 of the Book)

Criminal P. C. (1898), S. 167-Magistrate should state in writing the reasons for remand, and should satisfy himself as to its necessity.

Section 107 requires a Magistrate remanding an accused person to police custody to state his reasons in writing. A remand to police custody ought not to be granted by a Magistrate without satisfying himself as to it necessity, and the period of remand ought also be restricted to the necessities of the case.

Criminal P.C. (1898), S. 167-In absence of special reasons Magistrate in charge of Ilaqa should be approached by police for purpose of remand.

The Practice of obtaining remand from any Magistrate at the choice of the police is objectionable. In absence of special reasons such as distance or other similar difficulties, the Magistrate in charge of the Ilaqa should be approached by purposes of remand.

(At page 40 of the Book)

section 167, Criminal Procedure Code, requires a Magistrate remanding an accused person to police custody to state his reasons in writing. This provision has not been complied with the present instance. If the Magistrate had cared to study in diaries, as it was their duty to do before granting a remand, they would not have, I think, failed to discover that there was no legal justification for remanding the accused to police custody aftei the expiry of the first remand. I would also take the opportunity to invite attention to the rules on the subject in Chap.6, Vol.II of the Rules and Orders of the High Court in which the subject has been dealt with at great length and stress had been laid on the great care necessary in remanding accused persons to police custody. It will a appear from these instructions that a remand to police custody ought not to be granted by a Magistrate without satisfying himself as to its necessity and the period, of remand ought also to be restricted to the necessities of the case.

I may incidentally remark that the practice of obtaining remands from any Magistrate at the choice of the police, which appears to prevail at present, is objectionable.

The total period of remand to police custody for investigation of an offence permissible under section 167, Criminal Procedure Code, having expired, there was no legal justification for the second and third remands to police custody granted in the present instance.

Remand (Session Trails-Procedure and Practice, pp. 250-254) (At page 42 of the Book)

Remand. Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours and, there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station of the police officer making the investigation, if he is not below the rank of Sub-Inspector.

(At page 42 of the Book)

Remand to police custody-High Court Instructions.-Chapter 11-B of the Rules and. Orders of the High Court of Judicature at Lahore, Vol. III deals with remands to police custody. It runs as follows:

(1) The following instructions on the subject of remands to Police custody have been issued by the High Court.

(2) Magistrate should observe the great distinction between a remand to Police custody and an ordinary remand to the Magistrate's lock-up under section 344 on the adjournment of an inquiry or trial owing to the absence of a witness or from any other reasonable cause.

(3) The non-completion of the inquiry or trial justifies the latter, but the former requires something more, as it is expressly provided by section 167 that the non-completion of the investigation shall not, in the absence of a special order of a Magistrate, be deemed to be a sufficient case for the detention of an accused person by the Police.

Ordinarily, when an investigation in complete, the proper course is for the accused person to be sent up promptly with such evidence as has been obtained, and for the trial to be commenced at once by the Magistrate and proceeded with, as for as possible, and then adjourned for further evidence. In the detention of the High Court, a remand to police custody ought only to be granted in cases of real necessity and when it is shown in the application that there is good reason to believe that the accused can point out property or otherwise assist the Police in elucidating the case.

(5) The Police are too often desirous of retaining the accused in their custody for the longer period than twenty-four hours merely in the hope of extracting some admission of guilt from him. This is contrary to section 163 and the following section of the Code generally; and Magistrates must be careful not to facilitate this object by too great a readiness in granting remands.

(6) It should be further remembered that remands to Police custody cannot be granted under the Code of Criminal Procedure for a longer period than 15 days altogether, and cannot be granted at all by a Magistrate of the Third Class, or by a Magistrate of the Second Class not specially empowered by the Provincial Government.

(At page 54 of the Book)

I interrogated Ch. Sher Ali twice during his custody in NAB for ninety days. It is correct that this visit took place in Attock Fort. I did not send Ch. Sher Ali to Attock fort. I do not remember on what dates I conducted the investigation in Attock Fort."

RETROSPECTIVE OPERATION

44. Mr. Akram Sheikh then proceeded to dilate upon "retrospectivity of statutes" and in that context referred to a book titled: "The Right of the Individual to Personal Security in Islam" authored by Osman Abd-el-Malek al-Saleh, wherein under sub-heading "The Principle of Non-Retroactivity of Penal Laws", the writer observed as under:

"1. The Principle of Non-Retroactivity in Islamic Law and Its Importance to Individual Security.

"Individuals can never be sufficiently secure to enjoy their rights and liberties if they can be accused of crimes for acts which were allowed when they were committed. Thus, Islamic law has long recognized the principle of non-retroactivity of criminal laws as part of the foundation of its criminal justice system. This principle means in essence that criminal laws have only prospective and not retroactive effect. The significance of this principle is that it protects individual security and prevents abuse of power."

"In view of the significance Islamic law attaches to the non-retroactivity principle, it is embodied in the Constitutions of several Muslim States, and it is deemed a Constitutional principle applicable to all the authorities of the State. This universal recognition of the principle of non-retroactivity in Islamic law is in large measure due to the emphasis placed on the principle of legality, which by its very nature precludes the retroactive application of the criminal law."

The precedence of the Non-Retroactivity Principle in Islamic Law.

"While the principle of non-retroactivity had its origin in positive legal systems with Article 8 of the French Declaration of the Rights of Man in 1789, it has been an integral part of Islamic law for fourteen centuries. The only exception to this principle in Islamic jurisprudence is that the criminal law has retroactive effect if it favours the accused."

"The Qur'an cites many instances in which this principle was applied. For example, God prohibited the practice of usury, but He did not punish those who engaged in such acts prior to his decree. God also forbids the marriage of one man to two sisters at the same time, but He did not punish such marriages which took place before the coming of Islam. He also prohibits a man from marrying his father's wives, and condemns such practice as obscene, but He did not condemn such acts prior to Islam:

"And marry not those women whom your fathers married, except that hath already happened in the past (of that nature). Lo! It was ever lewdness and abomination, and an evil way."

"Similarly, the prohibition of adultery, theft, drinking alcoholic beverages and other crimes did not apply in pre-Islamic times.."

"The underlying purpose of the non-retroactivity principle is to give reasonable notice to individuals of God's displeasure and to allow them time to put aside the old ways and conduct themselves according to God's command."

45. Mr. K.M.A. Samdani, learned A.S.C. For the petitioners in Constitution Petitions Nos. 10 and 28 of 2000 submitted that his clients, although politically apart but, so far as accountability is concerned, they are one. He stated that his clients and he himself are all in favour of accountability, but this exercise must be undertaken under valid laws, not only in the interest of justice but also in the interest of the credibility of the Government. He submitted that if there are doubts about the validity of a law under which certain persons are being or have been proceeded against, it does not serve the purpose. He submitted that a law can be struck down by the Superior Judiciary only on three grounds: (i) If the law is in conflict with any of the Fundamental Rights guaranteed under the Constitution; (ii) If the law runs counter to any other provisions of, the Constitution; (iii) If the law is unfair, unjust, inequitable or against the accepted norms of jurisprudence as held in Mehram Ali's case and other similar cases.

46. The learned counsel submitted that Mehram Ali's case goes a long way in supporting his contentions with regard to the provisions of the NAB Ordinance. He, however, questioned that portion of the precedent case wherein it was observed that it would not apply to the convictions already recorded. He contended that if a law is invalid or is declared invalid, it is invalid since its inception. He prayed that if the provisions of the NAB Ordinance are going to be declared invalid, they may be so declared from their inception and the judgment should apply to the convictions already recorded and to the pending as well as future proceedings.

47. Mr. Muhammad Ikram Ch. Formulated his points as under:

(i) Whether the NAB Ordinance falls within the definition of law and has it achieved the objects of its promulgation;

(ii) Whether the earlier laws were not adequate against the corruption and bribery etc. And whether the impugned Ordinance can be struck down on the touchstone of Article 2A of the Constitution;

(iii) Whether the Fundamental Rights to be enforced under Article 184(3) have been attended to under the law and Constitution through judgments of this Court.

He referred to the following Statutes :

(i) Prevention of Corruption Act, 1947 (Act II of 1947);

(ii) Prevention of Corruption Act (West Pakistan Extension) Ordinance, 1958;

(iii) Pakistan Criminal Law Amendment Rules,1962;

(iv) Public and Representative Offices (Disqualification) Act, 1949;

(v) Elective Bodies (Disqualification) Order, 1959.

to contend that these laws were promulgated to cope with the menace of bribery/corruption committed by different public functionaries and political persons in Pakistan. He submitted that adequate legislation in the shape of above laws against corruption/bribery and other mal-practices being already in the field, there was no need for promulgating the NAB Ordinance. He submitted that the impugned law is tainted with mala fide as it has been promulgated with a view to roping in persons who might be opposed to the present regime. He argued that the NAB Ordinance is inconsistent with the established principles of law relating to administration of justice in criminal cases as laid down by this Court from time to time, therefore, the same is arbitrary in nature.

The learned counsel referred to the following excerpt from the treatise "THE WARREN COURT AND ITS CRITICS" by Clifford M. Lytle :

"In delivering the majority opinion for the Court, Justice Clark concluded that the arguments which had been used to support limiting the exclusionary rule to the Federal Government in the Wolf case were no longer meaningful. Clark reasoned that nothing can destroy a Government more quickly than its failure `to observe its own laws, or worse, its disregard of the charter of its own existence. "

48. Dr. Z. Baber Awan, learned A.S.C. Appearing for the petitioner in C.P. No, 20 of 2000, submitted that, in its present form, the NAB Ordinance offends against the Constitution as also the rights of the citizens guaranteed under the regular laws as well as the Constitution. He next submitted that:

(i) As per the definition of 'holder of public officegiven in section 5(m)(ii), the Chief Executive, who is sitting in the chair of the Prime Minister and exercising all the powers and performing the functions of that office, is not included in this definition. He prayed that clause (ii) (ibid) should be amended to include the Chief Executive of the country;

(ii) Section 5(m)(v) includes the Chairman/Vice-Chairman of a Zila Council, a Municipal Committee, a Municipal Corporation or a Metropolitan Corporation, but omits the Presiding Officer of the Cantonment Board, invariably an officer of the Armed Forces, who should be included in the above definition in that he also performs similar functions as are performed by the Mayor of a Municipal Corporation or the Chairman of a District Council;

(iii) Section 5(r) read with section 31 (c) of the NAB Ordinance, which defines the offence of 'wilful default', keeps out of its purview the person who writes off or waives a loan despite the fact that he is privy to and abettor of the offence and as such merits to be included in the list of persons who are said to commit the.Offence of 'wilful default';

49. The second submission of Dr. Baber Awan relates to the parallel judicial system created under the NAB Ordinance and according to him the following provisions of the Code of Criminal Procedure stand violated by various provisions of the NAB Ordinance:

(i) Section 154, Cr.P.C. Authorizes every person to lodge information about the commission of a cognizable offence whereas under section 18(a), the power exclusively vests with the Chairman NAB;

(ii) Under section 200, Cr.P.C. a complaint can be lodged with the Court whereas under section 18 (b) (i) (ii) (iii) of the NAB Ordinance, nobody except the Chairman NAB can file a complaint. Refer Syed Jalal Haider v. The State (1972 SCMR 517);

(iii) Sections 156 and 157, Cr. P. C. Authorize investigation,

inquiry, re-investigation, transfer of the investigation to multiple agencies and different persons/agencies like CIA, FIA, Crimes Branch, etc. Can hold investigations, but under section 18(d) of the NAB Ordinance, the complainant, i,e, the Chairman NAB and nobody else can make investigation;

(iv) Under section 202, Cr.P.C., in a case of direct complaint to the Court, the Court may get the case investigated from a person other than a police officer, but under the NAB Ordinance, there is no provision of re-investigation and transfer of investigation;

(v) In section 167(4), Cr.P.C., it is provided that whenever physical remand is given, a copy of the paper of remand with the reasoning has to be sent by the Court granting the remand to the concerned Sessions Judge, who is in charge of the relevant Sessions Division, but under section 24(d) of the NAB Ordinance, the accused is liable to be detained for 90 days and no discretion is left with the Court;

(vi) Under Article 203 of the Constitution, the Accountability Court should be under the supervisory jurisdiction of the High Court in regard to grant of physical remand and the copy of the remand order should be sent to the relevant Bench of the High Court to see that the Court has not acted mechanically. Refer Ghulam Sarwar v. The State (1984 SCMR 134);

(vii) Under section 167 (5) (6) and (7), Cr.P.C., keeping in view the honour and modesty of women, other than in the cases of murder and dacoity,.No woman can be kept in a police station, but under the NAB Ordinance, separate police stations have been created where women accused are detained;

(viii) According to section 169, Cr.P.C., the Investigating Officer has the prerogative of applying his own mind and conscience and can discharge an accused if evidence is deficient, but under section 24(d) of the NAB Ordinance, this power has been taken away from the Investigating Officer and has been vested with the Chairman NAB, who does not investigate the cases himself;

(ix) Section 173 (b), proviso I, Cr.P.C. Provides that where investigation cannot be completed within 14 days from the date of registration of F.I.R., the officer in charge of the police shall within three of the expiration of such period, forward to the Magistrate an interim report (incomplete challan) but under section 18 (f) of the NAB Ordinance, no such period has been fixed. In all other special laws enacted so far, the period of remand for completion of investigation is 14 days;

(x) Section 172, Cr.P.C., the Investigating Officer is bound to write down the Case Diaries, but the NAB Ordinance is silent about this valuable right of the accused person;

(xi) Sections 177, 179 and 180, Cr.P.C. Deal with the Place of inquiry and trial and under section 185, Cr.P.C., if there is a doubt as to where exactly the offence is committed, reference has to be made to the relevant High Court, which will decide the question, whereas under section 16(b) of the NAB Ordinance, the Government has to choose the place of inquiry and trial;

(xii) Section 31 (a) of the NAB Ordinance has taken the place of three sections of Code of Criminal Procedure, namely, 87, 88 and 512. Under the first two sections, proclamation can be issued and property attached and under section 512, the Court may record evidence, which can be used when the accused is arrested, but under section 31 (a), simply for the reason that the accused is not coming to the Court, he will be convicted without right of defence, opportunity of hearing and recording of evidence, summarily for 3 years. Against the punishment under section 31 (a), no appeal is provided whatsoever and three/four convictions have been recorded;

(xiii) Section 494, Cr.P.C. Gives power to the prosecutor to withdraw a case, who is in charge of the prosecution of a particular case, of course with the consent of the Court, but this right has been taken away by section 31 (b) of the NAB Ordinance where withdrawal of a case is in the total discretion of Chairman NAB;

(xiv) Under section 417 (2), Cr.P.C. Any person aggrieved of an order of acquittal, can go in appeal, but this right has been forfeited by section 32 of the NAB Ordinance;

(xv) Under section 201 of. Pakistan Penal Code, the trial Court is empowered to take cognizance of false prosecution, but section 36 of the NAB Ordinance takes away this right because all people concerned with the NAB are indemnified from prosecution;

(xvi) Under section 497, Cr.P.C. If a person is detained without warrant, is arrested, appears or is brought before the Court, the accused can be released on bail if -

+ the accused is a woman;

v the accused is infirm or has a sickness, which is hazardous to his life as held in Mian Manzoor Wattoo v. The State (2000 SCMR 107);

v the case is of further inquiry, but section 9 (b) of the NAB Ordinance takes away all these rights;

50. Dr. Baber Awan next submitted that the process of accountability ought to continue in the interest of the country and proposed that as in the case of Wafaqi Mohtasib, the Chairman NAB should be a sitting Judge of the Supreme Court and the Regional Accountability Bureau should be headed by a sitting Judge of the High Court concerned. He further submitted that:

v Under section 190 (3), 0...P.C., all the challans of murder cases, even the cases of high treason, be submitted to the concerned Judicial Magistrates who are directly subordinate to the High Court. Under section 63, Cr.P.C. Such Magistrates are authorized to discharge the accused if there appear no reasons to proceed further;

v The accountability cases should be assigned to the concerned Sessions Judges instead of the present Accountability Courts which are manned by the retired Sessions Judges as well;

3 Under section 25 (a) and (b), the power of 'plea bargainis with the Chairman NAB. Ordinarily, the prosecutor and the defence lawyer go to the chamber of the Judge for 'plea bargain'. This power may be given to the trial Court with the consent of the prosecutor concerned;

Appropriate enactment should be introduced empowering the Accountability Courts to put a question to the accused at the time of framing of the charge as to whether he is ready for 'plea bargain'

or not? '

v Under sections 204, Cr.P.C., even in the murder cases, including high treason, the trial Court is empowered to issue summons or warrants against the accused person for procuring his attendance in the Court whereas under section 91, Cr.P.C., when a person summoned in the Court appears, the Court directs him to furnish the bail bonds. This facility should be expressly provided in the relevant law of accountability;

51. Dr. Babar Awan concluded his arguments by referring to the following excerpts from the book titled 'Long Walk to Freedomby Nelson Mandela:

"On 1st May, 1963, the Government enacted legislation designed `to break 'the backof Umkhonto, as Voster put it. The General Law Amendment Act, better known as the Ninety-

Day Detention Law, waived the right of habeas corpus and empowered any police officer to detain any person without a warrant on grounds of suspicion of a political crime. Those arrested could be detained without trial, charge, access to a lawyer, or protection against self-incrimination for up to ninety days. The ninety-day detention could be extended, as Vorster ominously explained, until this side of eternity'. The law helped to transform the country into a police state; no dictator could covet more power than the Ninety-Day Detention Law gave to the authorities."

52. Mr. Abdul Haleem Pirzada, learned Sr.A.S.C., appearing for the petitioner in C.P. No, 32 of 2000, stated that in view of the admitting order, the onus has shifted to the respondents and sought permission to make submissions in rebuttal after the conclusion of the arguments on their behalf.

53. Ch. Mushtaq Ahmed Khan, learned Sr. A.S.C., appearing for Nawabzada Nasrullah Khan, petitioner in C.P. No,24 of 2000, submitted that the grievance of his client against the NAB Ordinance and the process of accountability being carried out thereunder is that the accountability has to be even-handed, above board and for all times to come, to be controlled by a Commission headed by a judicial authority. He contended that the operation of NAB Ordinance is discriminatory in nature and violates the principle of equality as enshrined in Articles 4 and 25 of the Constitution. He submitted that by virtue of section 5 (m) (iv), the persons who belong to the Armed Forces and the civil 'servants in the attached departments have been excluded from the definition of 'holder of public office'. He clarified that unless a person comes within the purview of 'holder of public office', he cannot be tried by an Accountability Court.

54. Ch. Mushtaq Ahmed Khan read out section 16 (a) of the NAB Ordinance to contend that the power of transfer/withdrawal of cases from the ordinary Courts for trial in the Accountability Courts given to the Chairman NAB, offends against the concept of Independence of Judiciary inasmuch as it confers judicial power on the executive authorities. He submitted that such power should be vested in the High Court concerned.

55. The learned counsel next contended that section 25 of the NAB Ordinance is violative of Article 25 of the Constitution and should be taken out of the statute book inasmuch as if a person is found guilty of an offence, he should be brought to book and should not be allowed to go scot free. The learned counsel also submitted that the power of Chairman NAB under section 31 (b) of the NAB Ordinance to withdraw the prosecution of a case and to release the accused person without the approval of the 'Court beinguncontrolled, militates against the concept of Independence of Judiciary. He submitted that the NAB Ordinance requires to 'be struck down or in the alternative a road map be given as done in Mehram Ali's case.

56. Mr. Iqbal 'Haider, petitioner in C.P. No, 33 of 2000, challenged sections 6, 7, 8, 9, 15 and 31 of the NAB Ordinance. He submitted that sections 6 to 8 deal with the appointments of the Chairman, NAB and the Prosecutor General Accountability, abut no qualifications whatsoever have been laid down with the result that even a layman can be appointed to these posts. He contended that the Chairman, NAB cannot assume the powers of a Court. He further submitted that a period of 3 years has been given to the present regime and the continuity in office of Chairman, NAB is uncertain.

57. Mr. Iqbal Haider referred to section 15 of the NAB Ordinance to contend that the same is violative of Article 63 of the Constitution inasmuch as under the former provision, the disqualification is for a period of 21 years whereas under the latter, it is only 5 years.

58. Mr. Abdul Hafeez Pirzada, learned Sr. A.S.C., appearing for the petitioner in C.P. No, 26 of 2000, submitted that:

v The NAB Ordinance has hit the Constitutional conscience of Pakistan, a phrase expressed in Article 2 of the 1962 Constitution, equivalent of Article 4 of the 1973 Constitution, by no less a jurist than Chief Justice Cornelius in the judgment reported as Jhamandas v. Chief Land Commissioner (PLD 1966 SC 229);

The Constitution is an organic instrument whereby a society regulates its life and if the conscience of the society is hit, it is intolerable;

Jurisdiction of the Supreme Court under Article 184(3) of the Constitution is not subject to the limitations and trappings of Article 199 i,e,, (i) the requirement of 'aggrieved partyand (ii) without there being an alternate remedy. The only limitation applicable is the enforcement of Fundamental Rights of great public importance, which in this case is not disputed and while exercising jurisdiction under Article 184(3), the conscience of the Constitution, i,e, Article 4, will be kept in mind. Refer Syed Wasi Zafar v. Government of Pakistan (PLD 1994 S.C. 621);

v If a law is held to be void, then, in the light of Yousaf Ali v. Muhammad Aslam Zia (PLD 1958 SC (Pak.) 104), the superstructure built thereon ceases to exist. This principle was not followed in Mehram Ali's case. Had it been followed, the heaven would not have fallen. Heavens have fallen in the civilized world, but those societies have not disappeared. This Court must strike down this law if it is found to be invalid, as held by this Court in Yousaf Ali (supra);

v Article 8 (1) of the Constitution deals with ex,post facto situation inasmuch as any law, custom or usage having the force of law to the extent of their inconsistency with the Fundamental Rights have been rendered void.

S Article 8(2) is prospective in nature and prohibits the State from making any law, which takes away or abridges the Fundamental Rights. The mandate of Article 8 (2) affects the competence of lawmaking of the President without going into the thorny issue of what the PCO authorizes him to do or not to do. In Article 8 (2), the word used is 'Stateand not the legislature. Therefore, the mandate is against the State as an entity including the President, the Parliament, the Provincial Assemblies, or anyone who has authority to make law. The NAB Ordinance, being violative of the Fundamental Rights, which cannot be suspended in view of the judgment in Syed Zafar Ali Shah's case, is hit by Article 8 (2) of the Constitution and is liable to be struck down;

v Petitioner, Anwar Saifullah was arrested in November, 1999 and released recently by this Court. He has been convicted for misuse of authority for one year, which sentence he has served out. He has, therefore, approached the Court for enforcement of his Fundamental Rights;

v Under the NAB Ordinance, absolute, arbitrary, capricious, fanciful and discriminatory powers of detaining any person for 90 days with no obligation to give reasons for such detention, have been vested in the Chairman NAB, whose minimum qualifications have also not been laid down. Thus, the rights guaranteed in Article 9 read with Article 8 (2) and Article 10, cannot be protected;

v The NAB Ordinance has dichotomized the society inasmuch as various categories of public functionaries have not been included in the definition of 'holder of public office';

v Two successive Chairmen NAB are serving Lieutenant-Generals in the Pakistan Army and a huge force of nearly 1000 has been employed in the Organization with unguided power. The entire cross-sections of the society, representing at one stage or the other the will of the people, can be prosecuted under the NAB Ordinance for misuse of authority whether of master or of servant and for a favour, whether material or not. This type of process of accountability touches across the national integration process but one of the prime institutions of the country which is enjoined under the Constitution to protect the country from external aggression and internal disorder, has been excluded from the process of accountability, The people are looked down upon as if they are the enemy. The conscience of the Constitution of Pakistan is that thousand guilty persons may be acquitted than one innocent be sent to the gallows.

59. Learned counsel referred to the case of Calder v. Bull [3 U.S. 386 (Dall.) (1798)] and argued that the NAB Ordinance is liable to be struck down in its entirety on the following grounds in that it is within the restricted jurisdiction of this Court under Article 184(3) to do so:

(i) Wilful and deliberate failure of the President to obey the injunctive mandate of the Constitution and its conscience spelt out from Articles 4 and 8(2) of the Constitution.

(ii) Many provisions of this Ordinance are violative of the Fundamental Rights in that the good part cannot be separated from the bad and therefore, the doctrine of severability is not attracted in this case. This submission is buttressed by the argument that if such an exercise is at all undertaken, the remainder will be a legal instrument which will be inchoate, incomplete, vague, absurd and meaningless and, therefore, unworkable.

(iii) The field is totally and adequately occupied, and therefore, in accordance with the law declared by this Court there was no room for promulgating the NAB Ordinance.

(iv) The very idea of ex post facto legislation is abhorrent to the administration of justice.

(v) The moral authority behind the NAB Ordinance stands eroded. The Ordinance is not covered by the doctrine of State Necessity. On the contrary, it is explicitly excluded from the applicability of the doctrine of State Necessity by this Court in Zafar All Shah (supra). Its constitutionality will be judged on the touchstone of the Constitution itself as re-emphasised and reiterated by this Court in Zafar Ali Shah's case. For all intents and purposes, there is no difference between this case and any other ordinary case of promulgation of an ordinance. This Court may consider and uphold or strike down the NAB Ordinance in the ordinary course of the exercise of its jurisdiction under Article 184(3), which this Court had re-asserted and:upheld in the case of Zafar Ali Shah (supra).

(vi) The learned counsel for the petitioners had very elaborately drawn the attention, of this Court at the time of admission of the petitions and have also done so during the submissions now, as to what parts of the NAB Ordinance are violative of which Fundamental Right. Suffice it to say that out of all the Fundamental Rights which this Court had held to be unsuspendable including liberty, life, dignity of man, inviolability of home etc., two are enough for the purposes of striking down the impugned Ordinance. These are guarantees against ex post facto laws in criminal matters and protection against discrimination. Discrimination means discrimination by the law itself or by an individual or organization or institution of the State pursuant to the powers conferred on him or it by the law.

60. Mr.Pirzada referred to Article 12 of the Constitution which reads thus :

"12. (1) No law shall authorise the punishment of a person -

(a) for an act or omission that was not punishable by law at the time of the act or omission; or

(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

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

and elaborated that three principals have been enunciated by Article 12 of the Constitution First, an act or omission that was not punishable by law at the time of the act or omission, under no principle of law that can be made punishable. The only, exception is in the case of abrogation of Constitution which is not the case here. Secondly, the rules of evidence cannot be changed ex post facto and prescribe or require or relax a mode or standard less stringent than the one that was in force at the time when the act was undertaken or omission occurred. Thirdly, no law can prescribe a penalty greater than or different from the penalty prescribed by law for the offence at the time of its commission.

61. Mr. Pirzada.Argued that the NAB Ordinance is not procedural but substantive law in that changing the rules of evidence to reduce the rigours of standard of proof has been held by this Court to be substantive and not procedural law.

62. He further argued that in order to promote and consolidate a civilized society with an organized and recognized legal system, the Court cannot permit ex post facto laws. A citizen organizes his life and discharges his obligations to the society according to the laws in force at the relevant time.

63. The learned counsel referred to section 9(a)(vi) and (vii) of the NAB Ordinance to contend that these provisions are to be read with section 14(d) (ibid). If the law says that one is presumed to be guilty the moment he is charged by the Accountability Court then it takes away the right of the accused under section 342, Cr.P.C. Section 9 (a)(vi) (ibid) has created two distinct offences i,e, (i) misuse of authority by an accused so as to gain any benefit or favour for himself or any other person and (ii) wilful failure to exercise authority to prevent the grant or rendition of any undue benefit or favour which he could have prevented by exercising his authority. He was of the view that the first offence was a monstrous one under which 50% references have been filed by the NAB. Referring to section 14(d) he argued with

vehemence that it was a "Bill of Attainder" and a legislative judgment, in that, the burden of proof has been placed on the accused and the prosecution is only required to frame a charge. He submitted that an accused has no access to documents which can be pressed into service to discharge the burden of proof. The moment the NAB authorities touch a case, the accused is incarcerated, burdening him with the responsibility to prove his innocence by producing positive evidence, which amounts to adding injury to insult. He went on to argue that the 'presumptionenvisaged by section 14(d) would come into play in the absence of positive proof with the result that an accused will be convicted by the Accountability Court which has no discretion to ignore or deviate from any provision of the Ordinance.

64. He referred to the word 'misusewhich, according to him, has been used for the first time and the previous word was 'abuse'. He contended that the word 'misuseis a wider term and it includes every 'abusebut not vice versa. The important thing is the context in which a word is used and that to say that new offence has been created means that there is a departure from the norm. The word, which has been used in the Statutes for more than fifty years consistently, has been dropped and the word 'misusehas come. In support of his contention, he referred to section 5 of the Prevention of Corruption Act, 1947 (Act No, II of 1947), relevant portion whereof reads thus:

"5. Criminal misconduct. -(1) A public servant is said to commit the offence of criminal misconduct:

(d) if he, by corrupt or illegal means, or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; .... ".

Reference was also made to Sheikh Mujibur Rahman and another v. The State (PLD 1964 Dacca 330), wherein at page 357 of the report, it was observed:

"60 In matters like this the Legislature can be said to have dispensed with the ingredient of mens rea indirectly. In the present case, however, it appears that the language indicates that one has to obtain some pecuniary advantage by abusing his position as public servant either for himself or for any other person. The word `obtainimplies and presupposes some amount of effort on the part of the person who means to obtain a thing; and an effort is never possible without a conscious state of mind. If any person wants to obtain or obtains anything for himself or for others he must be presumed to have made some efforts so that in normal routine course without such effort the thing sought to be obtained might not be available. The word 'abusein this connection also pre-supposes that the position held by the public servant is used in a perverse manner and not in a normal way."

He next contended that while it was difficult to accept the action of 12th October, 1999 it was also difficult to deny its moral authority. Since the morality of the action was accepted by the people of Pakistan but that moral authority has seriously eroded and one of the causes of that erosion is the unfair law and procedure for accountability, of which this Court should take judicial notice. To substantiate his point of view, the learned counsel referred to pages 1, 6 and 14 of the written reply by Mr. Maqbool Elahi Malik, A.S.C. Appearing on behalf of NAB, which respectively read as under:-

RECOVERIES SINCE ESTABLISHMENT OF NAB DIRECT RECOVERIES

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.	Recovery through Courts	01.056 Billion
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INDIRECT RECOVERIES

.	PTCL	05.597 billion
.	CDA	02.484 billion
.	Under Process Recovery to Banks From:-	
.	. Avaris	1.4 Billion

	. Lakhanis	1.5 Billion
.	Custom duty evasion Wine trader Karachi	0.1 Billion
.	Total	11.081 Billion
	Total recoveries all inclusive	Rs.50.542 Billion
	Total Amount Remitted to AGPR	0.768

He contended that this ground of erosion of moral authority of the present regime also necessitates that the whole impugned Ordinance be struck down. He further contended that unless enforcement of laws and the administration of justice is not improved, people cannot be frightened by making draconian laws. He referred to Nabi Ahmed v. Home Secretary, Government of West Pakistan, Lahore.(P L D 1969 Karachi 599), wherein it has been held.

"21. In England, the basic sentiment of revulsion against injustice is strengthened by the jealousy of Courts to preserve their jurisdiction uncontaminated by extra-judicial considerations. They regard all considerations, whether political, administrative or even leislative, if they are not embodied in the law itself, as subordinate, if not entirely extraneous, to the judicial outlook. In the United States of America, emphasis on the Constitutional separation of power is added. In the words of the American jurisprudence, 16th volume, page 771, Art.429 :

"The position has been taken, however, in some jurisdictions that when an action is once commenced, jurisdiction is purely a judicial question, and it is unconstitutional, underthe doctrine of the separation of the powers of Government, for the Legislature to attempt to usurp the judicial function by interfering legislation to oust the jurisdiction of the Court."

"The leading authority in America is Calder v. Bull (1798) 2 Dall 386 in which the meaning of ex post facto legislation has been explained as follows:

"(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

(2) Every law that aggravates a crime, or makes it greater than it was when committed.

(3) 'Every law that changes the punishment, arid inflicts a greater punishment, than the law annexed to the crime when committed. .

(4) Every law that alters the legal rules of evidence, and receives less or different testimony that the law required at the time of the commission of the offence, in order to convict, the offender."

"22. One more consideration which appeals to me is that law-abiding members of society regulate their lives according to the law as it exists at the time of their actions, and they expect the law to be steadfast and reliable-See Hughes and others v. Lumley and others (1854) 4 E&B 358. They assess and weigh the consequences according to the demands of existing law, including the requirements implicit in the existing system of law, and are entitled to . Feel cheated if the law later lets them down by taking away or reducing their rights, or increasing their burdens. As pointed out by Willes, J. In Phillips v. Eyre 22 LT 869 at p.612 :

"Retrospective laws are no doubt prima facie of questionable policy, and contrary to the general principle that a legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law."

Further :

"Blackstone, J., 1 corn. 46, describes laws ex post facto of this objectionable class as those by which 'after an action indifferent in itself is committed, the Legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had, therefore, no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust'."

23.

"24. People do not mind changes in law, if only the procedure is altered without altering the substance of the law. True, it is not easy to draw a line between substantive and procedural law, but the task is not impossible if the essential difference is kept in mind. According to Salmonds Jurisprudence, 12th edition of 1966 at page 128-

"The law of procedure may be defined as that branch of the law which governs the process of litigation .... All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter."

Thus:

" 'a right of appeal, a right to give evidence on one's own behalf, a right to interrogate the other party,rules defining the remedy .... As those which define the right itself,that part of criminal law which deals, no with crimes alone, but with punishments also, as the measure of liability and many rules of procedure which, in their practical operation, are wholly or substantially equivalent to rules of substantive laws,"

and, as such must be treated as falling within the classification of substantive law. In this category has been included by this Court the change of forum-

"If in the process any existing rights are affected or the giving of retroactive operation causes inconvenience or injustice."

"See Adnan Afzal v. Sher Afial (PLD 1969 SC 187)."

Reliance was also placed on Bhai Khan and others v. The State (PLD 1992 SC 14), wherein at page 23 of the report, it was observed:

"7. ..... These Articles prohibit convictions and sentences being recorded in the criminal jurisdiction sunder ex post facto laws. Previously ex post facto laws imposed liability and punished acts which earlier were lawful when done. Such laws retrospectively created offences for acts or omissions that were not punishable at the time they were done or retrospectively punished persons for offences by penalties greater than or of different kinds from those prescribed for such offences at the time the same were committed. The broad range and nature of ex post facto laws is ably set out by Qadiruddin Ahmad, J. In para. 20 of his judgment in Nabi Ahmad v. Home Secretary, West Pakistan (P L D 1969 Karachi 599 at 610-11). Being against equity and tll 'notions of fairplay and justice, these ex post facto laws over a period of time came to be abhorred. Slowly but surely such ex post facto laws were avoided by resorting to beneficial construction or rendered invalid by legislation and the above Articles in both the Pakistan and Indian Constitutions clearly render invalid such ex post facto laws and cover acts and omissions which may even have theif commencement in the pre-constitution period. See Keshavan M. Memon v. State of Bombay AIR 1951 SC 128. Where ex post facto laws only mollify or lessen the rigours of criminal law, but do not otherwise aggravate them, doubt has been expressed as to whether such laws fall within the prohibition of such articles. The Indian Supreme Court in Rattan Lal v. The State of Punjab (AIR 1965 SC 444) has treated such a law as not falling within the prohibition."

Reference was also made to Soni Devrajbhai Babubhai v. State of Gujarat (AIR 1991 SC 2173) wherein at page 2176 of the report, it has been observed:

"10. In our opinion, the protection given by Article 20(1) is a complete answer to the appellant's contention. The contention of learned counsel for the appellant that section 304-B inserted in the Indian Penal Code does not create a new offence and contains merely a rule of evidence is untenable. The rule of evidence to prove the offence of dowry death is contained in section 113-B of the Evidence Act providing for presumption as to dowry death which was a simultaneous amendment made in the Indian Evidence Act was so amended simultaneously with the insertion of section 304-B in the Penal Code by the same Amendment Act is another pointer in this direction. This contention is, therefore, rejected."

65. Mr. Hafez Pirzada again referred to "Commentary by Jon Roland on Calder v. Bull", 3 U.S. 386 (1798), wherein the author, in the beginning of the commentary, restated the points made in the opinion rendered in the above judgment, of which point No, 7 reads thus:

"7. The prohibitions against ex post facto laws, and by implication, bills of attainder, while intended mainly for criminal penalties, such as disablements of life, limb, or liberty, but also inclikle disablements of property, when such disablements are of a vested right in property."

It was further observed:

"The linking of ex post facto laws and bills of attainder to criminal actions fails to consider that the purpose of these provisions is protection of the rights of defendants, and it matters little, except perhaps to the reputation of the defendant, whether the action is called 'civilor 'criminalif the right sought to be disabled is the same. A competency hearing that seeks to confine the defendant to a mental institution is a petition to disable the liberty of the defendant, and as such must be accorded the same due process protections that a 'criminalaction would have that sought to imprison the defendant. For the defendant there is little difference between confinement in a mental institution and confinement in a penal institution."

66. Dr. A. Basit, learned A.S.C. Appearing on behalf of the petitioners in Constitution Petition No, 19 of 2000, at the outset, formulated his points as under:

1. The NAB Courts, as they are functioning under the existing Ordinance, have destroyed the Federal structure, inasmuch as the territorial limits specified in the Notifications establishing the same have been disregarded by the Chairman, NAB.

2. The main object of the NAB Ordinance, i,e,, to recover foreign assets has been defeated in the manner in which NAB Courts have been, set up, located and permitted to function. Unless recognition of these Courts is available in the States where assets have been secreted, any judgment rendered by the NAB Court is likely to be disregarded.

3. The hierarchy under the NAB system has destroyed the respect for normal Courts, inasmuch as, the judgment rendered by this Court in Dr. Farooq Sattar's case has been disregarded by filing a Reference against him notwithstanding a prohibitory order to the contrary and the NAB is continuing with his trial.

Learned counsel stated that the alleged illegality raised in point No, 3 above, could not be urged in the Constitution petition filed by the petitioner before this Court as the same had arisen out of the dismissal of the petitioner's Constitution petition in the High Court.

The above contention is repelled as the only question involved herein relates to the vires 'of the impugned Ordinance. The petitioner has already moved a petition for leave to appeal for redress of his grievance reflected in point No,3-above, which will be attended to on its own merits in due course. Any observation in these proceedings as to Dr. Farooq Sattar's case may be prejudicial to either party. Furthermore, we have categorically stated in the "admitting order" that individual grievances whether directly or indirectly would not be adjudicated upon in these proceedings.

67. Elaborating his other points, Dr. A. Basit submitted that two features are necessary to be noted: (i) this is a period of deviation from Constitution and the judicial review has to be adapted to this situation; and (ii) massive corruption still exists for which drastic laws are required and if these laws are drastic but not effective to achieve the object, even then they are counter-productive. He submitted that unless qualified and competent Judges are appointed and the trials are conducted in open Cowls, the States to which, assets have been secreted out, will not honour the judgments, therefore,the judicial review should be geared up to make directions in terms of section 37 of the impugned Ordinance. He further submitted that Constitution remains under suspension and the Courts having validated such suspension, the criteria for judicial review cannot be directly derived from the text of the Constitution of 1973. Drastic laws are required for checking corruption and particularly for recovering misappropriated assets in foreign banks. Foreign Courts and States will release the assets only if the NAB Ordinance is so interpreted by this Court as to enable Pakistan to seek recovery of misappropriated amounts as National assets. He submitted that MQM does not subscribe to the hue and cry raised by those politicians who have been in power and about whom information is available to the local Intelligence Agencies regarding their secret abodes. He referred to section 5(m)(vi) of the impugned Ordinance and contended that serving army officers have been excluded from the accountability process, which needs to he examined.

68. Dr. A: Basit further contended that in the presence of an Accountability Court established under the impugned Ordinance for a particular Province, change of venue of trial of an accused person who resides in that Province to an Accountability Court of another Province through an administrative order of the Chairman NAB, is destructive of the Federal structure of Pakistan. In support of his contention, the learned counsel referred to a judgment passed by Lahore High Court in Writ Petition No, 6734 of 2000 on 5-7-2000, wherein it was observed:

"The other argument of the learned counsel that the Accountability Court of Attock presided over by Mr. Farrukh Latif has no jurisdiction in view of Notification dated 5-1-2000 whereunder his jurisdiction is only extended to the Province of Punjab and the Islamabad territory has got no force. It must be appreciated that the Accountability Courts are established by President of Pakistan after consultation with the Chief Justice of Pakistan which prima facie establishes that the Courts are set up on countrywide basis and by no stretch of imagination their territorial jurisdiction can be limited. Even section 5(g) of the NAB Ordinance under which these Courts are established does not talk about the territorial limits. If the notification issued under section 5(g) has stated otherwise limiting the jurisdiction to a specific territory, said notification cannot override the provision of law. Apart from this section 16(d) of the NAB Ordinance empowers the Chairman or in his absence, the Deputy Chairman qua the selection of the forum."

69. Dr. A. Basic concluded his arguments by submitting that the present Government had adopted the policy of circulating the draft-Ordinances to elicit public reaction from the concerned quarters and, in that regard, two legislations viz. 'The Regulation of Medical Education and Training in Pakistan Ordinance, 2000and 'Freedom of Information Ordinance, 2000were circulated but this practice was not followed in the case of the impugned Ordinance, therefore, a direction be issued to the President of Pakistan under section 37 of the Ordinance to circulate the Ordinance to elicit public opinion and in the meanwhile to keep the impugned provisions under suspension.

70. Mr. Abid Hasan Minto, learned Sr. A.S.C. Appearing on behalf of the Federation vehemently argued that this is a case which does not purely involve a question of Constitutional validity of a certain Ordinance. The arguments addressed at the Bar may indirectly have some bearing on the Constitution itself and the state of affairs which prevails in the society at present but these arguments are not, strictly speaking, the arguments within the framework of Article 184(3) of the Constitution. He submitted that "admitting order" dated 12th September, 2000 contains 23 formulations, out of which many do not necessarily relate to Fundamental Rights.

71. He submitted, on instructions, that the Ordinance in question is the product of an extraordinary situation and special dispensation and that he would refrain from raising any technical objections with regard to the competence of these petitions before this Court or as to what questions this Court would like to take up for determination. He submitted that ordinarily an Ordinance goes to the Parliament for the purposes of consideration where it is considered thread-bare and proper evaluation of the proposed law is made but presently we are dealing with a method of dispensation in special circumstances in which we are living today, therefore, the Federation is willing to take note of any objection of real/substantive nature in the Ordinance itself, which affects the Constitutional rights of the citizens and take appropriate measures in regard thereto. Mr. Minto referred to Zafar Ali Shah's case (supra) wherein this Court held that the Proclamation of Emergency has not completely suppressed or destroyed the old legal order but was a case of Constitutional deviation for a transitional period so as to enable the Chief Executive to achieve his declared objectives as clearly spelt out in paragraph 13 of the Short Order and granted a short period of time within which the deviation and its purposes ought to have been completed. He contended that the State of Pakistan is passing through a difficult time, which should be kept in mind while considering the wires of the Ordinance. He submitted that although ordinarily whatever this Court observes through its judgments prevails as law of the land for all times to come until the law is changed by the Court itself through a subsequent pronouncement yet keeping in view the extraordinary character of the situation, the judgment rendered in such circumstances should also be treated to be a special rendering by the Court. He added that in a case of this character, during the period of army takeover, where special circumstances are available and where the Federation has submitted to the jurisdiction of this Court in ex tenso and not limited itself to Article 184(3) of the Constitution, a word of caution must enter the judgment, in that, several of these issues may not be germane to the jurisdiction of this Court under Article 184(3) of the Constitution. He, however, contended that the impugned Ordinance is intended to be a permanent law and that objections are invited for the purposes of making it a law which will remain permanently on the Statute book as a law which will be applied to the citizens of Pakistan. As to why this Ordinance, like other legislations, had not been circulated by the Government, Mr. Minto submitted that the Government has been circulating all its measures and Ordinances and the public debates are now being held with regard to the question even of the future quantum of autonomy but the impugned Ordinance was a law which required a quick measure and could not hav been circulated in that fashion because were, it circulated then, the person who could have been brought to book thereunder, would have vanishe altogether. He, however, added that the Federation has submitted the impugned Ordinance to the jurisdiction of this Court for the purpose of scrutinizing the same.

72. He criticized the statement of Mr. Aitzaz Ahsan that the impugned Ordinance is a cannon to kill the flies and agreed with Dr. A. Basit that the question is not whether a law is draconian or harsh but whether it hits the nail or not and that is it constitutional or not? He also criticized the plea of Mr. Abdul Hafeez Pirzada to the effect that: "destroy whole of this

law" and contended that this law has served for a year and a half and good results have been achieved therefrom.

73. He referred to the following statement at page 14 of the Paper Book containing additional document, submitted by Mr. Maqbool Elahi Malik on behalf of the Federation, showing 'directand 'indirectrecoveries since the establishment of National Accountability Bureau:

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.	Custom duty evasion - Wine trader Karachi	0.1 Billion
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	Total 11.081 Billion Total recoveries all inclusive	Rs.50.542 billion
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The above statement was also relied upon by Mr. Abdul Hafeez Pirzada, Sr. A.S.C. To show that total recovery through 'Plea Bargainingwas Rs,1.064 billion and through Accountability Courts Rs,1.056 billion. Rest of the money amounting to Rs, 37.341 billion was recovered by other institutions through their own processes.: In order to rebut the above argument of Mr. Abdul Hafeez Pirzada, Mr. Abid Hasan Minto submitted a.Chart indicating the rate of recovery by the banks and other institutions during the last ten years preceding the promulgation of the impugned Ordinance and contended that in view of the position shown therein, it would be inferred that after the promulgation of NAB Ordinance and because of its terms, the said recoveries have been made. He further contended that there is a provision which says that if after coming into force of this law somebody pays off his debt/loan, his liability may be washed away and as the defaulters were conscious of the rigours of the law and were keen to avoid the same, therefore, they paid off their loans. He submitted that this fact shows the actual impact and effect of this law. Answering the question that the impugned Ordinance is likely to scare away the potential investors, Mr. Minto submitted that the dilemma of this society is that he who is the investor is also the culprit. He, however, added that new provisions have been incorporated from time to time through amendments for the purposes of safeguarding the investment-climate and preserving the development of the society, which is another feature of the impugned Ordinance that it is not a static law but amenable to changes in view of experience and public criticism. He contended that the reason for promulgating this law was that all those laws which preceded it, had failed to deliver;

corruption remained rampant and the things were manipulated in such a way that those laws became ineffective: He further contended that it is a society of influences rather than democratic leanings. He submitted that even the 'bestdemocracies of the world resort to employment of massive resources and funds for one candidate or a political party as against the other and that those who are able to manage those funds, do manage them, but not through their own resources but through variety of sources. He argued that it is common knowledge how public influences are used to bring about those funds and even the office of President is used to manipulate the same whether it be United States, Germany or any other country. In the third world countries, it was contended, the situation is the worst. The champion of democratic institutions in the third world is our neighbour and it would be seen that there are financial and credibility crisis, which are created by the corrupt society itself. He then referred to an Article titled: "White. Collar Crime" from Encarta Encyclopedia by Sutherland, which reads thus:

"White-Collar Crime

White-Collar Crime, illegal acts committed by middle- or upper-class persons in conjunction with their ordinary occupational pursuits. The term, which has no legal significance, was first popularized by the American criminologist Edwin H. Sutherland in his classic paper 'White-Collar Criminality(1940). Sutherland argued that important sociological differences exist between conventional crimes such s burglary and murder, which are defined - without reference to the social status or occupation of the perpetrator, and white-collar crimes such as fraud, embezzlement, price-fixing, antitrust violations, income-tax evasion, misuse of public funds, and abuse of political and legal powers. In general, the latter are committed by persons of relatively high social status, are intimately connected with the socially approved occupation of the perpetrator, and are treated by the authorities more leniently and inconsistently than are conventional crimes.

Historically, the chief sanctions against white-collar criminals have been loss of position and public trust, loss of a professional licence, and the levying of fines. Rarely were jail sentences imposed and served. This leniency in prosecution stemmed partly from the perception that a high-status individual implicated in criminal activity was sufficiently punished by the presumed loss of social esteem or occupational prospects, or both; and partly from the fact that most white-collar crimes are so-called victimless offences. Only recently has this attitude begun to change.

White-collar crime has become an increasing problem in the latter part of the 210th century. Authorities in the U.S., in particular, are dealing more severely with such crimes because of a growing feeling that an effort must be made to establish equality before the law for all citizens-without regard to money, power, or social status. In part, this is a result of the greater awareness of the fallibility of public officials in the aftermath of the Watergate Scandal."

