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**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.

P L D 2009 Supreme Court 393

Present: Iftikhar Muhammad Chaudlhry, C.J. Mian Shakirullah Jan and Raja Fayyaz Ahmad, JJ

SINDH HIGH COURT BAR ASSOCIATION---Petitioner

Versus

FEDERATION OF PAKISTAN through Secretary Ministry of Law, Justice and Human Rights, Islamabad and 4 others--Respondents

Constitution Petition No.9 of 2009, decided on 3rd April, 2009.

Constitution of Pakistan (1973)

----Art. 184(3)---Constitutional petition under Art.184(3) of the Constitution before Supreme Court---Contentions of the petitioners were that Judges of the High Court were illegally directed to cease to hold office in pursuance of the Proclamation of Emergency of 3rd November, 2007, which was it correctly validated by a 7 Member Bench of Supreme Court in the case of Tikka Iqbal Muhammad Khan v. General Pervez Musharraf PLD 2008 SC 178 holding. inter alia, that the Judges who had not taken oath under the Provisional Constitution Order, 2007 had ceased to hold office; that said judgment was per incuriam in view of the 12 Member Bench judgment in the case of Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan PLD 2000 SC 869 wherein it was held in unambiguous terms that after the pronouncement of this judgment, no Judge of a Superior Court could be removed except by following the procedure laid down in Article 209 of the Constitution; that in the case of Tikka Iqbal Muhammad Khan, the judgment in tyre case of Zafar Ali Shah was not examined in the correct perspective, therefore, the judgment of the 12 Judges would prevail; that the said Judges were reappointed for a period of one year vide Notification dated 26-8-2008, which, in effect, was the revival of their original appointment as they were given the seniority position prevailing on 2nd November, 2007 and later on vide Notification, dated 15-9-2008 the period of their appointment as Additional Judges of the High Court was extended for six months with effect from the date when their present term expired, thus, this period of six months would be added to the earlier period of appointment as Additional Judges, which was to expire on 25-8-2009 and for all intents and purposes they would be entitled to continue their service as Additional Judges up to 25-2-2010; that although the Chief Justice, High Court of Sindh earlier misunderstood and misinterpreted the Notifications dated 26-8-2008 and 15-9-2008, but on a representation made by the Judges corrected the error and assigned them Court work; that subsequently, the Ministry of Law as well as the then incumbent of the office of Chief Justice of Pakistan, through their separate letters, interpreted the Notifications dated 26-8-2008 and 15-9-2008 in a manner that their period of appointment as Additional Judges had already expired, which was not the correct interpretation of both the Notifications; that without prejudice to his plea with regard to the interpretation of the Notifications dated 26-8-2008 and 15-9-2008, the Chief Justice and the Governor of Sindh both recommended the two Additional Judges for their appointment as permanent Judges under Article 193 of the Constitution; that after recommendation of the Chief Justice and the Governor of Sindh regarding permanent appointment of the Judges, in view of the law laid down in Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324, they ought to have been appointed accordingly---Supreme Court ordered to issue notice to the respondents for filing of parawise comments/written statement, if desired by them, in the meanwhile, notice be also issued to the Attorney-General for Pakistan under O.XXVII-A of the Code of Civil Procedure, 1908 read with Order XXIX of the Supreme Court Rules, 1980 as important questions regarding interpretation of the constitutional provisions were involved in the case and that the parawise comments/written statement be filed within a period of three weeks and on receipt of the same, the case shall be listed for hearing.

Rashid A. Razvi, Advocate Supreme Court and Anwar Marrsoor Khan, Advocate Supreme Court for Petitioner.

Nemo for Respondents.

Date of hearing: 3rd April, 2009.

ORDER

IFTIKHAR MUHAMMAD CHAUDHARY, C.J.---This petition has been filed by the Sindh High Court Bar Association with the following prayer:--

“The petitioner, therefore, prays that his Hon’ble Court may be pleased:--

(i) To declare that the respondents No.3 and 4 are and continue to be Judges of the High Court of Sindh and would continue as Additional Judges till 25th August, 2010 and that their term of appointment has not expired as opined by Justice Abdul Hameed Dogar;

(ii) To declare and direct Registrar of the High Court of Sindh that the respondent should be assigned regular work as Judges of the Sindh High Court;

(iii) To issue writ of mandamus directing the respondents to act in accordance with Constitution and the Law in the matter of appointment of Judges, in particular, the respondents Nos. 3 and 4, further directing the continuance of respondents Nos. 3 and 4 to perform functions and duties as Judges of the High Court of Sindh unless justiciable reasons are placed on record to ignore the recommendations by constitutional consultees asked through office memorandum dated 13th March, 2009;

(iv) To issue directions to the respondent No.1 and the Registrar of the High Court of Sindh to place the entire record of proceedings of consultation leading to issuance of notification dated 12th March, 2009 before this Hon’ble Court;

(v) To issue a writ of mandamus to appoint the respondents Nos. 3 and 4 as permanent Judges of the High Court of Sindh under Article 193 of the Constitution of the Islamic Republic of Pakistan;

(vi) To grant costs of the petition; and

(vii) To grant any other relief or reliefs as may be considered appropriate and just in the circumstances of the case.”

2. The learned counsel contended that respondents Nos. 3 and 4 (Mr. Justice Zafar Ahmed Khan Sherwani and Mr. Justice Abdul Rasheed Khalwar were illegally directed to cease to hold office in pursuance of the Proclamation of Emergency of 3rd November, 2007, which was incorrectly validated by a 7 Member Bench of this Court in the case of Tikka Iqbal Muhammad Khan v. General Pervez Musharraf PLD 2008 SC 178 holding, inter alia, that the Judges who had not taken oath under the Provisional Constitution Order, 2007 (PCO 2007) had ceased to hold office. According to the learned counsel this judgment was per incuriam in view of the 12 Member Bench judgment in the case of Zafar Ali Shah v. Pervez Musharraf, Chief Executive of Pakistan PLD 2000 SC 869 wherein it was held in unambiguous terms that after the pronouncement of this judgment, no Judge of a Superior Court could be removed except by following the procedure laid down in Article 209 of the Constitution, According to him, in the case of Tikka Iqbal Muhammad Khan, the judgment in the case of Zafar Ali Shah was not examined in the correct perspective. Therefore, the judgment of the 12 Judges would prevail.

3. The learned counsel further contended that the respondents Nos. 3 and 4 were reappointed for a period of one year vide Notification dated 26-8-2008. which, in effect, was the revival of their original appointment as they were given the seniority position prevailing on 2nd November, 2007 He pointed out that later on vide Notification, dated 15-9-2008 the period of their appointment as Additional Judges of the High Court was extended for six months with effect from the date when their present term expired. This according to the learned counsel this period of six months would be added to the earlier period of appointment as Additional Judges which was to expire on 25-8-2009 and for all intents and purposes they would be entitled to continue their service as Additional Judges up to 25-2-2010. He submitted that although the Chief Justice, High Court of Sindh earlier misunderstood and misinterpreted the Notification dated 26-8-2008 and 15-9-2008, but on a representation made by the respondents Nos. 3 and 4, corrected the error and assigned them Court work Subsequently the Ministry of Law as well as the then incumbent of the office of Chief Justice of Pakistan, through their separate letters, interpreted the Notifications dated 26-8-2008 and 15-9-2008 in a manner that their period of appointment as Additional Judges had already expired, which according to the learned counsel, was not the correct interpretation of both the Notifications.

4. The learned counsel also contended that without prejudice to his plea with regard to the interpretation of the Notifications, dated 26-8-2008 and 15-9-2008, the Chief Justice and the Governor of Sindh both recommended the two Additional Judges for their appointment as permanent Judges under Article 193 of the Constitution of the Islamic Republic of Pakistan, 1973. The learned counsel maintained that after recommendation of the Chief Justice and the Governor of Sindh regarding permanent appointment of the respondents Nos. ‘3 and 4, in view of the law laid down in Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324, the respondents ought to have been appointed accordingly.

5. Issue notice to the respondents for filing of parawise comments/written statement, if desired by them, in the meanwhile, notice be also issued to the learned Attorney-General for Pakistan under Order XXVII-A of the Code of Civil Procedure, 1908 read with Order XXIX of the Supreme Court Rules, 1980 as important questions regarding interpretation of the constitutional provisions are involved in the case. Let the parawise comments/written statement be filed within a period of three weeks and on receipt of the same, the case shall be listed for hearing.

C.M.A. No.1032 of 2009

6. Notice in the miscellaneous application be also issued.

M.B.A./S-18/S                                                                                    Order accordingly.

P L D 2009 Karachi 408

Before Mushir Alam, Khilji Arif Hussain, Gulzar Ahmad, Maqbool Baqar and Faisal Arab, JJ

SINDH HIGH COURT BAR ASSOCATION, through Honorary Secretary---Petitioner

Versus

FEDERATION OF PAKISTAN through Ministry of Law and Justice, Islamabad and 4 others---Respondents

Constitutional Petition No.D-40 of 2009, decided on 25th June, 2009.

Per Gulzar Ahmed, J; Mushir Alam; Khilji Arif Hussain and Maqbul Baqar, JJ, agreeing---

(a) High Court (Lahore) Rules and Orders---

----Vol. I, Ch.3, Part A, R.6 & Ch.10, Part A, R.1---Sindh Chief Court Rules (AS), R.12(2)---West Pakistan Civil Courts Ordinance (II of 1962), S.28---Sindh Courts Act (VII of 1926), S.8---Constitution of Benches by Chief Justice of High Court of Sindh---Application of R.12(2), Sindh Chief Court Rules (AS)---Scope---Contention was that R.12(2) of the Sindh Chief Court Rules (AS) required one or both Judges to sit as member of the Full Bench and it being not so, the Full Bench was not properly constituted---Held, High Court (Lahore) Rules and Orders were being applied in exercise of appellate jurisdiction of Sindh High Court; Rule 12(2) of the Sindh High Court being not applicable to the High Court of Sindh and Sindh Courts Act, 1926 except its S.8, having been repealed, contention had no force and the same was rejected---Rule 6, Part A, Ch.3, Vol.V and Rule 1, Part A, Ch.10, of Vol.V of High Court (Lahore) Rules and Orders give ample power to the Chief Justice to constitute Bench including the Full Bench without any condition and that it was not necessary for the Chief Justice to sit as a member of the pull Bench constituted by him---Principles.

Messrs Muqtada Khan Iqtada Khan v. Mst. Allah Rakhi Begum PLD 1972 Kar. 471; The State v. Muhammad Ashraf PLD 1961 (WP) Kar. 452 and Abdul Aziz v. Abdul Wahab PLD 1964 (W.P.) Kar. 630 ref.

(b) Writ---

----Mandamus and quo warranto, writs of---Rule for issuing a writ of mandamus/enforcement of fundamental rights and for issuing writ of quo warranto is governed by two different independent sets of law in which there is no similarity and the ultimate decision of the court, in case writs are issued, produces altogether different results---In issuing of writ of mandamus/enforcement of fundamental rights, the court directs the official functionaries to do and perform what law requires them to do and to perform, and in case of issuing of writ quo warranto the person holding or purporting to hold public office ceases to hold office for it being without authority of law.

(c) Constitution of Pakistan (1973)---

----Art. 199(1)(ii)---Constitutional jurisdiction of High Court----Scope---Article 199(1)(ii) of the Constitution confers powers on the High Court to entertain and decide a petition of quo warranto---Constitutional duty has been cast upon the High Court to decide such matter, which duty ought not be abdicated for reason that some point in the nature of mandamus/involving enforcement of fundamental rights either collaterally or directly involved in the constitutional petition before the High Court be also pending adjudication before the ‘Supreme Court, in view of the clear distinction in the matters of quo warranto and mandamus---Such would be more appropriate, for the added reason that if any party is aggrieved by the decision of the High Court, it will have remedy to having the decision of High Court examined by the Supreme Court.

Miss Benazir Bhutto v. Federation of Pakistan and another PLD 1988 SC 416 ref.

(d) Constitution of Pakistan (1973)---

----Art. 199---Constitutional jurisdiction of High Court---Scope---Petition of quo warranto in respect of Judge of a superior Court will be maintainable under Art.199 of the Constitution.

Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161 quoted.

Al-Jehad Trust’s Case PLD 1996 SC 324 ref.

(e) Constitution of Pakistan (1973)---

----Arts. 177, 193, 197 & 48---Appointment of Supreme Court and High Court Judges---Object of providing consultation, inter alia, in Arts.177 & 193 of the Constitution---Principles.

Following are the settled principles on the subject:---

(I) 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 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.

(II) Since the Chief Justice of High Court concerned and Chief Justice 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.

(III) 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 the Executive. It should be effective, meaningful, consensus-oriented leaving no room for complaint of arbitrariness or unfair play.

(IV) The Chief Justice of a High Court and Chief Justice of Pakistan are well-equipped to assess as to the knowledge and suitability of a candidate of 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.

(V) None of the consultees/functionaries is less important or inferior to the other. All are important in their respective spheres. The Chief Justice 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.

(VI) The view of none of the consultee can be rejected arbitrarily in a fanciful manner and that the views of Chief Justice of the High Court concerned and Chief Justice of Pakistan cannot be rejected arbitrarily for extraneous consideration and if the Executive wishes to disagree with their views, it has to record strong reasons which will be justiciable.

(VII) That if a person found to be unfit by the Chief Justice of a High Court and 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 he cannot be appointed as it will not be proper exercise of power to appoint under the Articles of the Constitution.

(VIII) That since the interpretation of the various Articles by the Supreme Court becomes part of the Constitution and as it becomes the law, it is incumbent on all Executive and judicial authorities throughout Pakistan to act in the aid of the Supreme Court by virtue of Article 190. An advice under clause (1) of Article 48 of the Constitution, therefore, cannot be in violation of law as declared by the Supreme Court. If the advice tendered by the Prime Minister in respect of appointment of the Judge of a superior Court is in accordance with the judgment in the Judges’ case, it will be binding on the President. But if the advice is contrary to the said judgment the President has several options which inter alia, include the following:---

(i) The President may agree with the reasons recorded by the Prime Minister for not accepting the recommendations of the Chief Justice or the Chief Justices. In that event the above reasons will be justiciable as held in the Judges’ case.

(ii) The President may refer the matter to the Prime Minister for reconsideration under the proviso of clause (1) of Article 48 of the Constitution.

(iii) The President may refer the matter for consideration of the Cabinet under clause (c) of the Article 46 of the Constitution.

(iv) The President may convene a meeting and may invite the Prime Minister, the Chief Justice of Pakistan and Chief Justice of High Court concerned for resolving the issue by participatory consultative process and consensus-oriented.

(v) The President may make a reference to the Supreme Court under Article 186 for soliciting opinion.

The Executive Authority is bound to accept the views of Chief Justice of High Court concerned and Chief Justice of Pakistan in the matter of appointment of Judges in superior judiciary and such views cannot be rejected arbitrarily for extraneous consideration and if the Executive wishes to disagree with their views, it has to record strong reasons which will be justiciable and that if a person is found to be unfit by the Chief Justice of a High Court concerned and Chief Justice of Pakistan for appointment as a Judge of a High Court, he cannot be appointed as it will not be a proper exercise of power to appoint under Articles of the Constitution. The assumption is that the views of the Chief Justice of a High Court and Chief Justice of Pakistan are identical and does not speak of a case in specific terms where the views of Chief Justice of High Court concerned and Chief Justice of Pakistan may not be the same. The judgment proceeds on the assumption that there will be identity of views of Chief Justice of High Court concerned and Chief Justice of Pakistan in the matter of appointment of a Judge or Additional Judge of High Court concerned and Chief Justice of Pakistan being Members representing judiciary have their channels of discussion/consultation open between them and if there does crop-up difference of opinion between them, they are completely free to have their views discussed with each other to reach consensus between them.

The differences in views between Chief Justice of High Court and Chief Justice of Pakistan in the matter of appointment of a Judge or an Additional Judge in the High Court have been arising but there appears to be no one case where it may not have been resolved through the process of consultation between them. No such situation- could have been visualized nor comprehended for the reason that Chief Justice of High Court and Chief Justice of Pakistan being head of their respective Courts are always expected to resolve their differences by an amicable means so as to forward to the Executive a consensus view from the side of judiciary regarding appointment of a Judge or an Additional Judge of a High Court.

Supreme Court on Record Advocate Association v. Union of India AIR 1994 SC 268; Philosophy of Law, 2nd Edn. By Joel Feinberg and Hyman Gross; Al-Jehad Trust v. Federation of Pakistan PLD ‘1996 SC 324; Justice Ghulam Haider Lakho v. Federation of Pakistan PLD 2000 SC 179; Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and another PLD 1989 Kar. 404; M.M. Gupta and another v. State of J&K and others AIR 1982 SC 149 and Al-Jehad Trust through Raees-ul-Mujahidin Habib Al-Wahabul Khairi, Advocate Supreme Court and another v. Federation of Pakistan others PLD 1997 SC 84 ref.

(f) Constitution of Pakistan (1973)---

----Arts.177, 193, 197 & 260---Appointment of Supreme Court and High Court Judges---”Consultation”---Meaning.

The definition of the word “consultation” given in the Constitution is: shall, save in respect of appointment of Judges of the Supreme Court and High Courts, means, discussion and deliberation which shall not be binding on the President. This definition in the first place provides consultation by means of discussion and deliberation in the case of appointment of Judges in the Supreme Court and High Courts and secondly provides saving clause which as a rule is construed to exempt something from immediate interference or destruction.

The word “consultation” as defined in the Constitution with meaning of discussion and deliberation, as an exception has been made binding on the President only in respect of appointment of Judges of Supreme Court and High Courts and it seems to be based on the rationale not far to be found i.e. pronouncement of Supreme Court in the Judges’ case.

Understanding Statutes Conons of Construction, 2nd Edn., p.114 by S. M. Zafar and Judge’s case PLD 1996 SC 324 ref.

(g) Constitution of Pakistan (1973)---

----Arts. 193 & 197---Appointment of Judges of High Court---Consultative process---Principles---By not adhering to the recommendations of the Chief Justice of concerned High Court and by not giving any reasons for such non-adherence and without consulting the Chief Justice of the High Court, appointing a permanent Judge of said High Court and granting 6 months extension as Additional Judge through a notification was not based upon mandatory consultation as required by the Constitution read with Judge’s case PLD 1996 SC 324 which provided that there should be participatory consultative process’ between the consultees and also with the Executive and it should be effective, meaningful, purposive, consensus oriented leaving no room for complaint of arbitrariness or unfair play and that the views of each of the consultees was binding on the Executive and in case Executive wishes to disagree with view of any of the consultees, it was required to give strong reasons for it---Views of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan Will be binding on the Executive---Views of judicial consultees in respect of appointment of a Judge of High Court has to be expressed by the Chief Justice of Pakistan with the supporting views of the Chief Justice of High Court concerned which has to be evolved through participatory consultative process to be effective, meaningful, purposive and consensus oriented---If the recommendations of Chief Justice of Pakistan are not based on such consultative process, such recommendations to the Executive will not be binding and if the Executive accepts such recommendations, it will become justiciable---Non-justiciablity is attached to the recommendations of the Chief Justice of High Court and that of Chief Justice of Pakistan expressed conjunctively---Law and principles on the subject elaborated.

Judges’ case PLD 1996 SC 324; Judges’ case AIR 1994 SC 268, p.447 by His Lordship Verma, J; Supreme Court Bar Association v. Federation of Pakistan PLD 2002 SC 939; Justice Ghulam Haider Lakho v. Federation of Pakistan PLD 2000 SC 179 ref.

(h) Constitution of Pakistan (1973)---

----Arts. 177 & 260---Appointment of Judge of Supreme Court---Consultative process---Principles---Article 177 of the Constitution provides that the Judges of Supreme Court shall be appointed by the President in consultation with Chief Justice of Pakistan---Only one judicial consultee is provided and by the dint of Judge’s case and the definition of the word “consultation” in the Constitution, the consultation of the Chief Justice of Pakistan in appointment of Judges in the Supreme Court has been made binding on the President.

(i) Constitution of Pakistan (1973)---

----Art. 197---Appointment of Additional Judge of the High Court---Expectancy of Additional Judge of being made a permanent Judge--Principles.

Though there is well-established practice/convention of an Additional Judge being appointed against a permanent vacancy has a reasonable expectancy to be considered for appointment as a permanent Judge but such expectancy has been made subject to the satisfaction of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan---If the Chief Justice of the High Court does not recommend the appointment of an Additional Judge as a Permanent Judge, the qualification of reasonable expectancy will not stand, for that in order to take contrary view from the one taken by the Chief Justice of the High Court concerned either strong reasons have to be assigned or his consensus through consultative process is obtained. The rule of fitness and suitability has an edge over the principles of seniority and legitimate expectancy.

(j) Constitution of Pakistan (1973)---

----Arts. 193 & 199(1)(b)(ii)---Constitutional petition---Maintainability---Constitutional petition challenging the right to hold office of a Judge of High Court is maintainable under Art.199(1)(b)(ii) of the Constitution.

(k) Constitution of Pakistan (1973)---

----Arts. 193, 197 & 260---Appointment of High Court Judges---Consultative process---Principles---Consultation with regard to the confirmation and/or extension of a Judge of the High Court by the President/Executive with the consultees mentioned in Arts.193 & 197 of the Constitution read with definition of “consultation” under Art.260 of the Constitution has to be effective, meaningful, consensus oriented, purposive--Any appointment, confirmation and or extension in disregard of said principles shall be violative of the Constitution and the well-established constitutional conventions and thus invalid---Where the said procedure was not adhered to in the matter of confirmation and extension of an Additional Judge of the High Court, his “confirmation” was held by the Full Bench to be treated as an “extension” in his tenure as an Additional Judge of High Court as recommended by the Chief Justice of the concerned High Court, for a period of one year from the date of expiry of his tenure as mentioned in the notification relating thereto---Chief Justice of concerned High Court having not recommended the name of an Additional Judge for extension in his tenure, extension in his tenure being violative of the Constitution, was declared invalid.

Per Faisal Arab, J; Mushir Alam; Khilji Arif Hussain and Maqbul Baqar, JJ agreeing---

(l) Constitution of Pakistan (1973)---

----Arts. 193, 197, 199(1)(b)(ii)(5) & 209---Appointment of High Court Judges---Constitutional jurisdiction of High Court---Scope---Contentions regarding maintainability of the constitutional petition challenging constitutionality of appointment of High Court Judges were that no proceedings in the nature of quo warranto lay against a Judge of a High Court as under Art.199(5) of the Constitution, High Courts had been specifically excluded from the definition of “person” as under Art.192 of the Constitution, High Court meant and included its Chief Justice and all the puisne Judges, therefore, proceedings under Art.199(1)(b)(ii) of the Constitution were not maintainable even against a Judge of a High Court as he did not come within the meaning of “person” provided in Art.199(1)(b)(ii) Of the Constitution and that in case a Judge of superior Court was not fit to hold his office, Art.209 of the Constitution should be resorted to---Validity---Held, under Art.199(1)(b)(ii) of the Constitution, right of a person to hold a public office could be tested--Validity and constitutionality of appointment of a Judge of High Court was outside the purview of the enquiry under Art.209 of the Constitution---Remedy provided under Art.209 of the Constitution, therefore, could not be equated with the proceedings filed under Art.199(1)(b)(ii) of the Constitution to challenge the unconstitutional appointment of a Judge of superior Court---Principles.

Under specific provision of Article 199(1)(b)(ii) of the Constitution, right of a person to hold a public office can be tested. The provisions of this Article are applicable in cases where there is (i) intrusion or usurpation of a public office i.e. either the office was never granted to a person or if granted, his right to the office subsequently stood terminated or forfeited or (ii) the grant of public office is found to be legally defective. In any of these situations, a High Court can declare the right to a public office to be invalid. Hence under Article 199(1)(b)(ii) of the Constitution, a High Court can inquire from a holder of public office, by what authority he has a right to hold his office. While examining the legality of an appointment to a public office, not only the authority of the grantee comes under scrutiny but the scrutiny can go beyond the grant itself and examine the very propriety and legality of the procedure that was adopted in the grant of public office. In other words, a High Court can examine the question whether the procedure that was followed for making an appointment conforms to the requirements of the law and the accepted norms established over the years that have come to be recognized as constitutional conventions. It is an appropriate remedy in cases where public has some interest in the controversy that needs to be resolved and is not meant to be invoked purely for protecting interests of a private right i.e. it cannot be used to question the legality of official acts that a holder of office has performed while in office to which he had no right. Thus, this remedy under Article 199(1)(b)(ii) of the Constitution is limited only to examine a right to a public office.

When the appointment of a Judge of superior Court is called in question on the ground that he did not possess the prescribed qualifications or his appointment does not fulfil the requirements of the Constitution, the relater is not asking the Court to strike down any of his actions which he had performed or is performing as Judge of a superior court but is .asking to examine his right to hold the office of a Judge of the superior Court. Such a case does not fall within the mischief of the provision of Article 199(5) of the Constitution.

In case an appointment is found to be in violation of the provision of any Article of the Constitution, then such person is not entitled to hold and continue in office and the appointment cannot only be called in question on the ground that it infringes the Fundamental Rights guaranteed under Articles 9 and 25 of the Constitution but information in the nature of quo warranto can also be sought through a petition filed under Article 199(1)(b)(ii) of Constitution.

The Supreme Judicial Council cannot grant any relief where there is an illegal and unconstitutional appointment to a superior Court. Hence, the validity and constitutionality of appointment of a Judge of a superior Court is outside the purview of the enquiry under Article 209 of the Constitution as it has no nexus either with the mental or physical incapacity of the Judge to perform the duties of his office or with the misconduct of the Judge. The remedy provided under Article 209 of the Constitution, therefore, cannot be equated with the proceedings filed under Article 199(1)(b)(ii) of the Constitution to challenge the unconstitutional appointment of a Judge of a superior Court.

Proceedings in the nature of quo warranto against a judge of a superior Court are maintainable under Article 199(1) (b) (ii) of the Constitution and provisions of Article 209 of the Constitution have no application in such matters.

In case violation of the provision of Constitution is brought to the notice of a Judge of a superior Court in appropriate proceedings which involves the person of another Judge of the same Court, the relief, in the absence of a Constitutional bar, cannot be declined at the cost of maintaining high tradition to have comity amongst the Judges.

Asad Ali v. Federation’ of Pakistan PLD 1998 SC 161 ref.

(m) Sindh Chief Court Rules (AS)---

----R. 12(2)---Sindh Courts Act (VII of 1926), S.12---Constitution of Full Bench by Chief Justice of High Court---When a Full Bench was not constituted on the request of a Division Bench and no question as contemplated by R.12(2), Sindh Chief Court Rules (AS) had been referred for its decision, R.12, Sindh Chief Court Rules (AS) was not applicable-Principles:

(n) Constitution of Pakistan (1973)---

----Arts. 193, 197 & 199---Pakistan Legal Practitioners and Bar Council Rules, 1976, R.165---Memorandum of Association of the Sindh High Court Bar Association, Art.3(d)---Appointment of High Court Judges---Challenge to constitutionality of such appointments by Sindh High Court Bar Association under Art.199 of the Constitution---Contention of the respondents was that Bar Association, had no locus standi to maintain a constitutional petition on the issue---Validity---Held, duty of Advocates was not limited to their obligations towards their clients and courts but they also have to keep their eyes and ears open and raise their voice whenever an occasion arises in order to ensure that no political interference takes place which may compromise the independence of judiciary---Rule 165, Pakistan Legal Practitioners and Bar Councils Rules., 1976 and Art.3(d) of the Memorandum of Association of the Sindh High Court Bar Association entitled the Bar Association, which was a body of advocates, to protest earnestly and actively against the appointment of Judges through a process, which was not mandated by the Constitution and Constitutional conventions and had every right to call in question any executive action that interfered with the independence of judiciary---Sindh High Court Bar Association, which was a body of advocates of the Sindh High Court, therefore, had locus standi to file the constitutional petition.

Sharaf Fridi v. Federation of Pakistan PLD 1989 Kar. 404; Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161 and Judges’ case PLD 1996 SC 324 ref.

(o) Constitution of Pakistan (1973)---

----Arts. 193, 177 & 199---Appointment of High Court Judges---Opinion of Chief Justice of Pakistan on the recommendations of Chief Justice of concerned High Court---Justiciability---Scope---Where an appointment is challenged on the ground that consultative process lacked constitutional requirements and disregarded the rule laid down in Judges’ case, such is a situation where the question of non-justiciability would not arise---If such situation was not made justiciable then it would not be possible to question an appointment even if it was made in violation of rules laid down in the Judges’ case.

Judges’ case PLD 1996 SC 324 ref.

(p) Constitution of Pakistan (1973)---

----Arts. 177, 193 & 199---Appointment of High Court Judges---Remarks made in relation to an appointee by judicial consultees under Arts.177 & 193 of the Constitution were not justiciable---Full Bench expunged all averse remarks made against respondents (appointee Judges) in the petition that were said to have been expressed by the Chief Justice of the High Court in his opinion---Full Bench observed that the Bench shall be examining the opinions of judicial consultees only for the limited purpose to form its (Full Bench) opinion on the question whether in confirmation of the Judge of the High Court and extension in the judicial tenure of other two Judges, the consultative process was carried out as was required to be undertaken under Art.193 of the Constitution and defined by Supreme Court of Pakistan in its various judgments, most particularly the Judges’ case.

Judges’ case PLD 1996 SC 324 ref.

(q) Constitution of Pakistan (1973)---

----Arts. 193 & 197---Appointment of Judges of the High Court---Method---Consultative process---Principles.

The method of appointment of a Judge or an Additional Judge of a High Court is the same i.e. the one that is provided in Article 193 of the Constitution. Article 193 provides that appointment of a Judge of a High Court is to be made by the President after consulting with (a) the Chief Justice of Pakistan, (b) the Governor concerned, and (c) the Chief Justice of the concerned High Court (except where the appointment is that of the Chief Justice of the High Court itself).

The Judges’ case recognizes the importance of consultations in the whole process of appointment of Judges to the superior Courts and therefore, the term “consultation” was given an extensive and elaborate meaning.

The word “consultation” was given wider and enlarged meaning keeping in view the fact that appointments relate to the exalted position in the judiciary that has to function independently. It was for this reason felt that no room should be left for political considerations in the appointment of Judges as it would then compromise on the requisite credentials, which Judges of superior Court must possess. To achieve this objective, importance of the opinion of the Chief Justice of the High Court to which appointments are to be made was recognized along with the opinion of the Chief Justice of Pakistan. The opinion of both the judicial consultees being expert opinion, in case they (any of them) find a person not fit and capable to be appointed as Judge of a High Court then the executive must not act against such advice.

Judges’ case accords constitutional recognition to the convention of consulting the Chief Justice of the High Court concerned and the Chief Justice of the Pakistan in the appointment of Judges to the Federal Court now Supreme Court and the High Courts that was in vogue prior to the independence and continued since then. It was considered that continuation of such convention would result in induction of competent and capable people of known integrity in the superior judiciary which is assigned very delicate task to ensure that all the functionaries of the State act within the limits delineated by the Constitution and close the doors for making appointments on political consideration. The words “after consultation” referred to, inter alia, in Articles 177 and 193 of the Constitution involve participatory consultative process between the judicial consultees and executive consultees as both the set of consultees are well-equipped in their specific spheres to assess the suitability of a candidate for judgeship in the superior Courts and none of the consultees is less important or inferior to the other.

The views of none of consultees can be rejected arbitrarily and in fanciful manner. If a person found unfit to be a Judge of the High Court by the Chief Justice of the High Court concerned or the Chief Justice of Pakistan then he cannot be appointed by the President as it will not be a proper exercise of power under Article 193 of the Constitution. The consultative process is mandatory and without it no appointment/confirmation can be made and in absence of consultation as contemplated and interpreted by the Supreme Court (Judges’ case) the appointment or confirmation of a Judge in the superior Courts shall be invalid.

Thus, it is quite evident that while making appointments to the superior Courts, there is no room for arbitrariness. When a Judge of a High Court is to be appointed, the Chief Justice .of Pakistan and the Chief Justice of the concerned High Court have to first arrive at a consensus on the appointment of a recommendee by engaging themselves in a participatory consultative process. The final opinion so reached is then forwarded by the Chief Justice of Pakistan to the executive. The adoption of such procedure is mandatory. Failure to do so would invalidate the appointment or confirmation of a Judge as it would not be regarded as an outcome of an effective, meaningful and consensus oriented consultations.

Though the Chief Justice of the Supreme Court is head of the entire Judiciary and may be figuratively paterfamilias of the brotherhood of Judges but the Chief Justice of a High Court is also an equally important constitutional functionary when it comes to the appointment of Judges of the High Courts and in the entire consultative process it cannot be said that, in any way, his role is less important than the role of the Chief Justice of the Supreme Court.

When consultation is a constitutional requirement then it cannot be treated as a mere formality. The whole object of appointment through consultative process would be defeated if even after the differences in the opinions of the two judicial consultees, no further consultations take place between them. In the present case, there was total absence of having any further consultations with the Chief Justice of High Court in spite of the differences in the two opinions. Thus, the consultative process lacked basic requirements of the “consultations” as defined in the Judges’ case and thus, the confirmation of a Judge and extension in the judicial tenure of Judges was in complete violation of the rules laid down in the Judges’ case.

Al-Jehad Trust’s case PLD 1996 SC 324; Malik Asad Ali’s case PLD 1998 SC 161; Ghulam Haider Lakho’s case PLD 2000 SC 179; Supreme Court Bar Association’s case PLD 2002 SC 939; S.P. Gupta v. Union of India AIR 1982 SC 149 and Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268 ref.

(r) Constitution of Pakistan (1973)--

----Arts. 193 & 197---Appointment of Judges of the High Court---Consultative process---Primacy of opinion---Principles.

Constitution has not envisaged giving primacy to the opinion of any individual judicial consultee in the matter of appointment of Judges to the High Courts. In the matter of appointment of High Court Judges, the opinion has to be formed by both the judicial consultees collectively. When such an opinion is formed, the Chief Justice of Pakistan forwards the same to the Executive. When this collective opinion comes in conflict with the opinion of the Executive it has to be given primacy for the reason that the Chief Justice of High Court concerned and the Chief Justice of Pakistan have expertise knowledge about the ability and competency of a candidate for judgeship. They are well-equipped to assess the knowledge and suitability of a person who is being considered for appointment as a Judge.

Wherever it is stated in Judges’ case that the opinion of the Chief Justice of Pakistan has primacy, insofar as it relates to the appointment of High Court Judges, it means primacy of the common opinion collectively formed by both the judicial consultees over the opinion of the Executive. The reason for stating that opinion of the Chief Justice of Pakistan has primacy is because the collective opinion is finally forwarded by the Chief Justice of Pakistan to the appointing authority i.e. the President. When this collective opinion comes in conflict with the opinion of the Executive then it has to be given primacy over the opinion of the Executive in order to preserve independence of the judiciary. In such a situation if the Executive does not wish to appoint the recommendee on account of negative opinion about his antecedents, the Executive is bound to give reasons for that, whereas no reasons are required to be given by the judicial consultees for their negative opinion about a recommendee. Therefore, in case a person is found to be unfit for appointment by the Chief Justice of the High Court concerned or the Chief Justice of Pakistan then he cannot be appointed as it will not be a proper exercise of power under Article 193 of the Constitution. This restriction on the powers of the appointing authority not to appoint a person who has not been recommended by either of the two judicial consultees gives primacy to their opinion over the opinion of the Executive. Thus, the negative opinion of any of the judicial consultees cannot be ignored by the Executive in any circumstance.

Judges’ case PLD 1996 SC 324 ref.

(s) Constitution of Pakistan (1973)---

----Arts. 193 & 197---Appointment of Judges of the High Court--Constitutional Conventions---Enforceability---Constitutional Conventions are enforceable as if they are provisions of the Constitution---Guidance has to be taken from well-established Conventions, which have dealt with similar situations in the matter of appointment of Judges in the past---Where the Chief Justice of High Court gives negative opinion about a person and Chief Justice of Pakistan holds a positive opinion then it is all the more necessary that the matter be referred back to the Chief Justice of the High Court for reconsideration and only after reaching consensus, recommendations be sent to the appointing authority.

Judges’ case PLD 1996 SC 324 and Malik Asad Ali’s case PLD 1998 SC 161 ref.

(t) Constitution of Pakistan (1973)---

----Arts. 193 & 197---Confirmation of Additional Judges of the High Court---Procedure to be followed.

In the matter of confirmation of additional Judges of the High Courts, the procedure that is followed is that before the judicial tenure of an Additional Judge of a High Court expires, the Chief Justice of the concerned High Court decides (a) whether or not to recommend him for confirmation or (b) whether his tenure needs to be extended for a further period and the question of confirmation be deferred till then. The Constitution has specifically assigned a consultative role to the Chief Justices of the High Courts in the entire process of appointment of Judges/Additional Judges to their respective High Courts. The object of having consultations between the Chief Justice of a High Court and Chief Justice of Pakistan is to appoint such persons who are fit and suitable to hold the office of the High Court Judge and about whom there are no differences of opinion about his fitness and suitability. Differences on the fitness and suitability of a person make him controversial. In such circumstances it is better not to appoint a controversial person who though may be otherwise fit to be appointed as a Judge. This is so because both the judicial consultees have been collectively entrusted with the obligation to appoint such persons whose credentials to hold the office of Judge are beyond reproach. When there is collective responsibility then there is no room for arbitrariness. Appointing a person about whom there are reservations in the mind of any of the two judicial consultees is certainly going to create an adverse perception among the lawyers’ community as well as among the public which may shatter confidence in the judiciary.

Therefore, in case the Chief Justice of the High Court gives his negative opinion and does not recommend confirmation or extension in the judicial tenure of an additional Judge and on the other hand the Chief Justice of Pakistan is of the opinion that the additional Judge deserves to be confirmed then both the judicial consultees must engage themselves in further consultations. The two judicial consultees must discuss on the point of their differences and reach at some consensus. It is only after reaching consensus that the Chief Justice of Pakistan forwards the final opinion to the Executive. In this manner, the final opinion that is communicated by the Chief Justice of Pakistan to the executive is not merely his individual opinion but an opinion that is formed collectively by both the judicial consultees after engaging themselves in consultative process. The main object of having consensus-oriented consultations could only be achieved if such a course is adopted.

Any deviation in the method of appointment prescribed under the Constitution and defined in the Judges’ case is likely to shake the confidence of the public in the institution of judiciary and tarnish its image as the neutral arbiter in disputes between citizen and citizen and citizen and State and therefore, such deviation would vitiate the right to hold office.

Any adverse remark expressed in relation to any person by any of the judicial consultees in the course of the consultative process is not open to judicial scrutiny and hence not justiciable. What is open to judicial scrutiny is the propriety and legality of the consultative process which, if found to be deficient on the touchstone of the provisions of the Constitution (as defined in the Judges’ case and practised through well-established constitutional Conventions), would lead to invalidating the appointment.

Judges’ case PLD 1996 SC 324 and Malik Asad Ali’s case PLD 1998 SC 161 ref.

(u) Constitution of Pakistan (1973)---

----Arts. 193, 197 & 203---Appointment of Judges of the High Court---Executive cannot appoint a candidate for judgeship if the Chief Justice of the concerned High Court or the Chief Justice of Pakistan has given negative opinion, in the entire process of appointment and/or confirmation of High Court Judges, the opinion of the Chief Justice of the High Court is of vital importance---Ignoring the opinion of Chief Justice of the High Court would amount to treating his opinion as a mere formality---Principles.

Though the President has sole power to appoint Judges but the opinion of the consultees, particularly of the Chief Justice of the High Court and the Chief Justice of Pakistan, who are supposed to be experts in the field of law in which the appointment is to be made, cannot be ignored. The Chief Justice of the High Court and the Chief Justice of Pakistan normally know the advocates who appear in their Courts regularly and therefore, they would recommend names of such advocates who are capable and fit to be Judges of the High Court. It is in this context that their opinions, which is expert opinion in a way, cannot and should not be ignored. Then some of the elevations to the High Courts are made from the subordinate judiciary as well. The Chief Justice of the concerned High Court is in a better position to know the performance and capabilities of the Judges of the subordinate judiciary by virtue of Article 203 of the Constitution. This Article entrusts the concerned High Court with the responsibility to supervise and control all Courts subordinate to it. The Chief Justice of the concerned High Court is in direct contact with the District Judges and is aware of their performance as Judges. The Chief Justice of the concerned High Court therefore, is in best position to know their potential and capability to become Judges of the High Court. In this background, the opinion of the; Chief Justice of the concerned High Court gains immense importance when it comes to the appointments that are to be made to his High Court. The negative opinion of both the judicial consultees has to be respected. In case the Executive gives negative opinion about a person for reasons of his improper antecedents in whose favour the Chief Justice of the High Court and the Chief Justice of Pakistan have given their positive opinion the Executive may not appoint such person but it has to give strong reasons for that. On the other hand the Executive cannot appoint a candidate for judgeship if the Chief Justice of the High Court or the Chief Justice of Pakistan have given negative opinion. In the entire process of appointment and/or confirmation of High Court Judges, the opinion of the Chief Justice of the High Court is of vital importance. Ignoring his opinion would amount to treating his opinion as a mere formality.

Judges’ case PLD 1996 SC 324 ref.

(v) Constitution of Pakistan (1973)---

----Arts. 193 & 197---Appointment of Judges of High Court---Differences as to suitability and fitness about a candidate between the two judicial consultees---Principles.

Whenever differences as to suitability and fitness arise about a person between the two judicial consultees, attempt should be made to reach at some consensus. If no consensus is reached then the Executive cannot appoint such a person, as it would not be a proper exercise of power under Article 193 of the Constitution. Then to maintain transparency, the entire consultative process must also be reflected from the record i.e. it should be in writing. The Executive cannot choose from any of the two diverse opinions of the judicial consultees and appoint a person which the executive deems fit. The Executive can only vouch for the antecedents of a person, which too are justiciable. Appointing a person that is likely to give rise to controversy should always be avoided at all costs. Disregard of this principle, which has its root in the time-honoured Conventions, would defeat the very object for which the consultative process was devised in the Constitution and defined in the Judges’ case.

Judges’ case PLD 1996 SC 324 ref.

(w) Constitution of Pakistan (1973)---

----Arts. 193 & 197---Appointment/confirmation of Judges of High Court---Consultative process, in the present case, had not been validly held while confirming an Additional Judge of the High Court---Contention was that when the Judge was administered oath by the same Chief Justice of the High Court who had not recommended his confirmation, therefore, legal infirmity, if any, stood cured---Validity---Held, there was no estoppel against the law or the Constitution---Oath by itself could not cure the defect that was left in the consultative process, which was a mandatory requirement of the Constitution---No consultee possessed exclusive role in the appointment of a High Court Judge---If the Chief Justice of High Court gave oath to a Judge on account of notification by the appointing authority, that did not mean that the consultative process that originally lacked validity under the Constitution would become valid---Obligation to have effective, meaningful, purposive and consensus oriented consultations . before final recommendations were sent to the Executive for consideration had to be discharged in the light of time-honoured past Conventions and the rules laid down in the Judges’ case---Giving oath was secondary which would not cure the inherent defect in the entire process of confirmation of a High Court Judge.

Judges’ case PLD 1996 SC` 324 ref.

(x) Constitution of Pakistan (1973)---

----Arts. 193 & 197---Appointment of Judges of High Court---Question, in the present case, was whether in the matter of recommendation, extension, confirmation or otherwise of Additional Judges of High Court, there was ‘consultation by and between the Constitutional consultees within the contemplation of Articles 193 & 197 of the Constitution, as expounded by the Supreme Court of Pakistan in the cases of Al-Jehad Trust’s case (PLD 1996 SC 324); Malik Asad Ali’s case (PLD 1998 SC 161); Ghulam Haider Lakho’s case (PLD 2000 SC 178) and the Supreme Court Bar Association’s case  (PLD 2002 SC 939)---Verdict of the High Court with regard to the controversy involved in the case summarized.

Following is the summary of the verdict of the High Court on the subject.

(i) It is time honoured constitutional Convention that the process of appointment of a High Court Judge is initiated by the Chief Justice of the concerned High Court and the recommendation for appointment is finally forwarded to the appointing authority by the Chief Justice of Pakistan and this is done only , after both the judicial consultees have reached consensus by engaging themselves in a participatory consultative process.

(ii) The norms that have emerged from the time honoured constitutional conventions have to be respected in the entire consultative process. Guidance has to be taken from the well-established constitutional Conventions, which have dealt with similar situations in the past. Appointing a person that may give rise to controversy should be avoided at all costs. Disregard of this principle, which has its root in the time-honoured conventions, would defeat the very object for which the consultative process was devised in the Constitution and defined in the Judges’ case.

(iii) In the Judges’ case (PLD 1996 SC 324) wherever there is reference to the opinion of “the Chief Justice of Pakistan and the Chief Justice of the High Court”, the Word “and” appearing in the said phrase is to be read to mean the opinion which both the judicial consultees have collectively formed with regard to the suitability and fitness of a person.

(iv) Wherever it is stated in the Judges’ case that the opinion of the Chief Justice of Pakistan has primacy, insofar .as it relates to the appointment of High Court Judges, it refers to the opinion that is collectively formed by both the judicial consultees with consensus that has primacy over the opinion of the executive consultees.

(v) When the Chief Justice of the High Court in his opinion expresses disapproval of any person to be appointed as Judge and on the other hand the Chief Justice of Pakistan finds such person to be suitable for appointment then the record must reflect that further consultations were held between them to sort out the differences. Without addressing the differences in the two opinions, the purpose of having meaningful and effective consultations could never be realized.

(vi) In order to ensure effective consultations between the Judicial consultees; the reasons for disagreement, if any, must be disclosed to the other for reconsideration.

(vii) Where the differences between the Chief Justice of Pakistan and Chief Justice of the High Court remain, in spite of an attempt to sort them out, then appointment should not be made as it would not be in the best interest of the judiciary to appoint a controversial person.

(viii) The Chief Justice of Pakistan and the Chief Justices of High Courts are head of their respective institutions and therefore, if any of them find a person not fit and capable to be appointed as a Judge of the High Court then the Executive cannot disregard such negative opinion and must not appoint a controversial person as it would not be proper exercise of power under Articles 193 and 197 of the Constitution.

(ix) In case the Executive wishes to disagree with the positive opinions of the judicial consultees on account of its negative opinion about the antecedents of a person, it has to give strong reasons, which shall be justiciable but the Executive cannot appoint a person in case the Chief Justice of the High Court or the Chief Justice of Pakistan has given negative opinion about his suitability and fitness.

(x) In order for the consultative process to be credible and transparent, it should always be in writing and must form part of the record, as the appointment of Judges to’ the superior Courts is too important a matter to be left to speculation and conjectures.

(xi) The concept of non-justiciability was devised only to provide a carte blanche to the judicial consultees so that they, while considering appointments under the Constitution, may give their free and frank opinion about a person, without any inhibitions and without putting up with the embarrassment that is bound to come, in case the adverse remarks made in their opinions are made justiciable and allowed to be challenged through representations and legal proceedings.

(xii) What is open to judicial scrutiny is the propriety and legality of the consultative process which if found to be deficient on the touchstone of the provisions of the Constitution (as defined in the-Judges’ case) and the well-established constitutional Conventions, would invalidate the appointment.

In order for a consultative process to be in line with the constitutional requirements and well-established constitutional Conventions, no appointment, confirmation or extension in the judicial tenure of an Additional Judge of High Court could be valid if the Chief Justice of the concerned High Court has not given his positive recommendations in the matter or revised his earlier negative recommendations.

Al-Jehad Trust’s case PLD 1996 SC 324; Malik Asad Ali’s case PLD 1998 SC 161; Ghulam Haider Lakho’s case PLD 2000 SC 179 and Supreme Court Bar Association’s case PLD 2002 SC 939 ref.

(y) Constitution of Pakistan (1973)---

----Arts. 193 & 197---Appointment of Judges of the High Court---Consultative process-Constitutional requirements and constitutional conventions---Held, in order for a consultative process to be in line with the constitutional requirements and well-established Conventions, no appointment, confirmation or extension in the judicial tenure of an Additional Judge of High Court could be valid if the Chief Justice of the concerned High Court has not given his positive recommendations in the matter or revised his earlier negative recommendations.

Per Mushir Alam, J, agreeing with. Gulzar Ahmad and Faisal Arab, JJ

(z) Constitution of Pakistan (1973)---

----Arts. 175(3), 193, 197 read with Art.260---Appointment of Judges of the High Court---Disagreement of Chief Justice of Pakistan with the recommendation of Chief Justice of concerned High Court---Option of initiating .participatory consultative and consensus-oriented process through exchange of correspondence or invitation to the Chief Justice of concerned High Court---Non-arrival of judicial consultees to any consensus---Role of the President in such circumstances---Scope and extent elaborated.

The disagreement of Chief Justice of Pakistan with the recommendation of Chief Justice of High Court is not something unusual in the context of appointment, extention or confirmation of a Judge of High Court and instances are there. It is but part of the healthy consultative process aiming at arriving at consensus amongst the judicial consultees. In case the Chief Justice of Pakistan disagrees with the opinion of the Chief Justice of High Court in the matter of appointment, extention or confirmation or otherwise of a Judge of High Court for any good reasons same may be disclosed to the Chief Justice of concerned High Court to enable him to reconsider his recommendation. If the Chief Justice of concerned High Court still does not deem it necessary to review his opinion as regards non-recommendation either for appointment, extention or non-confirmation of a Judge as the case may be, and he maintains his opinion, then non-appointment, non-extention or non-confirmation of that person as a Judge of High Court for reasons to be recorded by the President is permissible in the public interest. If the non-appointment, non-extention or non-confirmation in rare case, on this ground, turns out to’ be a mistake, in the ultimate public interest the same is less harmful than a wrong appointment. One can very well imagine the devastating and far reaching consequence of wrongful appointment and the judiciary of Pakistan has suffered immensely on this count.

In case of disagreement between the Judicial Consultee, Chief Justice of Pakistan has option to initiate participatory consultative and consensus-oriented process, through exchange of correspondence or may invite the Chief Justice of concerned High Court and engage into integrated participatory consultative process for selecting the best of the best and most suitable person available for appointment. In event consensus inter se judicial consultee cannot be arrived at, and a person is opined to be unfit by the Chief Justice of the concerned High Court for the judgeship of the High Court, such person should not be recommended for appointment, extention and or confirmation by the Chief Justice of Pakistan. From the record made available to us on the subject-matter, it appears that the President in the present case, acted mechanically, without application of mind in post haste in issuing the notification on the very date of receipt of recommendation, without making any conscious effort to encourage consensus amongst the two judicial consultees.

Role of the President in the appointment of Judges of superior Courts should not be taken lightly to be merely ceremonial, mechanical, or executive; it is solemn constitutional duty of vital importance, which must, be performed and discharged objectively, impartially with due deference, seriousness and conscious application of mind, in its true spirit to maintain the independence, dignity and majesty of the Judiciary, the pivotal pillar of the State and with the object to select the best of the best and most suitable person for the judgeship of superior Courts.

If the President/Executive appoints a candidate found to be unfit and unsuitable for the judgeship of the High Court by either of the two judicial consultees, it will not be a proper exercise of important and solemn constitutional authority, under the. Articles 175(3), 193, 197 read with Article 260 of the Constitution.

Non-adherence to the constitutional duty cast upon the President/Executive, and non-observance of mandatory consultative procedure as noted above, amounts to abdication in discharge of its important and constitutional duty. If the President/Executive appoints a candidate found to be unfit and unsuitable for the judgeship of the High Court by either of the two judicial consultees, it will not be a proper exercise of power under the relevant Articles of the Constitution and is always justiciable and amenable to judicial review by superior Courts for the simple reason that mandatory procedure of meaningful, consensus oriented and purposive consultation was not adhered to.

S.C. Advocates-on-Record Association v. Union of India AIR 1994 SC 268 and AIR 1999 SC 1 ref.

Rasheed A. Rizvi for Petitioner.

Sardar Abdul Latif Khosa, Attorney General of Pakistan along with Nazar Akbar, Deputy Attorney General for Pakistan for Respondent No.1.

Yousuf Leghari, Advocate General, Sindh and. Aziz A. Munshi, Advocate for Respondent No.2.

None present for Respondent No.3.

Yawar Farooqui and Irfan Memon for respondent No.4.

Muhammad Javed Alam, Advocate for respondent No.5.

Khalid Anwar, Abdul Hafeez Lakho and Qazi Faez Isa as Amicus Curiae.

Dates of hearing: 14th, 21st, 22nd, 27th, 28th 29th, 30th April, 2009 and 4th and 6th May, 2009.

**JUDGMENT**

**GULZAR AHMED, J.**---This constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has been filed by the Sindh High Court Bar Association through its Honorary Secretary Mr. Munir-ur-Rehman with the following prayers:--

(i) A writ of quo-warranto be issued against the Respondents No.3,4 & 5 as under what authority they have assumed the offices of the Judge of the Sindh High Court.

(ii) That this Hon’ble Court be pleased to declare the appointment of Justice Bin Yamin and as permanent Judge the extension of the judicial tenure of Justice Syed Pir Ali Shah and Justice Arshad Noor Khan as additional Judges of the High Court of Sindh are unlawful, ultra vires the Constitution, mala fide and of no legal consequence.

(iii) That in the alternative and without prejudice to the above reliefs, this Hon’ble Court may be pleased to suspend the operation of impugned Notifications.

(iv) A writ of prohibition restraining the Respondents No.1 & 2 from appointing or elevating any person as Judge of this Hon’ble Court till decision of this petition.

(v) To direct the Ministry of Law, Government of Pakistan to place the entire record of proceedings of consultation before this Hon’ble Court regarding appointment of Judges made on 12`h December 2008.

(vi) That this Hon’ble Court be pleased to grant such other relief as may be deemed necessary and just in the circumstances of the case.

(viii) That this Hon’ble Court be pleased to award costs of the petition.

2. The respondent No.1 in the petition is Federation of Pakistan through Secretary Ministry of Law and Justice, respondent No.2 is the Province of Sindh through Chief Secretary while respondent Nos.3, 4 & 5 are the Judges of this Court, in respect of whom this petition has been filed with the prayer as noted above.

3. By the notification dated 14.1.2007, the President of Pakistan under Article 197 of the Constitution read with Provisional Constitutional Order No.1 of 2007 and Oath of Office (Judges) Order, 2007 appointed, besides others, the respondent Nos.3, 4 & 5 as Additional Judges of this Court for a period of one year. While their term as Additional Judges was expiring, the Chief Justice of this Court processed his recommendation for their confirmation or otherwise as Judge of this Court. Ultimately two notifications dated 12-12-2008 were issued. By one of the notification, the respondent No.3 namely Mr. Justice Bin Yamin was appointed as a Judge of this Court and by the other notification the tenure of respondents 4 & 5 namely Mr. Justice Syed Pir Ali Shah and Mr. Justice Arshad Noor Khan as Additional Judges of this court was extended for a period of six months. Both notifications have been impugned by the petitioner in this petition to the extent of respondents 3 to 5.

4. Initially this petition was being heard by a Division Bench of this Court comprising of the Chief Justice and a companion Judge sitting with him. On 6-3-2009 petitioner’s counsel requested the Division Bench for constitution of a larger bench upon which he was directed to submit a proper application to the Registrar of the Court. On 1-4-2009, the Chief Justice passed order constituting a larger bench for hearing of this petition.

5. During the hearing of this petition the petitioner’s counsel made a statement that in view of the fact that Mr. Justice Iftikhar Muhammad Chaudhary, the Hon’ble Chief Justice of Pakistan has been restored to his office, he does not press prayer (iv), which may be dropped from the petition. M/s. Khalid Anwar, Abdul Hafeez Lakho and Qazi Faez Isa senior Advocates were appointed as Amicus Curiae to assist the Court in dealing with the intricate and substantial question of interpretation of constitutional law involved in the matter. The Attorney General, of Pakistan and the Advocate General Sindh have already been issued notices as is required by order XXVII A, C.P.C.

6. The petitioner had filed applications seeking directions to the respondent No.1 and the Registrar of this Court to place before this Court entire record of consultation proceedings regarding respondents Nos. 3, 4 & 5. Such applications of the petitioner were disposed of by directing the respondent No.1 to make available such record for the examination of the Court and that such record should be kept with the learned Attorney General/Deputy Attorney General to enable the Court to examine the same, if deemed necessary.

7. At the outset, learned Advocate General, Sindh raised two preliminary objections; one of which was that larger bench has not been constituted in accordance with Rule 12 of Sindh Chief Court Rules (AS) and secondly, the petition is not maintainable. These objections were raised by the learned A.G. Sindh on 14.4.2009 and it was ordered that such objections will be heard and decided after hearing all the learned counsel on the main petition at Katcha Peshi stage. On 21.4.2009, learned A.G. Sindh informed the Court that respondent No.2 namely Province of Sindh has appointed Mr. Aziz A. Munshi, Advocate to represent it in the matter, who being not present in court, at the request of learned A.G. Sindh matter was adjourned. Mr. Nazar Akbar, learned Deputy Attorney General made available to the Court, the record in sealed cover of recommendations in respect of respondents No.3 to 5. The sealed cover was opened in the Chamber of Hon’ble Senior Puisne Judge in the presence of all the Members of the Bench, when Mr. Rasheed A. Rizvi, Advocate for the petitioner, Mr. Aziz A. Munshi, Advocate for respondent No.2, Mr. Yawar Farooqui, Advocate for respondent No.4, Mr. Javed Alam, Advocate for respondent No.5 and M/s. Abdul Hafeez Lakho and Qazi Faez Isa, Amicus Curiae were also in attendance. In the sealed cover three documents were found namely:-

(i) The recommendation letter of the Chief Justice of Sindh High Court, addressed to the Governor of the Province of Sindh;

(ii) The recommendation letter of the .Governor of the Province of Sindh addressed to the Law Secretary, Government of Pakistan, Islamabad; and

(iii) The recommendation letter of the Chief Justice of Pakistan addressed to the Secretary Law, Government of Pakistan, Islamabad.

8. The cover was then sealed without examining the contents of the three documents and such sealed cover was handed over to the Nazir of this Court for its safe custody in lock and key, with direction to produce the same if their contents are to be examined. Pursuant to this exercise, following question was framed by the Court on which counsel for the parties and Amicus Curiae were called upon to make their submissions:--

“Whether in the matter of recommendation, extension, confirmation or otherwise of respondents 3 to 5, there was consultation by and between the constitutional consultees within the contemplation of Articles 193 and 197 of the Constitution of Islamic Republic of Pakistan, 1973, as expounded by Honourable Supreme Court of Pakistan in the cases of Al-Jehad Trust (PLD 1996 SC 324), Malik Asad Ali (PLD 1998 SC 161), Ghulam Hyder Lakho (PLD 2000 SC 178) and Supreme Court Bar Association (PLD 2002 SC 939), respectively.”

9. Though the learned A.G. Sindh, who appeared for respondent No.2 and also on notice under Order XXVII-A CPC, has raised objections regarding constitution of bench and on the maintainability of the petition but subsequently as Mr. Aziz A. Munshi, Advocate has appeared for respondent No.2, he did not raise the first objection but stated that in his arguments he will raise the question regarding maintainability of the petition. However, as learned A.G. Sindh has raised objection regarding constitution of the bench, I deem it necessary to address the same in the first instance.

10. The precise objection of the learned Advocate General was that Sub-rule (2) of Rule 12 of the Sindh Chief Court Rules (AS) requires one or both referring Judges to sit as Member of the full bench and it being not so, the full bench was not properly constituted. Mr. Rasheed A. Rizvi, has, however, contended that the order dated 1-4-2009, by which the full bench was constituted by the Chief Justice, was not a judicial order but was an administrative order and in any case the Rules referred to by learned Advocate General has no application to this Court, rather High Court Rules and Orders as applicable to the Lahore High Court apply to the Sindh High Court. Mr. Yawar Farooqui, learned counsel for respondent No.4 has made an express statement that he has no objection to the constitution of the full bench. The question as to whether the Sindh Chief Court Rules (AS) are applicable or not to this Court was addressed by a simple statement by a Division Bench of this Court in the case of MESSRS MUQTADA KHAN IQTADA KHAN V. MST. ALLAH RAKHI BEGUM (PLD 1972 Karachi 471), that Sindh Chief Court Rules (AS) do not apply to this court. Besides Sub-rule (2) of Rule 12 make reference to Section 12 of the Sindh Court Act, 1926. Incidentally, the Sindh Court Act, 1926 was repealed by the Section 28 of Punjab/Sindh/NWFP/Balochistan Civil Courts Ordinance, 1962 except Section 8 of it in respect of district of Karachi. Section 8 of the said Act provides that the Chief Court shall be the highest civil court of appeal and revision and the highest Court of criminal appeal and revision for Sindh and the principal civil Court of original jurisdiction for the civil district of Karachi and shall be the. Court of Session and shall exercise the powers and perform the duties of a Sessions Judge in the Sessions Division of Karachi. This provision has nothing to do with the constitution of the bench by Chief Justice. To the extent the objection raised by learned Advocate-General on the basis of Sub-rule (2) of Rule 12 of Sindh Chief Court Rules (AS) the same being not applicable to this Court and Sindh Court Act, 1926 except its Section 8 having been repealed, the objection of learned Advocate General has no force and the same is rejected.

11. It may, however, be noted that High Court Rules and Orders are being applied in exercise of appellate jurisdiction of this Court as is reflected from the judgments of this Court in the cases of THE STATE v. MUHAMMAD ASHRAF (PLD 1961 (WP) Karachi 452) and ABDUL AZIZ v. ABDUL WAHAB (PLD 1964 (WP) Karachi 630) (Full Bench). This Court has also made certain amendments in the High Court Rules and Orders and one of such amendments was made by Sindh Amendment vide Correction Slip 188, published in Gazette of Sindh Part-IV-A dated 23.10.1975. The origin of application of the High Court Rules and Orders to this Court seems to have its source upon constitution of the High Court of West Pakistan through High Court of West Pakistan (Establishment) Order 1955 with its principal seat at Lahore and benches at Karachi and Peshawar and circuit courts in other places of Province of West Pakistan. High Court Rules and Orders which were applicable to High Court of Judicature at Lahore apparently came to be applied to the West Pakistan High Court bench at Karachi more so for the reason that through Order of 1955, the Chief Court of Sindh ceased to exist. This was further fortified by repealing of the Sindh Court Act, 1926 (except its Section 8) by the Civil Court Ordinance, 1962. Though through subsequent High Courts (Establishment) Order, 1970 the High Court of West Pakistan ceased to exist and in its place three High Courts were established namely High Court for the Province of NWFP to be called the Peshawar High Court with its principal seat at Peshawar, High Court for the Province of Punjab and Islamabad territory to be called Lahore High Court with its principal seat at Lahore and High Court for the Provinces of Balochistan and Sindh to be called Sindh and Balochistan High Court with its principal seat at Karachi and by the Balochistan and Sindh (High Courts) Order, 1976 the High Courts of Sindh and Balochistan were separated and High Court for the Province of Balochistan to be called High Court of Balochistan with its principal seat at Quetta and High Court for the Province of Sindh to be called High Court of Sindh with its principal seat at Karachi were established but no change as to the application of High Court Rules and Orders to this Court was brought nor any other rules seem to have been made by the Sindh High Court in the terms provided in Article 202 of the Constitution for regulating the practice and procedure of the Court for dealing with its appellate side work.

12. Rule 6 of Chapter 3, Part-A High Court Rules and Orders Volume-V provides that a full bench shall ordinarily be constituted of three judges, but may be constituted of more than three judges in pursuance of an order in writing by the Chief Justice. Rule 1 of Chapter 10, part-A of High Court Rules and Orders deals with administrative business and its second proviso lays down that those matters which are the executive concern of the Chief Justice, namely the constitution of benches and the appointment of control of High Court establishment shall be dealt with in accordance with such instructions as may from time to time be issued by the Chief Justice. The above mentioned two rules give ample power to the Chief Justice to constitute bench including the full bench without any condition and that it is not necessary for the Chief Justice to sit as a member of the full bench constituted by him.

13. The next question that may be adverted to at this stage is with regard to the objection-pressed by learned Attorney General, Mr. Aziz A. Munshi, and Mr. Yawar Farooqui that a Civil Petition No.9 of 2009 under Article 184(3) of the Constitution of Islamic Republic of Pakistan filed by the petitioner is pending in the Hon’ble Supreme Court of Pakistan, in which similar question of facts and law are involved as in the present petition and propriety demands that Hon’ble Supreme Court be allowed to decide the said petition first and thereafter this petition may be taken up for hearing by this Court. Mr. Abdul Hafeez Lakho, learned Amicus Curiae has, however, submitted that question or questions be formulated by this Court and same be referred for the decision of Hon’ble Supreme Court. Mr. Khalid Anwar, learned Amicus Curiae has contended that there is no need for. this Court to go into the question as to whether the Chief Justice of Pakistan, who has exercised the power of a consultee under Article 193 of the Constitution, was a de facto or de jure Chief Justice of Pakistan and that such question be left to be determined by Hon’ble Supreme Court and that so far the present petition is concerned, this Court is fully competent to hear and decide the same. Mr. Rasheed A. Rizvi, learned counsel for the petitioner has submitted that Constitutional Petition No.9 of 2009 filed by the petitioner in Hon’ble Supreme Court of Pakistan is altogether for different reliefs and in any case no relief of quo-warranto has been sought in it and that choice of the forum lies with the petitioner and in this respect relied upon the case of MISS BENAZIR BHUTTO v. FEDERATION OF PAKISTAN AND ANOTHER (PLD 1988 SC 416) and contended that the petition may be heard and decided by this Court.

14. As the submission is based upon the Constitutional Petition No.9 of 2009, filed in the Hon’ble Supreme Court of Pakistan by the petitioner, I have gone through its contents and find that it is based upon interpretation of notification issued by the President of Pakistan relating to the tenure of appointment as Additional Judges of Mr. Justice Zafar Ahmed Khan Sherwani and Mr. Justice Abdul Rasheed Kalwar and notification of extension of their tenure as Additional Judges and also involves, as a matter of fact, question of mala fides of the respondent No.1 and about the competency and powers of Federal Law, Secretary and also about the weight of opinion of the Chief Justice of Sindh High Court in the matter of making appointments of Additional Judges, recommending extension of their tenure or confirming them as permanent Judges. The relief sought in the said petition is as follows:--

(i) to declare that the Respondents Nos.3 and 4 are and continue to be judges of the High Court of Sindh and would continue as Additional Judges till 25th August 2010 and that their term of appointment has not expired as opined by Justice Abdul Hameed Dogar;

(ii) to declare and direct Registrar of the High Court of Sindh that, the Respondents should be assigned regular work as judges of the Sindh High Court;

(iii) to issue writ of mandamous directing the respondents to act in accordance with Constitution and the Law in the matter of appointment of Judges, in particular, the Respondents No.3 and 4 further directing the continuance of Respondents No.3 and 4 to perform functions and duties as Judges of the High Court of Sindh unless justiciable reasons are placed on record to ignore the recommendations by constitutional consultees asked through office memorandum dated 13th March 2009;

(iv) to issue directions to Respondent No.1 and the Registrar of the High Court of Sindh to place the entire record of proceedings of consultation leading to issuance of notification dated 12th March, 2009 before this Hon’ble Court;

(v) to issue a writ of mandamus to appoint the Respondents Nos.3 and 4 as permanent judges of the High Court of Sindh under Article 193 of the Constitution of the Islamic Republic of Pakistan;

(vi) to grant costs of the petition; and

(vii) to grant any other relief or reliefs as may be considered appropriate and just in the circumstances of the case.

On the other hand, the petitioner in the present petition has sought the following relief:

(i) A writ of quo-warranto be issued against the Respondents no.3,4 & 5 as under what authority they have assumed the offices of the Judge of the Sindh High Court.

(ii) That this Hon’ble Court be pleased to declare the appointment of Justice Bin Yarnin and as permanent Judge the extension of the judicial tenure of Justice Syed Pir Ali Shah and Justice Arshad Noor Khan as additional Judges of the High Court of Sindh are unlawful, ultra vires the Constitution, mala fide and of no legal consequence.

(iii) That in the alternative and without prejudice to the above reliefs, this Hon’ble Court may be pleased to suspend the operation of impugned Notifications.

(iv) A writ of prohibition restraining the Respondents Nos.l & 2 from appointing or elevating any person as Judge of this Hon’ble Court till decision of this petition.

(v) To direct the Ministry of Law, Government of Pakistan to place the entire record of proceedings of consultation before this Hon’ble Court regarding appointment of Judges made on 12th December 2008.

(vi) That this Hon’ble Court be pleased to grant such other relief as may be deemed necessary and just in the circumstances of the case.

(vii) That this Hon’ble Court be pleased to award costs of the petition.

15. It may be noted that the relief claimed in para (iv) above, was dropped by the learned counsel for the petitioner during the course of hearing of this petition. Putting contents of both the petitions in juxtaposition, it will become evident that Constitutional Petition filed in the Hon’ble Supreme Court is in the nature of issuing to writ of mandamus or for the enforcement of fundamental rights, whereas in the Constitutional Petition in this court the relief claimed is that of quowarranto. The rule for issuing a writ of mandamus/enforcement of fundamental rights and for issuing writ of quo-warranto are governed by two different independent sets of law, in which there is no similarity and the ultimate decision of the Court, in case writs are issued, produces altogether different results. In issuing of writ of mandamus/enforcement of fundamental rights, the Court directs the official functionaries to do and perform what law requires them to do and perform and in case of issuing of writ of quo-warranto the person holding or purporting to hold public office ceases to hold office for it being without authority of law. Thus the end-result is to be measured for exercise of judicial power by the Court and not merely its form or its apparent look. It being different, perhaps the rule of propriety as canvassed will not be attracted.

16. Having said that the end result of the petition before Hon’ble Supreme Court and the petition before this Court will altogether be different and further parties effected by it are also different and the Constitution by its Article 199(1)(ii) specifically confers powers on the High Court to entertain and decide a petition of quo-warranto, I, earnestly believe that a constitutional duty has been cast upon this Court to decide such matter, which duty ought not to be abdicated for reason that some point either collaterally or directly involved in this petition be also pending adjudication before the Hon’ble Supreme Court in view of clear distinction in the two matters as noted above. This seems more appropriate in doing so, for the added reason that if any of the party is aggrieved by the decision of this Court, it will have remedy of having the decision of this Court examined by the Hon’ble Supreme Court. In the case of Miss Benazir Bhutto (supra), the Hon’ble Supreme Court at page 488 has observed as follows:--

“The opening words “without prejudice” in Article 184(3) mean only not affecting, saving or excepting and when read with the words following thereafter, “to the provisions of Article 199”, the expression means no more than to save the provisions of Article 199 without, in any way, superimposing itself on the power of the Supreme Court to decide a question of public importance relating to the enforcement of any of the Fundamental Rights. What it aims at is that it leaves the power of the High Court under Article 199 intact. It is for the party who is affected to choose which of the two forums it wishes to invoke, and if it be the Supreme Court then the power exercisable is subject to the limitation under Article 184(3), that is, that the element of “public importance” must be involved in the enforcement of Fundamental Rights.”

17. The next argument that was raised is regarding the competency of this Court to issue writ of quo-warranto against a Judge of the High Court. The learned Attorney General has argued that in the case of. ABRAR HASSAN V/S GOVERNMENT OF PAKISTAN & ANOTHER (PLD 1976 SC 315) split decision was given by the Hon’ble Supreme Court on the question as to whether a petition for quo warranto will lie against a Judge of the High Court. He stated that a Judge of High Court. being itself a High Court, no writ can be issued by the High Court against High Court and that there is not a single case where the High Court may have taken up the case of its own Judge about his competency to remain as a Judge or not and relying upon the case of MALIK ASAD ALI V/S FEDERATION OF PAKISTAN (PLD 1998 SC 161) stated that Supreme Court has been conferred superior jurisdiction under Articles 187 & 190 of the Constitution which powers are not available to High Court under Article 199 of the Constitution. Mr. Yawar Farooqui, learned counsel for respondent No.4 has contended that a petition for quo-warranto will not lie against respondent No.4 who fulfils the qualification of being appointed as Additional Judge and that there has been no allegation against him of corruption during his tenure of 31 years service in lower judiciary and that the remarks made on his ACR by Mr. Justice Syed Saeed Ashhad, the then Chief Justice of this Court, requiring improvement, such remarks were also removed from the service record of respondent No.4 before his elevation as Additional Judge of this court. Mr. Abdul Hafeez Lakho, learned Amicus Curiae also contended that High Court does not possess power to issue writ of quo-warranto against a Judge, of its own court. M/s Khalid Anwar and Qazi Faez Issa, the other two learned Amici Curiae contended that this Court is fully competent to decide this petition. Mr. Rasheed A. Rizvi, learned counsel for the petitioner has contended that petition of quowarranto lies against a Judge of High Court and court will also be competent to issue such writ if it is satisfied that there was no consultative process in respect of appointment of Judges as laid down in Al-Jehad Trust’s case.

18. Apparently, there was difference of opinion amongst the Hon’ble Judges of Supreme Court in the case of Abrar Hassan (supra) on the question- as to whether a petition of quo-warranto will lie against a Judge of High Court or not. The case of Abrar Hassan was decided by the four Member bench of Hon’ble Supreme Court and on this point, the Court was equally divided. The case of Abrar Hassan subsequently came to be considered by ten Member Bench of the Hon’ble Supreme Court of Pakistan in the case of Malik Asad Ali (supra) where the observation of the Court on this point starts from para. 75 which is as follows:--

“75. It is, therefore, quite clear that there was unanimity in the views of all the four learned Members of Bench in Abrar Hassan’s case that the appointment of a Judge of superior Court could be brought under challenge before a Court. However, there was divergence of opinion on the question of nature of proceedings which could be filed to challenge such appointment. Muhammad Yaqub Ali, C.J. and Anwarul Haq, J. were of the view that a direct proceeding to challenge the appointment of a Judge of superior court under Article 199 of the Constitution would be barred in view of the provision of clause (5) of Article 199, and therefore, such an appointment could only be challenged collaterally in a properly filed proceedings. The other two learned Members of the Bench Salahuddin Ahmed and Muhammad Gul, JJ on the contrary held the view that such appointment could be challenged directly only through a petition under Article 199(1)(b)(ii) of the Constitution and not collaterally in other proceedings. This divergence of opinion amongst the learned Judges of the Bench in Abrar Hassan’s case was the result of different interpretation of clause (5) of Article 199 of the Constitution by them.

Muhammad Yaqub AAli, C.J. and Anwarul Haq, J. held that the `Judge’ and `High Court’ are synonymous and interchangeable, and therefore, issue of a writ to a Judge would amount to issuance of writ to High Court which is prohibited by Article 199(5) of the Constitution. The other two learned Members of the Bench, Salahuddin Ahmed and Muhammad Gul, JJ. while disagreeing with the above interpretation, held that a Judge and the Court are not always synonymous. According to them, the Judge is properly identified with the Court when it does something in exercise of the jurisdiction vested in it as a Court. Otherwise, its personal identity remains distinct from the Court. The point has been aptly illustrated by the learned Judges (Salahuddin Ahmed, J and Muhammad Gul, J. by citing an example where the Judge unlawfully confines his domestic servant at his house and when he convicts and sentences him to jail in a case brought before him as a Judge of the Court. In the former case, the action of the Judge will be amenable to the jurisdiction of High Court under Article 199 of the Constitution while in the latter case, it cannot be challenged under Article 199 ibid. Once again there appears to be unanimity in the views of all the learned four Members of the Bench in Abrar Hassan’s case, that a Judge of a superior Court in his personal and individual capacity is not immune from the process of Court under Article 199 of the Constitution and that this immunity extends only to the acts and orders passed as a Judge of the Court or a member of the Court.

76. The dominant consideration which persuaded Muhammad Yaqub Ali, C.J. and with which Anwarul Haq, J. agreed, were stated in the opinion of Muhammad Yaqub Ali, C.J. as follows:-

A more rational view is that clause (5) is intended to debar Judges of the High Courts from issuing writs to each other. There is a weighty reason in support of this view. If this bar is not there then the judgments delivered by individual groups of Judges of High Courts in different jurisdictions may in the final event, be challenged, by litigants under Article 199 as without, lawful authority on variety of grounds such as error apparent on the face of the judgment, order ‘or decree, bias, mala fides etc. In this connection ‘one should bear in mind large number of decisions given by High Court in the past interfering with the orders passed by the Tribunals of exclusive jurisdiction such as the orders passed by the Rehabilitation Authorities, Custodian of Evacuee Property, Settlement Authorities, Revenue Board etc. to which finality was attached by Statute. These precedents will provide ample girth, to the jurisdiction of each Judge of the High Courts to quash, under Article 199, judgments, decrees and orders passed by other Judges of his Court. I do not see how such a result can be avoided if we exclude `Judges’ from the term High Court and Supreme Court in clause (5) of Article 199.

77. With greatest ,respect, we may point out that the judgments delivered by a Judge or group of Judges are the functions which identify the Judge or Judges with the Court and therefore, to that extent the bar contained in clause (5) of Article 199 of the Constitution is fully attracted. The conclusions of Salahuddin Ahmed and Muhammad Gut, JJ in Abrar Hassan’s case, supra, were also not different. What these two learned Members of the bench. (Salahuddin Ahmed and Muhammad Gul, JJ.) in Abrar Hassan’s case said was, that while the orders passed by a Judge in exercise of the jurisdiction of the Court cannot be called in question under Article 199 of the Constitution, the acts of a Judge performed in his personal capacity did not enjoy this protection. The difference between a Judge acting as a Court and a Judge acting in his personal and individual capacity is not only real but is necessary to preserve, otherwise a Judge will not be answerable for wrong done by him in his individual capacity. It may be pointed out that by accepting the office of a Judge, a person does not lose his individual identity as an ordinary citizen. Therefore, while action taken or orders passed by him in the former capacity as a Judge of the Court cannot be brought under challenge, under Article 199 of the Constitution, his action as an ordinary individual will be subject to ordinary law of the land including Article 199 of the Constitution. In this view of the matter, in our humble opinion, the view expressed by Salahuddin Ahmed and Muhammad Gul, JJ in Abrar Hassan’s case in respect of the maintainability of a petition seeking information in the nature of quo warranto against a Judge of superior Court seems to be more rational, practical and nearer to the spirit of the provision of the Constitution. A petitioner in a petition filed against a Judge `of the superior Court seeking information in the nature of quo warranto, does not challenge any action or order of a Judge passed in his capacity as a Judge of the Court or a member of the Court. The qualification to hold the office of a Judge is personal to the individual and has nothing to do with his performance of duty as a Court or member of the Court. The qualifications for appointment of Judges of the superior Court are laid down meticulously in the Constitution. To possess the qualifications prescribed under the Constitution is a sine qua non for an individual to hold the office of a Judge of superior Court. Therefore, when the appointment of a Judge of superior Court is challenged on the ground that he did not possess the qualification prescribed by the Constitution, the relater is not asking the Court to strike down any of his actions which he has performed or is performing as a Judge of the superior Court but asks for examination of his personal qualification to be entitled to hold the office of the Judge of superior Court. Such an exercise, in our humble opinion, does not fall within the mischief of the provision of Article 199(5) of the Constitution. We are, therefore, in no doubt that a petition seeking information in the nature of quo warranto lies against the Judge of a superior Court under Article 199 of the Constitution. We are further of the view that such an attack on the validity of the appointment of a Judge of a superior Court through collateral proceeding is not a proper remedy as firstly, such occasion may or may not arise and secondly, when the appointment of a Judge is attacked collaterally in a proceeding arising from his order, he is not necessarily arrayed as a respondent in the Court and therefore, he cannot be called upon to justify his appointment. It is also to be noted that in a collateral attack, on the validity of the appointment of a Judge, the proceedings are directed against the order passed by him and validity of his appointment is only challenged through a side wind, which is possible only, if the order passed by the Judge is subject to appeal, revision, review or other proceedings before a higher forum. Therefore, if the law does not permit any appeal or other proceedings against the order passed by a Judge, the occasion to challenge the validity of his appointment in collateral proceedings may not arise at all. For this reason too, we are in respectful agreement with the view expressed by Salahuddin Ahmed and Muhammad Gul, JJ in Abrar Hassan’s case that a petition against the Judge of a superior Court seeking information in the nature of quo warranto is maintainable under Article 199 of the Constitution. This view is more rational and has the effect of advancing the remedy and suppressing the mischief.”

This judgment of the Hon’ble Supreme Court clearly states that a petition of quo-warranto in respect of Judge of a superior Court will be maintainable under Article 199 of the Constitution.

19. Having dealt with preliminary matters which were raised before the Court, I, now come to examine the actual question which was framed by the Court for the determination of this case, which is noted in para 8 above.

20. Elaborate arguments were addressed by learned counsel for the parties so also learned Amicus Curiae. I would deal with the arguments, in the first instance, which have relevance to the question framed by the Court.

21. Learned counsel for the petitioner has contended that in appointments of respondents 3 to 5 as Judge or extension of tenure as Additional Judge through impugned notifications, there was no effective, meaningful, purposive, consensus-oriented consultation as laid down in Al-Jehad’ Trust’s case (the Judges’ case) and that in such consultative process, primacy ought to have been given to the recommendations of the Chief Justice of Sindh High Court who otherwise was also a de jure Chief Justice of Sindh High Court while Mr. Justice Abdul Hameed Dogar was, merely a de facto Chief Justice of Pakistan.

22. Learned Attorney General on the other hand contended that the process of consultation as’ provided in the Constitution was complied with before issuing of notifications regarding respondents 3 to 5. He further contended that the President of Pakistan has acted on the recommendations of the Chief Justice of Pakistan who being paterfamilias of the judiciary, his recommendations are not justiciable. He also argued that though the Judges’ case requires that there should be consensus between the constitutional consultees for appointment of Judges of superior judiciary but it does not go on to say that there should be unanimity between all the constitutional consultees, as attaining unanimity in human affairs is not always possible. Except for the last mentioned contention of learned Attorney General, similar arguments were advanced by Mr. Aziz A.Munshi and also by Mr. Yawar Farooqui.

23. Mr. Khalid Anwar, the learned Amicus Curiae has contended that the Court has to examine whether the procedure for appointment of Judges in superior judiciary as laid down in the Judges’ case was followed before final decision in respect of respondents 3 to 5 was taken and that the matter of procedure is always justiciable and in this regard Court should examine whether the recommendations of Chief Justice of Pakistan reflected that he has made efforts for obtaining consensus as it has to be reflected in his recommendations and all matters regarding the consultative process should be in writing for maintaining transparency and good governance and that the opinion of one consultee has no less importance than of the others and it cannot be rejected without following consensus oriented consultation. He further contended that after the pronouncement in the Judges’ case, the word consultation with its definition was added in Article 260 of the Constitution and that such definition has to be given effect. He further contended that the High Court is not a subordinate Court to the Supreme Court nor Supreme Court has supervisory jurisdiction over the High Court, both being creature of Constitution, are independent Courts while the Supreme Court has appellate jurisdiction over the judgments, decrees and order passed by the High Court: The judicial power of Chief Justice of Pakistan is similar to that of other Judges of Supreme Court except that he possesses administrative powers regarding formation of benches and the administration of the Supreme Court. In the matter of appointment of Judges of High Court under Article 193 of the Constitution, the Chief Justice of Pakistan does not sit as appellate judge on the recommendation of Chief Justice of a High Court but performs functions of a constitutional consultee as one of the, consultees and all consultees arc equal having no superiority over others. He also contended that in case of conflict of opinion of Chief Justice of High Court and Chief Justice of Pakistan, it was necessary that such disagreement ought to have been resolved through, consultative process in order to make it a consensus oriented exercise. Relying upon the case of SUPREME COURT ON RECORD ADVOCATE ASSOCIATION v. UNION OF INDIA (AIR 1994 SC 268) the learned Counsel contended that if there be conflict of opinion between Chief Justice of a High Court and Chief Justice of Pakistan concerning the appointment of a judge of High Court, for valid reasons to be recorded and communicated to the Chief Justice of Pakistan non-appointment would be permissible. He further contended that conclusion of the consultation should either be `yes’ or `no’ of all the four consultees as provided in the Constitution. Mr. Abdul Hafeez Lakho, the learned Amicus Curiae has also contended that there has to be effective consultation between constitutional consultees and only after such consultation has taken place final decision should be made. Mr. Qazi Faez Issa, the learned Amicus Curiae contended that the process of consultation for the appointment of a Judge or Additional Judge of High Court the recommendations of Chief Justice of a High Court should not be considered meaningless rather if the Chief Justice of Pakistan differs with it, the opinion of the Chief Justice of a High Court should be given preference.

24. Learned counsel for the parties as well as the learned Amici Curiae in the course of their arguments extensively read from the various reported judgments of the Supreme Court of Pakistan and Supreme Court of India, while Mr. Yawar Farooqui also relied upon the Halsbury’s Law on the point of appointment and transfer of Judges, appointment process of Supreme Court of Canada, appointment of Australian Judges, process of appointment of Judges in United Kingdom, a note on filling up of vacancy of Chief Judge of Malaya and of Philosophy of Law, 2nd Edition by Joel Feinberg and Hyman Gross.

25. To the extent of reference made by Mr. Yawar Farooqui to the process of appointment of Judges of foreign countries except India, the Hon’ble Supreme Court in case of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) (hereinafter to be called Judges’ case) at page 478 has dealt with the question as follows:--

“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, therefore, do not consider it necessary to examine such foreign references relied upon by Mr. Yawar Farooqui.

26. In the present case the Court is concerned’ with the case of respondents to 5. Respondent No.3 appears to have been appointed as Judge of this Court under Article 193 of the Constitution while respondents 4 & 5 appear to have been given extension of tenure as Additional Judges in terms of Article 197 of the Constitution. The manner of appointment of an Additional Judge under Article 197 has been provided to be the same as provided in Article 193 of the Constitution. Article 193 of the Constitution provides for appointment of High Court Judge and its clause (1) says that a Judge of High Court shall be appointed by the President after consultation with the Chief Justice of Pakistan, with the Governor concerned and except where the ‘appointment is that of Chief Justice with the Chief Justice of the High Court. The word “after consultation” has been comprehensively considered by the Hon’ble Supreme Court in the Judges’ case. The Judges’ case has arisen on the facts which are concisely noted in the case of Mr. Justice Ghulam Haidar Lakho v. Federation of Pakistan (PLD 2000 SC 179) and I consider it necessary to reproduce the same:

“2. To understand the present controversy, it is necessary to briefly state here the background of the Judges’ case. In the year 1994, the then Federal Government of Pakistan, appointed twenty Additional Judges at a time against the vacancies existing in the Lahore High Court vide notification dated 4.8.1994. The appointments of these twenty Additional Judges were made after consultation with the then Acting Chief Justice of Lahore High. Court and the then Chief Justice of Pakistan. Similar appointments of Additional Judges of High Courts were also made in the High Courts of Sindh and Peshawar by the then Federal Government in consultation with the respective Acting Chief Justices of the High Courts and the Chief Justice of Pakistan in 1993, 1994 and 1995. It may be mentioned here that prior to the appointment of twenty Judges in the Lahore High Court in August, 1994, the Government had declined to confirm Additional Judges of High Courts of Lahore and Sindh, appointed by the previous Government on completion of their period as Additional Judges, which was resented by the members of the bar. The appointment of twenty Judges in the Lahore High Court in August, 1994 in this background was not received well in the public and the legal circles, and were described as politically motivated and not on merits. In this backdrop, Al Jehad Trust, a social organization, headed by Habib-ul-Wahabul-Khairi, a practising lawyer of this Court, filed a direct petition before this Court under Article 184(3) of the Constitution, wherein besides challenging the appointment of an Acting Chief Justice of Pakistan instead of permanent Chief Justice and various other issues relating to appointment, transfer and removal of Judges of the superior Courts were raised. Mr. Habib-ul-Wahab-ul-Khairi also filed a petition bearing No. 875 of 1994 in the Lahore High Court under Article 199 of the Constitution directly challenging the non-confirmation of 8 Additional Judges of High Court and appointment of 20 Additional Judges of the High Court. The above writ petition filed by Al-Jehad Trust through Habib-ul-Wahab-ul-Khairi before the Lahore High Court was heard along with two other similar Writ Petitions Nos.9893 and 10186 of 1994, and these were dismissed by a learned division bench of that Court by judgment dated 4-9-1994. Against the above judgment of the learned Division Bench of the High Court of Lahore, leave was granted in Civil Appeal No.805 of 1995 filed by Al-Jehad Trust. The above appeal, along with direct Constitutional Petition No.29 of 1995 was heard by a Bench of this Court consisting of five learned Judges for days together and by  a detailed judgment dated 20th March, 1996 while interpreting various Articles in the Constitution relating to superior judiciary, it laid down the parameters for appointment, transfer and other matter relating to superior judiciary of Pakistan.”

27. After the hearing in Judges’ case was concluded; a short order dated 20-3-1996 was passed which is as follows:--

“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 other 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 Provision 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 and 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 Supreme Court 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 of 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 23`d 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.

We have examined in detail the special characteristics of our 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 provision 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 the 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 the 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 exists.

(v) That in view of the relevant provisions of the Constitution 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 reason 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 Constitution 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) The 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 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 vs. 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 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 line 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 regularizing the appointment/ 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 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.”

28. On passing of above short order in the Judges’ case, reasons for the short order were recorded subsequently by the three Hon’ble Judges of the bench separately namely by Hon’ble Mr. Justice Sajjad Ali Shah (the then Chief Justice of Pakistan), Hon’ble Mr. Justice Ajmal Mian and Hon’ble Mr. Justice Manzoor Hussain Sial. Hon’ble Mr. Justice Fazal Ilahi Khan and Hon’ble Mr. Justice Manzoor Hussain Sial agreed with the judgment/reasons given by Hon’ble Mr. Justice Ajmal Mian but Hon’ble Mr. Justice Manzoor Hussain Sial also added his reasons. In the case of Mr. Justice Ghulam Haidar Lakho (supra) the Hon’ble Supreme Court of Pakistan has held that the opinion recorded by both Mr. Justice Sajjad Ali Shah, the Chief Justice and Mr. Justice Ajmal Mian in the Judges’ case are to be treated as judgment of this Court.”

29. At page 422 of the Judges’ case as many as 11 Constitutional questions of public importance relating to working of judiciary were formulated by the Court and I am mainly concerned here with the question No.(ii) which is as follows:--

(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?

30. After examining the peculiar features of our country and constitutional history relating to judiciary of pre-partition and post-partition times, the Islamic jurisprudence in relation to working of judiciary and its appointments and commentaries of various authors on constitutional work, the judgment of six Member bench of this Court in the case of Sharaf Faridi & 3 others V/S The Fed. of Islamic Republic of Pakistan through Prime Minister of Pakistan & another (PLD 1989 Karachi 404), the case of M.M. Gupta and another v. State of J&K & others (AIR 1982 SC 149) and the case of Supreme Court Advocate on Record Association v. Union of India (AIR 1994 Supreme Court 268) the Hon’ble Supreme Court made the following observations at page 490 of the judgment:-

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 of 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 disagree 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 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 no 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 of power. “

31. In case of Al-Jehad Trust through Raees-ul-Mujahidin Habib Al-Wahabul Khairi, Advocate Supreme Court & another V/S Federation of Pakistan and others (PLD 1997 SC 84) which is a case arising, inter alia, out of a reference made by the President of Pakistan under Article 186 of the Constitution for opinion of the Supreme Court to the effect, whether or not the powers of President to make appointment of Judges in the Supreme Court and High Court in Articles 177 & 193 of the Constitution are subject to provision of Article 48(1) of the Constitution which envisages in the exercise of his function, the President shall act in accordance with the advice of Cabinet or Prime Minister. The matter of consultation as required under Articles 177 & `193 of the Constitution was further elaborated in this case and at page 193 of the judgment the following observation was made:

“Since the interpretation of the various Articles by this Court becomes part of the Constitution and as it becomes the law, it is incumbent on all Executive and Judicial Authorities throughout Pakistan to act, in aid of the Supreme Court by virtue of Article 190. An ‘advice under clause (1) of Article 48 of the Constitution, therefore, cannot be in violation of the law as declared by this Court. In other words, if the advice tendered by the Prime Minister in respect of appointments of the Judges of the superior Courts is in accordance with the judgment of this Court in the Judges’ Case, it will be binding on the President. But if the advice is contrary to the above judgment, the President has several options which inter alia include the following:-

(i) The President may agree with the reasons recorded by the Prime Minister for not accepting the recommendations of the Chief Justice or the Chief Justices. In that event the above reasons will be justiciable as held by this Court in the Judges’ Case.

(ii) The President may refer back the matter to the Prime Minister for reconsideration under the proviso to clause (1) of Article 48.

(iii) The President may refer the matter for consideration of the Cabinet under clause (c) of Article 46 of the Constitution.

(iv) The President may convene a meeting and may invite the Prime Minister, the Chief Justice of Pakistan and the Chief Justice of High Court concerned for resolving the issue by participatory consultative process, consensus-oriented. Mr. Justice (Retd.) Muhammad Shahabuddin, former Chief Justice of Pakistan, in his Book under the title `Recollections and Reflections’ quoted by me in para 46 at page 483 in my opinion in the Judges’ Case has referred to the above practice.

(v) The President may make a reference to this’ Court under Article 186 for soliciting opinion.”

32. On perusal of the two judgments, one in the Judges’ case and the other inter alia, arising out of the Presidential reference, the following law seems to have been laid down by the Hon’ble Supreme Court.

(I) 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 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;

(II) Since the Chief Justice of High Court concerned and Chief Justice 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;

(III) 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 the Executive. It should be effective, meaningful, consensus- oriented leaving no room for complaint of arbitrariness or unfair play;

(IV) The Chief Justice of a High Court and Chief Justice of Pakistan are well equipped to assess as to the knowledge and suitability of a candidate of 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.

(V) None of the 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.

(VI) The view of none of the consultee can be rejected arbitrarily in a fanciful manner and that the views of Chief Justice of the High Court concerned and Chief Justice of Pakistan cannot be rejected arbitrarily for extraneous consideration and if the Executive wish to disagree with their views, it has to record strong reasons which will be justiciable.

(VII) That if a person found to be unfit by the Chief Justice of a High Court and 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 proper exercise of power to appoint under the Articles of the Constitution.

(VIII) That since the interpretation of the various Articles by the Supreme Court becomes part of the Constitution and as it becomes the law, it is incumbent on all Executive and judicial authorities throughout Pakistan to act in the aid of the Supreme Court by virtue of Article 190. An advice under clause (1) of Article 48 of the Constitution, therefore, cannot be in violation of law as declared by the Supreme Court. If the advice tendered by the Prime Minister in respect of appointment of the Judge of a superior Court is in accordance with the judgment in the Judges’ case, it will be binding on the President. But if the advice is contrary to the said judgment the President has several options which, inter alia, include the following:--

(i) The President may agree with the reasons recorded by the Prime Minister for not accepting the recommendations of the Chief Justice or the Chief Justices. In that even the above reasons will be justiciable as held in the Judges’ case.

(ii) The President may refer the matter to the Prime Minister for reconsideration under the proviso of clause (1) of Article 48 of the Constitution.

(iii) The President may refer the matter for consideration of the Cabinet under clause (c) of the Article 46 of the Constitution.

(iv) The President may convene a meeting and may invite the Prime Minister, the Chief Justice of Pakistan and Chief Justice of High Court concerned for resolving the issue by participatory consultative process and consensus-oriented.

(v) The President may make a reference to the Supreme Court under Article 186 for soliciting opinion.

33. The consistent view of the Hon’ble Supreme Court ,of Pakistan as reflected from the above referred judgments has been that the Executive Authority is bound to accept the views of Chief Justice of High Court concerned and Chief Justice of Pakistan in the matter of appointment of judges in superior judiciary and such view cannot be rejected arbitrarily for extraneous consideration and if the Executive wishes to disagree with their views, it has to record strong reasons which will be justiciable and that if a person is found to be unfit by the Chief Justice of a High Court concerned and Chief Justice of Pakistan for appointment as a judge of a High Court, he cannot be appointed as it will not be a proper exercise of power to appoint under Articles of the Constitution. The judgment thus proceeds on the assumption that the views of the Chief Justice of a High Court and Chief Justice of Pakistan are identical and does not speak of a case in specific terms where’ the views of Chief Justice of High Court concerned and Chief Justice of Pakistan may not be the same. The assumption that there will be identity of views Chief Justice of High Court concerned and Chief Justice of Pakistan in the matter of appointment of a Judge or Additional Judge of the High Court perhaps is based on the time tested fact that both the Chief Justice of High Court concerned and Chief Justice of Pakistan being Members representing judiciary have their channels of discussion/ consultation open between them and if there does crops-up difference of opinion between them, they are completely free to have their views discussed with each other to reach consensus between them. As an instance, the case of Mr. Justice Mushtaque A. Memon (as he then was) was put before the Court. It was informed to the Court that when the tenure of Mr. Justice Mushtaque A. Memon as an Additional Judge of this Court was about to expire, recommendation was forwarded by the then Chief Justice of Sindh High Court for extending his tenure as an Additional Judge for another six months. The then Chief Justice of Pakistan did not agree with such recommendation of the then Chief Justice of Sindh High Court and discussions opened between them and it was ultimately resolved that the then Chief Justice of Sindh High Court will recommend appointment of Mr. Justice Musthaque A. Memon as a permanent Judge of this Court which was done and ultimately accepted by the Executive. The difference in views between Chief Justice of High ‘Court and Chief Justice of ,Pakistan in the matter of appointment of a Judge or an Additional Judge in the High Court have been arising but there appears to be no one case where it may not have been resolved through the process of consultation between them. No such situation could have been visualized nor comprehended for the reason that Chief Justice of High Court and Chief Justice of Pakistan being head of their respective Courts are always expected to resolve their differences by an amicable means so as to forward to the Executive a consensus view from the side of judiciary regarding appointment of a Judge or an Additional Judge of a High Court.

34. His Lordship Verma, J who has written the majority view in the ‘case of Supreme Court Advocate on Record Association (supra) has made a hint to an eventuality of conflict of opinion between a Chief Justice of High Court and Chief Justice of India in respect of appointment of a Judge in High Court which was considered in the Judges’ case at page 481 as follows:--

“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.

The observations made in the last sentence in the above quoted paragraph from the Judges’ case amply demonstrate that factually it has not been held that the Chief Justice’s views would have primacy in all the matters of recommendations made by him for the appointment of Judges in the superior Courts.

35. I may note that after pronouncement in Judges’ case was made by the Hon’ble Supreme Court, the word “consultation” with its definition was added in Article 260 of the Constitution initially through the Legal Frame Work Order 2002 (Chief Executive Order No.24/2002) which was made part of the Constitution by the Constitution (Seventeenth Amendment) Act 2003 which is as follows:

“consultation” shall, save in respect of appointments of Judges of the Supreme Court and High Courts, means discussion and deliberation which shall not be binding on the President.”

36. In the Constitution various functions have been assigned ‘to the President and among them there are some functions which the President has to perform with consultation namely; under Article 71(4) the President may in consultation of Speaker of National Assembly and Chairman of Senate make rules for conducting of business of Mediation Committee, under Article’72(1), the President after consultation with the Speaker of National Assembly and the Chairman may make rules as to the procedure with respect to joint sittings of and communication between two houses, under Article 101(1) to appoint Governor of each Province after consultation with Prime Minister, under Article 160(1) to appoint persons after consultation with the Governors of the Provinces to constitute National Finance Commission except for the persons who are already designated in this Article, under Article 177 to appoint Judges in the Supreme Court of Pakistan after consultation with the Chief Justice of Pakistan, under Article 193(1) to appoint Judges of the High Court in consultation with the consultees provided in this Article, under Article 200(1) to transfer a Judge of a High Court from one High Court to another High Court after consultation. with the Chief Justice of Pakistan and Chief Justices of both High Courts, under Article 203C(4) to appoint a Judge of a High Court after consultation with the Chief Justice of High Court as a Judge of Federal Shariat Court, under Article 203F(3)(b) to appoint in consultation with the Chief Justice two Ulema in Shariat Appellate Bench of Supreme Court, under Article 218(2)(b) to appoint a Judge of High Court from each Province after consultation with the Chief Justice of High Court concerned and with the Commissioner as Member of Election Commission, under Article 235(1) make a proclamation of financial emergency after consultation with the Governors of the Provinces, under Article 243(3) to appoint in consultation with Prime Minister, Chairman Joint Chiefs of Staff Committee, the Chief of Army Staff, Chief of Naval Staff and Chief of Air Staff, under Article 268(2) to accord sanction after consultation with the Prime Minister for altering, repealing or amending the laws specified in the Sixth Schedule. These are the functions which under the Constitution are required to be performed by the President with consultation with the respective authorities as noted above.

37. The definition of the word “consultation” given in the Constitution is: shall, save in respect of appointment of Judges of the Supreme Court and High Courts, means, discussion and deliberation which shall not be binding on the President. This definition in the first place provides consultation by means of discussion and deliberation in J the case of appointment of Judges in the Supreme Court and High Courts and secondly provides saving clause which as a rule is construed to exempt something from immediate interference or destruction. In Understanding Statutes Cannons of Construction, Second Edition by S.M. Zafar at page 114 the learned author has stated thus:.

“Therefore saving is a provision, the intention of which is to narrow the effect of the enactment to which-it refers so as to preserve some existing legal rule or right from its operation.”

Based on such interpretation of saving clause, it can safely be construed that the word “consultation” as defined in the Constitution with meaning of discussion and deliberation, as an exception has been made binding on the President only in respect of appointment of Judges of Supreme Court and High Courts and it seems to be based on the rational not far to be found i.e. pronouncement of Hon’ble Supreme Court in the Judges’ case,.

38. In view of above state of law as it exists, I have examined the record of recommendations as handed over to the Court by Mr. Nazar Akbar the learned Deputy Attorney General of Pakistan and as noted above, which only comprised of three letters. The Chief Justice of the High Court of Sindh through his letter dated 4-12-2008 has initiated the process of recommendation through addressing the same to the Governor of Sindh. In such letter, detail discussion and reasons have been assigned in support of the recommendations and ultimately it recommended granting of extension of tenure of Additional Judge for a period of one year to respondents Nos.3 and 5 while it declined to recommend the appointment of respondent No.4 as permanent Judge of this Court. On this recommendation of the Chief Justice of High Court of Sindh, the Governor of Sindh sent his letter of recommendations dated 11-12-2008 to Mr. Justice Agha Rafique Ahmed Khan, the then Federal Law Secretary recommending the appointment of respondent No.3 as permanent Judge of this Court and in respect of respondents Nos.4 & 5 it recommended granting of extension of term as Additional Judges of this Court for a period of one year. Mr. Justice Abdul Hameed Dogar, the then Chief Justice of Pakistan in his letter dated 12-12-2008 addressed to Mr. Justice Agha Rafique Ahmed Khan the then Federal Law Secretary acknowledged the receipt of the recommendations of Chief Justice of High Court of Sindh and of the Governor of Sindh and noted in his letter the recommendations of the Chief Justice of High Court of Sindh and that of the Governor of Sindh and recommended that the respondent No.3 be appointed as Judge of the High Court of Sindh under Article 193 of the Constitution while the tenure of the respondents Nos.4 & 5 as Additional Judges be extended for a period of 6 months. It will. thus be seen that in the first place the Governor of Sindh has not agreed with the recommendations of the Chief Justice of High Court of Sindh in respect of respondents Nos.3 & 4 to the extent that the respondent No.3 was recommended by the Chief Justice, High Court of Sindh for granting extension as an Additional Judge for a period of one year while the Governor of Sindh has recommended his appointment as a permanent Judge of the High Court of Sindh while in respect of respondent No.4 the Chief Justice High Court of Sindh has declined to appoint him as permanent Judge but the Governor has recommended granting him extension as Additional Judge for a period of one year. The then Chief Justice of Pakistan agreed with the recommendations of the Governor of Sindh and recommended appointment of respondent No.3 as permanent Judge of the Sindh High Court and granting extension as Additional Judge to respondent No.4 for six months. As regards respondent No.5 both the Chief Justice of High Court of Sindh and the Governor of Sindh had recommended extension as Additional Judge for a period of one year which was curtailed by the then Chief Justice of Pakistan to six months. The President seems to have accepted the recommendation of the then Chief Justice of Pakistan and passed final order resulting in issuing of the impugned notifications. The main feature of the above noted three letters appears to show that although the Chief Justice of High Court of Sindh in his letter has initiated recommendations in respect of respondents Nos.3 to 5 with detail discussion and assigning reasons in support of his recommendations but in respect of respondents Nos.3 and 4, it was dissented by the Governor of Sindh and also by the then Chief Justice of Pakistan and the President by making the final order pursuant to which the impugned notifications were issued. There is nothing in the record placed before the Court which may show that either the Governor of Sindh, the then Chief Justice of Pakistan or the President have given reasons for dissenting with recommendations of the Chief Justice of the High Court Sindh or any of them at all consulted the Chief Justice of High Court of Sindh and sought his consensus in making appointment of the respondents No.3 and 4 as it has been done. Whether this manner of consultation between the constitutional consultees for appointment or otherwise of a Judge of a High Court was permissible by the Constitution read with the pronouncement of Hon’ble Supreme Court in Judges’ case, obviously its answer is not difficult to find that it was not. In the Judges’ case it was held that none of the consultees/functionaries is less important or inferior to the other and all are important in their respective spheres and the view of none of the consultee can be rejected arbitrarily in a fanciful manner and that the view of Chief Justice of High Court concerned and the Chief Justice of Pakistan cannot be rejected arbitrarily for extraneous consideration and if the Executive wish to disagree with their views, it has to record strong reasons which will be justiciable. It was also specifically held in paragraphs (xiii) of the short order of the Judges’ case that the consultation for appointment/confirmation of a Judge of a superior Court by the President/Executive with consultees mentioned in the relevant Article of the Constitution is mandatory, any appointment/confirmation made without consulting any of the consultee would be’ violative of the Constitution and, therefore, invalid. This being the mandate of law, it was mandatory for the President/Executive to have given strong reasons for dissenting with the recommendations of the Chief Justice of the High Court of Sindh or ought to have consulted the Chief Justice of High Court of Sindh for obtaining his consensus in making appointment or otherwise of respondents Nos.3 and 4. Not an iota of evidence or material has been placed before the Court that any such effort at all was made either by the Governor of Sindh, the then Chief Justice of Pakistan or by the President/Executive. The argument that the President/Executive was bound by the recommendations of the then Chief Justice of Pakistan as a Paterfamilias of the judiciary, apparently seem to over simplify the matter which on its close scrutiny fails to meet the test laid down in the Judges’ case that in the first place there has to be participatory consultative process between the consultees and also the Executive which should be effective, meaningful, consensus-oriented leaving no room for complaint of arbitrariness or unfair play and that each of the consultee is not less important or inferior to other and views of the none of the consultee can be rejected arbitrarily and if the Executive wish to disagree with a view of a consultee, it has to record strong reasons which will be justiciable and secondly the appointment/confirmation made without consulting any of the consultee would be violative of the Constitution and therefore, would be invalid. Though in the Judges’ case it is mentioned that the views of Chief Justice of Pakistan as a Paterfamilias of judiciary will deserve due deference but as observed by His Lordship Verma, J in the case of Supreme Court Advocates on Record Association (supra) that when the recommendation is for appointment to a High Court, and the opinion of Chief Justice of High Court conflicts with that of Chief Justice of India, the non-appointment for the valid reasons to be recorded and communicated to the Chief Justice of India would be permissible.” Upon this observation His Lordship Ajmal Mian, J in the Judges’ case observed that “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.” The primacy of view of the Chief Justice of India is based on plurality in the process of decision making under the Constitution of India and not as an individual and it is so reflected in the following observation of His Lordship Verma, J, reproduced in the Judges’ case at page 447:

“Appointments:

(1) What is the meaning of the opinion of the judiciary symbolized 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 appointment 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 view of the senior most Judges 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. Articles 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 or more senior Judges of the 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. (Emphasis is mine)

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.”

39. Article 193 of the Constitution of Pakistan for appointment of a Judge in High Court, provides for two judicial consultees, one the Chief Justice of the High Court concerned and the other Chief Justice of Pakistan. Both being equal consultees, their views will prevail with the Executive in the matter of appointment or non-appointment of a Judge in a High Court. The views of the Chief Justice of Pakistan as a Paterfamilias of the judiciary, will deserve due deference if the same is also supported by views of the Chief Justice of High Court concerned which has to be evolved through participatory consultative process which should be effective, meaningful, purposive and consensus-oriented. In the event where there is no identity of views between the Chief Justice of High Court concerned and Chief Justice of Pakistan, there would be no bindingness of the recommendations of the Chief Justice of Pakistan on the Executive and if the Executive accepts the views of the Chief Justice of Pakistan without supporting views of Chief Justice of High Court concerned, the action of the Executive will become justiciable. This is so because in the Judges’ case it has been consistently held 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 wish to disagree with their views, it has to record strong reasons which will be justiciable and 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 cannot be appointed as it will not be a proper exercise of power to appoint under the Articles of the Constitution. Thus there has to be conjunctive views of the judicial consultees to make it binding on’ the Executive. I am therefore, of the clear view, that by not adhering to the recommendations of the Chief Justice of the High Court of Sindh and by not giving any reasons for m such non adherence and without consulting the Chief Justice of the High Court of Sindh, appointing respondent No.3 as a Permanent Judge of this Court and granting 6 months extension as Additional Judge to the respondent No.4 through the impugned notifications was not based upon mandatory consultation as required by the Constitution read with Judges’ case which provides that there should be participatory consultative process between the consultees and also with the Executive and it should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play and that the views of each of the consultee is binding on the Executive and in case if he wishes to disagree with view of any of the consultee, he is required to give strong reasons for it.

40. It was argued before the Court by the learned Attorney General so also by Mr. Aziz A. Munshi and Mr. Yawar Farooqui that the recommendations of the Chief Justice of Pakistan who being Paterfamilias of judiciary is not justiciable and in this respect relied upon the judgments in the case of Supreme Court Bar Association v. Federation of Pakistan (PLD 2002 Supreme Court 939) and the case of Mr. Justice Ghulam Hyder Lakho (Supra). So far the case of Supreme Court Bar Association referred to by the learned Counsel, its facts were altogether different from the present case as it related to the question of appointment of Judges of the Supreme Court of Pakistan only. Article 177 of the Constitution provides that the Judges of Supreme Court shall be appointed by the President in consultation with the Chief Justice. There is thus one judicial consultee in this provision and by the dint of Judges’ case and the definition of the word “consultation” in the Constitution, the consultation of the Chief Justice in appointment of Judges in the Supreme Court has been made binding on the President. In appointment of a Judge in the High Court, the Judges’ case consistently holds that the views of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan will be binding on the Executive. The views of the judicial consultees in respect of appointment of a Judge in a High Court has to be expressed by the Chief Justice of Pakistan with the supporting views of the Chief Justice of the High Court concerned which has to be evolved through participatory consultative process to be effective, meaningful, purposive and consensus-oriented. If the recommendations of the Chief Justice of Pakistan are not based on such consultative process, with all due respect and humility, my view is, that such recommendations to the Executive will not be binding and if the Executive accepts such recommendations, it will become justiciable. In the Ghulam Hyder Lakho’s case also it was observed that:--

“In view of the above quoted observation of Ajmal Mian, J it is quite clear that the recommendations of the Chief Justice of the High Court and that of Chief Justice of Pakistan are not justiciable.”

The above quotation will show that non-justiciability is attached to the recommendations of the Chief Justice of High Court and that of Chief Justice of Pakistan expressed conjunctively.

41. As regards the arguments of Mr. Yawar Farooqui that the Additional Judge has a legitimate expectancy of being made a permanent Judge, in the Judges’ case it was observed as follows:--

“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 permanent Judge except in a rare case. In this view of the matter, a person who is appointed against 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.”

The reading of the above quotation will amply demonstrates that though there is well established practice/convention of an Additional Judge being appointed against a permanent vacancy has a reasonable expectancy to be considered for appointment as a permanent Judge but such expectancy has been made subject to the satisfaction of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan. If the Chief Justice of the High Court concerned does not recommend the appointment of an Additional Judge as a Permanent Judge, the qualification of reasonable expectancy will not stand, for that in order to take contrary view from the one taken by the Chief Justice of the High Court concerned either strong reasons have to be assigned or his consensus through consultative process is obtained. In the case of Supreme Court Bar Association (supra) which though related to the appointment of Judges in the Supreme Court but while dealing with the argument of legitimate expectancy, the Court observed that the rule of fitness and suitability has an edge over the principle of seniority and legitimate expectancy.