He also referred to Russ Long's Lecture Notes on "Whitle Collar Crime", dated July 12, 2000, wherein it has been observed:

"II. The Cost of White-Collar Crime"

"The dollar loss attributed to white-collar crimes, according to Sutherland, is probably greater than the dollar loss from all other types of crimes. For example, the American business

community lost $50 billion in 1980 to white-collar crime. This was nearly 10 times more than the monetary value of all forms of street crimes (from Eitzen, 1986:426)."

"III. The Goals of White-Collar Crime: Profit And Political Power"

"Money is not the only motive for engaging in white-collar crime. Often political power is the goal. In the 1950s and 1960s, when the FBI illegally broke into offices of left-wing political organizations, enhancing power was the objective, not money (see Coleman and Cressey, 1984:416). The entire Watergate affair was oriented toward enhancing power."

"V. Penalties For White-Collar Crime"

"The difference in how we respond to white-collar crime and 'regularcrime is dramatic. If an individual shot and killed another individual with a hand gun, the death penalty would be considered. What happens when people are killed because a contractor uses substandard building material? Remember the Hyatt House disaster in Kansas City?"

"As a result of differences in perceptions between white-collar crime and regular crime, the accident in Kansas City was seen as a misfortune while an individual who shoots another individual is seen as a murderer. White-collar criminals almost never go to jail. Former Vice-President Spiro Agnew was never sentenced for bribery and tax evasion. President Nixon received a full pardon for his part in the planning of the Watergate burglary, as well as its cover-up. Oliver North became a hero while acknowledging that he lied to Congress. Reagan vetoed the Ethics in Government Bill in November 1988. His spokesperson said 'it was bad politics, but good Government'. Let's also not forget the 25 deaths that resulted at Hamlet, North Carolina's Emmett Roe chicken plant. The owners had locked all the exits. The owner, who ordered the doors locked, was sentenced to 19 years and will be paroled in 2 to 6 years."

"Incarceration rates dramatize the differential perceptions of white-collar crime compared to other types of crime. According to the American Bar Association (ABA), 91 per cent. Of those convicted of bank robberies go to jail while only 17 per cent. Of those convicted of embezzlement of bank funds go to jail. Only five per cent. Of people suspected of committing white-collar crimes were convicted and only a small per cent. Of these actually went to jail. Such statistics are indeed peculiar given that the average dollar loss that results from street crime is much less than the dollar loss experienced from white-collar crime. In Florida, for example, street crime amounted to $ 35 per crime while the average loss to white-collar criminal activities was $ 621,000 (data is from Eitzen, 1986: 427)."

"VI. Why Don't White-Collar Criminals Go To Jail?"

"Clearly a double standard exists between white-collar crimes and street crimes. The following are some reasons that explain why white-collar criminals are not more rigorously pursued.

1. White-collar criminals have money and can, therefore, afford the best legal advice.

2. Laws are generally written in favour of the white-collar criminal.

People who commit white-collar crimes are sometimes the same people who are in a position to see to it that their crimes are not defined too negatively.

3. Whereas the impact of white-collar criminals on the nation is great,

the cost to each individual is small. White-collar crimes do not impact individuals with the same intensity as when one individual is victimized by a petty criminal.

4. Virtually no police effort goes into fighting white-collar crime.

Enforcement is many times put in the hands of Government Agencies (like the Environmental Protection Agency - EPA). Often these agencies can act only as watchdogs and point the finger when an abuse is discovered.

5. Assigning blame in white-collar crime cases can be difficult. For

example, pollution may be the result of corporate neglect, but corporation cannot be sent to jail. Corporations could be heavily fined (a viable option), but the social impact of severely punishing an institution that may provide jobs to hundreds of people, as well as supply social necessities, may be more detrimental than the initial violation of the law."

74. Mr. Abid Hassan Minto further contended that high corruption, serious fraud and white-collar crime is not a commonplace crime. It is not a mere infraction of law, or rules, or solemn contract. It does not affect only one or a few individuals. Its victim ultimately becomes the entire society. It involves the elite of the society who wield immense social, economic and political influence. These crimes destabilise the economic and social foundations of the society and when corruption enters the body politic of a nation, it destroys the very system as conceived by a democratic polity. It is destructive of democracy.

75. Mr. Minto stated that Pakistan's conditions have been taken notice of by this Court itself in Federation of Pakistan and others v. Haji Muhammad Saifullah Khan (P L D 1989 Supreme Court 166), Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another (PLD 1992 Supreme Court 646), Mian Muhammad Nawaz Sharif v. President of Pakistan and others (P L D 1993 Karachi 473), Mohtarma Benazir Bhutto and another v. President of Pakistan and others (PLD 1998 Supreme Court 388) and Syed Zafar Ali Shah and others v. General Pervez Musharraf and others (P L D 2000 SC 869). The learned counsel placed on record a comparative chart on the issue of corruption as dealt with by this Court in the above judgment's, which is to the following effect :

P L D 2000 SC 869 Syed Zafar Ali Shah and others v. General Pervez Musharraf and others	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhuito and another v. President of Pakistan and others	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. President of Pakistan and others	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another	P L D 1989 Supreme Court 166 Federation of Pakistan and others v. Haji Muhammad Saifullah Khan

Page 1129: 223. It has been alleged that the former Prime Minister and his chosen few in the Parliament plundered the national wealth and amassed personal wealth by engineering bank defaults of Rs, 356 billion and thereby indulged in acts of corruption and corrupt practices, which destroyed the national economy. On account of such massive corruption and corrupt practices in the administration of the affairs of the Government and its various bodies, authorities and corporations, the orderly functioning of the Government in accordance with the	Page 565: There is sufficient material available in the record produced by the respondents in support of the following ground mentioned in the order of dissolution:- 1…… 2…… 3…… 4….. 5….. 6.Corruption in the Government Departments and Corporations, and making of appointments in violation of rules and regulations.	Page 717: 45. I may refer to ground (d) of the impugned order, which reads as follows: - "(d) Maladministration, corruption and nepotism have reached such proportions in the Federal Government, its various bodies, authorities and other corporations including banks supervised and controlled by the Federal Government the . Lack of transparency in the process of privatisation and in the disposal of public/Government properties, that they violate the requirement of the Oath(s) of the public representatives together	Page 694: 24. This then brings into focus certain connected , circum- stances which are stated to have caused the breakdown, as is referred to by the President, namely, horse-trading to win over members of the Assemblies and corruption, inducement, nepotism and measures taken to prevent defection and/or to win over members from the other side, in contravention of Constitution and law, which had assumed prominence.The	Page 220: There is another reason too for exercising the discretion or the choice in this manner. On the sub-continent,, as elsewhere in the Parliamentary De-mocracies, in order to avoid or in any case to reduce corrupt and illegal practices at an election, control has been exercised through the maxi- mum limit of election expenses. Such a limit

provisions of the				

P L D 2000 SC 869 Syed Zafar Ali Shah and others v. General Pervez Musharraf and others	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v. President of Pakistan and others	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. , President of Pakistan and others	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another	P L D 1989 Supreme Court 166 Federation of Pakistan and others v. Haji Muhammad Saifullah Khan
Constitution and the law had lost its meaning. It is alleged that public faith in the integrity and honesty of the Government had disappeared, in that, the members of the Government were either directly or indirectly involved in such corruption and corrupt practices. It is alleged that Mian Nawaz Sharif's Constitutional and		With the Prime Minister, the Ministers and Ministers of State prescribed in the Constitution and prevent the Government from functioning in accordance the provisions of the Constitution." that It may be observed that ground (d) is more or less identical to ground.(c) and	learned Judges of the High Court found from the material on the record that these malpractices were perpetrated to win over the members of the Assemblies by inducement, that those that defected were ostensibly rewarded, that this exercise gave rise to corruption,	Always existed in the recent past in our country and did so when members of these Assemblies con- tested the elec- tions and got elected. But soon thereafter when came the time to file the return of the expenses incurred at the election all were absolved of this responsibility by

moral authority stood completely eroded and that the situation was somewhat similar to the situation that was prevalent in July, 1977. 224. Regarding petitioners' plea that the politicians/ parliamentarians have been condemned as a class for indulging in corruption and corrupt practices it has been averred in the written statement that the charges are neither vague nor general nor		ground (f) (iii) and (f)(v) to that of ground (e)(ii) and (e)(iii) of the ground in the case of Ahmed Tariq Rahim (supra),wherein it has been held that the above grounds themselves are not sufficient independently to warrant of taking action under Article 58(2)(b) of the Constitution but they can, however, be invoked, referred to and made use	horse-trading and misuse of public funds running into crores of rupees and this posed a serious threat to the public interest and to the Coalition Govern- ment and that the national institutions began to crumble.	making an amend-ment in the law.

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P L D 2000 SC 869 Syed Zafar Ali Shah and others v. General Pervez Musharraf	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v.	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. , President of Pakistan and	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahim v.	P L D 1989 Supreme Court 166 Federation of Pakistan and others v.

and others	President of Pakistan and others	others	The Federation of Pakistan and another	Haji Muhammad Saifullah Khan
neither vague nor general nor undefined. It is pleaded that the systematic manner in which the entire of alongwith grounds more relevant like grounds (a) and (b) which corresponded to grounds governmental process was (s) apd (c) in the present In this manner undermined and subverted case (reference may be even this formal and the way self-serving made to para. Marked M public account-policies were followed by the at page 666 PLD 1992 SC ability was dis-previous Government, do provide sufficient proof of the above allegations. ... ...On behalf of the Federation, voluminous record spreading over dozens of paper books has been filed in support of		With the Prime Minister, the Ministers and Ministers of State prescribed in the Constitution and prevent the Government from functioning in accordance the provisions of the Constitution." that It may be observed that ground (d) is more or less identical to ground.(c) and ground (f) (iii) and (f)(v) to that of ground (e)(ii) and (e)(iii) of the ground in the case of Ahmed Tariq Rahim (supra),wherein it has been held that the above grounds themselves are not	learned Judges of the High Court found from the material on the record that these malpractices were perpetrated to win over the members of the Assemblies by inducement, that those that defected were ostensibly rewarded, that this exercise gave rise to corruption, horse-trading and misuse of public funds running into crores of rupees and this posed a serious threat to the public interest and to the Coalition Govern- ment and that the	Always existed in the recent past in our country and did so when members of these Assemblies con- tested the elec- tions and got elected. But soon thereafter when came the time to file the return of the expenses incurred at the election all were absolved of this responsibility by making an amend-ment in the law.

the allegations of corruption and corrupt practices by the former Prime .Minister as well as other members of his Government.		sufficient independently to warrant of taking action under Article 58(2)(b) of the Constitution but they can, however, be invoked, referred to and made use	national institutions began to crumble.	
Pages 1145 to 1147: 232. Now we come to the question whether corruption can be made a	Page 503: 100.. The next ground in the order of dissolution is corruption, nepotism and violation- of rules in the administration of the -	Pages 778-779: 44. Next ground in the (t) Article 58(2)(b) - and order of dissolution is (d) which relates to mal	Page 648: (f) Article 58(2)(b) Dissolution of National Assembly by the	

In the above case). Pensed with for the members of these Assemblies.

P L D 2000 SC 869 Syed Zafar Ali Shah and others v. General Pervez Musharraf and others	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v. President of Pakistan and others	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. , President of Pakistan and others	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahim v. The Federation of	P L D 1989 Supreme Court 166 Federation of Pakistan and others v. Haji Muhammad Saifullah Khan

			Pakistan and another	
ground for justifying intervention by the Armed Forces. We would beexamining this question in aslightly different perspective, inasmuch as, the world community, is committed tothe policy of showing "zerotolerance" to all types of corruption. It is a sad state of affairs that no conceivable steps were initiated to curbthe systematic corruption because of lack of transparent accountability during the tenure of the previous Government.The material placed before us indicates that the former Government had shown little interest ineradicating corruption from the society.	affairs of the Government and its, variousbodies, authorities and corporations, which was done in such a manner that orderly functioning of Government in accordance with the provisions of the Constitution and law became impossible and in some cases national security was challenged. In this context the petitioner has taken the stand, as is reflected in the petition, that allegations of corruption, nepotism and violation of rules, even though reprehensible, did not constitute a ground that	administration, corruption and nepotism by the Federal Government showing lack of transparency in the process of privatization. It is asserted by the respondents that process of privatization lacked transparency and was vitiated by various illegalities and trading for political of the irregularities. Units were transferred to favourites without following proper procedure and methodology for fixation of net worth of units were not consistent. Recovery of sale price was not madein specified time-frame and manner which resulted	President - Utility and efficacy of the National Assembly as a representative Institution elected by the people under the Constitution and its mandate, was defeated by internal dissentions and frictions, persistent and scandalous horse-trading for political gain and furtherance of personal interests,corrupt practices and inducement in contravention of the Constitution and the law,and by failure to discharge substantive legislative functions other than the adoption of the Finance Bill, and further the National Assembly had lost the	

	was sufficient in itself to justify an order under Article 58(2)(b) the Constitution. In any case the ground is too vague and too general in nature and could not be sustained. Such matter could easily have been taken to the Courts and remedy of dissolving the entire National Assembly was no solution and nor was it sanctioned by the Constitution. Stand is taken by the respondents in the written statement that reliance placed by the petitioner on the case of Nawaz Sharif (supra) is not helpful to her for the reason that in that case there were	in wastage of public assetsat the cost of national further the Nation alex chequer. The mode of		

	isolated instances of corruption for which			

P L D 2000 SC 869 Syed Zafar Ali Shah and others v. General Pervez Musharraf and others	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v. President of Pakistan and others	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. , President of Pakistan and others	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another	P L D 1989 Supreme Court 166 Federation of Pakistan and others v. Haji Muhammad Saifullah Khan
of public office for privategain. In view of the fact that scope of corruption haswidened, this definition would include the abuse of all offices of trust. It has diverse meanings and far-reaching effects on society,Government and the people.Of late, the culture of corruption and bribe hasembedded in our society tothe extent that even routine works which should be done without any approach or	enough supportive material was not sale/transfer enabled the confidence of the available and as against that in the instant transferees to manipulate people; Council of case violation of rules and regulations in prices of products of	Sale/transfer enabled the transerees to manipulate prices of products of sold units and made fortunes overnight to the detriment of the consumers.Eight cement factories were sold to one group of Industrialists and the manner in which the muslims commercial Bank was sold to the	confidence of the people; Council of Common Interests under Article 153, which is responsible only to parliament, had not be allowed to discharge its Constitutional functions and exercise its powers despite persistent demands of the provinces and parliament had	

influence are commonly known to be done on some such consideration.This bribe culture has plagued the society to the exent that it has become a way of life.In Anatulay VIII (1988) 2 SCC 602 where Abdul Rahman Anatulay, Chief Minister of Maharashtra was prodecuted	sold Common Interests respect of corruption and nepotism had been carried out on such a widespread, pervasive, and systematic basis that such charges can validly form basis for action under Article 58(2)(b). In other words in the Present case there was colossal difference inmagnitude in both scale and nature of corruption , nepotism and corrupt practices in question and the whole system of governance had been subverted and channels of administration polluted by a sustainedabuse of power. It is, therefore, submitted that in the instant. Case there is overwhelming evidence to establish that persons holding highest in the	favouraties of the petitioner namely Mansha Group is well-known. Sale of properties owned by the Federal Government including Corporations was un constitutional and in doing so Article 153,154 and 156 read with Article 161 were violated by the petitioner and his Government. 45. In relation of	also not been allowed to function in that regard as required by Articles 153 and 154 of the Constitution and in relation to Articles 155 and 161 of the Constitution of Pakistan; National Finance Commission under Article 160 of the	

	Government are guilty of corrupt practices and gross abuse of power which is a validcan not be carried on in accordance with the provisions of the constitution. In their joinder petitioner has once again denied the allegation and demanded that the			

P L D 2000 SC 869 Syed Zafar Ali Shah and others v. General Pervez Musharraf and others	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v. President of Pakistan and others	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. , President of Pakistan and others	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahimv. The Federation of Pakistan and another	P L D 1989 Supreme Court 166 Federation of Pakistan and others v. Haji Muhammad Saifullah Khan

For Corruption sabyasachi Mukharji,J. lamented as follows: Values in public life and perspective of values in public life, have undergone serious changes and erosion during the last few decades.what was unheard before is commonplace today.A new value orientation is being undergone in our life and culture. We are at the threshold of the cross-road of values.it is for the sovereign people of this country to settle these conflicts yet the Courts have a vital role to play in these matters.”	Respondents be made to prove the allegation strictly. <u>Page 510</u> 109. on the ground of corruption, nepotism and violation of rules in the administration, It the written statement, large scale corruption is alleged in the finance sector of the Federal Government in which the petitioner as prime minister also retained for herself the portfolio of finance and did not appoint any persons as Finance Minister. She appointed one Minsiter of state for Finance and a retired bureaucrat as advisor on finance. In that set-up petitioner herself assumed the responsibility and maintained complete	Pakistan Telecommunication Corporation, the petitioner and his Government went to the extent of hiring services of foreign consultants and got legislation prepared abroad in advance for privatization in such a manner that only foreign investors could by it.In this connection Ministry of Law Justice was not consulted. The foreign investor was to purchase only 26% of the share holding in the proposed. Corporation while Government of Pakistan though holding 74% was not given any right of vote. Tax-Holding was proposed to be given Foreign purchaser. Buyer was to be a Government	Constitution had never been called to meet and allowed to function, thus blocking mandatory Constitutional process in the matter of allocation of share of revenues to the provinces despite their persistent demands;Constitutional powers and functions of the provinces had been deliberately frustrated and extension of executive authority of the Federation to the provinces in violation of Article 97 and by the general manner of implementation of the peoplesprogramme and senate which is representative of the	

234. Although we are dealing with a case of	control over the financial sector of the Federal Government. She took all the key decisions herself without involving anyone else. Page 509: 108. Another case of misappropriation cited is that Ms. Naheed Khan, Political Secretary to the Petitioner, and one Rehmatullah, the Consultant to the			

P L D 2000 SC 869 Syed Zafar Ali Shah and others v. General Pervez Musharraf and others	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v. President of Pakistan and others	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. , President of Pakistan and others	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another	P L D 1989 Supreme Court 166 Federation of Pakistan and others v. Haji Muhammad Saifullah Khan
Intervention by the Armed	petitioner, while the	Within a Government.	Federating Units under	

Forces, yet it would be advantageous to allude to the ground of corruption, which came up for consideration in the cases of kh. Ahmad Tariq Rahim (PLD 1992 646), Mian Muhammad Nawaz Sharif (P L D 1993 Karachi 473) and Benazir Bhutto (PLD 1998 Supreme Court 388)(supra).In the first case,it was observed by Shafiur Rehman,J. that corruption may not have been independently sufficient to warrant such an action, but it can be invoked, reffered to and made use of alongwith other more relevant grounds, which are by themselves sufficient to justify the action taken. In Mian Muhammad Nawaz Sharif's case (supra),it was observed that "if the	petitioner was the Prime Minister, forwarded lists of person and had cheques issued for them for total amount of Rs.34,90,000.In gross violation of rules sums totaling to Rs. 6.1717 million and 27.05 million were sunctioned on the directions received from Ms. Naheed khan and Mr. Rehmatullah respectively. In the rejoinder allegation is denied on the ground that the signatures of Ms. Naheed Khan were forged. In any case a case has been filed against her under sections 409,420 and 109 P.P.C. and section 5(2) of prevention of Corruption Act,1947 in which bail has been granted to her. These incidents can be considered in the light of the fact that during the tenure of the	There was reason to believe that petitioner and his Government had Similarly decided to sell WAPDA, the Railways, PNSC, the ports to the foreign investors thus, allowing foreign intervention in vital sectors of Pakistan to the control of foreign companies. The Government of Federation was not authorised under the Constitution or law to sell in the aforesaid manner. 46.it is claimed by the respondents that important decisions were taken by the petitioner and his nominees bypassing and in total disregard of	Article 59 and is an integral part of the Parliament, had been ridiculed and its Constitutional role had been eroded-such ground by themselves were sufficient to justify the President to dissolve the National Assembly under Article 58(2)(b) of the Constitution of Pakistan. Page649: (g) Article 58(2)(b) Dissolution of National Assembly by the President under Article 58(2)(b) of the Constitution of Pakistan. Corruption and	

	petitioner as Prime Minister how rules of the procedure were being violated with impunity and how public money was being dealt with by person who were very close to the petitioner. These incidents certainly show any element of the lack of responsibility in the administrations of the petitioner and could go a long way in satisfying the mind of the			

P L D 2000 SC 869 Syed Zafar Ali Shah and Others v.General Pervez Musharraf and others	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v. President of Pakistan and others	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. , President of Pakistan and others	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another	P L D 1989 Supreme Court 166 Federation of Pakistan and others v. Haji Muhammad Saifullah Khan
Corruption, nepotism and favouritism are such of a	President that the	Constitutional requirements	Nepotism in the Federal	

large scale that they have resulted in the breakdown of the constitutional machinery completely,it may have nexus with the above provision''. In the third case of Benazir Bhutto, this Court took notice of enormous corruption and treated it as an independent ground on the basis of which an Assembly could be dissolved (Underlining is by way of emphasis). Once corruption parvades in the body politic and official circles, then the entire Government/administration becomes completely crippled and paralyzed. Recounting the instances of alleged corruption the Federation has pointed out sharifs'	Government of the Federation was not being run in accordance with the provisions of the Constitution. Page 511: In respect of financial irregularities mentioned in detail in the written statement and supported by documents which are contained in a separate file annexed with the written statement, the petitioner rejoinder has said nothing at all excepting three lines in respect of Mr. Aziz Memon which are responded as under. "It is well-known that even though	and rules of business. Proposed privatization of WAPDA, PTC, portion of Pakistan Railways or other Corporations owned by the Federal Government, PIA and nationalized banks whether sold and/or under consideration of being sold were never brought by the petitioner before CCI and NEC. What is stated above clearly shows that in respect of policy of privatization. Constitutional requirements of provisions regarding CCI and NEC were not followed and Provinces were not given opportunity to participate in the formulation of such	Government, its functionaries and authorities and agencies statutory and other corporations, including banks working under it supervision and control and the holders of representative offices had reached such proportions that the orderly functioning of the Government in accordance with the provision of the constitution including the requirements of the oaths prescribed therein; and the law, did not longer carry public faith and credibility and despite being subject to wide public condemnation	

	Aziz Memon was a Government party M.N.A., he was arrested during the petitioner tenure and the case is sub judice. No special treatment was meted out of him, therefore, the allegation has no force." Such a short reply in the rejoinder clearly shows that other allegations are not denied specifically and categorically. Nothing more is needed to be said in respect of this allegation leveled by the respondent and the			

P L D 2000 SC 869 Syed Zafar Ali Shah and others v. General Pervez Musharraf and others	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v. President of Pakistan and others	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. , President of Pakistan and others	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another	P L D 1989 Supreme Court 166 Federation of Pakistan and others v. Haji Muhammad Saifullah Khan
Ownership of Cayman Island, and offshore company through Al-Towfeek Co. and the case of huge quantity sugar export to India – receiving heavy amount as rebate. When corruption permeats in Socail, political and financial transactions to such an extent that even proper and honest orders and transactions are suspected to the pint of belief being a result of corruption, one is compelled to infer all is not well and corruption has gone deep in the	document which have been produced in respect thereof except that there is overwhelming evidence produced by the respondents on the ground of financial irregularities committed by the petitioner or by others within her knowledge and she did not do any thing to remedy the situation to save the nation and its economic ruination and disaster Page 532	policies.it also appears that on the ground of mal-administration, corruption and nepotism of the Federal Government there was sufficient material befor the President which has been produced in the Court as Annexures ‘Ato ‘A-12and ‘Btom ‘Rwhich were considered in support of the ground of dissolution. Pages 837-838 24. The word ‘corruptionhas not	the Government had failed to take appropriate action in that behalf;authorties, resources and agencies of the Government of the Federation including statutory corporations, authorties and banks had been misused for political ends and purposes and for personal gains and civil services of Pakistan had been undermined by disregarding the provisions of Articles 240 and 242 of the Constitution of Pakistan. Such goods though were not independently	

roots. No doubt, this an age of " corruption eruption" but during the last few years there have been large scale prosecutions of former world leaders in various countries on the charges of corruption and corrupt practices, in some	In any case in the written statement instances in respect of certain projects and in support thereof a large number of documents have also been filed which show corruption. Nepotism and undue favour in official dealing of such projects which speak for themselves and the petitioner does not say that the documents produced by the respondents are false and fabricated but instead reliance has been placed on newspaper cutting of the statements in which the catetaker Prime Minister or the interior Minister had stated that initially	been defined by any law, but is has diverse meaning and far-reaching effects on society, Government and the people. It covers a	sufficient to warrant the action of dissolution of National Assembly by the President but Could	

P L D 2000 SC 869 Syed Zafar Ali Shah and others v.	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v.	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. ,	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq	P L D 1989 Supreme Court 166 Federation of

General Pervez Musharraf and others	President of Pakistan and others	President of Pakistan and others	Rahim v. The Federation of Pakistan and another	Pakistan and others v. Haji Muhammad Saifullah Khan
Cases leading to convictions, which phenomenon must not be taken lightly and the issue must be addressed adequately and effectively through transparent institutionalized processes. 235. The Observations made herein and in the short Order are not intended to condemn en block the politicians and parliamentarians as a class.Undoubtedly, there are good, honest and upright as well as corrupt people in every group of persons. These observation are confined only to the situation, which is being attended to in these cases. Any proceedings commenced against any person including the parliamentarians	they did not find material connecting the petitioner with the acts of corruption. In the final analysis after perusal of the documents produced by the respondents alongwith the written statement and the reply of the petitioner in the rejoinder and the documents filled by her in support of her stance, it can be said that the change framed by the respondents id adequately substantiated. <u>Page 534</u> That being to Mr. Khalid Anwar was unable to show that there was no mistake in the name and the person named in the schedule is related to Mr.Asif Zardari. If this is accepted as correct,even than it is apparent that persons named in the schedule have been	Wide field and can apply to any colour of influence, to any office, any any institutions, any forum or public. A person working corruptly inconsistent with the official duty, the rights of others and the law governing it with intention to obtain an improbable advantage for himself or someone else.Dealing with corruption with Khalid Malik's case I had observed as follows:- " This bribe culture has plagued the society to this	be invoked, referred to and made use of alongwith ground more relevant. <u>Page 653</u> The formal order of the president of Pakistan under Article 58(2)(b) which was gazetted is reproduced hereunder is extensor:- a. ……. b. …….. c. …….. The Federal Government has failed in its duty	

of politicians or members from	favoured out of way after violation of rules. No mentioned is made in the rejoinder with regard to the allotment of land to the parliamentarians. Therefore, that charge stands established.	extent that it has become a way of life. In Anatulay VIII(1998) 2 SCC 602 where Abdul Rehman Antulay, Chief Minister of Maharashtra was prosecuted for	under Article 148(3) of the Constitution to protect the province of Sindh against internal disturbance and to ensure that the Government of	

P L D 2000 SC 869 Syed Zafar Ali Shah and others v. General Pervez Musharraf and others	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v. President of Pakistan and others	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. , President of Pakistan and others	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another	P L D 1989 Supreme Court 166 Federation of Pakistan and others v. Haji Muhammad Saifullah Khan
Islands. 236. The Federation has also alleged that most of the politicians / parliamentarians have misdeclared their assets both before the wealth	"The word 'corruptionhas nowhere been defined but it has diverse meaning and far reaching effects on society, Government and people. It is always used in a sense which is completely	Walks of life emantes, from corruption of power and corruption of liberty Corruption breeds corruption 'Corruption of libertyleads to	Page 705 43.Before concluding, a few matters call for-consideration,which I would like to touch: First: …. Second: Without accountability at all	

Tax Authorities as well as the Election Commission including, the former Prime Minister who admittedly despite owning a helicopter, did not declare the same in his declaration of assets.It has been Pleaded on Behalf of the Federation that although misdeclaration of assets was a matter of record, yet the Constitutional Authorities failed to file references against them before the concerned for(a) thus, all such Politicians/ Parliamentarians through their acts of commission and omission	opposite to honesty, orderly and action performed according to law. It covers a wide field and can apply to any colour of influence, to any office, any institutions, any forum or public. A person working corruptly acts in consistent with the official duty, the rights of others and the law governing it with intention to obtain an improbable advantage for self or some one else. There are various forms of corruption.One where a person discharges his duty according to law but on certain consideration. His act may be proper and legal but its performance is influenced by extraneous consideration be it monetary, affection or love. The culture of corruption and bribe, of late, has embedded in our society to	'liberty of corruption' Corruption and bribery adversely affect the social, moral and political life of the nation. In society rampant with corruption peoples loose faith in the integrity of public administration. In India in 1964 Committee on the prevention of corruption known as Sanathanam Committee observed as follows:- It was represented to us corruption has increased to such an extent that people have started losing faith in	levels, no headway can be made and any system of Government would meet failure. Till we have sorted this out, no access can be achieved with a Parliamentary system of Government. The setting up of a Parliamentary Ombudsman or Ethics Committee to unsure Parliamentary Accountability, to watch and control the personal actions of and exercise	

	this extent that even routine works which should be done without any approach of consideration are commonly know to be			

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the general public under the laws of the country will,no doubt be decided on their own merits in the accordance with law and on the basis of the legally admissible material brought before the concerned for in those proceedings without being influenced by any observation made in this	Page 625: 34. The sixth ground relates to corruption,nepotism and violation of rules in the administration of affairs of the Government and its various bodies, authorities and corporations, which were so extensive and widespread that the orderly functioning of the Government in accordance with the provisions of the	Corruption sabyasachi Mukharju,J. laments as follows:- Values in public life and perspective of values in public life, have undergone serious changes and erosion during the last few decades. What was unheard before is commonplace today. A new	The provision is carried on in accordance with the provisions of Constitution, despite the heavy loss of life and property, the role of terror in urban and rural areas, roits,arson, dacoities, kidnapping for ransom, politics of violence among citizens and	

judgment. Put differently, it will be only after finalization of the proceedings as above that the country will be geared up for resort to democratic principal and corruption-free society which are prerequisites for good governance.This situation has also been recognized by the commonwealth Finance Ministers meeting held on 21-23rd September,1999 at Grand Cayman, Cayman	constitution and the law had become impossible. Public faith in the integrity and honesty of the Government had disappeared. Page 663: 43. The question whether corruption can be made ground for dissolving the National Assembly has assumed great importance particulary at a time when it has plaged every walk of life in the governance of the country and administration. The question was considered in Khalid Malik v. Federation of Pakistan PLD 1991 kar.1 where I had observed as follows:-	value orientation is being undergone in our life and culture. We are at threshold of the cross-road of values. It is for the sovereign people of this country to settle these conflicts yet the Courts have a vital role to play in these matter'." The degeneration in all	widely condemned failure of the Provincial Government and its law enforcing agencies,and also, in this behalf, failed to act under appropriate provisions of the constitution.	

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and others			Pakistan and another	Haji Muhammad Saifullah Khan
have rendered themselves ineligible for being members of the representative bodies. In order to substantiate the above allegations the learned Attorney-General has filled voluminous record wherein specific instances of misdeclaration of assets have been given. We have been examined the relevant record only for the purposes of the present controversy and find that sufficient material exists showing, prima, facie, that a large number of politicians indulged in misdeclaration of assets, which factor has a bearing	done only on consideration. The bribe culture has plagued the society to this extent that it has become a way of life. In Anatualy VIII (1988) 2 SCC 602 where Abdul Rehman Anatulay Chief Minister of Maharashtra was prosecuted for corruption Sabyasachi Mukharji, J.laments as follows. 'Values in public life and perspective of values in public life, have undergone serious changes and erosion during the last few decades. What was unheard before is commonplace	the integrity of public administration. We had heard from all sides that corruption, in recent years, spread even to those levels of administration from which it was conspicuously absent in the past. We wish we could confidently and without reservation assert that at the political level Ministers,legislator,party officials were free from the malady. The general Impressions are unfair and exaggerated. But the very fact that such impressions are there causes damage to social fabric.' The committee also observed that there is a popular belief of corruption among all	of official and constitutional fuctions by the elected representative and take action against them, where necessary, by secret ballot, would set the pace for clean politics and orderly parliamentary working. Selective accountability is a negation of democracy, as it can only lead to further political polarization and revenge and impair the democratic process.	

on the issue in had. We may clarify that misdeclaration of assets before the wealth Tax Authorities qua the Election Commission	today. A new value orientation is being undergone in our life and culture.We are at threshold of the cross-road of values. It is, for the soverign people of this country to settle these conflicts yet the Court have a vital role to play in these matter.'" The degeneration in all walks of life emantes, from corruption of power and corruption of liberty. Corruption breeds corruption. 'Corruption of libertyleads to 'liberty of corruption'." 			

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Others v.General Pervez Musharraf and others	President of Pakistan and others	Nawaz Sharif v. , President of Pakistan and others	Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another	Pakistan and others v. Haji Muhammad Saifullah Khan
may not by itself be a ground for intervention of the Armed Forces on 12th October,1999 but this aspects of the matter when viewed in the overall context and with particular reference to the alleged massive corruption and corrupt practice becomes a relevant factor. <u>Page.1140</u> 228. Syed sharifuddin Pirzada, learned Senior A.S.C. was right in contending that there were serious allegations of corruption, nepotism, lack of transparency and non-accountability and that where there is corruption,there	Corruption and bribery adversely affect the social, moral and political life of the nation. In society rampant with corruption peoples lose faith in the integrity of public administration. In India in 1964 Committee on the Prevention of Corruption known as Sanathanam Committee observed as follows: 'It was represented to us corruption has increased to such and extent that people have started losing faith in the integrity of public administration. We had heard from all sides that corruption,in recent years,spread	clases and strata which 'testifiesnnot merely to fact of corruption but its spread,. Such belief has a social impact causing 'damage to social fabric'. The anti-corruption and panel laws have remained ineffective due to their inherent defect in Adequately meeting the fast multitudinous growth of corruption and bribery. Corruption in high places has remained unearthed leading to a popular belief that immunity is attached to them.To combat corruption the whole process and procedure will have to		

is not good Government, which fact has been recognised by this Court observing that	even to those levels of administration from which it was conspicuously absent in the past. We wish we could confidently and without reservation assert that at the political level Ministers, legislator,party officials were free from the malady. The general impressions are there caused damage to Social fabric.' The committee also observed that there is			

P L D 2000 SC 869 Syed Zafar Ali Shah and Others v.General Pervez Musharraf and others	PLD 1998 Supreme Court 388 Mohtarma Benazir Bhutto and another v. President of Pakistan and others	P L D 1993 Karachi 473 Mian Muhammad Nawaz Sharif v. , President of Pakistan and others	PLD 1992 Supreme Court 646 Khawaja Ahmad Tariq Rahim v. The Federation of Pakistan and another	P L D 1989 Supreme Court 166 Federation of Pakistan and others v. Haji Muhammad Saifullah Khan

corruption by itself is aamong allground for imposition of Martial Law or Proclamationof Emergencies. Page 1147: 237. We now take up another rallied issue relating to economic condition of the country. It was alleged on behalf to the Federation that the former Prime Minister and his business associates exported sugar produced in their sugar mills to India by railed and earned millions of rupees as profit. It was pointed out that several, SROs were promulgated by the then Government to claim export rebate on sugar and there by the former Prime Minister and his predecessor committed breach of faith	a popular belief of corruption among all classes and strata which testifies not merely to fact of corruption but its spread. Such belief has a social impact causing damage to social fabric. The Anti-corruption and panel laws have remained ineffective due to their inherent defect in adequately meeting the fast multitudinous growth of corruption and bribery. Corruption in high places has remained unearthed leading to a popular belief that immunity is attached to them.To combat corruption the whole process and procedure will have to be made effective and institutionalized. The spread of corruption and bribe culture is so wide that even rumours and concocted stories	be made effective and institutionalized."4 However, the Supreme Court in Ahmad Tariq Rahim's case at page 666 observed that the grounds like corruption, nepotism, misuse of banks and violation of Articles 240 and 242 relating to the services may not be independently sufficient to warrant such an action (order of dissolution). They can, however, be invoked, referred to and made use of with grounds more relevant like ground (a) (failure of legislative functions of the National Assembly) and (b) ¬wilful undermining and impairing the working of the Constitutional arrangements and usurping		

	assume the proportion of general belief. Corruption cripples the Government and Administration. It paralyse's the course of justice and throws honest persons of integrity in oblivion as redundant and misfit. No. Government with record of corruption, nepotism and favouritism can claim to be run according to Constitution and Law.			

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with Pakistani banks/overseas and resident Pakistanis by	Where corruption is of enormous nature affecting	the authority of the Province and such institutions resulting in		

removing 11 billion dollars lying in their accounts in the banks in Pakistan without their consent and utilized the same for unauthorized purposes, which remain unexplained till today. It was further stated that the former Government froze the FEBC accounts and misappropriated the foreign exchange belonging to resident and non-resident Pakistanis.which not only brought bad name to the Pakistani banks but also to Pakistan as a country and the responsibility of this huge fraud lies heavily on the former Prime Minister.	major spheres of life and is said motivating force in taking major decisions and public dealings by the Government and administration, it will surely have nexus with the order of Dissolution." This ground also came up for consideration in Kh. Ahmed Tariq Rahim's case PLD 1992 Supreme Court 646. At page 666, Shafiur Rehman, J. observed that "It is true that some of the grounds like (c) (corruption), (e)(ii) and (e)(iii) may not have been independently sufficient to warrant such an action. They can, however; be invoked, referred to and made use of along with grounds more relevant like (a) ar1.1 (b) which are by themselves sufficient to justify the	discord,confrontation and deadlock adversely affecting the integrity, solidarity and well-being of Pakistan. This view is binding on me. In the present case the learned Attorney-General has pointed out about the corruption, nepotism and lack of transparency in the process of rivatization of Muslim Commercial Bank and sale of aliment factories,but on examination of those documents and the explanation offered by the petitioner the same cannot form an independent ground for dissolution. They, however, may be		

	action taken". In Mian Muhammad Nawaz Sharif's case, Ajmal Mian, J. observed that "if the corruption, nepotism and favouritism are of such a large scale that they have resulted in the breakdown of the Constitutional machinery completely, it may have nexus with the above prevision." I had reiterated my views quoted above, but			

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	further observed that the observations in Ahmed Tariq	taken into consideration provided some substantial,		

	Rahim are binding. Now is the time to reconsider this aspect of the case thoroughly as in my view in Mian Muhammad Nawaz Sharifs case or that of Kh. Ahmed Tariq Rahim this aspect had cursorily been dealt with. In Kh. Ahmed Tariq Rahim only one sentence quoted above was mentioned with regard to corruption. There was no full-fledged discussion on the question whether corruption could be made a ground for dissolution of the National Assembly. There seems to be no settled view and there appears to be divergence of opinion as according to Ajmal Mian, J. if the corruption is so enormous that the Government cannot be carried on in accordance	effective and well recognised grounds as set out in the judgment of this Court are proved and made out against the petitioner.		

	with the Constitution, it can be made a ground for dissolution of the Assembly. Whether on the ground of corruption an Assembly can be dissolved depends upon the nature of corruption and its enormity. Time has come to make assessment of the situation and also to			
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	consider whether corruption can be made a ground for dissolution of the Assembly. Corruption which pervades in the administration,			

	social and moral life which is rampant in political levels of Ministers, legislator, officials and it has gone so deep into the roots that a general impression has been created that no administrative, Government or even Governments corporation work normally done in the discharge of duty can be performed without resorting to corruption. Once corruption pervades in the body politic and official circles, then the entire Government and Administration is completely crippled and paralyzed. Honesty and integrity is sidetracked. There becomes a general impression that all official acts are motivated by corruption, favouritism and nepotism. This follows that any Government or Administration			

	about which such impression has been created and have become common which may not be true in totality, it destroys the authenticity, legality and validity of the actions. Such actions purported to be done			

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	under the provisions of law or the Constitution, but motivated by private impulses, benefits and corruption cannot be termed as performed under the Constitution. When this			

	becomes- order of the day, it becomes difficult to say that the Government is run in accordance with the provisions of the Constitution. From the enormous record produced in this case to show corruption, nepotism, bribery and favouritism, one can safely assume that corruption at such massive scale had destroyed the social, moral, legal and political fabric of the nation. Where corruption is of such a nature, it can be made a ground for dissolution because the Government cannot be allowed to be run on the whims and caprices, corruption and bribery, favouritism and nepotism. I will distinguish Kh. Ahmed Tariq			

	Rahim's case as there on the ground of corruption the material produced was not of such enormous nature nor this aspect was considered factually and legally by Shafiur Rehman, J. in detail. Recounting the instances of corruption one			

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	may point out to Surrey Estate title documents of which are not available on record and is stated to be in the name of a company allegedly a dummy company in the			

	nature of a benami title-holder. However, circumstantial evidence discussed above connects the link between Surrey Estate and the petitioner, her husband and Bilawal House. Although the petitioner had denied any connection with Surrey Estate, the shipment through PIA of alleged household effects, telephone calls, permission obtained for constructing stable and security arrangements lead to the inference that tile petitioner and her husband have interest in the said property. In cases. of corruption sometimes it is difficult to obtain definite evidence, but it is not uncommon that in cases where disciplinary action as opposed to			

	penal and criminal action is taken in the absence of direct evidence, from indirect material which directly and clearly points out to corruption, inference can be drawn. There may not be direct evidence against a Government official to prove specifically			

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	alleged corruption, but if he lives beyond his means, it may be a relevant fact against him. Besides this, massive appointments made on the recommendation of M.N.As.,			

	M.P.As., Ministers or Prime Minister's Secretariat in violation of the rules in the Government offices and public corporate sector is a corruption of serious nature as it excludes the meritorious persons, destroys the structure of service and shakes the confidence of the people. It also breeds in efficiency and encourages indiscipline. What makes it more serious that such appointees and the nominees of the party in power give in obedient command performance in violation of Rules and Regulations. The instance of Bait-ul-Mal referred above makes a horrifying reading. The Amin, who is a trustee in violation of the rules had dished out two cheques of Rs. 10 million each in the name of Maj. Gen. (Retd.)			

	Nasirullah Babar which on material available has not been distributed amongst the needy and poor as required by law. A s sIitical mila e has been sought at the			

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	cost of Bait-ul-Mal. Even Ms. Naheed Khan was also recipient of money from Bait-ul¬Mal in disregard of the rules and regulations. The financial scams, irresponsible and reckless policies motivated by personal or individual benefits, rise in written off loans, advances by banks and financial			

	institutions, transactions made by Pakistan Steel Mills and similar other transactions and permissions referred to above give a general impression to all and sundry that every order passed, agreement and transaction made suffered from corruption. When corruption pervades in the social, political and financial transactions to such an extent that even proper and honest orders and transactions are suspected to the point of belief being a result of corruption one is compelled to infer all is not well and corruption has gained deep in the roots. No doubt this is an age of "corruption eruption", but during the last two years one third of Indian Cabinet and the Secretary General, NATO were charged of corruption and have fallen while Italy's postwar			

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	prominent Prime Ministers, two former Presidents of South Korea were indicted for corruption and the later were even sentenced. There have been parliamentary investigations into financial abuses at high level in Japan, Turkey, Colombia and Mexico. Pakistan is not far behind. It has fallen in line. Although the President in his address warned against corruption, it continued unabated. In my opinion, there was sufficient material and the corruption was so enormous and widespread that an order of dissolution could be passed individually on this basis or			

	collectively together with other substantive grounds discussed above.			

6. Mr. Minto referred to the following portions of the preamble to the NAB Ordinance:

"NAB ORDINANCE

ORDINANCE NO. XVIII OF 1999

An Ordinance to provide for the setting up of a National Accountability Bureau so as to eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices and matters ancillary thereto;

Whereas it is expedient and necessary to provide for effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misuse/abuse of power, misappropriation of property, kick-backs, commissions and for matters connected and ancillary or incidental thereto;

And whereas there is an emergent need for the recovery of outstanding amounts from those persons who have committed default in the repayment of amounts to. Banks, Financial Institutions, Government and other agencies;

And whereas there is a grave and urgent need for the recovery of State money and other assets from those persons who have misappropriated or removed such assets through corruption, corrupt practices and misuse of power and/or authority;

He submitted that it is composite law and does not merely create Courts. The objects mentioned in the Preamble are very singular to this kind of legislation and such statements are not available in the preambles of other enactments. Ft is squarely related to the objective reality. He emphasized that the interpretation of various provisions has to be made in conformity with the objects of the legislation unless this Court finds that these objects are ultra vires the Constitution or they are outside the scope of the legislative competence of the Federation. If they are within the legislative competence of the Federation then they will be taken note of and carefully considered while interpreting the various provisions thereof. He stated that burden of the arguments addressed on behalf of the petitioners is on the ground that there are several provisions of this law which indicate that a lot of power has been given to the National Accountability Bureau and Courts are not involved in that matter. He prefaced his arguments with the submission that the preamble itself clarifies that it is a law which involves detection, which otherwise will be the subject-matter of a separate law. It involves investigation, which ordinarily is the subject-matter of totally different laws.

Prosecution and speedy disposal are also the matters with which the Courts are concerned. So, in regard to the question of "parallel judiciary" and "judicial independence", it is to be kept in mind that this Court is interpreting a law which does not merely create a Court but also requires disposal of cases by taking notice of several other areas which are not a part of Court activities. A law which merely creates a Court and its jurisdiction, is of distinct character as compared to a law in which several other issues have been dealt with. According

to him, one matter which is not provided for in section 25 is a parallel or alternate method of resolving a dispute, After the amendment of this section through Ordinance 24 of 2000, if the Court has taken cognizance of the offence or trial commenced, the Chairman NAB may release the accused only with the approval of the Court vide section 25(a)(ii) ibid. Similarly, in section 25-A relating to payment of loan etc. a method has been evolved vide Ordinance .4 of 2000, whereby an elaborate machinery has been created with regard to detection and investigation of persons accused of wilful default, non-payment of dues to a bank or financial institution etc. The Ordinance when read as a whole demonstrates that it is a statute which creates Courts and lays down principles and methodology for the disposal of cases before them. By virtue of an amendment in section 25, the words Chairman NAB in clause (e) have been substituted by the words "Governor, State Bank of Pakistan". Resultantly, the matter is now within the discretionary exercise of power of the professionals to decide whether or not to accept the recommendation of the reconciliation committee or pass other appropriate orders for reasons to be recorded the rein. The statute as amended does not encroach upon the powers of the. Court in that regard. Section 25-A also evolves a machinery for the purposes of alternate resolution of, the disputes which is a well-known modern concept for reducing the backlog in Courts.

'77. The learned counsel also pointed out that from the date the NAB Ordinance was promulgated, more than one amendments were made therein. Some of the amendments are formal and some substantial in character and were actually the result of public comments as also observations by the Courts.

78. The learned counsel next referred to the Prevention of Corruption Act, 1947 (Act II of 1947) and contended that even the then political dispensation under the colonial rule, took note of a post World War-II circumstance that a lot of things were happening in the society which were breeding corruption and, therefore, the necessity for the enactment of Act II of 1947. The Prevention of Corruption Act, 1947 only took care of the post war situation yet, it became a permanent law and remains so on the statute book, even today. This aspect will be quite instructive in appreciating the rationale for enacting the impugned Ordinance.

79. Mr. Minto also referred to an Indian statute "The Prevention of Corruption Act, 1988" and stated that this is later in point of time i,e,, several decades subsequent to its forerunner and is a new law altogether. This (1988 Law) keeps alive several provisions of the original law and introduces several others, most of which arc relevant for purposes of controversy involved herein because they raise many more presumptions as compared to those which find mention in section 5 of 1947 Act. He argued that in 1984, India made laws which related to terrorism affected areas. They made elaborate. And new dispensation for taking Cognizance of matters of that magnitude. There are new provisions in the latter enactment relating to remand of the accused. Now, in India by a general statute, they have created presumptions in several areas in the Evidence Act as well. The Indian Evidence Act has now a new section 111-A, in which a totally new category of presumptions has been catered for. He further submitted that as far as the presumptions are concerned, both in the realm of anti-Corruption and anti-terrorism acts in India, they are retrospective in operation and this matter has gone to several High Courts as also the Supreme Court of India and upheld, ruling that they fall in the category of procedural laws.

80. Mr. Minto argued that so far as the punishments and creation of offences by the impugned Ordinance are concerned, they are protected by Article 12 of the Constitution. He argued that under Article 12 of the Constitution ex post facto legislation can neither create

new offences nor provide harsher punishment than the one which was available for it already. This is the limited impact Of Article 12 of the Constitution.