42. Mr. Yawar Farooqui further argued that if the matter of confirmation of an Additional Judge in a High Court is squarely left on the views of the Chief Justice High Court concerned, the Additional Judge may become target of personal like and dislike and therefore, the views of other consultees should not be ignored. Though in substance, the argument has already been addressed by me above but I may usefully reproduce initial part of the para-52 of the judgment in the Judges’ case which is as follows:--

“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.”

Except for bare argument of personal like and dislike, no instance was quoted by the learned Counsel where the fact of personal like or dislike may find support.

43. At the conclusion of hearing on 6-5-2009 the Court has passed the following short order.

“We have heard all the learned counsel for the parties, learned Attorney General for Pakistan, learned Advocate General of Sindh and learned Amicus Curiae in the matter. For the reasons to follow later this petition is disposed of in the following terms;

(1) The Petition challenging the right to hold office of a judge of this Court is, maintainable under Article 199(1)(b)(ii) of the Constitution of Islamic Republic of Pakistan 1973.

(2) As the consultation with regard to the confirmation and or extension of a Judge of the High Court by the President/Executive with the consultees mentioned in the Articles 193 and 197 of the Constitution of Islamic Republic of Pakistan 1973 read with definition of consultation under Article 260 of the Constitution has to be effective, meaningful consensus oriented, purposive and therefore, any appointment, confirmation and or extension in disregard of these principles shall be violative of the Constitution and the well established .constitutional conventions shall be invalid.

As the above procedure was not adhered to in the matter of confirmation and extension of Respondents Nos.3 and 4 respectively, we therefore hold that;

a1) The confirmation of Respondent No.3 as a Judge of this Court is hereby treated as an extension in his tenure as an Additional Judge of this Court as recommended by the Chief Justice of this Court for a period of one year, from the date of expiry of his tenure as mentioned in the notification dated 14-12-2007.

(b) As regard Respondent No.4 we are of the view tat the Chief Justice of this Court did not recommend his name, hence extension in his tenure being violative of the Constitution is declared invalid.

(c) As regard Respondent No.5 there is no disagreement of opinion by and between all the constitutional consultees, therefore the Petition as against Respondent No.5 is dismissed.

We however find it necessary to clarify that we have consciously avoided deliberating upon Proclamation of Emergency Order, 2007 and the Oath of Judges Order, 2007 and its ramifications and consequences firstly for the reasons that the said question is before Honourable Supreme Court and secondly Mr. Rasheed A. Razvi counsel for the Petitioner has not pressed said ground before us for the limited purposes of decision in the instant petition.”

The above are the reasons for the short order which is to be read as part of the judgment.

44. The Court is extremely grateful to M/s. Khalid Anwar, Abdul Hafiz Lakho and Qazi Faez Issa, the learned senior Advocates who appeared as Amici Curiae and rendered their valuable assistance to the Court in addressing intricate issues raised in this case.

(Sd.) Gulzar Ahmad, J

I have agreed to reasoning subject to separate note.

(Sd.) Mushir Alam, J

(Sd.) Khilji Arif Hussain, J

(Sd.) Maqbool Baqar, J

(Sd.) Faisal Arab, J

FAISAL ARAB, J.---This constitution petition filed under Article 199 of the Constitution by the Sindh High Court Bar Association calls in question the confirmation of Justice Bin Yamin as a Judge and extension in judicial tenures of Justices Pir Ali Shah and Arshad Noor Khan as Additional Judges of this High Court. The main ground that has been taken against these three Judges, who are respondents Nos.3 to 5 in this petition, is that while confirming respondent No.3 and extending tenures of respondents Nos.4 and 5, the negative opinion of the Chief Justice of this High Court, Justice Anwar Zaheer Jamali was disregarded and notifications for the confirmation extension in judicial tenures were issued by the President .of Pakistan. In this manner it is alleged that provisions provided in the Constitution for consultation and as interpreted in the cases of Al-Jehad Trust (PLD 1996 SC 324), Malik Asad Ali (PLD 1998 SC 161), Ghulam Haider Lakho (PLD 2000 SC 178) and the Supreme Court Bar Association (PLD 2002 SC 939) were violated which amounts to interference in the independence of the judiciary. As the petitioner maintains that respondents Nos.3 to 5 are not entitled to constitutionally hold their offices, therefore the petitioner seeks information in the nature of quo warranto and a declaration that confirmation of respondent No.3 and extension in judicial tenures of respondents Nos.4 and 5 is ultra vires of the Constitution and of no legal effect.

2. In response to the notices that were issued, respondent No.3 filed a statement stating that in order to maintain dignity of the office of a High Court Judge, he has no comments to offer except that he was appointed by the competent authority after due consultations and therefore his appointment is not open to question under Article 199’ of the Constitution. Respondent No.4 did not file any written reply or counter affidavit. His counsel however contested the proceedings by making oral submissions. Respondent No.5 filed counter ‘affidavit, wherein, inter alia, the maintainability of the petition has been challenged on the ground that the petitioner has no locus standi to file this petition. It is also the case of the respondent No.5 that the appointment and extensions in the judicial tenures were made strictly in accordance with the provisions of Articles 193 and 197 of the Constitution and denied that the Chief Justice of this High Court in his opinion has made any adverse comments against him.

3. After hearing arguments at the preliminary stage, we on 27-4-2009 framed following question which, needs to be addressed by us while deciding the controversy on merits:

“Whether in the matter of recommendation, extension, confirmation or otherwise of Respondents No.3 to 5, there was consultation by and between the constitutional consultees within the contemplation of Articles 193 and 197 of the Constitution of Islamic Republic of Pakistan, 1973, as expounded by the Honourable Supreme Court of Pakistan in the cases of Al-Jehad Trust (PLD 1996 SC 324), Malik Asad Ali (PLD 1998 SC 161), Ghulam Haider Lakho (PLD 2000 SC 178) and the Supreme Court Bar Association (PLD 2002 SC 939)”.

4. Mr. Yousuf Laghari, learned Advocate General of Sindh, at the very outset raised preliminary objection as to the maintainability of this petition against a judge of a High Court on account of the bar contained in Article .199(5) of the Constitution. He also questioned the constitution of this bench by referring to Rule 12 of Sindh Chief Court Rules (Appellate Side) -and section 12 of Sindh Court Act, 1926. He also submitted that adverse remarks made against respondents Nos.3 to 5 in paragraph 7 of this petition be expunged as they are derogatory to the office of a judge of a superior Court. The counsel for respondents Nos.4 and 5 has raised similar preliminary objections.

5. Mr. Rasheed A. Razvi, learned counsel for the petitioner, in response to the preliminary objection that petition is not maintainable under Article 199 (5) of the Constitution, referred to the case of Abrar Hasan reported in PLD 1976 SC 315 as well as to the case of Malik Asad Ali reported in PLD 1998 SC 161 and submitted that in both these cases it has been held that the provisions of Article 199 (1) (b) (ii) of the Constitution can be invoked to seek information in the nature of quo warranto even against a Judge of a superior Court. With regard to applicability of Rule 12 of Sindh Chief Court Rules (Appellate Side) read with Section 12 of Sindh Court Act, 1926, Mr. Razvi argued that as this full bench has not been constituted at the instance of a Division Bench and no legal question has been referred for its consideration, therefore the provisions of Rule 12 of Sindh Chief Court Rules (Appellate Side) have no application. He further submitted that it is the prerogative of the Chief Justice to constitute benches and in the present case the Chief Justice of this Court, considering the fact that questions of public importance have been raised in this petition, directed the constitution of full bench comprising of five Judges. He submitted that in doing so it was not at all necessary that one of the members of the division bench before which this petition earlier came up for hearing should have also been a member of the full bench. He then submitted that in any case Sindh Court Act, 1926 stood repealed by Sindh Civil Courts Ordinance, 1962 and therefore it has no application. He submitted that after the creation of one unit, the Rules of Lahore High Court became applicable and as the Sindh Chief Court Rules (Appellate Side) were never revived, the Lahore High Court Rules continue to remain applicable to this Court as well.

6. With regard to the preliminary objection taken by the respondents on the locus standi of the petitioner to file the present petition, Mr. Rasheed A. Razvi referred to Memorandum 3(d) of the Memorandum of Association of-the Sindh High Court Bar Association and Rule No. 165 of Pakistan Legal Practitioners and Bar Councils Rules, 1976 and submitted that the provisions of the Memorandum and the Rules entitle the petitioner to file the present petition.

7. On merits of the petition, Mr. Rasheed A. Razvi, argued that in the matter of confirmation of respondent No.3 and extension in the judicial tenures of respondents Nos.4 and 5 there was no effective consultation as defined in the case of Al-Jehad Trust reported in PLD 1996 SC 324 (also known as Judges’ Case) and other cases that followed the Judges Case. He submitted that in the matter of appointment of Judges to the High Courts, rule has been laid down in the Judges’ Case that apart from the recommendations of the Chief Justice of Pakistan, the recommendations of the Chief Justice of the High Court forms essential part of the consultative process and cannot be ignored. He submitted that in the appointment and confirmation of a judge of a High Court, the recommendations of the Chief Justice of the concerned High Court should always be preferred as he is the best person ‘to judge the suitability and fitness of person to be appointed as a High Court Judge. Mr. Razvi further submitted that recommendations of the Chief Justice of the High Court should not have been ignored by the President and finding two conflicting opinions about respondents No.3 to 5, he should not have appointed extended their tenures and at best he should have referred the matter back for further consultations on the differences. He submitted that if the Chief Justice of Pakistan intends to disagree with the negative recommendations ‘of the Chief Justice of the High Court then before expressing his final opinion to the President, he should have held further consultations with the Chief Justice of this High Court so that the conflicting opinions are reconsidered and differences sorted out. He submitted that in case the record show that matter was referred back and the Chief Justice of this Court reconsidered his earlier opinion then he has no case but if the matter was never referred back to the Chief Justice of this Court then there is total absence of effective consultations as required to be held in terms of the Judges Case.

8. Mr. Razvi while reading specific passages from the Judges’ Case submitted that it has been held that the consultations should be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint or arbitrariness or unfair play. He submitted that this Court may examine the entire consultative process in the light of the Judges’ Case which holds the field and in case there is any deviation from the rule laid down in the Judges Case then the confirmation or extension in tenures of respondents Nos.3 to 5 be declared invalid. Emphasizing the importance of consensus between the two judicial consultees in the consultative process, Mr. Rasheed A. Razvi submitted that in the Judges Case wherever the word `and’ appears between the Chief Justice of Pakistan and Chief Justice of the High Court with regard to their opinions, it is to be read in unison i.e. the opinion which they both colllectively form with regard to the suitability and fitness of an appointee and wherever it is mentioned that primacy lies with the Chief Justice of Pakistan it means primacy of the final opinion which is forwarded to the executive by the Chief Justice of Pakistan after it is collectively formed with the Chief Justice of the concerned High Court, leaving no differences between them. He submitted that when differences occur in the opinions of the two judicial consultees then the same should be first sorted out by referring the matter back for reconsideration of the opinion and without such referral, conflicting opinions remain on the record and in such circumstances appointment should not be made as the same would become controversial.

9. Mr. Aziz A. Munshi learned advocate, who appeared on behalf of the Province of Sindh relying on the case of Supreme Court Bar Association versus Federation of Pakistan reported in PLD 2002 SC 939, argued that recommendations of the Chief Justice of Pakistan have been held to be not justiciable and therefore are final and not open to question in any legal proceedings. He submitted that in the confirmation of respondent No.3 and extensions in the tenure of respondent No.4 and 5, the Chief Justice of Pakistan has given his favourable opinion and on that basis the notifications for confirmation / extensions in judicial tenures were issued therefore the same cannot be called in question in these proceedings.

10. Mr. Munshi also argued that even where differences of opinion arise between the two judicial consultees, the opinion of the Chief Justice of Pakistan has to prevail over the opinion of the Chief Justice of the High Court as the opinion of the former has primacy over the latter.

11. Mr. Munshi next argued that once a person has been appointed on the recommendations of the Chief justice of Pakistan as a Judge or as an Additional Judge then he cannot be removed other than by invoking the provisions of Article 209 of the Constitution as a judge of superior Court cannot be removed in any other way. He also argued that this petition is not maintainable as the petitioner has no locus standi to file this petition.

12. Mr. Yawar Farooqui, learned counsel for respondent No.4 argued that the petition is based on information of persons who are not supposed to have access to the privileged record of the Chief Justice of the High Court. He also argued that opinions of the consultees such as Governor and Chief Justice of Pakistan were taken into consideration and accepted while extending judicial tenure of Respondent No.4. He submitted that provisions of Article 199 (1) (b) (ii) of the Constitution could have been invoked only when the respondent Judges were not qualified to be appointed as Judges of this Court, which is not the case here. He next submitted that in so far as respondent No.4 is concerned, the Chief justice of Pakistan has not confirmed him but only gave him extension in his judicial tenure for a period of six months and in such circumstances it would not be appropriate to scrutinize the extension of judicial tenure of respondent No.4. He argued that even if the Chief Justice of the High Court has expressed any negative opinion about respondent No.4, he would again be examining respondent No.4’s performance by June this year and shall be giving his final opinion about him. He further submitted that Respondent No.4 has spent 31 years in service in the subordinate judiciary and in his entire tenure no adverse remarks are on his record therefore no useful purpose would be achieved if respondent No.4 at this stage is stopped from functioning as Additional Judge of this Court. He further submitted that the deficiency in the consultation process, if any, should not be made basis for respondent No.4’s disqualification and on the contrary the deficiency in the consultative process be rectified without taking any adverse action. He also submitted that there is no case law which deals with a situation where differences in the consultative process have occurred between the Chief Justice of Pakistan and Chief Justice of a High Court however there is case law which suggests that Chief Justice of Pakistan has veto power over the other Consultees as his opinion has been given primacy over the others, therefore, when the Chief Justice of Pakistan recommended extension in the tenure of respondent No.4 then his opinion was not open to question.

13. Mr. Jawed Alam Advocate who appeared for respondent No.5 argued that it is no body’s case that no consultation took place at all. He submitted that extension in the judicial tenure of respondent No.5 was made on the recommendations of the Chief Justice of Pakistan who holds primacy over the opinion of the other consultees in the matter and therefore no illegality was committed. In addition to this, he adopted the arguments of Mr. Yawar Farooqui.

14. Mr. Qazi Faez Issa who appeared as amicus curiae submitted that in order to ascertain whether the constitutional requirements of consultative process were met or not, the official record be examined by the Court. He submitted that opinion of the Chief Justice of this High Court cannot be lightly taken as a bare formality; if there were no deliberations to sort out the differences of opinions then the recommendations of the Chief Justice of the High Court would become meaningless, defeating the very purpose of having consultations under Article’ 193 of the Constitution. He submitted that in the consultative process both the Chief Justice of Pakistan as well as Chief Justice of High Court have veto power in the sense that if any of them does not recommend the appointment or extension in the judicial tenure of any appointee then such negative recommendations cannot be ignored by the executive and neither appointment can be made nor judicial tenure extended. He further submitted that in the present case, the de jure Chief justice of Pakistan, Justice Iftikhar Muhammad Chaudhry was not allowed to function and Justice Abdul Hameed Dogar usurped the office of Chief Justice of Pakistan until his retirement on 21.03.2009, therefore, for this reason also the opinion of Justice Abdul Hammed Dogar cannot be treated as legitimate opinion under the Constitution. He further submitted that in view of the unconstitutional acts committed on 3-11-2007 and without such action being validated by the Parliament, the case of Tikka Muhammad Iqbal is not binding on this Court. He submitted that mechanism for amending the Constitution is provided in Article 238 of the Constitution and no amendment can be brought about in the Constitution without following such mechanism. He therefore submitted that the judgment given in the case of Tikka Muhammad Iqbal case, whereby the infamous and so-called Article 270-AAA was attempted to be made part of the Constitution, has no legal validity. He further submitted that even otherwise, the case of Tikka Muhammad Iqbal was decided by a short order dated 23.11.2007 and this short order does not mentions the so-called Article 270-AAA as the same was not even subject matter of dispute in that case, therefore the detailed judgment given in Tikka Muhammad Iqbal’s case cannot legitimize Article 270-AAA and make it part of the Constitution. He finally submitted that inspite of the defects in the entire consultative process, let the cases of respondents Nos.3 to 5 be ordered to be regularized by starting the whole process de novo in order to resolve the controversial issue involved in this petition.

15. Mr. Khalid Anwar, learned senior counsel who appeared as amicus curiae submitted that in the process of appointment, confirmation and extension of judicial tenures of the Judges, the fact as to who was de jure or de facto Chief Justice of Pakistan may be overlooked; the only thing which needs to be examined is whether the consultative process that was carried out was meaningful and consensus oriented. He submitted that when consultations are required to be consensus oriented then it means that controversial persons should not be appointed; once Chief Justice of the High Court in his opinion expresses disapproval of any person to be appointed as Judge and on the other hand the Chief Justice of Pakistan finds such person to be suitable for appointment then the record must reflect that further consultations were held between them to sort out the differences. He submitted that it is to be seen whether the Chief Justice of Pakistan in his opinion has discussed the opinion of the Chief Justice of the High Court who has given negative opinion about a recommendee and touched upon the areas of their differences. Without addressing the differences in the two opinions, the purpose of having meaningful and effective consultations would never be realized. He submitted that where the differences between the Chief Justice of Pakistan and Chief Justice of the High Court remain, in spite of an attempt to sort them out, then appointment should not be made in the best interest of the judiciary as the appointee has become controversial. He submitted that unless the Chief Justice of the High Court gives his approval in fovour of an appointee, the Chief Justice of Pakistan cannot impose his own opinion as there is no room for arbitrariness in the whole process of consultation nor Article 193 of the Constitution makes any consultee superior to the other. He elaborated his submission by stating that the powers of the Chief Justice of Pakistan are (a) judicial power (b) administrative power and (c) as a constitutional consultee and acting as consultee under Article 193 of the Constitution, he cannot sit in appeal on the recommendations of the Chief Justice of the High Court for the reason that Article 193 does not give overriding effect to the opinion of the former over the opinion of the latter. He therefore submitted that there is no primacy of the opinion of Chief Justice of Pakistan over the opinion of the Chief Justice of the High Court. He elaborated this submission by stating that what is meant by primacy of opinion of the Chief Justice of Pakistan’ is not the primacy of opinion of an individual but the primacy of the collective opinion of both the judicial consultees over the opinion of the executive consultees. Mr. Khalid Anwar therefore maintained that in case two diverse opinions come before the President, one of the Chief Justice of Pakistan and the other of Chief Justice of High Court then the President should either refer the matter back to the judicial consultees for reconsideration or should not appoint a controversial person at all.

16. Mr. Khalid Anwar next submitted that the entire process of consultation has to be transparent and should always be in writing in order to lend credence to the consultative process, which should then become part of the record as the appointment of judges to the superior Courts is too important a matter to be left to conjunctures and speculation.

17. Mr. Khalid Anwar next submitted that the question which is to be addressed in this petition is whether the obligation that is required in a consultative process, as contemplated in the Judges Case, was discharged or not. Whether consultations were held to an extent that left no room for arbitrariness. If this had happened then it is end of the matter but if the record shows that the opinion of the Chief Justice of the High Court was summarily brushed aside then this is a procedural lapse creating inherit defect in the consultative process and would be open for judicial review. In support of his submission Mr. Khalid Anwar read relevant passages from the Judges’ case, which shall be referred by us in the latter part of this judgment.

18. Mr. Abdul Hafeez Lakho who also appeared as amicus curaie submitted that this Court may examine the record in order to ascertain whether there were meaningful consultations or not and in case any procedural lapse is found then the consultative process be started de novo in order to bring it in consonance with the rules laid down in the Judges’ Case. He also submitted that whether at the relevant time there was a de jure Chief Justice of Pakistan or not, the de facto doctrine is always applicable which may be applied to the cases of respondent judges. In support of his submission on de facto doctrine, he referred to paragraph 142 of Asad Ali’s case reported in PLD 1998 SC 161 and read a passage from page 1496 of Mehram Ali’s case reported in PLD 1998 SC 1445.

19. The Attorney General for Pakistan Mr. Sardar Abdul Latif Khoso at the very outset submitted that as the conduct of the respondent Judges per se is not under scrutiny in this petition it is appreciable that this Court vide order dated 28-4-2009 expunged the adverse remarks that were made in the petition against the respondent Judges. He submitted that had such remarks been allowed to remain on record, it would have undermined the prestige of the judiciary. On merits of the petition he submitted that the Judges’ Case talks about consensus but consensus does not mean unanimity of opinion of Chief Justice of the High Court concerned with the Chief Justice of Pakistan as the latter holds primacy in the matter and in the present case the confirmation of respondent No.3 and extension, in the judicial tenures of respondent No.4 and 5 were backed by the recommendations of Chief Justice of Pakistan, therefore no impropriety or illegality was committed in the consultative process.

20. We shall now proceed to examine the above-referred submissions that have been made by the’ learned counsel for the parties and amicus curiae.

I. Writ of Quo Warranto:

21. Under our constitutional history, quo warranto used to be one of the recognized writs. This writ was initially provided under section 223-A of Government of India Act, 1935 and thereafter under Article 170 of 1956 Constitution. When invoked, it requires a person, to whom it is directed, to show under what authority he was holding a public office. The issuance of writs for the first time was done away with under the 1962 Constitution and in substitution thereof the power of judicial review of executive / administrative actions was given to the High Courts, which included the power to examine the right to a public office. This last mentioned remedy i.e. the power to examine the right to a public office, which is akin to writ of quo warranto, was also adopted in our 1973 Constitution under Article 199 (1) (b) (ii) which reads as follows:

“199. Jurisdiction of High Court: (1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by. law,-

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

            (i) -----------------------------------------------

            (ii) -----------------------------------------------

(b) On the application of any person, make an order-

            (i) -----------------------------------------------

(ii) Requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office”

22. Under this specific provision of Article 199 (1) (b) (ii) of the Constitution, right of a person to hold a pubic office can be tested. The provisions of this Article are applicable in cases where there is (i) intrusion or usurpation of a public office i.e. either the office was never granted to a person or if granted, his right to the office subsequently stood terminated or forfeited or (ii) the grant of public office is found to be legally defective. In any of these situations, a High Court can declare the right to a public office to be invalid. Hence under Article 199(1)(b)(ii) of the Constitution, a High Court can inquire from a holder of public office, by, what authority he has a right to hold his office. While examining the legality of an appointment to a public office, not only the authority of the grantee comes under scrutiny but the scrutiny can go beyond the grant itself and examine the very propriety and legality of the procedure that was adopted in the grant of public office. In other words, a High Court can examine the question whether the procedure that was followed for making an appointment conforms to the requirements of the law and the accepted norms established over the years that have come to be recognized as Constitutional conventions. It is an appropriate remedy in cases where public has some interest in the controversy that needs to be resolved and is not meant to be invoked purely for protecting interests of a private right i.e. it cannot be used to question the legality of official acts that a holder of office has performed while in office to which he had no right. Thus this remedy under Article 199(b)(ii) of the Constitution is limited only to examine a right to a public office.

23. An objection as to the maintainability of this petition has been taken on the ground that no proceedings in the nature of quo warranto lie against a Judge of a High Court as under Article 199(5) of the Constitution, High Courts have ‘been specifically excluded from the definition of “person” and under Article 192 of the Constitution, a High Court means and includes its Chief Justice and all its puisne judges. It was therefore contended that proceedings under Article 199(1)(b)(ii) of the Constitution are not maintainable even against a Judge of a High Court as they do not come within the meaning of “person” as provided in Article 199(l)(b)(ii) of the Constitution.

24. This question of seeking information in the nature of quo warranto against a Judge of a superior Court under Article 199(1) (b) (ii) of the Constitution is now well settled. In the case of Asad Ali versus Federation of Pakistan & others reported in PLD 1998 SC 161, the Supreme Court has held that proceedings calling for information in the nature of quo warranto against a Judge of a superior Court are maintainable under Article 199(1) (b) (ii) of the Constitution. In the said case it was held that the qualification to hold the office of a Judge is personal to the individual and has nothing to do with his performance of duty as a Court or member of the Court. To possess the qualifications prescribed under the Constitution is a sine qua non for an individual to hold the office of a Judge of superior Court. Therefore, when the appointment of a Judge of superior Court is called in question on the ground that he does not possess the prescribed qualifications or his appointment does not fulfil the requirements of the Constitution, the relater is not asking the Court to strike down any of his actions which he has performed or is performing as Judge of a superior Court but is asking to examine his right to hold the office of a Judge of the superior Court. Such a case does not fall within the mischief of the provision of Article 199(5) of the Constitution.

25. The Hon’ble Supreme Court in Asad Ali’s case reported in PLD 1998 SC 161 has also held that independence of judiciary can be secured only through appointment of persons of unimpeachable integrity, high repute and competence, strictly in accordance with the procedure prescribed under the Constitution, to the high offices of the Judges of superior Courts. Any deviation in the method of appointment prescribed under the Constitution (as defined in Judges’ case) is likely to shake the public confidence in the institution of judiciary and tarnish its image as a neutral arbiter in disputes between citizen and citizen and citizen and State, thus, infringing the Fundamental Rights of the citizens guaranteed under Article 9 and 25 of the Constitution to have free, fair and equal access to independent Courts and Tribunals. Thus in Asad Ali’s case it was held that in case an appointment is found to be in violation of the provision of any Article of the Constitution, then such person is not entitled to hold and continue in office and the appointment can not only be called in question on the ground that it infringes the Fundamental Rights guaranteed under Article 9 and 25 of the Constitution but information in the nature of quo warranto can also be sought through a petition filed under Article 199(1) 9(b) (ii) of the Constitution.

26. With regard to the argument of Advocate General that in case a Judge of superior Court is not fit to hold his office, Article 209 of the Constitution should be resorted to, we may point out that in Asad Ali’s case it was held that the scope of Article 209 is confined to two situations only i.e. incapacity of a Judge to perform his duty of his office and his misconduct. The Supreme Judicial Council cannot grant any relief where there is an illegal and unconstitutional appointment to a superior Court. Hence, the validity and constitutionality of appointment of a Judge of a superior Court is outside the purview of the enquiry under Article 209 of the Constitution as it has no nexus either with the mental or physical incapacity of the Judge to perform the duties of his office or with the misconduct of the Judge. The remedy provided under Article 209 of the Constitution therefore cannot be equated with the proceedings filed under Article 199(1) (b) (ii) of the Constitution to challenge the unconstitutional appointment of a Judge of a superior Court.

27. In Asad Ali’s case it was also held that the reason to keep the question of validity or constitutionality of appointment of a Judge of superior Court outside the purview of the enquiry under Article 209 of the Constitution was for the reason that validity of appointment is open to challenge before the High Court under Article 199 (1) (b) (ii) of the Constitution. Therefore, we are of the view that proceedings in the nature of quo warranto against a judge of a superior Court are maintainable under. Article 199(1) (b) (ii) of the Constitution and provisions of Article 209 of the Constitution have no application in such matters.

28. In Asad Ali’s case it was also held that though it is always desirable that the Judges of superior Court maintain high degree of comity amongst themselves in order to maintain harmony and smooth working of the. Courts and also to preserve their institutional image in the eyes of the public but such a desire, should not come in the way of discharging the Constitutional duty imposed upon the Judges of superior Courts to protect and defend the Constitution under the oath of their w office. In case violation of the provision of Constitution is brought to the notice of a Judge of a superior Court in appropriate proceedings which involves the person of another Judge of the same Court, the relief, in the absence of a Constitutional bar, cannot be declined at the cost of maintaining high tradition to have comity amongst the Judges.

II. Constitution of Full Bench:

29. An objection to the constitution of this full bench has also been taken on the ground that while constituting it, the provisions of Rule 12(2) of the Sindh Chief Court Rules (Appellate Side) read with section 12 of Sindh Courts Act, 1926 were ignored. According to the Advocate General, power to constitute full benches is provided in section 12 of the Sindh Courts Act, 1926 which is to be read with Rule 12(2) of the Sindh Chief Courts Rules (Appellate Side). He submitted that under Rule 12(2) one of the two judges of the division bench, which earlier took up this petition for hearing ought to have sat on this bench. Section 12 of Sindh Courts Acts, 1926 reads as follows:

12. Power to refer question to full bench.---Any single judge of the Chief Court and any bench of Judges thereof, not being full bench, may in any case refer for the decision of a bench of two judges or of a full bench, respectively, any question of law or custom having the force of law or the construction of any documents, or the admissibility of any evidence arising before the judge or bench and shall dispose of the case in accordance with the decision of the bench to which the question has been referred:

[Provided that nothing in this section shall apply to a judge of the Chief Court exercising the jurisdiction of the Chief Court as the principal criminal Court of original jurisdiction for the sessions division of Karachi.]

30. Then Rule 12 of Sindh Chief Court Rules (Appellate Side) read as follows:

12. Composition of Full Bench.--(1) A full Bench shall consist of any number of Judges not less than three.

(2) When a Bench of two Judges makes a reference under Section 12 of the Act, one of the referring Judges or both may sit as a member or members of the full bench.

31. The circumstances envisaged in the above referred Rule would arise only when single bench refers any question of law or custom or the construction of any documents or the admissibility of any evidence to a bench of two Judges or a division bench refers similar question to a full bench for its decision. This is not the case here. The Chief Justice of this Court exercising his prerogative, passed an administrative order on 1-4-2009 and constituted the present full bench. No question has been referred to this bench so as to attract Rule 12(2) of the Sindh Chief Court Rules (Appellate Side). Even otherwise, when a question is referred to a division bench or to a full bench, Rule 12(2) of the Sindh Chief Court Rules (Appellate Side) only provides that the referring judge or any of the referring judges may sit on the full bench. The language of the Rule 12(2) does not suggest that the referring judge or judges must be member(s) of the full bench. As this full bench was not constituted on the request of a division bench and no question as contemplated by Rule 12(2) has been referred for its decision, the objection as to the constitution of this full bench is not sustainable. Furthermore, the Sindh Court Act, 1926 stood repealed by the Sindh Civil Courts Ordinance, 1962.

III. Locus standi of the Petitioner:

32. As regards the objection that the petitioner has no locus standi to file this petition, Mr. Rasheed A. Razvi referred to memorandum No.3(d) of the Memorandum of Association of the Sindh High Court Bar Association and Rule No. 165 of the Pakistan Legal Practitioners and Bar Councils Rules, 1976. Article 3 (d) read as follows:

3. The aim and objects of the Association are:

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

            (b) -------------------------------------

            (c) -------------------------------------

(d) to direct its efforts to uphold the case of independence of judiciary and the Rule of Law.

33. Rule No. 165 of the Pakistan Legal Practitioners and Bar Councils Rules reads 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 which may embarrass their free and fair consideration of the questions before them for the decision. The aspiration of advocates for judicial positions should be governed by an impartial estimate of their ability to add honour to the office and not by a desire for the distinction the position may bring to themselves.

34. From the above referred provisions of the Memorandum of Association of the Sindh High Court Bar Association and Rule 165 of the Pakistan Legal Practitioners and Bar Councils Rules, 1976 it becomes quite evident that duty of advocates is not limited to their usual obligations towards their clients and the courts but they also have to keep their eyes and ears open and raise their voice whenever an occasion arise in order to ensure that no political interference takes place which may compromise the independence of judiciary. Thus the above-referred provisions entitle the petitioner, which is a body of advocates, to protest earnestly and actively against the appointment of judges through a process, which is not mandated by the Constitution and Constitutional conventions. They therefore have every right to call in question any executive action that interferes with the independence of Judiciary. The fact that the petitioner has locus standi in the matter also finds support from ‘this Court’s judgment in the case of Sharaf Faridi versus Federation of Pakistan reported in PLD 1989 Karachi 404 wherein the lawyers of Karachi Bar Association and Pakistan Bar Council successfully challenged the powers of appointment, posting, transfers, promotions, removals of members of subordinate judiciary as well as certain appointments and transfer of judges of this High Court. Then in the case of Malik Asad Ali versus Federation of Pakistan reported in PLD 1998 SC 161, the petitioners of that case were practising advocates who successfully challenged the validity and constitutionality of appointment of a Judge of superior Court and it was held that it was open to challenge before a High Court under Article 199 of the Constitution. The Judges’ Case reported in PLD 1996 SC 324 is yet another example where the petition was filed by a person who was an advocate. We are therefore of the view that the petitioner, which is the body of advocates of this High Court has locus standi to file this petition.

IV. De facto doctrine:

35. In Asad Ali’s case it has been held that the recognition of the principle of de facto exercise of power by a holder of the public office is based on sound principle of public policy to maintain regularity in the conduct of public business, to save the public from confusion and to protect private rights which a person may acquire as a result of exercise of power by the de facto holder of the office. While passing short order on 6-5-2009, we had clarified that we have consciously avoided deliberating upon Proclamation of Emergency Order, 2007 and the Oath of Judges Order, 2007 and its ramifications and consequences for the reasons that Mr. Rasheed A. Razvi counsel for the Petitioner has not pressed the same before us for the reason that these questions are already pending adjudication before the Hon’ble Supreme Court. We therefore shall be examining the consultative process without going into the question whether at the relevant time the de jure Chief Justice of Pakistan was made non-functional.

V. Non-justiciability of the recommendations:

36. The maintainability of this Petition has been questioned on yet another ground i.e. the opinion of the Chief Justice of Pakistan is not justiciable. It was argued that as the confirmation of respondent No.3 and extension in the judicial tenures of respondents Nos.4 and 5 have been made on the recommendations of the Chief Justice of Pakistan, whose recommendations are not justiciable, the same cannot be called in question before any Court of law. In support of this contention, reliance was placed by Mr. Aziz Munshi on the case of Supreme Court Bar Association versus Federation of Pakistan reported in PLD 2002 SC 939.

37. The reasons for which an opinion is said to be not justiciable are these. The office of the judge of a superior Court is to be filled by best available person and in the process of appointment / confirmation, a name of a potential appointee may come up for consideration against whom any of the two judicial consultees may have certain reservations. Often it happens that while expressing their opinions, the judicial consultees make certain adverse remarks about a person whose appointment is being considered. If the judicial consultees’ adverse remarks are allowed to be questioned before a Court of law then the judicial consultees would always be reluctant to give their open and forthright opinion as to the suitability and fitness of a person who is being considered for appointment. It was in this context considered necessary that the opinions of the judicial consultees should not be justiciable. Thus, adverse remarks expressed by the judicial consultees in relation to any appointee, under Article 193 and Article 177 of the Constitution, are not open to challenge in a court of law. In the case of Advocate-on Records Association versus Union of India reported in AIR 1994 SC 268, the reason given for non-justiciability was that it would prevent any inhibitions against expressing a free and frank opinion in the process of selecting a person for the office of a judge. In the case of Supreme Court Bar Association versus Federation of Pakistan reported in PLD 2002 SC 939 our Supreme Court held that if the recommendations are made justiciable, the primacy of the opinion of the Chief Justice of Pakistan will be undermined directly or indirectly, embarrassment will be caused to the judicial consultees as well as the recommendee, independence of judiciary, smooth working of the Court will be affected and pressure groups will emerge at different levels. It was for such considerations that a carte blanche has to be given to the judicial consultees so that they may give their free and frank opinions without any inhibitions that are not open to challenge in a Court of. law. The concept of non-justiciabilty was introduced to protect the judicial consultees from embarrassment. This protection is for the Chief Justice of Pakistan as well as the Chief Justices of the High Courts. However, where an appointment is challenged on the ground that the consultative process lacked constitutional requirements and disregarded the rule laid down in the Judges’ Case then this is a situation where the question of non-justiciability does not arise. If this too is not made justiciable then it would not be possible to question an appointment even it was made in violation of the rules laid down in the Judges’ Case.

38. The Judges’ Case is itself an example that the concept of non-justiciability does not mean that even though the consultative process is found to be deficient, appointment cannot be nullified because it had the approval of the Chief Justice of Pakistan. In the Judges’ Case which was decided in 1996, appointments of several judges in three High Courts were declared to be invalid only for the reason that they did not meet the criteria of `consultation’ as provided in the Constitution. We may point out that in the Judges’ Case, the original appointments of the affected Judges were backed by the recommendations of a permanent Chief Justice of Pakistan yet the petition was entertained and allowed. Thus it becomes abundantly clear that the concept of non-justiciability was not devised to protect an appointment that has the approval of the Chief Justice of Pakistan, though it may not be in accordance with the Constitution but it was devised only to provide a blanket cover to the judicial consultees so that while considering appointments under the Constitution, they may give their free and frank opinion about an appointee without any inhibitions and without putting up with the embarrassment that is bound to come in case the adverse remarks made in their opinions are challenged in some legal proceedings.

39. As the remarks that are made in relation to an appointee by a judicial consultees under Articles 177 and 193 of the Constitution are not justiciable, we vide order dated 28-4-2009 expunged all averse remarks made against respondent No. 3 to 5 in this petition that were said to have been expressed by the Chief Justice of this High Court in his opinion. We shall be examining the opinions of the judicial consultees only for the limited purpose to form our opinion on the question whether in the confirmation of respondent No. 3 and extension in the judicial tenures of respondent Nos. 4 & 5, the consultative process was carried out as is required to be undertaken under Articles 193 of the Constitution and defined by our Supreme Court in its various judgments, most particularly the Judges Case.

VI. The Consultative process:

40. We shall now proceed to examine the process of confirmation of respondent No.3 and extensions in the judicial tenures of respondent No.4 and 5 in the light of the following question that we framed on 27-4-2009.

“Whether in the matter of recommendation, extension, confirmation or otherwise of Respondents Nos.3 to 5, there was consultation by and between the constitutional consultees within the contemplation of Articles 193 and 197 of the Constitution of Islamic Republic of Pakistan, 1973; as expow{ded by the Honourable Supreme Court of Pakistan in the cases of Al-Jehad Trust (PLD 1996 SC 324), Malik Asad Ali (PLD 1998 SC 161), Ghulam Haider Lakho (PLD 2000 SC 178) and the Supreme Court Bar Association (PLD 2002 SC 939)”.

41. The method of appointment of a Judge or an additional Judge of a High Court is the same i.e. the one that is provided in Article 193 of the Constitution. Article 193 provides that appointment of a Judge of a High Court is to be made by the President after consulting with (a) the Chief Justice of Pakistan, (b) the Governor concerned, and (c) the Chief Justice of the concerned High Court (except where the appointment is that of the Chief Justice of the High Court itself).

42. The Judges’ Case recognizes the importance of consultations in the whole process of appointment of Judges to the superior Courts and therefore the term `consultation’ was given an extensive and elaborate meaning. Justice Sajjad Ali Shah in his opinion in Judges’ Case at pages 405 paragraph 82 held as follows:--

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 given 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 Hi h Court and the Chief Justice of Pakistan. Fourthly, the President is administered oath by 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. (Underlining is ours to lay emphases)

43. From the above quoted passage of the Judges’ Case it is quite evident that the word ‘consultation’ was given wider and enlarged meaning keeping in view the fact that appointments relate to the exalted position in the judiciary that has to function independently. It was for this reason felt that no room should be left for political considerations in the appointment of Judges as it would then compromise on the requisite credentials, which judges of superior Court must possess. To achieve this objective, importance of the opinion of the Chief Justice of the High Court to which appointments are to be made was recognized along with the opinion of the Chief Justice of Pakistan. It was held that as the opinion of both the judicial consultees being expert opinion, in case they (any of them) find a person not fit and capable to be appointed as Judge of a High Court then the executive must not act against such advice.

44. Justice Ajmal Mian while rendering his opinion in the Judges’ case made following observations which start from the last paragraph at page 490 of the Judges Case:

“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 thQ 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 High Court concerned and the Chief Justice of Pakistan have expertise knowledge about the ability and competency’ of 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 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 person for the judgeship of a superior Court keeping in view the object enshrines 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…………………………..”

45. The above quoted passage from the opinion of Justice Ajmal Mian in the Judges’ Case accords constitutional recognition to the convention of consulting the Chief Justice of the High Court concerned and the Chief Justice of the Pakistan in the appointment of Judges to the Federal Court now Supreme Court and the High Courts that was in vogue prior to the independence and continued since then. It was considered that continuation of such convention would result induction of competent and capable people of known integrity in the superior judiciary which is assigned very delicate task to ensure that all the functionaries of the State act within the limits delineated by the Constitution and close the doors for making appointments on political consideration. It was held by Justice Ajmal Mian that the words “after consultation” referred to inter alia, in Articles 177 and 193 of the Constitution involve participatory consultative process between the judicial consultees and executive consultees as both the set of consultees are well equipped in their specific spheres to assess the suitability of a candidate for judgeship in the superior Courts and none of the consultees is less important or inferior to the other.

46. Then at pages 492 of the Judges’ case starting from first paragraph, Justice Ajmal Mian further observed as follows:--

“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 arbitrary for extraneous consideration and if the Executive wishes to disagree 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 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 view among the learned counsel appearing for the parties and the learned counsel appearing as amicus curiae that consultatory process is mandatory and without it no 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 of power.” (Underlining is ours to lay emphases)

47. In the above passages quoted from the Judges’ Case, Justice Ajmal Mian has been very categorical that the views of none of consultees can be rejected arbitrarily and in fanciful manner. It was also observed that a person found unfit to be Judge of the High Court by the Chief Justice of the High Court concerned or the Chief Justice of Pakistan then he cannot be appointed by the President as it will not be a proper exercise of power under Article 193 of the Constitution. It was ‘also held that the consultative process is mandatory and without it no appointment/confirmation can be made and in absence of consultation as contemplated and interpreted by the Supreme Court (in Judges’ Case) the appointment or confirmation of a Judge in the superior Courts shall be invalid.

48. Thus it is quite evident that while making appointments to the superior Courts, there is no room for arbitrariness. When a judge of a High Court is to be appointed, the Chief Justice of Pakistan and the Chief Justice of the concerned High Court have to first arrive at a consensus on the appointment of a recommendee by engaging themselves in a participatory consultative process. The final opinion so reached is then forwards by the Chief Justice of Pakistan to the executive. The adoption of such procedure is mandatory. Failure to do so would invalidate the appointment or confirmation of a Judge as it would not be regarded as an outcome of an effective, meaningful and consensus oriented consultationss.

49. We have also noticed that in the Judges’ Case, our Supreme Court has acknowledged the fact that the Articles of our Constitution, which pertain to the appointments of superior Court Judges have been lifted from the Indian Constitution with minor variations. Therefore, while interpreting the provisions of our Constitution, the fact as to how similar provisions were interpreted by the Indian Supreme Court were held to be relevant by our Supreme Court in the Judges’ Case. In the Judges’ Case reference has specifically been made two Indian cases i.e. S.P. Gupta versus Union of India reported in AIR 1982 SC 149 and `Supreme Court Advocates-on-Record Association versus Union of India reported in AIR 1994 SC 268 as they were found to be relevant by our Supreme Court. Mr. Khalid Anwar, learned amicus curiae has also referred to various passages from the Advocates-on-Record case that have been reproduced in the Judges’ Case which are helpful in specifically dealing with the controversy involved in the present case.

50. While giving importance to minority view expressed in S.P. Gupta’s case our Supreme Court quoted a passage from the said case in the last part of paragraph 33 at page 445 of the Judges’ Case which is follows:--

“………..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...” (Underlining is ours to lay emphases)

51. Then at page 447 of the Judges’ Case while dealing with the issue of primacy following extract from Advocate-on-Record case was quoted.

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 crystallized into conventions not exhaustive are expected to be observed by the functionaries to regulate the exercise of their discretionary powers in the matters of appointment and transfer.

Appointment:

(1) 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 or 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 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 person 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.

52. Again at page 450 of the Judges’ Case following extract from Indian judgment in Advocates on Record case was quoted.

“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 personal character and 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

53. The above passages from the Indian case of Advocate-on-Record which have also been reproduced in the Judges’ Case and referred to by Mr. Khalid Anwar, clearly show that though the Chief Justice of the Supreme Court is head of the entire Judiciary and may be figuratively paterfamilias of the brotherhood of Judges but the Chief Justice of a High Court is also an equally important constitutional functionary when it comes to the appointment of Judges of the High Courts and in the entire consultative process it cannot be said that, in any way, his role is less important than the role of the Chief Justice of the Supreme Court.

VII. Primacy of opinion:

54. Constitution has not envisaged\_ giving primacy to the opinion of any individual judicial consultee in the matter of appointment of Judges to the High Courts. As discussed above, in the matter of appointment of High Court Judges, the opinion has to be formed by both the judicial consultees collectively. When such an opinion is formed, the Chief Justice of Pakistan forwards the same to the executive. When this collective opinion comes in conflict, with the opinion of the executive it has to be given primacy for the reason that the Chief Justice of High Court concerned and the Chief Justice of Pakistan have expertise knowledge about the ability and competency of a candidate for judgeship. They are well equipped to assess the knowledge and suitability of a person who is being considered for appointment as a judge. This has been so held by Justice Ajmal Mian in the last paragraph at page 490 of the Judges Case.

55. The decision in the Judges’ case is itself an example of the vital role that has been assigned to the Chief Justice of the High Court in the entire process of appointment of High Court Judges. In Judges’ case, the appointment of Judges in three High Courts i.e. this High Court, Lahore High Court and Peshawar High Court were declared to be invalid only for the reason that they were appointed on the recommendations of the Acting Chief Justices of the High Courts instead of permanent Chief Justices. Several appointments of the High Courts were invalidated and the process was ordered to be held de novo through the permanent Chief Justices of the respective High Courts. This decision in the Judges’ case was given in spite of the fact that the original appointment of the affected judges were backed by the recommendations of permanent Chief Justice of Pakistan. Had there been primacy of the opinion of the Chief Justice of Pakistan over the opinion of the Chief Justice of the High Court, the Judges’ case would not have nullified the appointments.

56. Wherever it is stated in Judges’ Case that the opinion of the Chief Justice of Pakistan has primacy, in so far as it relates to the appointment of High Court Judges, it means primacy of the common opinion collectively formed by both, the judicial consultees over the opinion of the executive. The reason for stating that opinion of the Chief Justice of Pakistan has primacy is because the collective opinion is finally forwarded by the Chief Justice of Pakistan to the appointing authority i.e. the President. When this collective opinion comes in conflict with the opinion of the executive then it has to be given primacy over the opinion “of the executive in order to preserve independence of the judiciary. In such a situation if the executive do not wish to appoint the recommendee on account of negative opinion about his antecedents, the executive is bound to give reasons for that, whereas no reasons are required to be given by the judicial consultees for their negative opinion about a recommedee. It is for this reason that Justice Ajmal Mian at page 492 of the Judges Case observed “....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 the above Articles of the Constitution”. Therefore, in case a person is found to be unfit for appointment by the Chief Justice of the High Court concerned or the Chief Justice of Pakistan then he cannot be appointed as it will not be a proper exercise of power under Article 193 of the Constitution. This restriction on the powers of the appointing authority not to appoint a person who has not been recommended by either of the two judicial consultees gives primacy to their opinion over the opinion of the executive. Thus the negative opinion of any of the judicial consultees cannot be ignored by the executive in any circumstances.

VIII. The past Conventions:

57. In the Judges’ case as well as in Asad Ali’s case due recognition has been given to the Constitutional conventions which are enforceable as if they are provisions of the Constitution itself. In the matter of appointments of Judges, guidance has be taken from well established conventions, which have dealt with similar situations in the past. In the past there had never been a situation when the Chief Justice of this Court had not recommended confirmation of an Additional Judge yet the Chief Justice of Pakistan in disregard of such negative opinion has recommended his confirmation without first seeking reconsideration of the negative opinion of the Chief Justice of the High Court. In the year, 1998 when confirmation of Mr. Mushtaq Ahmed Memon, who was then an Additional Judge of this Court, came up for consideration, the Chief Justice of this Court recommended extension in his judicial tenure only, whereas the Chief Justice of Pakistan was of the view that Mr. Memon deserves to be confirmed, The Chief Justice of Pakistan referred the matter back to the Chief Justice of this Court to consider confirmation of Mr. Memon instead of giving him further extension in his judicial tenure. After reconsidering his earlier opinion, the Chief Justice of this Court changed his earlier opinion and recommended Mr. Memon’s confirmation and only thereafter the Chief Justice of Pakistan forwarded Mr. Memon’s name to the executive for confirmation. Keeping this past convention before us, which falls within the meaning of consultative process as defined in the Judges, Case, we are of the opinion that in a case where the Chief Justice of a High Court gives negative opinion about a person and the Chief Justice of Pakistan holds a positive opinion then it is all the more necessary that the matter be referred back to the Chief Justice of the High Court for reconsideration and only after reaching consensus, recommendations be sent to the appointing authority.

IX. Examining the disputed appointments:

58. In the matter of confirmation of Additional Judges of the High Courts, the procedure that is followed is that before the judicial tenure of an additional Judge of a High Court expires, the Chief Justice of the concerned High Court decides (a) whether or not to recommend him for confirmation or (b) whether his tenure needs to be extended for a further period and the question of confirmation be deferred till then. The Constitution has specifically assigned a consultative role to the Chief Justices of the High Courts in, the entire process of appointment of judges/additional judges to their respective High Courts. The object of having consultations between the Chief Justice of a High Court and Chief Justice of Pakistan is to appoint such persons who are fit and suitable to hold the office of the High Court Judge and about whom there are no differences of opinion about his fitness and suitability. Differences on the fitness and suitability of a person makes him controversial: In such circumstances it is better not to appoint a controversial person who though may be otherwise fit to be appointed as a judge: This is so because both the judicial consultees have been collectively entrusted with the obligation to appoint such persons whose credentials to hold the office of judge are beyond reproach. When there is collective responsibility then there is no room for arbitrariness. Appointing a person about whom there are reservations in the mind of any of the two judicial consultees is certainly going to create an adverse perception among the lawyers’ community as well as. among the public which may shatter confidence in the judiciary.

59. Therefore, in case the Chief Justice of the High Court gives his negative opinion and does not recommend confirmation or extension in the judicial tenure of an additional Judge and on the other hand the Chief Justice of Pakistan is of the opinion that the Additional Judge deserves to be confirmed then both the judicial consultees must engage themselves in further consultations. The two judicial consultees must discuss on the point of their differences and reach at some consensus. It is only after reaching consensus that the Chief Justice of Pakistan forwards the final opinion to the executive, In this manner, the final opinion that is communicated by the Chief Justice of Pakistan to the executive is not merely his individual opinion but an opinion that is formed collectively by both the judicial consultees after engaging themselves in consultative process. The main object of having consensus-oriented consultations could only be achieved if such a course is adopted.

60. In Asad Ali’s. case the Hon’ble Supreme Court held that any deviation in the method of appointment prescribed under the Constitution and defined in the Judges’ case is likely to shake the confidence of the public in the institution of judiciary and tarnish its image as the neutral arbiter in disputes between citizen and citizen and citizen and State and therefore such deviation would vitiate the right to hold office.

61. We have already held that any adverse remarks expressed in relation to any person by any of the judicial consultees in the course of the consultative process is not open to judicial scrutiny and hence not Justiciable. What is open to judicial scrutiny is the propriety and legality of the consultative process which if found to be deficient on the touchstone of the provisions of our Constitution (as defined in the Judges’ case and practised through well established Constitutional conventions) would lead to invalidating the appointment. Therefore, all that needs to be examined in this case is whether the consultative process that took place amongst the four constitutional consultees in relation to respondent Nos. 3 to 5 falls within the meaning of the term “consultation” as defined by the Supreme Court in the Judges’ Case and whether the well established Constitutional conventions were respected.

62. Upon examining the record, we have noticed that the confirmation of respondent No.3 as a permanent Judge and extension in the judicial tenure of respondent No.4 as Additional Judge took place in complete departure from the past conventions in that Justice Abdul Hameed Dogar acting as Chief Justice of Pakistan altogether ignored the opinion of the Chief Justice of this Court which the latter gave in relation to respondents Nos.3 and 4. From the record we have noticed that, the Chief Justice of this High Court in his opinion dated 4-12-2008 recommended extension in the judicial tenures of respondents Nos.3 and 5 only. With regard to respondent No.4, the Chief Justice of this Court expressed negative opinion about him and neither recommended his confirmation nor extension in his judicial tenure. The Governor however in his opinion dated 11-12-2008 recommended confirmation of respondent No.3 and extension in the judicial tenures of respondents Nos.4 and 5. On receiving both the recommendations on 12.12.2008, Justice Abdul Hameed Dogar on the very same day recommended confirmation of respondent No.3 and extension in the judicial tenures of respondents Nos. 4 and 5. This opinion of Justice Abdul Hameed Dogar was clearly in conflict with the opinion of the Chief Justice of this Court in so far as respondents Nos. 3 and 4 were concerned, yet without first having any further consultations with the Chief Justice of this Court, Justice Abdul Hammed Dogar forwarded his opinion to the executive. When the Chief Justice of this Court had neither recommended confirmation of respondent No.3 nor recommended extension in the judicial tenure of respondent No.4, then there ought to have been further consultations in order to reach at some consensus. There is nothing on record to show that any attempt was made towards this direction. When consultation is a constitutional ‘requirement then it cannot be treated as a mere formality. The whole object of appointment through consultative process would be defeated if even after the differences in the opinions of the two judicial consultees, no further consultations take place between them. In the present case, there was total absence of having any further consultations with the Chief Justice of this High Court in spite of the differences in the two opinions. Thus the consultative process lacked basic requirements of the `consultations’ as defined in the Judges’ case and thus the confirmation of respondent No.3 and extension in the judicial tenure of respondent No.4 was in complete violation of the rules laid down in the Judges’ case.

63. In the Judges’ Case, the Hon’ble Supreme Court has also held that though the President has sole power to appoint Judges but the opinion of the consultees, particularly of the Chief Justice of the High Court and the Chief Justice of Pakistan, who are supposed to be experts in the field of law in which the appointment is to be made, cannot be ignored. The Judges’ Case recognizes the fact that the Chief Justice, of the High Court and the Chief Justice of Pakistan normally know the advocates who appear in their Courts regularly and therefore, they would recommend names of such advocates who are capable and fit to be judges of the High Court. It is in this context that their opinions, which is expert opinion in a way, cannot and should not be ignored. Then some of the elevations to the High Courts are made from the subordinate judiciary as well. The Chief Justice of the concerned High court is in a better position to know the performance and capabilities of the judges of the subordinate judiciary by virtue of Article 203 of the Constitution. This Article entrusts the concerned High Court with the responsibility to supervise and control all courts subordinate to it. The Chief Justice of the concerned High Court is in direct contact with the District Judges 1 and is aware of their performances as judges. The Chief Justice of the concerned High Court therefore is in best position to know their potential and capability to become judges of the High Court. In this background, the opinion of the Chief Justice of the concerned High Court gains immense importance when it comes to the appointments that are to be made to his High Court. The negative opinion of both the judicial consultees has to be respected. It is for this reason held in the Judges Case that in case the executive gives negative opinion about a person for reasons of his improper antecedents in whose favour the Chief Justice of the High Court and the Chief Justice of Pakistan have given their positive opinion the executive may not appoint such person but it has to give strong reasons for that. On the other hand the executive cannot appoint a candidate for judgeship if the Chief Justice of the High Court or the Chief Justice of Pakistan have given negative opinion. In the entire process of appointment and/or confirmation of High Court Judges, the opinion of the Chief Justice of a High Court is of vital importance. Ignoring his opinion would amount to treating his opinion as a mere formality.

64. Whenever differences as to suitability and fitness arise about a person between the two judicial consultees, attempt should be made to reach at some consensus. If no consensus is reached then the executive cannot appoint such a person, as it would not be a proper exercise of power under Article 193 of the Constitution. Then to maintain transparency, the entire consultative process must also be reflected from the record i.e. it should be in writing. The executive cannot choose from any of the two diverse opinions of the judicial consultees and appoint a person which the executive deems fit. The executive can only vouch for the antecedents of a person, which too are justiciable. Appointing a person that is likely to give rise to controversy should always be avoided at all costs. Disregard of this principle, which has its root in the time-honoured conventions, would defeat the very object for which the consultative process was devised in the Constitution and defined in the Judges’ Case.

65. It was also argued that as the respondent No.3 was administered oath by the very same Chief Justice of this Court who had not recommended his confirmation therefore legal infirmity if any stood cured. Suffice is to state that there is no estoppel against the law or the Constitution. Oath by itself could not cure the defect that was left in the consultative process, which is a mandatory requirement of the Constitution. No consultee possesses exclusive role in the appointment of a High Court Judge. If the Chief Justice of this Court gave oath to respondent No.3 on account of issuance of notification by the appointing authority, it does not mean that the consultative process that originally lacked validity under the Constitution would become valid. The obligation to have effective, meaningful, purposive and consensus oriented consultations before final recommendations are sent to the executive for consideration had to be discharged in the light of the time-honoured past conventions and the rules laid down in the Judges’ case. Therefore giving oath is secondary which would not cure the inherent defect in the entire process of confirmation of respondent No.3.

66. What has emerged from the above discussion with regard to the controversy involved in this case can be summarized as follows:--

(i) It is time honoured constitutional convention that the process of appointment of a High Court Judge is initiated by the Chief Justice of the concerned High Court arid the recommendation for appointment is finally forwarded to the appointing authority by the Chief Justice of Pakistan and this is done only after both the judicial consultees have reached consensus by engaging themselves in a participatory consultative process.

(ii) The norms that have emerged from the time honoured constitutional conventions have to be respected in the entire consultative process. Guidance has to be taken from the well-established constitutional conventions, which have dealt with similar situations in the past. Appointing a person that may give rise to controversy should be avoided at all costs. Disregard of this principle, which has its root in the time-honoured conventions, would defeat the very object for which the consultative process was devised in the Constitution and defined in the Judges’ case.

(iii) In the Judges’ case (PLD 1996 SC 324) wherever there is reference to the opinion of “the Chief Justice of Pakistan and the Chief Justice of the High Court”, the word “and” appearing in the said phrase it is to be read to mean the opinion which both the judicial consultees have collectively formed with regard to the suitability and fitness of a person.

(iv) Wherever it is stated in the Judges’ case that the opinion of the Chief Justice of Pakistan has primacy, in so far as it relates to the appointment of High Court Judges, it refers to the opinion that is collectively formed by both the judicial consultees with consensus that has primacy over the opinion of the executive consultees.

(v) When the Chief Justice of the High Court in his opinion expresses disapproval of any person to be appointed as Judge and on the other hand the Chief Justice of Pakistan finds such person to be suitable for appointment then the record must reflect that further consultations were held between them to sort out the differences. Without addressing the differences in the two opinions, the purpose of having meaningful and effective consultations could never be realized.

(vi) In order to ensure effective consultations between the Judicial consultees, the reasons for disagreement, if any, must be disclosed to the other for reconsideration.

(vii) Where the differences between the Chief Justice of Pakistan and Chief Justice of the High Court remain, in spite of an attempt to sort them out, then appointment should not be made as it would not be in the best interest of the judiciary to appoint a controversial person.

(viii) The Chief Justice of Pakistan and the Chief Justices of High Courts are head of their respective institutions and therefore if any of them find a person not fit and capable to be appointed as a Judge of the High Court then the executive cannot disregard such negative opinion and must not appoint a controversial person as it would not be “proper exercise of power under Articles 193 and 197 of the Constitution.

(ix) In case the executive wishes to disagree with the positive opinions of the judicial consultees on account of its negative opinion about the antecedents of a person, it has to give strong reasons, which shall be justiciable but the executive cannot appoint a person in case the Chief Justice of the High Court or the Chief Justice of Pakistan has given negative opinion about his suitability and fitness.

(x) In order for the consultative process to be credible and transparent, it should always be in writing and must form part of the record, as the appointment of judges to the superior Courts is too important a matter to be left to speculation and conjectures.

(xi) The concept of non-justiciability was devised only to provide a carte blanche to the judicial consultees so that. they, while considering appointments under the Constitution, may give their free and frank opinion about a person, without any inhibitions and without putting up with the embarrassment that is bound to come, in case the- adverse remarks made in their opinions are made justiciable and allowed to be challenged through representations and legal proceedings.

(xii) What is open to judicial scrutiny is the propriety and legality of the consultative process which if found to be deficient on the touchstone of the provisions of our Constitution (as defined in the Judges’ case) and the well-established constitutional conventions, would invalidate the appointment.

67. In view of the above discussion, we are of the opinion that in order for a consultative process to be in line with the constitutional requirements and well established constitutional conventions, no appointment, confirmation or extension in the judicial tenure of an additional Judge of High Court could be valid if the Chief Justice of the concerned High Court has not given his positive recommendations in the matter or revised his earlier negative recommendations.

68. In the end, we thank the learned counsel for the parties as well as the amici curiae for rendering their valuable assistance to this Court, which enormously helped us in deciding the controversy involved in this case.

69. We allowed this petition by passing following short order on 6-5-2009.

SHORT ORDER

We have heard all the learned counsel for the parties, learned Attorney General for Pakistan, learned Advocate General of Sindh and learned Amici Curiae in the matter. For the reasons to follow later this Petition is disposed of in the following terms;

(1) The Petition challenging the right to hold office of a Judge of this Court is maintainable under Article 199 (1) (b) (ii) of the Constitution of Islamic Republic of Pakistan 1973.

(2) As the consultation with regard to the confirmation and or extension of a Judge of the High Court by the President/Executive with the consultees mentioned in the Articles 193 and 197 of the Constitution of Islamic Republic of Pakistan, 1973 read with definition of consultation under Article 260 of the Constitution has to be effective, meaningful consensus oriented purposive and therefore, any appointment, confirmation and or extension in disregard of these principles shall be violative of the Constitution and the well established constitutional conventions shall be invalid.

As the above procedure was not adhered to in the matter of confirmation and extension of Respondents Nos.3 and 4 respectively, we therefore hold that;

(a) The confirmation of Respondent No. 3 as a Judge of this Court is hereby treated as an extension in his tenure as an Additional Judge of this’ Court as recommended by the Chief Justice of this Court for a period of one year from the date of expiry of his tenure as mentioned in the notification dated 14-12-2007.

(b) As regard Respondent No.4 we are of the view that the Chief Justice of this Court did not recommend his name, hence extension in his tenure being violative of the Constitution’ is declared invalid.

(c) As regard Respondent 5 there is no disagreement of opinion by and between all the constitutional consultees, therefore the Petition as against Respondent No.5 is dismissed.

We however find it necessary to clarify that we have consciously avoided deliberating upon Proclamation of Emergency Order, 2007 and the Oath of Judges Order, 2007 and its ramifications and consequences firstly for the reasons that the said question is before Honourable Supreme Court and secondly Mr. Rasheed A. Razvi counsel for the petitioner has not pressed said ground before us for the limited purposes of decision in the instant petition.

70. The above are the reasons for the short order that we passed on 6-5-2009.

(Sd.) Faisal Arab, J

I agree and have added a note.

(Sd.) Mushir Alam, J

I agree

(Sd.) Khilji Arif Hussain, J

MUSHIR ALAM, J.---(1) I had the privilege to go through the considered and well reasoned opinions handed down by my learned brothers Justice Gulzar Ahmed and Justice Faisal Arab covering all aspects of the matter argued before us, I appreciate the manner in which sensitive and complicated issues have been dealt with ease and eloquence by my learned brothers. I could do no better. With the due deference slightly to the extent narrated herein; with regard to inter se primacy of opinions of two judicial consultees and the options exercised by the President dealt with by my learned brother Justice Gulzar Ahmed, I concur with rest, of the reasoning and conclusions drawn by both the learned brothers on all fours.

(2) Reaping the wisdom from J.S. Verma, J’s lucid opinion, in the case of S.C. Advocates on Record Association v. Union of India AIR 1994 SC 268 para 501 @ pages 438, and approved in Presidential Reference AIR 1999 SC’ 1, I would only like to add that the disagreement of Chief Justice of Pakistan with the recommendation of Chief Justice of High Court is not something unusual in the context of appointment, extention or confirmation of a Judge of High Court and instances have been quoted by my learned brothers. It is but part of the healthy consultative process aiming at arriving at consensus amongst the judicial consultees. In case the Chief Justice of Pakistan disagrees with the opinion of the Chief Justice of High Court in the matter of appointment, extention or confirmation or otherwise of a Judge of High Court for any good reasons same may be disclosed to the Chief Justice of concerned High Court to enable him to reconsider his recommendation. If the Chief Justice of concerned High Court still does not deem it necessary to review his opinion as regards non-recommendation either for appointment, extention or non-confirmation of a Judge as the case may be, and he maintains his opinion, then non-appointment, non-extention or non-confirmation of that person as a Judge of High Court for reasons to be recorded by the President is permissible in the public interest. If the non-appointment, non-extention or non-confirmation in rare case, on this ground, turns out to be a mistake, in the ultimate public interest is less harmful than a wrong appointment. One can very well imagine the devastating and far reaching consequence of wrongful appointment and the judiciary of Pakistan has suffered immensely on this count.

(3) We had the rare opportunity to peruse the past record of appointment, extention and or confirmation of judges of this Court, which shows that the candidate who was not recommended for appointment, extention or confirmation as a judge of this Court by the Chief Justice of Pakistan for appointment, extention or confirmation as a judge of this Court. Instant case appears to be solitary exception in. deviation from the established and past conventions in the subject-matter, at least of this Court.

(4) In event of disagreement between the Judicial Consultee, Chief Justice of Pakistan has option to initiate participatory consultative and consensus-oriented process, through exchange of correspondence or may invite the Chief Justice of concerned High Court and engage into integrated participatory consultative process for selecting the best of the best and most suitable person available for appointment. In event of consensus inter se judicial consultee cannot be arrived at, and a person is opined to be unfit by the Chief Justice of the concerned High Court for the judgeship of the High Court, such person should not be recommended for appointment, extention and or confirmation by the Chief Justice of Pakistan. From the record made available to us on the subject-matter, it appears that the President acted mechanically, without application of mind in post haste in issuing the notification on the very date of receipt of recommendation, without making any conscious effort to encourage consensus amongst the two judicial consultees.

(5) Role of the President in the appointment of Judges of superior Courts should not be taken lightly to be merely ceremonial, mechanical, or executive; it is solemn constitutional duty of vital importance, which must be performed and discharged objectively, impartially with due deferance, seriousness and conscious application of mind, in its true spirit to maintain the independence, dignity and majesty of the Judiciary, the pivotal pillar of the State and with the object to select the best of the best and most suitable person for-the judgeship of superior Courts.

(6) If the President/Executive appoints a candidate found to be unfit and unsuitable for the judgeship of the High Court by either of the two judicial consultees, it will not be a proper exercise of important and solemn constitutional authority, under the Articles 175(3), 193, 197 read with Article 260 of the Constitution.

(7) Non-adherence to the constitutional duty cast upon the President/Executive, and non-observance of mandatory consultative procedure as noted above, amounts to abdication in discharge of its important and constitutional duty. If the President/Executive appoints a candidate found to be unfit and unsuitable for the judgeship of the High Court by either of the two judicial consultees, it will not be a proper exercise of power under the relevant Articles of the Constitution and is always justiciable and amenable to judicial review by superior Courts for the simple reason that mandatory procedure of meaningful, consensus oriented and purposive consultation was not adhered to.

(Sd.) Mushir Alam, J

M.B.A./5-80/K                                                                                    Order accordingly.

2003 P L C (C.S.) 285

[Supreme Court of Pakistan]

Present: Qazi Muhammad Farooq, Rana Bhagwandas and Abdul Hameed Dogar, JJ

MUHAMMAD IQBAL KHAN NIAZI

Versus

LAHORE HIGH COURT, LAHORE through Registrar

Civil Appeal No.625 of 1999, decided on 22nd October, 2002.

(On appeal from the judgment dated 4-12-1998 of the Punjab subordinate Judiciary Service Tribunal (Lahore High Court, Lahore) passed in Service Appeal No. 11 of 1996).

(a) Punjab Judicial Service Rules, 1994---

---High Court of West Pakistan Delegation of Powers Rules, 1960, Sched., Item 2(g)---Punjab Civil Service (Judicial Branch) Rules, 1962, R.8(1)--Punjab Civil Servants Act (VIII of 1974), S.10(1)---Constitution of Pakistan (1973), Art. 212(3)---Termination of service of la Civil Judge before the expiry of maximum period of probation---Validity---Leave to appeal was granted by the Supreme Court to consider, inter alia, the contentions that the petitioner was appointed as Civil Judge by the orders of the Governor and therefore his services could not be dispensed with by the High Court; that only the power of appointment was delegated to the High Court and the power of termination/removal from service had not been specially delegated to the High Court, therefore, other prevailing rules i.e. High Court of West Pakistan Delegation of Powers Rules, 1960 would be applicable whereunder only the Governor was competent to remove a Civil Judge from the service; that for the purpose of the interpretation of the rules of service governing the judicial officers, namely West Pakistan Delegation of Powers Rules, (960, West Pakistan P.C.S. (JB) Service Rules, 1962 and Punjab Judicial Service Rules, 1994 were to be read together; that. S.10(1) of the Punjab Civil Servants Act, 1974 was un-Islamic and also violative of principles of natural justice enshrined in the maxim “audi alteram partem” and that services of the petitioner were terminated by a Committee headed by the then Acting Chief Justice which action was violative of the principles enunciated by the Supreme Court in the case of Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324.

Al-Jehad Trust through Raeesul Mujahideed Habib-ul-Wahab-ul-Khairi and others v. Federation of Pakistan and others PLD 1996 SC 324 ref.

(b) Punjab Civil Service (Judicial Branch) Rules, 1962---

----Rr. 8(1) & 3(b), Expln.---Initial probationary period ---Extension--Record did not indicate that any order was passed by the day following the completion of the initial probationary period of two years envisaged by R.8(1) of the Rules, probationary period, in circumstances, stood extended by a period of two years in view of Cl. 3(b) and Expln. thereof.

(c) Civil service-

---- Termination of service---Order of termination was passed without assigning any reason---Contention of the civil servant was that termination of service had put him under the vestige of a stigma---Validity---Order of termination of service having been passed without assigning any reason for the action was simpliciter and harmless in nature---Allegation that the order put him under the vestige of stigma was more imaginary than real---stigma does not flow from an innocuous order of termination of services.

(d) Punjab Civil Service (Judicial Branch) Rules, 1962---

----R.8(2)---Probationer judicial officer---Competent Authority is empowered to ascertain whether the work or conduct of a member of the service during the period of probation has been satisfactory or otherwise.

(e) Punjab Civil Servants Act (VIII of 1974)--

----S.10(1)---Punjab Civil Service (Judicial Branch) Rules, 1962, R.8--Probationer Civil Judge---Termination of service---Plea of discrimination --­Validity---Batchmates of the Civil Judge whose services were terminated had successfully crossed the hurdle of the probationary period whereas he had bogged down and his services were dispensed with on the strength of the ,provisions of S.10(1) of the Civil Servants Act, 1974 read with R.8, Punjab Civil Service (Judicial Branch) Rules, 1962---Question of discrimination n case of the aggrieved civil servant would not arise, in circumstances.

(f) High Court of West Pakistan Delegation of Powers Rules, 1960---

---West Pakistan General Clauses Act (VI of 1956), S.15---Notification No. SOR.I(S&GAD)-Integ. 15-23-59 dated 22-4-1970---Power to dismiss or remove from service etc. a Civil Judge was specifically delegated to the High Court and it is immaterial whether it was exercised or not---High Court, therefore, “is competent to dismiss or remove from service or retire compulsorily or reduce in rank or suspend a Civil Judge---Principles.

Muhammad Siddiq Javaid Chaudhry v. Government of West Pakistan PLD 1974 SC 393; The Secretary, Government of the Punjab v. Riaz-ul-Haq 1997 SCMR 1552; Karachi Port Trust v. Altaf Ahmed 1996 SCMR 1205; Rehan Saeed Khan and others v. Federation of Pakistan and others 2001 PLC (C.S.) 1275; Liaqat Ali Shahid v. Government of the Punjab 1999 PLC (C.S.) 334 and Muhammad Suleman v. Lahore High Court, Lahore and another Civil Petition No. 1056-L of 1999 ref.

(g) Punjab Civil Servants Act (VIII of 1974)---

---S.10(1)---Vices of S.10(1), Punjab Civil Servants Act, 1974---Contention hat S.10(1) of the Act was un-Islamic was bereft of substance as the same as not so far been declared to be repugnant to the Injunctions of Islam as laid down by the Holy Qur’an and Sunnah of the Holy Prophet (p.b.u.h.).

(h) Civil service---

----Probationer---Vested right to continue in service---Scope---Termination of service---Maxim: “Audi alteram partem”--Applicability --- Probationer has no vested right to continue in service, therefore, his services can be terminated without a show-cause notice and the question of violation of the principles of audi alteram partem does not arise except in case of mala fides.

Province of Sindh v. Public at Large PLD 1988 SC 138 and Rehan Saeed Khan and others v. Federation of Pakistan 2001 PLC (C.S.) 1275 ref.

K.M.A. Samadani, Senior Advocate Supreme Court and M.S. Khattak, Advocate-on-Record for Appellant.

Malik Azam Rasool, Advocate Supreme Court for Respondent.

Date of hearing: 22nd October, 2002.

**JUDGMENT**

**QAZI MUHAMMAD FAROOQ, J.**---This appeal, by leave of the Court, has arisen from the judgment, dated 4-12-1998 of the Punjab Subordinate Judiciary Service Tribunal Lahore High Court, hereinafter referred to as the Tribunal, whereby the appellant’s Service Appeal No. 11 of 1996 was dismissed:

2. The relevant facts are that on the recommendations of the Punjab Public Service Commission the appellant was appointed as a Civil Judge, vide Notification No.1-26/89-SO(Admn-IV) dated 25-8-1991. However, during the period of probation his services were terminated under section 10(1) of Punjab Civil Servants Act, 1974 by the Lahore High Court by virtue of Notification No.187/RHC/CJJ/B-30 dated 8-10-1995. The departmental appeal/representation made by him remained un-responded for a period of 90 days, therefore, he invoked the jurisdiction of the Tribunal but his appeal was dismissed.

3. While dismissing the appeal the Tribunal observed that the appellant was posted as a Civil Judge on 12-10-1991 and having not been confirmed was under probation on 8-10-1995 when his -services were dispensed with and even if the date of commencement of his probation is reckoned from 12-10-1991, when he had joined the training course, he would still be under probation in view of the Rules on the subject which provide that unless, a Judicial Officer is earlier confirmed or made permanent the maximum period of probation would be four years. The argument that the services of the appellant were terminated while a complaint against him, made by the Registrar of the Lahore High Court to the District and Sessions Judge, Rawalpindi, was being looked into was repelled by the Tribunal by holding as under:-

            “As has been held in the case of Abdul Karim v. The West Pakistan Province    (PLD 1956 SC 298) and by us in Service Appeal No. 11 of 1993, even in cases     where some enquiry is pending and there are allegations of misconduct, the       Authority can still exercise the power of termination available during the probation period. This is so because a person under probation is strictly not in     service, even though while on probation he is subjected to all incidents of service including disciplinary proceedings.”

4. Leave was granted to consider, inter alia, the following contentions raised by the learned counsel for the appellant:-

            (i) That the petitioner was appointed as Civil Judge by the orders of the Governor          as is borne out by the Notification dated 25-8-1991 and, therefore, his services could not be dispensed with by the respondent High Court. In this context it was submitted that in the matter of probation, it was specifically directed in the order dated 25-8-1991 that the petitioner would be governed by the PCS(JB) Rules, 1962 and that under rule 8, thereof the power to dispense with the services of a probationer only vests with the Government in the absence of specific delegation of power under the said rule, the respondent High Court had do authority to terminate the services of the petitioner.

            (ii) That meanwhile Judicial Service Rules, 1994 were enforced whereunder only           the power of appointment was delegated to the High Court and that the power of    termination/removal has not been specifically delegated to the respondent-High         Court, therefore, other prevailing rules i.e. High Court of West Pakistan Delegation of Powers Rules, 1960 would be applicable whereunder only the Government was competent to remove a Civil Judge from, the service. In this context, it has been canvassed that for the purpose of the interpretation of the rules of service governing the Judicial Officers, namely, West Pakistan Delegation of Powers Rules, 1960, the West Pakistan PCS (JB) Service Rules, 1962 and Punjab Judicial Service Rules, 1994 are to be read together.

            (iii) That section 10(1) of the Punjab Servants Act, 1974 is un-Islamic and also violative of principle of natural justice enshrined in the maxim: “audi alteram partem. “

            (iv) ‘that the; services of the petitioner were terminated by a Committee headed by         the then Acting Chief Justice which action is violative of the principle enunciated       in the case of Al Jehad Trust through Raeesul Mujahideen Habib-ul-Wahab-ul-Khairi and others v. Federation of Pakistan and others (PLD 1996 SC 324).”

5. The learned counsel for the appellant did not press the contention listed at Serial No. iv of the leave granting order. He, however, reiterated the remaining contentions with vehemence and in support of contention No. (iii) cited Province of Sindh v. Public at Large (PLD 1988 SC 138) wherein it has been held that any provision of law whereunder someone can be harmed or condemned without affording such person an opportunity of defence against said action is against the Qur’anic commands as supplemented and interpreted by the Sunnah of the Holy Prophet (P.B.U.H). He also drew our attention to Serial No.2(g) of the Schedule to the High Court of West Pakistan Delegation of Powers Rules, 1960 under which the Provincial Government was the Competent Authority to dismiss or remove from service or retire compulsorily or reduce in rank or suspend Civil Judges. He also raised two additional arguments. First, that the order of termination of services of the appellant was liable to be struck dawn on the ground of discrimination inasmuch as on 8-10-1995 when services of the appellant were terminated a notification was issued in respect of his 18 batch mates to the effect that they had completed the period of probation in terms of the conditions laid down in their appointment Notification dated 25-8-1991. Secondly, that in the letter dated 31-10-1992 addressed to the District and Sessions Judge, Rawalpindi by the Registrar Lahore High Court certain allegations with regard to the conduct of the appellant were made and the appellant had filed a reply also, therefore, there should have been an inquiry against him but instead of holding an inquiry his services were terminated on the technical ground of probation. In this context it was also contended that termination of his services without holding an enquiry had stigmatized the appellant as a result whereof he was not selected in the recent selection and appointment of Additional District and Sessions Judges. Reliance was placed on Muhammad Siddiq Javaid Chaudhry v. Government of West Pakistan (PLD 1974 SC 393), The Secretary, Government of the Punjab v. Riaz-ul-Haq (1997 SCMR 1552) and Karachi Port Trust v. Altaf Ahmed (1996 SCMR 1205).

6. Learned counsel for the respondent, on the other hand, submitted that action against the appellant had been validly taken under the Punjab Judicial Service Rules, 1994 which had repealed the Punjab Judicial Service (JB) Rules, 1962. He further submitted that vide Notification dated 22-4-1970 issued by the Services and General Administration Department the entry against Serial No.2(g) of the Schedule of High Court of West Pakistan Delegation of Powers Rules, 1960 was deleted and the expression ‘Provincial Government’ was substituted by the expression ‘High Court’. He went on to submit that inspite of that amendment the cases of the probationers used to be forwarded to the Governor but after the promulgation of the Punjab Judicial Service Rules, 1994 the High Court being the Appointing Authority was fully empowered to deal with the cases of the probationers. He also submitted that the contentions raised by the learned counsel for the appellant had already been settled in Rehan Saeed Khan and others v. Federation of Pakistan and others (2001 PLC. (CS) 1275), Liaqat Ali Shahid v. Government of the Punjab (1999 PLC (CS) 334), and Muhammad Suleman v. Lahore High Court Lahore and another (Civil Petition No.1056-L of 1999) decided on 21-5-2002.

7. The appellant was appointed as a Civil Judge alongwith 18 others on 25-8-1991 by the Governor of the Punjab on the recommendations of the Punjab Public Service Commission. In the Notification/appointment letter it was expressly mentioned that “the officers appointed shall remain on probation prescribed under rule 8 of PCS (JB) Rules, 1962, but have no right of confirmation till permanent vacancies became available, or in case they are rendered ineligible otherwise after expiry of the period of probation. They shall also be required to complete training and pass such Departmental Examination as prescribed in the rules or as may be prescribed from time to time. Their services shall be governed by the PCS (JB) Rules, 1962 and under other Rules, Regulations and instructions applicable to them as inforce hereinafter or issued in future”.

8. The services of the appellant were terminated on 8-10-1995. The Notification issued-in respect thereof is worded thus:-.

            “The Acting Chief Justice and Judges are pleased to terminate the service of Mr.             Muhammad Iqbal Khan Niazi, Civil Judge 3rd Class, Rawalpindi, on probation;             under section 10(1) of the Punjab Civil Servants Act, 1974, with immediate       effect.”

9. Before proceeding further it is necessary to reproduce clause (i) of subsection (1) of section 10 of the Punjab Civil Servants Act, 1974 under which services of the petitioner were terminated. It reads as under:-

            “(1) The service of a civil servant may be terminated without notice--

            (i) during the initial or extended period of his probation:

Provided that, where such civil servant is appointed by promotion on probation or, as the case may be, is transferred and promoted on probation from one service cadre or post to another service cadre or post his service shall not be terminated so long as he holds a lien against his former post, service or cadre, and he shall be reverted to this former service or as the case may, cadre or post; “

10. It will also be advantageous to reproduce rule 8 of the Punjab Civil Service (Judicial Branch) Rules, 1962. It reads as under:-

            “8. Probation. ---(1) A person appointed to the service against a substantive      vacancy shall remain on probation for a period of two years.

            Explanation:---Officiating service and service spent on deputation to a   corresponding or a higher post may be allowed to count towards the period of        probation.

(2) If the work or conduct of a member of the Service during the period of probation has been unsatisfactory, Government may, notwithstanding that the period of probation has not expired, dispense with his services.

(3) On completion of the period of probation of a member of the Service, Government; may subject to the provisions of sub-rule (4), confirm him in his appointment, or if his work or conduct has in the opinion of Government, not been satisfactory--

            (a) dispense with his services; or

            (b) extend the period of the probation by a period not exceeding two years in all,           and during or on the expiry of such period pass such orders as it could have             passed during or on the expiry of the initial probationary period.

            Explanation I.---If no orders have been made by the day following the completion         of the initial probationary period, the period of probation shall be deemed to have been extended.

            Explanation II.---If no orders have been made by the day on which the maximum             period of probation expires; the probationer shall be deemed to have been         confirmed in his appointment from the date on which the probation was last            extended or may be deemed to have been so extended.

            (4) No person shall be confirmed in the service unless he successfully completes             such training and passes such departmental examinations as may be prescribed by             Government from time to time.

            (5) If a member of the Service fails to complete successfully any training or pass             any departmental examination prescribed under sub-rule (4), within such period       or in such number of attempts as may be prescribed by Government, Government             may dispense with his services.”

11. The appellant was appointed on 25-8-1991 and it was clearly provided in the Notification that his services shall remain on probation prescribed under rule 8 of PCS(JB) Rules, 1962. The record does not indicate that any order was passed by the day following the completion of the initial probationary period of two years envisaged by clause (1) of rule 8, therefore, the probationary period of the appellant stood extended by a period of two years in view of clause 3(b) and Explanation-I thereof. The services of the appellant were undoubtedly dispensed with before the expiry of the maximum period of probation and for that very reason he has not alleged that the order of termination of his services was passed before the expiry of the probationary period. The allegation that the order of termination of his services had put the appellant under the vestige of a stigma is more imaginary than real inasmuch as the order having been passed without assigning any reason for the action is simplicitor and harmless in nature. Stigma does not flow from an innocuous order of termination of services. Similarly, in the absence of the record of the selection and appointment of the Additional District and Sessions Judges it is rather speculative to say that the appellant was sidelined on account of the fall out of the order of termination of his services. There is also no force in the contention that an enquiry ought to have been held in respect of the allegations made in the letter dated 31-10-1992 addressed to the District and Sessions Judge Rawalpindi by the Registrar Lahore High Court instead of terminating the services of the appellant through the leverage of the probationary period. We have gone through the said letter as well as the explanation of the appellant. The letter does not contain any allegation of corruption and the matters mentioned therein are that the appellant was not punctual, had availed medical leave frequently, had not appeared before the Medical Board, had not written orders in two civil suits and responded to the advice of the District and Sessions Judge in an adamant and irresponsible manner. The explanation furnished by the appellant was to the effect that on account of serious illness he had applied for medical leave which was duly sanctioned by the High Court, he could not appear before the Medical Board due to rush of work but had appeared subsequently on the date fixed, the orders in two suits were dictated and announced by him on 30-7-1992 but could not be annexed with the file summoned by the District and Sessions Judge as the same had got mixed up with other files and being a beginner in service he could not even think of ignoring the advice of District and Sessions Judge. There can be two possible reasons for not holding an enquiry. Firstly, that the explanation furnished by the appellant was found plausible and, secondly, the material with the Competent Authority was not sufficient to substantiate the allegations. Be that as it may, there is nothing on the record or in the order in question from which it could be gathered that the said letter had served as a springboard for terminating the services of the appellant. Even if the allegations reflected in the said letter are presumed to be instrumental in termination of services of the appellant the matter cannot be blown out of proportion in view of clause (2) of rule 8 of the Punjab Civil Service (Judicial Branch) Rifles, 1962 which empowers the Competent Authority to ascertain whether the work or conduct of a member of the service during the period of probation has been satisfactory or otherwise. The contention also overlooks the time lag between the complaint and the fiction taken against the appellant. The letter of the Registrar Lahore High Court was issued on 31-10-1992 whereas services of the appellant were terminated on 8-10-1995. If services of the appellant were to be terminated on account of the allegations made in that letter by using .the power to terminate services during the probationary period the action would have been taken promptly and not after three years. The delay goes a long way to suggest that the order in question is neither founded on the said letter nor is tainted with mala fide.

12. The discrimination-related contention is also untenable for the short reason that the appellant’s batch-mates had successfully crossed the hurdle of the probationary period whereas he had bogged down and his services were dispensed with on the strength of the provisions of section 10(1) of the Punjab Civil Servants Act, 1974 read with rule 8 of the Punjab Civil Service Judicial Branch) Rules, 1962. The question of discrimination would have arisen if the probationary period of a similarly placed batch-mate of the appellant would have been terminated.

13. This brings us to the first contention highlighted in the leave granting order that under Rule 8 of the Punjab Civil Service (Judicial Branch) Rules, 1962 the power to dispense with the services of a probationer only vested with the Government and the High Court had no authority to terminate the services of the appellant for want of specific delegation of power. The contention is misconceived. The Schedule to the High Court of West Pakistan Delegation of Power Rules, 1960 was amended vide Notification No. SO.RI(S & GAD)-Integ. 15-23-59 dated 22-4-1970, the entries against Serial No.2(d), (e), (f) and (g) were deleted and in column No.4 under caption ‘Authority competent to dismiss or remove from service or retire compulsorily or reduce in rank or suspend, the entry “High Court” was inserted in place of the entry “In other cases, Provincial Government.” The power to dismiss or remove from service etc. of a Civil Judge was specifically delegated to the High Court and it is immaterial whether it was exercised or not.

14. We now advert to the second main contention that in the Punjab Judicial Service Rules, 1994 only the power of appointment has been delegated to the High Court and the power of termination/removal has not been specifically delegated, therefore, the High Court of West Pakistan Delegation of Power Rules, 1960 would be applicable whereunder only the Provincial Government is competent to remove a Civil Judge from service. The contention is not only devoid of substance but also offends the concept of independence of judiciary under which the power to appoint and remove judicial officers has been taken away from the Provincial Government and conferred on the High Court. It is clearly mentioned in the Notification of appointment of the appellant that his services shall be governed by the PCS (JB) Rules, 1962, and under other Rules, Regulations and instruction applicable to him as inforce hereinafter or issued in future. The West Pakistan Civil Service (Judicial Branch) Rules, 1962 were repealed by the Punjab Judicial Service Rules, 1994 and as mentioned earlier the Schedule to the High Court of West Pakistan Delegation of Power Rules, 1960 was amended vide Notification No. SORI (S&GAD)-Integ-15-23-59 dated 22-4-1970, therefore, the High Court is competent to dismiss or remove from service or retire compulsorily or reduce in rank or suspend a Civil Judge. It is true that in the Punjab Judicial Service Rules, 1994 power of termination/removal is not specifically mentioned but the omission is immaterial. The requisite power already stands delegated through the aforementioned notification which holds the field in view of the provisions of rule 11 of the Punjab Judicial Service Rules, 1994 that in all matters not expressly provided for in the rules members of the service shall be governed by such rules as have been or may hereafter be prescribed by Government and made applicable to them. Moreover, according to rule 4 of the Punjab Judicial Service Rules, 1994 the High Court is the ‘Appointing Authority and it goes without saying that an Appointing Authority has inherent power dismiss or remove from service an appointee unless a different intention appears in the enactment. The Punjab Judicial Service Rules, 1994 have not imposed any fetter on the powers of the Appointing Authority in this context. Needless to refer to section 15 of the West Pakistan General Clauses Act which, clearly provides that the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by itself or any other Authority in exercise of that power.

15. The contention that section 10(1) of the Punjab Civil Servants Act, 1974 is un-Islamic is bereft of substance as the same has not so far been declared to be repugnant to the Injunctions of Islam as laid down by the Holy Qur’an and Sunnah of the Holy Prophet (p.b.u.h). As regards the principle of natural justice enshrined in the maxim “Audi alteram partem” suffice it to say that it has been held in Rehan Saeed Khan and others v. Federation of Pakistan (2001 PLC (C.S.) 1275) that a probationer has not vested right to continue in service, therefore, his services can be terminated without a show-cause notice and the question of violation of the principles of audi alteram partem does not arise except in case of mala fides. It is scarcely necessary to mention that the impugned order cannot be termed as mala fide by any standard.

For the reasons stated above, the appeal is dismissed with no order is to costs.

M.B.A./M-711/S                                                                                 Appeal dismissed.

2001 S C M R 901

[Supreme Court of Pakistan]

Present: Muhammad Bashir Jehangiri, Nazim Hussain Siddiqui and Rana Bhagwan Das, JJ

MUHAMMAD RIAZ----Petitioner

versus

SECRETARY, MINISTRY OF KASHMIR AFFAIRS AND NORTHERN AREAS, GOVERNMENT OF PAKISTAN and 15 others----Respondents

Civil Petition No.206 of 2000, decided on 19th January, 2001.

(On appeal from the judgment, dated 9-12-2000 Federal Service Tribunal, Islambad, passed in Appeal No.770(R)CS of 2000).

Constitution of Pakistan (1973)----

----Arts.1(2)(d), 260 & 212(3)---Service of Pakistan---Northern Areas whether territories forming part of Pakistan---Service Tribunal had not considered the petitioner as civil servant and his appeal was dismissed--Leave to appeal was granted by Supreme Court to consider as to whether the Executive Authority of the Federation of Pakistan having been exercising its power and continuous occupation of the Northern Areas for the last 52 years, the employees of the Northern Areas were discharging their functions in connection with the affairs of the Federation which squarely fell within the ambit of “Service of Pakistan” as defined in Art.260 of the Constitution; whether the territories of Northern Areas found mention in Art. 1(2)(d) of the Constitution and, therefore, form part of Pakistan and whether the question that the territories known as “Northern Areas” did or did not form part of the Federation was not determinable by the Service Tribunal in the light of principles enunciated by Supreme Court in The Superintendent, . Land Customs, Torkham (Khyber Agency) v. Zewar Khan and 2 others (PLD 1969 SC 485) and Al-Jehad Trust through Habibul Wahab Al-Khairi, Advocate and 9 others v. Federation of Pakistan through Secretary, Ministry of Kashmir Affairs. Islamabad and 3 others (1999 SCMR 1379).

The Superintendent, Land Customs, Torkham (Khyber Agency) v. Zewar Khan and 2 others PLD 1969 SC 485 and Al-Jehad Trust through Habibul Wahab Al-Khairi, Advocate and 9 others v. Federation of Pakistan through Secretary, Ministry of Kashmir Affairs, Islamabad and 3 others 1999 SCMR 1379 ref.

Sheikh Riazul Haq, Advocate Supreme Court and M.A. Zaidi, Advocate-on-Record for Petitioner.

Nemo for Respondents.

Date of hearing: 19th January, 2001.

**JUDGMENT**

**MUHAMMAD BASHIR JEHANGIRI, J.**---Muhammad Riaz petitioner seeks leave to appeal under Article 212(3) of the Constitution of Islamic Republic of Pakistan, 1973, against, the judgment dated 9-12-2000 passed by the learned Federal Service Tribunal (the Tribunal), in Appeal No.770(R)/CS of 2000.

2. The facts of the case, briefly stated, are that the petitioner was employed as Sub-Inspector in the, Office of the Superintendent of Police, Northern Areas, Skardu. After exhausting departmental remedy, he filed service appeal in the Tribunal with a view to seeking his confirmation in the service. The learned Tribunal which was seized of the appeal, non-suited the petitioner, holding that the petitioner was not in the service of Pakistan within the ambit of Articles 240 and 260 of the Constitution of Islamic Republic of Pakistan, 1973, and, therefore, he did not fall within the definition of civil servant provided for in the Service Tribunals Act (LXX of 1973.). In point of fact what the learned Tribunal has held is that the Northern Areas are not forming part of the Federation of Pakistan.

3. The petitioner, feeling aggrieved, seeks leave to appeal.

4. We have heard Sheikh Riazul Haque, learned Advocate Supreme Court appearing on behalf of the petitioner and grant leave to appeal to consider the following propositions:--

(i) Whether the Executive Authority of the Federation of Pakistan, has been exercising its power and continuous occupation of the Northern Areas for the last 52 years, therefore, the employees of the Northern Areas are discharging their functions in connection with the affairs of the Federation which squarely falls within the ambit of “Service of Pakistan” as defined in Article 260 of the Constitution of Islamic Republic of Pakistan. 1973”

(ii) Whether the territories of Northern Areas find mention in Article No.1(2)(d) of the Constitution and, therefore, form the part of Pakistan?

(iii) Whether the question that the territories known as “Northern Areas” do or do not form part of the Federation was not determinable by the learned Tribunal in the light of the principles enunciated by this Court in the cases of : The Superintendent, Land Customs, Torkham (Khyber Agency) v. Zewar Khan and 2 others (PLD 1969 SC 485) and Al-Jehad Trust through Habibul Wahab Al-Khairi, Advocate and 9 others v. Federation of Pakistan through Secretary, Ministry of Khashmir Affairs, Islamabad and 3 others (1999 SCMR 1379).

5. The appeal arising out of the titled petition is directed to be listed for hearing in Court within four months.

C.M.A. No.31 of 2001

The operation of the impugned judgment of the learned Tribunal is suspended in the meantime.

Q.M.H./M.A.K./M-218/S                                                                   Leave granted.

P L D 2000 Supreme Court 179

Present: Saiduzzaman Siddiqui, C.J., Irshad Hasan Khan, Raja Afrasiab Khan, Muhammad Bashir Jehangiri and Nasir Aslam Zahid, JJ

Mr. Justice GHULAM HYDER LAKHO, HIGH COURT OF SINDH, KARACHI and odors---Petitioners

versus

FEDERATION OF PAKISTAN through Secretary Law, Justice and Parliamentary Affairs, Islamabad and others---Respondents

Constitutional Petitions Nos. 43, 44, 47, 49, 50 of 1996, 59 of 1997 and 7, 24, 25, 39 and 44 of 1998, decided on 1st December, 1999.

(Under Article 184(3) of the Constitution of Islamic Republic of Pakistan, 1973).

(a) Judgment--

----Short order---Nature---Short order in a case is the summary of the findings of the Court while detailed reasons are elaboration of that summary---Unless there is any conflict between the short order and the detailed reasons, both are to be read together to understand the real import and scope of the judgment.

(b) Constitution of Pakistan (1973)-

----Art. 193---Appointment of High Court Judges--Effect of Supreme Court Judgment in Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324--Appointment/confirmation of the Judge of the High Court made by the Government in consultation with the Acting Chief Justice has been declared to be invalid in AI-Jehad Trust case PLD 1996 SC 324 by Supreme Court on the ground that same was violative of the mandatory provision of the Constitution, it was held that such invalidity in the process of consultation in making the appointment/confirmation of the Judges, was to be removed by a fresh processing of the case by the permanent Chief Justice keeping in view the provisions of Art.193 of the Constitution--the Chief Justice of the High Court and the Chief Justice of Pakistan in that process were of the opinion that any of the incumbents was not fit for appointment \_ or confirmation or lacked the qualification prescribed in Art.193 of the Constitution for appointment as a Judge of the High Court, they were entitled to express their opinion accordingly within the scope of Supreme Court judgment in AI-Jehad Trust case PLD 1996 SC 324.

(c) Constitution of Pakistan (1973)---

----Art. 193---Appointment of High Court Judge---Procedure---Additional Judge ceases to hold the office if the period specified in the notification appointing him as an Additional Judge is not extended and in such an eventuality, he cannot claim hearing before expiry of the period mentioned in the notification ---Additional Judge appointed in the High Court against permanent vacancy or if permanent vacancy occurs while such Judge is performing function as Additional Judge, he acquires a legitimate expectancy and he is entitled to be considered for permanent appointment on expiry of his period as Additional Judge if he is recommended by the. Chief Justice of the High Court concerned and the Chief Justice of Pakistan---Where the Chief Justice of the High Court concerned and the Chief Justice of Pakistan do not recommend a particular incumbent for confirmation or appointment as a Judge of the High Court and these recommendations are accepted by the President/Executive, the same cannot be brought under challenge in the Court on the ground that the incumbent was not heard before making such recommendation---Recommendations of the Chief Justice of the High Court concerned and Chief Justice of Pakistan, therefore, are not justiciable.

The appointment of an additional judge of the High Court is for a specified period. Such appointment, therefore, comes to an end on expiry of the period mentioned in the notification appointing the additional judge of the High Court, unless the period is further extended or the appointment is converted into a Judge of the High Court. Therefore an Additional Judge ceases to hold the office if the period specified in the notification appointing him as an Additional Judge is not extended. In such an eventuality, he cannot claim hearing before expiry of the period mentioned in the notification. However, additional judges appointed in the High Court against permanent vacancies or if permanent vacancies occur while such judges are performing functions as additional judges, they acquire a legitimate expectancy and they are entitled to be considered for permanent appointment on expiry of their period as additional judges if they are recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan.

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.

Where the Chief Justice of the High Court concerned and the Chief Justice of Pakistan do not recommend a particular incumbent for confirmation or appointment as a Judge of the High Court and these recommendations arc accepted by the President/Executive, the same cannot be brought under challenge in the Court on the ground that the incumbent was not heard before making such recommendations.

The recommendations of the Chief Justice of the High Court and that of Chief Justice of Pakistan are not justiciable.

Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 ref.

(d) Constitution of Pakistan (1973)---

----Arts. 193 & 209---Appointment of High Court Judge---Recommendations of the Chief Justice of the High Court concerned and that of Chief Justice of Pakistan in respect of fitness or otherwise of a person to be appointed/confirmed as a Judge of the High Court, would not fall within the scope of Art.209 of the Constitution ---Contention that a Judge once appointed in the High Court could not be removed, except in accordance with provisions of Art.209 of the Constitution was repelled.

Asad Ali v. Federation of Pakistan PLD 1998 SC 161 ref.

(e) Constitution of Pakistan (1973)---

----Art. 209---Scope of Art.209 of tile Constitution.

Asad Ali v. Federation of Pakistan PLD 1998 SC 161 quoted.’

(f) Constitution of Pakistan (1973)---

----Art. 193---Appointment of High Court Judge---Effect of Supreme Court judgment in Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324--Appointment/confirmation of the Judge of the High Court made by the Government in consultation with the Acting Chief Justice having been declared to be invalid in Al-Jehad Trust case PLD 1996 SC 324 by Supreme Court on the ground that same was violative of the mandatory provisions of the Constitution in the process of consultation in making the appointment/confirmation of the Judge, was to be removed by a fresh processing of the case by the permanent Chief Justice keeping in view the provisions of Art. 193 of the Constitution---If the Chief Justice of the High Court and the Chief Justice of Pakistan in that process were of the opinion that any of the incumbents was not fit for appointment nor confirmation or lacked the qualification prescribed in Art.193 of the Constitution for appointment as a Judge of the High Court, they were entitled to express their opinion accordingly within the scope of Supreme Court judgment in Al-Jehad Trust case PLD 1996 SC 324---Additional Judge of the High Court was appointed on the recommendation of a permanent Chief Justice of High Court; his tenure as Additional Judge was extended for one year and on the recommendation of Acting Chief Justice of the High Court and the then Chief Justice of Pakistan and similarly confirmation of the Judge was also recommended by Acting Chief Justice of High Court---Effect---Confirmation of the Additional Judge having taken place on the recommendation of Acting Chief Justice, it was not a valid confirmation within the scope of Supreme Court judgment in Al-Jehad Trust case---Initial appointment of the Judge as Additional Judge, though did not suffer from any Constitutional infirmity, his confirmation fell within the mischief of judgment of Supreme Court in case of Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 and accordingly, his case needed fresh processing and regularisation within the scope of direction in the said Supreme Court judgment---Confirmation of Additional Judge having been rendered invalid by force of the Supreme Court judgment in Al-Jehad Trust case, he shall be deemed to have not been confirmed as a Judge of High Court and shall be entitled to practice before that High Court.

(g) Constitution of Pakistan (1973)---

----Art. 193---Appointment of High Court Judge---Effect of Supreme Court judgment in Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324--Appointment/confirmation of the Judge of the High Court made by the Government in consultation with the Acting Chief Justice having been declared to be invalid in Al-Jehad Trust case PLD 1996 SC 324 by Supreme Court on the ground that same was violative of the mandatory provisions of the Constitution, it was held that such invalidity in the process of consultation in making the appointment/confirmation of the Judge, was to be removed by a fresh processing of the case by the permanent Chief Justice keeping in view the provisions of Art.193 of the Constitution---If the Chief Justice of the High Court and the Chief Justice of Pakistan, in that process, were of the opinion that any of the incumbents was not fit for appointment or confirmation or lacked the qualification prescribed in Art. 193 of the Constitution for appointment as a Judge of the High Court, they were entitled to express their opinion accordingly within the scope of Supreme Court judgment in Al-Jehad case PLD 1996 SC 324---Judge of High Court having resigned from his office could not challenge his de-notification as a Judge of the High Court but he could not be declined the rights of practice before the High Court concerned as his confirmation as Judge of the High Court was rendered invalid under the law declared by Supreme Court in Al Jehad Trust case.

(h) Constitution of Pakistan (1973)---

----Art. 193---Appointment of High Court Judge---Effect of Supreme Court judgment in Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324--Appointment/confirmation of the Judge of the High Court made by the Government in consultation with the Acting Chief Justice having been declared to be invalid in Al-Jehad Trust case PLD 1996 SC 324 by Supreme Court on the ground that same was violative of the mandatory provisions of the Constitution, it was held that such invalidity in the process of consultation in making the appointment/confirmation of the Judge, was to be removed by a fresh processing of the case by the permanent Chief Justice keeping in view the provisions of Art.193 of the Constitution---If the Chief Justice of the High Court and the Chief Justice of Pakistan, in that process, were of the opinion that any of the incumbents was not fit for appointment or confirmation or lacked the qualification prescribed in Art. 193 of the Constitution for appointment as a Judge of the High Court, they were entitled to express their opinion accordingly within the scope of Supreme Court judgment in Al-Jehad case PLD 1996 SC 324---When the Judge was not recommended for retention/confirmation as a Judge of the High Court by the Chief Justice of concerned High Court or the Chief Justice of Pakistan during the process of regularisation and recommendation or non-recommendation being not justiciable, de-notification of such a Judge was not open to any exception.

(i) Constitution of Pakistan (1973)---

----Art. 193---Appointment of High Court Judge---Effect of Supreme Court judgment in Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324--Appointment/confirmation of the Judge of the High Court made by the Government in consultation with the .Acting Chief Justice having been declared to be invalid in Al-Jehad Trust case PLD 1996 SC 324 by Supreme Court on the ground that same was violative of the mandatory provisions of the Constitution, it was held that such invalidity in the process of consultation in making the appointment/confirmation of the Judge, was to be removed by a fresh processing of the case by the permanent Chief Justice keeping in view the provisions of Art. 193 of the Constitution---If the Chief Justice of the High Court and the Chief Justice of Pakistan, in that process, were of the opinion that any of the incumbents was not fit for appointment or confirmation or lacked the qualification prescribed in Art. 193 of the Constitution for appointment as a Judge of the High Court, they were entitled to express their opinion accordingly within the scope of Supreme Court judgment in Al-Jehad case PLD 1996 SC 324---Judge was not recommended for retention as a Judge of the High Court either by Chief Justice of the concerned High Court or by the Chief Justice of –Pakistan during the process of regularisation and was informed that he did not possess 10 years’ active practice and, therefore, he could not be confirmed and he was also given the option to resign from the office of the Judge of High Court which he declined---Contention of the Judge was that ground of his removal from the office of the Judge of High Court that he did not possess the requisite 10 years’ active practice, was the result of misreading of the date of his enrolment as 6-2-1989 which was actually 8-2-1979 which contention was found to be correct---Judge, after de-notification as a Judge of the High Court was once again recommended for appointment as an Additional Judge which he consented---Held, Judge, in circumstances, could not challenge the de-notification as Judge of the High Court and it’ he was again recommended for that office in accordance with law de-notification should not come in the way of his fresh appointment.

Per Raja Afrasiab Khan, J., Contra--

Per Muhammad Bashir Jehangiri, J.; generally agreeing with Saiduzzaman Siddiqui, CJ.---

Raja Abdul Ghafoor, Advocate-on-Record for Petitioner (in C.P. No.43 of 1996).

Shahzad Jehangir, Senior Advocate Supreme Court and Mahmood A. Qureshi, Advocate-on-Record (absent) for Petitioner (in C.P. No. 44 of 1996).

Malik Saeed Hassan, Senior Advocate Supreme Court and Raja M. Anwar, Senior Advocate Supreme Court and S.A. Aasim Jafri, Advocate-on-Record (absent) (in C.P. No.47 of 1996).

Shehzad Jehangir, Senior Advocate Supreme Court and Mehr Khan Malik, Advocate-on-Record for Petitioner (in C.P. No.49 of 1996).

Ch. Mushtaq Ahmad Khan, Senior Advocate Supreme Court and Mehr Khan Malik, Advocate-on-Record for Petitioner (in C.P. No.50 of 1996).

Malik Saeed Hassan, Senior Advocate Supreme Court, Raja M. Anwar, Senior Advocate Supreme Court and S.A. Aasim Jafri, Advocate-onRecord (abseno (in C.P. No.59 of 1997).-----------------------------

Qazi M. Jamil, Senior Advocate Supreme Court for Petitioner (in C.P. No.7 of 1998).

Ch. Mushtaq Ahmad Khan, Senior Advocate Supreme Court and Mehr Khan Malik, Advocate-on-Record for Petitioner (in C.P.- No.24 of 1998).

Munir Peracha, Advocate Supreme Court and Ejaz M. Khan, Advocate-on-Record for Petitioner (in C.P. No.25 of 1998).

Aitezaz Ahsan, Advocate Supreme Court and M. S. Khattak, Advocate-on-Record for Petitioner (in C.P. No.39 of 1998).

Ch. Mushtaq Ahmad Khan, Senior Advocate Supreme Court and Mehr Khan Malik, Advocate-on-Record for Petitioner (in C.P. No.44 of 1998).

Tanvir Bashir Ansari, Deputy Attorney-General for Pakistan for Respondents (in all Cases).

Dates of hearing: 8th, 10th, 11th and 12th, November, 1999.

JUDGMENT

SAIDUZZAMAN SIDDIQUI, C. J.---The abovementioned Constitutional petitions under Article 184(3) of the Constitution of Islamic Republic of Pakistan (hereinafter to be referred as “the Constitution”) have been filed by eleven former Judges of High Courts of Lahore, Peshawar and Karachi, to challenge their removal from their respective offices as Judges of the High Courts in implementation of judgment of this Court in Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 (hereinafter to be referred as ‘the Judges’ case).

2. To understand the present controversy, it is necessary to briefly state here the background of the Judges’ case. In the year 1994, the then Federal Government of Pakistan, appointed twenty Additional Judges at a time against the vacancies existing in the Lahore High Court vide notification dated 4-8-1994. The appointments of these twenty Additional Judges were made after consultation with the then Acting Chief Justice of Lahore High Court and the then Chief Justice of Pakistan. Similar appointments of Additional Judges of High Courts were also made in the High Courts of Sindh and Peshawar by the then Federal Government in consultation with the respective Acting Chief Justices of the High Courts and the Chief Justice of Pakistan in 1993, 1994 and 1995. It may be mentioned here that prior to the appointment of twenty Judges in the Lahore High Court in August, 1994, the Government had declined to confirm Additional Judges of High Courts of Lahore and Sindh, appointed by the previous Government on completion of their period as Additional Judges, which was resented by the members of the bar. The appointment of twenty Judges in the Lahore High Court in August, 1994 in this background was not received well in the public and the legal circles, and were described as politically motivated and not on merits. In this backdrop, Al-Jehad Trust, a social organisation, headed by Habib-ul-Wahab-ul-Khairi, a practising lawyer of this Court, filed a direct petition before this Court under Article 184(3) of the Constitution, wherein besides challenging the appointment of an Acting Chief Justice of Pakistan instead of permanent Chief Justice and various other issues relating to appointment, transfer and removal of Judges of the superior Courts were raised. Mr. Habib-ul-Wahab-ul-Khairi also filed a petition bearing No.875 of 1994 in the Lahore High Court under Article 199 of the Constitution directly challenging the non-confirmation of 8 Additional Judges of High Court and appointment of 20 Additional Judges of the High Court. The above writ petition filed by Al-Jehad Trust through Habib-ul-Wahab-ul-Khairi before the Lahore High Court was heard along with two other similar Writ Petitions Nos.9893 and 10186 of 1994, and these were dismissed by a learned division Bench of that Court by judgment dated 4-9-1994. Against the above judgment of the learned Division Bench of the High Court of Lahore, leave was granted in Civil Appeal No.805 of 1995 filed by Al-Jehad Trust. The above appeal, alongwith direct Constitutional Petition No.29 of 1995 was heard by a Bench of this Court consisting of five learned Judges for days together and by a detailed judgment dated 20th March, 1996 while interpreting various Articles ‘in the Constitution relating to superior judiciary, it laid down the parameters for appointment, transfer and other matters relating to superior judiciary of Pakistan. At this stage, we may also mention that on conclusion of the hearing of Judges’ case, the Court fixed 20th March, 1996 as the date for announcement of the judgment. The Federal Government on 19th March, 1996 issued a notification appointing Rao Naeem Hashim Khan, Amir Alam Khan, Talat Yaqub, Muhammad Asif Jan, Zahid Hussain Bokhari, Nasira Javed Iqbal, M. Javed Butter, Riaz Hussain, Karamat Nazir Rhandari and Rana Muhammad Arshad Khan, as -fudges of the Lahore High Court and they were also administered oath of their offices on 19-3-1996. The short order in Judges’ case announced by this Court on 20th of March 1996 reads as follows:--

“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 other co-related Articles.

3.         Pakistan is governed by the Constitution of Islamic Republic 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 of 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 he 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 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 our 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 Power’, 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. No.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, consensusoriented, 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 reasons/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 later 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 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)        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)        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 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 appointment/confirmed inter alia of respondents Nos.7 to 28 in Civil Appeal No.805 of 1995 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. “

3. Reasons for the above short order were recorded subsequently by, three learned Judges of the Bench separately. On the opinion rendered by Sajjad Ali Shah, C.J. (as he then was) in the case, the other three learned Judges recorded the following notes:--

“I have 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.

(Sd.)

AJMAL MIAN, J.

I also agree with the above reasoning.

(Sd.)

FAZAL ILAHI KHAN, J.

I also agree with above reasoning and have also recorded additional reasons.

(Sd.)

MANZOOR HUSSAIN SIAL, J.