81. He argued that in the matter of substantive law and substantive rights, the general presumption regarding such statutes is that they are not retrospective. But, in the realm of procedure, the general presumption is to the contrary, unless the provision itself says that it is prospective. It can be shown from the statute itself that presumption to the contrary has been displaced.

82. Mr. Minto stated that the corruption in the society was noticed at the highest judicial level in the 'cases referred above and in many others. He contended that the above cases are of great importance because each one of them is a case in which a legally established Government was dismissed. In Zafar Ali Shah's case (supra) it was said that corruption is a valid ground for upsetting a legally established system.

83. The learned counsel next contended that this Court may also take judicial notice of several things which are happening in the society and in one form or the other they have been brought to the notice of this Court: These are the failure and closure of the Banks as also scandals having overtaken, -among others, Mehran Bank. In the field of their financial activity, Banks advance loans without obtaining proper securities in that regard. Unable to take back the money, they are driven to writing off the loan. These are very serious matters and this Court may see that when the banks get destabilized the economy of the country is not far behind to follow suit. When the banks gets destabilized, the common citizen who is the depositor in the banks, suffers the most. The ratio of the money which a common citizen deposits in the bank is much more than the deposits by the elite because the latter keep their money elsewhere. Therefore, it is common man's money which is actually spent on different exercises. Six thousand people of a certain bank were laid off and their services were terminated. They approached the Service Tribunal as also this Court. Ultimately they remained out of service. The, amount of money which that bank had squandered away, including written off loans, was the cause of the destabilization of the Bank. The amount of money that those six thousand employees were earning as their salaries from the bank, was only a fraction of that amount.. Then, there were scams of Cooperative Societies and Finance Companies. Taj Company is now in a situation where the High Court is managing its affairs. Cooperative Societiesmatter ultimately came before this Court. It is well known that in the Punjab they created a special law "Undesirable Cooperative Societies (Dissolution) Act, 1993 which again came before a Full Bench of five Judges of the High Court and it was unanimously held that that law was a 'Bill of Attainderand as there was no show-cause notice, therefore, it was declared ultra vires. This judgment was upheld by this Court.

84. Mr. Minto accepted the general arguments of Mr. Baber Awan to the effect that several provisions of the impugned Ordinance are not consistent with what has been provided in Cr.P,C. However, it was argued that Cr.P.C. Will apply 'subject to any inconsistency with this lawand that there are provisions inconsistent with Cr.P.C. He submitted that Cr.P.C. Is not a code of fundamental rights but a procedural law which can be altered and new procedure/s introduced, instead. Petitioners have failed to make out a case that the NAB Ordinance is violative of the Fundamental Rights.

85. Mr. Minto next contended that he is not opposed to examining the question of improvement of NAB Ordinance in these proceedings under Article 184 (3), in that this Court is exercising its jurisdiction in special circumstances. According to him, the arguments

addressed at the Bar on behalf of the petitioners that this is a special kind of crime internationally recognised, complicated and difficult, helps him in these proceedings.

86. He argued that the question of innocence of an accused person was a matter which gained prominence in the 14th and 15th centuries and became ultimately an ipsi dixit, a fundamental principle of criminal jurisprudence but then departures have been made therefrom. In fact, .a foreign jurisdiction in the modern world in the Continent itself has not accepted that principle. For example, in France they have never accepted the principle of innocence of an accused person because they had confidence in their Om system of administration of justice.

87. Mr. Minto referred to the contention of Mr.Baber Awan. And stated that the law itself provides in section 17 that Cr.P.C. Applies subject to its inconsistency with the NAB Ordinance and that this is not an unusual statement to be made in a law. He made a statement at the Bar that no woman has ever been arrested, detained, or taken to the Police Stations in pursuance of this law by the NAB. He stated that although the impugned Ordinance is a harsh law but the manner in which people's money has been squandered does require such a law.

88. The learned counsel referred to volume IV of the reply filed by Mr. Maqbool Elahi Malik, Advocate-General, Punjab, which contains a large number of extracts from various Acts from foreign jurisdiction, in particular, Criminal Justice Acts of 1987 and 1988 from England, the Encyclopaedia of Democracy, Encyclopaedia of Crimes, Human Rights, press clippings, etc., as ready material for reference.

89. Mr. Minto next referred to Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath (1991) 71 Company Cases 403); Subash Chander v. State of Punjab and others (AIR 1979 Punjab and Haryana 238); Bashiruddin Ashraf v. The Bihar Subai Sunni Majlis-Awaqf and another (AIR 1965 SC 1206); Sajjan Singh v. State of Punjab (AIR 1964 SC 464); and State v. Hyder Ali (AIR 1955 Hyderabad 128); on the question of retrospectivity in the context of Article 20 of the Indian Constitution (equivalent to Article 12 of the Constitution of the Islamic Republic of Pakistan) and the presumptions raised in a variety of statutes and retrospectivity attached to the presumptions therein.

90. Rebutting the arguments of Mr. Muhammad Akram Sheikh regarding competence of the Federal Legislature to deal with jurisdiction of the Courts as also the NAB Ordinance being an invasion on the Provincial autonomy, Mr. Minto referred to Entry 55 of the Federal Legislative List which reads as under:-

"Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorised by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers."

He also referred to Article 175 of the Constitution, which reads:-

(1) There shall be a Supreme Court of Pakistan, a High Court for each province and such other Courts as may be establish by law.

(2) No Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(3)

He submitted that there cannot be any Court established under the law, which will have any jurisdiction that the law has not conferred on it. However, the superior judiciary has inherent power of judicial review, which is a special attribute of the superior judiciary and is not the subject matter of clause (2) of Article 175 of the Constitution. An example of the power of judicial review is contained in Article 187 of the Constitution. It is no where provided in the Constitution that the Supreme Court shall have power to decide the question of its own jurisdiction. It is only in the exercise of its inherent jurisdiction that the Supreme Court decides this question, which it does even where a statute has specifically ousted its jurisdiction. Even the Constitutional provisions inhibiting the jurisdiction of the Court by some method or other, or which seek to cut down the power of the Court, can be considered and a proper interpretation can be placed on them, keeping in view the inherent power of the Court. The power of judicial review is not the subject-matter of Article 175 (2) of the Constitution, which deals only with the jurisdiction of the Court to be conferred by law. The learned counsel made the above submission as a statement of law.

91. The learned counsel submitted that he has no cavil with the proposition that the Federal Legislative List does not contain any entry which confers any power on the Federal Government to establish any Court. However, he referred to Item 1 of the Concurrent Legislative List relating to criminal law, including all matters included in the Pakistan Penal Code, but excluding offences against laws with respect to any of the matters specified in the Federal Legislative List and also to Items 2, 3 and 4 of the Concurrent Legislative List where the Federal Government is empowered to legislate on matters relating to criminal/civil procedures as well as evidence/oath, etc. Be submitted that section 6, Cr.P.C. Describes the criminal Courts and 'any other Court established by or under any other law'. Thus, the Federal Government is competent to. Make a law providing for special Courts and the procedure under which the Courts will function and dispense justice. Mr. Minto submitted that complete answer to the plea raised by Mr. Akram Sheikh regarding competence of the Federal Government to promulgate the NAB Ordinance is provided in Items 1, 2 and 46 read with Item 47 of the Concurrent Legislative List. He submitted that the objection of the petitioners that it is a case of 'occupied field', is not well-founded, inasmuch as such a situation arises where a legislation by the superior legislature is already in the field. He next submitted that a Legislature, which has made any law, is competent to change, annul, re-frame or add to that law. He submitted that it is not even so much as controverted by the petitioners that the Provincial Governments/Legislatures have not made any legislation on the subject in question. .

92. Referring to the plea of Mr. Aitzaz Ahsan regarding invasion of the Provincial autonomy, Mr. Minto submitted that the law relating to crimes is not a law which goes on the basis of territorial considerations.

Indeed, all laws relating to the jurisdiction of Courts and for filing causes before the Courts, whether civil or criminal, do not take their queue on the principle of federation. In civil law, it is the cause of action that determines in most cases where the suit has to be filed - where the defendant resides, where the debtor resides - so there are variety of considerations, not considerations of territorial character relatable to federal character. In criminal cases, the general principles are contained in sections 177 to 182, Cr.P.C. i,e, where the crime takes place, the Courts in that area have jurisdiction and it matters little whether the person belongs to one or the other Province. It is the crime, its nature and the place where it is committed that

determine the place where the trial has to take place. Section 178, Cr.P.C. Authorizes the Provincial Governments to determine the venue for trial of offences. It is a law of procedure, the scheme of which is not concerned with the question of Provincial autonomy. When a crime is committed in various parts of the country over various places, any Court of those areas is competent to take cognizance of the matter. The learned counsel emphasized that in determining where the matter has to be tried, no consideration is given to the provincial nature of the society or the autonomous nature of the Provinces or that the accused belongs to one or the other Province - all these matters have no relationship with the Provincial autonomy except for the High Courts which have been created under the Constitution for each Province and there is no other perception of the Court concerning the Provincial division, but in that regard also, the scheme at one time was that two Provinces had one High Court. The scheme of the creation of the Supreme Court is not of that character, it is not a Federal Court. It is the apex Court. It is a Court for the whole of Pakistan and it does not go by the principle of federation in that fashion in which the allocations are made and distributions take place. In its own wisdom, the Supreme Court may decide how to manage its own composition, that is a different thing, but the Constitution does not do that, it looks into it as an apex Court. There have been demands that, as in the United States, there should be a Federal Court. The judiciary is a totally distinct entity devoid of the questions, which arise as a matter of politics in the context of Federation. He submitted that the place of sitting of the Court is to be determined by the Government because it is the duty of the Government to provide the Court houses.

93. The learned counsel referred to the Preamble of the NAB Ordinance and submitted that it is a composite and extensive law and its interpretation has to be done in a manner different from the normal interpretation placed on purely criminal statutes. This law deals with, among other things, setting up of the National Accountability Bureau, which is an executive authority, an administrative authority, an Investigating Agency and which deals with several aspects of 'corruption', etc. The learned counsel submitted that NAB does not merely deal with crimes of corruption, it also deals with their investigation and settlement out of Court.

Settlement out of Court is now an established method by which things are resolved in several developed societies. It is necessary in these cases where the accused is a potential investor and his such form is inter-linked with the economy of the society. He should be given an opportunity to play his role in the society after he has cleared his liability. Rather, it is in the nature of a facility provided to the accused and, in some cases, even the punishment of disqualification does not ensue. There is nothing wrong in the NAB Ordinance providing for a procedure of bargaining. The settlement so reached cannot be described as illegal, in any sense of the term.

94. Under the normal criminal law, except in cases which are compoundable, all other cases are resolved through the process of adjudication on the basis of evidence. There is no alternate resolution of crimes and this is the general law. Until the Islamic law intervened, the general law was that even the offence of murder was not a compoundable offence. The mere fact that an alternate resolve procedure was not there, does not upset the procedure itself. It does not have any effect on the vires of the NAB Ordinance. The fact that this law provides for an additional method in the sphere of criminal law, does not impinge upon its validity.

95. With reference to the objections raised by Mr. Babar Awan, Mr. Minto submitted that the vires and reasonableness of the NAB Ordinance cannot be tested on the touchstone of the provisions of the Code of Criminal Procedure. It is within the competence of the Legislature

to change the Criminal Procedure Code subject to the Constitution until and unless a Fundamental Right is affected and even the whole law of procedure can be changed and no person has any vested right in procedure.

96. Mr. Minto further submitted that this law is not a usual criminal law, inasmuch as it does not provide this kind of alternate dispute resolution. It may be called a draconian law, which may be harsh according to the estimation of the other side, because in the circumstances in which the country finds itself today, a plunderer must be harshly dealt with. He submitted that retrieval of the looted money is the object of the impugned Ordinance.

97. He respectfully submitted that if there is a provision in the NAB Ordinance which is ex facie ultra vires the Constitution, this Court can strike it down. None of its provisions offends against the Fundamental Rights, neither on the question of bail, transfer of the proceeding, freezing of property, creation of offences and their application in a particular fashion, which are not retrospective in operation, nor even the presumptions raised therein. He argued that while exercising its jurisdiction under Article 184 (3) of the Constitution, this Court should confine itself to the examination of the vires of the NAB Ordinance on the touchstone of the Fundamental Rights and should abstain from determining the individual grievances, inasmuch as this would amount to pre judging and pre-determining the matters, which can be effectively gone into when the concrete cases reach this Court in appropriate proceedings.

.98. At one stage, Mr. Minto made another statement of law in the following terms:

As far as jurisdiction of the Accountability Court is concerned, it will be determined with reference to the terms of the NAB Ordinance read with Article 175 (2) of the Constitution.

The learned counsel submitted that in order to determine whether a law has. Been competently made or not, the law itself and Article 175 of the Constitution, i,e, the source of law, will be looked into. The Legislature is competent to limit it or alter it subject to the Constitution. Principles and maxims in the domain of 'inherent jurisdictionare special attributes of the superior Courts alone.

99. Mr. Minto made yet another statement of law to the following effect:

The burden of proof and the presumptions; all are in the realm of evidence. The law of evidence is a law of procedure notwithstanding the observations in Nabi Ahmed (supra), unless some provision has completely vested a substantive right in some citizen, which cannot be retrospectively affected, but ordinarily it is a law of procedure. However, the nature of offence or the nature of punishment cannot be changed, which are guaranteed under the Constitution."

He elaborated the proposition thus: 'a prosecutor cannot be debarred from tendering in evidence a mechanical device in proof of a certain offence, which was not in existence at the time the offence was committed and objection to that effect by the accused would be of no consequence.

100. Mr. Minto next referred to the definitions of 'Courtand 'Judgegiven in section 5 (i) (g) and (h) respectively (to be read together) and submitted that they throw light on the character of the Court under the NAB Ordinance. He next referred to section 9 (b), which describes the jurisdiction of the Court - the most objectionable provision according to the petitionersside,

inasmuch as it debars the Accountability Court as well as the High Court from releasing the accused on bail and the applicability of sections 426 to 561-A, Cr. P. C. Has been excluded and contended that the above special dispensation does not qualify for being set at naught in these proceedings.

101. The learned counsel submitted that section 12 of NAB Ordinance relates to the freezing of property whereas objections against the freezing order can be filed under section 13 of the NAB Ordinance before the Accountability Court and then NAB has nothing to do with it. As to the objection regarding absence of right of appeal against the freezing of property, the learned counsel submitted that there are a variety of laws in which no appeal is provided against the interim orders. As to the rights of third parties, he submitted that it would be very difficult to retrieve the property in case the decision is subsequently reversed.

102. The learned counsel submitted that section 16 of the NAB Ordinance deals with the creation of the post of Administrative Judge by the High Court who will be empowered to regulate the activities of other Judges and the filing of reference/s at the instance of Chairman NAB before any Court.

103. Mr. Minto submitted that the remedy provided under Article 199 of the Constitution, in certain conditions, would be available to all persons who have been taken into custody under the NAB Ordinance. Then there is the remedy under Article 184(3), apart from usual right of appeal under Article 185(3). This is common law of the land, which is available to every accused. There is nothing in the NAB Ordinance which overtakes the provisions of the Constitution.

104. Mr. Minto argued that Article 203 of the Constitution is applicable to the Courts under the NAB Ordinance and the Accountability Courts are subordinate to the High Court, and therefore, the power of superintendence vested in the High Court prevails over these Courts within the hierarchy of the Courts of the country and for the purposes of the Constitution.

105. Mr. Minto submitted that, as stated earlier, this is an extensive and composite law, which applies to a variety of circumstances, because when NAB is dealing with outside agencies, it has nothing to do with Accountability Courts. The NAB has exclusive and independent jurisdiction to deal with the cases of corruption.

106. Mr. Minto submitted that while examining the vires of this law, the following provisions may be given deeper consideration:

v Section 5 (a) wherein 'accusedhas been extensively defined;

v Section .5 (m) defines 'holder of public office', which has been gathered from all the previous statutes on the subject and thus, the scope and purview of the process of accountability has been enlarged;

v Clause (iv) of section 5 (m) has brought all persons in the service of Pakistan within the purview of accountability, inasmuch as even the serving officers of the Armed Forces, who are employed in organizations other than the Armed Forces, have been included;

v Likewise in clause (vi) (ibid), all those persons have been included who have served in, resigned, retired, discharged or dismissed from the Armed Forces and thus, only a limited

class of persons employed in the Armed Forces, who are within the discipline of the Force concerned, have been excluded with a view to maintaining integrity in the institution inasmuch as public trial in such cases would not be in the interest of the Institution. Even otherwise, such persons are amenable to the discipline of the Force concerned;

+ The word 'personused in various provisions of this law is wide enough to cover any person and thus, nobody is being spared and across the board accountability is being conducted throughout the length and breadth of the country with no discrimination whatsoever, inasmuch as there is no political bias, no Provincial bias.

+ The impugned law is applicable to the politicians, bureaucrats and other persons, it is vast in its application and the exceptions are very exceptional and very limited;

+ Article 8 (3) and Article 199 (3) of the Constitution, which grant immunity to the members of the Armed Forces from the judicial scrutiny of their actions in the exercise of extraordinary jurisdiction of the High Court;

+ Even the Universal Declaration of Human Rights also creates an exception in the above fashion;

+ Section 14 (d) makes only that default punishable which is which is contumacious, persistent and the defaulter does not intend to pay the dues. If the default is beyond control, it is not wilful C fault and it will be ignored. This provision is not an abstract one, inasmuch as there are persons who have eaten away the public money, got it waived, written it off. Thus, due attention has to be paid to the word `wilful';

+ There are features favourable to the accused. Under the NAB Ordinance, a period of 30 days is provided from the commencement of the law for repaying the defaulted amount. Thus, the offence of 'wilful defaultunder the NAB Ordinance is not retrospective offence to be hit by Article 12 of the Constitution. Even prior to the enforcement of the NAB Ordinance, a warning was given by the Chief Executive and in consequence large amounts were paid back by a large number of persons voluntarily;

+ Under this law, for the first time a civil transaction has been converted into an offence, which has no precedent in criminal law;

+ Facts antecedent to the law can be borrowed and considered for the purposes of establishing an offence, although the offence becomes applicable from the day it comes into existence. The mere fact that facts, which constitute the offence, are taken from a day before or many days before the law came into force, does not make it retrospective;

v Entry into the Indian territory, initially with a valid permit, was declared illegal ab initio on cancellation of the permit by the Indian Supreme Court in the case of a person from Pakistan;

v In Halsbury's Laws of England, 4th edition, Volume 45, para. 1389, it is said:

"If a person enters on the land of another under an authority given him by law, and, while there, abuses the authority by an act which amounts to a trespass, he becomes a trespasser ab initio, and may be sued as if his original entry were unlawful."

v A person may have certain rights under a contract, but certainly no one has any right in breach of a contract, particularly where the breach is wilful, or the person keeps on defaulting and above all what right a wilful defaulter is entitled to claim;

v It is well-known that in the realm of contractual obligations, there may be an actionable wrong, inasmuch as it may be a tortious act for which damages may be claimed, or it may be a breach of contract for which specific performance/damages can be claimed, or it may also entail criminal liability;

v In the case of Bashiruddin (supra), where a statutory trust was created and a Mutawalli was appointed, who had to act under the direction and supervision of the trustees called Majlis. The Mutwalli disobeyed certain orders of the Majlis, which disobedience was later declared an offence with retrospective effect. The Indian Supreme Court held that Article 20 (equivalent of Article. 12 of the 1973 Constitution) was not attracted;

v Section 16 (a) empowering Chairman NAB to move the Court for transfer/withdrawal of a case cannot be termed arbitrary or discriminatory, inasmuch as the rights of the accused have been taken care of in section 17 (ibid), which provides that the provisions of the Code of Criminal Procedure would be applicable in so far as they are not inconsistent with the provisions of the NAB Ordinance;

S As to the continuance of freezing of property after the accused has been acquitted, the provision may be amended to provide continuation of such freezing during the period provided for filing an appeal against the acquittal order whereafter it would be for the Court to make appropriate orders;

v Bail is not a Constitutional right, but it is the creation of a statute and is available under certain circumstances and subject to the limitations provided therein and the Legislature is competent to take away this right subject, of course, to the Constitution. Innocence of the accused has not been the basis for provisions relating to the grant of bail, it is the circumstances of the case, the kind of offence with which he is charged, the nature of punishment to be awarded to him, the status and position of the person, who is involved (in the present case very powerful persons are involved), the kind of crime (in the present case financial/economic crimes are involved, which are very difficult to be detected). Besides, the extraordinary remedy provided under the Constitution is available to every accused person. v Under section 24 (d), a maximum period of 90 days is provided for detention in connection with investigation etc., which is not automatic or that the accused is to be detained for 90 days straightaway. Generally, the accused is produced before the Court after every 10/15 days, in some cases even with an interval of 3/4 days, and the Court, keeping in view the facts and circumstances of the case, determines the period of further custody. It is reasonable if the accused is directed to be produced before the Court after every 15 days or earlier keeping in view the. Facts and circumstances of each case, for appropriate orders;

There is no usurpation of powers of the Court by virtue of the provisions of section 25 (a) or section 25-A, inasmuch as these are alternate mechanisms, which take place between the parties;

v The procedure/method for appointment of Chairman NAB is provided in the NAB Ordinance, which is prescribed keeping in view the law itself and the purposes of the law. It

may be pointed out that no qualifications are laid down for the posts like Chairman WAPDA, Chairman PIA, etc.

107. Mr. Aziz A. Munshi, Attorney-General for Pakistan submitted that he has appeared in response to the notice issued by this Court vide order dated 12-9-2000 whereby the petitions challenging the NAB Ordinance were admitted to regular hearing. He reiterated the submissions made by Mr. Abid Hasan Minto regarding sections 9, 10, 13, 16, 24 and 32 of the NAB Ordinance. He added that one of the declared objectives of the Chief Executive is to complete the accountability process leading to recovery of the amounts that were taken away by acts of corruption. He further added that the members of the Armed Forces are subject to accountability under the Army Act, 1952 and the arguments addressed at the Bar to the contrary are devoid of any substance.

108. Mr.Aziz A. Munshi further submitted that the learned counsel for the petitioners had stated that the executive authority of the Federation does not extend to a Province as the Proviso to Article 97 provides ".... That the said authority shall not, save as expressly provided in'the Constitution or in any law made by Majlis-e-Shoora (Parliament), extend in any Province to a matter with respect to which the Provincial Assembly has also power to make laws." They failed to notice that clarification made in Article 149 (2) of the Constitution to the effect that "The executive authority of the Federation shall also extend to the giving of directions to, a Province as to the carrying into execution therein of any Federal law which relates to a matter specified in the Concurrent Legislative List and authorises the giving of such direction".

109. The learned Attorney-General also contended that in the case of Mrs.Benazir Bhutto v. The Federation of Pakistan and others (1991 M L D 2622) Parliament and Provincial Assemblies (Disqualification for Membership) Order (17 of 1977) has been declared to be legal.

110. Mr.Aziz A.Munshi further stated that his pleadings regarding section 14(d) of the impugned Ordinance have been misconstrued by the learned counsel for the petitioners and that he had not given any concession in regard thereto.

111. Mr.Maqbool Ilahi Malik, learned Senior A.S.C. Appearing on behalf of the NAB stated that for the first time, in the history of this country many good things have happenedon account of the NAB Ordinance which have been extolled by the international community as well. He emphasised, that those things should not be allowed which are not allowed by the Constitution but, if the rigours of the NAB,. Ordinance are lessened, the very useful work being done by the authorities functioning under it will be adversely affected. He stated that as an organisation the NAB has an Herculean task to perform. He enumerated the principles of operational functions of the NAB as below

(a) Highest respect to the judiciary and judicial process;

(b) Decentralised execution at RABs, effective monitoring by NAB;

(c) Exercise of powers with due diligence and restraint;

(d) Effective liaison and co-ordination with affiliated investigation agencies and other Government Department.

(e) Appropriate legal cum diplomatic effort in co-ordination with Foreign Office and Interior Division and Law Division for overseas cases;

(f) Maximum reliance on experts of relevant fields for each stage of the operational cycle.

112. The learned counsel referred to the NAB Ordinance and argued that it is a law which deals not only with corruption and bribery but also new offences like kick-backs, commissions and misuse of authority etc. The people who have been targeted under this law are every powerful and influential. The procedure has been made stringent and there is utmost desire and demand that all the requisite steps should be completed in the shortest possible time.

113. The learned counsel stated that the Chairman NAB had given the following directions/parameters for prioritization :

(1) Quality of available evidence;

(2) Amount involved;

(3) Impact on national. Economy;

(4) Impact on the common man based on their perception of the person(s) involved.

114. The learned counsel stated that the following instructions had been given by the Chairman National Accountability Bureau

(a) Plea bargaining may not be. Recommended where it is desired to create an impact by convicting the accused due to his corrupt act and reputation of corruption and status;

(b) No assurances of any kind be given to the accused prior to final decision by Chairman;

(c) One plea bargaining agreement must not give blanket cover to an accused in other cases, the agreement should be worded accordingly;

(d) The agreement must clearly state that the proposal of Plea Bargaining is accepted under section 25 read with section 15;

(e) The amount of Plea Bargaining should commensurate with default and increase with the stage at which the case is being processed i,e, inquiry, investigation, adv. Investigation or prosecution;

(f) Beneficiaries of illegal land allotment cases may be persuaded to pay up the complete amount;

(g) 'The process of accepting voluntarily returns from PTCL Employees and, in turn dropping of corruption cases against them should be stopped forthwith till the team is asked to frame the rules and puts up its recommendations.

With reference to 'plea bargainingthe learned counsel stated that it is meant to settle the amount which is due from a person, out of the Court. This exercise does not involve any

judicial process. Explaining different ways in which matters are being settled between the two parties, he said, one is consultation and the other is negotiation and these are without the interference of judicial process and judicial proceedings. He stated that these processes are not entirely criminal and some matters partake of civil proceedings as well. The learned counsel argued that the proceedings primarily become criminal when after the take-over by the new dispensation thirty days have passed but the liability has not been cleared and the person becomes an accused person.

115. Refuting the contentions of the learned counsel for the petitioners that the impugned Ordinance tantamounts to creating a parallel judicial system in the country, Mr.Maqbool Ilahi Malik, made a statement at the Bar that sections 5(g), 16(c), 16(a), 17, 32(a), 32(b) and 34 when read together do point to the fact that there is no parallel judicial system. He further stated that all those flaws which were pointed by this Court in Mehram Ali and others v. Federation and others (PLD 1998 Supreme Court 1445) have been taken care of while drafting the Ordinance and by amending the same.

116. With regard to 'wilful defaultthe learned counsel submitted that it has two parts. If the default is committed today there is no question of retrospectivity. But if the default was there before the new dispensation came into operation and thirty days had passed thereafter, then it had become a default. He referred to Punjab Shops and Establishment (Security) Act, 1999, to contend that as per the said enactment any shopkeeper who does not employ a Chowkidar or does not do certain other things provided therein commits offence. The provisions with regard to wilful default fall in the same category inasmuch as there was a continuous obligation to be discharged but the same was not fulfilled. In the same strain he referred to section 403, P.P.C. And submitted that after the passage of time fixed for discharging the liability the individual concerned commits criminal breach of trust within the contemplation of section 403, PPC.

117. Referring to the provision of freezing of property he submitted that identical provisions are contained in the FIA Act, 1974 which have been upheld in Fazal. Mahmood v. Sardar Khan and 3 others (P L D 1996 Karachi 475 at 480) and Syed Hyder Ali v. Assistant Director, F.I.A. Commercial Circle Quetta and 4 others (1999 M L D 1527 at 1530).

118. Regarding filing of References, Mr.Maqbool Ilahi Malik referred to section 16 of the Ordinance and submitted that selection of venue of trial is the exclusive choice of the NAB which is not unconstitutional in any sense of the term. Moreover, such course also has the support of section 9 read with sections 178 and 197 (2), of Cr.P.C. In this behalf he placed reliance on In re: Reference made by Sessions Judge, Larkana for transfer of cases (1990 PCr.LJ 1687), M/s. V.C.K. Bus Service (P) Ltd., Coimbatore and another v. H.B.Sethna and others (AIR 1965 Madras 149) and Riffat Askari v. The State (PLD 1997 Lahore 285).

119. As to detention of a person for a period of up to ninety days under section 24(d), the learned counsel argued that this period of remand has nexus with the nature of crime and the offences with which the accused are charged. Even after the expiry of remand of fifteen days under the Cr.P.C. The accused goes back to the judicial lock-up and remains with the police. He referred to the case of Haji Kabir Khan and stated that it took 60 days to detect and investigate his assets and in the case of Mir Faiq Jamali it took 108 days to detect the misuse of Government funds and contended that 90 days period is required to collect the incriminating material.

120. Lastly, he contended that the question of shifting of burden of proof is not being raised for the first time. There are so many laws in which the burden of proof has been placed on the accused. Nabi Ahmed (supra) is distinguishable in that the observation there has a direct nexus with a Convention. He concluded his arguments with the submission that burden of proof falls in the domain of procedural law and, therefore, is retrospective in operation.

ARGUMENTS IN REBUTTAL

121. Mr. Muhammad Akram Sheikh speaking in rebuttal argued that reference was filed against Faisal Saleh Hayat under Parliament and Provincial Assemblies (Disqualification for Membership) Order (17 of 1977), which was pending before an Hon'ble Judge of this Court and the learned Attorney-General did not find time for more than eleven months to appear and assist the Court. He contended that the law did not deliver effectively because of the poor assistance by the prosecutors.

122. The learned counsel referred to the judgment of this Court in Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (P L D 2000 SC 869) wherein it was held that the Federal Government may make laws, can even amend the Constitution but cannot touch the principles of Federalism, independence of judiciary and Parliamentary form of Government blended with Islamic provisions.

123. He referred to the Third Schedule of 1962 Constitution and stated that there was only one Central Legislative List. There was no Concurrent List. Since an argument has been raised that Cr..P.C. And the Criminal Law entries in the Concurrent List will enable the Federal Government to make a law and so do Entry 46 in the Concurrent List in the 1973 Constitution: "Offences against laws with respect to any of the matters in this List; jurisdiction and powers of all Courts except the Supreme Court, with respect to any of the matters in this List." and Entry 4 regarding: "Evidence and oath, recognition of laws, public acts and records and judicial proceedings," still, it is asserted by him, no amount of legislative power to make laws and create offences will enable the Government to establish Courts.

124. He stated thk Entries 1 and 2 of the Government of India Act, 1935 and that of the 1956 Constitution are similar in nature. Therefore, it shall have to be interpreted that when the law specifically provided for organization and constitution of the Court it understood the subject of organization and setting of the Court as a distinct subject. Otherwise, everything should have come under the Criminal Procedure Code. He submitted that the framers of the Constitution right from 1935 are conscious of the fact that law relating to evidence as also Criminal and Civil. Procedure is not a law where the Federal Government can competently establish Courts.

125. The learned counsel argued that no answer either in the written form or in the arguments has been submitted to show nexus between the present legislation and the promulgation of emergency. Otherwise, if this Court concedes the legislative power to the Government then they can substitute all existing laws made by the Parliament by churning out legislative instruments. This Court in Judgescase has held that (i) the law and the Constitution made by the Parliament and (ii) the Constitution :amended by Eighth Amendment by one person, stand on different parameters. So, the provisions of Eighth Amendment shall give way to the provisions of the original Constitution Dealing with the matters of transfer of Judges from the High Courts to Federal Shariat Court, it was ruled that such transfer/appoinunent under the proviso to clause (4) of Article 203-B of Chapter 3-A of the Constitution will give way to.

Article 209 because Chapter 3-A had been promulgated by General Zia-ul-Haq through the Constitution (Amendment) Order, 1980 (P.O. No,1 of 1980).

126. He argued that prosecutors in one case act as counsel in other cases for plea bargaining before the Chairman NAB. Were it before an open Court it would have been clogged because inherent conflict of interest is involved in that behalf. There should not be shying of and bypassing of the Courts. He stated that all offences under this law have been made compoundable. It is not the wilful default alone which can be settled through plea bargaining. A most heinous offence of kick-backs of huge amounts is also compoundable. He argued that the money which is being retrieved is public money and the ultimate custodian of public money is, in order, this Court, the High Courts and the other Courts. The working of the law on the ground tantamounts to legalizing extortion or ransom from the citizens of the country without reference to the Court. If the Accountability Cour,t is only a Court sharing powers within the hierarchy of the Courts, then how come it is overreaching the powers of the Company Judges trying the defaulters.

127. The learned counsel referred to section 31-D of the Ordinance which reads :

"S.31D. Inquiry, investigation or proceedings in respect of imprudent bank loans, etc. - Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan:

Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan."

He stated that the above amendment is procedural and the same is retrospective. It was mandatory on them to have the pending cases at least looked at by the Governor, State Bank of Pakistan, which they have not done.

128. He argued that his efforts to know how many defaulters are there and how many of them are being prosecuted by NAB, have not yielded the desired result. The list provided indicates that they are prosecuting 64 defaulters. This number of defaulters is too meagre to admit of being the result of any criteria whatsoever, he argued. He contended that it seems to be the discretion of the Chairman NAB to prosecute a person who has defaulted for one million rupees and to let get off defaulters of hundred billion rupees each. He prayed that if the Court is not persuaded to scrap the whole law then a criteria be laid down that the NAB must provide a system whether black crows are to be tried or white. He argued that the quantum of embezzlement must be the criteria and in today's world it may be hundred million or fifty million.

129. With reference to section 25 of the Ordinance the learned counsel argued that the NAB has various criteria for structuring agreements with different people which is discriminatory. Whatever they do they should submit it before the Court. They cannot afford to be arbitrary.

130. He submitted that this Court has provided them with an exit strategy which they have not devised for themselves and it is the gracious indulgence of this Court in the great national

interest. The people are recognizing the Government because of the Review Judgment and because of the main judgment. The attitude of the world has changed and that is why it is necessary that the mandate given to them needs to be regulated and structured so that discretion is not allowed to remain with them.

131. The petitioners are claiming the right to choose the venue for reference and they have the right to move for transfer. A person belonging to Sindh has a right to be tried in Sindh, because people are there to provide him diet and look after him in their own territory. Why they have established different Courts under different notifications with attached areas. This Court should not allow them to file references without nexus with the commission of the crime.

133. Lastly, he contended that they say that no law is justiciable under Universal Declaration of Human Rights (UDHR) and Cairo Declaration. Except for three Articles each in Cairo Declaration and UDHR, others are part of our Fundamental Rights and every law is liable to be tested on the touchstone of our Fundamental Rights.

134. Mr. Abdul Hafeez Pirzada speaking in rebuttal stated that some Constitutional instruments prior to 1973 invested the Provincial legislatures and Governments with the power to establish Courts. In 1973 departure was made and all residual powers were vested in the provinces. This was one of the agreements on which consensus was achieved that the residual powers will vest in the provinces and this is how the issue of Provincial autonomy was resolved at that time. That is why there is no entry in the relevant List of the Constitution in that regard. He maintained that any subject on which there is no categorical provision in the Federal List or the Concurrent List, is Provincial. Establishment of Courts falls within the residual power of the Provinces.

135. Mr. Pirzada referred to Messrs Gadoon Textile Mills and 814 others v. WAPDA and others (1997 S C M R 641) to contend that just because a law is subject-matter of the Concurrent List does not ipso facto confer executive authority on the Centre. All that the Concurrent List says is that both the Federal Parliament and the Provincial Legislature shall be competent to legislate in respect of the subjects provided in the Concurrent List. As far as the Executive authority is concerned, the same does not vest in the Federation. In this context he referred to Articles 97 and 137 of the Constitution as well. If the Federal Law impinges on the Provincial Authority and enacts on concurrent subjects, it has to expressly oust the Executive Authority of the province, otherwise even under the Federal Law the Executive Authority shall vest in the Province. He reiterated that this Court has deprecated resort to legislation by Ordinances if the field is occupied. Occupied fieldmeans that comprehensive legislation exists and there is no need to promulgate any 'law on the same subject. The Constitution provides that in the event of a Federal Law and a Provincial Law coming into conflict with each other, the Federal Law shall prevail and, to the extent of inconsistency, the Provincial Law shall remain subservient to the Federal Law. He referred to The Collector of Customs, Karachi and others v. Messers New Electronics (Pvt) Limited and 59 others (P L D 1994 Karachi 363) in support of his plea.

136. He referred to Nabi Ahmed (supra) and contended that it is an over simplification and naivety of the submission of the learned counsel for the Federation that the above judgment flows from Human Rights Convention. In fact it is based on Human Rights Convention only for a country which does not have a written Constitution. In the countries which have written Constitution, vires of legislation are tested on the touchstone of Constitution and not any

Convention. That is why our Courts have referred, with approval, the precedents from the American jurisdiction. He also pointed out that Nabi Ahmed (supra) was reaffirmed by this Court and the learned counsel for the respondents had not been able to produce any judgment to the contrary. Unless this Court revisits and overrules Nabi Ahmed (supra), the same is binding and as such section 14(d) has to be struck down. Mr. Pirzada referred to "A Treatise on the Constitutional Limitations" by Thomas M.Cooley, to contend that violation of a contract made in the past cannot be made punishable ex post facto. He emphasised that it is the biggest error to say that NAB Ordinance is not ex post facto.

137. Referring to clause (2) of Article 12- of the Constitution, he submitted that law cannot authorize punishment of a person with penalty greater than or of a kind different from the penalty prescribed by law for that offence at the time it was Committed. There is no dearth of authority for the proposition that approach should be beneficial and reducing the rigours of law in the light of the Principle recognized by the Constitution in the shape of power to grant immunities and pardons by the President. However, in the ordinance in question, the term of imprisonment stands enhanced from 7-years to 14-years. In this respect he cited the example of Azam Khan Hoti, a politician and former Federal Minister from N.-W.F.P. Who has been awarded 14-years imprisonment, confiscation of property and disqualification for 21-years for an offence which, at the relevant time, carried maximum punishment of 7-years and submitted that NAB Ordinance cannot be held valid on the ground of State Necessity either.

138. He next contended that the learned counsel for the respondents have tried to justify the promulgation of NAB Ordinance on the ground of corruption. Such argument is untenable because while determining Constitutional validity of an enactment, special approach is not permissible. Moreso, the NAB Ordinance is not claimed to be a temporary law.

139. Mr. Pirzada further contended that Article 12 of the Constitution deals with the menaceof corruption partly in that in the event of prospective application of the NAB Ordinance, Article 25 of the Constitution will come into play. Referring to Inam-ur-Rehman v. Federation of Pakistan and others (1992 SCMR 563 at 590) it was contended that the NAB Ordinance is liable to be struck down as it has the potentialities of being discriminatory. He went on to submit that there would be no objection if a Commission is set up to institutionalize the office of Chairman, NAB like the Officer of Wafaqi Ombudsman and Chief Election Commissioner. Even in the Ehtesab Act, the office of Chief Election Commissioner was institutionalized by providing that he should be a retired Judge of Supreme Court.

140. Mr.Abdul Haleem Pirzada argued that it has been said that moral authority has been eroded by the NAB Ordinance. It stands totally demolished by just one act of the present Government i,e, when they took Mr. Nawaz Sharif off the hook and sent him abroad by giving him VIP exit while cases were, pending against him before the NAB Courts. He said that according to the Chief Executive he had looted the money and wanted to kill him when he was in the plane. However, the Establishment could not mete out the same treatment to the late Prime Minister of Pakistan from Sindh.

141. He further argued that something more than the conscience of the Constitution has been violated by the promulgation of the impugned Ordinance. He lamented that all the Military rulers had never shown any respect for the Constitution. The Chief Executive says that this Constitution is a limb of the body, which could be chopped off any time for the welfare of the

body. But the Constitution is not the limb of the body, it is the soul of the body and one cannot live without soul.

142. He further stated that the statement made by the Chief Executive to the effect that the Government has respect and regard for the Courts is not correct in that according to his statement published in Daily-Jang dated 20-2-2001, he has deplored the tendency of granting bail to 'undesirablepersons.

143. He argued that as NAB cases are mostly based on documents therefore, fifteen days time for remand is more than reasonable.

144. As to freezing of the properties of third parties, he said that assuming such properties are not frozen by the Accountability Court during the trial and orders are passed while disposing of the case finally, the result would be that third parties would be condemned unheard. The rule of natural justice demands third parties may be given the right of appeal. He prayed that when the properties are mentioned in a reference, the names of those persons should be given in whose names the same stand ostensibly. The 'precise submission was that at the stage of trial those persons in whose names the properties actually stand should be put on notice to enable them to show that they had acquired those properties with their own resources and be given chance to lead evidence, if so desired.

145. He differed with Mr. Minto that 'defaultis distinguishable from wilful default and that under the Ordinance an accused is not liable for punishment for default simpliciter. He further submitted that the question for consideration is at what stage the accused will prove that the default is not wilful. He asserted that under the prevalent practice, a reference is filed against the suspects irrespective of the fact whether default has been committed wilfully or otherwise. He prayed that the provision of "wilful default" be struck down.

146. He argued that the claim of the other side that in the matter of burden of proof, there are some exceptions cannot stand legal scrutiny in that it has to be shown whether those exceptions were available in terms of the relevant provisions of the Ordinance or not.

147. With regard to venue of trial, he argued that it is the right of the accused that he be tried at the place where the offence occurred. However, under the impugned Ordinance it is the right of the Government to file the reference anywhere in Pakistan. He argued that it is unfair to try a person from Sindh in Punjab. In all fairness the place of trial ought to be the place where the offence occurred.

148. Mr. K.M.A.Samdani while exercising his right of reply submitted that his clients are not against the process of accountability but they have prayed for total annulment of the impugned law from its very inception.

149. Mr.Mushtaq Ahmad Khan speaking in rebuttal adopted the arguments of Mr.Abdul Hafeez Pirzada. However, he stated that during the course of his arguments he had referred to various sections of the impugned Ordinance to show that it is discriminatory in nature particularly section 5(m)(iv). The learned counsel stated that, in fact, it was not his argument that the exemption of Armed Forces from the process of accountability will create some discrimination because they have their own system of accountability and there is a provision in that regard under Article 199(3) of the Constitution. He submitted that Mr. Minto did go through that portion of his argument but missed the main portion of the above section. He

stated that in fact his argument was with regard to the next part of that section which reads : "...Other than a person who is a member of any of the armed forces of Pakistan, or for the time being is subject to any law relating to any of the said forces, except a person who is, or has been a member of the said forces and is holding, or has held, a post or office in any public corporation, bank, financial institution, undertaking or other organisation established, controlled or administered by or under the Federal Government or a Provincial Government". He contended that in fact this portion of the above section will take out of the ambit of the accountability so many other categories of civil servants who although do not fall within the definition of 'members of the armed forcesbut they are civil servants and only because they are working with the armed forces, therefore, they have been exempted.

150. The learned counsel further argued that the question of transfer of cases under section 16-A of the impugned Ordinance has been dealt with, but his emphasis was also on section 16(a), which is regarding trial of offences, because in that the Court does not come at all. In other cases it is the High Court which is to be moved. The Chairman has to write a letter to the Court of the Anti-Corruption Judge to send any case to. The Accountability Court and the case shall stand transferred. This part of the argument has not been replied to, by the other side and that makes the entire section ultra vires.

151. Mr. Muhammad lkram Ch., referred to section 2 of the'impugned Ordinance and contended that the intention of the law makers was to rope in maximum number of those people who are politicians although certain other categories have also been mentioned therein. He stated that no arguments were addressed on this issue by the learned counsel representing the Federation and/or the NAB.

152. He further contended that earlier he had referred to section 2 of the Prevention of Corruption Act, 1947 wherein thirteen categories of different public servants have been enumerated and regarding which he had made a very precise submission that after legislating on the subject over the past 53 years, after all, why this Ordinance was ultimately thought to be promulgated. He contended that appropriate legislations against corruption, bribery and mal-practices were already in the field and they were adequate, therefore, there was no need for the impugned Ordinance. He contended that under section 5 of the impugned Ordinance certain new clauses have been added with a view to wielding more power by the legislature and that his arguments in that behalf were not replied to by the learned counsel for the respondents.

153. The NAB Ordinance has been promulgated to provide for the setting up of a National Accountability Bureau so as to eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices and matters ancillary thereto. The purposes and objects of the NAB Ordinance have been detailed in its Preamble.