Similarly, on the opinion recorded by Ajmal Mian, J. (as he ‘then was) which was also signed by Fazal Ilahi Khan and Manzoor Hussain Sial, JJ. Manzoor Hussain Sial, J. added the following note:--

“I agree with the judgment of my learned brother H.J.(2) but would like to add my reasons thereto.

(Sd. )

MANZOOR HUSSAIN SIAL, J.”

It is, therefore, quite clear that the opinion recorded by both Sajjad Ali Shah, C.J. and Ajmal Mian, J., in the Judges’ case are to be treated as the judgment of this Court. In the above-stated background, we now proceed to examine the contentions of the learned counsel for the petitioners and the learned Deputy Attorney-General in the above petitions. The learned counsel for the petitioners have raised the following contentions in support of the above petitions: --

“(i)        That the short order pronounced by the Court in Judges’ case on 20th March, 1996, is the only order which was subscribed by four out of five learned Judges of the Bench and therefore this order alone could be considered as the judgment of the Court in the case.

(ii)        That the separate reasons recorded by the three learned judges of the Bench subsequently, cannot be treated as the judgment of the Court and anything said in those reasons which is not to be found in the short order is to be ignored.

(iii)       That in terms of the short order of the Court, the respective Chief Justices of High Courts were required to process the cases of only the recently appointed/confirmed Judges for regularisation and therefore, this process could not be extended to de-confirm or nullify the appointments of the Judges.

(iv)       That the petitioners were de-confirmed or the appointments were nullified by the Government without hearing them and as such the action of Government nullifying their appointments as Judges of the High Court offended against the principles of natural justice.

(v)        That some of Judges were coerced by the authorities to tender their resignations and as such these resignations be declared invalid and inoperative.

(vi)       That the petitioners could only be removed from their offices by following the procedure prescribed under Article 209 of the Constitution.

(vii) That the removal ‘of the petitioners from the office of Judges of the High Court in the above manner amounted to a stigma and as such the petitioners were entitled to be heard.

(viii)That one of the petitioners (Ch. Mushtaq Ahmed Khan) was treated in a discriminatory manner inasmuch as that his batch-mates were transposed as appellants/petitioners in the-judges’ case and were given relief of reinstatement but his case was differently, treated though circumstances in all these cases were identical; and

(ix)       That in some cases the reason given for removal of the petitioners was the result of misreading of the record which vitiated the order of removal of petitioners from service.

The learned Deputy Attorney-General in reply to the above contentions of the petitioners submitted as follows:--

(a)        That the short order and the reasons recorded in support of the short order subsequently by the learned Judges of the Bench are to he react together while giving effect. to it.

(b)        That the conclusions recorded in the: short order of the case are in the nature of a judgment in rem. the directions given therein are ,judgment in personam while the reasoning,, are the roads to the destination. Therefore, all three are to be read together to achieve the purpose anti .object of the decision.

(c)        That the reasons recorded by Chief Justices of the, High Courts arid the Hon’ble Chief justice of Pakistan regarding competency or otherwise of a candidate for judgeship if accepted by the executive/President, were not Justiciable and, therefore, the same cannot be challenged on the principle of audi alteram partem.

(d)        That. some of the petitioners approached this Court after considerable delay and having acquiesced in the action and therefore, they could not be allowed to challenge the action of the Government now.

(e)        That the direction given by this Court in the Judges’ case for processing and regularisation of the cases of recently appointed/confirmed judges did not mean that the Hon’ble Chief Justices while processing such cases had to take only such steps as were necessary to regularise the appointment and they could not recommend their removal or non-confirmation as Judges of the High Courts.

(f)         That some of the petitioners having resigned from their offices as judges of the High Court were not entitled to file the present petitions and re-agitate the matter, and

(g) That reference to recently appointed/confirmed judges in the short order did not mean only those judges who were appointed within the close proximity of the date of the short order.

4.         Before considering the above contentions, it would be appropriate to first decide the plea of the petitioners that only short order dated 20th March, 1996 in Judges’ case is to be treated as the order of the Court and that the reasons recorded subsequently by the learned Judges- separately are to be ignored while implementing the direction of the Court. We are unable to subscribe to this view. The short order in a case is the summary of the findings of the Court while detailed reasons are elaboration of that summary. Unless there is any conflict between the short order and the detailed reasons, both are to be read together to understand the real import, and scope of the judgment. We have carefully gone through the short order and the detailed reasons recorded in support of the short order by Sajjad Ali A Shah, C.J. and Ajmal Mian, J. and are of the view that there is no conflict between the short order and the detailed reasons recorded subsequently by the learned Judges of the Bench in support of the short order. We are, therefore, of the view that the short order dated 20th March, 1996 send the reasons recorded in support thereof by the learned Judges 1Sajjad Ali Shah, C.J. and Ajmal Mian. J. subsequently are to be react together to give effect to the judgment in Judges’ case.

5. The contentions raised by the learned counsel for the petitioners in support of the above petitions may be divided in two broad categories for the sake of convenience.. The first category includes the contentions which are common to- all the above petitions. In the second category, fall the pleas which are peculiar to individual cases. We will, therefore, first deal with the contentions which are common in all the above petitions. Broadly speaking, these are three main. contentions. The first contention is, that the direction given by this Court in the Judges’ case to, the respective Hon’ble Chief Justices of the High Courts for processing and regularisation of the cases of the recently appointed/confirmed judges, did not mean that the Hon’ble Chief Justices of the High Courts while processing these cases could also recommend their removal on non-confirmation as Judges of the High Courts It is contended vehemently that the word ‘regularisation’ did not cover within its meaning, the recommendations for de-confirmation or removal from the. office of judgeship. The second contention common in all the above petitions is, that the removal/de-notification of the, judges by the Government in pursuance of the recommendations of the Chief Justices of the High Courts and the Chief Justice of Pakistan, was opposed to the principles of natural justice and as such the action taken by the Government in this behalf is liable to be struck down as without jurisdiction and void. The third contention common in all these cases, is that a judge once appointed could only be removed in accordance with the provisions of Article 209 of the Constitution, whereas the petitioners were removed/de-notified without following the procedure prescribed under Article 209 of the Constitution. It is, accordingly, contended that the removal of the petitioners from their respective offices as Judges of the High Court was unconstitutional and void. We will take up the above three contentions in. the same order in which they are raised.

The first common contention is that the word ‘regularisation’ used in paragraph (f) of the short order did not mean or permit the Hon’ble Chief Justices of the High Courts to recommend removal or non-confirmation of the judges. It is contended that the word ‘regularisation’ means to make regular which could not be interpreted to. mean refusal to make regular. It is argued on behalf of the petitioners that the only defect discoverable in the appointment/confirmation of the petitioners as judges of the High Court was that they were recommended for appointment/confirmation by the Acting, Chief Justices instead of permanent Chief Justices and therefore, this defect in their appointments could be regularised in terms of the short order dated 20th March, 1996 by making the same recommendations by the permanent Chief Justices of the respective High Courts. The argument on its face may appear to be attractive but it cannot stand scrutiny in terms of the judgment of this Court in Judges’ case. We have already reproduced earlier the short order in Judges’ case. Conclusion No.xiii recorded in° the short order declared the appointments/confirmation of the Judges of the High Court made by the Government in consultation with the Acting Chief Justices violative of the mandatory provision of the Constitution and therefore, invalid. This conclusion when read with direction No. (f) of the short order made it clear that this invalidity in the process of consultation in making the appointment/confirmation of the judges, was to be removed by a fresh processing of the cases by the permanent Chief Justices keeping in view the provisions of Article 193 of the Constitution. Therefore, if the Hon’ble Chief Justices of the High Courts and the Chief Justice of Pakistan in that process were of the opinion that any of the incumbents was not fit for appointment or confirmation or lacked the qualification prescribed in Article 193 of the Constitution for appointment as a Judge of the High Court, they were entitled to express their opinion, accordingly, within the scope of direction No.(f) of the short order.

The second contention of the petitioners common in the above cases is, that petitioners’ removal/non-confirmation as Judges of the High Court was violative of the principles of natural justice as they were not heard or given any hearing by the Chief Justices before recommending their removal/de-notification. The appointment of an additional judge of the High Court is for a specified period. Such appointment, therefore, comes to an end on expiry of the period mentioned in the notification appointing the additional judge of the High Court, unless the period is further extended or the appointment is converted into a Judge of the High Court. Therefore an Additional Judge ceases to hold the office if the period specified in the notification appointing him as an Additional Judge is not extended. In such an eventuality. he cannot claim hearing before expiry of the period mentioned in the notification. However, this Court in, its judgment in Judges’ case observed that additional judges appointed in the High Court against permanent vacancies or if permanent vacancies occur while such judges are performing functions as additional judges, they acquire a legitimate expectancy and they are entitled to be considered for permanent appointment on expiry of their period as additional judges if they are recommended by the Chief Justice of the High Court concerned and the Chief Justice of Pakistan. The above conclusion recorded in the short order were explained in the opinion rendered in the Judges’ case by Ajmal Mian, J. (as he then was) as follows:--

“If we were 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 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 (it), it becomes evident that sub-clause (a) ‘NO 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-.D clause (a) of clause (2) of Article 193, this issue will not be justiciable before the Court of lacy. 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 ±!ighl Court concerned and the Chief Justice of Pakistan.”

(‘The underlining is by its to supply emphasis).

In view of the above-quoted observations of Ajmal Mian, J. it is quite clear that the recommendations of the Chief Justice of the High Court and that of Chief Justice of Pakistan are not, justiciable.

In these circumstances, we are inclined to hold that where the Chief Justice of the High Court-concerned and the Chief Justice of Pakistan do not recommend a particular incumbent for confirmation or appointment as a Judge of the High Court and these recommendations are accepted by the President Executive, the same cannot be brought under challenge in the Court on the ground that the incumbent was not heard before making such recommendations. We, therefore, find no force in the 2nd.contpntion raised on behalf of the petitioners in the above cases.

The last common contention of the petitioners in these cases is that a judge once appointed in the High Court could not be removed, except in accordance with the provisions contained in Article 209 of the Constitution. The scope of Article 209 of the Constitution was examined in the case Asad Ali v. Federation of Pakistan PLD 1998 SC 161 at length and the following unanimous conclusions were recorded:--

“80.      At this stage, we may also deal with another argument advanced by Mr. Abdul Hafeez Pirzada, the learned counsel for respondent No.2, in this behalf. Mr. Abdul Hafeez Pirzada, very vehemently argued that the only method provided under the Constitution to remove a Judge of the superior Court from his office is, to initiate proceedings against him before the Supreme I Judicial Council as provided under Article 209 of the Constitution, Article 209 of the Constitution referred by the learned counsel reads as under:--

“209.--(I) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.

(2) The Council shall consist of--

(al 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.

Explanation.-- For the purpose of this clause. the inter se seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice. and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.

(3)        If at any time the Council is inquiring into the capacity or conduct of a Judge who is it member of the Council, or a member of the Council is absent or is unable to act due to illness or any other cause, then--

(a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and

(b)        If such member is the Chief Justice of a High Court, the Chief Justice of another High Court. who is next in seniority amongst the Chief Justices of the remaining High Courts, shall act as a member of the Council in his place.

(4)        If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.

(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.

(8)        The Council shall issue a Code of Conduct to be observed by Judges of the Supreme Court, and of the High Courts.”

81.       With due deference to the learned counsel, firstly, the right to move the Supreme Judicial Council (SJC) against a Judge of the superior Court 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 Court 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. It is, therefore, quite clear that besides the fact that the Supreme Judicial Council itself cannot grant any relief to a person aggrieved by the illegal and unconstitutional appointment of a Judge of the superior Court, the invalidity and unconstitutionality of the appointment of a Judge of a superior Court are outside the purview of the enquiry under Article 209 of the Constitution, because such an appointment has no nexus either with the mental or physical incapacity of the Judge to perform properly, the duties of his office or with the misconduct of the Judge concerned. Therefore, the remedy provided under Article 209 of the Constitution cannot be equated with the proceedings filed under Article 199(1) (b) (ii) of the Constitution to challenge the unconstitutional appointment of a Judge of the superior Court. The reason for keeping the question of validity or constitutionality of the appointment of a Judge of superior Court outside the purview of the enquiry under Article 209 of the Constitution is obvious, as validity of such appointment is open to be challenged before the High Court under Article 199 of the Constitution in appropriate proceedings.” (The underlining is by us to supply emphasis).

In view of the above-stated legal position, we are of the view that the recommendations of the Chief Justices of the High Court concerned and that of Chief Justice of Pakistan in respect of fitness or otherwise of a person to be appointed/confirmed as a Judge of the High Court would not fall within the scope of Article 209 of the Constitution. We, accordingly, repel the 3rd common contention of the petitioners in the above cases.

6. Having dealt with the above three contentions which are common in the above petitions, we now take up the individual petitions to examine the remaining relevant contentions in each case separately. At this stage, we may mention that in some of the above petitions, the petitioners contended that although they were not aware of the exact recommendations of the Chief Justices of the High Courts and that of Chief Justice of Pakistan but they understand that the Chief Justices of the High Courts and the Chief Justice of Pakistan, had recommended their confirmation as Judges of the High Courts but contrary to these recommendations they were not confirmed or allowed to continue as Judges of the High Courts. The petitioners further jointly contended that at no stage, they were informed about the grounds on which they were found unfit to hold the office of the Judge of the High Court and as such their non-confirmation as Judges of the High Court was against the principle of natural justice.

7. In view of the preceding discussion, the petitioners were neither entitled to be informed about the recommendations made by the respective Hon’ble Chief Justice of the High Courts and the Hon’ble Chief Justice of Pakistan, in their cases regarding their suitability or otherwise for continuation/confirmation-as Judges of the High Courts, nor they were

entitled to be heard in respect of such recommendation. However, in order to satisfy ourselves that the petitioners were de-notified by the Government as Judges of the High Court in accordance with the recommendations of the respective Chief Justices of the High Courts and the Chief Justice of Pakistan, we have consulted the official record and are satisfied that President/Executive had acted in accordance with recommendations of the respective Chief Justices of the High Courts and the Chief Justice of Pakistan, in de-notifying the appointments of the petitioners as Judges of the High Courts anti in no case the de-notification of the petitioner was contrary to the recommendations of the Chief Justice of High Court and the Chief Justice of Pakistan. We now proceed .to take up each petition separately to examine it on merits and to decide the remaining contentions in these cases in so far they are applicable to each of these cases.

Constitutional Petition No: 49 of 1996

The petitioner, Ch. Mushtaq Ahmed Khan, was appointed as Additional Judge of Lahore High Court, for a period of. two years along with 8 others vide notification dated 26th August, 1992. On expiry of the period of two years, the tenure of Ch. Mushtaq Ahmed Khan was extended for a further period of one year vide notification dated 28th August, 1994. Before expiry of the extended period of his tenure, Ch. Mushtaq Ahmed Khan was appointed as the Judge of the Lahore High Court vide notification dated is( June, 1995. His appointment as Judge of the .Lahore High Court was denotified by the Government on 30-9-1996.

The additional contention of the petitioner in this case is, that he was recommended for appointment   as an Additional Judge of Lahore High Court by the permanent Chief Justice of Lahore High Court and as such his case did not fall within the mischief of condition number xiii and direction number (f) of the short order in the Judges’ case. It is further contended that under direction number (f) of the short order in Judges’ case, only the cases of the recently appointed Judges of the High Courts were to be processed and regularised and as the petitioner was appointed in 1992 and was confirmed in June. 1995 long before the date of judgment in the Judges’ case, his case could not be re-opened under direction number (f) of the Judges’ case. It is . also contended that other Judges of Lahore Court who were appointed along with the petitioner in 1992 and were not confirmed were transposed as appellants in the Judges’ case and were granted relief by way of confirmation as Judges of the Lahore High Court under the orders of this Court while the petitioner was denied that relief though he was a confirmed Judge.

The petitioner is a senior advocate of this Court and has a lucrative practice. We, therefore, enquired from him during the course of the arguments if he was really interested, in seeking his restoration as Judge of Lahore High Court. He very candidly stated that the real purpose of this petition is to vindicate his honour and he will be satisfied and will not seek restoration to the office of the Judge, if his de-notification is declared invalid. .

The case of the petitioner is distinguishable from the cases of the other Judges of Lahore High Court who were not confirmed/de-notified as the Judges of the High Court of Lahore. The petitioner was appointed as the Additional Judge of Lahore High Court vide notification dated 26-8-1992 on the recommendations of Mian Mahbub Ahmed, Chief Justice, who was the permanent Chief Justice of Lahore High Court. Therefore, to the extent that the initial appointment of the petitioner did not suffer from any constitutional infirmity the argument appears to be correct. However, his tenure as Additional Judge of High Court was extended for one year on 28-6-1994 oft the recommendation of the Acting Chief Justice of Lahore High Court (Mr. Justice Muhammad llyas) and the then Chief Justice of Pakistan (Mr. Justice J Sajjad Ali Shah). Similarly, the confirmation of the petitioner as a Judge of Lahore High Court was also made on the recommendations of the Acting Chief Justice of Lahore High Court (Mr. Justice Muhammad llyas). Therefore, though the initial appointment of the petitioner its the Additional Judge of Lahore High Court did not suffer from any constitutional infirmity, his confirmation as the Judge of Lahore High Court fell within the mischief of conclusion number xiii of the short order in the judges’ case, and accordingly, his case needed fresh processing and regularisation within the scope of direction number (t1 of the short order in Judges’ case.

The petitioner has contended that his case was not covered within the meanings of the expression “recently appointed judges” used in direction number (f) of the short order in Judges’ case. We have already reproduced the short order in Judges’ case earlier in this judgment. The expression used in direction number (f) of the short order is “,judges recently appointed/confirmed”. The effect of direction number (t) of the short order was explained in para number 87 of the judgment of Sajjad Ali Shah, C.J. (as he then was) as follows:--

“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 re-viewed and steps can be taken by the permanent Chief Justices to regularise them  this call 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.”

The petitioner’s confirmation as the Judge of Lahore High Court K having taken place on the recommendation of Acting Chief Justice, it was not  a valid confirmation within the meaning of conclusion number xiii of the short order and as such the petitioner case required processing and regularisation in terms of direction number (f) of the short order in Judges case. .

We have gone through the official record and noticed that the Chief Justice of Lahore High Court (Mr. Justice Khalil-ur-Rehman Khan) and the then Chief Justice of Pakistan (Mr. Justice Sajjad Ali Shah) did not recommend the name of petitioner for confirmation as a Judge of the Lahore High Court. As observed earlier by us, the recommendations of the Chief Justice of High Courts and the Chief Justice of Pakistan are not justiciable,  therefore, no relief can be granted to the petitioner in the circumstances. However, as the petitioner’s confirmation as a Judge of Lahore High Court I on 1-6-1995 was rendered invalid by force of the judgment of this Court in the Judges case, he shall be deemed to have not been confirmed as a Judge:” of the Lahore High Court and shall be entitled to practice before that Court

Constitutional Petition No.59 of 1997

The petitioner in this case was appointed as the Additional Judge of Lahore High Court alongwith 19 others on 4-8-1994 for a period of one year. On 1st of June, 1996, he was appointed as the Judge of Lahore High Court. Since the appointments of the petitioner as the Additional Judge and the Judge of the Lahore High Court were made after consultation with the Acting Chief Justice of Lahore High Court, these appointments were invalid in terms of conclusion number xiii of the short order in Judges’ case. The appointment of petitioner, therefore, required processing and regularisation in accordance with the direction number (f) of the short order. The petitioner, however, resigned from his office as the Judge of Lahore High Court on 18-6-1996. The petitioner having resigned from his office as a Judge of Lahore High Court, cannot now challenge his de-notification as a Judge of the Lahore High Court. The petitioner, however, is right in contending that he cannot be declined the right of practice before the Lahore High Court as his confirmation as Judge of the Lahore High Court was rendered invalid under conclusion number xiii of the short order in the Judges’ case. We, are accordingly, of the view that though the petitioner is not entitled to the relief of reinstatement, he is entitled to practice as an advocate before the Lahore High Court.

Constitutional Petitions Nos. 47/96 50/96, 24/98 and 44/98

The petitioners in petitions No.47/96, 50/96 and 44/98 were appointed alongwith 17 others as Additional Judges of Lahore High Court vide notification dated 4th of August, 1994 for a period ‘of one year. Similarly, the petitioner in Constitutional Petition No.24/98 was also appointed alongwith 4 others as an Additional Judge of Lahore High Court for a period of one year vide notification dated 9th October, 1995. The petitioners in Petition No.47/96, 50/96 and 44/98 were later appointed as Judges of Lahore High Court on 19th March, 1996, a day before the announcement of the judgment in the Judges’ case. It is an admitted position that the petitioners were appointed as Additional Judges or as Judges of Lahore High Court after consultation with the Acting Chief Justice of Lahore High Court. In view of the conclusion No.xiii of the short order in the Judges’ case, the appointments of the petitioners were rendered invalid and their cases were required to be processed for regularisation .in terms of direction No.(f) of the short order. We have consulted the record maintained in respect of the appointment of the petitioners and find that none of the petitioners was recommended for retention/confirmation as a Judge of the High Court by the Chief Justice of the Lahore High Court or the Chief Justice of Pakistan. We have already held that the recommendations of the  Chief Justices of the High Courts and that of the Chief Justice of Pakistan are  not justiciable in Court and therefore, in view of our above findings, the denotification of the petitioners is not open to any exception. The petitioners are, accordingly, not entitled to any relief in the present proceedings.

Constitutional Petitions No.7 and 25 of 1998

The. petitioners in the above petitions were appointed as Additional’ Judges of Peshawar High Court vide notification dated 9th October, 1995 for a period of one year. By virtue of the decision of this Court in the Judges’ case, their appointment was rendered invalid as they were appointed as Additional Judges after consultation with Acting Chief Justice of Peshawar High Court. The cases of the petitioners were, accordingly, required to be processed and regularised in terms of direction number (i) of the short order in the Judges’ case. The petitioners were not recommended for retention/confirmation as Judges of the High Court by the permanent Chief Justice of Peshawar High Court and the Hon’ble Chief Justice of Pakistan. The petitioners were, accordingly, informed by the Governor, N.-W.F.P., vide his letter dated 7th August, 1996 that they were not recommended for appointment as Judges of the High Court as they did not possess the required experience. They were asked by the Governor, N .-W . F. P. , to supply the necessary details if they so desired. The petitioners in the above petitions, however, resigned from their offices as Judges of the High Court in response td the letter received by them from the Governor, N.-W.F.P. The petitioner in Constitutional Petition No.7 of 1998 has contended before us that he was forced to resign by the Governor and therefore, his resignation should not be taken info consideration. The contention cannot be accepted as there is no material on record before us to hold that the petitioner was forced by the Governor, N.W.F:P., to resign from the office of Judge of the High Court. The Governor N.-W.F.P. had issued identical letter to the other Additional Judges of the Peshawar. High Court who were affected by the judgment of this Court in the Judges’ case but none of them complained that the Governor N.-W. F. P. prevailed upon them, to resign from the office of Judge of the High Court. Apart from it, the petitioner was allegedly forced to resign from the office of Judge of High Court in August 1996 but he kept quite until 25th of April, 1998 when he filed the present petition and for the first time, raised-this contention. The petitioner in Constitutional Petition No.25 of 1998. also resigned from the office of Judge of Peshawar High., Court like petitioner in Constitutional Petition No.7 of 1998. He has not alleged that he was forced by the Governor N,-W.F.P. to resign from his office, We otherwise find it difficult to believe that the Governor, N.-W.F.P. who had issued identical letters to all the judges who were not to be confirmed in pursuance of the order of this Court in Judges’ case, would have forced the petitioner in Constitutional Petition No.7 of 1998 to tender his resignation. The petitioners in the above two petitions having already tendered resignation from their offices as Judges of the High Court, cannot he allowed to turn round and challenge the same after a period of about two years. Apart from it, as earlier pointed out by us, the recommendations of the Chief Justice of the High Court and that of the Chief Justice of Pakistan are not justiciable in any Court and therefore, if the petitioners were not confirmed or allowed to continue as Judges of the High Court in pursuance of the recommendations of the Chief Justice of Peshawar High Court and the Chief Justice of Pakistan, they cannot question such recommendations in the present proceedings. The petitioners are, therefore, not entitled to any relief in the present proceedings.

Constitutional Petition No.39 of 1998

The petitioner in the above petition was appointed as Additional Judge of Peshawar High Court vide notification dated 13-12-1993 alongwith 3 others. He was later appointed as Judge of Peshawar High Court after consultation with the Acting Chief Justice of Peshawar High Court. His appointment as an Additional Judge and as a Judge of Peshawar High Court having been made after consultation with the Acting Chief Justice of Peshawar High Court, was rendered invalid as a result of conclusion No.xiii of the short order in the Judges’ case. The case of the petitioner was, accordingly, required to be processed and regularised in terms, of the direction number (f) of short order in the Judges’ case. The petitioner was not recommended for retention as a Judge of Peshawar High Court either by the Chief Justice of Peshawar High Court or by the Chief Justice of Pakistan during the process of regularisation. He was, however, informed by the Governor. N.-W.F.P., that as he did not possess 10 years active practice,  therefore, he could not be confirmed as a Judge of Peshawar High Court. He was also given the option to resign from the office of the Judge of the High Court if he so desired but he did not accept this suggestion. The petitioner contends that the ground for his removal from the office of the Judge of Peshawar High Court that he did not possess the requisite 10 years active practice; was the result of misreading of the date of his enrolment as 6-2-1989 which was actually 8-2-1979. To this extent, this contention of the  petitioner appears to be correct. However, from the record, it appears that the petitioner was otherwise not recommended either by the Chief Justice of Peshawar High Court or by the Chief Justice of Pakistan for retention as a Judge of Peshawar High Court. Apart from it, the petitioner admitted before its that after he was de-notified as Judge of Peshawar High Court, he was recommended for appointment as the Additional Judge of Peshawar High Court in April, 1997 by the Chief Justice of Peshawar High Court to which he consented. He was once again considered and recommended by the Chief Justice of Peshawar High Court in 1998 for appointment as an Additional Judge of the High Court to which also he consented. In these circumstances, P the petitioner cannot be permitted now to challenge his de-notification as the judge of Peshawar High Court. We are, however, of the opinion that de­notification of the petitioner in September, 1996 as a Judge of the Peshawar High Court should not come in the way of his fresh appointment as a Judge of that Court if he is again recommended for that office in accordance with the law specially for the reasons that after his de-notification two successive Chief Justice of the Peshawar High Court at different times, recommended him for appointment as the Additional Judge of the Peshawar High Court. With these observations, we decline to grant any relief in the present proceedings.

Constitutional Petitions Nos.43 and 44 of 1996

The petitioners in the above two petitions were appointed as Additional Judges of High Court of Sindh by notification dated 6th of June, 1994 for a period of one year after consultation with the Acting Chief Justice of Sindh High Court. They were later confirmed as Judges of High Court of Sindh by notification dated 31st May, 1995 after consultation with Acting Chief Justice of that Court. Their cases were reprocessed for regularisation in view of the judgment of this Court in Judges’ case and they were not recommended for being retained as Judges of the High Court of Sindh with the result their appointments as Judges of the High Court were de-notified on 30th of September, 1996. They have challenged their de-notification in the present proceedings.

We have consulted the record maintained in respect of the appointment of Judges of High Court of Sindh and find that both the petitioners were not recommended by the permanent Chief Justice of High Court of Sindh as well as learned Chief Justice of Pakistan and as a result of these recommendations their appointments were de-notified. As we have already held in these cases that the recommendations of the Chief Justice of a High Court and that of the Chief Justice of Pakistan are not justiciable, no  relief can be granted to the petitioner in the present proceedings as they were not recommended for retention/confirmation as Judges of the High Court. It may also be added here that in so far petitioner in petition No.44 of 1996 is i concerned, he has already attained the age of superannuation i.e. 62 years and therefore, for this reason too, he cannot be granted any relief now.

            8.         As a result of above discussion, all the abovementioned petitions are

dismissed.

(Sd.)

SAIDUZZAMAN SIDDIQUI, C.J.

(Sd.)

IRSHAD HASAN KHAN, J.

I have given a short note of my own whereby I have expressed my inability to agree with the proposed judgment.

(Sd.)

RAJA’AFRASIAB KHAN, J.

Separate note attached.

(Sd.)

MUHAMMAD BASHIR JEHANGIRI, J.

(Sd.)

NASIR ASLAM ZAHID, J.

RAJA AFRASIAB KHAN, J.---I have the privilege to peruse the proposed judgment rendered by the Hon’ble Chief Justice of Pakistan. After hearing the learned counsel for the parties and perusing the record, I have come to the conclusion that there is no other option for me but to uphold the S view already expressed by me on the controversy Reference in this behalf may be made to Habib-ul-Wahab-Al-Khairi and others v. Federation of Pakistan and others PLD 1995 Lahore 27. I, therefore, with utmost respect, cannot agree with the proposed judgment of the Hon’ble Chief Justice.

(Sd.)

RAJA AFRASIAB KHAN, J.

MUHAMMAD BASHIR JEHANGIRI, J.---While generally) agreeing with the conclusions arrived at by the Honourable Chief Justice in a well-considered judgment, I am constrained to add a few lines as I look at the cases of two de-notified Judges, namely, Ch. Mushtaq Ahmad and Mr. Salim Dil Khan which are distinguishable at least on factual plane and should have been looked at differently if not sympathetically. The judgment in Judges case no doubt was a landmark in the annals of judicial history. But it was the implementation of the judgment which left much to be desired.

In the case of Ch. Mushtaq Ahmad, if ultimate recommendations for his confirmation by Justice (Retd.) Ch. Muhammad Ilyas, the then Acting Chief Justice, were not in accord with the guidelines prescribed in. the judgment in ‘Judges case’, the earlier recommendation of the same Acting Chief Justice for extension of this period as Ad hoc Judge ought to have also been ignored. He unfortunately, like some others, had been a victim of perhaps personal reasons weighing with those who were at the helm of affairs  at that crucial juncture. Additionally those Judges were victims of a sustained venomous whispering campaign and, therefore, their career was sacrificed at the altar of technical grounds.

In my considered view another case in point is that of Mr. Salim Dil Khan, a former Judge of Peshawar High Court. He has been the victim of sheer venomous personal vendetta. So much so his particulars of active practice at the bar were forged to render his case to fall under disqualification.

Such cases were obviously the outcome of violation of the principle of natural justice, namely, ‘audi alteram partem’ which superior Court quote in their judgments day in and day out.

I am, therefore, reluctantly constrained to add that the case of Ch. Mushtaq Ahmad could have been dealt with a more equitable setting in order to vindicate his honour and repute even by allowing pension if it was due to him on the basis of length of service on the Bench and addition of some more pacifying remarks in his favour.

I have decided to refrain from making further observations in the case of Mr. Salim Dil Khan as some relief has been impliedly granted to him, namely, qua his eligibility for his re-elevation to the Bench.

(Sd.)

MUHAMMAD BASHIR JEHANGIRI, J.

M. B. A./G-57/S                                                                                  Orders accordingly.

P L D 1998 Supreme Court 45

Present: Sajjad Ali Shah, C. J.,

Mukhtar Ahmed Junejo and Muhammad Bashir Jehangiri, JJ

BABAR AWAN and another---Petitioners

versus

FEDERATION OF PAKISTAN through

Secretary, Law, Justice and Parliamentary

Affairs---Respondent

Constitutional Petitions Nos.23 and 29 of 1997, decided on 30th October, 1997

(a) Constitution of Pakistan (1973)---

----Arts. 190 & 184(3)--=Action in aid of Supreme Court---Constitutional petition before Supreme Court with prayer to the effect that since the Federal Government had not appointed five Judges in the Supreme Court as requested by the Chief Justice of Pakistan, action might be taken within the contemplation of Art. 190 of the Constitution---Supreme Court, keeping in view the urgency of the matter from the point of view that Bills were being introduced in the National Assembly curtailing the powers of the Supreme Court and reducing the number of Judges and correct legal position having already been provided in the relevant Articles of the Constitution pertaining to judiciary and enunciated in the judgment in the case of appointment of Judges reported as Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324, allowed the petitions and ordered to .make a request to the President of Pakistan to render assistance under Art. 190 of the Constitution which contemplated that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court.

Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 and AlJehad Trust v. Federation of Pakistan PLD 1997 SC 84 quoted.

(b) Constitution of Pakistan (1973)---

----Art. 190---All Authorities to act in aid of Supreme Court---Judgment of Supreme Court---Failure in implementation---Consequences---Article 190 of the Constitution of Pakistan is a mandatory provision---Executive has no other alternative but to act in aid of Supreme Court---Person responsible for non-implementation can be punished by the Supreme Court for contempt for disobedience of its judgment.

Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84 ref

(c) Constitution of Pakistan (1973)---

----Art. 177---Appointment of Supreme Court Judges---Failure to make appointments on recommendation of Supreme Court within the time frame fixed by the Court---Presumption---Final appointment orders are to be passed by the Government on the recommendations of the Supreme Court within 30 days and if it is not done, it shall be presumed that the Federal Government/Prime Minister has no objection to such recommendations and President can proceed to take necessary steps on such presumption.

Petitioner in person (in C.P. No.23 of 1997)

Muhammad Akram Sheikh, Senior Advocate Supreme Court, Syed Shamim Abbas Bokhari, Advocate Supreme Court and M.A. Zaidi, Advocateon-Record for Petitioner (in C.P.No.29 of 1997).

Moulvi Anwarul Haq, Deputy Attorney-General (on Court Notice)

Date of hearing: 30th October, 1997

ORDER

SAJJAD ALI SHAH, C.J.--Both these Constitutional petitions have been filed directly in this Court under Article 184(3) of the Constitution with common prayer to the effect that since the Federal Government has not appointed five Judges in the Supreme Court as requested by the Chief Justice of Pakistan, action may be taken as is contemplated under Article- 190 of the Constitution which provides that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court.

2. After hearing Mr. Babar Awan, petitioner in C.P. No.23 of 1997 and Mr. Muhammad Akram Sheikh, who is President of the Supreme Court Bar Association, in C.P.No.29 of 1997, we issued notice to the Attorney-General for Pakistan to assist the Court on behalf of the respondent. The learned Attorney-General was unable to appear in person and sent his Deputy Attorney General, Moulvi Anwarul Haq. After hearing the learned counsel in the Court and keeping in view the urgency of the matter from the point of view that Bills are being introduced in the National Assembly, curtailing the powers of the Supreme Court and reducing the number of Judges, we have allowed these petitions for taking steps for action under Article 190 of the Constitution. 1 Another important factor which has impressed us profoundly to take such decision is that the correct legal position is already enunciated in the relevant Articles of the Constitution pertaining to judiciary and the judgment of the Supreme Court in the case of Appointment of Judges reported as AI-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324.

3. The Chief Justice of Pakistan addressed a letter to the Federal Law Secretary on 20th August, 1997 in which he requested for Appointment of five Judges in the Supreme Court, which fell vacant within the sanctioned strength of 16 Judges (CJP + 16 Judges) following the rule of seniority laid down in the case of Appointment of Judges mentioned above. Since the date of the letter about 72 days have expired. Neither these Judges have been appointed, nor any reply in writing has been received from the Federal Government. It is provided in the short order of the above mentioned judgment that permanent vacancies of Judges are to be filled in immediately not later than 30 days.

4. It was submitted by the learned counsel for the petitioners that the President of Pakistan was pleased to file Special Reference No.2 of 1996 in the Supreme Court under Article 186 . of the Constitution seeking opinion of this Court whether the advice of the Prime Minister as contemplated under Article 48(1) ‘of the Constitution was binding or not on the President in respect of Appointment of Judges in the Supreme Court and the High Courts in view of the judgment of this Court in the case of Appointment of Judges (supra). Reference No.2 of 1996 was taken up for hearing alongwith Constitutional Petitions Nos. 23 and 54 of 1996 and disposed of vide judgment dated 4th December, 1996 which is reported as Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84, and it is held therein that since our Constitution contemplates parliamentary form of Government, President has to act on the advice of the Prime Minister even in respect of appointment of Judges in the superior judiciary subject to ratio decidendi in the case of appointment of Judges and the guidelines laid down therein. An interesting question arose in that case as to what would happen if the judgment of the Supreme Court in the case of appointment of Judges was not implemented and in such case what action possibly could be taken within the four corners of the Constitution and law. Two paragraphs from that judgment which are very pertinent to the point at pages 146 and 147 of the report are reproduced verbatim as under:-

‘“85. The last point is very thought-provoking and was raised in the Court during the hearing, which is to the effect as to what will happen if the judgment of the Supreme Court in the Appointment of Judges case is not implemented. Learned counsel who had appeared in these matters made different comments. Mr. S.M. Zafar as amicus curiae stated that in such a situation President will be justified to invoke Article 58(2)(b) of the Constitution because it would amount to arising of situation in which Government of the Federation cannot be carried on in accordance with the provisions’ of the Constitution. Under the four corners of the Constitution Article 189 provides specifically that any decision of the Supreme Court shall to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan. Article 190 envisages that all executive and judicial Authorities throughout Pakistan shall act in aid of the Supreme Court. Article 204 empowers the Supreme Court to punish for contempt any person who-

(a) abuses, interferes with or obstructs the process of the Court in any way  or disobeys any order of the Court;

(b) scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt;

(c) does anything which tends to prejudice the determination of a matter pending before the Court; or

(d) does any other thing which, by law, constitutes contempt of Court;

86. In the case of non-implementation of the judgment it will have to be found out as to who is responsible for not implementing it. Article 190 is a mandatory provision under which there is no alternative for the r Executive but has to act in aid of the Supreme Court. Person identified as responsible for non-implementation of the judgment can be punished by the Supreme Court for contempt for disobedience of its judgment. Perusal of Articles 177 and 193 and other Articles which are relevant for the subject-matter of judiciary shows that Supreme Court has to correspond with the President for appointments as he is named specifically in the relevant Articles and all executive actions are to be taken in his name. It is expected that President shall see to it that appointments of Judges in the superior judiciary are made in strict accordance with the Constitutional scheme contemplated in Articles 177 and 193 of the Constitution which are to be interpreted and read in conjunction with the judgment in Al-Jehad Trust case which is authoritative adjudicatory pronouncement in respect of interpretation of Articles in the Constitution relating to the judiciary. Time frame is also provided in the judgment within which appointments are to be finalised. If there is undue delay or impasse which shows that dilatory tactics are being adopted and sincere attempt is not being made to implement the judgment, then it will become the Constitutional duty of the President to see that judgment of the Supreme Court is implemented and there is, no violation or non-compliance of Article 190 of the Constitution which makes it mandatory for all executive and Judicial Authorities throughout Pakistan to act in aid of the Supreme Court. If all the Executive and Judicial Authorities in Pakistan are unable to come in aid of the Supreme Court and judgment is not implemented, then such situation would be open to be construed as impasse or deadlock and would amount to very unhappy situation reflecting failure of Constitutional machinery and one would be justified to say that a situation has arisen in which the Government of Federation cannot be carried on in accordance with the provisions of the Constitution as is contemplated under Article 58(2)(b).

5. At the time when the judgment was passed by this Court in the case of Appointment of Judges, Article 58(2)(b) was available in the Constitution under which the President in his discretion could dismiss the Government and dissolve the National Assembly where in his opinion a situation had arisen in which 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.

6. Later, the Government of Mohtrama Benazir Bhutto was dismissed and the National Assembly was dissolved vide Proclamation dated 5-11-1996. In the Proclamation, reliance was placed on several grounds, two of which were that the judgment of the Supreme Court in the case of Appointment of Judges was not implemented and secondly the judiciary was ridiculed. Mohtrama Benazir Bhutto challenged the Proclamation of Dissolution in this Court and lengthy hearing before a Bench of Seven Judges took place, and finally the petition was dismissed by majority of 6 to 1 vide short order dated 29-1-1997. In the majority judgment, both the grounds with regard to non-implementation of the judgment and ridiculing of judiciary were accepted as justifiable grounds for dissolution.

7. The judgment in the Reference mentioned above is reported as Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84. Paragraph 30 from the judgment of Saiduzzaman Siddiqui, J., at page 249 of the report is reproduced as under:-

“30. I am in respectful agreement with the above observations and inclined to hold that if the Prime Minister within the time frame fixed in the judgment of this Court in AI-Jehad Trust case fails to tender his advice, he or she shall be deemed to have agreed to the recommendations of the Chief Justice of Pakistan and that of the Chief Justice of Provincial High Court as the case may be, and the President may proceed to make the final appointment on that basis. The question of law referred by the President under Article 186 of the Constitution to this Court for opinion, is answered a§ stated above.”

8. In view of what is stated above it is very clear that as per the guidelines laid down in the case of Appointment of Judges, final appointment orders are to be passed by the Government within 30 days and if it is not done, then it is to be deemed that the Federal Government/Prime Minister has no objection to the p recommendations and steps can be taken by the President for final appointment on the assumption mentioned above. Since the legal position with regard to the appointments is very clearly stated in the relevant Articles of the Constitution and the judgments of the Supreme Court mentioned above, very justifiably, in

the peculiar circumstances of the case, request is made to the President to render assistance under Article 190 of the Constitution which contemplates that all executive and Judicial Authorities throughout Pakistan shall act in aid of the Supreme Court. In the result, for the facts and reasons stated above, both these p petitions are allowed. The Registrar of this Court is directed to send a copy of this judgment to the Military Secretary to the President for its placement before the President of Pakistan for whatever action he deems fit and proper as contemplated under Article 190 of the Constitution.

M.B.A.B-5/S                                                                 Petitions allowed

P L D 1998 Supreme Court 388

Present: Sajjad Ali Shah, C.J., Saleem Akhtar,

Fazal Ilahi Khan, Zia Mahmood Mirza, Irshad Hasan Khan,

Raja Afrasiab Khan and Munawar Ahmad Mirza, JJ

Mohtarma BENAZIR BHUTTO and another---Petitioners

versus

PRESIDENT OF PAKISTAN

and others---Respondents

Constitutional Petitions Nos.58 and 59 and Civil Miscellaneous Applications Nos.805, 935, 806 and 848 of 1996, decided on 29th January, 1997, reasons released on 13th September, 1997.

Per Saiiad Ali Shah, C.J.; Saleem Akhtar, Fazal Ilahi Khan, Irshad Hasan Khan, Raja Afrasiab Khan and Munawar Ahmad Mirza, JJ. agreeing: Zia Mahmood Mirza, J. Contra-

(a) Constitution of Pakistan (1973)---

----Preamble & Art.239---Constitution (Eighth Amendment) Act (XVIII of 1985), Preamble---Eighth Amendment to the Constitution has come to stay in the Constitution unless it is amended in the manner prescribed in the Constitution.

(b) Constitution of Pakistan (1973)---

----Arts. 58(2)(b) & 184(3)---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Grounds---Validity---President, under Art.58(2)(b) of the Constitution of Pakistan (1973), in his discretion can dissolve the National Assembly where he forms opinion on the basis of material before him having nexus with the Dissolution Order and Art.58(2)(b) of the Constitution that situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and appeal to the electorate is necessary---Once the evil is identified, remedial and corrective measures within the Constitutional framework must follow---Theory of total breakdown of Constitutional machinery as the only ground for dissolution of National Assembly having been rejected in the case of Muhammad Nawaz Sharif v. President of Pakistan PLD 1993 SC 473, was no more in the field-Contention that the President can invoke Art. 58(2)(b) of the Constitution to dissolve the National Assembly only in such a grave situation in which Martial Law can be imposed as in 1977 and there is complete breakdown of Constitutional machinery, was repelled.

It is not correct to say that the President can invoke Article 58(2)(b) to dissolve the National Assembly only in such a grave situation in which Martial Law can be imposed as in 1977 and there is complete breakdown of Constitutional machinery. Under the said provision, the President in his discretion may dissolve the National Assembly where he forms opinion on the basis of material before him having nexus with the Dissolution Order and Article 58(2)(b), that situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and appeal to the electorate is necessary.

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. There may be occasion for the exercise of such 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. The theory of total breakdown of Constitutional machinery as the only ground for dissolution of National Assembly has been rejected in the case of Muhammad Nawaz Sharif v. President of Pakistan PLD 1993 SC 473.

Muhammad Nawaz Sharif v President of Pakistan PLD 1993 SC 473 distinguished.

(c) 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---Material for grounds of Dissolution Order---Requisites, sufficiency and validity---Not necessary that material produced in support of the grounds of the Dissolution Order in its totality must be present before the President at the time of forming opinion and must be scrutinized by him in detail---Sufficient if there is material having nexus with the order of dissolution and Art.58(2)(b) of the Constitution before the President after perusal of which he forms his opinion and passes order of dissolution---Nothing is wrong with the production of corroborative or confirmatory material in support of the grounds which have been made available after the date of the order of dissolution.

(d) 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---Grounds---Material for---Newspaper cuttings can be relied upon by the President as material in support of the grounds for dissolution.

(e) 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---Grounds of order of such dissolution and dismissal ---Validity--Sufficient material with regard to the ground of extra judicial killings by the Government had been produced which had been properly and justifiably considered by the President; enough material was produced in support of the ground with regard to the belated implementation of the judgment in the case of appointment of Judges which was short of total compliance, the non implementation of which violated Arts.190 & 2A of the Constitution of Pakistan; adequate material was produced in favour of the ground of dissolution that the Prime Minister in her speech before the National Assembly had ridiculed the judgment of the Supreme Court in the appointment of the Judges’ case which was also repeatedly telecast and in order to harass the Judges of the Supreme Court, Constitution (Fifteenth Amendment) Bill was introduced in the Parliament for initiating the process of accountability against -the Judges by sending the Judges of the superior Courts on forced leave if fifteen per cent. of the members moved a motion against them which Bill ran counter to Art.209 of the Constitution which was already in existence for taking action against Judges before the body of Supreme Judicial Council; record was also available in favour of the ground of dissolution to show that complete separation of Judiciary from the Executive was being delayed and by law Executive Magistrates were given powers to sentence to imprisonment for three years, which was against the spirit of judgment of the Supreme Court; sufficient material was also available on the record in support of the ground of dissolution showing that under the orders of the Prime Minister telephones of the Judges of the Supreme Court, Leaders of the Political Parties and high ranking military and civil officials were being tapped and transcripts sent to the Prime Minister for reading and enough material was produced in support of the ground of the dissolution which covered the subject of corruption, nepotism and violation of rules---Supreme Court, in circumstances, upheld the order of dissolution of National Assembly and dismissal of the Cabinet passed by the President under Art.58(2)(b) of the Constitution of Pakistan (1973).

Per Saiiad Ali Shah, C.J.; Afrasiab Khan and Munawar Ahmad Mirza, JJ. agreeing Zia Mahmood Mirza, J. Contra-

(f) Constitution of Pakistan (1973)---

----Preamble & Art. 2A---Basic structure of the Constitution of Pakistan (1973)---Prominent characteristics of the Constitution are amply reflected in the Objectives Resolution (Art. 2A) which is a substantive part of the Constitution---Main features reflected in the Objectives Resolution are Federalism and Parliamentary form of Government blended with Islamic provisions.

(g) Constitution of Pakistan (1973)--

----Art. 239---Constitutional amendment---constitution can be amended in the manner contemplated under Art.239 of the Constitution.

(h) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Provisions of Art.58(2)(b) of the Constitution [since omitted by Constitution (Thirteenth Amendment) Act (I of 1997)] had 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.

(i) Constitution of Pakistan (1973)---

----Art. 186---Reference to Supreme Court by the President---Physical act of filing a Reference is a ministerial action which is routinely done---Where Reference was only physically filed in the Supreme Court on 21st and it was registered with the Registrar’s office as late as the 25th in such circumstances, wild insinuations and casting aspersions in ‘relation to a wholly innocuous act were an called for and there was no justification for imagining conspiracies and pre-determined plans which had not the remotest connection with reality.

(j) Constitution of Pakistan (1973)---

----Art. 186---Reference to Supreme Court by the President---Grant of ex post facto approval by the Cabinet to the filing of Reference amounted to the approval of the same after which raising of objection was not proper and Prime Minister could not be allowed to approbate and reprobate in the same breath.

(k) Constitution of Pakistan (1973)---

----Arts. 148 & 149---Object of Arts. 148 & 149 of the Constitution of Pakistan (1973).

Provisions of Articles 148 and 149 of the Constitution regulate relationship between the Federation and a Province in a situation in which Federal law is applicable in that Province and a situation has arisen in which it is to be considered as to how the Federal law is to be made applicable so that it should bring about the desired result and be effective so that proper remedial measures are adopted to contain and control the situation in which the Federal Government has to adopt supervisory role and give directions to the Province in which the Federal law is being applied.

(1) Equity---

----Definition---”Law” and “equity”---Distinction---Equity is merged in the law in Pakistan but the principles are recognized and relief can be granted or refused on the basis of such principles.,

There is difference between law and equity as law is based upon set rules which may not be attracted when justice is done on the basis of equity. Equity is defined as justice administered according to fairness as contrasted with the strictly formulated rules of common law. In Pakistan equity is merged in the law but the principles are recognised and relief can be granted or not on the basis of such principles.

Black’s Law Dictionary ref.

(m) Constitution of Pakistan (1973)---

----Arts. 184(3) & 199---Constitutional petition---Jurisdiction of Supreme Court and High Court---Scope---Petitioner who seeks equity must come to the Court with clean hands---Conduct of the petitioner is to be taken into consideration and if he has suppressed any material fact from the Court or has come to the Court with unclean hands, then relief under the Constitutional jurisdiction can be denied to him---Making such statement by petitioner which is factually incorrect and so proved as borne out from the record, cannot be approbated.

          Jurisdiction of the Supreme Court under Article 184(3) of the Constitution of Pakistan is akin to and co-related with the jurisdiction of the High Court under Article 199 where under relief is granted or not in the form of writs. One very famous maxim of equity is that petitioner who seeks equity must come to the Court with clean hands. Conduct of the petitioner is to be taken into consideration and if he has suppressed any material fact from the Court or has come to the Court with unclean hands, then relief under the Constitutional jurisdiction can be denied to him.

Making such statement which is factually incorrect and so proved as borne out from the record cannot be approbated.

Manzoor Hussain v. Zulfiqar Ali 1983 SCMR 137; Abdul Hafeez v. Board of Intermediate and Secondary Education 1983 SCMR 566; Muhammad Sharif v. Mst. Zubaida Begum 1983 SCMR 1197; Muhammad Ashraf Qadri v. Principal, King Edward Medical College, Lahore PLD 1982 SC 131 and Abdul Ghani v. Abdul Ghafoor 1968 SCMR 1378 ref.

(n) Extra judicial killing---

---- Meaning.

“Extra judicial killing” means a killing which has no sanction or permission under the law or which cannot be covered or defended under any provision of law.

(o) Custodial killing--

----Meaning---Burden of proof.

“Custodial killing” means killing of a person who is\* in custody of investigating agency. For that burden is upon the investigating agency to explain as to how that person, who was in their custody, met his death and whether that death was natural or unnatural and in what circumstances it had come about.

Custodial killings are to be explained satisfactorily as is required under the law.

(p) Extra judicial killing---

---- Killing in encounter with police or law enforcing agencies ---Justification--Such Agency has to show that the killing had come about during exercise of right of private defence by that Agency which was in fact first attacked by the deceased and the Court has to give finding whether the killing was justified.

(q) Administration of justice---

---- Law to be allowed to take its normal course---Forums where cases are pending are to be allowed to decide them and other forums provided under the law for hearing of appeal are to be allowed to be approached as laid down and specifically provided in that law.

(r) Custodial killing---

---- If a person is taken into custody then he is bound to be dealt with strictly according to law and is to be punished only when the case is proved against him---Such person cannot be allowed to be killed by any person while he is in custody and if this is done then that clearly shows that there is no writ of law but law of jungle.

(s) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution of Pakistan---Ground---Validity---If both the Provincial Government and the Federal Government dealing with a situation where there was large scale killings and persons in custody were allegedly being killed by unknown persons in a Province and material on record beyond doubt connected the Federal Government and the Prime Minister with the handling of law and order situation then it could be said that the ground was available to the President to come to the conclusion that a situation had arisen in which the Government of the Federation could not be run in accordance with the provisions of the Constitution and the Constitutional machinery had failed.

(t) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Such power of the President was to be exercised by him in his discretion where, in his opinion, a situation had arisen in which the Government of the Federation could not be carried on in accordance with the provisions of the Constitution---President, therefore, had to be objective and must have material to form his opinion in order to take the action as was contemplated under Art.58(2)(b) of the Constitution.

(u) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Power of dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Nature---Availability of material in support of the grounds---Law and order situation could be one of the many grounds which could be collectively and jointly considered by the President to form opinion objectively that the situation was such that the Government of the Federation could not be carried on according to the provisions of the Constitution.

While exercising power under Article 58(2)(b) of the Constitution, discretion of the President was not absolute but was qualified one and he had to act on the material in support of the grounds and then form opinion in objective manner.

The power given to the President under Article 58(2)(b) was the power which is to be exercised by him in his discretion. No doubt the President has to form his opinion objectively which was different from subjective satisfaction and the discretion was not absolute but is qualified one, but the said provision did not say that the President had to act as a Court of law and had to form opinion on the same lines as the Courts do and give adjudication on issues of facts and laws. There is difference between the exercise of discretion by the President as provided in the Constitution and the Court of law where documents are to be produced and admitted in evidence after stringent judicial scrutiny.

What was important in the context of dissolution of National Assembly by the President under Article 58(2)(b) of the Constitution was availability of material in support of the grounds and law and order. situation could be one of many grounds which could be collectively and jointly considered by the President to form opinion objectively that the situation was such that the Government of the Federation could not be carried on according to the provisions of the Constitution. This power was given to the President in the Constitution and not only that but it was to be used by him and this power was to be exercised by him in his discretion for which his objective assessment of the situation was required but he could not be equated with a Court of Law but only it was expected from him that he would act as per rules of prudence because he was exercising a very important power which had been conferred upon him by the Constitution and the discretion exercisable by .him was not absolute but was deemed to be qualified one and was circumscribed by the object of the law that conferred it.

Ahmad Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646 ref

(v) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997))---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---If some documents on the. same subject of one of the grounds of dissolution were produced subsequent to the date of dissolution, such documents could be used as corroboratory material. and there was nothing wrong with relying upon such documents which only confirmed the fact which was already in the knowledge of-the President.

     State of Bombay v. Atma Ram Shridhar Vaidya AIR 1951 SC 157 and Tarapada and others v. The State of West Bengal AIR 1951 SC 174 ref.

(w) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and Cabinet by the President under Art.58(2)(b) of the Constitution--Grounds---Validity---Extra judicial killings---President had considered sufficient material on the subject and more than adequate material had been produced in the Court which showed that there were killings going on in Karachi and Sindh to such an extent that the people started feeling unsafe and unsecured and both the Federal and Provincial Government of Sindh failed to control the situation---President, in consequence, held, was justified in using that ground as the ground for dissolution of National Assembly.

(x) Civil Procedure Code (V of 1908)---

----0. VIII, R.1---Expunction of words from written statement---Respondent in his written statement had remarked about petitioner, who is a lady and remained Prime Minister of Pakistan twice to the effect that “it is strange that the petitioner who likes to portray herself as the daughter of the East and the darling of the West “---Objection of the petitioner was to the word “darling” ---Validity--Held, use of word “darling” should have been avoided particularly when the reference was in respect of the petitioner who was not only a lady but had remained Prime Minister of the country twice---Supreme Court directed that words “darling of the West” be deleted from the written statement of the respondent.

(y) Constitution of Pakistan (1973)--- ,

-- -Arts. 2, 2A & 227---Provisions of Arts. 2, 2A & 227 of the Constitution of Pakistan have given Islamic character to the Constitution by fully securing the independence of Judiciary and by providing that all existing laws should be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur’an and Sunnah.

Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 ref.

(z) Constitution of Pakistan (1973)---

----Arts. 177 & 193---Appointment of Judges of Supreme Court and High Courts---Independence of Judiciary---Appointments of Judges and the manner in which such appointments are made have close nexus with the independence of Judiciary.

Al-Jeliad Trust v. Federation of Pakistan PLD 1996 SC 324 ref.

(aa) Constitution of Pakistan (1973)---

----Arts. 177 & 193---Appointment of Supreme Court and High Court Judges--Procedure---Essentials---Word “consultation” occurring in Arts. 177 & 193 of the Constitution---Connotation.

The word “consultation” occurring in Articles 173 and 193 of the Constitution is defined as effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. Recommendations made by the Chief Justice of the High Court and the Chief Justice of Pakistan in respect of appointments of Judges in the High Courts are to be accepted by the President/Executive in the absence of very sound reasons to be recorded. Acting Chief Justices are not consults within the Constitutional scheme. Ad hoc Judges can be appointed in the Supreme Court only after the sanctioned strength is exhausted. Vacancies are to be filled ordinarily within 30 days and in extraordinary circumstances within 90 days. Senior-most Judge in the High Court has legitimate expectancy to become Chief Justice and Additional Judges in the High Courts have legitimate expectancy to be made permanent Judges. Transfer of a Judge of the High Court without his consent and induction in the Federal Shariat Court is violative of Article 209. Ten years’ active practice as Advocate of the High Court is mandatory for a member of Bar for appointment as a Judge in the High Court as against enrolment simpliciter. Judge of the Supreme Court may not be sent as Acting Chief Justice of the High Court.

Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 quoted.

(bb) Constitution of Pakistan (1973)--

----Art. 189---Decision of Supreme Court---Binding nature---Short order of the apex Court, when it is speaking order particularly if the same contains specific directions, is to be acted upon without waiting for detailed reasons.

(cc) Constitution of Pakistan (1973)---

----Art. 63(1)(g)---Fair comment on the judgment of Supreme Court in Parliament---Extent---Intention of the maker of speech in the Parliament can be gathered from the tenor of the speech and also from the subsequent conduct.

No doubt in the Parliament fair comment can be made on the judgment of the apex Court but that comment is to be made in good faith with bona fide intention and is to be made in the language which is temperate and manner which is befitting to the member of the Parliament. Article 63(1)(g) envisages that a person shall be disqualified from being elected or chosen as member of the Parliament if he is propagating any opinion which is prejudicial to the integrity or independence of the Judiciary of Pakistan or which defames or brings into ridicule the Judiciary or Armed Forces of Pakistan. Of course intention of the maker can be gathered from the tenor of the speech and also from the subsequent conduct.

(dd) Fact--

----Proof---Newspaper cuttings---Facts given in newspapers having not been denied, would be considered as undisputed facts.

(ee) Constitution of Pakistan (1973)---

----Arts. 177, 193 & 48(1)---Appointment of Supreme Court and High Court Judges---President to act on advice---Advice of the Cabinet or the Prime Minister under Art.48(1) of the Constitution is attracted to the appointments of Judges as contemplated under Arts.177 & 193 of the Constitution which is further qualified by and subject to ratio decidendi contained in Supreme Court judgment in AI-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324.

Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 and AlJehad Trust v. Federation of Pakistan PLD 1997 SC 84 quoted.

(ff) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and Cabinet by the President under Art.58(2)(b) of the Constitution--Ground---Validity---Open defiance and non-implementation of the judgment of the Supreme Court by Prime Minister indicating violation of Arts.2A & 190 0: the Constitution and introducing Bill in the National Assembly with mala fide intention of scaring and harassing the Supreme Court Judges in order to take revenge from them on account of judgment in the case of appointment of Judge; which the Government did not want to implement and thus deliberately and intentionally ridiculed the Judiciary---President, in circumstances, was justified in taking action under Art.58(2)(b) on the ground of such steps by Prime Minister as she had violated her oath in which it was stated that she would discharge her duties and perform her functions honestly to the best of her ability faithfully in accordance with the Constitution of Pakistan and law.

Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84 ref.

(gg) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and Cabinet by the President under Art. 58(2)(b) of the Constitution--Ground---Validity---Government failed to separate Judiciary from the Executive in violation of Art. 175(3) of the Constitution and the deadline of such separation was fixed by the Supreme Court within which complete separation had not taken place---Federal Government was party to the proceedings in the Supreme Court and failed to persuade the Provincial Governments to develop consensus among themselves, with regard to sentence which should be allowed to be imposed by the Executive Magistrates, in respect of cases triable under the Minor Acts and on the other hand Federal Government had promulgated an Ordinance which was contrary to the spirit of the judgment of the Supreme Court---Dissolution of National Assembly and dismissal of Prime Minister and Cabinet under Art.58(2)(b) of the Constitution by the President was upheld by Supreme Court in circumstances.

(hh) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before .its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and Cabinet by the President under Art.58(2)(b) of the Constitution--Ground---Validity---Telephone tapping and eavesdropping techniques were adopted in respect of Judges of the Supreme Court, leaders of political parties and high ranking military and civil officials under the order of the Prime Minister and transcripts of such telephone conversations were being sent directly to Prime Minister for perusal---President in circumstances was justified in taking action under Art.58(2)(b) of the Constitution on the ground of such steps taken by the Prime Minister.

(ii) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Corruption, nepotism and violation of rules in administration of the affairs of the Government and its various bodies, 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--Violation of rules and regulations in respect of corruption and nepotism had been carried out on such a widespread, pervasive and systematic basis that such charges could validly form basis for action under Art.58(2)(b) of the Constitution.

Government of Sindh v. Sharaf Faridi and others PLD 1994 SC 105 distinguished.

(jj) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Innumerable appointments, transfers and postings of the Government servants made at the instance of members of National Assembly in violation of law declared by the Supreme Court that allocation of quotas to M.N.As. and M.P.As. for recommendation to various posts was offensive to the Constitution and the law and that all appointments were to be made on merits honestly and objectively and in the public interest--President, in circumstances, was justified in taking action under Art.58(2)(b) of the Constitution on the ground of such steps taken by the Government.

Munawar Khan v. Niaz Muhammad and others 1993 SCMR 1287 ref.

(kk) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Taking up in the Cabinet a Minister against whom criminal cases were pending, which the Interior Minister had refused to withdraw---Such ground alone may not be sufficient to invoke Art.58(2)(b) of the Constitution to dismiss the Government and dissolve the National Assembly on the ground that a situation had arisen in which the Government of the Federation could not be carried on in accordance with the provisions of the Constitution and an appeal to electorate was necessary but President could

consider same in conjunction with the material produced on other grounds to arrive at a general finding that a situation had arisen in which the Government of the Federation could not be carried on in accordance with the provisions of the Constitution.

(11) Constitution of Pakistan (1973)---

----Art. 184(1)---Original jurisdiction of Supreme Court---Scope---Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.

(mm) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Interpretation, scope and object of Art.58(2)(b), Constitution of Pakistan---Expressions “opinion” and “Government of the Federation cannot be carried on” occurring in Art.58(2)(b)---Connotation---Words “opinion” and “satisfaction”---Distinction---Formation of opinion and exercise of discretion by the President---Essentials---Judicial review---Principles.

Constitution is the supreme law of the land to which all laws are subordinate. Constitution is an instrument by which Government can be controlled. The provisions in the Constitution are to be construed in such a way which promotes harmony between different provisions and should not render any particular provision to be redundant as the intention is that the Constitution should be workable to ensure survival of the system which is enunciated therein for the governance of the country. Effect should be given to every part and every word of the Constitution. Hence, as a general rule, the Courts should avoid a construction which renders any provision meaningless or inoperative and must lean in favour of a construction which will render every word operative rather than one which makes some words idle and nugatory.

While interpreting fundamental rights, 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.

Approach of the Court while interpreting a Constitutional provision has to be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. Court’s efforts should be to construe the provision 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.

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.

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 the narrowest interpretation.

What is to be seen is the language used in Article 58(2)(b) which provides that the President may dissolve the National Assembly in his discretion where, 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. It is manifest that in the language used in this provision, there is no mention of total breakdown of Constitutional machinery or a dead-lock or stalemate.

Stalemate and dead-lock mean more or less same thing, while breakdown can be on account of stalemate or dead-lock, and stalemate and deadlock can include or can occur on account of breakdown as well. Hence meaning of these words are interchangeable. The Court has to see whether there is enough material in support of the grounds for dissolution and the President was right in his opinion and has exercised his discretion justifiably and in that exercise the President is not to be equated with Court of law but it can be expected from him that he would act within the rules of prudence and fairplay.

Article 58(2)(b) was inserted in the Constitution on I1-11-1985 by the Constitution (Eighth Amendment) Act, 1985. The background of this amendment was that President wanted to strike balance between the powers of the President and the Prime Minister, hence some extra powers were given to the President to be used by him in his own discretion including the above mentioned provision.

Article 58(2)(b) was inserted in the Constitution on 11-11-1985 which envisages that the President may also dissolve the - National Assembly in his discretion where 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.

Article 58(2)(b) provides a remedial measure which takes care of situation in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. The remedy is that the President can dismiss the Government of the Prime Minister and dissolve the National Assembly and hold election within 90 days. In such circumstances, against the dissolution of the National Assembly, appeal is heard by the people who can cast their votes and bring back the same Government and the same National Assembly or not and elect other members, who can bring about or set up new Government. All this is done within 90 days. Now the question arises as to who is going to decide whether such situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. This is to be decided by the President whose constitutional role and supervisory powers have been increased and improved by the Eighth Amendment. As President, he is consulted in Governmental affairs and the Prime Minister is supposed to apprise him of all the legislative measures which are proposed to be taken by the Government. It is the duty of the Prime Minister under Article 46 to communicate to the President all decisions of the Cabinet relating to the administration of the affairs of the Federation and proposals for legislation. In Article 58(2)(b) the words stalemate, dead-lock or complete breakdown of constitutional machinery are not mentioned and what is mentioned in very clear language is the fact that the situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution.

The scope of Article 58(2)(b) can be understood more clearly only after one traces the historical background of this provision.

In Article 58(2)(b), Constitution of Pakistan (1973) two words used are very pivotal in nature which purport to define the scope of this provision and the powers of the President in that respect. It is apparent that action can be taken under this provision by the President in his discretion for which he has to form “opinion” which is at lesser pedestal than “satisfaction”. One can form opinion without touch of finality as opinion lacks the element of absolutism and can always be . differentiated from satisfaction which has a touch of finality containing the element of absolutism. In other words it can be said that opinion has lesser responsibility than satisfaction from the point of view of burden of proof. For satisfaction proof is required but for opinion some thing lesser than proof is required. For example, after seeing the clouds one may form the opinion that it may rain, but this may not come true as it was just an opinion without a touch of finality. On the other hand after seeing a wet road from a window one can say that it has rained today. Satisfaction has touch of finality for which proof has been considered. On this line of reasoning it can be said that for opinion, evidence may not be conclusive, definitive and overwhelming. The President has to form opinion on the basis of material which may include knowledge of official transactions with which he has some nexus and the Court must not substitute its own opinion with the opinion of the President, nor can the Court sit in appeal on the opinion of the President. In such circumstances opinion of the Court differs from the opinion of the President because in forming the opinion the Court has to examine the evidence and some times has to record the evidence including examination-in-chief, cross-examination and reexamination as happens in the proceedings before the Court of law for which proper procedure is prescribed.

‘Satisfaction’ is by no means a term of art and appears to have been used in its ordinary dictionary sense. ‘Satisfaction’ is the existence of a state of mental persuasion much higher than a mere opinion and when used in the context of judicial proceedings, has to be arrived at in compliance with the prescribed statutory provision and other legal requirements. Far from being a subjectively or capriciously arrived at conclusion, it presumes observance of certain well-settled judicial principles and is a firm state of mind admitting of no doubt or indecision or oscillation. To be ‘satisfied’ with a state of things is to be honestly convinced in one’s own mind. Apart from the ‘legal satisfaction’, which is a term of art and connotes discharge of a claim, debt or legal demand, to satisfy in the ordinary sense is to convince. Satisfactory evidence is sufficient evidence meaning an amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt. ‘Satisfy’ is synonymous with, ‘convince beyond a reasonable doubt’ and ‘satisfaction’ is a state of mind, which connotes a sense of certainty, and conviction or release from suspense, doubt or uncertainty. ‘To satisfy’ means to furnish with sufficient proof or information or to assure or set free from doubt or uncertainty to convince.

It is in the light of the legal position stated above that one has to consider as to how the President is supposed to form his opinion for taking action contemplated under Article 58(2)(b) which stands at lesser pedestal than satisfaction. Whereas the opinion of the President is not legal opinion formed by the Court, hence the President cannot be equated with the Court of law so far the degree of proof is concerned in forming his opinion. It is in this context that the material available before the President for forming such opinion is to be considered whether it was sufficient or not to help him to form such opinion.

The President can dismiss the Government and dissolve the National Assembly in his discretion only when there is complete breakdown of constitutional machinery.

Action of the President under Article 58(2)(b) was open to question by the Court and was not beyond their jurisdiction. The Court could question the action of the President in dissolving the National Assembly to find out whether it was based on facts or not. “Discretion” and formation of “opinion” had to be based on facts and reasons which are objective realities. The discretion can be exercised by the President when machinery of the Government has broken down completely and its authority eroded and the Government cannot be carried on in accordance with the provisions of the Constitution. Discretion conferred by Article 58(2)(b) on the President cannot, therefore, be regarded as absolute one but is to be deemed as qualified one in the sense that it is circumscribed by the object of law that confers it.

The discretion of the President is not absolute but is to be deemed as qualified one and is circumscribed by the object of law that confers it. The Court can go into the question whether the discretion is exercised justifiably or not and whether there is material in support of the grounds. 4n other words discretion is put in strait-jacket and is made open to judicial review. Emphasis is on the fact that exercise of discretion to dissolve the National Assembly is closely co-related with appeal to the electorate which is to be done within 90 days as provided under Article 48(5) of the Constitution.

Discretion of the President is not absolute but is deemed to be qualified one and is circumscribed by the object of law that has conferred it. ‘Further, opinion can be formed objectively on the basis of material which must have nexus with the grounds of the order of dissolution.

Article 58(2)(b) though added by the Eighth Amendment is integral part of the Constitution and could be removed or repealed by the Parliament according to the procedure prescribed in the Constitution. Apart from that, in each case of dissolution of the Assembly by the President and dismissal of the Government of the Prime Minister, the discretion is not absolute but is qualified and the President has to be objective in assessment of the situation and everything depends upon the material which is produced in support of the grounds.

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 the Constitution reinforces this interpretation.

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 the methods extra-constitutional.

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 are not capable of being run 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 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 machinery or creating a situation of a stalemate or dead-lock in the working of the Government, will not be covered in the situations contemplated under Article 58(2)(b) of the Constitution.

Even otherwise this is a remedial provision in the Constitution which prevents the country from plunging into the disaster as was witnessed in 1977 and if the President is of the opinion that a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution, then this provision can be invoked because this is a much better provision to prevent Martial Law. After the dismissal of the Government, remedy of elections is available, and such elections can be held within 90 days in which the people have to return their verdict on the question of dissolution of the Assembly and dismissal of the Government. The order of dissolution is also subject to judicial review of the Court.

Now if the language used in Article 58(2)(b) is to be construed liberally not in favour of the President but against him who is supposed to exercise his discretion as allowed by the Constitution, even then in every situation in which it is not possible for the Government of the Federation to be carried on in accordance with the provisions of the Constitution, there will be a stalemate, dead-lock and breakdown of the constitutional mechanism which may be not on the same lines and not on the same scale and not with same gravity and not of the same magnitude as in 1977 which warranted imposition of Martial Law. For example the Supreme Court has rendered a judgment giving interpretation of Articles of the Constitution relating to appointment of Judges in the superior Courts and it is held that the President has to act on the advice of the Prime Minister in respect of appointments of Judges in the superior Courts subject to the judgment of the Supreme Court and if the Prime Minister refuses to comply with the judgment, then the situation can be called a dead-lock because the Prime Minister, by not complying with the judgment, also violates Article 190 of the Constitution which envisages that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. The Prime Minister also violates his/her oath of office which is to the effect that “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 ……That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan”. If the Prime Minister ridicules the Judiciary, then there is violation of Article 63(1)(g) which does not allow propagating any opinion affecting the integrity or independence of the Judiciary of Pakistan which amounts to bringing into ridicule the Judiciary or the Armed Forces of Pakistan. If such thing is done by any member of the Parliament, then such member could be disqualified from being elected as member of the Parliament as is contemplated under Article 63(1) of the Constitution. Other examples are telephone tapping, extra judicial killings and so on, which can give rise to the impression that the country is governed not so much by the Constitution but the methods extra-constitutional. In every case what is to be seen is the material in support of the grounds mentioned in the order of dissolution.

Federation of Pakistan v. Muhammad Saifullah Khan PLD 1989 SC 16.6; Kh. Ahmad Tariq Rahim v. Federation of Pakistan PLD 1992 SC 646; Muhammad Nawaz Sharif v. President of Pakistan PLD 1993 SC 473; Saeed Hassan v. Pyar Ali PLD 1976 SC 6; Islamic Republic of Pakistan v. Abdul Wali Khan PLD 1976 SC 57; Federation of Pakistan v. Maulvi Tamizuddin Khan PLD 1955 FC 240; Begum Nusrat Bhutto v. Chief of Army Staff and others PLD 1977 SC 657; Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84; Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324; Federation of Pakistan v. Aftab Ahmad Khan Sherpao PLD 1992 SC 723; Reference No.l of 1957 PLD 1957 SC 219; State v. Zia-ur-Rehman PLD 1973 SC 49; Federation of Pakistan v. Saeed Ahmad Khan PLD 1974 SC 151 and Khalid Malik v. Federation of Pakistan PLD 1991 Kar. 1 ref.

(nn) Constitution of Pakistan (1973)---

----Arts. 177 & 193---Appointment of Supreme Court and High Court Judges--Principles---Word “consultation” used in Arts. 177 & 193---Meaning.

The word “consultation” used in Articles 177 and 193 of the Constitution means consultation which is 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 the 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.

Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 quoted.

(oo) Constitution of Pakistan (1973)---

----Arts. 177, 193, 197 & 48---Appointment of Supreme Court and High Court Judges--- “Consultation” occurring in Arts.177 & 193---Definition---Advice of the Prime Minister to the President as contemplated under Art.48 of the Constitution is binding on the President subject to the Judgment of Supreme Court in Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324.

The Constitution of 1973 contemplated Parliamentary form of Government in which the Prime Minister is the Head of the Government and advice of the Prime Minister, as contemplated under Article 48, is binding on the President.

The advice of the Prime Minister to the President as contemplated under Article 48 of the Constitution is binding on the President in respect of appointment of Judges in the superior Courts as provided under Articles 177, 193 and 197 subject to the judgment in the case of appointment of Judges in which definition of the word “consultation” is given by the Court.

Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84 ref.

(pp) Interpretation of Constitution--

----Construction of provisions of Constitution---Principles.

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.

Constitution is the supreme law of the land to which all laws are subordinate. Constitution is an instrument by which Government can be controlled. The provisions in the Constitution are to be construed in such a way which promotes harmony between different provisions and should not render any particular provision to be redundant as the intention is that the Constitution should be workable to ensure survival of the system which is enunciated therein for the governance of the country. Effect should be given to every part and every word of the Constitution. Hence, as a general rule, the Courts should avoid a construction which renders any provision meaningless or inoperative and must lean in favour of a construction which will render every word operative rather than one which may make some words idle and nugatory.

While interpreting fundamental rights, 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.

Approach of the Court while interpreting a Constitutional provision has to be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. Court’s efforts should be to construe the provision 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.

Special Reference No. l of 1957 PLD 1957 SC 219; State v. Zia-urRehman PLD 1973 SC 49; Federation of Pakistan v. Saeed Ahmad Khan PLD 1974 SC 151; Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 and Khalid Malik v. Federation of Pakistan PLD 1991 Kar. 1 ref.

(qq) Words and phrases---

            ......      Stalemate” and “dead-lock” ---Meanings.

(rr) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly, dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Prime Minister as Head of the Government has to see that the Government of the Federation is carried on in accordance with the provisions of the Constitution and if this is not done, then it amounts to failure of constitutional machinery creating dead-lock and stalemate.

(ss) Constitution of Pakistan (1973)---

----Arts. 184(3), 17(2) & 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minster and the Cabinet by the President under Art.58(2)(b) of the Constitution---Constitutional petition under Art. 184(3) of the Constitution---Maintainability---Factors to be considered---Petitioner claimed infringement of her fundamental right guaranteed under Art.17 of the Constitution---Scope of Art. 17(2), extends from right to form or be a member of a political party which means that functioning is implicit in the formation of party---Right to form political party contemplates right of that political party to contest elections and-right to form the Government and to complete its normal tenure and if removed earlier it could constitute infringement of Art. 17(2)--Petition directly filed in the Supreme Court under Art. 184(3) of the Constitution was thus maintainable---Petition was additionally maintainable for the reason that dissolution of National Assembly under Art.58(2)(b) of the Constitution and dismissal of the Government was to be followed immediately with general elections to be held within 90 days as contemplated under Art.48(5) of the Constitution and in-between the two events the time left was only 90 days in which the question of validity of order of dissolution was to be decided by the competent forum for which direct petition in the Supreme Court was more ideal, convenient and efficacious.

Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Benazir Bhutto v. Federation of Pakistan PLD 1989 SC 66 and Ahmad Tariq Rahim v. Federation of Pakistan and others PLD 1992 SC 646 ref.

(tt) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Supreme Court upheld the action of the President for the reasons that sufficient material had been produced in support of the grounds in the order of dissolution.

Per Saleem Akhtar J.; Fazal Hahi Khan. J. aereeing--

(uu) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Scope and application of Art.58(2)(b) of the Constitution--Every breach or stray violation may not attract Art.58(2)(b) of the Constitution, but whether the breach and its effect had nexus with Art.58(2)(b), depended upon the nature of breach and the circumstances in which it had been caused.

Article 58(2)(b) of the Constitution of Pakistan no doubt empowers the President to take 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 President does not possess unfettered or unlimited power under Article 58(2)(b). It is restricted and circumscribed by preconditions. First he has to form opinion objectively on the material before him having nexus with the preconditions laid down by Article 58(2)(b) sufficient to satisfy any prudent man of normal intelligence that the Government cannot be carried on in accordance with the provisions of the Constitution and appeal to electorate is necessary. Thereafter, the President may exercise discretion to dissolve the Assembly. The situation which arises and leads to formation of opinion that the Government cannot be carried on in accordance with the Constitution may not be restricted to any one solitary instance of war-like conditions. There may be various and many situations. It is not possible to give an exhaustive list. Human nature, conduct, tactics, strategy, mechanism and political manoeuvring always change, fluctuate and create unpredictable situations to which Article 58(2)(b) may be applied.

Article 58(2)(b) requires the President first to form his opinion that the Government cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. This Article does not provide whether the basis for forming such opinion should be evidence as required in a Court of Law or material having nexus with the reasons mentioned in the Dissolution Order, sufficient to form an opinion. There should be sufficient material available to the President before forming the opinion. Proved evidence according to the Qanun-e-Shahadat or repealed Evidence Act to be the basis for forming opinion by the President is not required by the Court. It, therefore, does not require the standard of proof of evidence as required during a trial in a Court of Law. There should be material having nexus with Article 58(2)(b) sufficient to satisfy the President before forming the opinion. This does not mean that the material relied upon be vague, irrelevant, false, forged, concocted or which did not exist at the time of forming opinion. The material should be trustworUiy prima facie authentic relating to the incidents, events and happenings relied or referred on the basis of which a person of ordinary prudence, intellect and knowledge is able to form the same opinion.

Apart from the fact that Article 58(2)(b) of the Constitution of Pakistan can be used where there is a complete dead-lock and stalemate in observance of the provisions of the Constitution it can be invoked in circumstances where there exists constant, repeated and continued failure to observe the provisions of the Constitution to the extent that it creates an impression on a prudent man of ordinary intelligence that the Government of the Federation is not carried on in accordance with the provisions of the Constitution, but by extra-constitutional methods and devices.

A dead-lock can be caused due to non-observance or breach of the Constitution in such a manner\* that the Government seems to be carried on in violation of the. provisions of the Constitution. However, every breach or stray violation may not attract Article 58(2)(b), but whether the breach and its effect have nexus with the said Article, depends upon the nature of breach and the circumstances in which it has been caused.

Stalemate or breakdown is the result of incidents, occurrences, causes, happenings, conduct and several other factors which may lead to it. Such causes and instances may be many and several but the limitation is that it may result in stalemate, breakdown and serious violations of the provisions of the Constitution adversely affecting the functioning of the Government according to the Constitution.

The first consideration, therefore, will be whether situation has arisen in which Government cannot be carried on in accordance with the provisions of the Constitution and law. Where a Government cannot be run in accordance with the provisions of the Constitution then it indicates the failure of the constitutional machinery. Such situation arises when the writ of the Government is not enforceable, a climate of uncertainty and diffidence has been created on different levels of administration, there is general flouting and disrespect to the organs and Departments of the State; the institutions, organs and authorities constituted under the Constitution and the law, flout of law, external aggression bringing the entire machinery of the Government at a standstill; internal disturbances, insurgency, revolt, rebellion or civil war and economic crises which may paralyse the life and administration. Another situation may cover it when the Legislature no longer reflects the wishes or views of the electorate and they are at variance. There is large scale civil disobedience movement in which Government servants and employees of corporations, companies, banks and authorities connected with the day to day administration of the State refuse to cooperate and subjects refuse to pay taxes. The majority ruling power refutes, violates or refuses to run the Government according to Constitution and law. The writ of Government is no longer respected and is not enforceable. These are some situations during which machinery of the Government cannot be run in accordance with the Constitution. No exhaustive list can be provided but it entirely depends on the circumstances, facts and events which may happen.

Muhammad Nawaz Sharif v. Federation of Pakistan and others PLD 1993 SC 473 affirmed.

Federation of Pakistan v. Muhammad Saifullah Khan PLD 1989 SC 166; Ahmad Tariq Rahim’s case PLD 1992 SC 626; Aftab Ahmad Khan Sherpao’s case PLD 1992 SC 723; State of Rajasthan and others v. Union of India AIR 1977 SC 1361; Muhammad Nawaz Sharif v. Federation of Pakistan and others PLD 1993 SC 473 and Khalid Malik v. Federation of Pakistan PLD 1991 Kar. 1 ref.

J(vv) Qanun-e-Shahadat (10 of 1984)---

----Art. 164---Press clippings and newspaper reports---Admissibility as evidence---Factors.

In the present day media revolution, accessibility and investigative nature of reporting, unless the report is immediately contradicted or is palpably false and is contradicted by some similar contemporaneous reports, the Courts and Tribunals and persons, who are not required to form an opinion on the basis of strictly proved evidence as required by law of evidence, can rely upon such reports.

Press clippings, magazines, comments published in newspapers can be ‘considered, accepted, examined and taken note of and not excluded from consideration.

Such documents could be considered without requiring strict proof as required by the Law of Evidence applicable to trial .of cases. The authentic and uncontradicted news items published in the newspapers or magazines of contemporaneous events can form basis for drawing inferences and can be accepted as material for forming opinion,

Muhammad Nawaz Sharif’s case PLD 1993 SC 473 ref.

(ww) Constitution of Pakistan (1973)---

----Arts. 9, 14 & 25---Right to life---Inviolability of dignity of man---Equality before law---”Life”---Meanings---Extra judicial killings or custodial deaths, arrests and torture---Such acts by the State machinery violate Fundamental Rights under which a person is entitled to be treated according to law and equally before law---Human dignity being inviolable, the right to life could not be taken away except as provided by law, for there was no law to justify such an act perpetrated by the State machinery.

The Constitution guarantees Fundamental Rights, which are inviolable. Under Article 9 every person in Pakistan is guaranteed a “right to life” and he cannot be deprived of life and liberty except in accordance with law. Thus, it is a sacred right, which cannot be violated, discriminated or abused by any authority.

The word ‘life’ is very significant as it covers all facets of human existence. The word ‘life’ has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.

The Constitutional Law in America provides an extensive and wide meaning to the word ‘life’ which includes all such rights which are necessary and essential for leading a free, proper, comfortable and clean life. The requirement of acquiring knowledge, to establish home, the freedoms as contemplated by the Constitution, the personal rights and their enjoyment are nothing but part of life. A person is entitled to enjoy his personal rights and to be protected from encroachments on such personal rights, freedom and liberties. Any action taken which may create hazards of life will be encroaching upon the personal rights of a citizen to enjoy the life according to law.

Article 9 of the Constitution which guarantees life and liberty according to law is not to be construed in a restricted and pendantic manner. Life has a larger concept which includes the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights.

Extra judicial killings or custodial deaths cannot be justified as valid, legal or proper. Explanation had been given by the Authorities that such persons were hardened criminals and were killed during encounters. Even hardened criminals have a right to be prosecuted and charges to be proved against them according to law. Who is to decide that a particular person under arrest is a terrorist or a hardened criminal. This is not the authority of the Executive or any Agency to decide it beforehand and start operation to kill him. It is the domain of the Court to decide the offence committed by ‘a particular person and according to the law we are governed, a person alleged to have committed any crime shall be treated as innocent till the Court announces its verdict holding him guilty. This principle has been provided to safeguard the interest of the accused and also to protect the citizens from the highhandedness of the investigating/police authorities. When the agencies charged with the duty to protect the life and property of the citizens indulge in extra-judicial killings, then starts State terrorism in which the Police Authorities, the Rangers or any other agency is permitted by an executive order to execute, eliminate or kill a particular person. The crime becomes more heinous where persons are arrested under any charge, false or true, and then they are killed while in custody of the Police/Rangers. This law of jungle cannot be allowed to be perpetuated nor any civilized Government can be allowed to continue with it without any check. Such acts violate Article 9 of the Constitution which confers, protects and preserves life, liberty and property of the citizens. The Law of Nations does not allow to kill even an enemy soldier except in battle. So it is only in war that the persons who are fighting facing each other can be killed, but it does not permit the killing wholesale or en masse or even an individual if he is not in the battlefield. Even the prisoners of war are not allowed to be killed.

Such acts by the State machinery violate Fundamental Rights under which a person is entitled to be treated according to law and equally before law. The human dignity is inviolable and that the right to life cannot be taken away except as provided by law. There is no law to justify such an act perpetrated by the State machinery.

The object of guaranteeing Fundamental Rights and providing for their enforcement under Article 184(3) is intended to promote social, economic and cultural conditions, which promote life, liberty and dignity. The right to life, therefore, not only guarantees genuine freedom, but freedom from wants, illiteracy, ignorance, poverty and above all freedom from arbitrary restraint from authority. The right to life includes the right of personal security and safety, the right to have clean and lawful administration, the right to have honest and incorruptible actions by the authorities. All Government Authorities, civil, military or paramilitary are bound by the Constitution to enforce, respect and protect such rights and do not have the authority, power or right to destroy it, trample it or make a mockery of such right. All persons who are found responsible for such actions and violations must suffer prosecution and should be brought to book according to law. The right to life includes the right to live with respect, honour and dignity. Even a person, who violates any law, has the right to be treated and dealt with according to law. If a person is denied the right to life, then all rights which emanate from being a living human being, also vanish. In a State where extra-judicial killings are made at the orders of the Government at the helm of affairs, it cannot be treated as constitutional, legal or civilized.

Such extra-judicial killings, seizure and search not only violate the right to life, but impinge on the dignity of man and privacy of home as conferred by Article 14 of the Constitution. Such actions also violate Article 25 as the victims being citizens of Pakistan cannot be discriminated and have to be treated according to law and given equal protection of law.

Shehla Zia v. WAPDA PLD 1994 SC 693 and Pakistan Law Commission v. Ministry of Works 1994 SCMR 1548 ref.

(xx) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Extra-judicial killings and custodial deaths—Evdience and instances of extra judicial killings and custodial deaths were so enormous that President was justified in forming the opinion after being satisfied that the Government could not be carried on according to the provisions of the Constitution.

(yy) Constitution of Pakistan (1973)---

----Art. 63---Ridiculing the Judiciary or judgment of Court -Effect

To ridicule the Judiciary in any manner exhibits the greatest disrespect to an Institution which is a pillar in the State management and is a constitutional organ with powers conferred on it particularly to preserve, protect and defend the Constitution. It also interprets the Constitution and the law and can declare a law void and actions taken by the Executive and in certain cases by the Legislature to be without jurisdiction and of no legal effect.

All the institutions of the State, be it Legislature, Executive or the Judiciary, deserve full respect and cannot be ridiculed publicly or privately.

A judgment cannot be publicly ridiculed nor can anybody under the garb of fair comment criticise a judgment to degrade the Judiciary and the Judges in the eye of public. Any person ridiculing the judgment, or Judiciary making disparaging remarks about the Judges and their conduct in Court could be hauled up for contempt of Court. However, the elected representatives of the Houses have more burden to share because under the Constitution Article 63 clearly provides that any person, if he propagates any opinion or acts in any manner prejudicial to the integrity or independence of the Judiciary of Pakistan, shall be disqualified from being elected, chosen as and from being a member of the Majlis-e-Shoora (Parliament). Any person who has ridiculed the Judiciary would be disqualified even from seeking election to any of the Houses or being a member of a House.

(zz) Constitution of Pakistan (1973)---

----Art. 204---Contempt of Court---Any person ridiculing the judgment, or Judiciary making disparaging remarks about the Judges and their conduct, could be hauled up for contempt of Court.

(aaa) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Grounds---Validity---Non-implementation of Supreme Court judgments and ridiculing the judgment, Judiciary and making disparaging remarks about the Judges and their conduct by the Prime Minister---Sufficient material on record was available with regard to Judiciary that the President, in order to save the violation of the Constitution and to save the damage which was being caused to the Judiciary as an institution, dissolved the National Assembly and dismissed the Government.

(bbb) Constitution of Pakistan (1973)---.

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---If the happenings of certain incidents or occurrence of a certain act in respect of grounds of dissolution is established and is in the knowledge of the President before the date of dissolution, then in respect of such incidents, documents and material can be obtained at a later stage which will not render the order of Dissolution by the President as illegal.

(ccc) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Grounds---Validity---Link was established between the Prime Minister and the illegal and unconstitutional act of tapping phones and eavesdropping of citizens, Judges of the superior Courts, leaders of political parties and high ranking military and civil officers---Tapping or eavesdropping of citizens to whatever class, group or status they may belong, was not only an offence under Telegraph Act but it also offended against Arts. 9 & 14 of the Constitution of Pakistan---Such ground alone, held, was sufficient to dissolve the National Assembly by the President under Art.58(2)(b) of the Constitution.

(ddd) Constitution of Pakistan (1973)---

----Arts. 14, 9 & 19---Interpretation and scope of Arts. 9 & 14 of the Constitution---Inviolability of dignity of man and security of a person--Concept---Telephone tapping and eavesdroppings mar the protection afforded and guaranteed to the right to life and infringe the secrecy and privacy of a man---”Privacy of home”---Connotation---Telephone tapping and eavesdroppings being unconstitutional, appropriate mode of its regulation was desired by the Supreme Court---Supreme Court, however, observed that so long proper law was not legislated in the field which may protect the violation of Constitutional rights, in future whenever any telephone is required to be tapped, intruded or eavesdropping exercise is to be carried on, it should be done with the prior permission of the Supreme Court or by a Commission constituted by the Supreme Court which shall examine each case on its marits---Permission if granted by the Supreme Court or the Commission as the case may be, shall not exceed a period of six weeks and shall be reviewed immediately on expiry of six weeks.

Article 14 of the Constitution of Pakistan guarantees to protect dignity of man and the privacy of home which shall be inviolable subject to law. This provision providing for the dignity of man as a Fundamental Right, is unparalleled in the Constitutions and hardly Constitutions of a few countries provide for it. Dignity of man is not only provided by Constitution of Pakistan, but according to history and belief under Islam great value has been attached to the dignity of man and the privacy of home. If a person intrudes into the privacy of any man, pries into the private life, it injures the dignity of man, it violates the privacy of home, it disturbs the peace and tranquillity of the family and above all it puts such person to serious danger of being blackmailed. Such acts are not permissible under law and if any occasion arises for such operation, then it can be only in cases of defence and national security.

Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. Here the Constitution guarantees against any attack on life or liberty of a person subject to law. The word ‘life’ is not restricted to animal life or vegetative life. It carries with it the right to live in a clean atmosphere, a right to live where all Fundamental Rights are guaranteed, a right to have rule of law, a right to have clean and incorruptible administration to govern the country and the right to have protection from encroachment on privacy and liberty. With this definition of the word ‘life’ one would not deter to state that telephone-tapping and eavesdropping mar the protection afforded and guaranteed to the right to life. It infringes the secrecy and privacy of a man which may ultimately be a source of danger and insecurity. In this way the liberty guaranteed to a person is also invaded, restricted and circumvented. Therefore, if this exercise is to be considered from any angle, be it constitutional, legal or moral, no justification can be afforded for such reprehensible acts by the officials or the persons at the helm of governance of the country. History is replete with incidents when on breach of such rights Governments have been toppled. Not too far is the incident of Watergate when the President of America for conducting and interfering with the telephones and communication system of the Opposition had to resign and he was thrown out of office.

It is unlawful to intercept, reveal the existence of and disclose or divulge the contents of, wire or oral communications, unless the interceptor has previously obtained an order of a Court permitting a wiretap or other interception of the communication, or one party has consented to the interception.

Constitution in clear terms guarantees that the dignity of man and subject to law, the privacy of home, shall be inviolable and further that no person shall be deprived of life or liberty save in accordance with law. One may on strict interpretation of the words “the privacy of home” say that such guarantee is restricted to privacy of home and not office or any other premises outside home. This would be a restricted, illogical and completely out of context interpretation. The Constitution is to be interpreted in a liberal and beneficial manner which may engulf and incorporate the spirit behind the Constitution and also the Fundamental Rights guaranteed by the Constitution. The dignity of man and privacy of home is inviolable, it does not mean that except in home, his privacy is vulnerable and can be interfered or violated. Home in literal sense will mean a place of abode--a place where a person enjoys personal freedom and feels secure. The emphasis is not on the boundaries of home but the person who enjoys the right wherever he may be. The term ‘home’ connotes meaning of privacy, security and non-interference by outsiders which a person enjoys. According to Ballentine’s Law Dictionary, “in ancient law French, the word (home) also signified a man”. It also defines as “sometimes including not only a place of abode, but also support and maintenance”. Wider meaning should be given to the word ‘home’. The term ‘privacy of home’ also symbolises the security and privacy of a nature which a person enjoys in his home. The term “privacy of home” cannot be restricted to the privacy in respect of home, the privacy within the four walls of the home. It refers to .the privacy, which is sacred and secure like the privacy a person enjoys in his home. Such privacy of home a person is entitled to enjoy wherever he lives or works, inside the premises or in open land. Even the privacy of a person cannot be intruded in public places.

The inviolability of privacy is directly linked with the dignity of man. If a man is to preserve his dignity, if he is to live with honour and reputation, his privacy, whether in home or outside the home has to be saved from invasion and protected from illegal intrusion. The right conferred under Article 14 is not to any premises, home or office, but to the person, the man/woman wherever he/she may be.

An unauthorized intrusion into a person’s home and the disturbance caused to him thereby, is, as it were, the violation of a common law right of a man - an ultimate essential of ordered liberty, if not of the very concept of civilization.

Another aspect of the case in terms of the constitutional provision cannot be ignored that once any person’s telephone is subjected to eavesdropping,, tapping, intrusion or interference of any kind, it interferes with the right of free speech and expression. Normally a person talking on telephone always presumes that his voice is heard only by the person at the other end of the telephone. The telephonic system itself presumes that except the speaker and the listener no one else can hear the talks from one end to the other. This ensures privacy and freedom of speech as a person in the presence of others may not be able to talk so freely or to express himself without any restriction or hesitation. Therefore, the tapping and eavesdropping of telephone also infringes Article 19 which guarantees that every citizen shall have the right to freedom of speech and expression subject to any reasonable restriction imposed by law in the interest of glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign States, public order, decency or morality or in, relation to contempt of Court, commission of or incitement to an offense.

No procedure has been laid down for regulating the tapping, taping or eavesdropping of private or official telephones. Mere S.R.Os., official directions, rules or orders of the President, Prime Minister, Ministers, or other members of the Executive cannot permit or validate violation of the constitutional provisions. So long proper law is not legislated in this field which may protect the violation of constitutional rights, Supreme Court directed that in future whenever any telephone is required to be tapped, taped, intruded or eavesdropping exercise is to be carried on, it should be done with the prior permission of the Supreme Court or by a Commission constituted by the Supreme Court which shall examine each case on its merits. The permission if granted by the Supreme Court, or the Commission as the case tray be, shall not exceed a period of six weeks and shall be reviewed immediately on expiry of six weeks.

Tapping of telephones and eavesdropping of any person is reprehensible, immoral, illegal and unconstitutional act which the Authorities, finding that there is no clear provision to stop it, have indulged in such illegal activities. Constitution in clear terms gives guarantee against such violation. Therefore, such acts are unconstitutional and appropriate mode for its regulation should be legislated. Till such time it is duly regulated by any legislative act, Supreme Court would be justified to issue such direction to protect violation of Fundamental Rights.

Kh. Ahmed Tariq Rahim v. Federation of Paksitan PLD 1991 Lah. 78; Shehla Zia’s case PLD 1994 SC 693; American Jurisprudence, 2nd Edn., Vo1.74; Ballentine’s Law Dictionary; Charles Katz v. United States 389 US 347 = 19 L Ed: 2d. 576 = 88 S Ct 507; Olmstead v. United States 277 US 438, 457, 464, 466, 72 L Ed 944; 947, 950, 951, 48 S Ct 564, 66 ALR 376; Goldman v. United States, 316 US 129, 134-136, 86 L Ed. 1322, 1327, 1328, 62 S Ct 993; Warden v. Hayden 387 US 294, 304, 18 L Ed 2d 782, 790, 87 S Ct 1642; People’s Union for Civil Liberties (PUCL) v. The Union of India and another (1996) 9 SCALE 318; Munn v. Illinois (1877) 94 US 113, 142 and Wolf v. Colorado (1949) 338 US 25 ref.

(gee) Interpretation of Constitution---

---- Fundamental Rights---Constitution is to be interpreted in a liberal and beneficial manner which may engulf and incorporate the spirit behind the Constitution and also the Fundamental Rights guaranteed by the Constitution.

(fff) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Extensive and widespread corruption, nepotism and violation of rules in the administration of affairs of the Government and its various bodies, Authorities and corporations by which orderly functioning of the Government in accordance with provisions of the Constitution and law had become impossible; public faith in the integrity and honesty of the Government had disappeared and members of the Government and ruling parties were either directly or indirectly involved in such corruption, nepotism and violation of rules---Held, there was sufficient material and the corruption was so rampant and widespread that an order of dissolution could be passed individually on this basis or collectively together with other substantial grounds.

Khalid Malik v. Federation of Pakistan PLD 1991 Kar. 1; Ahmad Tariq Rahim’s case PLD 1992 SC 646 and Muhammad Nawaz Sharif v. Federation of Pakistan PLD 1993 SC 473 ref.

Ahmad Tariq Rahim’s case PLD 1992 SC 646 distinguished.

(ggg) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Action of President under Art.58(2)(b) of the Constitution--Ingredients to be present---Material having nexus with Art.58(2)(b) of the Constitution to the satisfaction of the President on the basis of which opinion could be formed that an appeal to electorate was necessary had to be there---Not necessary that for each of the grounds of Art.58(2)(b) separate grounds and

materials was to be stated under each category, if the material was common and both the ingredients could be satisfied, requirement would be fulfilled.

Muhammad Nawaz Sharif v. Federation of Pakistan PLD 1993 SC 473 ref.

(hhh) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Grounds---Validity---Extra judicial killings, ridiculing Judiciary, corruption, bribery, withdrawal of money from Bait-ul-Maal and the Banks and similar instances which had been given showed that the people had lost faith in the services, the administration and in the impartiality and legality of the Assembly as well---Members of the Assembly were not required to remain mute spectators of violation of the Constitution and infraction of Fundamental Rights at a massive scale rather they had their duty to discharge as required by the Constitution---President, in circumstances, was justified in forming an opinion that an appeal to the electorate was necessary.

(iii) Words and phrases--

            ......      Home” and “privacy of home” ---Meaning elaborated.

Ballentine’s Law Dictionary ref.

Per Irshad Hassan Khan, J.; Raia Afrasiab Khan and Munawar Ahmad Mirza, JJ. a2reeina-

(jjj) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Grounds---Material including newspaper clippings etc. relied upon by the President in dissolving the National Assembly was, of course, relevant and could be 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 but not a strict proof of the matters stated therein as is adjudicated in a regular trial.

(kkk) Constitution of Pakistan (1973)

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Interpretation, scope and application of Art.58(2)(b) of the Constitution---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---For exercising such powers by the President the requirement was not “satisfaction” of the President that situation had arisen in which the Government of Federation could not be carried on in accordance with the provisions of the Constitution and an appeal to the electorate was necessary but that of formation of “opinion” to the same effect---” Opinion” and “satisfaction” ---Connotation and distinction---Standard of proof in the form of material---Court was merely required to examine as to whether or not the President had exercised his power in accordance with the provisions of Art.58(2)(b) and that the action taken by him was bona fide and in doing so Court was not required to hold an enquiry with the charges levelled in the dissolution order, as if it was a Criminal Court.

For exercising power by the President under Article 58(2)(b) of the Constitution the requirement is not ‘satisfaction’ of the President that 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 but that of formation of ‘opinion’ to the same effect. The Framers of the Constitution deliberately chose a lesser word of ‘opinion’ instead of ‘satisfaction’. For example, under sub-clause (b) of clause (1) of Article 199 of the Constitution, on the application of any person the High Court may issue an appropriate writ, if it is ‘satisfied’ that no other adequate remedy is provided by law. Similarly, under Articles 232 and 233 of the Constitution relating to proclamation of emergency on account of war, internal disturbances etc. and power to suspend fundamental rights etc. during emergency period, there is concept of Presidential satisfaction and not that of formation of opinion. where the President is so satisfied he can assume power of Provincial Government. Whereas under Article 58(2)(b), the requirement is not ‘satisfaction’ but formation of ‘opinion’ by the President. There is, thus, clear distinction as to the connotation of these two words. For formation of ‘opinion’ lesser burden of proof is required than that of ‘satisfaction’. It is not to be based on overwhelming and conclusive evidence but on some material on the basis of which a reasonable man can form an opinion that the Government of the Federation cannot be run in accordance with the Constitution. The standard of proof in the form of material to support the charges cannot be the same as required for the proof of a criminal charge. On the other hand, ‘satisfaction’ is the existence of a state of mental persuasion much higher than a mere ‘opinion’ and when used in the context of judicial proceedings has to be arrived at in compliance with the prescribed statutory provisions.

The President can, therefore, exercise his power under Article 58(2)(b) of the Constitution if there is some material before him showing that the affairs of the Government of the Federation cannot be run in accordance with the Constitution. The words ‘stalemate’ or ‘dead-lock’ do not appear in the provisions of Article 58(2)(b). These concepts are to be read in the said Article in view of the process of judicial pronouncements.

Clearly, for formation of an opinion, the President can take note o! what the world says about State terrorism or other affairs of the Government. Of course, for forming opinion on the basis of such information he has to apply his independent mind. Contemporaneous acts can also be looked into by the President. He can also take judicial notice of press reports.

Press reports etc. can be relied upon, not as a strict proof of the matters stated therein as required by the law of evidence during a trial in a Court of law, but as a part of the material on the basis of which a person of ordinary prudence would conclude that the matters and the events narrated therein, did occur.

Court has, however, no concern with the quantity or sufficiency of the material nor can it sit in appeal on dissolution order passed by the President provided that the grounds stated therein have nexus with Article 58(2)(b) of the Constitution. The Court is merely required to examine as to whether or not the President has exercised his power in accordance with the provisions of Article 58(2)(b) and that the action taken by him is bona fide and in doing so the Court is not required to hold an enquiry into the charges levelled in the Dissolution Order, as if it was a criminal Court.

It is difficult to enumerate exhaustively the circumstances which may indicate the failure of the Constitutional machinery within the ambit of Article 58(2)(b). It. depends upon the facts and circumstances of each case. The principles laid down in Muhammad Nawaz Sharif’s case still hold the field. These principles do not envisage dissolution of the National Assembly on ground of complete breakdown of the Constitutional machinery alone.

It is not correct to say that Article 58(2)(b) can be invoked only when there is a state of war in the country, life has completely paralysed and the conditions are such as were prevalent in 1977 which had brought the country to the brink of disaster necessitating Martial Law. Clearly, the President in his discretion may dissolve the National Assembly where he forms an opinion on the basis of material before him having direct nexus with the conditions laid down in Article 58(2)(b), 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. Once the evil is identified, remedial and corrective measures within the constitutional framework must follow. There is also no force in the contention that the President should have resorted to alternate constitutional remedies before taking a drastic step of dissolving the National Assembly. No alternate remedy was available to the President but the alternate constitutional remedies are only available to the Prime Minister on whose advice the President has to act.

The President has to form the opinion objectively on the basis of the material having nexus with the grounds mentioned in the order which in turn, has to have nexus with the grounds laid down in Article 58(2)(b) of the Constitution, manifesting conscious and bona fide application of his mind. A Court could not sit as a Court of Appeal while examining the order of dissolution of the Assembly under the Constitution nor it could substitute or go into the question of sufficiency or otherwise of the material relied upon by the President, provided the material forming the basis of his opinion had nexus with the grounds of dissolution order as well as Article 58(2)(b). Newspaper clippings etc. could be relied upon as material in support of the grounds of dissolution. The President could also produce corroborative or confirmative material in support of the grounds which had been made available after the order of dissolution.

Newspaper cuttings can be relied upon as material in support of the dissolution of the National Assembly. However, Court has no concern with the quantity or sufficiency of the material nor can it sit in appeal on Dissolution Order passed by the President, provided the material relied upon has nexus with the grounds mentioned in the impugned order which in turn has nexus with Article 58(2)(b) manifesting application of mind by the President.

Federation of Pakistan v. Haji Muhammad Saifullah Khan PLD 1989 SC 166; Khawaja Ahmad Tariq Rahim’s case PLD 1992 SC 646; Mian Muhammad Nawaz Sharif v. President of Pakistan PLD 1993 SC 473; AIR 1977 SC 1361; Durgadas v. Rex AIR 1949 All. 148; S.S. Yusuf v.Rex AIR 1950 All. 69; Mohit Lal Pandit v. The State AIR 1951 Pat. 439(2); Islamic Republic of Pakistan v. Abdul Wali Khan PLD 1976 SC 57; Federation of Pakistan v. Aftab Ahmad Khan Sherpao PLD 1992 SC 723; T.N. Educational Department Ministerial and General Subordinate Services Association v. State of T.N. AIR 1980 SC 379; Tata Cellular v. Union of India (1994) 6 SCC 651; Administrative Law by Sir William Wade and Christopher Forsyth, 7th Edn., 1994, p.400; Chairman, East Pakistan Railway Board, Chittagong and another v. Abdul Majid Sardar, Ticket Collector PLD 1966 SC 725; Lahore Improvement Trust, Lahore through its Chairman v. The Custodian, Evacuee Property, West Pakistan, Lahore PLD 1971 SC 811 and Khalid Malik v. Federation of Pakistan PLD 1991 Kar. 1 ref.

(lll) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Extra judicial killings in Karachi and other parts of Pakistan---President had formed opinion objectively on the basis of the material having nexus with the said ground, which in turn, had nexus with the grounds laid down in Art.58(2)(b) of the Constitution manifesting conscious and bona fide application of his mind---No exception could be taken to the opinion of the President in circumstances.

(mmm) Constitution of Pakistan (1973)

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Delayed implementation of Supreme Court judgment and ridiculing the Judiciary by the Prime Minister---Prime Minister’s belated implementation in the case of appointment of Judges and ridiculing the Judiciary, being violative of Arts.190 & 2A of the Constitution of Pakistan and the material relied upon by the President having nexus with the ground of dissolution, no exception could be taken to the opinion of the President to dissolve the National Assembly.

(nnn) Constitution of Pakistan (1973)---

----Art. 190---Executive Authority cannot be allowed to disregard the orders of Supreme Court and express displeasure in respect thereof in public for a including the National Assembly.

(ooo) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (1 of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by President under Art.58(2)(b) of the Constitution--Ground---Validity---Prime Minister, though not having required majority in the House, moved a Bill in the National Assembly designed to embarrass and humiliate the superior Judiciary initiating the process of accountability against the Judges by sending the Judges of the superior Courts on forced leave if fifteen per cent. of the members moved a motion against them---Moving such a Bill being counter to Art.209 of the Constitution, which was already in existence for taking action against. Judges before the body of Supreme Judicial Council, no exception could be taken to the opinion of the President to take action under Art.58(2)(b) of the Constitution of Pakistan in circumstances.

(ppp) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act t of 1997)]---Dissolution of National Assembly and dismissal of the Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Complete separation of Judiciary from the Executive was delayed in defiance of Supreme Court judgment---Material available on record in support of such ground had clear nexus with the ground of dissolution of National Assembly under Art. 58(2)(b) of the Constitution.

(qqq) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Illegal phone tapping and eavesdropping techniques had been adopted by the Government of the Prime Minister on a massive scale in the case of Judiciary, high Government functionaries, political leaders including those in opposition, in violation of fundamental rights of privacy granted by Arts. 9, 14 & 19 of the Constitution, which was also offense under S.25 of the Telegraph Act---Material also showed that there was a systematic intrusion into and violation of the rights of the Judiciary as an institution---No exception could be taken to the opinion of the President to take action of dissolution of Assembly under Art.58(2)(b) of -the Constitution in circumstances.

Manzoor Ahmad v. The State 1990 MLD 1488; United States v. United States District Court for the Eastern District of Michigan 407 US 297, 32 L Ed 2d 752, 92 S Ct 2125; A. v. France (1993) 17 EHRP 462; Malone v. United Kingdom (1984) 7 EHRR 14, (1983) 5 EHRR 385; Klass and others v. Federal Republic of Germany (1978) 2 EHRR 214; Charles Katz v. United States (1967) 389 US 347; United States v. Richard M. Nixon (974) 418 US 683; American Jurisprudence, 2nd Edn., Vol. 74, 1974; Administrative Law by Wade and Bradley and Constitutional Practice by Rodney Brazier ref.

(rrr) Constitution of Pakistan (1973)

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Widespread, pervasive corruption, nepotism and violation of rules in the administration of the affairs of the Government and its various bodies, authorities and corporations carried out on systematic basis--Held, such charges could validly form the basis for action under Art.58(2)(b) of the Constitution.

Federation of Pakistan v. Haji Muhammad Saifullah Khan PLD 1989 SC 166 Mian Muhammad Nawaz Sharif v. President of Pakistan PLD 1993 SC 473 ref.

(sss) Constitution of Pakistan (1973)---

----Art. 58(2)(b) [before its omission by Constitution (Thirteenth Amendment) Act (I of 1997)]---Dissolution of National Assembly and dismissal of Prime Minister and the Cabinet by the President under Art.58(2)(b) of the Constitution---Ground---Validity---Induction of a Minister in the Cabinet against whom criminal cases were pending which the interior Minister had refused to withdraw---Such charge alone, held, could not form the basis of action in terms

of Art.58(2)(b) of the Constitution but in view of the charge and its nature, if read in conjunction with the other grounds, it was relevant for action under Art.58(2)(b) of the Constitution.

Constitutional and Administrative Law by Wade and Bradley, 11th Edn., pp.120-121 and Constitutional Practice by Rodney Brazier, pp.136-137 ref.

Per Zia Mahmood Mirza, J. Contra--

----As to interpretation, scope and application of Art.58(2)(b) of the Constitution.

----As to the grounds forming basis of Dissolution Order.

----As to Dissolution Order being not sustainable.

----As to admissibility of and weight to be attached to the press-clippings which formed the material in support of charge of extra judicial killings.

----As to whether grounds of extra judicial killings were legally or factually available to the President for exercise of power under Art. 58(2)(b) of the Constitution.

----As to allegations with regard to murder of Mir Murtaza Bhutto bearing no nexus with Art.58(2)(b) of the Constitution.

----As to ground of ridiculing the judgment of Supreme Court and its non implementation/deliberate delay in implementation of same being not available to the President for taking the step of dissolving tile National Assembly.

----As to mere moving a Bill in the National Assembly by the Government could not be made a ground for dissolving the National Assembly under Art.58(2)(b).

----As to non-separation of Judiciary from the Executive by the Government being not a ground available to the President for taking action under Art.58(2)(b) of the Constitution.