154. The NAB Ordinance broadly falls in three parts. First part consists of provisions, which are verbatim reproduction of some of the provisions of the Ehtesab Act, 1997. It reads:

IDENTICAL SECTIONS OF NAB

VIZ-A-VIZ EHTESAB

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S.5(m) "Holder of public office" means a person who (i) has been the President of Pakistan or the Governor of a Province. (ii) is, or has been the Prime Minister, Chairman Senate, Speaker of the National Assembly, Deputy Speaker National Assembly, Federal Minister, Minister of State, Attorney-General and other Law Officer appointed under the	S.2(i)i) "Holder of public office" means a person who (i) has been the President or the Governor of a Province; (ii) is, or has been, the Prime Minister, Chairman Senate, Speaker National Assembly, Deputy Chairman Senate, Deputy Speaker National Assembly, Federal Minister, Minister of State. Attorney-General and other Law Officer appointed under the Central Law Officers Ordinance, 1970 (VII

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Central Law Officers Ordinance, 1970 (VII of 1970), Advisor to the Prime Minister, Special Assistant to the Prime Minister, Federal Parliamentary Secretary, Member of Parliament, Auditor General. Political Secretary. Advisor or Consultant to the Prime Minister and holds or has held a post or office with the rank or status of a Federal Minister or Minister of State; (iii) . is, or has been, the Chief Minister,Speaker Provincial Assembly, Deputy Speaker Provincial Assembly, Provincial Minister, Advisor to the Chief Minister, Special Assistant to the Chief Minister, Provincial Parliamentary Secretary, Member of the Provincial Assembly,Advocate-General including Additional Advocate-General and Assistant Advocate-General, Political Secretary, Advisor or Consultant to the Chief Minister and who holds or has held a post or office with the rank or status of a Provincial Minister;	of 1970), Advisor to the Prime Minister, Special Assistant to the Prime Minister, Federal Parliamentary Secretary. Member of Parliament. Auditor-General, Political Secretary. Advisor or Consultant to the Prime Minister. and the holder of a post or -office with the rank or status of a Federal Minister or Minister of State; (iii) is, or has been, the Chief Minister, Speaker Provincial Assembly, Deputy Speaker Provincial Assembly, Provincial Minister, Advisor to the Chief Minister, Special Assistant to Chief Minister, Provincial Parliamentary Secretary, Member of the Provincial Assembly, Advocate-General, including Additional Advocate-General and Assistant Advocate-General,Political Secretary, Advisor or Consultant to the Chief Minister, and the holder of a post or office with the rank or status of a Provincial Minister;
(v) is, or has been, the Chairman or Vice-Chairman of a Zila Council. a municipal committee, a municipal corporation or a metropolitan corporation constituted under any Federal or Provincial law relating to local councils; and (p) "Property" includes any or all movable and immovable	(vi) is, or has been, the Chairman or Vice-Chairman of a Zila Council, a municipal committee, a Municipal corporation or a metropolitan corporation constituted under any Federal or Provincial law relating to local councils. (k) " property " includes any or all movable and immovable properties,

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properties situated within or outside Pakistan; and S.9. Corruption and corrupt practices: (a) A holder of a public office, or any other person,is said to commit or to have committed the offence of corruption and corrupt practices (i) if he accepts or obtains front any person or otters any gratification directly or indirectly, other than legal remuneration, as a motive or reward such as is specified in section 161 of the Pakistan Penal Code (Act XLV of 1860) for doing or for-bearing to do any official act, or for showing or for-bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person; or (ii) it he accepts or obtains or offers any valuable thing without consideration, or for a consideration which he knows-to be inadequate. from any person whom he knows to have been. or likely to be concerned in any proceeding or business transacted or about to be transacted by him. or having any connection with his official functions or from any person whom he knows to be interested in or related to the person so concerned; or if he dishonestly or	situated within or outside Pakistan. and S.3. Corruption and corrupt practices. (1). A holder of public office, or any other person covered hereby is said to commit the offence of corruption and corrupt practices— (a) if he accepts or obtains from any person any gratification other than legal remuneration, as a motive or reward such as is specified in section 161 of the Pakistan Pewit Code (Act XLV of I g60), for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions. favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person; or (b) if he accepts or obtains any valuable thing without consideration or for a consideration which he knows to be inadequate , from any person whom he knows to have been, or to be likely to be. concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with his official functions, or from any person whom he knows to be interested in or related to the person so concerned; or (c) if he dishonestly or fraudulently misappropriates or otherwise convene for his own use or for the use of any other person any

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fraudulently misappropriates or otherwise converts for his own use. or for the use of any other person,any progeny entrusted to him,or under his control, or willfully allows any other person no to do; Or (iv) if he by corrupt,dishonest, or illegal means, obtains or seeks to obtain for himself, or for his spouse and/or dependants or any other person. Any property,valuable thing. or pecuniary advantage; or	property entrusted to him or under his control, as a holder of public office or willfully allows any other person so to do; or (d) if he by corrupt dishonest or illegal means in abuse of his position as a holder of public office, obtains or seeks for himself or for his spouse or dependents my property, valuable thing or pecuniary advantage; or
S.10. Punishment for corruption and corrupt practices: (b) Any person giving illegal gratification, or abetting, assisting or aiding a holder of a public office through,or receiving or holding any property obtained or acquired by a bolder of public office, through corruption or corrupt practices, or being a beneficiary of any asset. property or gain obtained through corruption or corrupt practices shall fall within the scope of this section and shall be liable to the same or a lesser punishment that may be awarded to a holder of a public office as may be deemed fit by the Court.	Punishment for corruption and corrupt practices. (2) A person giving illegal gratification or abetting, assisting or aiding a holder of a public office or receiving or holding any property brained or acquired by a holder of public office through corruption or corrupt practices, or being a beneficiary of any asset property or gain obtained through corruption or corrupt practices shall fall within the scope of this section and shall be liable to the same or a lesser punishment than may be, awarded to a holder of a public office as may be deemed fit by the Court.
S.12. Power to Irma. property: (a) The Chairman NAB or the Court trying a person for any offence as specified under this Ordinance, may, at any tune. if	S.6. Power of the Court to freeze Property...(1) The Court trying a holder of public office for an offence under this Act may, at any time, if there appear reasonable around for believing that the

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there appear reasonable grounds for believing that the accused has committed such an offence, order the freezing of his property, movable or immovable, or part thereof, whether	grounds for believing that the accused has committed such offence, order the freezing of his property, movable or immovable, or any part thereof, whether in his

in his possession or in the possession of any relative, associate or person on his behalf. (b) If the property ordered to be frozen under subsection (a) is a debt or other movable property, the freezing may be made; © by seizure; or (i) by appointment of receiver; Or (ii) by prohibiting the delivery of such property to the accused or to anyone on his behalf; or (iii) by all or any of such or other methods as the Court or the Chairman NAB, as the case may be,deem fit.	possession or in the possession of any person on his behalf. (2) If the property ordered to be frozen under subsection (1) is a debt or other movable property, the freezing may be made— (a) by seizure; or (b) by appointment of a receiver; or (c) by prohibiting the delivery of such property to the accused or to anyone on his behalf; or (d) by all or any of such methods as the Court may think tit.
(c) If the property ordered to be frozen is immovable, the freezing shall in the case of land paying revenue, be made through the Collector of the district in which the land is situated, and in all other cases (i) by taking possession; or (ii) by appointment of receiver; Or (iii) by prohibiting the payment of rent or delivery of property to	(3) If the property ordered to be frozen is immovable, the freezing shall in the case of land paying revenue, be made through the Collector of the district in which the land is situated, and in all other cases (a) by taking possession; or (b) by appointment of a receiver; or (c) by prohibiting the payment of rent or delivery of property to the accused or to anyone on his behalf; or

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the accused or to any other person on his behalf; or (iv) by all or any of such methods as the Chairman NAB or the Court may deem fit:	(d) by all or any of such methods as the Court may deem fit:
Section 12(e). The powers, duties, and liabilities of a receiver, if any, appointed under this section shall be the same as those of a receiver	Section 6(5). The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under

appointed under Order XL of the Code of Civil Procedure, 1908 (Act V of ! 1908).	Order XL of the Code of Civil Procedure, 1908 (Act V of 1908).
S.14. Presumption against accused accepting illegal gratification: (b) Wherein any trial of an offence punishable under section 165-A of the Pakistan Penal Code, 1860 (Act XLV of 1860) it is proved that any gratification other than legal remuneration or any valuable thing has been given, or offered to be given, or attempted to be given, by any accused person, it shall be presumed, unless the contrary is proved, that he gave, or offered to give, or attempted to give, that gratification, or that valuable thing, as the case may be, as a motive or a reward such as is specified in sections 161 to 163 of the said Code, or, as the case may be, without consideration or for a consideration which he believed to be inadequate. (c) In any trial of an offence punishable under this Ordinance, the fact that the accused person	Section 8(2) Where in any trial of an offence punishable under section I65-A of the Pakistan Penal Code (Act XLV of 1860), it is proved that any gratification other than legal remuneration or any valuable thing has been given or offered to be given or attempted to be given, by any accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give, that gratification or that valuable thing, as the case may be, as a motive or a reward such as is specified in sections 161 to 163 of the said Code, or as the case may be, without consideration or for consideration which he believed to be inadequate. (3) In any trial of an offence punishable under this Act, the fact that the accused person or any other, person on his behalf, is in possession, for which the accused person cannot satisfactorily account of property or pecuniary resources disproportionate to his known

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the accused or to any other person on his behalf; or (iv) by all or any of such methods as the Chairman NAB or the Court may deem fit:	(d) by all or any of such methods as the Court may deem lit:
Section 12(e). The powers, duties, and liabilities of a receiver, if any, appointed under, this section shall be the same as those of a receiver appointed under Order XL of the Code of Civil Proedure, 1908 (Act V of 1908).	Section 6(5). The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Order XL of the Code of Civil Procedure, 1908 (Act V of 1908).

S.14. Presumption against accused accepting illegal gratification: (b) Wherein any trial of an offence punishable under section 165-A of the Pakistan Penal Code, 1860 (Act XLV of 1860) it is proved that any gratification other than legal remuneration or any valuable " thing has been given, or offered to be given, or attempted to be given, by any accused person, it shall be presumed, unless the contrary is proved, that he gave, or offered to give, or attempted to give, that gratification, or that valuable thing, as the case may be, as a motive or a reward such as is specified in sections 161 to 163 of the said Code, or, as the case may be, without consideration or for a consideration which he believed to be inadequate. (c) In any trial of an offence punishable under this Ordinance, the fact that the accused person	Section 8(2) Where in any trial of an offence punishable under section 165-A of the Pakistan Penal Code (Act XLV of 1860), it is proved that any gratification other than legal remuneration or any valuable thing has been given or offered to be given or attempted to be given, by any accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give, that gratification or that valuable thing, as the case may be, as a motive or a reward such as is specified in sections 161 to 163 of the said Code, or as the case may be, without consideration or for consideration which he believed to be inadequate. (3) In any trial of an offence punishable under this Act, the fact that the accused person or any other, person on his behalf, is in possession, for which the accused person cannot satisfactorily account of property or pecuniary resources disproportionate to his known

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or any other person on his behalf, is in possession, for which the accused person cannot satisfactorily account, of property or pecuniary resources disproportionate to his known sources of income. or that such person has, at or about the time of the commission of the offence with which he is charged, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily	sources or income, or that such person has, at or about the time of the commission of the offence with which he is charged, obtained an accretion to his pecuniary resources or property for which lie cannot satisfactorily account, the Court shall presume, unless the contrary is proved, that the accused person. is guilty of the offence of corruption and corrupt practices and his conviction therefor shall not be

account, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offence of corruption and/or corrupt practices and his conviction therefore, shall not be invalid by reason only that it is based solely on such a presumption.	invalid by 'reason only that it is based solely on such presumption.
S.16-B. Contempt of Count (a) abuses, interferes with or obstructs the process of the Court in any way or disobeys any order or direction of the Court: (b) scandalizes the Court or otherwise does anything which tends to bing the Court or a person constituting the Court into hatred, ridicule or contempt:	S.22.Power to punish for contempt: (a) abuses, interferes with, impedes. imperils, or obstructs. the process of the Chief Ehtesab Commissioner in any way or disobeys any order of the Chief Ehtesab Commissioner: (b) scandalizes the Chief Ehtcsab Commissioner 'or otherwise does anything which tends to bring the Chief Ehtesab Commissioner, in relation to his office, into hatred. ridicule or contempt;
(d) does anything which, by any other law, constitutes, contempt of Court. Explanation.In this section, the expression "Court" means an	(d) does any other thing which, by any other law, constitutes contempt of Court: Provided that fair comments made in good faith and in the public

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Accountability Court. Note: Appeal is provided in Ehtesab Act before Supreme Court.	in good faith and in the public interest on the working of the Chief Etnesab Commissioner or any of his staff, or on the report of the Chief Ehtesab Commissioner after the completion of any inquiry or investigation shall riot constitute contempt of the Chief Ehtesab Commissioner or his office. (2) Any person sentenced under subsection (I) may within thirty days of the -passing of the order, appeal to the Supreme Court

S.17. Provisions-of the Code to apply: (a) notwithstanding anything contained in any other law for the time being in force, unless there is anything in consistent the provisions of this Ordinance, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1989), shall mutant mutandis, apply to the proceedings under this Order. (b) Subject to subsection (a), the provisions of Chapter XXIIA of the Code shall apply to trials under this Ordinance. (c) Notwithstanding any thing contained in subsection (a) or subsection (b) or in any law for the note being in force, the Accountability Court may, for reasons to be recorded, dispense with any provision of the Code and follow such procedure as it May deem it in the circumstances of the case.	S.I2. Provisions of the Code to apply: notwithstanding anything contained in any other law for the time being in force, unless there is anything inconsistent with the provisions of this Act, the provisions of the Code of Criminal Procedure. 1898 (Act V of 1898), shall mutatis mutandis, apply to the proceedings under this Act. (2) Subject to subsection (I). the provisions of Chapter XXII-A of the Code shall apply to trials under this Act. (3) Notwithstanding anything contained in subsection (I) or subsection (21 or in any law for the time being in force, the Court may, for reason to be recorded, dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case. S.15. Cognizance of offences,etc…….. (I) The Court shall not take cognizance

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S.18. Cognizance of offences: (a) The Accountability Court shall not take cognizance of any offence sister this Ordinance except on a reference made by the Chairman NAB or an officer of the NAB duly authorised by hint (b) A reference under this Ordinance shall be initiated by the Chairman National Accountability Bureau, on	of an offence under this Act except on a reference made by the Chief Ehtesab Commissioner. (2) A reference under this Act may be initiated by the Chief Ehtesab Commissioner on (i) a reference received from the appropriate Government: or (ii) receipt of a complaint: or

(i) a reference received from the appropriate Government; or (ii) receipt of a complaint; or (iii) Us own accord. (c) Where the Chairman NAB or an officer of the NAB duly authorised by is of the opinion that it is or may be necessary and Appropriate to initiate proceedings against any person, he shall refer the matter for enquiry or investigation.	(iii) his own accord. Scc.(3) Where the Chief Ehtesab Commissioner is of the opinion that it may be necessary to initiate proceedings on a reference. complaint or on his own accord, as the case May be, he shall refer the matter to the Ehtesab Cell for enquiry and investigation.
Sec.18(1). If a complaint is inquired into and investigated by the NAB and it is concluded that the complaint received was prima facie frivolous or has been tiled with intent to malign or defame any person, the Chairman or Deputy Chairman NAB or the prescribed law officer may refer the matter to the Court, and if the complainant is found guilty	Sec.(7): In the event that the Chief Ehtesab Commissioner is of the opinion that a complaint received by him is patently mala fide, or has been filed with the intent to malign or defame the holder of a public office, he may refer the matter to the Court and if the complainant is found guilty he shall be punishable with imprisonment for a term which may extend to one year, or

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he shall be punishable with with fine, or with bet. imprisonment for a term which may extend to one year. or with fine or with both.	with fine or with both.
S. 24. Arrest: (c) The provisions of sub-section (a) shall also apply to cases, which have already been referred to the Court.	Sec.16(3) The provisions of subsection (2) shall also apply to cases which have already been referred to the Court.
Sec.26(c).Subject to sub section (d) the person to whom pardon has been granted under this section shall not -	S.18(3). Subject to subsection (4). the person to whom pardon has been granted under this section shall not—

(i) in the case of a full pardon be tried for the offence in respect I of which the pardon was granted; and (ii) in the case of a conditional pardon be awarded a punishment or penalty higher or other than that specified in the grant of pardon notwithstanding the punishment or penalty authorized by law.	(a) in the ca.se of a full pardon be tried for the offence in respect of which the pardon was granted; and (b) in the case of a conditional pardon be awarded a punishment or penalty higher or other than that specified in the grant of pardon notwithstanding the punishment or penalty authorised by law.
S.29. Accused to be competent witnesss. Provided that the accused shall not be compelled to be a witness against himself, Provided further that, where an accused person appears as a witness of his own choice and refuses to answer any question, the Court may draw such adverse	Sec.21: Provided that We accused shall not be compelled to be a witness against himself: Provided further that where an accused appears as a witness out of his own choice and refuses to answer any question, the Court may draw such adverse inference

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inference from such refusal as it may think proper.	from such refusal as it may think fit.
S.30. <u>False evidence etc:—</u> (a) Notwithstanding anything contained in the preceding provisions or any other law already in force,on pronouncement of judgment, the Accountability Court shall have the jurisdiction and power to take cognizance of an offence committed in the course of the investigation or trial of a case by any officer, any witness, including an expert, who has tendered false evidence in the case. whether he deposed in Court or not, or any other person, under sections 176 to 182 of Chapter X, or sections 191 to 204. or 211 to 223, or 225.A set Chapter XI, of the Pakistan Penal Code 1860 (Act XLV of 1860), or under any other law relating to false evidence and offences against public justice. and to summarily try him and award	S. 25. <u>Cognizance of false evidence etc. -(I)</u> Notwithstanding anything contained in the preceding provisions or any other law already in force,. on pronouncement of judgment. the Court shall have jurisdiction and power to take cognizance of an offence committed in the course of the investigation or trial of a case by a police officer, a witness, including an expert, who has tendered false evidence in a case relating to a matter covered by his specialty, whether he deposed in Court or not or any other person. under sections 176 to 182 of Chapter X. or sections 191 to 204, or 211 to 223 or 225-A of Chapter XI of the Pakistan Penal Cude (Act XLV of 1860). or under any other law relating to false evidence and offences against public justice, and to summarily try him and award punishment provided for the offence under the law.

punishment provided for the offence under the law. (b) For the purpose of trial under subsection (a). the Court may, as nearly as may be, follow She procedure specified in Chapter XXII of the Code.	(2) For the purpose of trial under subsection (1). the Court may. as nearly as may be, follow the procedure specified in Chapter XXII of the Code.
S.33. Transfer of pending proceedings.- Any and all proceedings pending before a Court under the Ehtesab Act, 1997 (IX of 1997), shall stand transferred to a Accountability	.31(2ka)-(c): (a) any proceeding pending before the special Court under the said orders shall continue as II the said orders had not been repealed.

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Court as soon as it is constituted under this Ordinance within the same Province, and it shall 001 be necessary to recall any witness or again to record any evidence that may have been recorded.	(b) ……. (c) any proceeding pending before a Court under the Ehtesab Ordinance, 1997 (XX of 1997). shall continue under this Act and it shall not be necessary to re-call any witness or once again word any evidence that may have been taken down.

The second part comprises those provisions, which are similar to the once in the Ehtesab Act,1997 with some ,modifications, additions,deletions ,etc. It reads:

MODIFIED SECTIONS OF NAB VIS-A-VIS EHTESAB

NAB ORDINANCE	EHTESAB ACT
Section-I Title: The National Accountability Ordinance. 1999	Section-1 Title: The Ehtcsab Act, 1997
S. 2. Commencement: -This Ordinance shall be deemed to have come into force from 1st day of January 1985.	S:1(2) Commencement. -The Act will be applicable from the 6th day of November, 1990. (S.29.

	Protection against retrospective punishment. - Nothing contained here in shall authorise the punishment of a person for an offence by a penalty greater than, or of a
	Kind different from, the penalty prescribed by law for that offence at the time the offence was committed and the Court while imposing a penalty. may, if necessary, modify it to such extent as may be necessary.)
S.4. Application…It extends to whole of Pakistan and shall apply to all persons in Pakistan and persons who are or have been in the service of Pakistan Wherever they may be including area which are part of Federally and Provincially administered tribunal areas.	S.1(2). Application.—It shall apply to the holders of public offices since the 6th November, 1990.
S.5. Definitions. (a) "Accused" shall include a person in respect of whom there are reasonable grounds to believe, is or has been involved in the Commission of any offence triable under this Ordinance and/or is subject of investigation inquiry by NAB, or concerned agency.	S.2. Definitions. -(a) "Accusedshall include a person in respect of whom information under subsection (I). section 16 shall be deemed to have been recorded.
(e)-Chairman National Accountability Bureaumeans a person who is appointed as such by the President of the Islamic Republic of Pakistan as mentioned in section 6(b) hereafter:	(c) "Chairman of the Ehtesab Cellmeans a person either holding a full time salaried post as such, or a part time post with no entitlement to salary or allowances, whose name is notified hereunder with the authority to appoint members of the Ehtesab Cell.
(g) “Court means an	(f) “Court” means a Bench of
Accountability Court which shall consist of a Judge who shall be appointed by the President of Pakistan after consultation	one or more Judges of the High Court nominated by the Chief Justice of the High Court

with the Chief Justice of Pakistan by notification in the official Gazette and a Judge other than a serving District and Sessions Judge who shall hold office for a period of two years unless removed earlier by the President of Pakistan after consultation with the Chief Justice of Pakistan.	
(k) 'National Accountability Bureau" means the Bureau set up and notified under this Ordinance. (hereinafter known as NAB): (I) 'Freezing" includes attachment, scaling. Prohibition, holding, controlling and/or managing any propeny either through a Receiver or otherwise as may be directed by the Coon or Chairman NAB, and in case it is deemed necessary the disposal thereof, by sale through auction or negotiation subject to confirmation by the Court it be Chairman National Accountability Bureau as the case may be after public notice. (iv) is holding, or has held, an office or post in the service of Pakistan or any service in connection with the affairs of the Federation or of a Province. or of a local council	(g) 'Ehtesab Cell" means a Cell set up by the Federal Government for the purpose of investigation and enquiry of offences under this Act: (h) freezing includes attachment,sealing, prohibition,holding, controlling or managing any property, either through a receiver or otherwise, and in the case of property being livestock or perishable goods. disposal thereof: (iv) is holding. or has held an office or post in Basic Pay Scale 18 or above in the service of Pakistan, or any service in connection with the

constituted under any Federal or Provincial law relating to the constitution of local councils, or in the management of corporations, banks,financial institutions, firms, concerns, undertakings or any	affairs of the Federation, or of a Province or of a local council constituted under any Federal or Provincial law relating to the constitution of local councils. or in the equivalent pay scale of management in corporations, banks, financial institutions,

other institution or organization established, controlled or administered by or under the Federal Government or a Provincial Government, other than a person who is a member of any of the armed forces of Pakistan, or for the time being is subject to any law relating to any of the said forces, except a person who is, or has been a member of the said forces and is holding, or has held, a post or office in any public corporation, bank, financial institution, undertaking or other organization established, controlled or administered by or under the Federal Government or a Provincial Government; (vi) has served in and retired or resigned from or has been discharged or dismissed from the Armed Forces of Pakistan;	firms, concerns, undertakings or any other institution, or organization established, controlled or administered by or under the Federal Government or a Provincial Government, other than a person who is a member of the armed forces, or for the time being is subject to any law relating to any of the said forces except a person who is, or has been a member of the said forces and is holding or has held an equivalent post or office in any public corporation, bank, financial institution, undertaking or other organisation established, controlled or administered by or under the Federal Government or a Provincial Government; and (v) is holding or has held an office or post in Basic Pay Scale 17 or below of the nature specified in sub-clause (iv) and is involved in an offence committed by a person or persons falling within sub-clauses (i) to (iv); Explanation... For the purpose of this sub.clause the expressions 'Chairmanand "Vice-Chairman shall include

"Explanation" For the purpose of this sub-clause the expressions 'Chairmanand -Vice-Chairman" shall include "Mayor and "Deputy Mayor as the case may be, and the respective councillors therein.	a Mayor and a Deputy Mayor as the case may be;
(n) "Offence" means the offences of corruption and corrupt practices as defined in this Ordinance and includes those offences as specified in the Schedule to this Ordinance	(j) "offence" means the offence of corruption and corrupt practices;
S.6. National Accountability	S.2 (g) "Ehtesab Cell"

Bureau: IA) There shall be constituted a National Accountability Bureau for the whole of Pakistan. (b) Chairman National Accountability Bureau: (i) There shall be Chairman NAB to be appointed by the President and he shall hold office during the pleasure of the President. (ii) The Chairman NAB shall be appointed on such terms and conditions and shall have the status and privileges as may be determined by the President.	(g) 'Ehtesab Cell" means a CelI set up by the Federal Government for the purpose of investigation and enquiry of offences under this Act: (c) 'Chairman of the Ehtesab Cellmeans a person either holding a lull time salaried post as such. or a part time post with no entitlement to salary or allowances, whose name is notified hereunder with the authority to appoint members of the Ehtesab Cell:
S.8. Prosecutor General Accountability (a) The Chairman NAB may appoint any person to act as	19. Special Prosecutor.The Chief Ehtesab Commissioner may, in consultation with the
the Prosecutor General Accountability, notwithstanding any other appointment Or office the latter may concurrently hold, upon such terms and conditions as may be determined by the Chairman. (b) The Prosecutor General shall give advice to the Chairman NAB upon such legal matters and perform such usher duties of a legal character as may be referred or assigned to him by the Chairman NAB and in the performance of his duties, he shall have the right of audience in all Courts established under this Ordinance and all other Courts and Tribunals in Pakistan.	Ministry of Law and Justice. Government of Pakistan appoint Special Prosecutors for conducting prosecution of cases under this Act.

(c) The Prosecutor General Accountability Bureau in consultation with the Attorney-General for Pakistan may with prior approval of the Chairman NAB, appoint Special Prosecutors to conduct prosecution of specific cases under this ordinance, before any Accountability Court or any other Cowl or Tribunal.	
Sec.9 Corruption and corrupt practices: (b) All offences under this Ordinance shall be non. bailable and. notwithstanding anything contained in sections 426.491. 497. 498 and 561-A	Sec.3 Corruption and corrupt practices: (2) All offences under this Act shall be non-bailable. And, notwithstanding anything contained in sections 497, 498 and 561-A or any other

or any other provision of the Code. or any other law for the time being in force no Coon including the High Court shall have jurisdiction to grant bail to any person accused of any offence under this Ordinance.	provision of the Code or any other law for the time being in force, no Court other than the Court defined in clause (f) of section 2 shall have jurisdiction to grant bail.
	(3) A holder of a public office or any other person accused of an offence under this Act shall not be released on bail by the Coon if there appear Reasonable grounds for believing that he has been guilty of such an offence.
(c) Where the Chairman NAB decides to release from custody or detention a holder of a public office or any other person accused of an offence Under this Ordinance, he shall do so after considering the gravity of the charge against such person and the accruing quantum of loss involved in the offence alleged to have	(4) Where a holder of a public office or any other person accused of an offence under this Act is released on bail, the amount of bail shall be fixed having regard to the gravity of the charge against such person and, where the charge specifies any amount in respect of which the offence is alleged to have been

been committed and may impose any reasonable conditions for such release. (d) The amount deposited by the accused with the NAB shall be transferred to the Federal Government or, as the case may be,a Provincial Government or the concerned bank or financial institution, etc., within one month from the date of such deposit.	committed, shall not be less than the said amount: Provided that the Court may direct that the amount be deposited in Court. (5) No Court shall release an accused person on bail unless the Chief Ehtesab Commissioner and the prescribed lawofficer have been given notice of the hail application and been given an opportunity of being heard. Ex this subsection, 'prescribed law officermeans..

S.10. Punishment for corruption and corm mt practices: (a) A person who commits the offence of corrmxion and corrupt practices shall be punishable with imprisonment for a term which may extend to 14 years. or with fine, or with both, and such of the assets and progeny of such person which is found to be disproportionate to the known sources of his income or which is acquired by money obtained through corruption and corrupt practices whether in his name or in the name of any of his dependants, or benamidars shall be liable to be forfeited to the appropriate Government.	(a) in relation to an application before the Court. the Advocate-General: and (b) in relation to an application before the Supreme Court of Pakistan, the Attorney General. S.4. Punishment for corruption and corrupt practices. (1) A person who commits the offence of corruption and corrupt practices shall be punishable with imprisonment lot a term which may extend to seven years, or with fine, or with both, and such of the movable or immovable property of such person. whether in his name or in the name of his dependents or bcnamidars obtained through such an offence during the tenure of his office, shall be liable to be forfeited to the appropriate Government: Provided that, where any person is convicted for an offence under clause (e) of section 3. the property, including bank deposits, found to be disproportionate to the known sources of his

	income shall be forfeited to the appropriate Government.
S.11. Imposition of fine. -Where a person found guilty of an offence is sentenced to pay a tine, irrespective of whether or	S.5 Imposition of line.—Where a person found guilty of an offence is sentenced to pay a fine, irrespective of whether or
not a sentence of imprisonment is imposed, the amount of the fine shall in no case he less .than the gain derived by the accused or any relative or associate which may be set off against the forfeited or frozen assets and property.	not a sentence of imprisonment is imposed, the amount of the fine shall in no case be less than the gain derived by the accused.
S. I 2 Power to freeze property. (d) If the property ordered to be frozen consists of livestock or is of a perishable nature, the Chairman NAB, or the Court may, if it deems proper and expedient, order the immediate sale thereof and the proceeds of the sale may be deposited with the Chairman NAB or the Court, or as either may direct as appropriate.	S.6 Power of the Court to freeze property. -(4) If the property ordered to be frozen consists of livestock or is of a perishable nature, the Court may, if it thinks expedient, order the immediate sale thereof and in such a case the proceeds of the sale may be invested in such Government securities or Government censored saying schemes as the Court may direct.
5.13. Claim or objection against freezing. (a) Notwithstanding the provisions of any law for the time being in force, the ¬Accountability Court shall have exclusive jurisdiction to entertain and adjudicate upon all claims or objections against the freezing of any property under section 12 above. Such claims or objections shall be made before the Accountability Court within 14 days from the date of the order freezing such property. (b) The Court may for sufficient cause extend the time for filing such claims or	S.7. Claim or objection against freezing. -(I) All claims or objections against the freezing of any property under section 6 shall be made within thirty days from the date of the order freezing such property, Provided that, where a person satisfies the Court that he had sufficient cause for not making the claim or objection within such period, the Court may admit such claim or objection, as the case may be, after that period: Provided further that any claim or objection made within the

objections for a period not exceeding additional 14 days. (c) No appeal shall lie against an order made under Section 12 of this Ordinance. S.I4. Presumption against accused accepting illegal gratification….. (a) Where in any Dial of a scheduled offence punishable under this Ordinance, it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person any gratification, other than legal remuneration,or any valuable thing, or any pecuniary advantage from a person or any agent of a person. for any favour shown or promiud to he shown by the accused; it shall be presumed,unless the contrary is proved, that he accepted or Obtained, or agreed to accept or attempted to obtain, that gratification or that valuable Ming or pecuniary advantage	period allowed under this subsection may, in the event of the death of a claimant Objector, be continued by his legal representatives. (2) The Court may,after such enquiry as it may deem fit. allow or disallow any claim or objection in whole or in pan and pass the appropriate order thereon. (3) Any person aggrieved by an order passed under this section may prefer an appeal against such order to the Supreme Court within thirty days. S.8. Presumption against holder of public office accepting illegal gratification.-.41) Where in any trial of an offence punishable under section 161 to 165 of the Pakistan Penal Code (Act XLV of 1860), it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person any gratification, other than legal remuneration, or any valuable thing, or any pecuniary advantage,from a person or any agent of a person, for any favour shown or promised to be shown by the accused, it shall be presumed. unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted, to obtain, that gratification or that valuable
for himself or some other person as the case may be as a motive or a reward such as is specified in sections 161 to 163 of the Pakistan Penal Code 1860 (Act XLV of 1860 or as the case may be without consideration or for a consideration which he believed to be inadequate.	thing or pecuniary advantage for himself or some other person as the case may be as motive or reward such as is specified in sections 161 to 163 of the said Code or as the case a may be without consideration or for a consideration which he believed to be inadequate.

S.15. Disqualification to contest elections or to hold public office. (a) Where an accused person is convicted for the offence of corruption or corrupt practices as specified in the Schedule to this Ordinance he shall stand disqualified for 21 years for seeking or from being elected chosen appointed or nominated as a member or representative of any public office or any statutory or local authority of the Government of Pakistan:	S.9. Disqualification to contest elections. -(1) Subject to subsection (2) where a holder of a public offence of corruption and corrupt practices and sentenced to a term of imprisonment for a term of not less than two years he shall stand disqualified from being elected or chosen as and from being a member of the Majlis-e-Shoora (Parliament) or the Provincial Assembly as the case may be for a period of five years reckoned from the date when he is released. (2) If any question arises whether a member of the Majlis-e-Shoora (Parliament) or a Provincial Assembly has become disqualified from being a member the Speaker or as the case may be the Chairman shall refer the question to the Chief Election Commissioner and if the Chief Election Commissioner is of the opinion that the member has become disqualified he shall case to be a member and his seat shall become vacant.
S.16. Trial of offences. –(a) Notwithstanding anything contained in any other law for the time being in for all persons accused of a scheduled offence shall be prosecuted for such offence by Court established pursuant to this Ordinance exclusively as constituted under section 5 (g) and the case shall be heard from day to day and disposed of within 30 days.	S.10. Trial of offences.-(1)Subject to the provisions of subsection (2) and notwithstanding anything contained in any other law for time being in force no person shall be prosecuted for the offence of corruption and corrupt practices by the chief Ehtesab commissioner save and except before a bench of the High Court defined in clause (f) of section 2 and the case shall be heard from day to day and disposed of within sixty days. (2) where more Benches than one have been constituted in a High Court. The cases referred to the High Court shall be assigned to various Benches by the Chief Justice of the High court. Explanation. -In this section High Court means the High Court within the local limits of whose jurisdiction the offence is alleged to have been committed.
S. 16-B Contempt of Court. - The Court shall have the power to punish for contempt of Court with imprisonment for a term Which imprisonment for a term which may extend to six months and with	S. 22. Power to punish for contempt. (1) The Chief Ehteasb Commissioner shall have the same powers mutatis mutandis as the Supreme Court has to Punish any person for contempt who—

fine which may extend to one million rupees any person who- (c) does anything which tends to prejudice the determination of a matter pending or most likely to come up before the Court; or	(c) does anything which tends to prejudice the determination of a matter pending before the Chief Ehtesab Commissioner
S.18. Cognizance of offences.- (d) The responsibility for inquiry into and investigation of an offence alleged to have been committed under this Ordinance shall rest on the NAB to the exclusion of any other agency or authority, unless any such agency or authority is required to do so by the Chairman or any officer of the NAB duly authorised by him. (e) The Chairman NAB and such members, officers and/or servants of the NAB shall have and exercise, for the purposes of an inquiry and/or investigation the power to arrest any person, and all the powers of an officer-in-charge of a Police Station under the Code, and for that purpose may cause the attendance of any person, and when if the assistance of any agency, police officer or any other official or agency, as the case may be, is sought by the NAB such official or agency shall render such assistance provided that no person shall be arrested without the permission of the Chairman or any officer duly authorized by the Chairman NAB. (f) Any Inquiry and Investigation under this Ordinance shall be completed expeditiously as may be practical and feasible. (g) The Chairman NAB or by an officer of the NAB duly authorised by shall appraise the material and the evidence placed before him during the inquiry and the investigation, and if he decides that it would be proper and just	S.15. Cognizance of offences, etc. (4) The responsibility for enquiring into, or investigating, an offence alleged to have been committed under this Act shall rest on the Ehtesab Cell, to the exclusion of any other agency or authority, and the said Cell shall be required to examine all material, evidence and proof and for this purpose may cause the attendance of any person: Provided that the Ehtesab Cell may require the assistance of any agency, police officer or other official, if it so deems fit

to proceed further, he shall refer the matter to an Accountability Court: S.19. Power to call for information. -The Chairman NAB or any authorized officer may, during the course of an inquiry or investigation in connection with. Contravention of any provision of this Ordinance:- (a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Ordinance or any rule or order made thereunder; (b) require any person to produce or deliver any document or thing useful or relevant to the inquiry; (c) examine any person acquainted with the facts and circumstances of the case; and (d) require any bank or	(5) The Ehtesab Cell shall complete the enquiry and investigation under this Act within one month or as soon thereafter, as may be feasible (6) On the completion of the enquiry and investigation indicating that the matter may require a reference to the Court it shall be the duty of the Ehtesab Cell to communicate to the Chief Ehtesab Commissioner its appraisal of the material and evidence in the form of a reference to him. S.20. Powers of the Chief Ehtesab Commissioner to seek assistance.-(1) The Chief Ehtesab Commissioner shall have the power to seek assistance and call for documents and information relevant to any proceedings pending before him under this. Act, from any Department of the Federal Government or a Provincial Government, local authority, bank, financial institution or any other person or authority and it shall be the duty of such Department, local authority, bank, financial institution, person or authority to render such assistance or furnish such document or information as he may require: Provided that in any case in which a serious question of banking secrecy with wider implications is raised, the Chief Ehtesab
financial institution, notwithstanding anything contained in any other law for the time being in force, to provide any information relating to any person whosoever. S. 24. Arrest: (a) " The Chairman NAB shall have the power, at any stage of the investigation under this Ordinance,. To direct that the	Commissioner shall first consult the Federal Government. (2) Any document or information called for under subsection (1) shall only be used for the proposes of this Act. S.16. Effect of reference etc. (1) Where a reference is made to the Chief Ehtesab Commissioner under

accused, if not already arrested, shall be arrested. (b) If the Chairman, NAB or an officer of the NAB duly authorised by him decides to refer the case to a Court, such reference shall contain the substance of the offence/ offences alleged to have been committed by the accused and a copy of such reference shall be forwarded to the Registrar of the Court to which the case has been sent to try the accused, and another copy shall be delivered to the accused. (d) Notwithstanding anything contained in the Code where the holder of a public office or any other person accused of an offence is arrested by NAB under this Ordinance NAB shall as soon as may be inform him of the grounds and substance on the basis of which he has been arrested and produce him before the Court established, under this Ordinance within a period of 24 hours of arrest excluding the necessary for the journey from the place of arrest to the Court and such persons shall having regard to the facts and circumstances of the case be liable to he detained in the custody of the NAB for the purposes of enquiry and investigation for a period not exceeding 90 days provided that no accused arrested under this Ordinance shall be released without the written order of the Chairman NAB or the order of the Court. S.25. Voluntary return/plea bargaining. - Where at any time whether before or after the commencement of the trial the holder of a public office or any other person accused of any offence under this Ordinance returns to the NAB, the assets or gains acquired through corruption of corrupt practices:	subsection (6) of section 15 such a reference shall be deemed to be an information recorded under section 154 of the Code. (2) The Chief Ehtesab Commissioner shall have the power to direct that the accused shall be arrested and the case referred to the Court for trial in accordance with law. The direction given by the Chief Ehtesab Commissioner shall contain the substance of the act of corruption and corrupt practices alleged to have been committed by the accused and a copy of such direction shall be forwarded to the Registrar of the Court having jurisdiction to try the accused and another copy shall be ,given to the accused on demand. `(4) Where the holder of a public office or any other person accused of an offence under this Act is arrested under the orders of the Chief Ehtesab Commissioner, and is produced before a Judicial. Magistrate for police custody under section 167 of the Code, such Magistrate may authorise his detention in such custody for a term not exceeding fourteen days as a whole but he shall not be authorised to release him on bail without the consent of the Chief Ehtesab Commissioner. S. 17. Voluntary return, etc.-Where before the commencement of trial or at any time, thereafter with the leave of the Court, the holder of public office or any other person accused of an offence under this Act voluntarily returns to the Chief Ehtesab Commissioner, the property, assets or gains acquired through corruption or corrupt practices, and discloses the full particulars

(i) if the trial has not commenced, the Chairman NAB may release the accused and (ii) if the Court has taken	relating thereto, the Court may not proceed with the trial subject to such conditions as to fine or penalty if any, as may be imposed by the Court and on condition that he resigns from office.
cognizance of the offence or the trial has commenced the Chairman NAB, may, with the approval of the Court, release the accused. (2) The amount deposited by the accused with the NAB shall be transferred to the Federal Government or, as the case may be, a Provincial Government or the concerned bank or financial institution, etc, within one month from the date of such deposit. (3) Notwithstanding anything contained in section 15 or in any other law for the time being in force where a holder of a public office or any other person voluntarily comes forward to return the illegal gain made by him or loss caused by him to the State exchequer through corruption and corrupt practices, the Chairman NAB may accept the offer and determination of the amount of illegal gain or loss caused, as the case may be, and its deposit with Nab, discharge such person of all his liabilities relating to the matter or transactions in issue provided that the matter is not under enquiry or investigation or sub judice in any Court of law.	
S.26. Tender of pardon to accomplice/plea-bargaining: (a) Notwithstanding anything contained in the Code, at any stage of investigation or inquiry, the Chairman may, with a view to obtaining the evidence of any person supposed to have been directlyor indirectly concerned in or privy to any offence, tender a full or conditional pardon to such a person on condition of his making a full an true	S.18. Tender of pardon to accomplice. -(1) Notwithstanding anything contained in the Code, in the case of an offence punishable under this Act; at any stage of investigation or inquiry, the Chief Ehtesab Commissioner may, with the approval of the Federal Government, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender

disclosure of the whole of the circumstances within his knowledge relating to the said offence including the names of the persons involved therein whether as principals . Or abettors or otherwise. (b) Every person accepting a tender of pardon under subsection (a) shall be examined by the Magistrate and shall also be examined as a witness in the subsequent trial.	a full or conditional pardon to such a person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relating to the said offence including the names of the persons involved therein whether as principals or abettors or otherwise. (2) Every person accepting a tender of pardon under subsection (1) shall be examined by the Chief Ehtesab Commissioner and shall also be examined as a witness in the subsequent trial.
(d) Where the Chairman NAB certifies that in his opinion, any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence through wilful or reckless misstatement, not complied with the condition on which the tender was made, such a person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have ,been guilty in connection with the said matter including the offence of giving false evidence, which he knows or ought to know is false. (e) Any statement made before a Magistrate by a person who has accepted a tender of pardon may be given in evidence against him at the trial.	(4) Where the Chief Ehtesab Commissioner certifies that in his opinion any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such a person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the said matter including the offence of giving false evidence. (5) Any statement made before the Chief Ehtesab Commissioner or the Court by a person who has accepted a tender of pardon may be given in evidence against him at such trial.
S. 27. Power to seek assistance. -The Chairman NAB, or an officer of the NAB, duly authorised by him, shall have the power to seek full and complete assistance and call for all or any documents an information relevant to or in connection with any matter or proceeding pending before the NAB, from any department of the Federal Government, Provincial Government, local authority, bank, financial Institution, person or any authority and institution or department in the public sector or the private sector, as he may deem it fit and proper to demand or require, provided that in any case in which a question of secrecy	S.20. Powers of the Chief Ehtesab Commissioner to seek assistance.-(1) The Chief Ehtesab Commissioner shall have the power to seek assistance and call for documents and information relevant to any proceedings pending before him under this Act, from any Department of the Federal Government or a Provincial Government, local authority, bank, financial institution or any other person or authority and it shall be the duty of such Department, local authority, bank, financial institution, person or authority to render such assistance or furnish such document or information as he may require: Provided that in any case in which a serious question of banking secrecy with wider

is involved or is raised at any time, the Chairman's decision shall be final. S.28. Appointment members of the staff and officers of the, National Accountability Bureau (NAB). -(a) The Chairman NAB, or an officer of the NAB, duly authorised by him may appoint such officers and staff as he may consider necessary for the efficient performance of his functions and exercise of power under this Ordinance. (b) The officers and members of staff, shall be appointed by Chairman NAB or by a person authorised by the Chairman NAB. (c) The officers and members of staff shall be entitled to such salary, allowances and other terms and conditions of services as the Chairman NAB may, with the approval of the Chief Executive, determine.	implications is raised, the Chief Ehtesab Commissioner shall first consult the Federal Government. (2) Any document or information called for under subsection (1) shall only be used for the proposes of this Act. 21. Appointment of members of staff and officers for the Chief Ehtesab Commissioner. -(1) The members of the staff and officers of the Chief Ehtesab Commissioner shall be appointed by the Federal Government in consultation with the Chief Ehtesab Commissioner. (2) The members of the staff and officers of the Chief Ehtesab Commissioner shall be entitled to such salary, allowances and other terms and conditions of service as may be determined by the Federal Government.
S.29. Accused to be competent witness. - Any person charged with an offence punishable under this Act shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him:	23. Accused to be competent witness. -Any person charged with an offence punishable under this Act shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or - any person charged with him at the same trial:
S.30. False evidence etc. - (c) The proceeding under subsection (a) may be initiated by the Court on its own accord at any time after the decision of the case or, in the event that there is an appeal, after the decision thereof, or on an application made by the Prosecutor or the person accused of an offence tried by the Court, within thirty days.	S.25 Cognizance of false evidence etc. -(3) The proceedings under subsection (1) may be initiated by the Court own its accord at any time after the decision of the case, or, in the event that there is an appeal after the decision thereof, or on an application made by the special Prosecutor or the person accused of an offence tried by the Court, within ninety 'days.
S.32. Appeal: (a) Any person convicted or the Prosecutor General, Accountability, if so directed by NAB, aggrieved by the final judgment and order of the Court under this Ordinance may, within ten days of the final Judgment and order of the Accountability Court prefer	S.26 Appeal. Any person sentenced by the Court under this Act may, within thirty days of the decision or the, order prefer an appeal to the Supreme Court.

an appeal to the High Court of the Province where the Court is situated.	
S.34. The President of the Islamic Republic of Pakistan in consultation with the Chief Justice of Pakistan may make rules for carrying out the purposes of this Ordinance and the said Rules, shall on promulgation be a part of this Ordinance.	
S.35. Repeal. -(a) The Ehtesab Act, 1997 (Act IX of 1997) shall stand repealed from the date of promulgation of this Ordinance, provided that notwithstanding the repeal Of the said Act, any proceedings pending under Ordinance CXI of 1996, Ordinance No, XX of 1997 and the Ehtesab Act, 1997, before any Court established under the said Act of 1997 and/or any of the aforesaid Ordinances amending the same, shall continue under this Ordinance as transferred under subsection (b) of section 33 to an Accountability Court. (b) Any case or proceeding pending under the aforesaid Ordinances and the Act of 1997 immediately, before the commencement of this Ordinance and transferred to any Court established under this Ordinance shall be proceeded with and all subsequent proceedings shall be completed in accordance with an under the provisions of this Ordinance.	S. 31. Repeal. -(1) The Holders of Representative Offices (Punishment for Misconduct) Order, 1977, (P.P.P.O. 16 of 1977), the Parliament and Provincial Assemblies (Disqualification for Membership) Order. 1977 (P.P.P.O. 17 of 1977), and the Ehtesab Ordinance, 1997 (XX of 1997), are hereby repealed. (2) Notwithstanding the repeal of the Holders of Representative Offices (Punishment for Misconduct) Order, 1977, (P.P.P.O. 16 of 1977), the Parliament and Provincial Assemblies (Disqualification for Membership) Order, 1977, (P.P.P.O. 17 of 1977), and the Ehtesab Ordinance, 1997 (XX of 1997), (a) any proceeding pending before the special Court under the said orders shall continue as if the said orders had not been repealed. (b) any proceeding pending before the Special Court under the said Orders shall continue as if the said Orders had not been repealed: (b) any appointments made under the Ehtesab Ordinance, 1997 (XX of 1997), including specifically that of the Chief Ehtesab Commissioner by the President shall continue for the appointed terms; and (c) any proceedings pending before a Court under the Elitesab Ordinance, 1997 (XX of 1997), shall continue under this Act and it shall not be necessary to re-call any witness or, once again record any evidence that may have been taken down.

The third part consists of altogether new provisions, phraseology whereof has been borrowed/taken from other enactments. It reads:

NEW SECTIONS OF NAB ORDINANCE

WITH CORRESPONDING PROVISIONS

IN OTHER STATUTES

NEW SECTIONS IN NAB ORDINANCE	CORRESPONDING PROVISIONS IN OTHER STATUTES
S. 5(c) "Assets" means any property owned, controlled by or belonging to any accused, whether directly or indirectly, or held Benami in the name of his spouse or relative or associate, whether within or outside Pakistan, for whichthey cannot reasonably account, or for which they cannot prove payment of full and lawful consideration;	S.2 (b) "assets" means any property owned, controlled or belonging to an accused, whether directly or indirectly, or whether within or without Pakistan for which they cannot reasonably account; (Control of Narcotic Substances Act, 1997)
5(d) "Associates" means- (i) any individual who is or has been managing the affairs for or keeping accounts of the accused or who enjoys or has enjoyed any benefit from the assets referred to above; (ii) any association of persons, body of individuals, partnership firms or private limited companies within the meaning of Companies Ordinance, 1984, of which such a person is or has been a member, partner or director or which has been promoted, floated, established or run by the same group of persons; (iii) any trustee of a private trust; and	S. 2 (c) "associate", in relation to an accused, means- (ii) any individual who, is or has, at the relevant time been managing the affairs or keeping the accounts of an accused; (iii) any association of persons, body of individuals, firm or private limited company within the meaning of Companies Ordinance, 1984 (XLVII of 1984), of which an accused is, or has, at the relevant time been a member, partner or director: (iv) any individual who is, or has been, at the relevant time a member, partner or director of any association of persons, body of individuals, firm or a private limited company referred to in sub-clause (iii); (v) a trustee of any trust created by an accused; or (vi) where the Special Court, for reasons to be recorded, considers that any property of an accused is held on his behalf by any other persons, such other person;

(iv) any person who ostensibly holds or is in possession or custody of any property of an accused on his behalf for the benefit and enjoyment of .The accused;	(Control of Narcotic Substances Act, 1997)
5(fa) Conciliation Committee means the conciliation committee constituted under section 25-A;	S.2(b) "Conciliation Court: means a Conciliation Court constituted under this Ordinance; (Conciliation Courts Ordinance, 1961)
5(h) "Judge" means, a person who has been a Judge of the High Court, is, or has been a District and Sessions Judge qualified to be a Judge of the High Court or any lawyer who is qualified to be a Judge of the High Court;	S.3(3)(a) a Chairman, being a person who is, or has been or is qualified to be, Judge of a High Court; (Service Tribunals Act, 1973)
5(j) "Deputy Chairman" means the person appointed as Deputy Chairman of the National Accountability Bureau by the President of the Islamic Republic of Pakistan;	
5(o) "Person" unless the context otherwise so requires, includes in the case of a corporate body, the sponsors, Chairman, Chief Executive, Managing Director, elected Directors, by whatever name called, and guarantors of the company. Or any one exercising direction or control of the affairs of such corporate body, and in the case of any firm, partnership or sole proprietorship, the partners, proprietors or any person having interest in the said firm, partnership or proprietorship, concern or direction or control thereof;	S.5(o)Explanation (ii) "person" includes a Hindu undivided family, a firm, an association or body of individuals, whether incorporated or not, a company and every other judicial person; (The Banking Companies Ordinance, 1962)
5(q) "Government Property" means both moveable and immovable properties belonging to the Government and includes gifts, donations, financial assistance grants, aid received or collected in whatever name or for whatever purpose during the tenure of office;	S.2(z) "Property" includes:- (i) all forms of property, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, real estate or in whatever name or for personal property of every whatever purpose during the description;

	(ii) tenure of office; property used to commit, or to abet the commission of, an offence punishable under this Act; (Control of Narcotic Substances Act, 1997)
5(r) "Wilful default" a person is said to commit an offence of wilful default under this Ordinance if he does not pay, or continues not to pay, or return or repay the amount to any bank, financial institution, cooperative society, or a Government department or a statutory body or an authority established or controlled by a Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations, instructions, issued or notified by the State Bank of Pakistan, or the bank, financial institution, cooperative society, " Government Department, statutory body or an authority established or controlled by a Government, as the case may be, and a period of thirty days has expired thereafter: Provided that it is not wilful default under this Ordinance if the accused was unable to pay, return or repay the amount as aforesaid on account of any wilful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution, cooperative society or a Government department or a statutory body or an authority established or controlled by Government.	
S. 6 . (a) .... (b) Chairman NAB. (i) …… (ii) The Chairman NAB shall be appointed on such terms and conditions and shall have the status and privileges as may be determined by the President.	S.6. Federal Tax Ombudsman. - (1) The Federal Tax Ombudsman shall be entitled to such salary, allowances and privileges and other terms and conditions of service as the President may determine..... 4. (2) The Federal Tax Ombudsman may resign his office by writing under his hand addressed to the President.