----As to illegal phone-tapping and eavesdropping techniques; President having no material available with him, at the time of passing the Dissolution Order in support of the allegation, could not dissolve the Assembly under Art;58(2)(b).

----As to corruption, nepotism and violation of rules having become rampant and widespread, President had no valid basis for forming such opinion and order of dissolution of Assembly under Art.58(2)(b) of the Constitution being not justified.

----As to induction of Minister in the Cabinet who was facing criminal charge being not a ground for dissolution of Assembly or having no nexus with Art.58(2)(b) of the Constitution.

----As to failure to comply with the requirement/directions of the President to place the matter of sale of shares in Government-owned Corporations before the Cabinet for consideration/reconsideration of the decision taken by E.C.C. being not a sustainable ground for action of the President under Art.58(2)(b) of the Constitution.

Aitzaz Ahsan, Advocate Supreme Court with Mehr Khan Malik, Advocate-on-Record for Petitioner (in Constitutional Petition No.59 of 1996).

Khalid Anwar, Mian Saqib Nisar, Advocates Supreme Court, Makhdoom Ali Khan and M.A. Zaidi, Advocates-on-Record for Respondents (in both the Petitions).

Syed Iftikhar Hussain Gilani, Advocate Supreme Court and Ejaz M. Khan, Advocate-on-Record for Petitioner (in Consitutional Petition No.58 of 1996).

Sahehzad Jehangir, Attorney-General for Pakistan (on Court Notice)

Dr. Farooq Hassan, Senior Advocate Supreme Court with Syed Inayat Hussain Shah, Advocate-on-Record for Applicant (in Criminal Miscellaneous Applications Nos. 805 and 806 of 1996).

Applicant in person (in C.M.As. Nos. 848 and 935 of 1996)

Dates of hearing: 13th January to 29th January, 1997.

                 SHORT ORDER

By majority of 6 to ., for reasons to be recorded later, we pass this short order as under.

2. On 5-11-1996 the President of Pakistan passed the dissolution order under Article 58(2)(b) of the Constitution whereby he dissolved the National Assembly of Pakistan ordering further that the Prime Minister and her Cabinet shall cease to hold office forthwith. He also appointed 3rd February, 1997 as the date for holding general elections to the National Assembly as contemplated under Article 48(5) of the Constitution. On 11-11-1996 Syed Yousaf Raza Gillani, Speaker of the National Assembly, filed Constitutional Petition No.58 of 1996 directly in this Court under Article 184(3) impleading Mr. Farooq Ahmed Khan Leghari, President of Pakistan, as respondent No. l and Federation of Pakistan and Malik Miraj Khalid, Caretaker Prime Minister, as respondents Nos.2 and 3 respectively. On 13-11-1996 Mohtrama Benazir Bhutto filed Constitutional Petition No.59 of 1996 directly in this Court impleading the President of Pakistan, Federation of Pakistan and Malik Meraj Khalid as respondents Nos. l, 2 and 3 respectively. The office returned this petition on two occasions for modification of the language and finally it was fixed for hearing alongwith Constitutional Petition No.58 of 1996 on 3-12-1996 as in both these petitions validity of the dissolution order has been called in question.

3. Preliminary objection was raised that Syed Yousaf Raza Gilani as Speaker could not invoke the jurisdiction of this Court directly under Article 184(3) and that he could seek remedy in the High Court. He insisted for hearing on the question of maintainability and after a detailed hearing order was passed on 11-1-1997 that the question of maintainability would be decided alongwith merits as has been held in the case of Muhammad Nawaz Sharif v. President of Pakistan PLD 1993 SC 473 to be heard alongwith Constitutional Petition No. 59 of 1996, Constitutional Petition No.60 of 1996 was filed on 23-11-1996 by Mr. Mehmood Khan Achakzai in which respondents are same as in Constitutional Petitions Nos.58’ of 1996 and 59 of 1996. He has challenged the Eighth Amendment in the Constitution to the extent of Article 58(2)(b) only alleging that the dissolution order, dated 5-11-1996 could not be passed under that provision. Since there was challenge to the part of the Eighth Amendment and there were other matters pending in this Court in which the Eighth Amendment was challenged, all such cases were clubbed together and detailed hearing was given to decide finally the question of challenge to the Eighth Amendment made in the Constitution. These cases relating to the Eighth Amendment were heard by a Bench of seven Judges as is presently constituted and short order was passed on 12-1-1997 holding that the Eighth Amendment has come to stay in the Constitution unless it is amended in the manner prescribed in the Constitution. In the result the Civil Appeals and the Constitutional petitions on the subject were dismissed by a short order. The counsel for Mr. Mehmood Khan Achakzai stated that he does not challenge the validity of the dissolution order passed under Article 58(2)(b) on merits. Hence Constitutional Petition No.60 of 1996 was also dismissed.

4. Now remains Constitutional Petitions Nos. 58 and 59 of 1996 filed by Syed Yousaf Raza Gilani and Mohtarma Benazir Bhutto respectively which were taken up for hearing. At the initial stage in both these petitions notices were issued to the respondents and the Attorney-General for Pakistan as contemplated under Order XXVII-A, Rule 1, C.P.C. On the direction of the Court in Constitutional Petition No.59 of 1996 the respondents have filed written statement on 12-12-1996 supported by material in Volumes 1 to 9 further split in parts which are twenty-four in number. Rejoinder was filed on 7-1-1997 in two parts.

5. On 14-12-1996 Mr. Aitzaz Ahsan expressed apprehension that since election schedule was going to be announced, it was possible that the finding in Saifullah’s case PLD 1989 SC 166 to the effect that relief being discretionary in writ jurisdiction may be refused to him on the ground that the whole election machinery was in full gear. He was assured that this will be kept in view while proceeding with the case.

6. Both these petitions were heard for thirteen working days as the election day fixed for 3-2-1997 is fast approaching and during the last days the Court extended the sitting up to 1-30 and even after 2-00 p.m. From thirteen working days, nine days were given to Mr. Aitzaz Ahsan minus half day given to Dr. Farooq Hassan who appeared for M.Q.M. as intervener in both the petitions. Four days were given to Mr. Khalid Anwar, learned counsel for the respondents. The learned Attorney-General was busy in other cases and he gave the time allocated to him to Mr. Khalid Anwar who appeared for the respondents.

7. Dr. Farooq Hassan has filed C.M.A. 806 of 1996 under Order XXXIII, Rule 6, Supreme Court Rules, 1980 read with Order I, Rule 10, C.P.C. with prayer that M.Q.M. may be allowed to be joined as party as respondent. He has filed this application in Constitutional Petition No.59 of 1996 and has also filed C.M.A. No.805 of 1996 in Constitutional Petition No.58 .of 1996. Prayer in both the applications is same. According to Dr. Farooq Hassan, M.Q.M. wants to be joined as necessary party to produce record and documents in support of ground No. 1 in the dissolution order with regard to extra-judicial killings/custodial killings in Karachi. He has further stated that on the same subject he has already filed Constitutional Petition No.46 of 1994 in this Court directly which is pending. Syed Iqbal Haider is another intervener. He has filed C.M.A. No.848 of 1996 in Constitutional Petition No.59 of 1996 and C.M.A. No.939 of 1996 in Constitutional Petition No.58 of 1996 and wants to be joined as necessary party but has not been able to satisfy us that he is necessary party. Since the same documents as are produced by M.Q.M. in support of the ground in the dissolution order on the subject of extra-judicial killings are produced by the respondents in both these petitions, we do not feel inclined to pass any orders on the four civil miscellaneous applications filed in both the petitions mentioned above.

8          Our findings are as under;--

Firstly, we do not accept the contention of Mr. Aitzaz Ahsan that the President can invoke Article 58(2)(b) to dissolve the National Assembly only in such a grave situation in which Martial Law can be imposed as in 1977 and there is complete breakdown of Constitutional machinery. We are of the view that under the said provision, the President in his discretion may dissolve the National Assembly where he forms opinion on the basis of material before him having nexus with the dissolution order and Article 58(2)(b), that situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and appeal to the electorate is necessary. In support of the proposition reference can be made to the case of Khawaja Ahmad Tariq Rahim v. Federation of Pakistan and another PLD 1992 SC 646 in which it is held by majority that 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. There may be occasion for the exercise of such 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. The theory of total breakdown of Constitutional machinery as the only ground for dissolution of National Assembly has been rejected in the case of Muhammad Nawaz Sharif v. President of Pakistan PLD 1993 SC 473.

Secondly, it is not correct to say as submitted by Mr. Aitzaz Ahsan, counsel for the petitioner, that her case is on all fours with the case of Muhammad Nawaz Sharif (supra), hence she is also entitled to the same relief of restoration as was given in that case. In the case of Nawaz Sharif it was conceded by the Attorney-General for Pakistan that the dissolution order was mainly based upon the speech made by the deposed Prime Minister on 17-4-1993 on electronic media which was an act of subversion and further that session of National Assembly was called hurriedly and the President thought that it was done to initiate proceedings of impeachment against him. In such circumstances it was held that the dissolution order was not sustainable.

Thirdly, it is not correct to say that the material produced in support of the grounds of the dissolution in its totality must be present before the President at the time of forming opinion and must be scrutinized by him in detail. It would be sufficient if there is material having nexus with the order of dissolution and Article 58(2)(b) before the President after perusal of which he forms his opinion and passes order of dissolution and further there is nothing wrong with production of corroborative or confirmatory material in support of the grounds which has been made available after the date of the order of dissolution.

Fourthly, newspaper cuttings can be relied upon as material in support of the grounds.

Fifthly, in the instant case the order of dissolution on the first ground of extra judicial killings sufficient material has been produced, which has’ been properly and justifiably considered.

Sixthly, we do not feel inclined to give any finding on the second ground in the dissolution order on the subject of murder of Mir Murtaza Bhutto, brother of the petitioner, and his seven other companions for the reason that the matter is sub judice before the

Tribunal of enquiry set up which is being presided over by a Judge of this Court and also F.I.Rs. have been filed which are being investigated in accordance with the law.

Seventhly, enough material is produced in support of the third ground with regard to the belated implementation of the judgment in the case of appointment of Judges, which is short of total compliance. By this non implementation Articles 190 and 2A of the Constitution are violated. There is also adequate material produced by the respondents to show that the petitioner in her speech before the National Assembly had ridiculed the judgment of the Supreme Court in the Judges’ case which was telecast also repeatedly and in order to harass the Judges of this Court, Constitution (Fifteenth Amendment) Bill was introduced in the Parliament for initiating the process of accountability against the Judges by sending the Judges of the superior Courts on forced leave if fifteen per cent. of the members moved a motion against them. This bill ran counter to Article 209 of the Constitution which is already in existence for taking action against Judges before the body of Supreme Judicial Council. Complete separation of judiciary from the executive is being delayed and by law Executive Magistrates are given powers to sentence to imprisonment for three years, which is against the spirit of the judgment.

Eighthly, there is sufficient material available on the record in support of the fifth ground showing that under the orders of the petitioner telephones of the Judges of the Supreme Court, leaders of the political parties and high ranking military and civil officials were being taped and transcripts sent to the petitioner for reading.

A         Lastly, there is also enough material produced in support of the fifth ground in the dissolution order which covers the subject of corruption, nepotism and violation of rules.

9. For the facts and reasons stated above, we uphold the order of dissolution passed by the President and dismiss the petitions.

ZIA MAHMOOD MIRZA, J.--- I regret my inability to agree with this

order dismissing the captioned petitions, as in my humble view for which I shall record reasons later on, the order, dated 5th November, 1996 impugned in these petitions cannot be sustained, with the result, that the National Assembly, the Prime Minister and the Cabinet stand restored.

            (Sd,)

Zia Mahmood Mirza, J

                                 JUDGMENT

SAJJAD ALI SHAH, C J.---Both the Constitutional petitions captioned above have been filed under Article 184(3) of the Constitution in which is challenged the proclamation dated 5th November, 1996 whereby the President of Pakistan has dissolved the National Assembly exercising his power under Article 58(2)(b) of the Constitution and further directing therein that the Prime Minister and her Cabinet. shall cease to hold office forthwith. Petitioner Mohtrama Benazir Bhutto filed her petition directly in this Court on 13-11-1996 while petitioner Yousaf Raza Gilani, who was Speaker of the National Assembly at the relevant time when the Proclamation was issued, filed his petition directly in this Court on 11-11-1996, which was two days before the filing of the petition by Mohtrama Benazir Bhutto. It would be worthwhile to mention here at the very outset that Mohajir Qoumi Movement (MQM) filed Civil Miscellaneous Application No.805 of 1996 in Constitutional Petition No.58 of 1996 and Civil Miscellaneous Application No.806 of 1996 in Constitutional Petition No.59 of 1996 on 7-12-1996 under Order 1, Rule 10, C.P.C. with prayer that MQM should be impleaded as necessary party as respondent in these petitions. Likewise, Syed Iqbal Haider filed Civil Miscellaneous Application No.848 of 1996 in C.P. No.59 of 1996 and Civil Miscellaneous Application No.935 of 1996 in C.P. No.58 of 1996 on 11-12-1996 under Order 1, Rule 10, C.P.C. with prayer to be joined in the proceedings as one of the necessary parties. Syed Iqbal Haider has filed these civil miscellaneous applications in his capacity as a Pakistani citizen and also as Chairman of Muslim Welfare Movement of Pakistan which, he claims, works for human rights, fundamental rights, rule of law and supremacy of the Constitution. Mr. Aitzaz Ahsan, learned counsel in C. P. No. 59 of 1996 also filed Civil Miscellaneous Application No.6 of 1997 seeking dismissal of the application filed by MQM for impleadment as a party in the proceedings against which reply is filed by MQM which is registered by the office unnecessarily as C.M.A. No.7 of 1997. Since it is a reply, there was no need of giving it a separate number as it can be considered as reply to C.M.A. No.6 of 1997. We shall come to these civil miscellaneous applications a little later.

2. It would be pertinent to mention here that Constitutional Petition No.60 of 1996 was filed by Mahmood Khan Achakzai under Article 184(3] of the Constitution, challenging the dissolution order passed by the President on 5-11-1996 and questioning the validity of the Eighth Amendment to the extent of Article 58(2)(b) of the Constitution taking stance that such provision is nonexistent in the Constitution and, therefore, the President was not competent to exercise his discretionary power under the provision which was not validly available in the Constitution. Qazi Muhammad Jamil, learned Advocate Supreme Court, appeared for petitioner Mahmood Khan Achakzai and at his request his petition was tagged alongwith two other Constitutional petitions which are under consideration right now as in all the three common order impugned is the Proclamation dated 5-11-1996 issued by the President of Pakistan under Article 58(2)(b) of the Constitution. Qazi Muhammad Jamil further stated that apart from challenging the dissolution order he had also challenged the validity of Article 58(2)(b) and to that extent the validity of the Eighth Amendment is also called in question. The Eighth Amendment was in challenge in many other cases which are pending. In such circumstances, it was considered proper to hear the cases in which there was challenge to the validity of the Eighth Amendment. Hence all such cases were directed to be bunched together for hearing and such order was passed by a Bench of three Judges on 3-12-1996. Later, all such cases in which the Eighth Amendment was challenged, including C.P. No.60 of 1996, were heard together by a Bench of seven Judges of this Court and after a detailed hearing, short order was passed on 12-1-1997.

3. It was held in the short order mentioned above that the question as to what is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality bur. 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. It was also held that the main features reflected in the Objectives Resolution 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 since those parliaments did not touch this amendment, it has come to stay in the Constitution unless amended in the manner contemplated under Article 239 of the Constitution. It was also held that Article 58(2)(b) 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. Resultantly, two civil appeals and three Constitutional petitions including C.P. No.60 of 1996 were dismissed.

4. Now we take up the question of maintainability of the petitions which are pending before us. They have been filed directly in this Court under Article 184(3) of the Constitution. In fact this question as such was raised when C.P. No.58 of 1996 was filed by petitioner Yousaf Raza Gilani as Speaker of the National Assembly which was dissolved by the Proclamation dated 5-11-1996. He was asked as to which of his fundamental rights was violated by the dissolution order dated 5-11-1996 as in the memorandum of the petition .he has not specifically stated so. The counsel for the petitioner submitted that in the petition it is mentioned that Article 4 of the Constitution was violated, which is right of individual to be dealt with according to law, and the petitioner invoked jurisdiction of this Court under Article 187 for complete justice after invocation of Article 190 which requires that all executive and administrative agencies shall act in aid of the Supreme Court. He further submitted that the petitioner claimed violation of his fundamental right under Article 17 of the Constitution and heavily relied upon the case of Mian Muhammad Nawaz Sharif v. President of Pakistan and others (PLD 1993 SC 473). In the said case it was held that Article 17 included not merely the right to form a political party but also comprised consequential rights. In respect of Article 17(2), which envisages right to form or be a member of a political party, it was held that it not only guarantees the right to form or be a member of political party but also to operate a political party and the forming of a political party necessarily implies the right of carrying on of all of its activities as otherwise formation itself would be of no consequence. In other words functioning is impliedly allowed in the formation of the party. When it was put to Syed Iftikhar Hussain Gilani, learned counsel for petitioner Yousaf Raza Gilani, that the right under Article 17(2) of the Constitution enunciated in the case of Mian Muhammad Nawaz Sharif (supra) could be invoked by a leader of a political party which had formed the Government and could not be invoked by the Speaker of the National Assembly, who continued as Speaker of the defunct National Assembly and as head of the Secretariat of that Assembly continued to enjoy all the perks and fringe benefits which went with that post including flying of the National flag, it was submitted by the learned counsel that this right as contemplated under Article 17(2) can be invoked even by a member of the political party and since in the case of Mian Muhammad Nawaz Sharif the facility was allowed that the question of maintainability would be considered alongside the merit, the same facility should be given to the petitioner as well. It is correct that in the case of Mian Muhammad Nawaz Sharif this Court had allowed the question of maintainability of the petition to be considered alongwith merits. The same benefit could be given to petitioner Yousaf Raza Gilani in C.P. No.58 of 1996 particularly when the order of dissolution in his petition and that of Mohtrama Benazir Bhutto in C.P. No.59 of 1996 is common and time was running out as the elections were to be held on 3rd February, 1997. Hence, it was ordered that both the petitions be heard together on the same lines as allowed in the case of Mian Muhammad Nawaz Sharif. When the hearing of these Constitutional petitions commenced the learned counsel for the Speaker did not appear and in fact neither he nor any body else appeared on his behalf to pursue the matter further and lost interest.

5. Since in both the petitions which are under consideration challenge is made to the validity of the Proclamation dated 5-11-1996 whereby the President has dissolved the National Assembly exercising his power under Article 58(2)(b) of the Constitution, the Proclamation of dissolution is reproduced verbatim as under:-

“Whereas during the last three years thousands of persons in Karachi

and other parts of Pakistan have been deprived of their right to life in

violation of Article 9 of the Constitution. They have been killed in

Police encounters and Police custody. In the speech to Parliament on

29th October, 1995 the President warned that the law enforcing

agencies must ensure that there is no harassment of innocent citizens in the fight against terrorism and that human and legal rights of all persons are duly protected. This advice was not heeded. The killings continued unabated. The Government’s fundamental duty to maintain law and order has to be performed by proceeding in accordance with law. The coalition of political parties which comprise the Government of the Federation are also in power in Sindh, Punjab and N.-W.F.P. but no meaningful steps have been taken either by the Government of the Federation or at the instance of the Government of the Federation, by the Provincial Governments to put an end to the crime of extra judicial killings which is an evil abhorrent to our Islamic faith and all canons of civilized Government. Instead of ensuring proper investigation of these extra judicial killings and punishment for those guilty of such crimes, the Government has taken pride that, in this manner, the law and order situation has been controlled. These killings coupled with the fact of widespread interference by the members of the Government, including members of the ruling parties in the National Assembly, in the appointment, transfer and posting of officers and staff of the law enforcing agencies, both at the Federal and Provincial levels, has destroyed the faith of the public in the integrity and impartiality of the law-enforcing agencies and in their ability to protect the lives, liberties and properties of the average citizen.

And whereas on 20th September, 1996 Mir Murtaza Bhutto, the brother of the Prime Minister’, was killed at Karachi alongwith seven of his companions including the brother-in-law of a former Prime Minister, ostensibly in an encounter with the Karachi Police. The Prime Minister and her Government claim that Mir Murtaza Bhutto has been murdered as a part of a conspiracy. Within days of Mir Murtaza Bhutto’s death the Prime Minister appeared on television insinuating that the Presidency and other agencies of State were involved in this conspiracy. These malicious insinuations, which were repeated on different occasions, were made without any factual basis whatsoever. Although the Prime Minister subsequently denied that the Presidency or the Armed Forces were involved, the institution of the Presidency, which represents the unity of the Republic, was undermined and damage caused to the reputation of the agencies entrusted with the sacred duty of defending Pakistan. In the events that have followed, the widow of Mir Murtaza Bhutto and the friends and supporters of the deceased have accused Ministers of the Government, including the spouse of the Prime Minister, the Chief Minister of Sindh, the Director of the Intelligence Bureau and other high officials of involvement in the conspiracy which, the Prime Minister herself alleged led to Mir Murtaza Bhutt&s ‘murder. A situation has thus arisen in which justice, which is a fundamental requirement of our Islamic Society, cannot be ensured because powerful members of the Federal and Provincial Government who are themselves accused of the crime, influence and control the law-enforcing agencies entrusted with the duty of investigating the offenses and bringing to book the conspirators.

And whereas on 20th March, 1996 the Supreme Court of Pakistan delivered its judgment in the case popularly known as the Appointment of Judges case. The Prime Minister ridiculed this judgment in a speech before the National Assembly which was shown more than once on nationwide television. The implementation of the judgment was resisted and deliberately delayed in violation of the Constitutional mandate that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. The directions of the Supreme Court with regard to regularization and removal of Judges of the High Courts were finally implemented on 30th September, 1996 with a deliberate delay of six months and ten days and only after the President informed the Prime Minister that if advice was not submitted in accordance with the judgment by end (of) September, 1996 then the President would himself proceed further in this matter to fulfill the Constitutional requirement.

The Government has, in this manner, not only violated Article 190 of the Constitution but also sought to undermine the independence of the judiciary guaranteed by Article 2A of the Constitution read with the Objectives Resolution.

And whereas the sustained assault on the judicial organ of State has continued under the garb of a Bill moved in Parliament for prevention of corrupt practices. This Bill was approved by the Cabinet and introduced in the National Assembly without informing the President as required under Article 46(c) of the Constitution. The Bill proposes inter alia that on a motion moved by fifteen per cent. of the total membership of the National Assembly, that is any thirty-two members, a Judge of the Supreme Court or High Court can be sent on forced leave. Thereafter, if on reference made by the proposed’ special committee, the Special Prosecutor appointed by such Committee, forms the opinion that the Judge is prima facie guilty of criminal misconduct, the special committee is to refer this opinion to the National Assembly which can, by passing a vote of no confidence, remove the Judge from office. The decision of the Cabinet is evidently an attempt to destroy the independence of the judiciary guaranteed by Article 2A of the Constitution and the Objectives Resolution. Further, as the Government does not have a two-third majority in Parliament and as the Opposition Parties have openly and vehemently opposed the Bill approved by the Cabinet, the Government’s persistence with the Bill is designed not only to embarrass and humiliate the superior judiciary but also to frustrate and set at naught all efforts made, including the initiative taken by the President, to combat corruption and to commence the accountability process.

And whereas the judiciary has still not been fully separated from the executive in violation of the provisions of Article 175(3) of the Constitution and the dead-line for such separation fixed by the Supreme Court of Pakistan.

And whereas the Prime Minister and her Government have deliberately violated, on a massive scale, the fundamental right of privacy guaranteed by Article 14 of the Constitution. This has been done through illegal phone-tapping and eaves-dropping techniques. The phones which have been tapped and the conversations that have been monitored in this unconstitutional manner includes the phones and conversations of Judges of the Superior Courts, leaders of political parties and high-ranking military and civil officers.

And whereas corruption, nepotism and violation of rules in the administration of the affairs of the Government and its various bodies, authorities and corporations has become so extensive and widespread that the orderly functioning of Government in accordance of the provisions of the Constitution and the law has become impossible and in some cases, national security has been endangered. Public faith in the integrity and honesty of the Government has disappeared. Members of the Government and the ruling parties are either directly or indirectly involved in such corruption, nepotism and rule violations. Innumerable appointments have been made at the instance of members of the National Assembly in violation of the law declared by the Supreme Court that allocation of quotas to MNAs and MPAs for recruitment to various posts was offensive to the Constitution and the law and that all appointments were to be made on merit, honestly and objectively and in the public interest. The transfers and postings of Government servants have similarly been made, in equally large numbers, at the behest of members of National Assembly and other members of the ruling parties. The members have violated their oaths of office and the Government has not for three years taken any effective steps to ensure that the legislators do not interfere in the orderly executive functioning of Government.

And whereas the Constitutional requirement that the Cabinet together with the Ministers of State shall be collectively responsible to the National Assembly has been violated by the induction of a Minister against whom criminal cases are pending which the Interior Minister has refused to withdraw. In fact, at an earlier stage, the Interior Minister had announced his intention to resign if the former was inducted into the Cabinet. A Cabinet in which one Minister is responsible for the prosecution of a Cabinet colleague cannot be collectively responsible in any matter whatsoever.

And whereas in the matter of the sale of Burmah Castrol Shares in PPL and BONE/PPL shares in Qadirpur Gas Field involving national assets valued in several billions of rupees, the President required the Prime Minister to place the matter before the Cabinet for consideration/reconsideration of the decisions taken in this matter by the ECC. This has still not been done, despite lapse of over four months, in violation of the provisions of Articles 46 and 48 of the Constitution.

And whereas for the foregoing reasons, taken individually and collectively, I am satisfied 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.

Now therefore, in exercise of my powers under Article 58(2)(b) of the Constitution I, Farooq Ahmad Khan Lxghari, President of the Islamic Republic of Pakistan do hereby dissolve the National Assembly with immediate effect and the Prime Minister and her Cabinet shall cease to hold office forthwith.

Further, in exercise of my powers under Article 48(5) of the Constitution I hereby appoint 3rd February 1997 as the date on which general elections shall be held to the National Assembly.

(Sd.)

Farooq Ahmad Khan Leghari, President.”

6. In C.P. No.59 of 1996 petitioner Mohtrama Benazir Bhutto has stated the facts that she as the Chairperson of Pakistan People’s Party (PPP) had entered into an agreement with Pakistan Muslim League, Junejo Group, PML(J), in September, 1993 and formed Pakistan Democratic Front (PDF) with her as its Chairperson and this agreement provided for electoral alliance between the two parties on the basis of which the elections of October, 1993 were contested and having won from NA-161 (Larkana III) Sindh, she commanded support of the majority of the members of the National Assembly and became the Prime Minister. She continued to enjoy the support of the majority in the National Assembly as Leader of the House until 5-11-1996. She appointed respondent No.l, Sardar Farooq Ahmad Khan Leghari, as Federal Minister for Foreign Affairs and subsequently nominated him as candidate of PDF to contest for the office of the President. He was elected as President of Pakistan with her fullest support as PDF backed candidate. There was turning point in relationship between the two when allegations were hurled against the President by the opposition that he made a fictitious land deal while he was Federal Minister with Mr. Younus Habib of Mahran Bank and Mr. Leghari came to believe that his wrong doings had been exposed deliberately by the husband of the petitioner. She assured him several times that she or her husband had nothing to do with

exposure but he became bitter and gradually became hostile and adversarial. Mr. Leghari started showing utter disregard for the petitioner and started sending sages to the Houses of the parliament and filing withdrawing references in Supreme Court without advice or consultation of the Prime Minister. On the September, 1996 petitioner’s brother Mir Murtaza Bhutto was brutally ordered near his house in Clifton Karachi and on the following day, which was Saturday (21st September, 1996) when it was a closed holiday of the Supreme Court, a reference was filed by the President in the Supreme Court. On 23rd September, 1996 when it was Soyem of late Mir Murtaza Bhutto, the President chose to send his message to the two Houses of the Parliament again without the petitioner’s required advice. Such acts showed vindictive and malicious mind of the respondent/President. On 25th September, 1996 the President sent letters to e Governors of Sindh and Punjab, complaining about law and order situation On 26th September, 1996 the President wrote to the petitioner informing her that he was not accepting any more resignations of the Judges affected by the judgment of the Supreme Court and required her to denotify all of them. It is mentioned in the petition that these irrefutable facts prove beyond any shadow of doubt the most hostile, biased, pre-determined and vindictive state of mind of the respondent/President who was in no position to act in a fair, just and reasonable manner as required by the oath of his office. All subsequent acts on the part of respondent No.l/President including the impugned order have been issued by him in the same state of mind with clear mala fide, hostile, and vindictive motives to harm the petitioner in her office, career, person, reputation and dignity. As such they are violative of Articles 9, 14 and 17 of the constitution. It is further stated in the petition that without justification in fact or in law, and moved only by a consuming personal malice towards the petitioner, respondent No.l (President), in the early hours of November 5, 1996, passed the impugned order purporting to dissolve the National Assembly of Pakistan and further declaring that the petitioner and her Cabinet shall cease to hold office at once. He thereafter appointed respondent No.3 (Malik Meraj Khalid) to be the caretaker Prime Minister of Pakistan.

7. In C.P. No.58 of 1996 petitioner Yousaf Raza Gilani has narrated the facts in his own way and stated that in the last couple of months before the dissolution order, campaign was launched by certain quarters that the Assemblies were likely to be dissolved by the President who would invoke his discretionary powers under Article 58(2)(b) of the Constitution. The newspapers were full of such speculations and the President kept on meeting, entertaining and supporting such persons who were known to be hostile to the present system of the parliamentary democracy in the country. The petitioner also made a grievance that the National Assembly was functioning smoothly, which could be judged from the fact that the President had sent a message to the petitioner as Speaker of the National Assembly on 23-9-1996 to consider and pass legislation regarding accountability. On 3-11-1996 the session of the National Assembly commenced to finalize composition of the select committee for the purpose of preparing a final draft accountability bill to be tabled before the National Assembly as expeditiously as possible. However, to forestall such a laudable move by the National Assembly, the President dissolved the National Assembly by the impugned order dated 5-11-1996. It was further averred in the petition that the powers conferred by Article 58(2)(b) of the Constitution are not to be subjectively applied but required existence of such objective conditions that show that the Government of the Federation cannot be carried out in accordance with the Constitution. In the instant case there was no justification legal or otherwise for exercise of such discretionary power as everything went smoothly and there was no apprehension of total collapse of Constitutional machinery and particularly there was no justification at all for dissolution of the National Assembly which was performing its functions quite satisfactorily.

8. On behalf of the respondents in C.P. No.59 of 1996 a very detailed and voluminous written statement has been filed, which runs into 200 pages. Attempt has been made to give reply in like manner in which the memorandum of the petition has been drafted. The sum total, very briefly stated, is that the allegations made by the petitioner with regard to the mala fides of the President or his misuse or abuse of power under Article 58(2)(b) of the Constitution are denied and endeavour is made to justify the Proclamation of dissolution of the National Assembly on the grounds specified therein and further amplified with supportive facts and documents. It is submitted in the written statement that the Proclamation of dissolution was justified as there was abuse of power by the Government resulting into corruption which had been institutionalized. Deliberate attempt was made to weaken the institutions and to bring about their collapse and downfall. The judgment of the Supreme Court in the case of appointment of Judges was disobeyed and the Judiciary was ridiculed. There was tapping of the telephones including Judges of the superior Courts and in order to undermine the independence of the Judiciary a Bill was moved in the Parliament to take action against the Judges by initiating proceedings against them in the National Assembly. The Federal Government had failed to separate the judiciary from the executive, and there were extra judicial killings in Karachi. Even the brother of the Prime Minister was killed by the Police and she claimed it to be a conspiracy and defended the Police. £200,000 were spent to engage private detectives under the guise of engaging Scotland Yard to solve the mystery of the murder in which Mir Murtaza Bhutto was killed alongwith his other seven companions. Illegal appointments were made on the recommendations of the public representatives like MNAs and MPAs. The public exchequer was treated as personal kitty of the Prime Minister and her cohorts. The nationalised banks were looted and the banking sector was bffectively destroyed. Even funds from Bait-ul-Mal were not spared. The Capital Development Authority’s plots were distributed amongst the favourites in disregard of the rules and regulations. Large scale illegalities were committed in Oil and Gas Development Corporation and Pakistan Steel Mills, and there were write offs of bank loans. Multi-Million dollar properties were acquired by the Prime Minister, her spouse, and her in laws in foreign lands. In such circumstances, a situation had arisen in which the President came to the conclusion that the Government of the Federation was not being carried on in accordance with the Constitution and an appeal to the electorate was necessary.

9. In the second part of the written statement, facts as stated in the petition, are denied paradise. Allegation in paragraph 3 of the petition is denied by asserting that the petitioner did not enjoy the support or could claim the confidence of any clear majority in the National Assembly and she did not have any stable, long term majority in the National Assembly or Senate. She was only able to cobble together short-term, fluctuating “working” majorities as and when the need arose. This is borne out, inter alia, by the legislative record of the Government headed by the petitioner. The necessary legislative work was, in fact, carried out by the petitioner’s Government by means of repeated promulgation of Ordinances. The petitioner made rare appearances in the Parliament.

10. Assertion in paragraph 4 of the petition is that the petitioner nominated Sardar Farooq Ahmed Khan Leghari as candidate of PDF to contest election to the office of the President. In the written statement, it is submitted that respondent No. l was PDF candidate for president ship, which is normal function in the system of parliamentary democracy, but after his election as President, he resigned from the membership of Pakistan People’s Party. It is further claimed that, as President, he was obliged to act always in the national interest, free from all narrow and parochial loyalties or party concerns of any nature whatsoever. Allegation in paragraph 5 of the petition is denied that a turning point came between the President and the Prime Minister when the opposition parties levelled allegations against the President of corruption that he had made a fictitious land deal with Mr. Younus Habib of Mehran Bank while the former was Federal Finance Minister. It is asserted that the petitioner’s Government itself had set up a judicial commission to investigate the entire matter and in the report of the Commission the President has been completely exonerated. The report of the. Commission was not published by the Federal Government for mala fide intention. It is denied in the written statement that there was any conceivable nexus between the allegations in the petition and the dissolution order. It is denied in the written statement that there was any element of personal hostility, and it was imperative to understand the concept of an institutional responsibility which transcends personal feelings.

11. Allegation in paragraph 6 of the petition is denied that the petitioner showed the President due respect and regard but he showed utter disregard for her. It is asserted in the written statement that the petitioner should not choose to personalize every Constitutional, or legal relationship. The President was and is fully cognizant of his Constitutional role, duties and obligations, including, inter alia, his oath of office, which required him to discharge his duties without illwill or favour to any person. It is further stated in the written statement that the petitioner, however, unfortunately regarded the President only as “part” of her Government, and indeed went to the extent of proclaiming that the Supreme Court was also “part” of her Government, and failed to realize that the office of the President, and judicial institutions, exist independently of the Government of the day. It is further stated that the petitioner should not have objected to the sending of the messages by the President to the Parliament and filing of the Reference in the Supreme Court without her advice. Nor was it correct for the petitioner to say that she obtained ex post facto approval of the Cabinet to the Reference just to placate the President hoping to avoid any conflict as these acts were done as permitted under the Constitution and the law. It is also stated in the written statement that when there was ex post facto approval of the Cabinet to the filing of the Reference, then what was the need of holding grievance against the filing of such Reference in the Supreme Court without advice of the Prime Minister.

12. Allegations in paragraphs 7, 8 and 9 of the petition are that the President had acted with “timing”, which exposed the malice and prejudice in his mind. He filed Reference in the Supreme Court on the following day of the tragedy in which Mir Murtaza Bhutto and his other companions were brutally murdered. It was Saturday and a closed holiday for the Supreme Court. On 23rd September, 1996 when there was “Soyem” of Mit: Murtaza Bhutto, the President sent the message to the two Houses of the Parliament without required advice of the Prime Minister. These allegations are denied in the written statement on the ground that no doubt Mir Murtaza Bhutto’s murder was a tragedy, genuinely mourned all over the country, but it was regrettable that the petitioner attempted to gain political mileage from it and squeezed the last drop of public sympathy from this tragedy. She rushed to Karachi, but did not proceed straight away to hospital and instead went to Bilawal House where she spent more than two hours before arriving at the hospital at around 5.00 a.m., Subsequently, Mir Murtaza’s widow levelled the responsibility for the murder of her husband on the law enforcing agencies and also on the petitioner’s husband, which are matters of public record.

13. It is stated in the written statement that so far filing of the Reference is concerned, no conceivable benefit could accrue to the President from filing the Reference on Saturday and not on Sunday. It is a well-known-fact that although Saturdays were holidays at the relevant time, the Chief Justice of Pakistan routinely attended his office on Saturdays and the Supreme Court building was not kept closed on that day or other Saturdays. The officers and the staff attended the office of the Court on Saturdays. There is a reception section which is kept open 24 hours a day throughout the year. The physical act of filing a reference is a ministerial action which was routinely done. Indeed, contrary to what the petitioner is asserting, the Reference was only physically filed on the 21st, and it was registered with the Registrar’s office as late as the 25th. In such circumstances the wild insinuations and casting aspersions in relation to a wholly

innocuous act are an called for and there is no justification for imagining conspiracies and pre-determined plans which have no remotest connection with reality. In fact grant of ex post facto approval by the Cabinet to the filing of the Reference amounts to the approval of the same after which raising of objection is not proper and the petitioner cannot be allowed to approbate and reprobate in the same breath.

14. Allegation is denied that sending of message to the Parliament is part of a timetable or in that respect the President was in any manner vindictive or actuated with malice towards the petitioner or any other person. The message related to the issue of corruption by holders of public offices and - executive posts. The message was not directed against any particular individual or party. It had no conceivable connection with Mir Murtaza’s murder. The message to the Parliament as well as Reference to the Supreme Court had been drafted much earlier than the day on which the tragedy of the murder of Mir Murtaza Bhutto took place. The petitioner claims grief and agony but she gave numerous public interviews which were to her political advantage, and objected to the sending of the message to the Parliament in discharge of his Constitutional responsibility and attributed this to be an act of callous indifference shown to her by the President. It is stated in the written statement that whenever issue of corruption is raised, the petitioner regards it as personal threat and affront and whoever speaks of accountability is considered at once as her adversary.

15. Allegations in paragraphs 10, 11 and 12 in the petition are denied in the written statement which are suggestive of predetermined plan under which the President acted to justify issue of the Proclamation of dissolution of the National Assembly. It is stated in the written statement that the President wrote letters to the Governors in connection with the deterioration of law and order situation which was more responsibility of the executive Government. It is averred that she petitioner should not have linked the matter of appointments of Judges of the Superior Courts with the condolence ceremony in relation to Mir Murtaza’s death particularly when the petitioner’s Government had been openly defying and disobeying the orders of the Supreme Court in the Judges case. Things had come to such a pass that finally the President was impelled to take action. There was no bias or hostility, nor was there any pre-determined or vindictive state of mind so far the President is concerned who acted fairly, justly and reasonably in accordance with his oath of office.

16.     In C.P. No.59 of 1996, the impugned order of dissolution dated 5-11-1996 is appended as annexure ‘A’ which has been reproduced verbatim in paragraph 5 of this judgment. On the same day, in the evening, the President addressed the nation, which got coverage on Radio and Television. In this address he has given details of the grounds on the basis of which the Proclamation in dispute was issued. It is not necessary to go into those details at this stage but it would be pertinent to point out the part of the address in which it is stated as to how and why the President felt it necessary to act as he did:

“My dear countrymen, Asslamo-allakum. This morning, in the supreme national interest under Article 58(2)(b) of the Constitution I have dissolved the National Assembly and the Prime Minister and her Cabinet have ceased to hold office forthwith. Further, in exercise of my powers under Article 48(5), I have declared that fresh elections to the National Assembly be held on February 3, 1997.1 have also appointed Malik Meraj Khalid as the Caretaker Prime Minister.

As the elected President of your country and a crusader for the restoration of democracy in Pakistan, my belief in the appropriateness of a democratic system of Government is without doubt and unflinching. I have taken this difficult decision within the Constitution to dissolve the National Assembly to save democracy from subversion from within. My paramount loyalty is to Allah, to my country and its Constitution. All office holders including the President, the Prime Minister and other high functionaries of the State are under oath to uphold the law and the Constitution. Elected representatives are under an additional obligation to their electorate to work for their interest and to respect the trust reposed in them. The act of voting, and the election to office of the majority party or group is only one part of the democratic process. The proper and efficient functioning of the Government, respect for the law, honest conduct of the affairs of the Government, and then to stand the test of accountability when called to do so, is as much part of the essence of democracy as the right to hold office and govern on behalf of the people. In Islamic tradition and under our Constitution, no individual or party is above the law. When a Government and its functionaries continuously and repeatedly violate the very law which forms the basis of its legality, then it is guilty of violating not only the Constitution but also the norms of democracy and the trust which has been reposed in them by the electorate.

After very careful consideration of the growing evidence, and without malice or favour towards anyone. I have become convinced that the Government of the PDF coalition headed by Mrs. Benazir Bhutto was violating a number of provisions of the Constitution.”

17. In the dissolution order dated 5-11-1996, grounds are mentioned but they are not enumerated. The first ground in the dissolution order pertains to extra judicial killings in Karachi. It is alleged that during the last three years, thousands of persons in Karachi and other parts of Pakistan have been deprived of their right to life in violation of Article 9 of the Constitution. They have been killed in police encounters and police custody. In the speech to the Parliament on

29th October, 1995, the President warned that the law enforcing agencies must ensure that there is no harassment of innocent citizens in the fight against terrorism and that human and legal rights of all persons are duly protected. The advice was not heeded. The killings continued unabated. No meaningful steps were taken either by the Government of the Federation or, at the instance of the Government of the Federation, by the Provincial Government to put an end to the crime of extra judicial killings which is an evil abhorrent to our Islamic faith and all canons of civilized Government. Instead of ensuring proper investigation of these extra-judicial killings, the Government has taken pride in proclaiming that the law and order situation has been controlled. These killings coupled with the fact of widespread interference by the members of the Government, including members of the ruling parties in the National Assembly, in the appointments, transfers and postings of officers and staff of the law-enforcing agencies, both at the Federal and Provincial levels, has destroyed the faith of the public in the integrity and impartiality of the law-enforcing agencies and in their ability to protect the lives, liberties and properties of the average citizen.

18. Extra judicial killings or killings in encounters as a ground for dissolution of the National Assembly is severely criticized and assailed in the petition as unsustainable for the following reasons. Firstly, it is a matter which relates to law and order situation which is a subject not in the Federal domain but relates to Provincial Governments. Secondly, on this subject as far as Karachi is concerned, Mr. Kamaluddin Azfar, who was then Governor of Sindh and later retained as such by the President under the caretaker set-up, defended these killings in his speech made on September 12, 1996 before an important forum of National Defence College. The copy of that speech was sent by the Governor to Syed Iqbat Haider, the then Minister for Human Rights vide Governor’s D.O. No.PS/Gov/P/96/5308 dated 14th September, 1996. The daily News of November 9, 1996 also reported on the subject and the earlier and present views of the Governor. The copy of the letter dated 14th September, 1996 of Governor Kamaluddin Azfar to Syed Iqbal Haider is at page 54 of Volume II of the petition. The copy of the speech delivered by the Governor at the National Defence College on 12th September, 1996 is in the same volume from pages 55 to 98 and the caption of the speech is ‘Karachi, Past, Present and Future’ by Kamal Azfar.

19. It is not necessary to reproduce the whole speech but it is worth -mentioning that in the beginning of the speech the history of the city of Karachi is traced from the days of Alexander the Great to the Port of Karachi which was established under the Karachi Port Trust Act, 1881. In 1947, after partition, Karachi was declared as capital of Pakistan and its population has increased by twenty times from half a million to over 10 million after partition. Under another sub-heading of Political Developments since 1947 it is stated that after partition, Karachi, as federal capital, remained a Muslim League city and after shifting of capital from there, the inhabitants of Karachi felt the sense of rejection which paved the way for ethnic discontent. In 1965 elections, Muslim League was split into Convention Muslim League headed by President Ayub Khan and the Council Muslim League which was the part of the Combined Opposition Parties. The Council Muslim League stood for restoration of 1956Constitution, which was parliamentary in nature, and opposed indirect election system under the Basic Democracies introduced in the 1962-Constitution which envisaged Presidential form of Government. The Convention Muslim League won the elections in Karachi and the victory procession was fired upon leading to carnage in Liaquatabad. During 1970 elections, Karachi city was polarized between the Socialist PPP and the religious parties which described socialism as un-Islamic, and also there was domination of Barelvi and Deobandi Schools of thought supported by immigrants with followers in Urdu-speaking areas.

20. From the speech some relevant paragraphs are reproduced verbatim, which speak for themselves:-

“The 1985-elections which were held on non-party basis opened the doors for fresh political alignments. The non-party elections gave rise to ethnic, sectarian and other considerations. These were strengthened by ethnic riots which started from Bushra Zaidi’s case of 1985 and reached the peak of the crescendo with the Aligarh Colony massacre of December 14-15, 1986. In the meantime the All Pakistan Mohajir Students Organization (APMSO) which was formed in 1978 had converted into a political force known as MQM on August 7, 1986 in a rally, accompanied by gun fire, held at Nishtar Park.

A major consequence of this ethnic polarization was to give rise to the MQM and the Punjabi Pakhtoon Itehad. It also sounded the death-knell for the JUP and JI which became extinct. The only other party apart from MQM with electoral support in Karachi remained the PPP which secured two NA seats and seven PA seats in 1988. The 1993 Provincial Assembly Elections were more or less a repeat of the 1988 Elections with the MQM and PPP being the single largest and second largest parties and JUP and JI and other virtually extinct. The MQM did not contest the 1993 elections for the NA, the seats being split between PPP and Muslim League.

In the Local Body elections held in 1987 the MQM swept the polls in Karachi and Hyderabad returning Dr. Farooq Sattar, the present leader of the Opposition in Sindh Assembly, and Senator Aftab Sheikh as Mayors of Karachi and Hyderabad respectively. The JUP and JI were wiped out. The only other party which remained in the field was the PPP which secured the Deputy Mayorship of districts West and South.

The MQM introduced violence into the politics of Karachi. For a whole decade between 1985 and 1995 Karachi was caught in the grip of violence. The violence continued unabated even though the MQM had the lion’s share in the power for half the period: first in cooperation with the PPP during 1988 and 1989 and then in collaboration with Mian Nawaz Sharif in 1990, 1991 and 1992.

At the time when the Army Operation started in June, 1992 the MQM was at the peak of its power. Alongwith Ministers at the Federal level, including the Ministry of Production which enabled the MQM to over staff the Pakistan Steel at the cost of driving it to bankruptcy from which it was rescued by Lt.-Gen. Sabieh Qamaruzaman, the MQM held the key Ministries of Education and Local Government, the biggest employers, in the Province of Sindh and the city of Karachi. Both the Mayors of Karachi and Hyderabad, the two big cities of the Province, belonged to the MQM. Yet its grip on power did not appease the MQM’s lust for bloodshed.

The PPP renegade Chief Minister Jam Sadiq had minority support from the rural areas and was propped up by Mr. Altaf Hussain who in return gained control of Karachi. Karachi was run like a state within a state. From 1990 to 1992 all DCs and SHOs were appointed in Karachi at the behest of MQM. The streets of Karachi were adorned with the banners which said “Death to those who disobey the Leader”. According to insiders, as many as 1500 MQM dissidents were killed. Among those who did not follow the path of blind obedience to Altaf Hussain was the Chief of MQM Azeem Tariq, assassinated in cold blood by MQM henchmen. In addition the MQM murdered scores of PPP activists.

Like other militant organizations like Khalsa and Tamil Tigers, the MQM once in orbit, were outside the gravitational force of its sponsors principally General Hamid Gul, Head of the ISI and the then Chief Minister Sindh Syed Ghous Ali Shah, who used the MQM to settle scores with the JI Mayor Abdul Sattar Afghani.

The Army Operation in Karachi failed because there was a difference of perception between the then President, Chief of the Army Staff and the Prime Minister. On the very first day of Army Operation the then President called the Corps Commander on three occasions asking him to stop the operation which was thus doomed to failure.

           Present Situation

The situation in Karachi when I was commissioned as Governor Sindh in mid 1995 is given in Annexures “A” & “B”. The situation today is also shown in the slides. There is a sea change.

The law and order situation in whole of the Sindh Province particularly in Karachi is well under control and has shown a tremendous improvement since August, 1995. The downward trend in the killings of citizens and members of law-enforcing agencies including police personnel at the hands of terrorists has been maintained by effective measures. I take pride in saying that the number of such killings has been brought down from 276 during the month of June 1995 to only 4 during the month of June 1996. In June 1995, 37 policemen were killed in Karachi the figure for June 1996 is zero. This improvement in the overall law and order situation is primarily the result of better intelligence and relentless efforts on the part of police which worked day and night without being complacent for a single moment for the accomplishment of this gigantic task.

               Activities of Militant Outfit of MOM(A)

After the General Elections of 1990 the MQM was made a coalition partner in the Government. This was followed by a brief’ interlude of peace. Some quarters were misled into hoping that opportunity to share in Government, would bring a positive change in MQM’s violent brand of politics. But these hopes were shortlived and in the days that followed the situation worsened and most parts of Karachi became hostage in the hands of MQM militant elements. Extortion, elimination of political rivals and exploitation by militant elements of the MQM became the order of the day.

In order to check the situation from going further adrift “Operation Clean Up” was launched by the Army in Karachi on June 19, 1992 or. the invitation of the then Prime Minister Mian Nawaz Sharif. the immediate reaction to the crack down was that the entire MQM leadership went underground. Altaf Hussain sought asylum in the UK. The militant activities temporarily dropped to a low key. However,. with the passage of time terrorist activities increased inter-factional clashes between MQM(A) and the splinter MQM Haqiqi and attacks oil law enforcement agencies gained momentum.

The MQM boycotted the National Assembly elections of 1993 but won most of the PA seats in Karachi and Hyderabad, the remaining seats being won by the PPP, Although offered a share in power, in the aftermath of General Elections of 1993, the MQM chose to stay in the opposition.

The Government of Mohtrama Benazir Bhutto initially extended the Operation Clears Up and the Army stay in Sindh. The MQM(A) responded by stepping up its subversive activities. In addition to its terrorist activities, the MQM(A) also launched a bitter propaganda campaign against the Pakistan Army, By drawing a parallel between the Indian occupied Kashmir and Karachi, MQM(A) charged the Army and Police of extra judicial killings and repression of Mohajirs. This was followed by a series of protests and strikes which resulted in loss of life and property and adversely affected the civic life in Karachi. In April 1994, MQM(A) launched a “Jail Bharo Tehreek” accompanied by renewed acts of terrorism. In September, 1994 the Government again reviewed the situation and decided to wind up Operation Clean Up.

Withdrawal of Army from Karachi was one of the main demands of MQM(A). The army withdrew in November, 1994 but there was no change in the MQM(A) stance. The MQM(A) accelerated its terrorist activities and subversive propaganda while MQM(A) militants continued to paralyse civic life in Karachi. The Sindh Government decided to initiate a process of dialogue. This step, however, had no effect on the MQM(A) strategy and MQM(A) sponsored terrorism continued unabated.

The Heroic Role of Karachi Police.

The Police succeeded in restoring peace but at the cost of police officers and men laying down their lives to protect the life, property and honour of the citizens. The Annexures “C”, “D” and “E” which deal with killings in 1994, 1995 and 1996 speak for themselves. Glowing tributes were paid to the gallant acts of Police officers and 47 of them (including 14 posthumous) were conferred Quaid-e-Azam Police Medals, on 23rd March. 1996, the highest gallantry award for Police officers in Pakistan. The three heroes of the field were Major Gen. (Recd.) Naseeru.llah Khan Babar, the Federal Minister for Interior, the Inspector-General of Police Sindh, Muhammad Saeed Khan and the DIG Karachi Dr. Shoaib Suddle but lasting credit is due to the Prime Minister of Pakistan Mohtrama Benazir Bhutto for keeping a firm hand at the helm.

Holding of International Cricket one dayers at National Stadium, Karachi was a turning point in the mood of the city. The British Minister of State for Foreign and Commonwealth Affairs Mr. Jeremy Hanley, who witnessed the cricket match with me on March 3rd. also paid rich tributes to Karachi Police and Sindh Government for making elaborate security arrangements for the occasion a tribute reiterated by tile U.K, Foreign Secretary, Mr. Malcom Riiltind at a luncheon speech it Governor House on 28th August, 1996.

The elimination of the most wanted and notorious terrorist of MQM(A). Nacem Sherri in an armed encounter with law enforcing agencies completed the pulverization of the militant and terrorist Wing of the MQM(A). The people of Karachi heaved a sigh of relief.

The consequential strike call given by the MQM(A) went unnoticed and people generally paid a deaf ear to it. This has demoralised the enemies of peace in Karachi and city has returned to normalcy.

In a nutshell, I would like to emphasize that the entire law and order atmosphere polluted by MQM(A) has been controlled. Yet there is no room for complacency. The symptoms of the.MQM(A) created virus against Pakistan are not visible but the germs of the disease remain and can tare up and revert to the 1992 situation if continuity is not maintained. To explain further, the MQM has access to funds, a number of fully indoctrinated militants who have the means to communicate through telephone, fax and telex, letters, and messengers many of them women, and international support from the enemies and rivals of Pakistan.

The international MQM Secretariat is at the centre of the axis between South Block in Delhi, MQM Headquarters in London and at 90 Azizabad, Karachi.

We have succeeded in containing the militant wing of the MQM with the help of a three pronged strategy making sure that the writ of the State runs through every nook and corner of Karachi, better intelligence to prevent and forestall acts of terrorism, quick and prompt response and reaction if any incident occurs anywhere in Karachi, and by a determined implementation of the socio-economic package contained in the Rs.121 billion Prime Minister’s package for Karachi in order to remove the genuine grievances and meet the felt needs of Karachians.”

21.    At pages 92 and 93, there is Annexure ‘A’ which is, reproduced as under:

“Dark era (1994 June 1995) Perpetrated by MQM(A).

(1)        There was virtually no law and order in the city.

(2)        The effectiveness and morale of Police and law enforcing agencies was

            very low and they were, rather, on the defensive.

(3)        The terrorists were in commanding position and they had established “No Go” areas where the Police/L.E.A. could neither enter nor carry out any operations.

(4)        Every District of Karachi particularly Central District had Torture Cells where the members of Police/L.E.A. and Political opponents were taken after abduction and subjected to severe and inhuman torture. many deaths were also reported in these Torture Cells.

(5)        The frequent strike calls given by MQM(A) were very successful and a

city full of life, was converted into haunted place. The people preferred to stay inside for fear of their lives.

(6)        The economic activity had come to “HALT” and the foreign capital was not only shy to come in but also started to fly out of country.

(7)        The Karachi Stock Exchange, hub of economic-activity, had almost       crashed and many investors suffered huge losses.

(8)        The socio-cultural life suffered a severe setback and the picnic spots gave a deserted look, as nobody was prepared to guarantee protection of life to the citizens.

(9)        The people were left with little faith in the Government agencies as bands of armed bandits and terrorists were roaming about freely and controlling different areas.

(10) Marriages/Valimas were can celled and most of the people abandoned their places of abode to save their lives.

(11) The city gave a very grim look especially in the evenings. Very few vehicles used to ply on the roads as travelling had become very unsafe.

(12) Bhatta collection by armed bands was order of the day and a roaring business. The business community and well-to-do people were forced to pay donations in return for their protection of life.

(13)      Despatch of dead bodies to different areas of upcountry was a common sight. This was the plight of human beings in metropolitan city of Karachi.

22. At pages 94 and 95 there is Annexure ‘B’ which is reproduced as under:

                            Present Situation.

The law and order situation is remarkably improved.

The morale of Police and Law Enforcing Agencies is very high and they are capable of handling any situation with dedication, commitment and courage.

The terrorists are on the run and have lost the initiative.

The backbone of organizational capability of the militant outfit of MQM(A) has been broken and their activities are at the lowest, ebb.

A large number of Torture Cells have been unearthed and a constant vigil is being kept for the eradication of this menace.