(iii) The Chairman NAB may resign his office by writing under his hand addressed to the President. (iv) The Chairman NAB may delegate any of his powers to, an Outhorize performance of any of his functions by, an officer of the NAB as he may deem fit and proper, subject to	(Establishment of Office of Federal Tax Ombudsman Ordinance, 2000)
such conditions, if any, as may be specified in the order, for carrying out the purposes of this Ordinance.	
(c) Acting Chairman, National Accountability Bureau. -As and when the Chairman NAB is absent or unable to perform the functions of his office due to any reason whatsoever, the Deputy Chairman will act as the Chairman NAB, and in case the Deputy Chairman is absent or unable to perform the functions of the office, any other person duly authorized by the Chairman NAB, to act as Chairman NAB.	7. Acting Federal Tax Ombudsman. -At any time when the office of the Federal Tax Ombudsman is vacant, or the Federal Tax Ombudshian is absent or unable to perform his functions due to any cause, the President shall appoint an Acting Federal Tax Ombudsman. (Establishment of Office of Federal Tax Ombudsman Ordinance, 2000)
S.7. Deputy Chairman, National Accountability Bureau. - (a) There shall be a Deputy Chairman NAB appointed by the President in consultation with the Chairman NAB. The Deputy Chairman shall assist the Chairman in the performance of his duties and carry out such functions as may be directed by the Chairman. (b) The Deputy Chairman shall serve at the pleasure of the President.	
S .9. Corruption and Corrupt practices. (vi) misuses his authority so as to gain any benefit or favour for himself or any other person, or to render or attempt to do so or wilfully fails to exercise his authority to prevent the gram, or rendition of any undue benefit or favour which he could have prevented by exercising his authority; or (vii) if he has issued any directive, policy, or any SRO (Statutory Regulatory Order) or	S.5(c)(d) S.S. Criminal Misconduct. (c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or (d) if he, by corrupt or illegal means or by otherwise abusing his position as public

any other order which grants or enables any concession or benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or associate or a benamidar or any other person; or under his control as a public servant or allows any other person so to do; or (viii) if he commits an offence of wilful default.	servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; (Prevention of Corruption Act, 1947)
S.12. Power to freeze property. Provided that any order of seizure freezing attachment or any prohibitory order mentioned above by the Chairman NAB shall remain in force for a period not exceeding 30 days unless confirmed by the Accountability Court where the Accountability Court where the Reference under this Ordinance shall be sent by NAB. Provided further that notwithstanding that the order of NAB or the Court shall be effective from the time of passing thereof or proclamation thereof in a newspaper widely circulated and dispatch at the last known address of the accused either by registered post A.D. Or courier service or any other mode of electronic media as the Court may deem proper having regard to the facts and circumstances of the case.	S.37(1)(2) Freezing of assets etc. –(1) Where the Special Court trying an offence punishable under this Act is satisfied that there appear reasonably grounds for believing that the accused has committed such an offence it may order the freezing of the assets of the accused his relatives and associates. (2) Where in the opinion of the Director- General or an officer authorized under section 21 an offence is being or has been committed he ma freeze the asses of such accused and within seven days of the freezing shall place before the Court the material on the basis of which the freezing was made and further continuation of the freezing or otherwise shall be decided by the Court.
S. 12(f). That the order of freezing mentioned above in section 12(a) to (e) shall, as the case may be, remain operative until final disposal by the Accountability Court or the Appellate Forum, notwithstanding filing of or pendency of an appeal under this Ordinance.	S.37 (2). Where in the opinion of the Director General or an officer authorised under section 21 an offence is being or has been committed, he may freeze the assets of such accused and within seven days of the freezing shall place before the Court the material on the basis of which the freezing was made and further continuation of the freezing or otherwise shall be decided by the Court. (Control of Narcotic Substances Act, 1997)

S.14. Presumption accused accepting gratification. (d) Where a person is accused of an offence under section 9(a) (vi) and (vii), the burden of proof that he used his authority, or issued any directive, or authorised the issuance of any policy or statutory rule or order (SRO), or made any grant or allowed any concession, in the public interest, fairly, justly, and for the advancement of the purpose of the enactment under which the authority was used, directive or policy or rule or order was issued or grant was made or concession was allowed shall lie on him, and in the absence of such proof the accused shall be guilty of the offence, and his conviction shall not be invalid by the reason that it is based solely on such presumption.	S.68. Presumption to the assets acquired through dealing in narcotics, -Where there is Proved, that such assets or part thereof were acquired, generated or obtained through cultivation, manufacture, production, sale, purchase, dealing or trafficking of narcotic drugs, psychotropic substances or controlled substances. (Control of Narcotic Substances Act, 1997)
S.15 Disqualification to contest elections or to hold public office. Provided that any accused person who has availed the benefit of section 25 of this Ordinance shall also be deemed to have been convicted for an offence under this Ordinance, and shall stand disqualified for 21 years as above. (b) Any person convicted of an offence of corruption and/or corrupt practices as described at serial No,1 of the Schedule shall not be allowed to apply for or be granted or allowed any financial facilities in the form of any loan or advances from any bank or financial institution in the public sector, for a period of 10 years from the date of conviction.	
S.16 Trial of offences. (b) The Court shall sit at such (c) Where more Courts than one have been established for an area, the Chief Justice of the High Court of the Province concerned shall, keeping in view the seniority and status of the Judges of various Courts,	S.15. Place of Sitting. -(1) Subject to subsections (2) and (3), a special Court shall ordinarily sit place or places as the Government may, by order, specify in this behalf. at such place or places as the Government may, by order, specify in that behalf. (Anti-Terrorism Act, 97)

designate a Judge of any such Court to be an Administrative Judge. (d) Notwithstanding anything contained in this section, if in respect of any case relating to an offence triable under this Ordinance, the Chairman NAB, having regard to the facts and circumstances of the case may file a reference before any Accountability Court established anywhere in Pakistan, and such Court shall have the jurisdiction to try the same.	S.13. Establishment of Special Courts. -(4) Notwithstanding anything contained in subsection (2) and subsection (3), the Federal Government or if so directed by the Government, the Provincial Government shall in addition to the existing Special Courts or such other special Courts as may be established in the area, establish one such additional special Court under this Act at the principal seat of the Lahore High Court and the High Court of Sindh and appoint a Judge of such High Court as a Judge of Special Court in consultation with the Chief Justice of the High Court concerned, and where a Judge of a High Court is appointed as Judge for any area under this Act he shall be the Administrative Judge for that area and such Administrative Judge may, in addition to the powers exercisable under this Act, either suo mom or on the application of any party, at any stage of the proceedings whether before or after the framing of charge, for sufficient cause including as mentioned in subsection (1) of section 28, transfer, withdraw or recall any case pending before any other special Court in that area and may either try the case himself or make it over for trial to any other special Court in that area. (Anti-Terrorism Act, 1997)
16-A. Transfer of cases. - (a) Notwithstanding anything contained in any other law for the time being in force, the Chairman NAB may apply to any Court of law or Tribunal that any case involving a scheduled offence under this Ordinance pending before such Court or Tribunal shall be transferred to a Court established under this Ordinance, then such other Court or Tribunal shall transfer the said case to any Court established under this Ordinance and it shall not be necessary for the Court to recall any witness or again to record any evidence that may have been recorded. (b) In respect of any case pending before a Court established under this Ordinance, the	S.49.Transfer of cases.- (1) Where more Special Courts than one are established within the territorial jurisdiction of a High Court, the High Court may, by order in writing, transfer a case, at any stage, from one special Court to another special Court in accordance with section 526 of the Code as if the special Court were a Court of Session. (2) On the establishment of Special Courts under sections 45 and 46, all cases where the sentence of an offence is two years or less, shall stand transferred to the respective special Court comprising a Judicial Magistrate of the First Class and all other cases to the respective special Courts

Chairman NAB having regard to the facts and circumstances of the case and in the interest of justice and for the protection and safety of witnesses it is necessary that such case is transferred for trial may direct the Prosecutor General Accountability to apply for the transfer of the case from any such Court in one Province to a Court in another Province or from one Court to a Court in another Province or from one Court in a Province to another Court in the same Province, provided that,- (i) in case the transfer is intended from a Court in a Province to a Court in another Province to the Chief Justice of Pakistan; and (ii) in case the transfer is intended from one Court in a Province to another Court in the same Province to the Chief Justice of the High Court; and if the Chief Justice of Pakistan or, as the case may be, the Chief Justice of High Court considers it expedient in the interest of justice so to do, he may transfer the case from one Court to another Court and case so transferred shall be tried under this Ordinance without recalling any witness whose evidence may have been recorded.	comprising of Sessions Judges or Additional Sessions Judges. (3) Notwithstanding anything hereinbefore contained, a remand may be granted by the nearest Special Court comprising a Judicial Magistrate of the First Class. (Control of Narcotic Substances Act, 1997)
S.20.Reporting of suspicious financial transactions. -(a) Notwithstanding anything withstanding anything contained in any law for the time being in force it shall be the duty of all banks and financial institutions to take prompt and immediate notice of all unusual or large transactions with context to the account which have no apparently genuine economic or lawful purpose and upon bona fide professional judgment of the Bank suspicion that such transactions could constitute or be related to illegal or illicit activities corruption or corrupt practices the manager or director of such financial institution shall report all such transactions to the Chairman NAB forthwith by the quickest possible mode of communication	S.12. Fidelity and Secrecy. -(4) Notwithstanding anything contained in subsections (1) and (2) the State Bank shall prepare and submit to the federal Government a special report every year on cases of write-off of loans mark-up and other dues or financial relief through a rescheduling and restructuring of loans and subsidized loans provided by the nationalized commercial banks in which established banking practices or authorized procedures have been departed from with a view to causing wrongful less to the bank or conferring wrongful gain on any constituent or such departure has caused wrongful loss to the bank or conferred wrongful gain on any constituent. If the matters raised in the

to communication to be confirmed in writing. (b) Whoever fails to supply the information in accordance with subsection (a) shall be punishable with rigorous imprisonment which may extend to 5 years, or with fine, or with both. (c) Where there are reasonable grounds to believe that the assets of a person or any part thereof were acquired through corruption or corrupt practices, and there was no other likely source of acquiring such assets or part thereof, it shall be presumed, unless proved to the contrary by the accused person, that such assets or part thereof were acquired, generated or obtained through corruption and corrupt practices.	report relate to public interest the Federal Government may submit the report or such part of its as relates to public interest, to Parliament or to the Standing Committee of a House of Parliament dealing with Finance. (5) Notwithstanding anything contained in subsections (1) to (4) or any other law for the time being in force, the Council shall, as and when directed by the Federal Government publish a list of persons from whom any loans, advances or credits amounting to one million rupees or more obtained from a bank, financial institution, cooperative society or corporate body, either in their own names or in the names of their spouses, dependents or business concerns, whether mainly owned by them or have any share in such business concerns, whether mainly owned by them or have any share in such business concerns, were due and have not been paid back for more than one year till the date as directed by the Federal Government. (The Banks (Nationalization) Act, 1974)
S.21. International Cooperation Request for mutual legal assistance. -The Chairman NAB or any officer authorized by the Federal Government may request a Foreign State to do the following acts in accordance with the law of such State:- (a) have evidence taken, or documents or other articles produced; (b) obtain and execute	S.57. Mutual legal assistance requests by Pakistan.-(1) The Federal Government or an officer authorised by the Federal Government under subsection (3) of section 56 may request a foreign State to:- (a) have evidence taken, or documents or other articles produced; (b) obtain and execute search warrants or other lawful
search warrants or other lawful instruments authorizing search for things relevant to investigation or proceedings in Pakistan believed to be located in that State, and if found, seize them; (c) freeze assets, by whatever processes are lawfully available in that State, to the extent to which the assets are believed on	instruments authorising a search for things relevant to investigations or proceedings in Pakistan believed to be located in that State, and if found, seize them; (c)freeze assets, the subject of actions or orders under subsection (2) of section 37, by whatever processes are lawfully available in that State, to the extent to

reasonable grounds to be situated in that State; (d) confiscate articles and forfeit assets to the extent to which the articles or assets, as the case may be, are believed to be located in that State; (e) transfer to Pakistan any such evidence, documents, things, articles, assets or proceeds realized from the disposal of such articles or assets; and (f) transfer in custody to Pakistan a person detained in the foreign State who consents to assist Pakistan in the relevant investigation or proceedings.	which the assets are believed on reasonable grounds to be located in that State; (d) confiscate articles the subject of orders under subsection (2) of section 33 and forfeit assets the subject of orders under subsection (2) of section 39 to the extent to which the articles or assets, as the case may be, are believed to be located in that State; (e) transmit to Pakistan any such evidence, documents, things, articles, assets or proceeds realized from the disposal of such articles or assets; and (f) transfer in custody to Pakistan a person detained in the foreign State who consents to assist Pakistan in the relevant investigation or proceedings. (Control of Narcotic Substances Act, 1997)
S. 22. Jurisdiction: (a) The Chairman NAB may investigate any suspected offence which appears to him on reasonable grounds to involve serious offences as given in the Schedule to this Ordinance, and has been referred to him, or of his own accord. (b) The Chairman NAB may, if he thinks fit, conduct any such investigation in conjunction with any other agency or any other person which/who is, in the opinion of the Chairman NAB, a proper Agency or person to be concerned in it.	
23. Transfer of property void. (a) Notwithstanding anything contained in any other law for the time being in force after the Chairman NAB has initiated investigation into the offences under this Ordinance, alleged to have been committed by an accused person, such person or any relative or associate of such person or any other person on his behalf, shall not transfer by any means whatsoever, create a charge on any movable or immovable property	S.7-Transfer of property void,- (1) After a special Court has taken cognizance of a scheduled offence alleged to have been committed by an accused person, such person or any relative of such person or other person on his behalf shall not, without the previous permission in writing. Of the Special Court, transfer, or create a charge on, any movable or immovable property owned by him or in his possession, while proceedings are pending before the Special Court; and any transfer

owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Accountability Court; and any transfer of any right, title or interest or creation of a charge on such property shall be void. (b) Any person who transfers, or creates a charge on property in contravention of subsection (a) shall be punishable with rigorous imprisonment for a term, which may extend to three years and shall also be liable to fine not exceeding the value of the property involved.	of, or creation of a charge on, such property without such permission shall be void. (2) Any person who transfers, or creates a charge on, any property in contravention of subsection (1) shall be punishable with rigorous imprisonment for a term which may extend to three years and shall also be liable to fine. (Offences in respect of Banks (Special Courts) Ordinance, 1984)
S.24. Arrest. (e) All persons presently in custody shall immediately upon coming into force of this subsection, unless previously produced before an Accountability Court, be produced before such Court as provided in subsection (d) and the Order authorising retention of custody by NAB shall be deemed to relate to the date of arrest. (f) The Chairman, NAB may declare and notify any place as a police station or sub-jail at his discretion.	6. (9) The Force may, in accordance with the law, establish as many police stations as are required for the efficient functioning of the Force and all police stations of Anti-Narcotics Task Force and Pakistan Narcotics Control Board shall be deemed to be the police stations of the Force; Explanation. -For the purpose of this Act, the expression "police station" means and includes any place declared as such, by the Federal Government or a Provincial Government to be a police station within the meaning of the Code. (Anti-Narcotics Force Act, 1997)
S.25-A. Payment of Loans etc. (a) Where a person has been arrested or is in the custody of NAB or apprehends such arrest or custody for the investigation of the charge against him of committing an offence of wilful default on account of nonpayment of dues to a bank or a financial institution or cooperative society, he may at any stage before or after such arrest or before, during or after such custody or investigation apply to the Governor State Bank of Pakistan for reconciliation of his liability through the conciliation committee and the Governor	4(1). Where a case is, under this Ordinance, referable to conciliation, any party to the dispute may, in the prescribed manner, and on payment of the prescribed fee, apply to the Chairman of the Union Council concerned for, as the case may, to the member representing the ward or, in the case of a ward which has more members than one, to such one of them as may be determined in the prescribed manner for the constitution of a Conciliation Court for the settlement of the dispute and unless the Chairman or, as the case may be, the member, for reasons to be recorded in writing, rejects the application, he shall proceed to constitute, in the prescribed

may, if he deems fit, refer the matter to the conciliation committee. (aa) The Governor, State Bank of Pakistan, shall constitute one or more conciliation committees for the purposes of this Ordinance. (b) The Conciliation Committee shall consist of a nominee of the Governor, State Bank of Pakistan, being a senior officer of the, State Bank well-qualified in the profession of banking who shall be the Chairman of the Committee, two nominees of the NAB to be nominated by the Chairman NAB, two Chartered Accountants to be nominated by the Governor, State Bank of Pakistan, one Chartered Accountant to be nominated by the Council of the Institute of Chartered Accountants of Pakistan, Karachi, such nomination to be obtained by the Governor, State Bank of Pakistan, a Chartered Accountant to be nominated by the lender bank or financial institution. Explanation.-Where the lender is a consortium or group of banks or financial institutions, the lender means the lead bank or financial institution. (bb) The Chairman of the Conciliation Committee shall convene the meetings and conduct proceedings of the Committee in the manner he deems fit.	manner, a Conciliation Court for the purpose: 5(1). A Conciliation Court shall be a body consisting of a Chairman and two representatives to be nominated, in the prescribed manner, by each of the parties to the dispute. (The Conciliation Courts Ordinance, 1961.)
(c) The Conciliation Committee, after ekamination of the record of the lending bank or financial institution and the borrower and after hearing the parties through their Chartered Accountant, shall determine the amount outstanding against the borrower calculated in accordance with law, rules,. Regulations and circulars of the State Bank of Pakistan and further determine the manner and the schedule of repayment having regard to the facts of each case. The borrower, it he so desires, shall be heard at commencement and before the conclusion of proceedings:	

Provided that the borrower shall have the right to have access to, and instruct, the Chartered Accountant representing him before the Conciliation Committee even if the borrower is in the custody, during the proceedings of the Conciliation Committee. (d) The Conciliation Committee shall conclude the reference within thirty days and its recommendations shall be recorded by its Chairman and shall contain the views of all members of the Committee. The recommendations of the Conciliation Committee shall be submitted to the Governor, State Bank of Pakistan. (e) The Governor, State Bank of Pakistan shall consider the recommendations submitted to him under subsection (d) and may accept the recommendations or may, for reasons to be recorded, pass such other appropriate order thereon as he deems fit. The acceptance of the recommendations of the Committee or passing any other order as aforesaid shall constitute the decision of the Governor, State Bank of Pakistan. (t) Where the borrower undertakes to repay the amount as determined by the Conciliation Committee or the Chairman NAB, as the case may be, the Chairman NAB may release the accused for the purpose of this Ordinance. (g) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, if the Chairman NAB is satisfied that any agreement entered into between a bank or a financial institution, a cooperative society and a lender is vitiated by the provisions of section 23 or any other provision of the Contract Act, 1872 (IX of 1872), or any other law or the same is Collusive or is against public interest, he may refuse to take such agreement into	

consideration for the purposes of conciliation Committee or the conclusion drawn by them. (h) In the event of failure either of the Conciliation Committee to conclude the reference within thirty days of the commencement of the conciliation proceedings or the failure of the borrower to accept and implement the decision of the Governor, State Bank of Pakistan regarding the payment and matters relating thereto, such failure to accept or implement the decision shall be referred to the Accountability Court subject to the provisions of section 31-D and the Court may proceed with the case thereafter; Provided that the period of thirty days may be extended by the Governor, State Bank of Pakistan by such further period or periods as he may find necessary having regard to the facts and circumstances of the case and for reasons to be recorded.	10. Where a certificate is issued that conciliation has failed, other under clause (b) of subsection (4) of section 5 or under sub- section (3) of section 8, any party to the dispute may seek its remedy in the Court in which it would in law be entitled

	to seek such remedy if this Ordinance had not been promulgated. (The Conciliation Courts Ordinance 1961.)
S.28. Appointment of Officers and Staff in the National Accountability Bureau. (d) Subject to subsection (e) the provisions of the Civil Servants Act, 1973 shall not apply to the persons appointed in NAB. (e) Nothing contained in sub-section (d) shall apply to a person who is a civil servant within the meaning of the law relating to appointments as civil servants of the Federation or a Province and is deputed to or posted in NAB.	
S.31. Prohibition to hamper investigation: (a) Notwithstanding any- thing contained in any other law for the time being in farce, if any person concerned with the inquiry and investigation and prosecution of a case consciously and, deliberately and with malice aforethought compromises, hampers, misleads, jeopardizes or defeats an investigation of a case under process before NAB or any concerned agency or, authority or any Courts or a Court, he shall be deemed to have committed the scheduled offence of corrupt practices and/or corruption. (b) No person will be proceeded with under this section except with the sanction of a Committee composing the Chairman NAB, Deputy Chairman NAB and the Prosecutor General Accountability.	17. Obstructions to officers.-Whoever hinders or obstructs any officer in the performance of his functions under this Act or wilfully furnishes to such officer any information which is, to his knowledge or belief, false in material particulars shall be punishable with rigorous imprisonment for a term which may extended to three years, or with fine, or with both. (The Control of Narcotic Substances Act, 1997)
S. 31-A . Absconding to avoid service of warrants. -Whoever absconds in order to avoid being served with any process issued by any Court or any other authority or officer under this ordinance or in any manner prevents, avoids or evades the service on himself of such process or conceals himself to screen himself from the	87. Proclamation for person absconding.-(1) if any Court is satisfied after taking evidence that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place

proceedings or punishment under this Ordinance shall be guilty of an offence punishable with imprisonment which may extend to three years notwithstanding the provisions of sections 87 and 88 of Code of Criminal Procedure, 1898, or any other law for the time being in force.	and at a specified time not less than thirty days from the date of publishing such proclamation. (The Criminal 'Procedure Code, 1898)
S.31-B. Withdrawal from prosecution. - Where at any stage of the proceedings, the Chairman NAB is of the Opinion that ends of justice so require he may direct the Prosecutor General Accountability to withdraw from prosecution of any person under this Ordinance and upon such withdrawal the accused shall be released if not required in any other case under this Ordinance. S.31-C. Court to take cognizance of offence with prior approval of the State Bank. -No Court established under this Ordinance shall take cognizance of an offence against an officer or as employee of a bank or financial institution for writing off, waiving, restructuring or refinancing any financial facility, interest or mark-up without prior approval of the State Bank of Pakistan.	494. Effect of withdrawal from prosecution. Any Public Prosecutor may, with the consent of the Court, before the judgment is pronounced, withdraw from the prosecution of any person either generally of in respect of any one or more of the offences for which he is tried; and upon such withdrawal, (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences; (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences. The Criminal Procedure Code, 1898)
S.31-D. Inquiry, investigation or proceedings in respect of imprudent bank loans, etc. - Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry investigation or proceedings in respect of imprudent loans defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan: Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000,	

shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan.	
S.32. Appeal. (b) All Appeals against the final Judgment filed before the High Court will be heard by a Bench of not less than two Judges constituted by the Chief Justice of the High Court and shall be finally disposed of within thirty days of the tiling of the appeal. (c) Notwithstanding any other law for the time being in force or this Ordinance, no appeal against any interlocutory order of the Court during the proceedings pending before it under this Ordinance, shall lie and an appeal shall lie only against the Final Judgment of the Court. (d) No stay of proceedings before the Court shall be granted by any Court on any ground whatsoever, nor proceedings thereof be suspended or stayed by any Court on any ground whatsoever.	48. Appeal.-(1) An appeal against the order of a Special Court comprising a Sessions Judge or an Additional Sessions Judge shall lie to the High Court and shall be heard by a bench of not less than two Judges of that Court. (2) An appeal against the order of the special Court comprising a Judicial Magistrate shall lie to a special Court comprising a Sessions Judge or an Additional Sessions Judge. (The Control , of Narcotic Substances Act, 1997)
S.36. Indemnity. -No suit, prosecution, or any other proceedings shall lie against the Federal Government, Provincial Government, Chairman NAB, or any other member of the NAB or any person exercising any power or performing any function under this Ordinance or the Rules made hereunder for any act or thing which has been done in good faith or intended to be done under this Ordinance or the rules thereof.	75. Indemnity.-No suit, prosecution or other proceedings shall lie against the Federal Government or Provincial Government or any officer of the Federal Government or of a Provincial Government for anything in good faith, done or intended to be done in pursuance of this Act or the rules made thereunder. (The Control of Narcotic Substances Act, 1997)
S.37. Removal of difficulties order. -The President may for the purpose of removing any difficulties in the enforcement of this Ordinance may make modifications, additions or omissions as may be deemed necessary or expedient for the interest of the State.	20. Power to remove difficulties. (1) If any difficulty arises in giving effect to the provisions of this Act, the Federal Government may by order published in the official Gazette, make such provisions not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for removal of the difficulty. (The Employment of Children Act, 1991)

155. The NAB Ordinance is sought to be struck down insofar as it: creates a parallel and non-federal judicial system;

denies the trial and appellate Courts the power to grant bail and to suspend sentences and vests the power to grant bail in the executive (Chairman NAB);

allows the prosecution to detain a person for 90 days without so much as an initial duly formulated and precise F.I.R.;

provides for unfair procedure in derogation of due process;

creates new offences;

is in vague, un-precise and sweeping language;

reverses, for these offences, the burden of proof; and

applies them retrospectively;

delegates unfettered and unguided discretion to the executive,

particularly as to the venue of the trial (question of federalism), plea bargaining and settlements;

denies altogether the right of appeal in certain circumstances;

156. It is also the case of the petitioners that some of the provisions of the NAB Ordinance are in conflict with some of the Fundamental Rights as also other provisions of the Constitution;

It has been promulgated by the Federal Government without any legislative competence;

It does not merely create a parallel judicial system, but a parallel system enabling the executive to exercise judicial powers, which is beyond the authority of the present dispensation, in that, conferment of judicial powers on the executive cannot be countenanced in law;

It provides criminal penalty for civil debt/contractual obligations, default whereof was not punishable at the time of the, execution of agreements in question, and even in the case of continuing breach, the same cannot be converted into an offence being hit by Article 12 (2) of the Constitution;

It is unfair, unjust, inequitable and against the accepted norms of jurisprudence as held by, this Court in the cases of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 Supreme Court 1445) and Sh. Liaquat Hussain v. Federation of Pakistan (PLD 1999 S.C. 504);

It violates the provisions of sections 154, 200, 156, 157, 202, 167(4), (5), (6) and (7), 169, 172, 173, 177, 179, 180, 185, 512,494, 417 of the Code of Criminal Procedure, section 201 P.P.C. And Article 203 of the Constitution;

The power of transfer/withdrawal of cases from the Courts of ordinary jurisdiction for trial in the Accountability Courts without the approval of the Court, vested in Chairman NAB, being uncontrolled militates against the concept of independence of judiciary;

Fundamental Rights cannot be suspended in view of the judgment in Syed Zafar Ali Shah v. General Pervez Musharraf (P L D 2000 SC 869) and this Court, in the exercise of its jurisdiction under Article 184(3) of the Constitution, can strike down the NAB Ordinance, being violative of Articles 8, 10 and 12 of the Constitution;

Some provisions of the NAB Ordinance are ultra vires and others are ultra vires, but the doctrine of severability is not attracted in these cases, in that, the good parts cannot be separated from the bad ones and therefore the entire NAB Ordinance should be struck down in view of the fact that the field is totally and adequately occupied by the existing laws on the subject;

It is an ex post facto law, the very thought whereof is abhorrent to the administration of justice;

It is not a mere procedural law, but a substantive law and therefore the rules of evidence to reduce the rigour of standard of proof are unsustainable;

157. The case of the Federation/respondents is that the NAB Ordinance does not suffer from any legal infirmity inasmuch as:

It is a valid piece of legislation made and promulgated by the competent authority under the Chief Executive's Order No, IX of 1999 dated 15-11-1999, as amended from time to time;

The legislation has been duly acted upon and is being administered throughout the country inasmuch as numerous Accountability Courts have been established and Judges have been appointed to such Courts in consultation with the Chief Justice of Pakistan. This ensures the independence of the Courts and the judiciary in general. All these Courts are presided over by serving and retired District and Sessions Judges, who are under the direct supervisory control of the Chief Justices of the respective High Courts of the four Provinces;

The NAB Ordinance is a special law falling in the series seeking to combat the evil of high level corruption. For the first time, through the NAB Ordinance, members of hitherto an untouchable class of influential and powerful persons, not merely restricted to holders of public offices, but also including bankers, businessmen, industrialists, bureaucrats and other persons, who are involved in corruption and corrupt practices as defined in the NAB Ordinance, fall within the purview of accountability in an effective and coherent manner;

The NAB Ordinance seeks to:

(i) re-define certain Offences and re-prescribe their punishments;

(ii) provide for Special Courts and procedure for trial of specified offences;

(iii) provide for special agency for pre-trial investigation/inquiry, namely, the National Accountability Bureau;

One of the objectives of the NAB Ordinance is the retrieval of the looted public money. It also provides for 'plea bargaining', which appears for the first time in such a law in Pakistan and in consequence 1064.600 million rupees have been recovered during a short span;

Up to 2.4.2001, 759 authorized investigations have been undertaken by the NAB out of which 143 have been completed while 586 are in progress and 30 have been closed or suspended. Similarly out of 261 filed in the Accountability Courts, 120 have been decided with 73 convictions and 16 acquittals. 46 'plea bargainingcases were concluded while 13 were rejected. Only 36 accused are in NAB custody for interrogation, 156 are in the judicial lock-ups, 56 have been released and 69 are at large;

The NAB Ordinance was framed keeping in mind Articles 175, 202 and 203 of the Constitution and the principles laid down in Mehram Ali's case (supra);

It does not create a new offence with retrospective effect, but an offence, which is in the nature of continuation of 'wilful defaultafter coming into force of the NAB Ordinance;

Section 5(r) does not negate the freedom of trade, business and profession as contemplated in Article 18 of the Constitution. It merely seeks to penalize deliberate evaders of due payments to financial institutions. Prosecution of genuine cases where there are no deliberate and wilful evasions is abandoned within the contemplation of the NAB Ordinance;

Section 5 (r), no doubt, is a Constitutional deviation in view of the provisions of Article 12 (2) of the Constitution, but on the ground of state survival and having regard to the objectives of the Chief Executive coupled with the law declared in the case of Syed Zafar Ali Shah (supra), no objection can be taken to section 5 (r), particularly when adequate safeguards have been provided by making appropriate amendments in the Ordinance;

Conciliation Committee has been established and no proceedings against the loan defaulters can be initiated by the NAB without the recommendation of the Governor, State Bank of Pakistan. However, section 25-A requires to be further suitably amended so as to empower the Court of competent jurisdiction to decide as to whether or not accept the agreement/conciliation reached between the parties;

The NAB Ordinance does not contravene the provisions of Articles 23/24 of the Constitution, in that, freezing of property of the accused persons (ill-gotten properties) is merely an interlocutory measure;

The vires of the NAB Ordinance cannot be tested on the touchstone of the Fundamental Rights, which stood suspended by the Proclamation of Emergency of 28th May 1998, which has been upheld by this Court in Syed Zafar Ali Shah's case (supra);

The burden of proof on accused is not an alien concept in jurisprudence. There are number of existing laws, which place the burden of proof on the accused and/or require an accused to rebut a statutory presumption. Such a course is not violative of the equality clause(s) of the Constitution;

The choice of Court to which a reference is sent for trial is a matter of procedure and no body has a vested right to demand that his case be tried by a particular Court/Bench;

The power conferred on Chairman NAB is not uncontrolled and his discretion is to be exercised judiciously having regard to the provisions of section 24A of the General Clauses Act, 1897, which require reasons to be recorded in writing for a deviation while passing any discretionary order;

The provisions of the Ordinance are in conformity with the established principles of procedure for criminal proceedings;

The nature of investigation and inquiry under the NAB Ordinance is of special kind, which entails inquiry and investigation into such offences, and in most cases requires tedious efforts including careful perusal of voluminous records of companies/banks, which cannot be completed overnight and therefore the period of 90 days for custody has been prescribed;

The period of remand of 90 days is not violative of Article 10(2) of the Constitution, in that, section 24 (d) requires production of the accused before an Accountability Court within 24 hours of the arrest;

Section 23 of the Ordinance, insofar as it prohibits transfer of any right, title, interest or creation of charge on property after Chairman NAB has initiated investigation into the offences under the NAB Ordinance, is an interlocutory measure, in that, it is not desirable that persons accused of such offences should frustrate the objects of law by creating third party rights in respect of illegally acquired property thereby creating hurdle in the objects of law;

Power vesting in Chairman NAB under section 24 (a) of the NAB Ordinance to order arrest of the accused if not already arrested at any stage of the investigation, is neither discriminatory nor violative of Article 25 of the Constitution, in that, similar powers are conferred upon police officers under section 54 Cr.P.C;

As to the case of voluntary return, .i,e, 'plea bargaining under section 25, the provision stands amended by virtue of Amendment Ordinance. No, XXIV of 2000 and now, by virtue of section 25 (a) (ii), after cognizance of the offence has been taken by the Court or the trial has commenced, Chairman NAB may release the accused only with the approval of the Court;

There is no restraint on freedom of contract, in that the powers earlier vesting in Chairman NAB under section 25 (e) and (g) have now been vested in the Governor, State Bank of Pakistan by virtue of the Amendment Ordinance No, XXIV of 2000, thus clause (g) of section 25 does not suffer from excessive delegation;

Section 32 (d) of the NAB Ordinance is subject to the Constitution and does not purport to oust the Constitutional jurisdiction of the Courts;

The Civil Servants Act, 1973 continues to apply to civil servants, who are deputed to or posted in the NAB. Those, who are appointed directly, are distinct and separate category and class of persons and therefore no violation of Article 25 of the Constitution is caused;

The mere fact that the Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this Court does not curb the power of the Legislature to make a new law on the same subject The NAB Ordinance is neither discriminatory nor un-Islamic and in any case, its vires cannot be examined on the touchstone of Article 2A of the Constitution;

The method of appointment in respect of Chairman NAB is contained in section 6(b) (I) and for other officers in section 28 ibid. Provisions relating to transfer of cases qua the Provincial Courts within the territories of a Province and from one Province to another Province, do not suffer from excessive delegation;

As regards special treatment to be meted out to women accused, the provisions of section 167, Cr.P C. Are applicable and the same have not been ousted:

SUMMARY OF THE ORDINANCE

158. The Ordinance intends to provide for the setting up of National Accountability Bureau so as to eradicate corruption and corrupt practices and hold accountable all persons accused of such practices and matters ancillary thereto as spelt out from the Preamble.

159. Section 1 of the Ordinance describes the title of the Ordinance. By virtue of section 2 it came into force on 16.11.1999 and has been made retrospectively applicable with effect from the 1st day of January 1985. Section 3 provides that the Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force. Section 4 covers its application and provides that it extends to whole of Pakistan and shall apply to all persons in Pakistan and persons who are or have been in the service of Pakistan wherever they may be including areas which are part of Federally and Provincially Administered Tribal Areas.

160. Section 5 defines the expressions, 'accused', 'appropriate Government', 'assets', 'associates', Chairman National Accountability Bureau', 'Code', 'conciliation committee', 'Court', 'Judge', 'Deputy Chairman', 'National Accountability Bureau', 'freezing', 'holder of public office', 'offence', 'person', 'property', 'Government propertyand 'wilful default'. Section 6 deals with the Constitution of National Accountability Bureau and appointments of its Chairman and Acting Chairman. Sections 7 and 8 deal with the appointments of Deputy Chairman and the Prosecutor General Accountability respectively. Sections 9 and 10 respectively deal with corruption and corrupt practices and punishments therefor. The matters relating to imposition of fine, freezing of property and claim or objection against the freezing are respectively dealt with in sections 11, 12 and 13.

161. Section 14 deals with the presumption against accused accepting illegal gratification. Section 15 provides for incurring of disqualification to contest elections or to hold public office by convicted persons. Sections 16, 16A and 16B respectively deal with the subjects of trial of offences, transfer of cases and contempt of Court. Section 17 relates to application of the Code of Criminal Procedure as also power of the Accountability Court to dispense with any of the provisions of the said Code. Cognizance of offences by the Accountability Court, power of Chairman NAB or any officer authorised by him to call for information and reporting of suspicious financial transactions by the banks and financial institutions for taking prompt action are dealt with under sections 18, 19 and 20. Section 21 deals with international cooperation and requests for mutual legal assistance. Jurisdiction of Chairman NAB to investigate suspected offences is provided under section 22 while section 23 deals with the circumstances under which the transfer of property by an accused or his relatives etc, shall be void. Section 24 deals with the arrest of the accused and other ancillary matters leading to the trial before an Accountability Court. Matters in relation to voluntary return/plea bargaining, payment of loans and tender of pardon to accomplice/plea bargaining are the subject-matter of sections 25, 25A and 26. Section 27 deals with power of Chairman NAB or an officer

authorised by him to seek assistance from any department of the Federal Government etc. And section 28 pertains to appointment of members of the staff and officers of NAB. Section 29 deals with the competence of the accused to be a witness and sections 30, 31 and 31A encompass the subjects of false evidence, etc, prohibition to hamper investigation and abscondence of accused to avoid service of warrants. Section 31B lays down the procedure for withdrawal from prosecution. Section 31C provides that the Accountability Court shall take cognizance of an offence against an officer or employee of a bank or financial institution with prior approval of the State Bank of Pakistan. Section 31D deals with inquiry, investigation or proceedings in respect of imprudent bank loans etc. The matters in relation to appeal after conviction are dealt with under section 32 and the subject of pending proceedings has been dealt with under section 33.

162. Section 34 lays down procedure for framing rules for carrying out the purposes of the Ordinance, which shall form part of the Ordinance itself. The subjects of repeal and indemnity are dealt with under sections 35 and 36 whereas section 37 provides for issuance of removal of difficulties order by the President. The Schedule of Offences provides for various terms of imprisonment in relation to the offences under the Ordinance.

MAINTAINABILITY OF PETITIONS UNDER

ARTICLE 184 (3) OF THE CONSTITUTION

163. Mr. Abid Hasan Minto at the outset vehemently argued that the Federation is submitting to the jurisdiction of this Court under extraordinary circumstances and would welcome any suggestions/amendments in the NAB Ordinance, but the same may not be treated as precedent. While we appreciate the ingenuity and originality of the gracious offer made by Mr. Minto, nevertheless we are of the view that it is never safe to decide cases on concession simpliciter in matters involving questions of great public importance. It is the duty of this Court to exercise powers and functions within the domain of its jurisdiction in respect of any law or provision of law which comes for examination to ensure that the majesty of the law prevails and erosions therein are prevented so that all persons live securely under the rule of law; to promote within the limits of judicial functions, the observance and attainment of Human and Fundamental Rights and to administer justice impartially among persons and between persons and the State which is sine qua non for the maintenance of Independence of Judiciary and encouragement of public confidence in the judicial system.

164. Any legislative instrument which undermines Independence of Judiciary or abrogates or abridges any Fundamental Right may be regarded as repugnant to the spirit of the Constitution. The Superior Courts have the power to declare such legislative instrument as 'unenforceable, partly or wholly, as the case may be, depending upon the nature of legislation and facts and circumstances of each case. When the existence and safety of the country is endangered because of the economic disaster, this Court is the sole Judge, both of the proportions of the danger and when and how the same is to be prevented and avoided. This is another circumstance for adjudicating the question of validity of the NAB Ordinance.

165. It is a settled Constitutional principle that Bench should be independent of the Executive and arbiter of the Constitution to decide all disputed questions. This is so because the Superior Courts in the exercise of their judicial powers have to check the arbitrary exercise of power by any other organ or authority of the State. It rests with the Courts alone to define and limit the exercise of power by the Executive in terms of a legislative instrument. Viewed

from this angle, it is the duty of this Court to protect the Fundamental Rights guaranteed under the Constitution and the independence of the judiciary. This Court is the ultimate guardian of the rights of the people. It is, therefore, the duty of this Court to authoritatively interpret not only the validity of the NAB Ordinance but also its scope.

166. When faced with this, Mr. Abid Hasan Minto argued that the petitioners are not entitled to invoke the jurisdiction of this Court under Article 184 (3) of the Constitution, in that, they do not satisfy the criteria laid down therein. The petitioners, who are facing trial under the NAB Ordinance have an adequate remedy by way of an appeal under section 32 ibid. Those who are not under trial, have no cause of action as they do not seek enforcement of any of the Fundamental Rights.

167. We are afraid, the preliminary objection has no force inasmuch as under Article 184 (3) the only requirement is that the petition should raise a question of public importance with regard to the enforcement of a Fundamental Right. Since the NAB Ordinance affects the public at large, question of its validity is a question of public importance. Under somewhat similar circumstances, in the case of Mehram Ali (supra) the validity of the Anti-Terrorism Act was examined and a number of provisions were struck down being violative of the provisions of the Constitution. This question was also dealt with in the admitting order vide paragraphs 4 and 5 thereof, which read thus:

"The above questions are matters of first impression and of great public importance involving Fundamental Rights as ordained by Article 184(3) of the Constitution and as commented upon by this Court in the case of Syed Zafar Ali Shah and others v. General Pervez Musharaf, Chief Executive of Pakistan and others (2000 SCMR 1137) wherein it was observed that: "The validity of National Accountability Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage.

"As observed at the outset of the hearing today that in these petitions the question of validity of the impugned Ordinance alone shall be examined and not individual grievances of the petitioners raised in some of the petitions either directly or indirectly: However, the petitioners shall not be debarred from raising their

respective pleas available under the law through appropriate proceedings before appropriate fora in accordance with law. It is also clarified that admission of these petitions shall not operate as stay of proceedings before NAB, Accountability Courts or any other Court in relation to the matters arising out of the impugned Ordinance. Of course, such proceedings shall be decided on their own merit and in accordance with law. It is further clarified that the petitioners herein or any accused whose cases are pending in Accountability Courts shall be at liberty, if so advised, to approach ti: appropriate forum under the Ordinance for redress of their grievances in accordance with law."

Also refer to the following observations in the case of Syed Zafar Ali Shah (supra):

"That the Superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces: if challenged, in the light of the principles underlying the law of State necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or

authority acting on his behalf "That the Courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches dated 13th and 17th October, 1999, on the touchstone of State necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the Superior Courts "That the validity of the National Accountability Bureau Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage."

This is another circumstance for examining the vires of the NAB Ordinance. Thus visualized, the preliminary objections as to the maintainability of the Constitutional Petitions raised by Mr. Abid Hasan Minto are hereby repelled.

168. Mr. Aziz A.Munshi, learned. Attorney-General also made a halfhearted attempt to raise a preliminary objection that these petitions are not maintainable on the ground that the questions raised therein by the petitioners relate to individual grievances which can only be considered by the competent judicial forum in accordance with law. He spent quite some time to argue that after adjudication by the Court in the first instance the appellate remedy provided by law can be invoked by the petitioners depending upon merits of each case. The petitions do not involve a question of public importance with reference to enforcement of any of the Fundamental Rights conferred by Part II of the Constitution and, according to him, in any case some of the Fundamental Rights still stand validly suspended by Proclamation dated 28.5.1998.

169. We are afraid, the objections are ex facie frivolous in that a bare reading of the admitting note would show that the petitions were admitted to regular hearing inter alia to examine whether the promulgation of the impugned Ordinance whereby it deems to have come into force with effect from 1.1.1985 being retrospective, contravenes the Fundamental Rights enshrined in Article 12 of the Constitution insofar as it creates a new offence of 'wilful defaultas also the question whether the impugned F Ordinance creates a parallel judicial system in disregard of the provisions of Articles 175, 202 and 203 of the Constitution and is violative of the law laid down by this Court in the case of Mehram Ali (supra). It is, therefore, the duty of the Court to examine the points raised in the petitions and pronounce authoritative judgement thereon. The preliminary objection as to maintainability of the petitions is ex facie fallacious and is hereby overruled.

COMPETENCE OF FEDERAL LEGISLATURE

TO PROMULGATE NAB ORDINANCE

170. Before examining the merits of the case, it is necessary to deal with the preliminary objection raised by Mr. M. Akram Sheikh, learned Senior A.S.C. And supported by Mr. Abdul Hafeez Pirzada, learned Senior A.S.C. That the impugned Ordinance was wholly void and liable to be struck down in that the Federal Legislature was not competent to promulgate the same under any provision of the Constitution and/or the subjects contained in the Federal Legislative List/Concurrent Legislative List. The precise objection was that the impugned legislation exclusively falls within the competence of the Provincial Legislatures and the promulgation of the same has the effect of invading the Provincial autonomy.

171. M/s Abdul Hafeez Pirzada and Muhammad Akram Sheikh vehemently argued that under the Provincial Lists in the Government of India Act, 1935, 1956 Constitution, Interim Constitution of 1972, the Central List of 1962 Constitution as also the Federal Legislative List and Concurrent List in the 4th Schedule of 1973 Constitution, the constitution and organization of all Courts except the Supreme Court is a Provincial Legislative subject and under Article 142 (c) of the Constitution the Parliament or the President cannot make laws in respect thereof. The NAB Ordinance and the creation of Accountability Courts thereunder are violative of the Constitution and the Fundamental Rights.

172.The learned counsel further argued that clause (2) of Article 175 deals with conferring of jurisdiction on the Courts and under Article 142 there is a clear distribution of law making powers between the Parliament and the Provincial Assemblies. Under Article 142 (c) where a legislative power is not mentioned in the Federal or the Concurrent List, the residuary powers vest exclusively in the concerned Provincial Legislature. Their precise submission was that the Federal Government can set up a Court only in the Federal territory and not in any Province.

173. Mr. Abid HaSan Minto did not agree with the arguments of M/S Abdul Hafeez Pirzada and Muhammad Akram Sheikh regarding competence of the Federal Legislature to deal with jurisdiction of the Courts as also the NAB Ordinance being an invasion on the Provincial autonomy. He referred to Article 175, Entry 55 of Part I of the Federal Legislative List and Entries 1, 2, 4, 46 and 47 of the Concurrent Legislative List to contend that the Federal Government does have the power to enact laws providing for establishment of Courts, which would function in the areas whether Federal or Provincial, as specified in the enactment.

174. In rebuttal, Mr.Abdul Hafeez Pirzada submitted that some Constitutional instruments prior to 1973 invested the Provincial Legislature and Governments with power to establish Courts. In 1973 departure was made and all residuary powers were vested in the Provinces because this was one of the agreements on which consensus had been reached, that is why, there is no Entry providing that the power to establish Courts was Provincial, because that is Provincial by virtue of the residuary powers. He argued that any subject on which there is no categorical provision in the Federal Legislative List or in the Concurrent Legislative List is Provincial. He referred to Messrs Gadoon Textile Mills and 814 others v. WAPDA and others (1997 S C M R 641) to contend that just because a law is subject-matter of the Concurrent Legislative List does not ipso facto confer executive authority on the Federal Government. All that the Concurrent Legislative List says is that both the Parliament and the Provincial Legislatures shall be competent to legislate in respect of subjects provided therein, but the Concurrent Legislative List does not vest executive authority in the Federation with respect to any matter within the exclusive legislative field of a Province. In support of the above contention, reference was made to Articles 97 and 137 of the Constitution, which read as under :

"97. Subject to the Constitution, the executive authority of the Federation shall extend to the matters with respect to which Majlise-Shoora (Parliament) has power to make laws, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan.

Provided that the said authority shall not, save as expressly provided in the Constitution or in any law made by Majlis-eShoora (Parliament), extend in any Province to a matter with respect to which the Provincial Assembly has also power to make laws."

137. Subject to the Constitution, the executive authority of the Province shall extend to the matters with respect to which the Provincial Assembly has power to make laws :

Provided that, in any matter with respect of which both Majlis-eShoora (Parliament) and the Provincial Assembly of a Province have power to make laws, the executive authority of the Province shall be subject to, and limited by, the executive authority expressly conferred by the Constitution or by law made by Majlis-e-Shoora (Parliament) upon the Federal Government or authorities thereof.

He further argued that if the Federal law impinges on the legislative authority of a Province and enacts on any subject within the Concurrent Legislative List, it has to expressly oust the executive authority of a Province, otherwise even with respect to a Federal law, the executive authority will vest in the Province concerned.

175. It would be advantageous to refer to the above provisions of the Constitution. Article 175 of the Constitution reads:-

175. (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and such other Courts as may be established by law.

(4) No Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(5) The Judiciary shall be separated progressively from the Executive within [fourteen] years from the commencing day.

Entries 55, 56, 58 and 59 of the Federal Legislative List read as under:-

"55. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorised by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.

56. Offences against laws with respect to any of the matters in this Part.

58. Matters which under the Constitution are within the legislative competence of [Majlis-e-Shoora (Parliament)] or relate to the Federation.

59. Matters incidental or ancillary to any matter enumerated in this Part."

Entries 1, 2, 4, 46 and 47 of the Concurrent Legislative List are as follows:

1. Criminal law, including all matters included in the Pakistan Penal Code on the commencing day, but excluding offences against laws with respect to any of the matters specified in the Federal Legislative List and excluding the use of naval, military and air forces in aid of civil power:

2. Criminal procedure, including all matters included in the Code of Criminal Procedure, on the commencing day.

4. Evidence and oath; recognition of laws, public acts and records and judicial proceedings.

46. Offences against laws with respect to any of the matters in this List; jurisdiction and powers of all Courts except the Supreme. Court, with respect to any of the matters in this List.

47. Matters incidental or ancillary to any matter enumerated in this List.

Entry 1 of the Concurrent Legislative List relates to criminal law, including all matters included in the Pakistan Penal Code, but excluding offences against laws with respect to any of the matters specified in the Federal Legislative List. Entries 2, 3 and 4 of the Concurrent Legislative List empower the Federal Government to legislate on matters relating to criminal/civil procedures as well as evidence/oath, etc.

176. It may also be noted that section 6 Cr.P.C. Describes the criminal Courts and any other Court established by or under any other law'. Thus, the Federal Government is competent to make a law providing for special Courts and the procedure under which the Courts will function and dispense justice. The objection of the petitioners that it is a case of 'occupied field', is not well-founded, inasmuch as, such a situation arises where a legislation is already in the field, which is not the case here: It is well-settled that a Legislature, which has made any law, is competent to change, annul, re-frame or add to that law. Admittedly, the Provincial Legislatures have not made any legislation on the subject.

177. In Shamas Textile Mills Ltd. And others v. The Province of Punjab and 2 others (1999 SCMR 1477) this Court dealt with the scope of distribution of legislative powers under Articles 141, 142 and 143 of the Constitution, the conflict in legislation between the Federal and the Provincial Legislatures, resolution by the Judiciary in the event of any inconsistency and the principles relating to the doctrine of `occupied fieldas well as the Central and Provincial Law making power under Article 162 of the 1962 Constitution. The head notes on the above aspects from the judgment authored by one of us (Muhammad Arif, J.) are as under:

"Distribution of legislative powers... Conflict between the Federal Legislature .And Provincial Legislature... Resolution by judiciary... In the event of any inconsistency between the Federal Law and Provincial Law the mandate of the Constitution, as contained in Art. 143 is to prevail Principles.. Doctrine of occupied field... Applicability,

In a unitary form of Government, all the legislative powers, of necessity, vest in the Legislature of the given country. In the Federal form of Government, however, the legislative powers vest . In the respective Legislatures in line with the dispensation under the Constitutional document/s concerned.

It is in the sphere of distribution of legislative powers in a federal set up that a conflict between the legislation by the Federal/Central Legislature and Provincial/State Legislature can arise for resolution by the Judiciary.

Articles 141, 142 and 143 of 1973 Constitution respectively deal with (1) extent of Federal and Provincial Laws; (2) subject-matter of Federal and Provincial Laws, and (3) inconsistency between Federal and Provincial Laws.

Under Article 141 [(Majlis-e-Shoora) (Parliament)] may make laws for the whole or any part of Pakistan and a Provincial Assembly may make laws for the Province or any part thereof. Under Article 142 (Majlis-e-Shoora (Parliament) has exclusive powers to make laws with respect to any matter in the Federal Legislative List and [(Majlis-e-Shoora (Parliament)] and Provincial Assembly also have powers to make laws with respect to any matter in the Concurrent List. Under clause (c) of Article 142 a Provincial Assembly shall and {(Majlis-e-Shoora (Parliament)} shall not have power to make laws with respect of any matter not enumerated in either the Federal Legislative List or the Concurrent Legislative List. Further, in the event of any inconsistency between the Federal law and the Provincial law, the mandate of the Constitution as contained in Article 143 is that then the Act of [(Majlis-e-Shoora (Parliament)] whether passed before or after the Act of the Provincial Assembly, or, as the case may be, the existing law, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy, be void.

The doctrine of occupied field is a concomitant of the larger doctrine of pith and substance and incidental encroachment under. The doctrine of pith and substance with all its concomitants, postulates for its applicability on a competition between Federal legislation and Provincial legislation and it would be erroneous to invoke the doctrine where there is no such competition, merely because a Provincial law conflicts with another law which has not been passed by the Federal Legislature but deals with a matter in the Federal List. Similar is the case where a Federal Statute provides that the Provincial Government may extend the operation of a law to any part of the Province and the legislation is brought into operation by the Provincial Government, the law does not lose its Federal character and does not become invalid when it comes into conflict with another Federal law.

Article 143 does not apply to the resolution of inconsistency between two "existing laws" in that it applies only when there is a conflict between a Federal law passed under the Constitution and an existing law, whether Provincial or Federal. In such a case, if the Federal law is passed with respect to a matter in the Federal List or Concurrent List, it would be intra vires the Federal Legislature and as regards the question of its repugnancy to an "existing law", the Federal law would prevail on the principle of repeal by implication which rests on the principle that if the subject-matter of the latter legislation is identical with that of the earlier one, then, the earlier law stands repealed by the latter enactment."

178. This is not the first time that the Federal Government has promulgated laws providing for creation of offences, the procedure and the punishments therefor and the establishment of Courts in the Provinces. Enforcement of the Anti-Terrorism Act, 1997 is a classic example of the above power of the Federal Government in the recent past. Articles 175, 202 and 203 of the Constitution provide a framework on Judiciary, i,e, there shall be a Supreme Court of Pakistan, a High Court for each Province and such other Courts, as may be established by law. The words, 'such other Courts as may be established by laware relatable to the subordinate Courts referred to in Article 203 of the Constitution. Article 225 of the Constitution also empowers the Federal Government to establish Election Tribunals, which operate within the Provinces. However, the functioning of any Court or tribunal, beyond the control and supervision of the High Court concerned in terms of Article 203 of the Constitution, does not fulfil the mandatory requirement of the Constitution, in that, under Article 203 read with Article 175 of the Constitution, the supervision and control of the subordinate judiciary exclusively vests in the High Courts. The above principles were also recognized by a 5-member Bench of this Court in the case of Mehram Ali (supra) wherein it was inter alia held that the provisions of the Anti-Terrorism Act, 1997 were valid except

those which militated against the concept of independence of Judiciary or which were repugnant to the provisions of Articles 175 and 203 etc. Accordingly, directions were issued for making appropriate amendments in the Act. Some other statutes were also promulgated by the Federal Legislature including the following:

(i) The Foreign Exchange Regulation Act, 1947;

(ii) Pakistan Criminal Law (Amendment) Act, 1958;

(iii) Prevention of Anti-National Activities Act, 1974;

(iv) Suppression of Terrorist Activities (Special Courts) Act, 1975;

(v) Drugs Act, 1976;

(vi) The Emigration Ordinance, 1979;

(vii) Offences in respect of Banks (Special Courts) Ordinance, 1984:

(viii) The Terrorist Affected Areas (Special Courts) Act, 1992;

(ix) The Control of Narcotic Substances Act, 1997;

(x) Anti-Terrorism Act, 1997.

179. It would thus be seen that the Constitution does confer power on the Federal Legislature to establish criminal Courts or tribunals and not necessarily those criminal Courts, which fall within the purview of section 6 Cr. P. C. It is also beneficial to refer to the following observations of this Court in the case reported as Abdul Hafeez v. The State (PLD 1981 SC 352):

6. The next point argued was that the phrase "inferior criminal Court"

has reference only to the criminal Courts established under the Criminal Procedure Code and if any criminal Court is established under any other or special law the same would not fall within the ambit of section 435/439 and its proceedings and orders will not be revisable by the High Court. The contention has no merit and at this place we may reproduce section 6 which occurs in Part II, Chapter Il of the Cr.P.C. And reads as follows:-

"PART II-Constitution and Powers of Criminal Courts and Offices CHAPTER II-Of the Constitution of Criminal Courts and Offices A-Classes of Criminal Courts

Section 6. Classes of Criminal Courts.-Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of criminal Court in (Pakistan), namely:-

(i) Courts of Session;

(ii) .....

(iii) Magistrates of the first class:

(iv) Magistrates of the second class:

(v) Magistrates of the third class."

A perusal of the above will show that the classes of the criminal Courts as given in section 6 are not exhaustive, because, it contemplates that such Courts may as well be "constituted under any law other than this Code". This may be read with Article 175 of the Constitution of 1973, which is headed as "Establishment and jurisdiction of Courts" and states that (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and such other Courts as may be established by law.

Combined effect of these two provisions is that "criminal Courts" are not necessarily only those which are mentioned in section 6 of the Criminal Procedure Code, but this term will also include such other criminal Courts which are constituted under any other law. Thus-

(i) the Court of a Municipal Magistrate of Calcutta was held to be a "criminal Court" in Abdoola Haroon and Co. v. Corporation of Calcutta A I R 1950 Cal. 36 and Ram Gopal Goenka v. Corporation of Calcutta A I R 1925 Cal.

1251.

(ii) the Court of the village headman under the Burma Village Act III of 1898 was held to be a criminal Court in Naga E. v. King-Emperor A I R 1924 Rang. 23;

(iii) the Court of a village Panchayat constituted under U. P. Village Panchayat Act VI of 1920. Was held to be a criminal Court in Kamlapati Panth and others v. Emperor A I R 1926 All. 27; and

(iv) the Court of a village Panchayat constituted under the Punjab Village Panchayat Act II of 1939, was held as a criminal Court in Dhirjoo v. Kamna and another A I R 1950 Hima. Pra.

40.

That the constitution of criminal Courts is not confined and restricted to such Courts as are mentioned in Cr.P.C. Is further clear from the fact that the words used in section 435 are "any inferior criminal Court", and the word "any" as is well known is not a word of limitation but of enlargement of the scope of the word next following it which means that it covers all types of criminal Courts constituted under any other law as well. For the general proposition that the power to make law includes the power to enforcing their observance by creating Courts or Tribunals of justice, see Mirza Gulzar Beg v. The Station House Officer, Railway Police and others (1), and which we, may add, will embrace the power, to create Courts of various types including "criminal Courts".

7. Examined in the light of the above, it is clear, that a Drug Court is also a criminal Court.

It would be advantageous to reproduce the following observations from the case reported as Mirza Gulzar Beg v. Station House Officer, Railway Police Station, Lahore and 3 others (PLD 1977 Lahore 435), which read as under:

"6. It was then submitted that the establishment of a special Tribunal under the Defence of Pakistan Ordinance and Rules was unauthorized as the Constitution of Pakistan did not authorise setting up of such tribunals of exclusive jurisdiction and that even otherwise the establishment of such Tribunals was violative of Article 25 of the Constitution which dealt with "equality of citizens" and laid down that "(1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex alone. (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children." It was submitted that the establishment of Special Tribunals under the Defence of Pakistan Rules/Ordinance purported to be discriminatory with regard to the offences of the kind to be dealt with thereunder. The contention has no merit. It was laid down in Brig. (Retd.) F. B. Ali and another v. The State (1), that trial of persons who committed a particular type of offence or offences by a Special Tribunal did not offend against Article 25 of the Constitution. Similarly, if the Defence of Pakistan Ordinance and the Defence of Pakistan Rules are valid laws as laid down in Malik Muhammad Suleman M. N. A. v. Islamic Republic of Pakistan (2), then establishment of Special Tribunals thereunder does not suffer from any lack of power. It is well known that numerous tribunals in the country are functioning, for example, Authority under the Payment of Wages Act, Industrial Tribunals/Labour Courts, Income-tax Appellate Tribunals etc. Etc. It is not necessary for setting up a Tribunal that there should be a specific sanction in the Constitution for that purpose. The real test is to see the subject-matter and pith and substance of the relevant law under which a tribunal is established. If that law falls within the competence of the appropriate Legislature then the establishment of Special Tribunals under that law and on those subjects which fall under that law would be a matter well covered by that law and no exception could be taken against their establishment on the score on which it is being advanced before me. Indeed apart from the High Courts or Supreme Court, it will be difficult at the present day to find any Court/Tribunal which does not owe its existence to an Act of the legislature. Were I to hold that such Acts were ultra vires, practically the whole administration of justice in the country would cease to exist. The power to make laws, in my opinion, includes the power to enforce their observance by the creation of Courts or Tribunals of justice. See Parmeshwar Ahir v. Emperor (3), where it was held that Special Tribunals could be created under the Defence of India (Criminal Amendment) Act IV of 1915, which was an Act corresponding or similar to the present Defence of Pakistan Ordinance. The point raised by the learned counsel has no substance even on the bare wording of the Article 175(1) of the Constitution, where it is laid down that, "there shall be a Supreme Court of Pakistan, a High Court for each Province and such other Courts as may be established by law." Clause (2) of this Article states that, "no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law". This shows that the Constitution does confer power on appropriate Legislature to create and establish Courts of all types including Special Courts or Tribunals and can regulate their jurisdiction by the relevant law. Learned counsel cited no case in support of his plea and nor he referred to any provision of any law, Constitution or any other text. He just enunciated the proposition but did not try to substantiate or support it in any manner before me. However, I have examined the point in some detail and finding no force therein, the same is hereby repelled."

180. As to the question regarding invasion of the Provincial autonomy, it may be observed that all laws relating to the jurisdiction of Courts and for tiling cases before the Courts, whether civil or criminal, do not take their queue on the principle of federation. In civil law, it is the cause of action that determines, in most cases, where the suit has to be tiled - where the defendant resides - where the debtor resides. So, there are variety of considerations but none relatable to federal territorial character. In criminal cases, the general principles are

contained in sections 177 to 182 Cr.P.C. i,e, where the crime takes place, the Courts in that area have jurisdiction and it matters little whether the person belongs to one or the other Province. It is the crime, its nature and the place of crime that determine the place where the trial has to take place. Section 178 Cr.P.C. Authorizes the Provincial Governments to determine the venue of trial of offences. It is a law of procedure, the scheme of which is not concerned with the question of Provincial autonomy. Where a crime has taken place in various parts of the country or is spread over various places, any of the Courts of those areas is competent to take cognizance of the matter. In determining where the matter has to be tried, no consideration is given to the Provincial nature of the society, autonomous nature of the Provinces or to the fact that the accused belongs to one or the other Province. All these matters have no concern with the concept of Provincial autonomy except the High Courts, which have been created under the Constitution for each Province. Mr. Abid Hasan Minto rightly contended that the scheme of the creation of the Supreme Court is not of that character. It is not a Federal Court. It is the apex Court. It is a Court for the whole of Pakistan and it does not go by the principle of federation in that fashion in which the allocations are made and distributions take place. In its own wisdom, the Supreme Court may decide how to manage its composition. That is a different thing, but the Constitution does not do that, it looks into it as an apex Court.

181. The arguments advanced by M/s M. Akram Sheikh and Abdul Hafeez Pirzada are not sustainable. The NAB Ordinance has been competently promulgated and is neither ultra vires the Constitution nor does it invade the Provincial autonomy in any manner.

182. Let us now deal with the remaining questions formulated in the 'admitting ordertopic-wise.

WHETHER ESTABLISHMENT OF ACCOUNTABILITY

COURTS IN THEIR PRESENT FORM CREATES A PARALLEL JUDICIAL SYSTEM.

183. The details of the topic find mention in question No, (i) which reads as under:

"Whether the Impugned Ordinance creates a parallel judicial system iii disregard of the provisions of Articles 175, 202 and 203 of the Constitution and is violative of the law laid down by this Court in the case of Mehram Ali and others v. The Federation and others (PLD 1998 Supreme Court 1445)?"

184. Mr. Abid Hasan Minto argued that in Mehram All's case, this Court held that other than such judicial Courts and tribunals which find specific mention in the Constitution itself, all Courts established under Article 175 would be subordinate to the Superior Judiciary, i,e, the High Courts and the Supreme Court. This subordination of Courts and their supervision and administrative control by the superior Courts was held to be a sine qua non of the Independence of Judiciary.

185. Section 5(g) provides that a Judge of an Accountability Court will be appointed by the President after consultation with the Chief Justice of Pakistan and he can only be removed from office earlier than the statutory period by the President, after consultation with the Chief Justice of Pakistan. Section 16(c) provides that where more than one Accountability Courts have been established for an area, the Chief Justice of the High Court of the Province

concerned shall designate an administrative Judge from amongst the Accountability Courts/Judges in that area.

186. Section 16A(b) provides that where the Chairman NAB seeks transfer of a case from one Accountability Court to another within a Province, an application seeking such transfer shall be made to the Chief Justice of the High Court for that Province and where the transfer is sought from an Accountability Court in one Province to an Accountability Court in another Province, an application seeking such transfer shall be made to the Chief Justice of Pakistan. Section 32 provides that appeals from final judgement and order of an. Accountability Court shall lie to the High Court of the concerned Province. Section 34 provides that rules shall be framed by the President for carrying out the purposes of the impugned Ordinance in consultation with the Chief Justice of Pakistan.

187. Mr. Minto argued that the above provisions, entailing appointment and removal of judges, transfer of cases, designation of administrative judges, hearing of appeals and framing of rules, put the Accountability Courts amply and effectively under the subordination and control of the Superior Courts. Section 5(g) provides a statutory security of tenure in that the judges of Accountability Courts are to remain in office for two years and their earlier removal, if at all, can only take place after consultation with the Chief Justice of Pakistan and not at the whim of the executive.

188. On these premises it was argued that the Impugned Ordinance does not create a parallel judicial system and merely creates "special Courts" in pursuance of Article 175 of the Constitution to function under the effective control of the Superior Courts while guaranteeing their independence by providing statutory security of tenure tbr their judges. The principles laid down in Mehram Ali's case, it is submitted, are fulfilled.

189. Notwithstanding the above provisions cited by Mr. Abid Hasan Minto, the questions which require consideration are (i) whether the above provisions of the impugned Ordinance are violative of the principle of trichotomy of powers as envisaged under the Constitution and (ii) whether the Ordinance has created a parallel judicial system in disregard of the L provisions of Article 175, 202 and 203 of the Constitution in the light of the law laid down in Mehram Ali (supra).

190. It is true that under section 5(g) of the Ordinance a Judge of an Accountability Court is appointed by the President of Pakistan in consultation with the Chief Justice of Pakistan and he cannot be removed earlier than the statutory period of two years after consultation with the Chief Justice of Pakistan. It is also true that as a matter of fact except few, all the Judges of the Accountability Courts are from the subordinate judiciary who were appointed through a consultative process. Though the Chief Justice of Pakistan is the sole consultee for appointment of a Judge of Accountability Court, nevertheless, he had obtained written recommendations from the Chief Justices of the concerned High Courts and only those persons were appointed who were recommended by the concerned Chief Justice.

191. Be that as it may, the provision of section 5(h) which permits the employment of a retired Judge of a High Court or a retired District and Sessions Judge does impinge upon the Independence of Judiciary. The statutory appointment of persons o-her than serving Judges is two years while a Sessions Judge serving on deputation as Judge, Accountability Court can be reverted to the subordinate judiciary at any stage as no statutory terms of deputation have been prescribed. Additionally, having regard to the principles of separation of powers and in

consonance with the concept of Independence of Judiciary, judicial powers cannot be exercised by executive functionaries. The NAB Ordinance vests various judicial powers such as grant of bail and release pending trial or appeal, exclusively in an executive authority, i,e, the Chairman NAB, in violation of the principle of separation of powers.

192. Section 9(c) read with section 24(d) of the NAB Ordinance vests the power to release any person accused of an offence under the NAB Ordinance in the Chairman NAB and that too on the basis of any conditions as he may thinks fit are unwarranted. The power to set conditions for the release of an accused from custody or detention is a judicial power which ought not to be exercised except by a Court which is established under Article 175 of the Constitution and is subject to the supervisory jurisdiction of the High Court in terms of Articles 202 and 203.

193. We are of the view that for smooth and effective functioning of the Accountability Courts all the Judges should be serving District and Sessions Judges qualified to be appointed as Judges of the High Court. They should be appointed for a period of three years, in consultation with the Chief Justice of the concerned High Court and not with the Chief Justice of Pakistan as contemplated in section 5(g) of the NAB Ordinance. During their term of appointment as such they shall not be transferred to any other place nor removed from service except on ground of misconduct, or physical or mental infirmity by the competent authority i,e, the High Court concerned, after following the procedure prescribed in the relevant rules in that regard. They shall be entitled to same remuneration, privileges, facilities and allowances as are admissible to their counterparts who are performing functions in respect of Courts and Tribunals established by the Federal Government. They shall not be paid the salaries and privileges as are admissible to Judges of the High Court except security arrangements if and when required having regard to the nature of their work. Remuneration already drawn for the period they performed their functions as Judges of the Accountability Courts shall not be recovered being hit by the doctrine of past and closed transaction. Further, appointment and posting as Judge of Accountability Court shall not debar such Judge from being elevated as Judge of a High Court if so appointed in terms of Article 193 of the Constitution.

194. The present incumbents/Judges of the Accountability Courts who are not serving District and Sessions Judges shall be given an option to serve as such on the last pay/salary drawn at the time of their retirement as District and Sessions Judges for the remainder part of their term of three years otherwise their services shall be dispensed with by giving them three months salary.

195. There is a positive direction by this Court in the case of Zafar Ali Shah (supra) that the Government shall accelerate the process of accountability in a transparent and coherent way. The Accountability Courts have since been established by the "President in consultation with the Chief Justice of Pakistan who in turn had supported the recommendations of the concerned Chief Justices of the High Courts in their entirety without suggesting additional names for any of the intending appointees, it would, therefore, be in the interest of quick disposal of accountability cases and in the fitness of things that the present incumbents/Judges of the Accountability Courts are not disturbed from performing their functions at the respective places of their posting. They shall be deemed to have been appointed for a period of three years from the day they entered upon their respective offices. However, the Judges of the Accountability Courts shall perform their functions under the supervision and disciplinary control of the respective High Courts.

196. Budgetary allocations already sanctioned/ear-marked for establishment of Accountability Courts, their Presiding Officers, staff and for other allied matters, shall remain operative notwithstanding the fact that Judges of the Accountability Courts shall be under the disciplinary control of the concerned High Courts and not the Federal Government. The relevant provisions in the NAB Ordinance, therefore, be suitably amended. BAIL

197. It was held in the case of Zafar Ali Shah (supra) that the powers of the superior Courts under Article 199 of the Constitution "remain available to their full extent....Notwithstanding anything contained in any legislative instrument enacted by the Chief Executive." Whereas, section 9(b) of the NAB Ordinance purports to deny to all Courts, including the High Courts, the jurisdiction under sections 426, 491, 497, 498 and 561A or any other provision of the Code of Criminal Procedure or any other law for the time being in force, to grant bail to any person accused of an offence under the NAB Ordinance. It is well settled that the Superior Courts have the power to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as section 497 of the Criminal Procedure Code, section 9(b) of the NAB Ordinance to that extent is ultra vires the Constitution. Accordingly, the same be amended suitably.

`RETROSPECTIVITYAND 'WILFUL DEFAULT'

198. Now we will take up questions No, (ii) and (iii) of the 'admitting ordertogether as the same are inter-connected. Former question is as to whether section 2 of the NAB Ordinance whereby it deems to have come into force with effect from 1.1.1985 is violative of Article 12 of the Constitution in so far as it creates a new offence of 'wilful defaultwith retrospective effect and the latter is as to whether section 5(r) which defines `wilful defaultnegates the freedom of trade, business or profession as contemplated by Article 18 of the Constitution.

199. Under section 5(r) 'wilful defaulthas been defined as under:

"'Wilful defaulta person is said to commit an offence of wilful default under this Ordinance if he does not pay, or continues not to pay, or return or repay the amount to any bank, financial institution, co-operative society, or a Government department or a statutory body or an authority established or controlled by a Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations, instructions, issued or notified by the State Bank of Pakistan, or the bank, financial institution, cooperative society, Government Department, statutory body or an authority established or controlled by a Government, as the case may be, and a period of thirty days has expired thereafter:

Provided that it is not wilful default under this Ordinance if the accused was unable to pay, return or repay the amount as aforesaid on account of any wilful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution; cooperative society or a Government department or a statutory body or an authority established or controlled by Government."

In Black's Law Dictionary the words 'defaultand 'wilfulhave been defined as under :

"Default: By its derivation, a failure. An omission of that which ought to be done; Specifically, the omission or failure to perform a legal or contractual duty, to observe a promise or discharge an obligation (e.g. To pay interest or principal on a debt when due); or

to perform an agreement The term also embraces the idea of dishonesty, and of wrongful act, or an act of omission discreditable to one's profession "

"Wilful: Proceeding from a conscious motion .Of the will voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary.

"Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification."

"An act or omission is "wilfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. It is a word of many meanings, with its construction often influenced by its context.....

"A wilful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A wilful act differs essentially from a negligent act. The one is positive and the other negative."

"Under Bankruptcy Code provision excepting from discharge debts "for wilful and malicious injury by the debtor" , term "wilful" means deliberate or intentional, i,e, deliberate or intentional act which necessarily leads to injury

"Act is "wilful" within meaning of section of Internal Revenue Code imposing penalty for wilful failure to pay federal income and social security taxes withheld from employees if it is voluntary, conscious and intentional; no bad motive or intent to defraud the United Sates need be shown, and a "reasonable cause" or

"justifiable excuse" element has no part in definition.....

"Under the Model Penal Code, a requirement that an offense be committed "wilfully" is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a *pose to impose further requirements appears. .....

"In civil actions, the word [wilfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterise a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act

It would be appropriate to refer to some decisions of the superior Courts from Pakistan and foreign jurisdiction wherein 'wilful defaulthas been dilated upon, which would help understand the real import of the expression. In Haji Ismail Dossa v. Monopoly Control Authority (PLD 1984 Karachi 315), it has been observed:

"25. The learned Authority noted that ignorance of law is no excuse and proceeded to consider the meaning of the word "default" as interpreted by various authorities. Relying on

the authorities of our Superior Courts where word 'defaulthas been interpreted it followed the dictum that default would seem to embrace every failure by the defendant to perform his contract unless prevented by the superior force over which he had no control." The entire emphasis of the learned Authority is on the meaning of the word "default" as interpreted by the judgments of our superior Courts. In majority of these cases the Courts were considering the provisions of West Pakistan Urban Rent Restriction Ordinance, where the word "default" has been used. In section 19 of the Ordinance, however, words used are "wilfully failed to register". There is a sharp difference in the meaning of the word "default" and "wilful default" or "wilful failure". There can be no cavil with the meaning of "default" as stated by the learned Authority, but will this meaning apply to "wilful default" or "wilful failure". The fact that the word "failure" has been qualified by the word "wilful" indicates that the 'failureor 'defaultshould be wrongful or intentional. 'Wilful failureas it is apparent, will occur when a party has purposely failed to comply with the provisions or intentionally avoided to comply, knowing full well that he is duty-bound to do so. In such cases the party knows that he has to do a certain act but intentionally persists to follow a different course. If the failure is without any intention it will be a "default" or "failure" simpliciter, but if it is intentional it will amount to "wilful default" or "wilful failure". In this regard reference can be made to Horabin v. British 0 v. Airways Corporation (1), where the meaning of "wilful misconduct" has been explained in the following manner:

"Wilful misconduct is misconduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however, gross that negligence or carelessness may be. The will must be a party to the misconduct, and not merely a party, to the conduct of which complaint is made. As an example if the Pilot of an Aircraft knowingly does some thing which subsequently a Jury find amounted to misconduct, that fact alone does not show that he was guilty of wilful misconduct. To establish wilful misconduct on the part of this imaginary Pilot, it must be shown not only that he knowing (and in that sense wilfully) did the wrongful act, but also that, when he did it, he was aware that he was committing misconduct."

Barry, J., has illustrated it in the following words:

"The same act may amount on one occasion to mere negligence, and on another to wilful misconduct. Two men driving motor cars may both pass traffic light after they have changed from yellow to red. In both cases there are the same act, a same traffic light, the cross-road, and the same motor-car. In the first case the man may have been driving a little too fast. He may not have been keeping a proper look-out, and he may not have seen the light (although he ought to have seen them) until he was too close to them and was unable to stop, and, therefore, crossed the road when the light was against him. He was not intending to do anything wrong, to disregard the provisions of the Road Traffic Act or to endanger the lives of any one using the road, but he was careless in not keeping a proper look-out, and in going too fast, and as a result, without intending to do anything wrong he committed an act which was clearly an act of misconduct. The second driver is in a hurry. He knows all about the lights, and he sees in plenty of time that they are changing from yellow to red, but he says to himself; "Hardly any traffic comes out of this side road which I am about to cross. I will go on. I am not going to bother to stop." He does not expect an accident to happen but he knows that he is doing something wrong. He knows that he should stop, and he is able to stop, but does not and he commits exactly the same act as the other driver. But in that frame of mind no Jury would have very much difficulty to the conclusion that he had committed an act of wilful misconduct."

"While determining whether the appellant has wilfully failed, the finding that he has defaulted, will not be sufficient to impose penalty unless it is established that he has intentionally and purposely defaulted knowing full well that he had to get himself registered."

In The Federation of Pakistan through the General Manager, N.W. Railway, Lahore v. Syed Hasham Ali Shah (PLD 1954 Lahore 769), Ortcheson, J. (as he then was), observed:

"I therefore find myself entirely unable to agree either that misconduct can be equated with mere negligence or that, as held by Suhrawardy, J., misconduct is something distinct from wilful misconduct. The word "wilful" is defined in the Concise Oxford Dictionary as "for which compulsion or ignorance or accident cannot be pleaded as excuse: intentional; deliberate" while misconduct is defined primarily as "improper conduct". Unless his will is a party to his action, a man cannot be held guilty of misconduct. " [p.776]F

In the above, Rahman, J. (as he then was), observed:

"Misconduct" may be intentional conduct inasmuch as the act or omission may have the feature of voluntariness included in it but it should still be distinguishable from intentional or wilful misconduct. To my mind, "misconduct" includes any highly improper or wrong conduct involving something more than mere negligence and "culpable neglect of an official in regard to his office" in the words of the Oxford Dictionary, would be one form of it. Misconduct, on the one side, has to be something more than negligence simpliciter and on the other less than "wilful misconduct". At least while fixing the lower boundary of the scope of its connotation. This may be a matter of some nicety in the circumstances of a particular case but the line has to be drawn somewhere consistently with the provisions of the statute and the language of the risk-note. The expression used in Risk Note-B may be regarded as a term of art in as much it is meant to be a compendious term covering inter alia the commission of an offence like mischief, criminal misappropriation, criminal breach of trust or theft by a Railway servant. These grosser forms of misconduct (if I might so describe them) which may be taken as corresponding to the "wilful misconduct" of English law, would a fortiori be included within the term "misconduct" and consequently the necessity for equating "misconduct" with "wilful misconduct" vanishes." [p. 782]G

In re: City Equirable Fire Insurance Company's Case ((1925) 1 Chancery 407) at page 409 of report, 'Wilful Neglect or Defaulthas been dealt with in the following words:

"Wilful Neglect or Default.-An act, or an omission to do an act, is wilful where the person who acts, or omits to act, knows what he is doing and intends to do what he is doing, but if that act or omission amounts to a breach of that person's duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty "

At page 431 of the report, it is observed:

..... Brown L.J. Expressed himself as follows: "Default is a purely relative term, just like negligence. It means nothing more; nothing less, than not doing what is reasonable under the circumstances not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word which it is sought to define is `wilful'. That is a word of familiar use in every branch of law,

and although in some branches of the -law it may have a special meaning, it generally, as used in Courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." If these words of Bowen L.J. Be read without reference to the facts of the case in which they were used, I should agree that the word 'wilfulin Art.150 was superfluous, and qualifies in no way a director's liability for negligence. For a director acting under compulsion, or at a time when his mind was no longer functioning, could hardly be said to be guilty of negligence or default-words that by themselves surely, connote free agency and spontaneous action of the will

At page 434 it was further observed:

"If I may say so with respect, the difficulty is not so much in ascertaining the meaning of the adjective "wilful", as in ascertaining precisely what is the noun to which the adjective is to be applied. An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty

At page 435 it was observed:

Brett L.J. Said (1): "In a contract where the term willful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is Omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do; and also, as my Lord has put it, if it is brought to his notice that what he is doing or omitting to do, may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct; or if he does, or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission.....

In a very recent judgement passed by a Full Bench of the Lahore High Court, Lahore, the question of 'wilful defaulthas been dealt with in the case Mrs. Shahida Faisal v. Federation of Pakistan (P L D 2000 Lahore 508), relevant portion whereof reads thus:

"24. From its reading, it is quite clear that a person who does not pay/return/repay the amount due to any bank, financial institution or statutory institutions within thirty days, that person becomes wilful defaulter and is liable to be proceeded under the Ordinance. This is, however, only subject to an exception that wilful default must not have been occasioned or caused by

the lending institution due to its wilful breach of agreement/contractual obligations. Seen from the above angle, it clearly follows that the circumstances of default became an offence punishable under the first Ordinance. Thereafter; the expression of 'wilfulwas added to it at Serial No,1 in amending Ordinance No, IV of 2000. From the above, two questions arise i,e, as to what is the nature of this offence and secondly whether it was/is hit by the principle of retrospectivity. With regard to first it is also to be seen in the context of the afore-described circumstances where-under this was made an offence. The case of the petitioner is that it is a non-continuing offence while the case of the N.A.B. Is that it was/is a continuing one. Such question was considered by the apex Court of neighbouring,India in State of Bihar v. Deokaran Nenshi AIR 1973 SC 908 in following terms:-

A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirements and which involved a penalty, liability for which continues until the rules or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes and offence once and for all and an act or omission which continues and, therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

"The rule, so enunciated, was reaffirmed in AIR 1984 SC 1688." "25. The question 'whether a particular offence is continuing or notdepends upon the language of the Statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting a particular act as an offence. Turning to the matter in hand in this petition, it is quite clear that the detenus did not pay the debt within the period committed by them. They did not make any promise to pay before the Court even. Seen from the above context, we have no option but to hold that the offence committed by the detenus is a continuing offence."

"26 Seen from the above chronological perspective: we have no difficulty in saying that act/omission of non-payment/nonrepayment of loans was made a continuing offence. The nature of continuing offence cannot be examined from the date of first happening of that offence. This applies to the phenomena of default. The defaulter is under duty to pay his liability and commits continuing offence on each occasion and on each moment he does not pay his liability. The declaration of Chief Executive, can safely be said has no nexus with the nature of offence. The declaration was intended to provide opportunity to defaulter to clear their liabilities and save themselves from criminal proceedings. On this view of the matter we are of the considered opinion that offence of wilful default as defined in the Ordinance is a continuing offence."

200. As to retrospective operation of the offence of 'wilful default, the learned Full Bench of the High Court, in the above report, after referring extensive case-law on the subject from Indian jurisdiction, concluded as under:

"29. In view of the facts and circumstances of the case in hand, we are very clear in our mind that the offence of wilful default incorporated in Schedule to Ordinance No, XVIII of 1999 as amended by 19 of 1999 and 4 of 2000 is a continuing offence and petitioners who had neither

paid the principal amount nor its markup cannot seek benefit under section 12 of Constitution; that the rule of retrospectivity is not applicable to offence which is continuing in nature."

It would be advantageous to refer the case of Municipal Corporation of Delhi v. Moti Lal (1972 Cr.L.J. 1536) wherein, as to continuing offence, it was held as under :

"9. ...As we have observed, to attract section 403 Cr.P.C. In prosecutions under the Prevention of Food Adulteration Act the sample lifted must be of the same thing from the same place at the same time from the same person. If any of these four elements is missing, it cannot be said that only one offence of storing for sale has been committed. For example, if a man is driving his car late in the evening without lights and is stopped and challaned, it cannot be said that he cannot be challaned again at all during the course of the same evening. The prohibition is with regard to driving after lighting up time without lights. If a man is caught once, it gives him no immunity that he can continue the offence throughout the evening. But he cannot be challaned from this offence more than once at the same time and at the same place. Similarly, storing for sale of any adulterated article of food is a continuing offence and in any case if the storing is at more than one place and samples are lifted from two places at different times, there will be two distinct offences."

201. For the last several years there has been tremendous increase in allegations of massive corruption against divergent strata of the society. The necessity for creating the offence of 'wilful defaultarose because in the past the prosecution agency and other Government agencies had not properly carried out their public duty to investigate the offences disclosed due to the alleged involvement of several persons holding high offices in the executive, public offices, etc. Indifferent/casual attitude of the concerned agencies to conduct and proceed with the investigation is understandable. This is, indeed, a grave situation. This Court can take judicial notice of the fact that great loss of public revenue owing to enormous corruption and failure to recover the looted money through huge bank loan defaults pose a serious threat to economic life, financial stability, credit and security of Pakistan including the unity and integrity of the nation. These are the circumstances in which the vires of the impugned Ordinance are to be judged, which was promulgated for an expeditious and thorough probe into corruption and corrupt practices and holding accountable those accused of such practices, which had already been delayed for several decades. The validity of the impugned Ordinance is also to be judged keeping in view the extraordinary circumstances prevailing in the country and the adverse impact of lacking probity in the public life leading to highest degree of corruption. Such a situation has also adversely affected the foreign investment and funding from the International Monetary Fund as well as the World Bank who have warned that future aid to Pakistan shall be subject to the requisite steps being taken to eradicate corruption. If the pervading corruption in the society is permitted to continue unchecked it would lead to economic disaster.

202. It was on 12th October, 1999, that the situation prevailing in the country in the sphere of economic debacle was recognised. The factors leading to the above situation on the ground, included the acts and omissions of persons who were the Members of the National and Provincial Assemblies, the Senate, the Civil Services, in business and/or working for gain in other disciplines in the country.

203. In Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (P L D 2000 SC 869) this Court took notice of the pleadings of the

parties, and after considering the adverse effects of the inaction etc of all concerned to collect the looted wealth of the country from those who were responsible therefor, it was observed that the action taken on 12-10-1999 was justifiable and that the speeches of the Chief Executive dated 13-10-1999 and 17-10-1999 correctly spelt out the plan/scheme to be adhered to by him for the purposes of making recovery thereof. It was held that Chief Executive of the Islamic Republic of Pakistan is entitled, inter alia, to perform all such acts and promulgate all legislative measures as would establish or lead to the establishment of the declared objectives of the Chief Executive as spelt out in his speeches referred above. The Chief Executive in his speech dated 17-10-1999 clearly stated:

"Revival of economy is critical. Our economy is in deep trouble and revolutionary steps are needed to put it back on track. The Pakistani people were subjected to betrayal of their trust. Their hard-earned money was frozen or taxed in violation of State commitment. We need to restore this trust."

"The process of accountability is being directed especially towards those guilty of plundering and looting the national wealth and tax evaders. It is also directed towards loan defaulters and those who have had their loans rescheduled or condoned. The process of accountability will be transparent for the public to see. My advice to the guilty is to return voluntarily national wealth, bank loans and pay their taxes before the hand of law forces them to do so with penalty. As a last chance I urge all defaulters to come forth and settle their debts within a period of four weeks, after which their names will be published and the law will take its due course. They owe this to Pakistan and I expect their spirit of patriotism to guide them."

It was in the above backdrop that the impugned Ordinance was promulgated and amendments made therein, subsequently. The plea . Taken by the petitioners that a person entering into contractual obligations before the promulgation of the impugned Ordinance cannot be made to suffer for his alleged failure to clear his said indebtedness under the impugned Ordinance and that too, as an offence, loses all significance in the light Of the above circumstances. It is not the case of any one of the petitioners that they have been willing to account for the ill-gotten wealth and that it was not their inaction which has placed them in the predicament in which they find themselves today. The sources of amassing wealth by the specific individuals and juristic persons being what they are, they should not expect any lenient view in the cases against them provided the action taken against them is not contrary to a valid piece of law. More so, when the efforts on behalf of NAB in putting them under notice of 30-days in terms of section 5(r) of the impugned Ordinance also fell on deaf ears. Viewed in this perspective, the transformation of the alleged civil action flowing out of the contractual obligations, into an "offence" under the impugned Ordinance, does not suffer from,any flaw whatsoever.

204. An eleven-Member Bench of this Court in Review Petitions Wasim Sajjad and others v. Federation of Pakistan through Secretary, Cabinet Division and others (P L D 2001 Karachi 233) upheld the judgment in Zafar Ali Shah (supra). In Zafar Ali Shah (supra), shortest possible time was given to the Chief Executive for restoration of civil rule after achieving the declared objective which necessitated the military take over and proclamation of emergency spelt out from the above speeches of Chief Executive dated 13th and 17th October, 1999. We also hereby reaffirm by way of emphasis that the validation and legitimacy accorded to the present Government is conditional, inter-linked and intertwined with the holding of general elections to the National Assembly, the Provincial Assemblies and the Senate of Pakistan within the time frame laid down by this Court leading to restoration of the democratic institutions, that is to say, the elections must be held and Assemblies restored by 12-10-2002.

205. It is true that unless a proper investigation is made and it is followed by equally proper prosecution, the efforts to recover the looted money would be an exercise in futility. The need for a strong and competent prosecution machinery is a sine qua non for a fair and competent investigation. Investigation and prosecution are inter-linked. If the conduct of those who are guilty of not discharging their contractual obligations in the re-payment of loans then in order to revive the economy in the light of the declared objectives of the Chief Executive particularly his speech dated 17-10-1999 and the law laid down in Zafar Ali Shah's case (supra), there does not appear to be any bar to promulgate the legislation to make such conduct amounting to an "offence" and the same must be duly investigated_ and the offender against whom a prima facie case is made out should be expeditiously prosecuted through a fair trial. It is well known that the international agencies like the International Monetary Fund and the World Bank have warned Pakistan time and again that future aid to the country may be subject to appropriate steps being taken to eradicate corruption.

206. In the Commonwealth Finance Ministers Meeting held on 21-23rd September, 1999 noticed in the case of Zafar Ali Shah's case (supra) it was inter alia observed that: Corruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly." In this context and in the interest of state survival any appropriate strategy/legislation for ameliorating the situation and reviving the economy has to be judged in the light of the test laid down in Zafar Ali Shah's case (supra). It may be re-emphasised that in the judgment in Zafar Ali Shah's case (supra), which was upheld in review, it was stated in unambiguous terms that the Chief Executive is entitled to perform all acts and promulgate all legislative measures as are highlighted in paragraph-6 of the Short Order, clause (v) whereof reads as under :

"(v). That these acts, or any of them, may be performed or carried out by means of Orders issued by the Chief Executive or through Ordinances on his advice."

207. The de facto and de jure status of the present regime was recognised for a transitional period to prevent any further destabilisation and with a view to create corruption free atmosphere at national level through transparent accountability; revive the economy before restoration of democratic institutions under the Constitution, in that, the Constitution offered no solution to the crisis. In these circumstances, the Court took judicial notice of the fact that the people of Pakistan generally welcomed the army takeover due to avowed intention of the Chief Executive to initiate the process of across-the-board and transparent accountability against persons from every walk of life against whom corruption and abuse of national wealth have been alleged, and take appropriate measures for stabilising the economy and restoring the democratic institutions within the shortest possible time after achieving his declared objectives. This will be another factor which shall be kept in mind while examining the validity of the impugned Ordinance.

208. Yet another factor, which is to be taken into consideration while judging the validity of the impugned Ordinance would be that one of the grounds on 'which validation and legitimacy was accorded to the present regime as stated in the case of Zafar Ali Shah (supra) was that the representatives of the people, who were responsible for running the affairs of the State were themselves accused of massive corruption and corrupt practices in the public as well as private spheres and were benefiting therefrom. They were resisting the establishment of good governance. There was a general perception that corruption was being practised by diversified strata including politicians, parliamentarians, public officials and ordinary citizens

and there was no political and economic stability in the country. The bank loan defaults were rampant, in that, as per report of the Governor, State Bank of Pakistan, Rs,356 billion were payable by the bank defaulters upto 12.10.1999. There being no accountability and transparency, economic stability in the country was highly precarious and there was an overall economic slowdown as GDP growth during the past three years had hardly kept pace with the growth of population and that Pakistan has a debt burden which equals the country's entire national income.

209. The seven principles of Public Life, stated in Volume-I of Lord Nolan's Report (1995) titled: "Standards in Public Life", are also needed to be kept in view. The principles are as follows: .

The Seven Principles of Public Life

Selflessness

Holders of public office should take decisions

solely in terms of the public interest. They should

not do so in order to gain financial or other

material benefits for themselves.

Integrity

Holders of public office should not place

themselves under any financial or other obligation to outside

individuals or organisations that influence them in the

performance of their official

duties.

Objectivity

In carrying out public business, including making

public appointments, awarding contracts, or

recommending individuals for rewards and

benefits, holders of public office should make

choices on merit.

Accountability

Holders of public office are accountable for their

decisions and actions to the public and must

submit themselves to whatever scrutiny is

appropriate to their office.

Openness

Holders of public office should be as open as possible

about all the decisions and actions that they take. They should give reasons for

their decisions and restrict information only when

the wider public interest clearly demands.

Honesty

Holders of public office have a duty to declare

any private interests relating to their public duties

and to take steps to resolve any conflicts arising in

a way that protects the public interest.

Leadership

Holders of public office should promote and

support these principles by leadership and

example."

210. If the conduct of a holder of public office amounts to an offence, it must be investigated forthwith and if a prima facie case is made out against the offender we see no reason why he should not be prosecuted for the majesty and maintenance of rule of law. A duty is cast on the judiciary to ensure the rule of law and guard against erosion therein. In the past the Government agencies had failed to perform their statutory duties to investigate matters and to prosecute all persons who were found to have committed offences of corruption, corrupt practices and recovery of Government dues with a view to protect the persons involved, who were very influential and powerful.

211. In view of persistence of corruption and genuine emergent need for the recovery of outstanding amounts from those persons who have committed default in the repayment of amounts to banks, financial institutions, Government and other agencies and all measures having failed to recover the same through ordinary Courts of law, it became necessary to promulgate this extraordinary legislation in the extraordinary circumstances prevalent in the

country. Had the Government agencies and the Revenue authorities performed their duties and legal obligations justly, fairly and in accordance with law and had there been proper investigation into alleged offences committed by important politicians, bureaucrats and the persons who were recipient of money from any unlawful sources given for unlawful considerations, there would have been no need to promulgate the impugned Ordinance. But when the matter discloses a clear nexus between crime/ corruption and powerful persons holding public offices which poses a serious threat to the economy as well as the very existence of the country, then to prevent erosion of the rule of law and to take steps for restoration of democracy in the country within the time frame laid down by this Court, it will have to be examined whether the mechanism involved for recovery of amounts from the wilful defaulters for reviving the economy is in conformity with the declared objectives of the Chief Executive. Applying the above principles, we are led to irresistible conclusion, after hearing the learned counsel for the petitioners at length, that there was a need for creation of an offence of 'wilful defaultand mechanism for recovery of the same as is purported to have been done under section 5(r) of the impugned Ordinance.

212. Also refer the Prevention of Corruption Act, 1947 (Act II of 1947) which was a political dispensation under the colonial rule, wherein a post war situation was taken note of, in that a lot of things were happening in the society which were breeding corruption, necessitating the enactment of the above Act. The Act became a permanent law and is on the statute book even today.

213. Reference may also be made to 'The Racketeer Influenced and Corrupt Organizations Act, 1970of USA, commonly known as RICO Act. It was passed by the United States Congress as a powerful tool in the fight against organized crime, which enables persons financially injured by a pattern of criminal activity to bring a RICO claim in state or federal Court, and to obtain damages three times the amount of their actual harm, plus their attorneys fees and costs. It has not only been successfully used against members of the Mafia, but also against legitimate business persons, etc. (Refer http://www.Ricoact.Com/).

214. It would thus be seen that the RICO Act was meant to protect society from the malfeasance of organized crime, but it was also intended to protect business from corruption and weed out criminal business practices. It can also be used to recover losses caused by business corruption. The RICO Act is complicated, but no more complicated than many other laws. If a business runs across corruption in its midst, it is the best weapon. Refer Civil RICO Report, Vol. 16, No,1, May 10, 2000. In section 1961 of the RICO Act, the "racketeering activity" has been defined thus:

"Sec.

1961. Definitions As used in this chapter -

(1) "racketeering activity" means

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year;

(B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1081 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-forhire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-2424 (relating to white slave traffic),

(C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labour organizations) or section 501(c) (relating to embezzlement from union funds),

(D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States,

(E) any act which is indictable under the Currency and Foreign , Transactions Reporting Act, or

(F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain."

Key Concepts of RICO Jurisprudence are illustrated in the following cases:

"RICO encompasses both legitimate and illegitimate enterprises. United States v. Turkette, 452 U.S. 576 (1981)

Under RICO, at section 1962(c), there must be a distinction between the RICO "person" and the RICO "enterprise." An individual cannot "associate" with himself. This is known as the person/enterprise distinction. River City Markets, Inca v. Fleming Foods West, Inc., 960 F.2d 1458 (9th Cir. 1992)

With regard to the person/enterprise distinction, one can associate with a group of which one is a member while the member and the group remain distinct. Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339 (3d Cir. 1995)

RICO's person/enterprise distinction is NOT met by alleging that a corporate person associated with its own employees, agents, subdivisions or affiliates. Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339 (3d Cir. 1995)

Under RICO, section 1962(c), there also must be a distinction between the enterprise and the racketeering activity; in other words, members of an enterprise must be linked by more than their participation in the same pattern of racketeering activity. This is known as the racketeering activity/enterprise distinction. McDonough v. National Home Ins. Co., 108 F.3d 174 (8th Cir. 1997)

A RICO enterprise need not be economically motivated. National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1993)

To be liable under section 1962(c), a person must participate in the operation or management of the enterprise itself. Reyes v. Ernst and Young, 507 U.S. 170 (1993)

Securities fraud is not a predicate act UNLESS the defendant has already been criminally convicted for the offense. 18 U.S.C. 1964(c)

A RICO claim can be predicated on mail and wire fraud alone but should not be so predicated. "Common Sense"

The factors of continuity plus relationship combine to produce a pattern. ,H.J. Inc. v. Northwestern Bell Tele. Co., 492 U.S. 299 (1989)

A close-ended pattern must generally last one year Grimmet v. Brown, 75 F.3d 506 (9th Cir. 1996)

A plaintiff only has standing to the extent that the injury to business or property occurred "by reason of " the conduct constituting the violation; a defendant who violates section 1962(c) is not liable for treble damages to everyone who might have been injured by other conduct nor is the defendant liable to those who have not been injured. Sedima, S.P.R.L. v. Imrex co., Inc., 473 U.S. 479 (1985) Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992)

Always bring a section 1962(c) and (d) claim; never bring a section 1962(a) or section 1962(b) claim without the section 1962(c) claim. The Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. 1961-68 (1994)

State Courts have concurrent jurisdiction over RICO claims. Taftlin v. Levitt, 493 U.S. 455 (1990)."

"See http://www.Ricoact.Com/rules_of_rico_jurisprudence.Htm.

215. The matter may be looked at from another angle as well. The mere fact that at the time of entering into an agreement no punishment was prescribed for default in payment of loan or bank dues, as the case may be, cannot possibly mean that the duty of the defaulter to re-pay the loan/dues also expired. The duty still remains. It continues till the loan/dues are repaid as required under the agreement. Therefore, non-payment of loan/dues in terms of the agreement within the contemplation of section 5(r) is a continuing breach of duty or obligation, which itself is continuing if duty to re-pay the loan/dues as aforesaid continues from day to day and the nonperformance of that duty/obligation from that point of view must be held to be a continuing default in the repayment of loan. Therefore, if it is continuing, there is a fresh starting point of limitation every day as the wrong continues. Viewed from this angle, there is no limitation and no question of retrospectivity involved as long as the duty remains undischarged.

216. It is also instructive to refer to section 23 of Limitation Act, 1908 which prescribes that in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues. It is within the competence of the Legislature to treat a continuing wrong as an offence independent of the contract so that the offence" so created is applicable to a case where there is a continuing breach of contract which has been converted into an offence, with a view to helping the general public at large in that sphere. It could, therefore, be rightly urged that there will practically be no limitation of prosecution under section 5(r) of the Ordinance as long as the duty to re-pay the loan/debt/bank dues continues under an agreement or contract and the same remains undischarged. The offence contemplated under section 5(r) is the one which is committed over a span of time, therefore, the last act of the offender controls the innocence or otherwise of the party. The nature of default contemplated here is not the default which is committed once and for all. It is a continuous default. Thus on every occasion the default occurs and recurs, it constitutes an act or omission which continues and is therefore a fresh act. Looked at from this angle the offence contemplated under section 5(r) is not retrospective but prospective in nature.

217. Notwithstanding the above findings, the next question which requires consideration whether section 5(r) is hit by clause (1) of Article 12 of the Constitution which contemplates thus:

"(1) No law shall authorize the punishment of a person -

(a) for an act or omission that was not punishable by law at the time of the act or omission; or

(b) for an ..,ffence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed."

218. Article 12 of the Constitution does not deprive the legislature of its power to give retrospective effect to an enactment, which the legislature is competent to enact. It merely provides that no law shall authorise the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission; or for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed. Seen in this perspective, the act of 'wilful default', is not an act or omission which was punishable by law at the time the same was committed but an act or omission committed 30-days after the promulgation of the Ordinance whereby the offence of `wilful defaultunder section 5(r) was created. As stated above, it was in the nature of a continuous wrong, which was converted into an offence prospectively i.e, in a case where such wrong/wilful default continued even after the expiry of 30-days of the promulgation of the impugned Ordinance and not retrospectively. In other words, it is a case where the punishment is prescribed in relation to the breach of a continuing duty which is not performed even within 30-days after the coming into force of the Ordinance. By no stretch of imagination it could be termed retrospective in operation, particularly, in view of the statement made by Mr. Abid Hasan Minto on behalf of the Federation that no prosecution was launched in respect of `wilful defaultwhere re-payment of loan etc. Was made good within 30-days of the promulgation of the Ordinance.

219. So far as the punishments and creation of offences by the impugned Ordinance are concerned, they are protected by Article 12 of the Constitution, in that, under Article 12 of the Constitution ex post facto legislation can neither create new offences nor provide for more punishment for an offence than the one which was available for it when committed. This is the limited impact of Article 12 of the Constitution. Therefore, the only prohibition as to retrospectivity of the offence, contemplated under clause (1) (a) (b) of Article 12 of the Constitution, is not attracted here. However, in order to ensure across-the-board accountability we order the following directions for the application of section 5 (r) of the impugned Ordinance. The same shall be suitably incorporated in the Rules to be framed under section 34 of the Ordinance, which shall on promulgation become part of the Ordinance.

(i) No prosecution for 'wilful defaultshall be launched before the expiry of 30 days statutory notice and an additional 7 daysnotice shallalso be served on the alleged defaulter to satisfy Governor, State Bank of Pakistan that he has not committed any 'wilful default'. The report of Governor, State Bank of Pakistan as to the prima facie guilt or innocence will be subject to the final decision of the Accountability Court. The same procedure will be followed with regard to recovery of other public dues falling within the contemplation of section 5(r) of the Ordinance. The Governor, State Bank of Pakistan shall record his recommendations within 7-days with reasons therein.

(ii) Any settlement arrived at with the defaulters by the Chairman, National Accountability Bureau or compounding of any offence shall be subject to the decision of the Accountability Court.

(iii) In respect of any person who is being investigated under the Ordinance, if the final report after full investigation, is that no prima facie case is made out to proceed further, and the case must be closed against him, that report must be promptly submitted to the

Accountability Court concerned for its satisfaction that the concerned authorities have not failed to perform their legal obligations and have reasonably come to such conclusion. The final decision in the matter would be by the concerned Accountability Court. The Accountability Court shall conclude the trial expeditiously after giving fair opportunity to the accused.

(iv) Everyone against whom there is reasonable suspicion of commission of a crime under the NAB Ordinance is to be treated equally and if need be, proceedings may be held in camera to the extent necessary in public interest and to avoid prejudice to the accused.

(v) The concerned prosecuting agencies shall conduct their responsibilities and functions without being influenced by extraneous consideration.

(vi) The Chairman NAB shall ensure reasonable and expeditious time-frame for the completion of investigation and launching of prosecution.

(vii) The Chairman NAB should take time-bound steps to establish a grievance redressal mechanism to promptly deal with the complaints received from the public against the Bureau.

(viii)While attending to nature of duty and functions of the officer engaged in the investigation of an offence, the following observations made in Union of India and Others v. Sushil Kumar Modi and others (1997 (4) SCC 770), be kept in view:

"4. At the outset, we would indicate that the nature of proceedings before the High Court is somewhat similar to those pending in this Court in Vineet -Narain v. Union of India (1996 (2) SCC 199) and Anukul Chandra Pradhan v. Union of India (1996 (6) SCC 354) and, therefore, the High Court is required to proceed with the matter in a similar manner. It has to be borne in mind that the purpose of these proceedings is essentially to ensure performance of the statutory duty by the CBI and the other Government agencies in accordance with law for the proper implementation of the rule of law. To achieve this object a fair, honest and expeditious investigation into every reasonable accusation against each and every person reasonably suspected of involvement in the alleged offences has to be made strictly in accordance with law. The duty of the Court in such proceedings is, therefore, to ensure that the CBI and other Government agencies do their duty and do so strictly in conformity with law. In these proceedings, the Court is not required to go into the merits of the accusation or even to express any opinion thereon, which is a matter for consideration by the competent Court in which the charge sheet is filed and the accused have to face trial. It is, therefore, necessary that not even an observation relating to the merits of the accusation is made by the Court in these proceedings lest it prejudice the accused at the trial. The nature of these proceedings may be described as that of 'continuing mandamusto require performance of its duty by the CBI and the other Government agencies concerned. The agencies concerned must bear in mind and, if needed, be reminded of the caution administered by Lord Denning in this behalf in R. v. Metropolitan Police Commr., (1968(1) All ER 763/1968 (2) QB 118). Indicating the duty of the Commissioner of Police, Lord Denning stated thus : (All ER p.769):

`I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State,...I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone."

The nature of such a proceeding in a Court of law was also indicated by Lord Denning, as under :

`A question may be raised as to the machinery by which he could be compelled to do his duty. On principle, it seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced. I think, either by action at the suit of the Attorney-General ; or by the prerogative order of mandamus." (Emphasis supplied)."

(ix) Unless a competent proecution follows a fair and competent investigation, the ultimate analysis would be violative of the principle of fair trial. A panel of competent lawyers of experience and impeccable reputation should be prepared with the advice of Ministry of Law, Justice and Human Rights. Their services should be utilised as prosecuting lawyers in cases of significance on reasonable remuneration. For terms and conditions of their services, guidance may be sought from the Central Law Officers Ordinance, 1970, prescribing method for the appointment -of Standing Counsel and Deputy Attorney-General s.

220. Adoption of the above course shall not affect the initiation of investigation and its continuation to its logical end or the proceedings pending before any authority/Court under NAB Ordinance. These instructions are being issued under Article 37 read with Article 187 of the Constitution, which empowers this Court to issue any appropriate directions, orders or decrees, as may be necessary for doing complete justice in any case or matter pending before it which are enforceable throughout Pakistan.

221. Suitable amendments shall also be made under section 37 of the Ordinance to provide for consultation by the President of the Islamic Republic of Pakistan with the Chief Justice of Pakistan for modifications, additions or omissions. This disposes of questions No, (ii) and (iii) of the `admitting order'.

POWER OF CHAIRMAN NAB TO FREEZE PROPERTY

222. Section 12 of the NAB Ordinance confers upon the Chairman NAB, the un-challengeable power to freeze the property of an accused. The power to deprive an individual of the legitimate use of his property is no minor concern but is one which goes to the root of the case. It is the duty of the Superior Courts to protect citizens from being deprived of their liberty and property, except in accordance with the Constitution and the laws, subject to reasonable restrictions. Section 12 ibid, in so far as it vests the power in the Chairman NAB to pass any order of seizure, freezing, attachment or prohibitory order by taking possession, or by appointment of receiver, or prohibiting the payment of rent or delivery of property to

the accused or to any other person on his behalf which shall remain in force for a period of not exceeding thirty days, suffers from excessive delegation. The ends of justice would be fully met if the period contemplated under the first proviso to clause (c) of section 12 is curtailed to fifteen days. Likewise, the provisions contained in clause (f) thereof that the order of freezing mentioned in section 12(a) to (e) shall, as the case may be, remain operative until final disposal by the Accountability Court or the Appellate Forum impinges upon the independence of Judiciary and suffers from excessive delegation in that it is for the Accountability Court alone to determine the period of duration during which the freezing shall remain operative till final disposal of the reference by the Accountability Court. Similarly, clause (f) also makes operative the freezing order notwithstanding filing or pendency of appeal under the Ordinance. This provision is against the concept of Independence of Judiciary. It is true that section 12 (a)(c)(iv) of the Ordinance provides for interlocutory measure to ensure that property relating to the accused is not dealt with by him or on his behalf pending investigation. Similar provisions exist in other laws, in respect of civil as well as criminal liability. Rules 1 and 2 Order XXXIX of the Code of Civil Procedure provide for passing of such orders. Section 37(2) of the Control of Narcotic Substances Act, 1997 and the Criminal Law Amendment Act, 1964 also contemplate powers to freeze property. Nevertheless, it is for the appellate Court alone to decide having regard to the merits of each case justly, fairly and in accordance with law whether or not the order of freezing shall remain operative upon filing of or during the pendency of an appeal under the Ordinance. However, the ends of justice will be fully met if clause (0 of section 12 of the Ordinance providing for continuation of freezing of property after the accused has been acquitted is suitably amended to provide for continuation of such freezing for a period not exceeding ten days to be reckoned- from the date of receipt of the certified copy of the order to enable the NAB for tiling an appeal against the acquittal order. Thereafter it would be for the appellate forum to pass appropriate orders.

223. Clause (c) of section 13, which relates to claim or objection against freezing, also denies the right of appeal against an order made under section 12 of the Ordinance. In Pakistan through Secretary, Ministry of Defence v. The General Public (P L D 1989 Peshawar 6) it was held by the Shariat Appellate Bench of this Court, as under:

"The Federal Shariat Court in its impugned judgment has also held that the right of appeal was recognised by the Holy Prophet (Peace be upon him) as well as by the Khulafa-e-Rashideen and discussed this question in great detail. Nothing has been shown to us in refutation thereof. The plea, thus, that barring the right of appeal does not offend against the Injunctions of Islam, cannot be accepted."

The purported denial of the right of appeal is violative not only of Article 2A of the Constitution but also power of the Superior Courts to correct such orders through exercise of. Their Constitutional jurisdiction. Clearly, the denial of right of appeal is contrary to the norms of justice as also violative of principles of natural justice. Also refer Messrs Chenab Cement Product (Pvt) Ltd. And others v. Banking Tribunal, Lahore and others (PLD 1996 Lahore 672). Thus, section 13(c) which denies the right of appeal is violative of the principles of the Islamic Injunctions and the same needs to be suitably amended so as to allow right of appeal to the accused as well as to the non-accused/third party whose claim or objection against freezing of property is dismissed by the Accountability Court.

BURDEN OF PROOF

224. Under section 14(d) of the impugned Ordinance, reproduced in the earlier part of the judgement, the 'burden of proofhas been placed on the person accused of an offence under section 9 (a) (vi) and (vii) ibid. Placing of 'burden of proofon an accused is not an unfamiliar concept in legal parlance. There is a large number of Statutes wherein the 'burden of proofhas been placed on the accused. Following is the list of some of the laws, which place the burden of proof on an accused:

"Section 178-A of the Seas Custom Act (VIII of 1878)

Section 24 (1) of the Foreign Exchange Regulation Act (VII of 1947)

Section 34 of the Drugs Act (XXXI of 1976) Section 9 of the Passports Act (XX of 1974)

Sections 8 and 14 of the Essential Supplies Act (III of 1957)

Section 5 of the Explosive Substances Act (VI of 1908)

Sections 8 and 13 of the FATA Food Stuff Control Regulations (I of 1994)

Sections 8 and 12 of Foodstuffs (Control) Act (XX of 1958) Sections 5 and 19 of Hoarding and Black Market Act (XIV of 1948) Section 33 of Prevention of Smuggling Act (XII of 1977)

Section 14 of the Price Control and Prevention of Profiteering and Hoarding Act (XXIX of 1977)

Section 112 of the Railways Act (IX of 1890) Section 9 of the Foreigners Act (XXXI of 1946) Section 77 of the Punjab Excises Act (I of 1914)

Section 9 of the Offences in Respect of Banks (Special Courts) Ordinance, 1984

Reference may also be made to the following laws which require an accused to rebut a statutory presumption against him:

Sections 4 and 5 (3) of the Prevention of Corruption Act (II of 1947)

Sections 29, 30 and 68 of the Control of Narcotic Substances Act (XXV of 1997)

Section 25 of the Terrorist Affected Areas (Special Courts) Act (X of 1992)

Section 8 of the Suppression of Terrorist Activities (Special Courts) Act (XV of 1975)

Sections 4 (2) and 9 of the Prevention of Gambling Act (XXVIII of 1977)

Section 32 of the Dangerous Drugs Act (II of 1930) Section 10 of the Opium Act (I of 1878)

Section 76 of the Punjab Excises Act (I of 1914)

Section 9 of Punjab Prevention of Gambling Ordinance (VII of 1978)

Section 11 of the Punjab Vagrancy Ordinance (XX of 1958) Section 51 of the Sindh Abkari Act (V of 1878)

Section 8 of the West Pakistan Prohibition of Opium Smoking Ordinance (II of 1960)

Section 8 of the Ehtesab Act (IX of 1997)

Section 24 (2), (3) and (4) of the Foreign Exchange Regulation Act (VII of 1947)

Where 'burden of proofis placed or presumptions are raised by a law on a class of persons that it creates, then as long as such presumptions are raised or 'burden of proofis placed uniformly in respect of persons to whom such a law applies, there is no violation of the equality clause/s of the Constitution. Laws raising presumptions against and placing onus of proof upon an accused have repeatedly been challenged in various jurisdictions and it has consistently been the view of Courts that subject to their uniform application and there being a rational connection between the facts presumed and the facts proved, such laws are valid. It would be advantageous to refer to case-law on the question of placing of 'burden of proofon the accused and 'presumptionagainst him in regard to a particular offence provided in a special enactment. In State of Madras v. A. Vaidyanatha Iyer (PLD 1958 SC (Ind.) 264), it was observed:##TE ##

"Therefore where it is proved that a gratification has been accepted, then the presumption shall at once arise under the section. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. It may here be mentioned that the Legislature has chosen to use the words "shall presume" and not "may presume", the former a presumption of law and latter of fact. Both these phrases have been defined in the Indian Evidence Act, no doubt for the purpose of that Act, but S. 4 of the Prevention of Corruption Act is in pari materia with the Evidence Act because it deals with a branch of law of evidence e.g., presumptions, and therefore should have the same meaning. "shall presume" has been defined in the Evidence Act as follows:

"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

It is a presumption of law and therefore it is obligatory on the Court to raise this presumption in every case brought under S. 4 of the Prevention of Corruption Act because unlike the case of presumption of fact, presumption of law constitute a branch of jurisprudence. While giving the finding quoted above the learned Judge seems to have disregarded the special rule of burden of proof under S.4 and therefore his approach in this case has been on erroneous lines."

In Muhammad Siddiq v. The State (1977 S C M R 503), the following view was taken:

"6. The learned counsel for the petitioner- argued before us that the approach of the Courts below was erroneous, inasmuch as they had discussed the case from the angle whether the defence plea was true or not, whereas the correct approach should have been that the prosecution had established its case. We do not find much force in this submission. It is an admitted fact that the tainted money was recovered from the petitioner. Thereafter the onus shifted upon him to explain how he had received it. Consequently, the Courts below were justified in closely analysing the defence plea advanced by the petitioner.

It was next contended that the High Court had misread the evidence while holding Ghulam Rasul to be an independent witness. He referred us to certain statements made in Court to show that Ghulam Rasul was the cousin brother of the complainant. Since the conviction was based on the evidence of the complainant coupled with that of Ghulam Rasul, who was erroneously considered to be an independent witness, it (conviction) stood vitiated.

It is true that Ghulam Rasul P.W. Was a relation of the complainant, but we are of the opinion that in the circumstances of the case the conviction is not liable to be set aside merely on account of the above misreading of evidence. The petitioner was caught red-handed with the tainted money and, thereafter, the onus on the prosecution was very light to establish his guilt. The remaining evidence on the record was sufficient to discharge the said burden."

Also refer Ghulam Ali v. The State (PLD 1963 (W.P.) Karachi 582) wherein it was held:

"9. In Ikramuddin v. The State (PLD 1958 Kar. 21), Bachal, J., in respect of a similar matter under the Anti-Corruption Act, opined that the presumption against the accused under section 4 of the Act. Is not to be drawn until the explanation offered by the accused is considered and found unsatisfactory. Where the accused offers a 'reasonable explanation which is acceptable and which raises a doubt as to the truth of the prosecution case, the presumption cannot be drawn. But if the Court feels justified in drawing a presumption against the accused after due consideration of the explanation, then the burden is on the accused to displace the presumption of criminal misconduct."

10. Their Lordships of the Supreme Court in Mir Ahmed v. The State (P L D 1962 Supreme Court 489) held:

where there is a question of correct treatment of a plea in defence which is of factual nature and is supported by evidence and circumstances, the decision must not be taken in relation to the accused's special pleading, but must rest on examination of the entire evidence, and if thereafter the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, this opinion reacts upon the whole case, and the accused is entitled to the benefit of such doubt, on the ground that the prosecution has not proved its case beyond reasonable doubt."

Reliance can also be placed on Ghulam Muhammad The State (1980 P. Cr. L.J . 1039) wherein it was observed:

"10. I have carefully considered the above legal proposition. Section 4(1) of the Prevention of Corruption Act, 1947 embodies a special rule of evidence which is contrary to the well recognised legal principle, that in a criminal case the onus to prove the guilt of the accused is always on the prosecution 'because the accused is presumed to be innocent. This departure from the well settled legal principle was necessitated by the fact that in corruption cases it was foundextremely difficult for the prosecution to prove that the money or valuable thing accepted or obtained by a public servant was by way of illegal gratification because no explicit reliance could be placed on the uncorroborated statement of the bribe giver in that behalf as his position was that of an accomplice. So in order to overcome the above difficulty section 4(1) of the Prevention of Corruption Act, 1947 was enacted. Now in view of the aforementioned statutory provisions it is no longer necessary for the prosecution to prove that the money or other valuable thing accepted or obtained by a public servant was received for doing or showing an undue favour in return for the said money or the valuable thing. I am in

respectful agreement with the interpretation of the provisions of section 4(1) of the Prevention of Corruption Act, 1947 as made in Muhammad Saleem's case. In Muhammad Siddique v. The State (1977 S C M R 503) the Supreme Court has also held that once the tainted money is recovered from the accused the onus to explain how he received it shifts upon him. Thus the prosecution case is not affected adversely merely because the statement of Muhammad Siddique is not corroborated by any evidence that the appellant had demanded illegal gratification from him and that the money paid to him which later on was recovered from him was by way of illegal gratification. The question of the appellant's guilt is to be determined on the explanation given by him with regard to the money received by him from Muhammad Siddique."

Reference may also be made to Badshah Hussain v. The State (1991 PCr.LJ 2299), wherein it was held:

"Presumption-Burden to dispel presumption on accused-Once it was proved to the satisfaction of the Court that tainted money recovered from accused had passed on to accused, the burden would be on accused to displace presumption arising under S.4 of the Act of commission of offence, which would be discharged if the accused person established his case by a preponderance of probability. "

In Abdul Razak Rathore v. The State (PLD 1992 Karachi 39), it was observed:

"10 The presumption in section 4 of the Prevention of Corruption Act, 1947 arises only upon proof that the accused person has accepted any amount as illegal gratification. In the case of Sultan Ali v. The State reported in PLD 1971 Kar. 78, a learned Single Judge of this Court observed that it would be an outrage on common sense and reason to infer that under section 4 of the Prevention of Corruption Act, 1947, the presumption has itself been displaced and that the offence of bribery must be held to be established the moment the money is passed into the possession of the accused without further proof that it was accepted as an illegal gratification. When the law raises a presumption against the accused and calls. Upon him to prove the contrary, it is well-settled that the contrary can be said to be proved if the accused succeeds in establishing that the act attributed to him is capable of an interpretation other than that suggested by the prosecution. The proof of the contrary need not necessarily be by evidence, oral or documentary; but it may be furnished by the statement of the accused himself or by the circumstances of the case.

"11 In Kazi Nizamuddin v. The State reported in P L D 1979 Karachi 294, a learned Single Judge of this Court examined the provisions of section 4 of the Prevention of Corruption Act, 1947, and observed as follows:-

"It is true that section 4 of the Prevention of Corruption Act, 1947 provides for presumption in favour of prosecution when the tainted money has been passed into the hands of the accused and the burden would be upon him to prove that it was not accepted by him as illegal gratification but this would require consideration of two important points. Firstly that whether the money in question was tainted as alleged by the prosecution and secondly what is the standard of proof required from the accused when per statutory requirements presumption operates against him. On the first point, it has been argued before me that in the instant case when the complainant is not supporting the prosecution allegation that the marked notes were meant to be delivered as illegal gratification and both the complainant and the appellant in the instant case unanimously state that money was given and returned for some other purpose,

which has nothing to do with the allegation of bribe, the money which was passed to the appellant during the raid was not tainted at all. On the second point, it has been argued before me that in the instant case when presumption operates against the appellant under section 4 of the said Act, the burden of proof which falls upon the appellant is not greater but lesser than the general standard of burden of proof on the prosecution which makes it imperative upon the prosecution to prove guilt of accused beyond any reasonable doubt. In this context it is further contended before me that in such a case when law raises a presumption against the accused and calls upon him to prove the contrary, it is well-settled that contrary can be said to be proved if the accused succeeded in establishing that the act attributed to him is capable of interpretation other than that suggested by the prosecution. The proof of the contrary need not necessarily be by evidence, oral or documentary, but it may be furnished by the statement of the accused or by the circumstances of the case."

Also see Shabbir Ahmed v. The State (PLD 1996 Karachi. 537), wherein it was observed:

"5 In my view the presumption imposed in section 4 of the Prevention of Corruption Act is not unrebuttable which can be rebutted by the statement of accused or by the circumstances of the case. The burden is still on the prosecution to prove beyond reasonable doubt that the tainted money was passed on to the accused and the same was recovered from his personal search. In this connection reference can be made to the cases of Sultan Ali v. The State ,(PLD 1971 Karachi 78), Kazi Niazmuddin v. The State (P L D 1979 Karachi 294) and Abdul Razak Rathore v. The State. (PLD 1992 Karachi 39).

"6. Mr. Shahadat Awan, Advocate for appellant has argued that admittedly the raiding party has not seen passing of tainted money nor have heard conversation between the complainant and the appellant according to the learned counsel for the appellant this creates doubts in the prosecution case and- the impugned conviction is not sustainable. He has referred to the following cases:-

(i) Allah Din and another v. The State 1975 PCr.LJ 1289;

(ii) Noor Ahmad v. The State 1991 PCr.LJ 1015;

(iii) Ghulam Rasool v. The State 1994 PCr.LJ 120;

(iv) Nazir Ahmad v. The State 1988 PCr.LJ 120;

(v) Muhammad Akhtar Siddiqui v. The State 1994 M L D 2029.

"7 The superior Courts have never sustained a conviction in an Anti-Corruption case where the Magistrate was not able to hear the conversation between the complainant and the accused nor in a case where the Magistrate was not able to see passing of tainted money from the complainant to the accused. In the instant case, it is an admitted fact that P.W.2 was sitting in the house of the complainant and came out after the revived signal 'from the concerned Mashir. By that time the conversation between the complainant and the appellant was concluded and the taintedmoney had already passed. Therefore, in my considered view this is not sufficient piece of evidence to sustain the conviction ordered by the learned trial Court."

"8 In the case of Bashir v. The State (?) PCr.LJ 670, the Magistrate who was supervising the trap as well as the other raiding party did not state at trial about passing of money nor heard conversation between the complainant and the accused. Benefit of doubt was extended and the accused was acquitted. In the case of Arshad Mirza v. The State PLD 1988 Lahore 640, the transaction regarding payment of illegal gratification was neither seen nor the conversation between the complainant and accused was heard by the raiding party and, therefore, the conviction was set aside. In the case of Muhammad Akhtar Siddiqui v. The State 1994 M L D 2029 a learned Single Judge of Lahore High Court Mr. Raja Afrasiyab Khan, J. (as his lordship then was) allowed the appeal and set aside the conviction order after considering the cases of Muhammad Tahir v. The State 1992 PCr.LJ 490, Nazir Ahmad v. The State 1988 P Cr. L J 775 and Tariq Mahmood v. The State 1985 PCr.LJ 1105. Following is the relevant portion of the said reported case:

"The prosecution had to prove that the members of the raiding party not only saw the payment of the tainted money to the accused but also overheard the conversation between the bribe-giver and the bribe receiver. In my view, the prosecution evidence does not inspire confidence in these circumstances. It is, therefore, not at all worth credence.....

"9. After exclusion of the evidence of P.W.2 and P.W.4 the only evidence remains in the field is of Mashir Nazarat Ali who is the same person to whom Begum Alfaraz was married with. In his cross-examination he has admitted that the complainant had informed him regarding his harassment by the appellant. He has also admitted that he was not able to hear the conversation between the complainant and the accused. He has simply witnessed passing of tainted money. Therefore, his evidence is also of no worth to sustain a conviction. On the question of solitary evidence of the complainant, Mr. Shahadat Awan, Advocate for the appellant has cited an unreported case of Inayat Masih v. The State Criminal Appeal No, 9 of 1993 where a learned Single Judge of this Court after referring to the cases of Muhammad Ramzan v. The State 1990 PCr.LJ 633, Noor Ahmad v. The State 1991 PCr.LJ 1015 and Malik Zafar v. The State 1989 MLD 4215 held that it would not be safe dispensation of justice to base conviction on the evidence of such interested witness. Appeal was allowed and the conviction was set aside."

In The State of West Bengal v. The Attorney-General for India, Intervener. (AIR 1963 SC 255), it was held:

"(11) This is a deliberate departure from the ordinary principle of criminal jurisprudence, under which the burden of proving the guilt of the accused in criminal proceedings lies all the way on the prosecution. Under the provision of this subsection the burden on the prosecution to prove the guilt of the accused must be held to be discharged if certain facts as mentioned therein are proved; and then the .Burden shifts to the accused and the accused has to prove that in spite of the assets being disproportionate to his known sources of income, he is not guilty of the offence. There can be no doubt that the language of such a special provision must be strictly construed. If the words are capable of two constructions, one of which is more favourable to the accused than the other, the Court will be justified in accepting the one which is more favourable to the accused. There can be no justification however for adding any words to make provision of law less stringent than the legislature has made it."

225. It will be instructive to refer to LIMA Declaration made at the conclusion of 8th International Anti Corruption Conference in LIMA (Peru) in September, 1997, referred to by

Ch. Mushtaq Ahmed Khan in his written submissions, wherein following steps have been enumerated, which may make both prevention and prosecution more effective:

"30. Countries should improve the effectiveness of their laws dealing with corruption to the maximum extent possible consistent with their constitutions and international human rights norms including:-

Abolishing any requirement to prove that an official who received an illegal gift actually give favours in return;

Providing a system for the declaration of assets by persons holding public positions of trust (and their families) and placing on them the obligation to justify increases out of line with legitimate sources of income;

Introducing the periodic or random monitoring of the assets and lifestyles of significant decision makers in the public sector (and their families and associates), where appropriate by an independent agency;

Laws which effectively empower the freezing, seizure and confiscation of the illicitly acquired wealth of officials found guilty of corruption wherever it may be and by whomsoever it may be held;

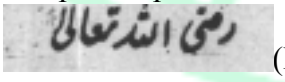
Providing appropriate protection for witnesses (and their families) and protecting whistle blowers;

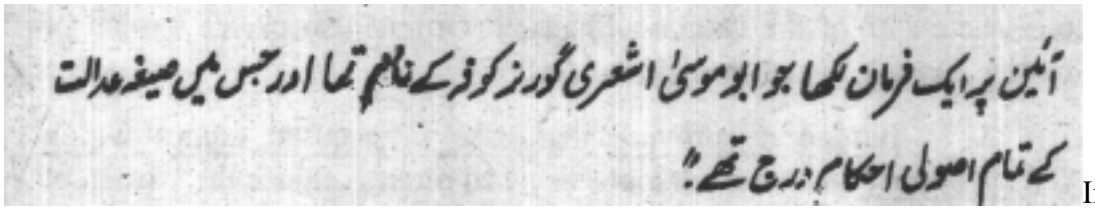
Providing a system for the recording of gifts received by officials;

Ensuring that officials at all levels cannot hide behind immunities but are fully subject to corruption laws; and

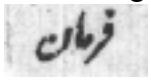
Debarring convicted criminals from standing for political office and appointment to positions of public rest.

We may also refer to an Urdu Book under the title:

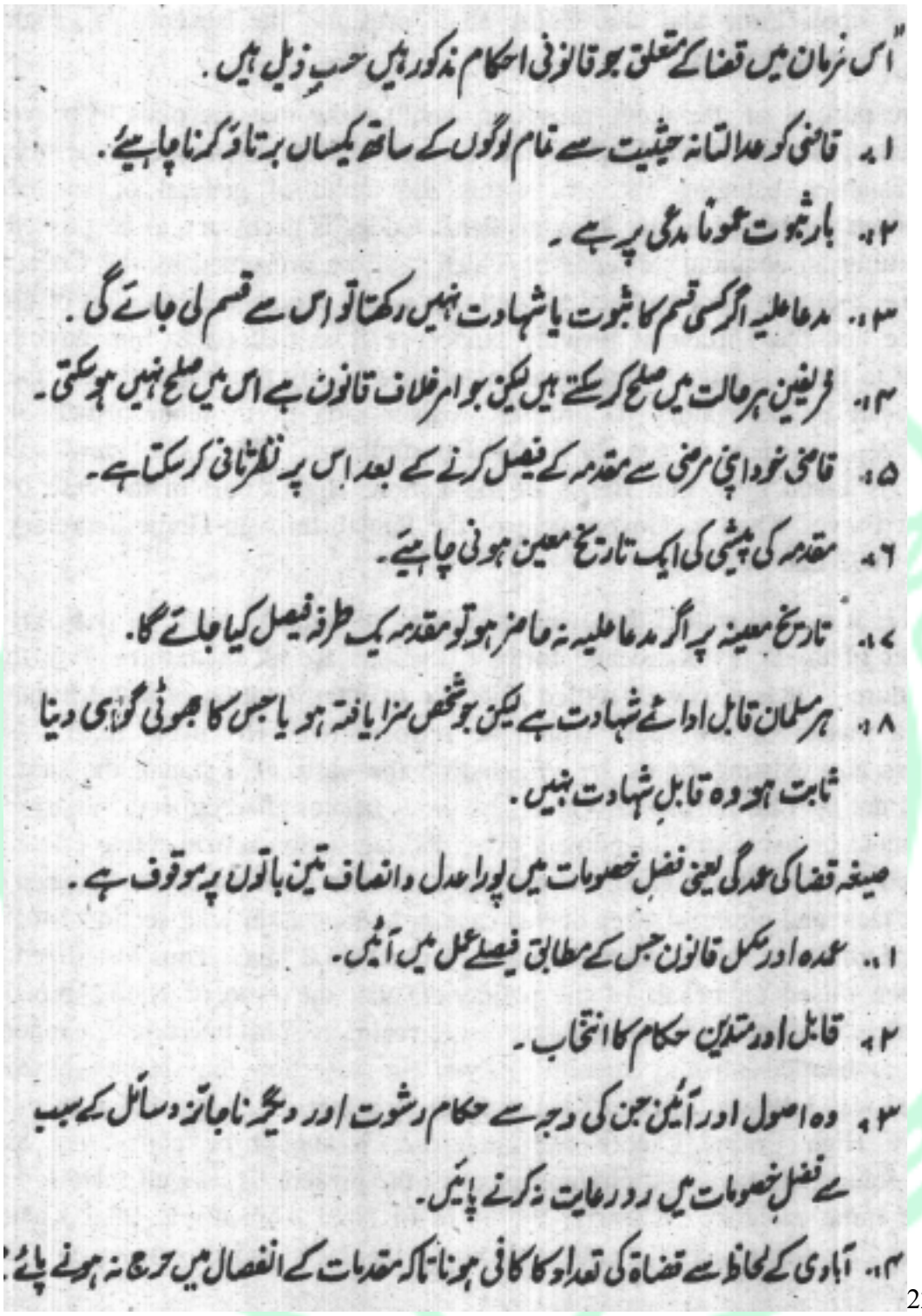
by Shamsul Ulema Allama Shibli Nomani referred to by Mr. Muhammad lkram Chaudhry as to the concept of separation and independence of Judiciary introduced by Hazrat Umer Farooq  (May Allah be pleased with him) during his Caliphate:-


آئین پر ایک فرمان لکھا جو ابو موسیٰ اشعری گورنر کوفہ کے نام تھا اور جس میں صیغہ عدالت
کے تمام اصولی احکام درج تھے۔"

In the above biography the author has quoted Arabic version of Hazrat Umer . Farooq's .Above


فرمان

and has deduced the following principles there from:



"اس زمان میں قضا کے متعلق جو قانونی احکام مذکور ہیں حسبِ ذیل ہیں۔

۱۔ قاضی کو عدالتانہ حیثیت سے تمام لوگوں کے ساتھ یکساں برتاؤ کرنا چاہیئے۔

۲۔ بارِ ثبوت عموماً مدعی پر ہے۔

۳۔ مدعا علیہ اگر کسی قسم کا ثبوت یا شہادت نہیں رکھتا تو اس سے قسم لی جائے گی۔

۴۔ فریقین ہر حالت میں صلح کر سکتے ہیں لیکن جو امر خلاف قانون ہے اس میں صلح نہیں ہو سکتی۔

۵۔ قاضی خود اپنی مرضی سے مقدمہ کے فیصل کرنے کے بعد اس پر نظرِ ثانی کر سکتا ہے۔

۶۔ مقدمہ کی پیشی کی ایک تاریخ معین ہونی چاہیئے۔

۷۔ تاریخ معینہ پر اگر مدعا علیہ نہ حاضر ہو تو مقدمہ یک طرفہ فیصل کیا جائے گا۔

۸۔ ہر مسلمان قابلِ ادائے شہادت ہے لیکن جو شخص سزا یافتہ ہو یا جس کا جھوٹی گواہی دینا ثابت ہو وہ قابلِ شہادت نہیں۔

صیغہ قضا کی عمدگی یعنی فصلِ خصومات میں پورا عدل و انصاف تین باتوں پر موقوف ہے۔

۱۔ عمدہ اور مکمل قانون جس کے مطابق فیصلے عمل میں آئیں۔

۲۔ قابل اور متدین حکام کا انتخاب۔

۳۔ وہ اصول اور آئین جن کی وجہ سے حکام رشوت اور دیگر ناجائز وسائل کے سبب سے فصلِ خصومات میں رو رعایت نہ کرنے پائیں۔

۴۔ آبادی کے لحاظ سے قضاۃ کی تعداد کا کافی ہونا تاکہ مقدمات کے انفصال میں حرج نہ ہونے پائے۔

226. Article 121 of the Qanun-e-Shahadat Order, also places burden of proof on the accused, which reads as under:

"121. Burden of proving that case of accused comes within exceptions.-When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code (Act XLV'of. 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

A bare perusal of the above provision would show that the onus to prove innocence may be shifted on to the accused, where existence of certain circumstances bringing his case within the ambit of general or special exceptions contained in the Pakistan Penal Code, is necessary to be proved for getting an acquittal, absence of which shall be presumed by the Court. We are, therefore, not inclined to hold that where a person is accused of an offence and the burden of proving innocence is shifted on to him having regard to the peculiar circumstances mentioned in any provision of law, the same can be derogatory to ordinary dispensation of criminal justice or violative of Articles 4 and 25 of the Constitution. The same view was correctly taken by a Full Bench of the Lahore High Court in the case of Liaqat Parvez Khan v. Government of the Punjab through Home Secretary (PLD 1992 Lahore 517).

227. It is well settled that matters relating to remedy, mode of trial, the manner of taking evidence and forms of actions are all matters relating to procedure. It is also well settled principle of interpretation of statutes that only a matter of procedure would be retrospective. However, if in this process any existing rights are affected on the basis of a statute the same would not operate retrospectively unless the legislature had either by express enactment or necessary intendment given the legislation retrospective effect. Viewed from whatever angle the plking of burden of proof on the accused, in the facts and circumstances of this case in juxtaposition with section 14(d) of the Ordinance falls within the realm of procedural law. Thus visualized, the plea raised on behalf of the petitioners that the ratio of Nabi Ahmed (supra) is applicable to all situations in the realm of substantive law, cannot stand a detailed scrutiny thereof. Even the assertion that Nabi Ahmed (supra) was followed in Bhai Khan (supra) by a learned Single Judge of the Lahore High Court, Lahore and therefore, it should be considered as applicable to the facts and circumstances of the present lis as well, also falls in the same category. Clearly, the cases of Nabi Ahmed and Bhai Khan (supra) are distinguishable and confined to the facts and circumstances of those cases.

228. The Accountability Courts have been established to deal exclusively with corruption and corrupt practices and hold accountable those accused of such practices and matters ancillary thereto so that cases can be decided speedily as also to guard against delays in investigation and to forestall the acts of the suspects who have been able to abuse the process of law by stalling investigations at initial stages through litigation of sorts. As to the validity of section 14(d), that if a holder of public office or any other person has issued any directive, policy or SRO (Statutory Regulatory Order) or any other order which grants or enables any undue concession or benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or associate or a benamidar or any other person is concerned, suffice it to say that there may be cases where the accusation cannot be supported by direct evidence and is a matter of inference of corrupt motive for the decision with nothing to prove directly any illegal gain to the decision maker. To protect decision making level officers and the officers conducting inquiry/investigation from any threats, appropriate measures must be taken to relieve them of the anxiety from the likelihood of harassment for taking honest decisions.

229. Viewed in the above context, although shifting of burden of proof on an accused in terms of section 9(a)(vi)(vii) read with section 14(d) may not he bad in law in its present form, but would certainly be counterproductive in relation to the principle of good governance. If decision making level officials responsible for issuing orders, SROs etc. Are not protected for performing their official acts in good faith, the public servants and all officers at the level of decision making would be reluctant to take decisions and/or avoid or prolong the same on one pretext or another which would ultimately lead to paralysis of State-machinery. Such a course cannot be countenanced by this Court.

230. Be that as it may, the prosecution has to establish the preliminary facts whereafter the onus shifts and the defence is called upon to disprove the presumption. This is also the consistent stand taken by Mr. Abid Hasan Minto as well as the learned Attorney-General who adopted his arguments. This interpretation appears to be reasonable in the context of the background of the NAB Ordinance and the rationale of promulgating the same notwithstanding the phraseology used therein. We are also of the view that the above provisions do not constitute a bill of attainer, which actually means that by legislative action an accused is held guilty and punishable. For safer dispensation of justice and in the interest of good governance, efficiency in the administrative and organizational set up, we deem it necessary to issue the following directions for effective operation of section 14(d):

(1) The prosecution shall first make out a reasonable case against the accused charged under section 9 (a)(vi) and (vii) of the NAB Ordina

(2) In case the prosecution succeeds in making out a reasonable case to the satisfaction of the. Accountability Court, the prosecution would be deemed to have discharged the prima facie burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt.

DISQUALIFICATION TO CONTEST ELECTIONS

OR TO HOLD PUBLIC OFFICE.

231. The provision of clause (a) of section 15 of the NAB Ordinance providing disqualification from being elected, chosen, appointed or nominated as a member or representative of any public office, or any statutory or local authority of the Government of Pakistan for a period of 21 years is too excessive and the same be suitably amended so as to provide disqualification for a period of 10 years to be reckoned from the date the convict is released after serving his sentence.

232. The proviso to clause (a) of section 15 ibid providing disqualification for 21 years shalt also be suitably amended to provide disqualification for 10 years to be reckoned from the date the convict is discharged of his liabilities relating to matter on transaction in issue.

VENUE OF TRIAL

233. The relevant question reads: "Whether section 16(d) of the impugned Ordinance which authorises the Chairman NAB to select the venue of the trial by tiling a reference before any Accountability Court established anywhere in Pakistan suffers from excessive delegation?

234. It is true that ordinarily, the jurisdiction to try a person for an offence does not depend upon the place where the offender is found, but the place where crime is committed. Generally speaking, all crime is local. These principles are also enshrined in the general law relating to proceedings in criminal prosecution and jurisdiction of the criminal Courts as also trials.Section 177, Cr.P.C. Also provides that every offence ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it is committed. However, notwithstanding the above provision, the Provincial Government under section 178 ibid may direct that any cases or class of cases in any district sent for trial to a Court of Session, may be tried in any Sessions Division provided such direction is not repugnant to any direction previously issued by the High Court under section 526, Cr.P.C. Or any other law for the time

being in force. Thus, the determination of venue of trial under the Ordinance in terms of section 16(d) does not contravene the concepts of 'federalismand/or Provincial autonomy.

TRANSFER OF CASES

235. Article 175 of the Constitution provides for the establishment and jurisdiction of the Supreme Court of Pakistan, a High Court for each Province and such other Courts as may be established by law. Apart from establishment of the Courts as aforesaid, the Constitution or the law may provide for the subjects in respect of 'which that power may be exercised and the manner of exercise of such power. It may demarcate/identify the territories/place or places in which a particular Court shall function. It may specify the persons in respect of whom the judicial power to hear and determine will be exercisable. Put differently, it may provide for the subject-matter over which the judicial power is to be exercised, the manner of exercise of jurisdiction, the right to adjudicate upon a particular subject-matter and the authority to exercise in a particular manner.

236. Article 175 (3) provides that the Judiciary shall be separated progressively fromthe Executive within 14 years from the commencing day. After expiry of the stipulated period, the cut-off date of 23rd March, 1994, had been given by the Supreme Court to enable the Provincial Governments to finalise separation of Judiciary from the Executive. Guidelines for achieving this objective as well as financial independence of the Judiciary were also laid down by this Court in the case of Government of Sindh v. Sharaf Faridi (PLD 1994 S.C. 105).

237. Article 203 of the Constitution provides that the supervision and control over the subordinate Judiciary exclusively vests in the High Court concerned. It comprehends all supervisory powers both judicial as well as administrative as to the working of the subordinate Courts including the disciplinary matters. Any provision in any law, direction or order empowering any executive functionary to have administrative supervision and control over the subordinate Judiciary either directly or indirectly, would militate against the concept of separation of powers and independence of Judiciary as envisaged under Article 175 and the Objectives Resolution as laid down by this Court in the case of Sharaf Faridi (supra). It would thus be seen that even under the general law, the power to order cases to be tried at different places falls within the domain of executive authority, which could not be termed as violative of judicia dindependence. Be that as it may, Mr. Abid Minto rightly contended that Article 203 of the Constitution is applicable to the Courts under the NAB Ordinance and such Courts are subordinate to the High Courts and therefore the power of superintendence vested in the High Court prevails over these Courts within the hierarchy of the Courts of the country and for the purposes of the Constitution. We are also of the considered view that the High Court, in appropriate proceedings whenever it is made to appear to it that a fair trial cannot be held before any Accountability Court at a particular place and it is expedient for the ends of justice that any offence under the NAB Ordinance be tried by any Accountability Court other than the Court seized of the matter, may transfer the case accordingly.

238. Section 16A (b) (i) and (ii) of the NAB Ordinance purports to achieve the above objective by empowering Chairman NAB to direct the Prosecutor General Accountability to apply for transfer of a case from any such Court in one Province to a Court in another Province or from one Court to a Court in another Province or from one Court in a Province to another Court in the same Province. The above section, however, does not meet the ends of justice, in that, the Chairman NAB has been given the choice to make a move before the

appropriate Chief Justice through the Prosecutor General, but such right is not available to the accused.

239. The above provision, insofar as it denies access to an accused person for the redress of his grievance in the matter of transfer of a case from one Court to another, is ultra vires Article 4 of the Constitution, which envisages the right of access to justice to all, which is equally founded in the doctrine of 'due process of law'. In Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324), it was held that the right of access to justice includes the right to be treated in accordance with law, the right to have a fair and proper trial and the right to have an impartial Court or tribunal. Without having an independent Judiciary, the Fundamental Rights enshrined in the Constitution will be meaningless. In Jibendranath Kishore Acharya Chaudhry v. Province of East Pakistan (PLD 1957 SC [Pak.] 9), this Court held that equality of citizens gives rise to two basic questions: first, to what extent the Legislature can delegate legislative functions to other bodies; and secondly, what control the Judiciary can exercise over departmental tribunals? As to the first, the rule is that while the Legislature cannot confer on any other body power to make whatever laws it likes, it can, by its Acts, define the outline of the legislative power within the limited field to carry out the purposes of the legislation. In Government of Baluchistan v. Azizullah Memon (PLD 1993 Supreme Court 341), it was held that the Legislature cannot frame such law as may bar right of access to Courts of law and justice. Any law, which denies the right of access to Courts and justice, is violative of Article 25 of the Constitution. It is true that the expression, 'equal protection of law', does not place any limitation on the power of the State to make reasonable classification of citizens in that regard, but if such classification is without any reasonable basis, it would tantamount to denying that right to a category of persons and the same being discriminatory is liable to be struck down.

240. In Zulfiqar Ali Bhutto v. The State (PLD 1979 SC 53), it was held that the rule regarding holding an open trial is not rigid and inflexible nor could it be pressed .To its breaking point in defeating very ends of justice. The Presiding Officer or the Magistrate concerned is empowered to forbid access of the public generally or any particular person remaining in Court at any stage of inquiry or trial for sufficient reasons in interests of administration of justice.

241. Paragraph 3, chapter 1 of the High Court Rules and Orders of the Lahore High Court, volume III provides as follows:

3. Court house in an open Court. Section 352 of the Code of Criminal Procedure lays down that the place where a Criminal Court is held, "shall be deemed an open Court to which the public generally may have access so far as the same can conveniently contain them", but the discretion to exclude the public from the ordinary Court room rests with the presiding Magistrate. When, however, the Presiding Magistrate, for any reason, excludes the public by holding his Court in a building. Such as a jail, to which the public is not admitted (and he is not entitled to do so without permission of the Department concerned), he should obtain the sanction of Government thereto, through the District Magistrate, and should inform the High Court that sanction has been accorded. It is not necessary to comment upon the case law cited from the Indian jurisdiction as well as decisions of the learned Judges in Chambers of the High Courts. Suffice it to say that the controversy on the subject stands concluded by a judgement of this Court in the light of the observations made in the case of Zulfiqar Ali Bhutto (supra).

242. Resultantly, in the matter of transfer of cases from one Court to another, either within a Province or from one Province to another, as contemplated under section 16A, the prosecutor and the accused must be placed on equal footing. To this extent, section 16A is deClared ultra vires the Constitution and needs to be suitably amended.

243. This also disposes of the objection under section 16A (a)(i) (ii) of the impugned Ordinance regarding 'transfer of cases'.

POWER OF ACCOUNTABILITY COURT TO DISPENSE WITH ANY

PROVISION OF CODE OF CRIMINAL PROCEDURE

244. Seventh Question that "Whether section 17(c) of the impugned Ordinance which. Enables the Accountability Court to dispense with any provision of the Code of Criminal Procedure, 1898, and follow such procedure as it may deem fit in the circumstances of the case is violative of Articles 4 and 25 of the Constitution" is devoid of any force, in that, no vested right exists in matters of procedure. Section 12(3) of the Ehtesab Act, 1997 also contained a similar provision, which was not held ultra vires the Constitution in Federation of Pakistan v. M. Nawaz Khokhar (P L D 2000 Quetta 26). However, sufficient guidelines have been given as to the scope of section 12(3) of the Ehtesab Act, 1997 in Benazir Bhutto v. The State (PLD 1999 SC 937), which read thus:

"21. The phrase 'as it may deem fitused in section 12(3) of the Act clearly signifies that Court has full and complete power to follow such procedure in order to do justice but in the exercise of such power, it must act justly, fairly and in accordance with law. The above phrase does not imply following arbitrary procedure but must be construed to follow only such procedure which is just and proper for doing justice between the parties and not in violation of any law "

Article 24A of the General Clauses Act, 1897, reads thus:

"24A. Exercise of power under enactments. -(1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment."

"(2) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making , the order or, as the case may be, for issuing the direction and shall provide a copy of the order or, as the case may be, the direction to the person affected prejudicially."

Thus visualised, the Court's power to dispense with a provision of Criminal Procedure Code is not uncontrolled and will be governed by the principles enshrined in section 24A (supra). If the Accountability Court deems fit to make departure from the provisions of the Criminal Procedure Code reasons will have to be recorded in writing under the section. In appropriate cases such reasons are justiciable in the exercise of Constitutional jurisdiction of the Superior Courts at the instance of an aggrieved party. Section 164 of the Qanun-e-Shahadat Order provides that. "In such cases as the Court may consider appropriate, the Court may allow to

be produced any evidence that may have become available because of modern devices or techniques".

245. The upshot of the whole discussion is that in terms of the impugned provision of section 17(c) of the NAB Ordinance, an Accountability Court shall not exercise its discretion arbitrarily but on sound judicial principles by assigning valid reasons. We, therefore, hold that section 17(c) is not violative of Articles 4 and 25 of the Constitution.

COGNIZANCE OF OFFENCES BY THE ACCOUNTABILITY COURT

246. Question No, (viii) of the 'admitting orderreads thus:

"(viii) Whether section 18 of the impugned Ordinance which prohibits the Accountability Court to take cognizance of any offence under the impugned Ordinance except on a reference made by Chairman NAB or an officer of the NAB duly authorised by him amounts to excessive delegation?"

247. As to above question, suffice it to say that the offences under the NAB Ordinance are special in nature and their investigation and inquiry extends to complicated transactions, bank accounts and books of account for which aid of experts may be required by investigating authority to unearth and detect such offences. It is, therefore quite reasonable as well as practical that the investigating agency should first thoroughly inquire into suspected offences and then decide whether or not to refer the same to an Accountability Court. There is, therefore, no excessive delegation of power in the above section. It may be observed that the Ehtesab Act, 1997 also contained a similar provision, which was declared to be a valid piece of legislation by this Court in M. Nawaz Khokhar (supra).

ARREST/DETENTION AND REMAND OF THE ACCUSED

248. Question No, (ix) of the 'admitting orderis to the following effect:

(ix) Whether section 24(d) of the impugned Ordinance which empowers the Chairman NAB to detain in his custody an accused person up to a period of ninety days after having produced him once before the Accountability Court; such power vesting in executive authority is contrary to the right of equal protection and also opposed to the spirit of Fundamental Rights contained in Clause (2) of Article 10 of the Constitution?

249. The petitioners have challenged the validity of clause (d) of section 24 ibid in so far it relates to detention of the accused in the custody of NAB for the purposes of inquiry and investigation for a period of ninety days. Article 10 of Part II of the Constitution provides safeguards as to arrest and methodology for the production of an accused before a Magistrate, communication of grounds, rights of the accused to be defended by counsel, arrest under detention law, constitution of Review Board, proceedings before Review Board and maximum period of detention. In the case in hand, we are not dealing with a law regarding preventive detention and, therefore, the provisions relating thereto in Article 10 ibid are not relevant the purpose of the controversy raised herein. We find that the provisions of clause

(d) of section 24 ibid are in substantial compliance of the provisions of clauses (1) and (2) of Article 10 of the Constitution which provide : "(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice; and (2) Every person who is arrested and detained in custody shall be produced before a Magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the Court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a Magistrate." However, the above clause is ultra vires to the extent that it denies the right of the accused to consult and be defended by a legal practitioner of his choice. To this extent clause .(d) of section 24 of NAB Ordinance requires to be suitably amended.

250. It is true that in terms of sections 167 and 344 Cr.P.C. When an accused is arrested he is bound to be produced before a Magistrate within a period of twenty-four hours and beyond such period police cannot detain him without seeking permission from a Magistrate and that no Magistrate can remand an accused to custody for a term exceeding fifteen days at a time, respectively. It is also well established that remand is not to be granted in routine and the liberty of citizens must be protected subject to the law and the Constitution. It is provided in NAB Ordinance that Cr.P.C. Applies subject to any inconsistency with the Ordinance. The provisions contained in clause (d) of section 24 ibid in so far as they relate to the remand of an accused, are inconsistent with the provisions of the Cr.P.C. Inasmuch as under sub-section (1) of section 344 of the Cr.P.C. The maximum period of remand is fifteen days. Mr.Baber Awan has rightly contended that several provisions of the impugned Ordinance are inconsistent with what has been laid down in Cr.P.C. But, as pointed out above, the Cr.P.C. Is applicable subject to any inconsistency with the Ordinance. Therefore, the mere fact that subsection (1) of section 344, Cr.P.C. Provides maximum remand for a period not exceeding fifteen days at a time, does not, ipso facto confer a right on a person accused of an offence under NAB Ordinance, to be detained for a period of not more than fifteen days at a time. We may also, however, refer to the explanation added to subsection (2) of section 344, Cr.P.C. Which provides that if sufficient evidence has been obtained to raise a suspicion that, the accused may have committed an offence and it appears likely that further evidence may be obtained in that behalf, this is a reasonable cause for a remand.

251. Mr.Abid Hassan Minto appearing for the Federation also stated at the Bar that under section 24(d), a maximum period of 90 days is provided for detention in connection with investigation etc., which is not automatic or that the accused is to be detained for 90 days straight away. Generally, the accused is produced before the Court after every 10/15 days, in some cases even with an interval of 3-4 days, and the Court, keeping in view the facts and circumstances of the case, determines the period of further custody. It is reasonable if the accused is directed to be produced before the Court after every 15 days or earlier keeping in view the facts and circumstances of each case, for appropriate orders.

252. Be that as it may, it is the duty of this Court to jealously safeguard the liberty of the citizens and to strike down a law, or suggest amendment thereto for protecting the same or avoiding undue harassment to them.

253. After carefully listening to the submissions of the learned counsel for the parties, we are inclined to the view that the outer limit of ninety days fixed in clause (d) of section 24 of NAB Ordinance appears to be excessive. We are of the view that prolonged detention of an

accused without sufficient cause for such detention, makes an inroad on the personal liberty of citizens as guaranteed under the Constitution, which cannot be countenanced by this Court.

254. We, therefore, direct that clause (d) of section 24 of the Ordinance be also amended to the extent that the Accountability Court shall not remand an accused person to custody under clause (d) of section 24 of, the impugned Ordinance for a term exceeding fifteen days at a time.. If sufficient and reasonable cause appears for further remand, after the expiry of the first fifteen days, the accused shall be brought before the Court for appropriate orders and that in no case, each remand shall be for a period more than fifteen days at a time. It is further directed that the Court passing order of remand as referred to above, shall forward a copy of such order with reasons for making it to the High Court concerned. Suitable amendments be made accordingly.

255. The Chairman NAB cannot under any principle of jurisprudence simultaneously assume the role of prosecutor and Judge. The power of judicial review and the matters relating to the administration of justice solely vest with the judiciary and such powers cannot be entrusted to the NAB being violative of the very concept of Independence of Judiciary.

256. In view of the above, we hold that the proviso to clause (d) of section 24 ibid in so far as it contains the provision that: "...No accused arrested under this Ordinance shall be released without the written order of the Chairman NAB is ultra vires being repugnant to the concept of Independence of Judiciary. Suitable amendment be made so as to delete the words "without the written order of the Chairman NAB or".

257. Question No, (xi) relates to the point: "Whether section 24(a) of the impugned Ordinance, empowering the Chairman NAB at any stage of the investigation under the impugned Ordinance, to direct that the accused, if not already arrested, shall be arrested, tantamounts to conferment of unbridled and unfettered powers of determining if an accused is to be arrested or not, is violative of Article 25 of the Constitution?"

258. The above contention is without any force. We are inclined to agree with Mr. Minto that the powers conferred by the impugned provision are part of normal powers relating to inquiries and investigation. Similar powers are conferred upon Police Officers by the Criminal Procedure Code under section 54 thereof. However, we have no doubt in our minds that K while exercising powers under section 24(a) of the impugned Ordinance the K Chairman NAB shall consider the facts and circumstances of each case justly, fairly, equitably, in accordance with law and in conformity with the provisions of section 24A of the General Clauses Act, 1897 and not in a discriminatory manner. Any such order passed by him is subject to correction in appropriate cases by theSuperior Courts in the exercise of their Constitutional jurisdiction. It is, therefore, difficult to hold that section 24(a) is ex facie ultra wires Article 25 of the Constitution.

259. Question No, (xii) that: "Whether in so far as section 24(c) of the impugned Ordinance which enjoins that the provision of clause (a) thereof shall also apply to cases which have already been referred to the Accountability Court, offends the provsions of Articles 4 and 25 of the Constitution on the ground of retrospectivity in its operation" is also devoid of any force, in that, there is no element of retrospectivity in clause (c) of section 24 of the impugned Ordinance. Besides, Articles 4 and 25 of the Constitution have nothing to do with the concept of retrospective operation of a law.

260. This disposes of Questions No, (ix), (xi) and (xii).

TRANSFER OF PROPERTY

261. Section 23 of the impugned Ordinance provides that where an investigation has been initiated into an offence under the NAB Ordinance, alleged to have been committed by an accused person, such person or any relative or associate of such person or any other person on his behalf is not authorised to transfer by any means whatsoever, create a charge on any movable or immovable property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Accountability Court, and any transfer of any right, title or interest or creation of a charge on such property shall be void.

262. It was argued that in so far as section 23 ibid prohibits transfer of property merely because an investigation has been initiated at the discretion of the Chairman NAB is violative of Articles 23 and 24 of the Constitution which guarantee rights to property. In so far as the above section makes any such transfer void even though both the transferor and the transferee be genuinely unaware of such investigation, the section offends Articles 2A, 4, 23, 24 and 25 of the Constitution. We are not inclined to hold that the above provision is in conflict with the aforementioned Articles of the Constitution in that reasonable restriction in the public interest may be imposed by a law on the right to hold, acquire or dispose of property. The NAB Ordinance by its very nature is a law relating to acquisition and retention of ill-gotten property and to recover the same.

263. Furthermore, section 23 ibid is an interlocutory measure to prevent persons accused of such offences to frustrate the objects of law by,creating third party interest in respect of illegally acquired property, thereby creating hurdles in the object of law i,e, to eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices and matters ancillary thereto. The purpose of this power is more to preserve the property acquired by the accused through corruption and corrupt practices so that ultimately if the guilt is proved the same can be taken back from him in accordance with law. Section 23 of the NAB Ordinance is also preventive in nature and prescribes penalties for the accused person who attempts to alienate or transfer by any means property after the Chairman NAB has initiated investigation, inquiry or proceedings have commenced against him in an Accountability Court. Put differently, it is in the nature of a restraint order. The protective measures are not by way of punishment but with a view to ensure that the final decision is not rendered redundant.

264. Additionally, somewhat similar provisions are contained in section 7 of the Offences in respect of Banks (Special Courts) Ordinance, 1984 which provides that: "After a Special Court has taken cognizance of a scheduled offence alleged to have been committed by an accused person, such person or any relative of such person or other person on his behalf shall not, without the previous permission in writing of the Special Court, transfer, or create a charge on, any movable or immovable property owned by him or in his possession, while proceedings are pending before the Special Court; and any transfer of, or creation of a charge on, such property without such permission shall be void." Viewed in this perspective, transfer of property by ,the accused or his relatives etc. Seems permissible with the approval of the Court. We therefore, direct that section 23 ibid be suitably amended to reflect that transfer of property by an accused person or any relative or associate of such person or any other person on his behalf or creation of a charge on any movable or immovable property owned by him or

in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Accountability Court, shall not be void if made with prior approval in writing of the Judge, Accountability Court, subject to such terms and conditions as the Judge may deem fit in consonance with the well established principles of law for passing interlocutory orders in consonance with the objects of the Ordinance.

PLEA BARGAINING

265. Question No, (xiii) relates to "plea bargaining". It reads thus:

"Whether the case of voluntary return (plea of bargaining) under section 25 of the impugned Ordinance is derogatory to the concept of independence of judiciary in so far as where the trial has commenced the Court cannot release the accused without 'consentof the Chairman NAB?"

266. A perusal of the Preamble of the NAB Ordinance shows that it is a composite and an extensive law and its interpretation has to be done in a manner different from the normal interpretation placed on purely criminal statutes. This law deals with, among others, setting up of the National Accountability Bureau, which is an executive as well as administrative authority and an investigating agency; which deals with several aspects of `corruption', etc. The NAB does not merely deal with crimes of corruption, it also deals with their investigation and settlement out of Court. Bargain out of Court is now an established method by which things are settled in several developed societies. It was necessary in cases where the criminal is a potential investor and is inter-linked with the economy of the society, he should be given an opportunity to play his role in the society after he has cleared his liability. There appears to be nothing amiss insofar as it does not oust the jurisdiction of the Accountability Courts to exercise their judicial power in appropriate proceedings. Rather this is in the nature of a facility provided to the accused. There is nothing wrong with the NAB Ordinance providing for a procedure of bargaining.

267. Moreover, the scheme for exploring the possibility of settlement during investigation/inquiry stage by the Charmin NAB cannot be ignored straight away. At the outset, most of the lawyers tend to consider the question of settlement out of Court. There is need to focus attention on this significant facet of the matter. The rationale behind the Ordinance is not only to punish those who were found guilty of the charges levelled under the Ordinance but also to facilitate early recovery of the ill-gotten wealth through settlement where practicable. The traditional compromise settlement, compoundability of offence during the course of proceedings by the Courts after protracted litigation is wasteful. Viewed in this perspective, a power has been vested in the Chairman NAB to facilitate early settlement for recovery of dues through 'plea bargainingwhere practicable. Lawyers are often interested in settling the disputes of their clients on just, fair and equitable basis. There are different approaches to settlement. Plea bargaining is not desirable in cases opposed to the principles of public policy. Chairman NAB/Governor, State Bank of Pakistan, while involved in plea bargaining negotiations, should avoid using their position and authority for exerting influence and undue pressure on parties to arrive at settlement. However, in the interest of revival of economy and recovery of outstanding dues, any type of alternate resolution like the 'plea bargainingenvisaged under section 25 of the Ordinance should be encouraged. An accused can be persuaded without pressure or threat to agree on a settlement figure subject to the provisions of the Ordinance. Establishing this procedure at the investigation/inquiry stage greatly reduces determination of such disputes by the Court. However, as the plea

bargaining/compromise is in the nature of compounding the offences, the same should be subject to approval of the Accountability Court. Accordingly, section 25 of the impugned Ordinance be suitably amended.

DISCRETION OF CHAIRMAN NAB TO REJECT

RECOMMENDATIONS OF 'COMMITTEEAND GOVERNOR,

STATE BANK OF PAKISTAN

268. Question No, (xiv) is to the effect:"Whether section 25A (e) and (g) give unfettered discretion to the Chairman NAB to reject the recommendations of a duly appointed committee and to refuse to recognize a settlement arrived at between a creditor and a debtor amounts to excessive delegation and restraint on the freedom of contract on the touchstone of Articles 4, 18 and 25 of the Constitution?"

269. The above provisions of section 25A (e) 'and (g) in their present form suffer from excessive delegation of power, in that, these provisions corner unfettered discretion on the Chairman NAB to reject the recommendations of a duly appointed committee and to refuse to recognize a settlement arrived at between a creditor and a debtor. We, therefore, direct that the recommendations made by the Governor, State Bank of Pakistan shall be binding on the Chairman NAB except for valid reasons to be assigned in writing subject to approval of the Accountability Court, to be accorded within a period not exceeding 7-days. Suitable amendment be made in section 25A (e) and (g).

STAY OF PROCEEDINGS BEFORE

ACCOUNTABILITY COURT

270. Let us now examine Question (xv) . To the effect whether section 32(d) of the impugned Ordinance purports to oust the jurisdiction of the Superior Courts from exercising their jurisdiction under Article 184(3) and Article 199 of the Constitution?

271. Section 32 of the Ordinance provides appeal before the High Court at the instance of any person convicted or the Prosecutor General Accountability. However, it prohibits appeal against an interlocutory order of the Court during the proceedings pending before it under this Ordinance and provides an appeal only against the final judgment of the Accountability Court. The main attack of the petitioners is directed against clause (d) thereof Which provides that no stay of proceedings before Accountability Court shall be granted by any Court on any ground whatsoever, nor proceedings thereof be suspended or stayed by any Court on any ground whatsoever.

272. It is well settled that Constitutional jurisdiction vesting in the High Courts under Article 199 of the Constitution cannot be taken away or abridged, or curtailed by subordinate legislation. The above provision in so far as it purports to oust the jurisdiction of the Superior Courts from exercising the jurisdiction whether under Articles 184(3) or 199 of the Constitution is ultra vires. Refer Inayat Ullah and others v. M.A.Khan and others (PLD 1964 SC 126), Nagina Silk Mills, Lyallpur v. Income-Tax Officer (PLD 1963 SC 322), Abdul Rashid v. Pakistan (PLD 1962 SC 42), Muhammad Anwar v. Government of West Pakistan (PLD 1963 Lah. 109), Abdul Rahim v. Chancellor of West Pakistan University of

Engineering and Technology (PLD 1964 Lah. 376), Mrs.Shahida Zahir Abbasi and 4 others v. President of Pakistan as Supreme Commander of the Armed Forces, Islamabad and others (PLD 1996 SC 632). However, by way of abundant caution, section 32 be suitably amended so as to clarify in unambiguous terms that ouster of jurisdiction does not embrace the Superior Courts in the exercise of their constitutional jurisdiction. Needless to observe that High Courts shall exercise this power sparingly in rare and exceptional circumstances for valid reasons to be recorded in writing.

273. Question (xvi) in the admitting order is to the effect whether various provisions of the impugned Ordinance grant arbitrary and unfettered discretion to the Chairman NAB e.g (i) under section 9(c) of the impugned Ordinance to set whatever conditions he feels with respect to the release of an accused from custody, (ii) under section 18(g) to refer or not a case to an Accountability Court and (iii) under section 25A(g) to refuse to recognize a settlement arrived at between a creditor and debtor.

274. We have already held that the Chairman NAB is not competent to reject a settlement arrived at between a creditor and debtor through the intervention of Governor, State Bank of Pakistan without the approval of the Accountability Court.

275. The powers vesting in the Chairman NAB to release an accused from custody having regard to the gravity of the charge against him, favour the accused. However, while doing so, he is to record valid reasons in writing. As regards the vesting of powers with the Chairman NAB under section 18(g) to refer or not a case to the Accountability Court after perusal of the material and evidence collected during inquiry and investigation, suffice it to say that this power corresponds to the normal powers vested in all Police Officers or Officers of investigating agencies. Reference may be made to section 170 Cr.P.C. Which reads as under :

"170. Case to be sent to Magistrate when evidence is sufficient.-(1) If, upon an investigation under this Chapter it appears to the Officer Incharge of the Police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or send him for trial or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the Officer Incharge of a Police-Station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) Omitted

(4) Rep. By the Code of Criminal Procedure (Amndt.) Act (II of 1926), S .2.

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report."

276. Clearly, the existence of sufficient evidence is a condition precedent for the police acting under section 170, Cr.P.C. And for making a request to the Magistrate to take cognizance of the offence. It is for the Officer Incharge of a Police Station to decide whether there is sufficient evidence to justify the forwarding of the accused to the competent Magistrate. As stated above, a corresponding provision is contained in section 18(g) to which no exception can be taken subject to compliance with the procedure laid down in section 170, Cr.P.C. So far as it is applicable. To this extent section 18(g) be suitably amended.

APPOINTMENT OF OFFICERS AND STAFF OF NAB

277. Question (xvii) formulated in the admitting order is whether to exclude the officers and staff of the NAB, who have not been deputed or posted to NAB from the Federation or a Province, from the category of civil servants within the purview of section 2(b) of the Civil Servants Act, 1973, is violative of Article 25 of the Constitution.

278. A perusal of section 28(d) of the Ordinance shows that it creates two categories of persons serving in NAB. The first category is of persons directly appointed to whom the Civil Servants Act, 1973 does not apply. The second category is, comprised of persons who are civil servants deputed to or posted in NAB. The Civil Servants Act, 1973 continues to apply to such persons. The officers and staff of the NAB are two different categories and classes of employees, therefore, no violation of Article 25 is involved.

279. Question (xviii) in the admitting order is to the effect whether the alleged violation of principles of Universal Declaration of Human Rights of 1948 and Cairo Declaration on Human Rights in Islam are justiciable in these proceedings.

280. It is not necessary to deal with this question in these proceedings and the same shall be considered in some other appropriate case, in that, the order proposed to be passed here does not contravene the above Declaration.

281. Question (xix) is whether the impugned Ordinance is liable to be struck down on the ground that earlier Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this Court and therefore there is no necessity for enacting the same.

282. This question has already been dealt with in the preceding paragraphs. Suffice it to say that new laws are not made only when previous laws have been declared invalid. The mere fact that Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this Court does not in any way prescribe any limitation on the competent legislature to make a new law on the subject. The question of 'occupied fieldhas already been dealt with earlier. It is not necessary to deal with this question any further.

283. Question (a) is with respect to whether the vires of the impugned Ordinance can be examined on the touchstone of Article 2A of the Constitution having regard to the law laid down by this Court in the case of Hakim Khan and 3 others versus Government of Pakistan through Secretary Interior and others (PLD 1992 SC 595).

284. It is not necessary to deal with the above question. Suffice it to say that the learned counsel for the petitioners have not been able to point out any of the provisions to be repugnant to the Injunctions of Quran and Sunnah. Furthermore, we have directed numerous amendments substitutions etc so as to render the impugned Ordinance to be intra vires the Constitution.

285. Question (xxi) deals with the point whether the provisions for appointment of Chairman and other officials in the NAB are discriminatory inasmuch as they do not lay down any qualifications in that regard or methodology for their appointment.

286. The method of appointment in respect of Chairman NAB is contained under section 6(b)(i) of the impugned Ordinance, which make the following reading:

"6.(b)(i) "There shall be Chairman NAB to be appointed by the President and he shall hold office during the pleasure of the President."

287. In so far as the provisions relating to methodology for appointment of Chairman NAB and Deputy Chairman NAB without prescribing any qualifications in that regard are concerned, it may be Observed that there are numerous other instances where no specific qualifications have been prescribed for certain appointments. Such examples include appointment of Governor of a Province, Director General FIA under Federal Investigation Agency Act, 1974, Managing Director of PIA under the Pakistan International Airlines Act, 1956 and Federal Tax Ombudsman under Establishment of Office of Federal Tax Ombudsman Ordinance, 2000. However, in view of the importance of the National Accountability Bureau, its objectives of eradication of corruption and corrupt practices and to ensure the process of accountability to be conducted in a coherent and transparent manner, it is essential that its independence is maintained. With a view to achieving the above objective we hold that clause (b)(i) of section 6 to the effect that the Chairman NAB, "shall hold office during the pleasure of the President" is ultra vires being repugnant to the concept of independence of an institution.

288. Section 6, therefore, requires to be suitably amended in the following terms.

(a) The Chairman NAB shall be appointed by the President in consultation with the Chief Justice of Pakistan.

(b) The Chairman NAB shall hold office for a period of three years.

(c) The Chairman NAB shall not be removed from office except on the grounds of removal of a Judge of the Supreme Court of Pakistan.

(a) The Chairman NAB shall be entitled to such salary, allowances and privileges and other terms and conditions of service, as the President determines and these terms shall not be varied during the term of his office.

(e) The Chairman NAB may, by writing under his hand, addressed to the President, resign his office.

289. In order to ensure continuity of the accountability process and in the light of the decision in Zafar Ali Shah (supra) that the process of accountability be accelerated, we direct that the

present incumbent of the office of Chairman NAB shall be deemed to have been appointed for a term of three years from the day he entered upon his office.

290. Section 7 of the impugned Ordinance provides for the appointment of Deputy Chairman, NAB. Clause (b) of section 7 ibid reads thus:

"7.(b) "The Deputy Chairman shall serve at the pleasure of the President."

In view of our observation in the immediately preceding paragraph, section 7(b) be suitably amended as under:

The Deputy Chairman shall hold office for a minimum period of two years and shall not be removed except on ground of misconduct as defined under section 2(4) of the Government Servants (Efficiency And Discipline) Rules, 1973.

PROSECUTOR GENERAL ACCOUNTABILITY

291. Appointment of Prosecutor General Accountability has been provided in section 8 of the impugned Ordinance, Clause (a) whereof reads as under:

"8.(a): "The Chairman NAB may appoint any person to act as the Prosecutor General Accountability, notwithstanding any other appointment or office the latter may concurrently hold, upon such terms and conditions as may be determined by the Chairman."

292. In view of the legal nature of duties of the Prosecutor General Accountability, he must be a person qualified to be appointed as a Judge of the Supreme Court of Pakistan in that his duty is to give advice to the Chairman NAB upon such legal matters and to perform such other duties of a legal character as may be referred or assigned to him by the Chairman NAB and, in the performance of his duties, he has a right of audience in all Courts including the High Courts and the Supreme Court. Section 8(a), therefore, be amended so as to provide as follows:

(a) The Prosecutor General Accountability shall hold an independent office on whole time basis and shall not hold any other office concurrently.

(b) He shall be appointed by the President in consultation with the Chief Justice of Pakistan and Chairman, NAB on such terms and conditions as may be determined by the President.

(c) His remuneration and fringe benefits shall in no case exceed those of the Attorney-General for Pakistan, who is the Principal Law A Officer of the country and holder of a Constitutional office.

(d) He shall hold a tenure post of not less than two years.

(e) His services shall not be dispensed with except on the grounds prescribed for removal of a Judge of the Supreme Court.

(t) He shall not be permitted to conduct private cases and in lieu thereof he may be allowed a special allowance.

(g) He may, by writing under his hand addressed to the President of Pakistan, resign his office.

In the interest of continuity of accountability process, the incumbent Prosecutor General shall continue in office on the existing terms and conditions of his service till his successor is appointed or he is found suitable to be retained in service as such subject to recommendations of the consultees as aforesaid.

INDEPENDENT PROSECUTION AGENCY

293. A panel of competent lawyers of experience and impeccable reputation shall be prepared in consultation with the Law and Justice Division. Their services shall be utilized as Prosecuting Counsel in cases of significance at reasonable fee on case-to-case basis. Even during the course of investigation of an offence, the advice of a lawyer chosen from the panel should be taken by the NAB.

294. Every prosecution which results in the discharge or acquittal of the accused must be reviewed by a lawyer on the panel and, on the basis of the opinion given, responsibility should be fixed for dereliction of duty, if any, of the concerned officer. In such cases, strict action should be taken against the officer found guilty of dereliction of duty in accordance with law.

295. Steps shall be taken for the constitution of an able and impartial agency comprising persons of unimpeachable integrity to perform functions of investigation and inquiry, etc. By the National Accountability Bureau.

296. Till the constitution of the aforesaid body, Special Counsel shall be appointed for the conduct of important trials in consultation with the Law and Justice Division.

TRANSFER OF CASES

297. Question (xxii) in the admitting note deals with the issue whether the provisions relating to transfer of cases qua the Provincial Courts within the territories of a Province and from one Province to another, suffer from excessive delegation. The above question has been thoroughly discussed in the preceding paragraphs while dealing with section 16(d) of the impugned Ordinance. No further examination of the impugned provision is called for.

SPECIAL TREATMENT TO WOMEN ACCUSED

298. Question (xxiii) in the admitting order, dated 12-9-2000 says whether in the absence of any provision in the impugned Ordinance regarding special treatment to be meted out to women-accused is not violative of the mandate under Article 25(3) of the Constitution and section 167 of the Criminal Procedure Code. Suffice it to say that there is no direction in Article 25 to make special provisions for women. It merely permits that provisions with regard to women may be made. In any case, since the provisions of the Criminal Procedure Code apply where such provisions are not specifically over-ridden or ousted in the NAB Ordinance, therefore, provisions relating to women-accused under the Cr.P.C.shall apply to the impugned Ordinance as well.

WITHDRAWAL FROM PROSECUTION

299. Section 31B of the NAB Ordinance empowers the Chairman NAB to direct the Prosecutor General Accountability to withdraw from prosecution of any person and release him if not required in any other case under the Ordinance if he is of the opinion that ends of justice so require.

300. Withdrawal of cases can neither be controlled by the Chairman NAB nor the Prosecutor General or Deputy Prosecutor General. Such course can be resorted to only if the Accountability Court so permits. Suitable amendment be made in section 31B of the Ordinance.

PERFORMANCE OF NAB

301. The report as to performance of the NAB and the submissions made by Mr. Maqbool Elahi Malik, learned Advocate General Punjab at the bar may be summed up as follows:

1. NAB INQUIRIES/INVESTIGATIONS:

(i) 759 investigations- against 256 politicians, 383 bureaucrats, 38 businessmen, 16 persons from armed forces and 66 others:

(a) 143 investigations completed;

(b) 586 investigations are in progress

(c) 30 investigations are suspended. REGIONS: (i) Accountability cases (politicians):

(a) 92 from Punjab

(b) 17 from NWFP

(c) 20 from Balochistan

(d) 37 from Sindh POLITICAL SPECTRUM:

(iii) (a) 54 belong to PPP

(b) 72 belong to PML

(c) 40 other fringe parties BUREAUCRATS:

(iv) a) 109 BPS 20 and above

(b) 257 BPS 19 and above

Total: 366

2. SUMMARY OF PROSECUTION TILL 2.4.2001:

(i) 216 cases tiled

(ii) 120 decided:

(a) 89 Court decisions

(b) 31 plea bargaining

(iii) 172 cases still pending

3. CLASSIFICATION OF OFFENCES IN REFERENCES FILED:

(i) 63 - corruption and corrupt practices

(ii) 65 assets beyond means

(iii) 70 misuse of authority

(iv) 31 embezzlement

(v) 23 wilful default

(vi) 9 under section 31A against absconders

4. PLEA BARGAINING:

(i) 87 cases received

(ii) 46 bargained

(iii) 25 under process

(iv) 13 rejected Amount paid: Rs,774.305 million

Amount to be paid further: Rs,290.295 million

Total payable: Rs,1064.600 million

5. STATUS OF ACCUSED:

(i) Arrest warrants issued for 318 persons

(ii) 36 persons in NAB custody

(iii) 157 persons in judicial lock up

(iv) 56 persons released

(v) 69 persons are at large

6. BANK DEFAULT CASES:

(i) On 31.1.2001 direct recovery: 37.341 billion

(ii) Money recovered through plea bargaining: 1.064 billion

(iii) Recovery through Courts: 1.056 billion

Total recovery: 40 billion

Adding other recoveries e.g. PTCL, CDA,

Customs duty evasion: 11 billion

Hence total recoveries amount to Rs, 51 billion 7. NAB'S IMPACT ABROAD:

(i) Arrest of Admiral (Retd.) Mansoor-ul-Haq

(ii) Co-operation of the UK Authorities appropos corruption of Benazir Bhutto and Asif Ali Zardari

8. NAB'S OTHER AREAS OF ACTION:

(i) Land scam

(ii) Co-operatives

(iii) Organized illegal emigration

(iv) Utility bills

302. We do not subscribe to the view that the performance of the NAB under its Chairman was not satisfactory in comparison to that of the Ehtesab Bureau and other functionaries created under the Ehtesab Act. Mr. Maqbool Elahi Malik has also placed on record copy of Operational Instruction No,1 (Marked Confidential) issued by NAB, salient features whereof read as under:

"The genesis of corruption in Pakistan is rooted in our historical; social and political history. The inherited system of governance has led to concentration of powers and privileges, thus glamorizing corruption in the society. Corruption is not a cause but a symptom of breakdown of systems and ethics. Fortunately, the tide is turning against the corruption, which lends a big support to NAB. At the same time, failing to deliver would have adverse consequences and therefore, cannot be ignored. The present Government has taken the challenge up-front and NAB has to deliver with a spirit of "JIHAD" in the shortest possible time."

Para 2 of the Instruction lays down the aims and objectives of NAB within the parameters of the NAB Ordinance and seven-point agenda of the present Government. These are:

(a) Identification, investigation and prosecution of cases of corruption ensuring speedy disposal.

(b) Urgent recovery of the state money and other assets misappropriated through corruption, corrupt practices and misuse of authority.

(c) Induce a deterrence against corruption in the society in general and amongst corm: institution/persons in particular.

(d) Develop a culture/mechanism of institutionalized accountability by every public/private organization.

(e) Structure NAB's organization on long term basis which is task oriented by highly professional.

The Instructions, amongst others, contain caution to be exercised against the individual acts of misconduct or misuse of authority, focus on operation, the capacity factor prioritization-parameters and process, review of ongoing cases, limiting factors, i,e, the society's balance is not disturbed, the economic activity is not damaged and the campaign is conducted without harassment, principles of operational functions, functional matters, investigation functions, overseas investigations, teamwork, actions following formal investigations, plea bargaining within the parameters of the law, prosecution functions, functional spectrum and organization, pre-trial function, organizational aspect, etc. The directions contained in the Operational Instruction No,1 appear to be laudable provided they are implemented in letter and spirit. However, apart from any internal instructions issued by the NAB for carrying out the objectives of the NAB Ordinance, it would be appropriate that rules as envisaged under the NAB Ordinance are framed as expeditiously as possible to make the process of accountability transparent in a coherent manner and in the light of the observations made in this judgment.

ACCOUNTABILITY OF ARMED FORCES

303. It was contended that section 5 (m) of the impugned Ordinance, which defines 'holders of public office', excludes a person who is a member of any of the Armed Forces of Pakistan, or for the time being, is subject to any law relating to any of the said Forces, therefore, it is discriminatory in so far as the accountability of the Armed Forces is concerned.

304. The learned counsel for the petitioners have overlooked the constitutional safeguards provided to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law for his actions being challenged under Constitutional jurisdiction of the High Court by virtue of Article 199 (2)(3) of the Constitution as well as Article 8, which lays down that the laws inconsistent With or in derogation of Fundamental Rights shall be void. Sub-clause (a) of Clause (3) of Article 8 provides as under:

"(3) The provisions of this Article shall not apply to-

(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."

305. Article 63(1) providing for disqualifications for membership of Majilis-e-Shoora (Parliament), in sub-clause (g) thereof, lays down:

"(g) he is propagating any opinion, or acting in any manner, prejudicial to the Ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan."

The above is the rationale for not including the members of the Armed Forces within the purview of the NAB Ordinance. This, however, does not mean that they are immune from accountability. The Pakistan Army Act, 1952 (XXXIX of 1952) (hereinafter called the Act) as well as the Pakistan Army Act Rules, 1954 (hereinafter called the Rules) are self-contained Codes, which provide for prosecution and punishment in cases involving F corruption, corrupt practices, illegal gratification and for matters connected F therewith and incidental thereto. Officers and persons enrolled in army F service are subject to section 2 of the Act. Offences of corruption and corrupt practices etc. Corresponding to and ejusdem generis with the offences contained in section 9 of the NAB Ordinance, 1999 are provided for in sections 27, 40, 42, 47 and 55 of the Act. Section 27 of the Act prescribes 'offences against property or persons of inhabitant of country where servingwhich is punishable with rigorous imprisonment for a term which may extend to fourteen years; section 40 of the Act deals with 'fraudulent offencein respect of property which is punishable with rigorous imprisonment for a term which may extend to five years; 'Illegal gratificationfalls under section 42 of the Act, which is punishable with rigorous imprisonment for a term which may extend to five years; section 47 relates to "False documents" which is punishable with rigorous imprisonment for a term which may extend to seven years; and section 55 of the Act provides for "violation of good order and discipline" and prescribes punishment for its breach, which may extend to five years.

306. Section 176 of the Act prescribes power of the Federal Government to make rules for the purposes thereof. Rule 13 read with Rule 157 of the Rules deal with investigation of charges, remand for trial, Court of inquiry and summary of evidence. Sections 80 to 142, contained in Chapters IX to XI of the Act provide for constitution, jurisdiction and powers of Court Martial. Following data shows corruption cases tried in the "Three Services" during the year 1999-2000:

Data of Cases of Corruption Tried in The Three Services

During the year 1999-2000

	Army	PAF	PN
Dismissal/Court Martials during year 1999-2000, relating to Corruption/Corrupt Practices/Frauds/Embezzlements/Illegal Gratifications, etc.	16	16	9

307. Viewed in the above perspective, it is wrong to contend that members of the Armed Forces are immune from accountability. Admittedly, they are subject to accountability in accordance with the methodology laid down in the Act and the Rules.

ACCOUNTABILITY OF NATIONAL

ACCOUNTABILITY BUREAU

308. The accounts of the National Accountability Bureau shall be kept in such form and in accordance with such principles and methods as the Auditor General of Pakistan may prescribe.

309. The accounts shall be audited by the Auditor General, Pakistan annually and his report shall be submitted to the President of Pakistan.

310. The Chairman NAB shall submit his Annual Report to the President of Pakistan as to affairs and performance of the National Accountability Bureau by 15th January of each succeeding year.

311. A mechanism shall be evolved by the Chairman NAB for redressal of the grievances against the functionaries of the National Accountability Bureau

ACCOUNTABILITY OF SUPERIOR JUDICIARY

312. Under Article 209 of the Constitution of the Islamic Republic of Pakistan, 1973, the Supreme Judicial Council of Pakistan consists of

(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts."

Clause (5) of the above Article reads as under:

"(5) If, on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity: or

(b) may have 'been guilty of misconduct, the President shall direct the Council to inquire into the matter."

A perusal of the above clause indicates that the right to move the Supreme Judicial Council (SJC) against a Judge of the Superior Courts under Article 209 of the Constitution is not available to any individual. Secondly, the President alone on the advice of Prime Minister or the Cabinet as the case may be, can refer a case of the Judge of the Superior Courts to Supreme Judicial Council for holding an enquiry against him. Thirdly, the jurisdiction of Supreme Judicial Council to hold an enquiry against the Judge of a Superior Court arises only when a reference is made to it by the President in this behalf. Fourthly, the enquiry by the Supreme Judicial Council against the Judge of a Superior Court under Article 209 ibid, is limited only to two points, namely (i) the incapacity of the Judge to perform the duties of his office properly arising from any physical or mental incapacity and (ii) misconduct of the Judge concerned. Lastly, the findings of the Supreme Judicial Council in such an enquiry are recommendatory in nature and the action, if any, is to be taken by the President on the advice of the Prime Minister or the Cabinet. Refer Malik Asad Ali v. Federation of Pakistan (PLD 1998 SC 161). However, in order to make the Supreme Judicial Council more effective and

functional and to ensure that the Judges of the Superior Courts observe the Code of Conduct in letter and spirit, the Chief Justice of Pakistan/Chairman Supreme Judicial Council convened meetings of the Council on 29.3.2000, 13.4.2000 and 30.4.2000 respectively wherein decisions, inter alia, were taken to make it obligatory on every Judge to take all steps necessary to expedite cases, and effectively control the processing thereof with a view to deciding the same expeditiously and to strictly adhere to the Code of Conduct, pursuant to the provisions contained in Articles II, IX and X of the Code of Conduct. Article X provides for quick disposal of cases. The Judges of the Superior Courts have to work and conduct themselves under the Code of Conduct already prescribed for them. They are oath-bound to preserve the Code and act in accordance with its dictates. The Code of Conduct is a fairly comprehensive document and covers both the public and private conduct of Judges. It lays down essential norms of behaviour to be observed in the interest of maintaining decorum and judicial propriety. The Supreme Judicial Council is a unique institution, which comprises the senior most Judges in judicial hierarchy and entrusted with the onerous responsibility of deciding complaints that are referred to it through references by the President alone. It is an essential prerequisite of the independence of judiciary that there is put in place a system of accountability. It should, therefore, be the endeavour of the Judges of the Superior Courts to make the Code fully applicable and ensure that it is strictly adhered to. As held in the case of Zafar Ali Shah (supra), the Judges of the Superior Courts are not immune from accountability. They are accountable only in the manner laid down under Article 209 of the Constitution. We may also observe that no question was raised by the learned counsel for the petitioners in regard to the accountability of Judges vis-a-vis NAB Ordinance. However, we thought it in the fitness of things to reaffirm the observations in the case of Zafar Ali Shah (supra) that the Judges of the Superior Courts are not immune from accountability and that it is for the President to make a reference if in a case such a course is desirable at his end.

PAST AND CLOSED TRANSACTIONS

313. M/s. Abdul Hafeez Pirzada, K.M.A.Samdani and M.Akram Sheikh vehemently argued and reiterated that the impugned Ordinance should be struck down as a whole on the ground of being void. They argued that even if some of the provisions contained therein are good and the others bad, the good ones will also have to be struck down for the reason that the doctrine of severability is not attracted in such a case. In support of their contention they placed reliance on Yousaf Ali v. Muhammad Aslam Zia and 2 others (PLD 1958 SC (Pak.) 104), wherein it was held that "...Where the Legislature clothes an order with finality, it always assumes that the order which it declares to be final is within the powers of the authority making it, and no party can plead as final an order made in excess of the powers of the authority making it, in the eye of the law such order being void and nonexistent. And if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute e principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they arefounded." The principle laid down in the case of Yousaf Ali (supra) is not attracted here, in that, neither the impugned legislation has been found to be void nor any order passed under the Ordinance purported to be void is subject-matter here. The individual grievances of any of the petitioners are not being examined in these proceedings. Also refer Zafar Ali Shah (supra) vide paragraph No,283 whereof it was observed :

"283 On the question of legislative power in relation to Court's declaration of law, the matter stands concluded by the judgment of this Court in Muhammad Yusuf v. The Chief Settlement and Rehabilitation Commissioner Pakistan, Lahore and another (P L D 1968 Lahore 101) in the following terms:

`This judgment was delivered on the 2nd November 1964, and its consequence was that as from that date all Courts subordinate to the Supreme Court and all executive and quasi-judicial authorities were obliged by virtue of the Constitution to apply the rule as laid down by the Supreme Court in cases coming upbefore them for decision. It did not have, and it cannot be contended that it had, the effect of altering the law as from the commencement of the Act so as to render void of its own force all relevant orders of the Settlement Authorities or of the High Court made in the light of the earlier interpretation which was that the exercise of the delegated power was subject to the provisions in Chapter VI of the Act."

In Zatar Ali Shah's case (supra) a specific direction was given that the Government shall accelerate the process of accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law. It was also observed that "the order passed therein will not affect the trials conducted and convictions recorded including proceedings for accountability pursuant to various orders made and Orders/laws promulgated by the Chief Executive or any person exercising powers or jurisdiction under his authority and the pending trials/proceedings may continue subject to this order" (emphasis provided). We see no reason to modify the above order of an eleven-Member Bench of this Court which is even otherwise binding on this Bench.

314. We, therefore, direct that this Order shall not affect the trials conducted and convictions recorded or any order passed or proceedings taken thereunder and the pending trials/proceedings may continue subject to this order.

CREDIBILITY OF JUDICIAL PROCESS

315. An Accountability Judge has to bear in mind that expeditious trial and fits early conclusion are necessary for the ends of justice and credibility of the judicial process. Any dilatory tactics of the accused shall not prevent the Court from concluding the trials most expeditiously, within the time frame laid down in the NAB Ordinance. Any observation made by this Court in this Order shall have no bearing on the merits of the cases pending before the Accountability Courts, which shall be decided in accordance with law. Care must be taken by the Accountability Courts to ensure that the credibility of the judicial process is not undermined in any manner whatsoever.

316. Before concluding we would like to record our highest appreciation for Mr. Aitzaz Ahsan, Senior A.S.C.; Mr. Muhammad Akram Sheikh, Senior A.S.C.: Mr. Abdul Hafeez Pirzada, Senior A.S.C.; Mr. K.M.A. Samdani, A.S.C.; Ch. Mushtaq Ahmad Khan, Senior A.S.C.; Mi. Muhammad Ikram Ch., A.S.C.; Dr. A. Basit, A.S.C.; Dr. Z. Baber Awan, A.S.C.; Mr. Abdul Haleem Pirzada, Senior A.S.C.; the learned Attorney-General for Pakistan, Mr. Abid Hasan Minto, Senior A.S.C. And Mr. Maqbool Ilahi Malik, Advocate General, Punjab assisted by their team members, for the valuable assistance rendered to the Court in resolving this complex matter of great public importance. We also record our highest appreciation for setting an exemplary tradition by the learned counsel appearing on either side, in particular, the Senior Advocates of this Court in limiting the amount of time allowed to each side for

arguments. Such limits can be helpful to the Court and the parties but should be imposed with care and caution and only after consultation with counsel to ensure a fair hearing.

317. We, therefore, allow these petitions with the observations that this order and the directions contained therein shall come into force with immediate effect. However, the Federal Government is directed to formally promulgate appropriate legislative instruments, as soon as possible, but preferably, within a period of two months from today in order to make necessary amendments, modifications, alterations, or substitutions, as the case may be, to give effect to the above directions. No costs.

318. The Registrar of this Court shall send copies of this judgment to all the learned Chief Justices of the High Courts; Secretary, Law, Justice and Human Rights Division, Government of Pakistan; and Chairman, National Accountability Bureau.

319. The 'Secretary, Law, Justice and Human Rights Division, shall, within three days of the receipt of the copy of the judgment, forward copies of the same to all the Presiding Officers of the Accountability Courts throughout Pakistan.

(Sd.)

Irshad Hasan Khan, CJ

(Sd.)

Muhammad Bashir Jehangiri, J.

(Sd.)

Ch. Muhammad Aril', J.

(Sd.)

Qazi Muhammad Farooq, J.