The strike calls are very rare and the response to these calls from the general public is very poor; they generally pay a deaf ear to such calls Karachi Stock Exchange also remained open during the last strike call.

The city life in Karachi has returned to normalcy.

The socio-cultural activities are on the increase. The picnic spots are thronged by the general public on weekends and holidays which speaks of their confidence in the capability of Police and Provincial Government to protect their life, honour and property. Marriage halls are also full of life throughout the week.

The economic activity is on the increase and the foreign investors are coming to Pakistan in view of the visible improvement in law and order situation.

Construction activity is visible all around and the prices of real estate are touching new heights.

The general public is co-operating with Police and other law enforcing agencies in the drive against the terrorists and other anti-social elements.

Collection of Bhatta (forced donations) by terrorists and their agents has been controlled to a great extent.

People who had left Karachi in despair and due to uncertainty, have started coming back to take part in their normal life.

All Hotels especially Five Star Hotels are booked to almost 100% occupancy and Hotel managements are charging full rates instead of reduced rates.

Holding of three one-day International Cricket matches was the acid test of effectiveness of Karachi Police and they, by the grace of Almighty, came out with flying colours. Rich tributes were paid for excellent arrangements not only by national press but also by international electronic and print media.

People have heaved a sigh of relief and it is generally thought that an impossible task has been accomplished. The reversal of trend is also beyond their comprehension.

23 At page 96 there is Annexure ‘C’ which is reproduced as under:--

                     KILLED-1994.

MONTHS MQM- MQM- SHIA        SUNNI            POLICE RANGER ARMY     OTHER           TOTAL

JAN     0         01        0          01        0          0          0          02        04

MONTHS MOM-A MQM- SHIA      s1’        INNI    POLICE RANGER ARMY     OTHER           TOTAL

FEB     04       01        0          02        01        0          0          03        11

MAR   04       03        0          01        04        01        1 0       04        17

APR     06       01        02        01        02        0          0          06        18

MAY   15       02        01        02        01        0          0          18        39

JUN     11       03        06        08        06        0          0          02        36

JUL      05       05        O8       08        07        0          0          55        88

AUG    13       10        03        06        05        0          01        64        102

SEP     I 0       10        07        12        118      0          01        36        84

OCT    1 4      14        08        11        15        0          01        55        118

NOV   1 5      22        0          01        12        01        01        77        129

DEC    10       09        12        13        15        05        O1       100      171

TOTAL113      81        47        66        76        117      05        422      817

24        AL page 97 there is Annexure ‘D’ which is reproeuccd as under:

                        KILLED-1995.

MONTHS MQM- MQM- SHIA        SUNNI            POLICE RANGER ARMY     OTHER           TOTAL,

JAN     07        09        O7       O5       08        0          11        79        115

FEB     13        17        36        30        08        0          0          59        163

MAR   09        25        11        04        10        02        0          65        126

APR     13        13        0          0          20        0          01        44        91

MAY   16        07        0          0          26        05        04        76        134

JUN     19        16        0          01        36        0-         02        202      276

JUL      11        . 02      0          0              10    03        02        205      233

AUG    03        03        0          01        16        01        0          129      153

SEP     02        0          01        0          15        0          01        106      125

OCT    02        05        0          0          16        02        01        100      126

NOV   0          03        0          0          06        0          0          112      121

DEC    01        01        02        0          04        0          0          71        79

TOTAL96        101      57        41        175      13        11        1248    1742

25.   At page 98 there is Annexure ‘E’ which is reproduced as under:-

                            KILLED-up to 30th June, 1996

MONTHS MQM-A MQM- SHIA SUNNI POLICE ‘RANGER ARMY I OTHER TOTAL

JAN                0           04        0          0          10        03        02        63        82

FEB     ‘          0           0          0          0          04        0          0          25        29

MAR              0           0          0          0          02        0          0          08        10

APR                0           01        0          0          0          0          0          08        09

MAY               0          04        0          0          01        0          0          01        06

JUN                 0          0          O1       0          0          0          0          04        05

TOTAL            0          09        O1       0          17        03        02        1 105   141

26. What is stated in the speech of Mr. Kamaluddin Azfar, parts of which have been reproduced in the above paragraphs, has been answered in the written statement filed on behalf of the respondents from which paragraphs 33, 34 and 35 are reproduced hereunder, which are self-explanatory:

“33. That the contents of submission (iii) are misconceived and are denied. The speech referred to and relied upon by the petitioner does not in any place refute or contradict what is stated in the Dissolution. Order. The speech merely catalogues and compiles the killings that went on in Karachi over the relevant period without in any manner asserting or even pretending that the killings carried out by the law enforcement agencies were lawful or in accordance with law. (Indeed, Mr. Azfar specifically took note of the “elimination” of an MQM(A) “terrorist” in an “armed encounter “).’This is the same basic point which is so obvious to ordinary people, but one which the petitioner has so much difficulty understanding. In a system based on the rule of law, there is (and must always be) a qualitative difference between law breakers and law enforcers. It is simply not possible.to enforce the law by breaking it. There might be temporary relief and momentary respite: but the long term consequence of the abasement and abuse of law enforcement agencies, and of allowing and even encouraging them to use unlawful means to “control” the situation, is (to paraphrase Gibbons) to convert them into “beasts in uniform”. And once that happens, one can only repeat the age old question: “who will guard the guardians?” Unfortunately however, the petitioner and her Government seemed to be utterly oblivious and indifferent to what the harvest would be of the crop that they were sowing.

34. That in this context, it may also be noted that Mr. Azfar’s speech relied upon by the petitioner in any case belies her claim that the Federal Government had nothing to do with the situation in Karachi. It will be recalled that Mr. Azfar was appointed as the Governor of Sindh by the petitioner’s Government. He performed his functions on the basis of his perception of himself as an appointee of the Federal Government and on the advice of the Chief Minister. It was for this reason that he lauded the operations carried out in Karachi and stated that “lasting credit [was] due to the [then] Prime Minister of Pakistan Mohtrama Benazir Bhutto for keeping a firm hand at the helm”. How could that be so if, as the petitioner now claims, the Federal Government had nothing to do with what was happening in Karachi? In the context of the Governor’s speech, can . there be any doubt as to which “helm” the Governor meant when he lauded the petitioner for keeping a firm hand on it? The statements of the Governor, which are accepted in totality by the petitioner, clearly establish that not only was the Federal Government involved in the operations launched and carried out in Karachi; it was in fact masterminding the entire show.

35. The petitioner next makes submissions in respect of the following part of the Dissolution Order (which is, contrary to what the petitioner claims, neither subjective nor insubstantial):

“They have been killed in police encounters and police custody. In the speech to Parliament on 29th October, 1995 the President had warned that the law-enforcing agencies must ensure that there was no harassment of innocent citizens in the fight against terrorism and that human and legal rights of all persons are duly protected. This advice was not heeded. The killings continued unabated. The Government’s fundamental duty to maintain law and order has to be performed by proceeding in accordance with law.” [pg. 9 of the petition]”.

27. On the subject of extra judicial killings whatever is stated in the dissolution order, elaborated later in the speech of the President and then whatever version thereof is given. in the petition by the petitioner and reply thereof in the written statement, it appears clearly that in the law and order situation, which took place in Karachi, the Federal Government, Provincial Government and other Law Enforcing Agencies were involved and here we are not concerned with the merits and demerits of that situation as to how it took place and who were responsible for it or not but the position beyond dispute is that there were killings on both the sides and there is specific allegation that there were extra judicial killings and also there were custodial killings, which require examination and explanation. Extra-judicial killings and or custodial killings are to be dealt with strictly according to law and the procedure which is laid down under the law. It is to be seen whether such killings have been dealt with strictly according to law and are justified as permitted by the law.

28. Here at this stage it would be pertinent to mention that after filing of C.P. No.59 of 1996 on 13-I1-1996, the MQM filed application under Order I, Rule 10 C.P.C. read with Order XXXIII, Rule 6 of the Supreme Court Rules, 1980 praying that MQM be allowed to be joined as respondent in support of the ground of extra judicial killings mentioned in the order of the dissolution. It is mentioned in the said application that over the last three years the MQM has voiced its concern repeatedly including filing of Constitutional Petition No.46 of 1994 in the Supreme Court, which is still pending awaiting final arguments. In that Constitutional petition in Volumes 5 and 21 many details of such killings are narrated. It was the agitation by the MQM which was fully noted by the media and published both in Pakistan and abroad leading to severe condemnation of the brutal tactics utilised by the Government of the petitioner in Constitutional Petition No.59 of 1996 against the rank and file of the MQM. In such circumstances it was claimed that the MQM as intervener be allowed to be joined as respondent in C.P. No.59 of 1996 to enable the intervener to fully assist the Court in giving all the relevant details for doing “complete justice” as envisaged by Article 187(1) of the Constitution. It was further averred in the said application of the intervener that the opening part of the President’s Proclamation contains the same language as is stated in paragraph 6 of Part III of Constitutional Petition No.46 of 1994 in which it has been stated that he Government of the petitioner in C.P. No.59 of 1996 at the relevant time had destroyed the sanctity of right of life guaranteed in Article 9 of the Constitution. In such circumstances since this matter is directly sub judice in these proceedings as well, it is in the interest of justice that the application of the intervener should be allowed. It is stated in the application of the intervener that negotiations were entered into by the MQM and the Administration for restoration of normalcy in

Karachi. Volume 17 of C.P. No.46 of 1994 contains complete details of talks and the correspondence exchanged during such negotiations. Actually during this time, which spreads between July, 1995 to December, 1995, the Government of the day unleashed the most terrible infliction of torture and suffering on the rank and file of the MQM leading to widespread furore over her Government’s policies. Reports by acknowledged international human rights agencies such as Amnesty International, Asia Watch and others fully substantiate this averment. Appended with this Application are six such reports, namely, ASA 33/01/96: February, 1996, ASA 33/15/96 dated 5th November, 1996, ASA 33/04/96 dated 23th May, 1996, ASA 33/17/96 dated November, 1996, E/CN.4/1997/7/Add.2 dated 15th October, 1996 and Human Rights Report Pakistan, 1996.

29. Petitioner Mohtrama Benazir Bhutto in C.P. No.59 of 1996 opposed vehemently request of MQM to be joined as party- to these proceedings and in this context filed C.M.A. No.6 of 1997 contending that the sole purpose of the suit is whether or not the President was justified in dissolving the National Assembly on November 5, 1996 for which are to be considered facts within the knowledge of the President and not the MQM. It wag further submitted that in such circumstances the MQM was thus irrelevant with regard to determining the facts known to the President at the time of the dissolution of the National Assembly. In such circumstances question arose whether MQM should be allowed to be-joined as a party to the proceedings under consideration or not particularly in the light of the fact that MQM had already filed in the Supreme Court C.P. No.46 of 1994 under Article 184(3) of the Constitution in which prayer is that the respondents named therein, namely, Federal Government and the Provincial Government of Sindh be prohibited from infringing fundamental rights of MQM to enable it to function as political party as envisaged in the Constitution and further political activities of MQM cannot be curtailed arbitrarily but save in accordance with law. It was further prayed that MQM was prevented from participating in the National Assembly elections, which had resulted in rendering that Assembly invalid.

30. In C.P. No.46 of 1994, Part V contains sub-heading “Persistent Genocide” in which stance is taken that the Federal Government and the Provincial Government of Sindh through their agents have consistently under a devised plan acted with malice aforethought to achieve the cleansing of Sindh by terrorising the Mohajir population to move away from Karachi to provide a numerical majority to the indigenous people of Sindh and to exterminate and kill the top several layers of leadership of MQM. It is further stated in the same petition that the killings have been perpetrated by the Law Enforcement Agencies working for or with approval of respondents Nos. l and 2 and their sponsored and protected group of Haqiqi. Further details have been given to show how kidnappings and killings had taken place of members and workers of MQM by Haqiqi group starting with murder of Mr. Salahuddin, the eminent

journalist and editor of Takbeer. Such killings are mentioned in detail from pages 84 to 95 in Part V of the memorandum of C.P. No.46 of 1994. That petition is still pending in which adjournments have been taken by both the parties with consent for production of documents in rebuttal and preparation of arguments. It would be pertinent to mention that in that petition notice was issued to the Attorney General for Pakistan on the question of maintainability of the petition and later it was submitted by the Attorney-General that the question of maintainability could be taken in hand only after written statement was allowed to be filed by the respondents in that petition, which was allowed to be done. Several dates were taken for preparation of the written statement with consent of the petitioners therein and finally the written statement was filed alongwith annexures containing 41 volumes. In any case dates had been given in that case with consent of the parties.

31. If we agree with the contention of Mr. Aitzaz Ahsan that MQM is not a necessary party because what is to be considered in these proceedings is the material in front of the President of Pakistan when he passed order of dissolution and not what MQM has to say, even then it appears that the Federal Government in this case has defended the ground of extra judicial killings in the proclamation of dissolution with the same material which is being relied upon by MQM in support of prayer that they should be allowed to be joined as necessary party in these proceedings.

32. In C.M.A. No.806 of 1996 filed by MQM in C.P. No.59 of 1996 in paragraph 12 of the memorandum of the application it is claimed that the opening part of the President’s Proclamation directly adopts the concept as well as almost the verbatim language of paragraph 6 of Part III, A of the Constitutional Petition No.46 of 1994 filed by MQM in which it has been averred that the Government of the Petitioner/Mohtrama Benazir Bhutto at the relevant time had destroyed the sanctity of right of life guaranteed in Article 9 of the Constitution. As such since the matter is directly sub judice in both the proceedings, it would be in the interest of justice that applicant/intervener’s submissions are heard.

33. In such circumstances and for the reasons stated above we considered it to be proper not to pass any order granting or not the prayer of MQM to be joined as necessary party in these proceedings as contemplated under Order I, Rule 10, C.P.C. but allowed their counsel to address the Court and put forward his arguments in support of the prayer. Not only that but during the hearing we had passed such order dated 18th January, 1997 after hearing Dr. Farooq Hassan for the intervener and Mr. Aitzaz Ahsan for the petitioner. We had directed that final order on this application would be passed after hearing of this case at the fag-end of the proceedings.

34. We are of the view that even without allowing the MQM to be joined as intervener in the present proceedings there is sufficient material already available

as is reflected in the written statement filed by the President and other respondents named in C.P. No.59 of 1996. It may be mentioned that common stand is taken by the President, Federation of Pakistan and the Caretaker Prime Minister in the written statement in support of the grounds mentioned and taken in the proclamation of dissolution. Paragraph 22 of the written statement is reproduced verbatim as under, which speaks for itself and shows commonalty in the stance taken in the written statement and MQM in their application under Order I, Rule 10, C.P.C. for impleadment as necessary party to these proceedings:-

“That it is amazing that the petitioner can go to the extent of denying the very factum of extra judicial killings in Karachi and other parts of Pakistan. The petitioner seems to be under the mistaken belief that if something is denied long enough, boldly enough and loudly enough, the truth can be obscured and even evaded altogether. Such a blatant disavowal of the truth may have been all in a day’s work for the late (and unlamented) Dr. Goebbels, but it is tragic to see a person who has twice held the office of the Prime Minister of Pakistan practising the art of the Big Lie perfected by the late- luminary of the Nazi regime. The numerous killings (or, more accurately, murders) that have been committed in police “encounters” and in police custody (and are euphemistically known as extra judicial killings) are facts that are well known and documented both within and without Pakistan . Several human rights organizations, both at home and abroad, have gathered and compiled irrefutable evidence and details of this evil. The petitioner herself, contrary to her bald denials in the petition, had detailed knowledge of exactly what was happening in Karachi and elsewhere.

Firstly, the ‘entire Karachi “operation” was being masterminded and controlled by the Federal Government. The then Interior Minister was intimately involved with the “operation” both at the strategic and even ‘‘      at the tactical level. The policy was largely framed at the Federal level and the role of provincial functionaries was reduced essentially to being willing executants (and executioners) of orders received from

Islamabad. Thus, for example, the Rangers were an integral part of the entire “operation”; this is a force directly under the control of the Federal Government. The Rangers were given special powers under the Rangers Ordinance, 1959 to give legal cover to their activities in Karachi. The electronic media was also utilised for this purpose. Many  alleged “terrorists” were paraded on television by the Federal

Government, Where they gave lengthy interviews to the press “confessing” their “crimes” in a manner reminiscent of communist era regimes.

Secondly, a voluminous record exists, and was available with the petitioner, which clearly indicated that scores of persons were being killed in police “encounters”. and/or custody in Karachi by the .law enforcement agencies. Periodic reports were made available to the petitioner and she was fully cognizant of what was happening in and to that city. Reports were submitted to her on a continuing basis, often several times a week and on many occasions, almost daily. Indeed, the reports covered all aspects of law enforcement in Karachi, and were not limited only to “terrorist” operations. It is therefore completely disingenuous of her to suggest that the ground taken by the President is “contrary to the facts”. The petitioner knew precisely what was going on in Karachi, down to the last “terrorist/criminal” killed by the police in an “encounter”, the last person arrested, the last TT recovered and the last car snatched. Contrary to what the petitioner is now stating, the evidence is plain, irrefutable and irresistible not only that extra-judicial killings were being carried out on a massive (and systematic) scale in Karachi and elsewhere, but also that the petitioner was fully aware of what was going on. The record not merely speaks volumes; it is in volumes. “

35. In respect of extra-judicial killings as ground No.l in the order of’ dissolution, petitioner Mohtrama Benazir Bhutto in C.P. No.59 of 1996 has taken the stand that these killings relate to law and order situation in the Province of Sindh with which the Federal Government is not concerned and has no link whatsoever. In this context it would be proper to reproduce as under petitioner’s submission (i) from page 12 of the memorandum of the petition:-

“It may be reiterated, in the first instance, that the Federal Government has no authority to investigate into any such incident whatsoever. If it had purported to do so that indeed would have been a grievous breach of Constitutional set-up which places this responsibility in the hands of the Provinces. No law permits the Federal Government to assume to itself, in any such eventuality, the powers and authority of the Provincial Governments. The complaint would have been valid if the Federal Government had indeed done so. That would, in fact have been a clear usurpation of authority not permitted by the Constitution, and the President could rightly have complained. Not otherwise. “

36. In the context of what is stated above, it would be pertinent to refer to Articles 148 and 149 of the Constitution, which are to be read together, envisaging obligations of the Provinces and the Federation and directions to the Provinces in certain cases. Both these provisions are so comprehensively stated in the Constitution that the best and simplest way would be just to reproduce them as they are, which is being done as under:

“ 148. --(1) The executive authority of every Province shall be so exercised as to secure compliance with Federal laws which apply in that Province.

(2)        ,Without prejudice to any other provision of this Chapter, in the exercise of the executive authority of the Federation in any Province regard shall be had to the interests of that Province.

(3)        It shall be the duty of the Federation to protect every Province against external aggression and internal disturbances and to ensure shat the Government of every Province is carried on in accordance with the provisions of the Constitution.

149.--(1) The executive authority of every Province shall be so exercised as not to impede or prejudice the exercise of the executive authority of the Federation, and the executive authority of the Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for that purpose.

(2)        The executive authority of the Federation shall 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 directions.

(3)        The executive authority of the Federation shall also extend to the giving of directions to a Province as to the construction and maintenance of means of communication declared in. the direction to be o1 national or strategic importance

(4)        \*The executive authority of the Federation shall also extend to the giving of directions to a Province as to the manner to which the executive authority thereof is to be exercised for the purpose of preventing any grave menace to the peace and tranquillity or economic life of Pakistan or any part thereof.”

37. It is thus clear that the above mentioned provisions in the Constitution regulate relationship between the Federation and a Province in a situation in which Federal law is applicable in that Province and a situation has arisen in which it is to be considered as to how the Federal law is to be made applicable so that it should bring about the desired result and be effective so that proper remedial measures are adopted to contain and control the situation in which the Federal Government has to adopt supervisory role and give directions to the Province in which is being applied the federal law.

38. The petitioner, as stated above, has denied involvement.of the Federal Government in law and order situation in Karachi relating to extra judicial killings, which is a ground mentioned in the order of the dissolution. In the same petition, the petitioner has relied upon the speech dated September 12, 1996 made at the National Defence College by Mr. Kamaluddin Azfar who was appointed Governor by her during her tenure. It is further stated by her that the same Governor was retained by the President in the caretaker set-up after dissolution of the National Assembly and dismissal of her Government. Extracts from the speech have been reproduced above in which the history of Karachi, political background, emergence of MQM as a party, and details of law and order situation in Karachi are mentioned, which need not be repeated. In Paragraph 24 of this judgment Annexure ‘B’ alongwith speech of the Governor is reproduced reflecting the present situation in Karachi after action by the Government claiming that the backbone of the organizational capability of militant outfit of MQM(A) has been broken and their activities are at the lowest ebb and further that city life in Karachi has returned to normalcy. The Governor also lauded the operation carried out in Karachi in his speech and stated that the lasting credit was due to the Prime Minister of Pakistan, Mohtrama Benazir Bhutto, for keeping a firm hand at the helm. For details reference can be made to paragraph 20 of this judgment wherein paragraphs from the speech are reproduced.

39. The charts which are annexures of the speech of the Governor and have been reproduced in this judgment in paragraphs 25 to 27) show that in the year 1994 in Karachi in all 817 persons were killed including 113 from MQM(A), 81 MQM(H), 47 Shia, 66 Sunni, 76 Police, 7 Rangers, 5 Army  and 422 others. In 1995 in all 1742 persons were killed including 96 from MQM(A), 101 MQM(H), 57 Shia, 41 Sunni, 175 Police, 13 Rangers, 11 Army and 1248 others. In 1996 up to 30th June total number of persons killed was 141 including 9 from MQM(H), 1 Shia, 17 Police, 3 Rangers, 2 Army and 105 others. The above mentioned figures have been given by the Governor in his speech and the figures given by him are not disputed and it can be presumed that these figures are supported by the record because they are given by the Governor with full responsibility after usual verification from the record.

40. It is stated that the army was withdrawn from Karahci in November, 1994 and replaced by the Rangers and this change took place during the tenure of the petitioner as Prime Minister. In fact the petitioner is on record claiming credit for such change. The respondents have produced a number of documents showing involvement of the Federal Government headed by the petitioner with law and order situation in Karachi, which resulted in extra judicial killings. The documents have been obtained from the Ministry of Interior and are available in Volume 1-A of the written statement. At page 160 of Volume 1-A is copy of the confidential letter dated 20th November, 1995 from Lieutenant Colonel Dabeer Rizvi for Director-General, Headquarters, Pakistan Rangers (Sindh) addressed to the Military Secretary to the Prime Minister and copies forwarded for information to Minister of Interior and Narcotics Control, Military Operations Directorate, GS Branch, GHQ, Rawalpindi, Military Intelligence Directorate, GS Branch, GHQ, Rawalpindi, and Headquarters 5 Corps. The subject of this letter is law and order situation in Sindh and enclosed with this covering letter are reports for the period from 1 to 15 February, 1995 on the subject mentioned above. The actual report with the heading “State of Law and Order in Sindh” from 1st February to 15th February, 1995 runs from pages 161 to 181. Two paragraphs from this report at pages 162 and 163 are reproduced as under by way of specimen reporting of incidents:-

“b. Intra-factional activity was also on the increase during the period under.review. There have been continuous killings between both the factions of the Mohajir Qaumi Movement. These killings appear to have been done to gain psychological ascendancy over the opponent in order to dominate each other’s area of influence. The areas of Liaquatabad, New Karachi, Khawaja Ajmair Nagri, Nazimabad, Orangi Extension and Malir were the main trouble spots. Mohajir Qaumi Movement (Altaf Group) appeared to have an upper edge in these areas A few houses of the opponents were also set on fire, 13th of February saw maximum killings in this regard, when five workers of Mohajir Qaumi Movement (Haqiqi Group), five of Pakistan People’s Party and three of Mohajir Qaumi Movement (Altaf Group) were killed.

c. Political motivated mafia gangs were also active. Zafroo group of Mohajir Qaumi Movement (Altaf Group) targetted personnel who were directly/indirectly involved with Law Enforcing Agencies in area of Orangi Town. Gudoo Behari group and Haji Isreal group also killed each others members. This primarily appeared to increase their dominance for Bhatta/Chanda collection and other criminal activities.”

41. In the same volume 1-A of the written statement from pages 192 to 206

are confidential Monthly Security Intelligence Reports sent by Headquarters

Pakistan Rangers (Sindh to the Military Intelligence Directorate and the Joint

Secretary (Civil Armed Forces), Government of Pakistan , Ministry of Interior,

Islamabad, on the situation in Sindh. There is Agency report on the activities of

MQM(A) from Ministry of Interior records containing file noting of the

petitioner as Prime Minister from pages 182 to 184 with the note of the Prime

Minister in her own handwriting at page 184. At page 189 is report of

Intelligence Bureau regarding activities of SHO of Pir Ilahi Bux Colony in

connection with criminal /terrorist activities of MQM(A).

42. In volume 1-A of the written statement, the respondents have produced copy of notification dated 20th July, 1995 whereunder the Federal Government conferred upon Rangers powers and duties of police officers with regard to arrest and search of any person as provided under Chapter V of the Cr.P.C. or any other law for the time being in force. Such power is exercised by the Federal Government as contemplated under section 10 of the Pakistan Rangers Ordinance, 1959. At page 487 of the same volume is letter dated 20th July, 1995 issued by the Ministry of Interior and Narcotics Control, Government of Pakistan, to the Director-General, Pakistan Rangers Sindh, Karachi on the subject of entrusting of duties, functions and powers of police officers to the Pakistan Rangers Sindh for the assistance of the Provincial police for the maintenance of law and order in Sindh. By this letter the Director-General Pakistan Rangers Sindh is informed that in response to the request of Provincial Government of Sindh, the Federal Government is pleased to direct the Civil Armed Forces located within civil administrative boundaries of that Province to act in aid of the civil powers according to the law.

43. At page 489 is letter dated 24-5-1995 from Home Secretary, Government of Sindh, to the Secretary Interior, Division, Government of Pakistan on the subject of entrusting of duties and functions under section 131-A of Cr.P.C. It is mentioned in the said letter that part of the responsibility for maintenance of public peace and security is entrusted to the officers of the Federal Government (Pakistan Rangers) under Article 147 of the Constitution and section 131-A of the Criminal Procedure Code, 1898 for a period of 12 months. The Federal Government is requested to consent to the proposed arrangement and to issue necessary instructions in this regard. It is further mentioned in this letter that details of the functions of Pakistan Rangers will be worked out mutually by the officers of the concerned Federal and Provincial Governments and the mechanics and modalities of the performance of such functions shall be worked out with the consent of the Provincial Government of Sindh. At page 492 is letter from the Home Secretary, Government of Sindh, to the Secretary, Interior Division, Government of Pakistan for extension in entrustment of powers and duties to the Rangers for another 12 months. At pages 490 and 491 is copy of the notification dated 17-5-1995 where under specific roles have been assigned to Rangers (Sindh) and its component units. Copy of this notification is sent to the Principal Secretary to the Prime Minister. At pages 493 and 494 is letter dated 18th July, 1996 from Section Officer, Ministry of Interior and Narcotics Control, Government of Pakistan to the Director-General, Pakistan Rangers Sindh on the subject of entrusting of duties, functions and powers of police officers to the Pakistan Rangers, Sindh.

44. The respondents have also produced in volume 1-A of the written statement at pages 495 and 495-A copy of the notification dated 22nd February 1995 where under the Headquarters of Pakistan Rangers Sindh (South), Karachi has been declared as an attached department of the Federal Government under the Ministry of Interior and Narcotics Control (Interior Division). At page 497 of the same volume is extract from the decisions of the Special Cabinet Meeting held on 24th July, 1995 in the Prime Minister’s Secretariat and the decision communicated thereby is that the Cabinet placed on record its appreciation of the excellent work done by the Rangers and Police in coping with the law and order situation in Karachi. At page 498 is letter from the Prime Minister’s Secretariat on the subject of law and order situation in Karachi whereby a number of directions have been issued by the competent authority including the one reproduced as under:-

‘Lists may be obtained by the Ministry of Interior of terrorists/criminals arrested in the Army crackdown and bailed out by the Sindh High Court. Since it has been desired that they should be re -arrested the Ministry of Interior in coordination with the Sindh Government should take necessary action in this regard. “

45. The documents speak for themselves and these documents have been produced by the respondents from the Ministry of Interior, Government of Pakistan. The documents mentioned in the preceding paragraphs clearly show that the Federal Government headed by the petitioner was involved in the law and order situation in Karachi and other parts of Sindh and the situation was being controlled by the Rangers under the control of the Federal Government as is allowed under the Constitution and relevant law, which provide that in a particular situation in which a Federal Law is being administered in the Province, the Federal Government can exercise supervisory control. We regret to say that in view of such documentary evidence how could the petitioner, who was Prime Minister of the country on two occasions, make such incorrect statement before the apex Court as is made at page 12 of the memorandum of C. P. No. 59 of 1996, which is reproduced once again herein below at the cost of repetition:

“It may be reiterated, in the first instance, that the Federal Government has no authority to investigate into any such incident whatsoever. If it had purported to do so that indeed would have been a grievous breach of Constitutional set-up which places this responsibility in the hands of the Provinces. No law permits the Federal Government to assume to itself, in any such eventuality, the powers and authority of the Provincial Governments. The complaint would have been valid if the Federal Government had indeed done so. That would, in fact have been a clear usurpation of authority not permitted by the Constitution,’ and the President could rightly have complained. Not otherwise. “

46. It would be pertinent at this stage to mention that there is difference between law and equity as law is based upon set rules which may not be attracted when justice is done on the basis of equity. Equity is defined in “Black’s Law Dictionary” as justice administered according to fairness as contrasted with the strictly formulated rules of common law. In Pakistan equity is merged in the law but the principles are recognised and relief can be granted or not on the basis of such principles. Jurisdiction of the Supreme Court under Article 184(3) is akin to and co-related with the jurisdiction of the High Court under Article 199 where under relief is granted or not in the form of writs. One very famous maxim of equity is that petitioner who seeks equity must come to the Court with clean hands. Conduct of the petitioner is to be taken into consideration and if he has suppressed any material fact from the Court or has come to .the Court with unclean hands, then relief under the Constitutional jurisdiction can be denied to him. In support of the proposition reliance can be placed on the cases of Mahzoor Hussain v. Zulfiqar Ali (1983 SCMR 137), Abdul Hafeez v. Board of Intermediate and Secondary Education (1983 SCMR

566), Muhammad Sharif v. Mst. Zubaida Begum (1983 SCMR 1197), Muhammad Ashraf Qadri v. Principal, King Edwards Medical College, Lahore (PLD 1982 SC 131) and Abdul Ghani v. Abdul Ghafoor (1968 SCMR 1378). Making such statement which is factually incorrect and so proved as borne out from the record cannot be approbated. We are not declining relief and shutting out the petitioner on that ground as we propose to examine all the contentions raised by the petitioner in great detail so that justice must be done according to law but in the circumstances we feel constrained to make observation as stated above.

47. At page 216 of Volume 1-A of the written statement is the chart showing up-to-date position of judicial inquiries regarding extra judicial killings and custodial deaths. The information in the said chart was handed over to JSP on 24-4-1996 in the meeting held in ‘S’ Block under State Minister for Law and Justice. The date of the chart is 22nd April, 1996. There are several columns in the said chart with Column No.l containing serial number, column No.2 showing names of the deceased/accused, column No.3 with date of death/killing, column No.4 showing whether death occurred in police or judicial custody or police encounter, Column No.5 showing whether judicial inquiry was ordered. Column No.6 provides for name of inquiry officer/tribunal Column No. 7 provides for information of present position of inquiry and lastly Column No.R provides for information whether any action taken against police officials. In this chart there are 26 serial numbers containing information of deceased/accused persons and in some serial numbers information relates to single deceased accused while in some other serial numbers information pertains to more than one deceased accused. In this chart column No.4 shows information as to how death had occurred and at the relevant time whether deceased accused was the police/judicial custody or died in police encounter. In the chart in 26 entries in all 41 deceased accused persons are mentioned from whom 13 died in police custody, 10 in police encounters, and from the remaining three. one died in police firing, one was killed by the terrorists and one died in jail custody.

48. In all the cases mentioned above judicial inquiries were ordered, which were conducted by Magistrates, SDMs or DMs and one case at Serial No.5, in which deaths of Nasir Hussain and Arif Hussain, elder brother and nephew of Altaf Hussain, are mentioned, inquiry was conducted by Mr. Justice Ghulam Haider Lakho of the Sindh High Court, which was completed and in the last Column No.R result shown is “exonerated”. In Column No.4, which gives information whether at the relevant time deceased accused was in which custody, it is mentioned that the deceased accused persons were killed by terrorists. The heading of Column No.8 is whether any action was taken against police officials and against this entry finding is “exonerated” which shows that the police were “exonerated”. From the remaining cases inquiries in 17 have been completed by the Magistrates and 8 were pending at the time when the information was supplied. In almost all the cases in which the proceedings of judicial inquiry have been completed, police people are exonerated except in 4 cases.

49. It appears from what is stated above that the petitioner relies upon the speech of the Governor of Sindh, which is very elaborate - supported by documents and charts and the respondents also have produced a number of documents from the Ministry of Interior to show that the Federal Government headed by the petitioner was involved in the control of the law and order situation in Karachi and other parts of Sindh. The question arises as to what is extra judicial killing. The answer is that it means a killing which has no sanction or permission under the law or which cannot be covered or defended under any provision of law. Another phrase used is custodial killing which means killing of a person who is in custody of investigating agency. For that burden is upon the investigating agency to explain as to how that person, who was in their custody, met his death and whether that death was natural or unnatural and in what circumstances it had come about. The third phrase used is killing in encounter with police or Law Enforcing Agencies. It appears that lot of explaining is to be done as required under the law by that agency to show that the killing had come about during exercise of right of private defence by that agency which was in fact first attached by the deceased. It also appears from the documents brought on the record by the parties in the cases under consideration that plea is taken by the investigating agency in several cases that accused while in custody and sometimes handcuffed was leading the police or personnel of Law Enforcement Agency to point out the place for recovery of incriminating material and was fired upon by unknown persons who opposed that recovery on the ground that it might connect them with the crime and in that connection one such case cited is that of Faheem Commando who was killed while he was in custody and was handcuffed.

50. We would like to make one thing clear that our intention is not to make any comments one way or the other with regard to any incident from which a case arises, which is to be dealt with according to law in the manner prescribed under the law and in the forum nominated by the law. We always want that the law should be allowed to take its normal course and the forums where such cases are pending should be allowed to decide them and other forums provided under the law for hearing of appeal should be allowed to be approached as laid down and specifically provided in that law. Here we are concerned in a limited sense with the material available before the President of Pakistan to justify his action as contemplated under Article 58(2)(b) in dissolving the National Assembly and dismissing the Government of the petitioner on the ground of extra judicial killings. Is such ground available for the action taken by the President and whether the impugned action is justified on that ground or not.

51. Mr. Aitzaz Ahsan, learned counsel for the petitioner in C.P. No.59 of 1996, contended before this Court that law and order cannot be made basis of dissolution of the National Assembly and dismissal of the Government of the Petitioner as it is a provincial subject and is responsibility of the Provincial Government. The  contention could click and hold the water only when the law and order situation is confined to the Province and is being handled by the Provincial Government to the exclusion of the Federal Government. On the contrary, in the instant case, it appears from the record that the Federal Government of the petitioner was involved in the control of the law and order situation in Karachi and other parts of Sindh, which fact is supported by the documents which are drawn up or reduced to writing in the course of official business. In fact the Federal Government of the petitioner opedy claimed credit for, controlling the law and order situation in Karachi and other parts of Sindh. Mr. Kamaluddin Azfar, the then Governor of Sindh, is on record having said in his speech mentioned above that the Government of Mohtrama Benazir Bhutto initially extended Operation Clean Up and the army stay in Sindh. MQM(A) responded by stepping up its subversive activities. That was followed by series of protests and strikes which resulted in loss of life and property and adversely affected civic life in Karachi. In September, 1994 the Government again reviewed the situation and decided to wind up the Operation Clean Up. After that MQM(A) accelerated its terrorist activities and subversive propaganda while MQM(A) militants continued to paralyse civic life in Karachi. The Sindh Government decided to initiate process of dialogue. While paying tributes to the Karachi Police for heroic role, the Governor stated that on account of gallant acts. of police officers 41 of them (including 14 posthumous) were conferred Quaid-e-Azam Police Medals on 23rd March, 1996. The three heroes of the field were Major-General (Retd.) Naseerullah Babar, Federal Interior Minister, Mr. Muhammad Saeed Khan, Inspector-General of Sindh Police, and Dr. Shoatb Saddal, Deputy Inspector-General of Police Karachi, but the lasting credit was due to the Prime Minister of Pakistan, Mohtrama Benzair Bhutto, for keeping a firm hand at the helm.

52. It is to be decided now whether the material available before the President on the ground of extra-judicial killings in which the Federal Government of the petitioner was involved was adequate or not to justify that action. In this context Mr. Aitzaz Ahsan contended before us that the President of Pakistan, after issue of proclamation of dissolution, in his speech on Radio and T.V. did not expand the ground of extra judicial killings in support of the order of dissolution and restated the same as briefly stated in the order of ,dissolution. The learned counsel further stated that before the date of dissolution the President presided over a meeting and held negotiations with MQM and had been advising the M.Q.M. to renounce violence  and participate in the mainstream of politics and also share power. In his address` to the joint sitting of ,the Parliament before proclamation of the dissolution the President did not say anything with regard to law and order situation in Karachi and while in Saudi Arabia in May, 1996 the President expressed his satisfaction with situation in Karachi. According to Mr. Aitzaz Ahsan in such circumstances extra-judicial killings cannot be taken as a ground for dissolution of the National Assembly particularly when the President did not point out this fact to the prime Minister nor advised her in writing.

53. On the other hand the stand taken on behalf of the respondents is that under Articles 148 and 149 of the Constitution it is the Constitutional duty of the Federal Government to tackle law and order. situation in Karachi and other parts of Sindh which responsibility cannot be shifted to others on the ground that the President did not raise objection earlier in point of time. There was coalition of PDF at the Centre with the PPP as the main partner while in Sindh the Government was of PPP. There is no dispute about the fact that petitioner Mohtrama Benazir Bhutto is a leader of PPP, hence she took it upon herself to solve the problem of law and order situation in Karachi and other parts of Sindh on her own as the Prime Minister of the country and also as leader of the PPP. If the Federal Government had taken upon itself to control the situation hen why it did not succeed and end did not come bringing about solution of the problem of the law and order situation in Karachi. The basic principle envisaged in the parliamentary democracy in the Constitution is that the President is to act on the advice of the Prime Minister and it is not the other way round. So far the speech of the President after the order of the dissolution is concerned, stand is taken on behalf of the respondents that the speech merely catalogued and compiled the killings that went on in Karachi over the relevant period without in any manner asserting or even pretending that the killings carried out by the Law Enforcement Agencies were lawful or in accordance with law. It is further submitted on behalf of the President that under no provision of the Constitution the President was required to give warning in writing or advise her or put her on notice before taking any action under Article 58(2)(b) on the ground mentioned above.

54. The law and order situation in Karachi and other parts of Sindh should not have been allowed to deteriorate and get out of control. The custodial killings are to be explained satisfactorily as i<s, required under the law. The killings in encounters with police are to be explained in proper manner and the Court has to give finding whether they were justified or not. There is absolutely no explanation available or produced on the record as to how the persons taken in custody and some of them in .handcuffs while leading the Police party/Law Enforcing Agencies for making recoveries, were allowed to be killed by some unknown persons who did not want recoveries to be made. If a person is taken  into custody then he is bound to be dealt with strictly according to law and is to be punished only when the case is proved against him. He cannot be allowed to be killed by any person while he is in custody. If this is done then it clearly shows that there is no writ of law but law of jungle. This shows inefficiency which tantamounts to total failure of the Constitutional machinery. If both the Provincial Government and the Federal Government jointly dealing with such situation fail then it can be said that the ground is available to the President to come to the conclusion that a situation has arisen in which the Government of the Federation cannot be run in accordance with the provisions of the Constitution and the Constitutional machinery has failed.

55. So far from 1994 to 30th June, 1996 in all 2700 persons have been killed in Karachi including 209 from MQM(A), 191 from MQM(H), 105 Shia, 107 Sunni, 268 Police, 23 Rangers, 18 Army and 1775 others. These killings do show that the persons have been killed and their numbers are given. These killings also include those of Police, Rangers and Army. Apart from MQM(A) and MQM(H), Sunnis and Shias have also been killed showing sectarian strife. These killings do reflect that law and order situation had slipped out of control and the killings were on increase. Not only that but in the newspapers, local as well national and international, there was general outcry against these senseless killings which had brought about disruption in the commercial activities with strikes and protests taking place very often resulting into flight of capital and shifting of people to other safer places in other Provinces. There was a feeling of insecurity among the citizens of Karachi in particular and in the residents of Sindh in general and people started remaining indoors from early evening to dawn without making any attempt to stir out of houses even for valid reasons. Lingering impression and feeling was that there was constant fear of unknown and lack of security and people thought that anything could happen to any body at any time and at any place.

56. Some international organizations taking interest in the happenings in Pakistan after conduct of investigation and verification of facts made by them independently, as claimed by them, involving an element of human rights violations, have published their reports which have been brought on the record and some of which was reproduced as under just to show how those organizations viewed what was happening in Karachi and other parts of Sindh.

There is copy of the Minutes of sitting of European Parliament on Thursday 15th February, 1996 from pages 27 to 30. Relevant portions at page 29 of the said minutes are reproduced as under:-

“.. convinced that the troubles are causing damage to all communities in urban Sindh, including the Mohajirs, and are detrimental to Pakistan’s economy and social progress,

Condemns the killing of innocent people, the use of torture and other human rights abuses, whether committed by members of the MQM factiqns or by Pakistani security forces, and especially deplores attacks on members of the families of MQM political leaders and Government officials;

Asks the Government of Pakistan to do all in its power to control those ;elements in the security forces that engage in human rights abuses and to plan the training of the security forces to respect human rights and democratic freedoms;”

At page 49 there is statement of Nicholas Burns, Spokesman of U.S. Department of State on the subject of Escalating Political Violence in Pakistan, which is reproduced as under:-

“Political violence in Pakistan’s largest city and most important port, Karachi, has claimed approximately 1,800 lives since the beginning of this year. In recent months, the violence has taken an extremely disturbing turn, with a sharp, increase in reported extra-judicial killings and the targetting of family .members of Government officials and MQM political leaders. Several weeks ago, the brother of Sindh Chief Minister Abdullah Shah was killed in a terrorist attack while travelling through an MQM controlled area of Karachi. More recently, the tortured and bullet-riddled bodies of two relatives of MQM leader Altaf Hussain were discovered in Karachi on December 9, after the two individuals were alleged to have been taken into police custody. The security forces have denied having custody of the two individuals prior to their deaths. We understand that Prime Minister Bhutto has ordered an investigation into the incident.

We are deeply concerned by the escalating cycle of violence in Karachi and particularly by the sharp increase in reported extra-judicial killings,

extortion and custodial deaths by security forces. The United States deplore the senseless murder of family members of Government and political leaders. We continue to believe that the best way to end the current violence in Karachi is at the bargaining table and urge the GOP and MQM to resume talks.”

At page 50 of Volume 1-A of the written statement is copy of letter dated October 12, 1995 from Mr. Donald A.Carnp, Acting Director, Office of Pakistan, Afghanistan and Bangladesh Affairs, last two paragraphs of which are reproduced as under:-

“Violence in Karachi has skyrocketed since the Army ended Operation Clean-up and returned to barracks on November 30, 1994. Over 1,500 have died in politically motivated violence during the last nine months alone, compared with 800 deaths in all of 1994. In an effort to defuse the violence, the Government of Pakistan and the MQM/A have engaged in several rounds of talks. The MQM/A is boycotting the

current round of discussions.

The U.S. Government deplores the violence and encourages both sides to find a political resolution to the fighting in Karachi. We urge both sides to show restraint.”

At page 255 and 256 of Volume 1-A of the written statement is copy of 1995 Human Rights Report on Pakistan by U.S. Department of State, relevant portion whereof is reproduced as under:-

“The number of extra-judicial killings increased in 1995. Most such the Federation cannot be run in accordance with the provisions of the Constitution and the Constitutional machinery has failed.

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The U.S. Government deplores the violence and encourages both sides to find a political resolution to the fighting in Karachi. We urge both sides to show restraint.”

At page 255 and 256 of Volume 1-A of the written statement is copy of 1995 Human Rights Report on Pakistan by U.S. Department of State, relevant portion whereof is reproduced as under:-

“The number of extra-judicial killings increased in 1995. Most such killings occurred in Sindh Province in clashes between the Government and factions of MQM. Both main MQM factions, the MQM/A and the Haqiqi, resorted to extra judicial killings and torture of their opponents and targetted police and security officials. In trying to restore order in Karachi, the Government used excessive force, including torture and reported encounter killings, against MQM activists.”

At page 390 of the same volume is available copy of the report of Amnesty International on Human Rights Crisis in Karachi and relevant portion at page 392 is reproduced as under:-

“Amnesty International continues to urge the Government of Pakistan to adopt measures to stop the large-scale human rights violations which are regularly reported from, Karachi, the capital of Sindh. The organization has received reports of hundreds of cases of unlawful detention, torture, deaths in custody, extra-judicial executions and “disappearances”, mainly in Karachi, but also in other cities of the Province. According to official figures, some 1,770 people were killed in Karachi in 1995; these include members of different political patties, law enforcement personnel and political residents of Karachi including women and children.”

57. In the same volume are contained newspaper cuttings from foreign countries, extracts from some of which are reproduced as under. At page 86 of the same volume is cutting from The Guardian of London dated March 22, 1995 carrying international news by Kathy Evens with the heading “Frankenstein’s monsters’ terrorise Karachi” relevant portion of which is reproduced as under:-

“They are young, ruthless, armed and for hire. Kathy Evens reports on the freelance killers who tout their services to rival ethnic political parties and religious groups in Pakistan’s main city, and the shady link between them and the Government’s intelligence agencies.”

There is cutting from Independent on Sunday from London dated 26th March, 1996 with heading’ “Terror/migrant melting-pot is recipe for murderous intrigue and Bhutto lets Karachi killings run out of control”. A portion of the said article which is relevant is reproduced as under:

“The Haqiqi were given arms, training and special ID cards allowing them carte blanche for their murderous activities, not only against the MQM but also in extorting money from Karachi’s businessmen. Although all of Karachi’s armed gangs extort money from shopkeepers, the Haqiqi are regarded as the most rapacious. The Haqiqis even demand money to keep schools open. “

At page 90 of Volume 1-A of the written statement there is cutting from the Guardian. London, dated March 12, 1996 with caption “Police take their

turn in Karachi’s war of-terror”. Relevant portions thereof are reproduced as under:-

Those who have been killed or arrested were Category A people. Those who are still at large are mainly involved in small offences. They are not that deadly”, Mr Suddle said. But he rejected accusations that Karachi’s peace has been bought With blood.

“This proposition that every man arrested is put before a firing squad, is absolute nonsense. though there have been a couple of cases where we also feel excessive fire power was used.”

However, Zohra Yusuf, Secretary-General of the Human Rights Commission of Pakistan, claimed the killing, some of which involved the torture of police prisoners, was systematic.

“This kind of extra-judicial killing is a kind of policy that was never seen before,” she said. “In Zia’s time, there was some semblance of judicial process, no matter how flawed. There is no end to it now and no one has been punished. The Government position is that these are terrorists and as such have lesser rights. “

At page 99 of Volume 1-A of the written statement there is cutting of Herald International Tribune published from Zurich on February 9, 1995 with heading “One of These Benazir Bhuttos Isn’t Nice” and some pertinent paragraphs therefrom are reproduced as under:-

WASHINGTON.- Pakistan has two Prime Ministers. Both are named Benazir Bhutto. Interviewed by David Frost. Miss Bhutto is an elegant politician who speaks eloquently about opportunities for Muslim women. At home, she retains laws that use Islam to deny rights to women ....ignores domestic sectarian violence, speaks for Kaehmiri rights but denies minority rights at home, builds atomic bombs but rarely builds schools.

Modern Karachi, the main tax base and commercial linchpin, is a battleground. More than 1,000 people died last year in incidents involving political parties. At least 50 have died in the last week.

When violence engulfed Karachi University, Miss Bhutto and her security forces did nothing. In the 15 months since she has been Prime Minister, she has made 22 foreign trips but paid almost no attention to Karachi’s problems.

In 1993 she was re-elected with a larger plurality than before having persuaded the nation that the military had prevented her from democratising the country while exempting her own behaviour and policies from any blame. Today a more powerful Benazir Bhutto is repeating her earlier errors. Foes accuse her of discriminating against minorities and of arrogantly abusing political opponents. Allegations of corruption in her family abound. .

The price tag for Miss Bhutto’s policies may be high. American companies, especially those investing in the energy sector, are assuming a sizable risk by entering Pakistan’s uncertain market.

Ignoring a major nuclear player weakens U.S non-proliferation policies. Prospects for Pakistani democracy suffer at the hands of predatory politicians. Both Bhuttos will visit Washington this spring. Ignoring Pakistan’s corruption will not help its democracy or U.S. Pakistani relations.”

At page 100 onwards of Volume 1-A of the written statement is copy of the issue of Newsline from Karachi with heading “Licence to Kill”, relevant portion therefrom at page 103 is reproduced as under:-

“The hawks in the Government were given a free hand to deal with the Karachi problem after the Government-MQM talks reached an impasse in October, 1995. “Shoot the miscreants on sight” was the order issued by Interior Minister, General (Retired) Naseerullah Babar who saw it as the only way to restore peace in the troubled city. And he has ensured that his orders are followed.

The Bhutto Government’s use of State terrorism to gain control over Karachi has not only further brutalised the ongoing bloody confrontation in the city but also set a highly dangerous trend. The increasing number of custodial and extra judicial killings in fake police encounters betrays the Government’s intention of settling a largely political issue through brute force. Never before in Pakistan’s history has such a naked use of State terrorism been witnessed. The carnage on Karachi’s streets by law enforcers under the pretext of combating terrorism has made a mockery of law and justice.,Many of those killed by the security forces have been involved in heinous crimes, but no civilised State can allow their execution without proving them guilty in a Court of law.

Such actions will only reinforce the concept of private justice, providing terrorists a justification for their crimes.”

At page 290 onwards of Volume 1-A of the written statement there is report of the Human Rights Commission of Pakistan on the subject of the State of Human Rights in 1994 and one short paragraph with the heading of “Extralegal killings” is reproduced as under:-

“The large number of extra-legal killings noted by HRCP was in Sindh, where 43 persons were killed in so-called encounters with the police and other law-enforcing agencies. Another 32 were alleged to have died of torture while in custody--19 in police stations, 11 in jails, one in hospital, and one in a Darul Aman. These killings were apart from the carnage in Karachi which claimed in riots and encounters over a thousand lives.

But other areas also reported many extra-legal killings. In the Punjab, 102 persons were gunned down in encounters’ including 25 policemen, 12 in N.-W.F.P. and three in Balochistan. Eleven persons were believed to have died in police custody, or soon after being set free, in Punjab, and three in Balochistan.”

At page 347 onwards of Volume 1-A of the written statement there is copy of Newsline of October, 1995 with heading “Encounter of another kind” and at page 348 there is portion in the Article which is reproduced hereunder:-

Interior Minister Naseerullah Babar’s campaign against ‘terrorism’ has contributed a great deal towards the Mohajirs’ disillusionment with the State. Babar’s strategy has been first to isolate them and then to kill them, but it is a plan that has backfired. In doing so he has only fertilised an already rich breeding ground for terrorism. As is only too frighteningly apparent today, the ongoing operation has created new cadres of terrorists; for every one that is apprehended or killed, dozens more surface daily.

Naseerullah Babar’s assertion that there were more than 2,500 terrorists in Karachi out of which 100 have been killed and 600 arrested, sums up his understanding of the Karachi problem. His myopic vision prevents him from seeing the millions of Mohajirs who find themselves outside the ambit of a democratic system and at the receiving end of endless search and arrest operations. The daily dose of venom spewed supposedly at the MQM terrorists by the establishment, is taken personally by the Mohajirs. And as a result of the harassment, the MQM’s hold is being further strengthened. Operation notwithstanding, its militant wing is capable of striking anywhere in the city and shutting it down trough a mixture of fear and popular support. “

At page 362 of Volume 1-A of the written statement there is issue of Newsline of February 1996 with heading “The Government’s policy is that if someone is a suspected terrorist, you go out and kill him”. This in fact is interview of Zohra Yusuf, Secretary-General, HRCP, and the first question and answer in the interview are reproduced as under:-

“Q. Has the HRCP investigated all the recent cases of alleged extrajudicial killings? If so. what were the findings?

A: We have investigated a number of cases of extra judicial killings and will continue to do so because most cases are in Sindh and now increasingly in Karachi: But we do not investigate each and every case because of our limited manpower and also because the press in Karachi is aware of what is happening and reporting quite well on this issue. The recent investigations carried out by the HRCP included the cases of Fahim Commando, Farooq Dada and Aslam Sabzwari Our findings confirmed what the. MQM had said earlier that they were extra-judicial killings. I want to emphasize when we investigate such cases, our consideration is not whether these people are criminals or not. Investigation of criminal cases is beyond our capacity and is not our concern because any person, even a criminal, has the right to the judicial process. We cannot condone any extra-judicial killings.”

59. The purpose of reproducing -the relevant portions from the newspaper cuttings as above is to show as to how comments were being made from time to time about law and order situation in Sindh and Karachi with main emphasis on the fact that it was not being controlled by the Government in the manner as it should have been and there was fall-out painting a very gloomy picture. It is not in dispute that there were killings in that part of the country and in 1994, 817 persons were killed, in 1995, 1742 persons were killed, and in 1996 up to 30th June, 141 persons were killed. We are not going into the details as to how these killings came about or what were the reasons or’ the facts in the background and whether there was any political, ethnic or any other motivation but the broad question before us is that if for any reason there was law and order situation, then the Government of the day was duty bound to control it in an effective manner and nip the trouble in bud in order to provide an atmosphere for people to breathe fresh air of peace and tranquillity. Contention was raised by Mr. Ahtizaz Ahsan that the reportings from foreign and local newspapers, portions of which are reproduced above, should not be relied upon as their authenticity cannot be vouchsafed and mostly one side version of the incidents is described therein. We are not impressed by this contention for the reason that presently we are in the era where journalism has also ,taken great strides in the field of investigative reporting and the general impression is that such reports are made after proper verification of facts and figures from reliable and dependable sources and relevant quarters. In any case before us no attempt was made to show that the authenticity of these reports was disputed or any statements were issued by the Government of the time denying the authenticity of the reports or making a suitable reply in rebuttal.

60. After filing of the written statement alongwith annexures including newspaper cuttings, some portions of which have been reproduced in the above paragraphs of this judgment, rejoinder was filed by the petitioner and on the ground of extra-judicial killings the same stand was reiterated that it was the responsibility of the Provincial Government and that both the President and the Governor of Sindh profusely praised the handling of the Karachi situation. It is further stated in the rejoinder that the President himself presided over meetings concerning law and order situation and encouraged the authorities to pursue the Government policy with a firm hand. It is also stated in the rejoinder that if the Federal Government is to be held responsible, then the President should himself accept the responsibility and resign. The stand taken by the petitioner in the rejoinder is contradictory in parts and is very unclear as containing both admission and denial. It is just like blowing hot and cold in the same breath which in legal parlance is called approbation and reprobation. In such circumstances it appears that the petitioner has not taken any categorical stand in very clear and unambiguous terms with regard to the killings and their responsibility. The material produced before us beyond doubt connects the Federal Government and the petitioner as Prime Minister with the handling of law and order situation in Sindh and Karachi. The argument is not tenable that if the Federal Government is held responsible, then the President, who presided over the meetings in connection with law and order situation, should also accept responsibility and resign because the Constitution contemplates Parliamentary form of Government in which the President is supposed to act on the advice of the Prime Minister, who is the head of the Government.

61. We are relying upon the newspapers cuttings mentioned above in a limited sense just to show that such events were taking place, which were being reported in the papers and foreign journals without denial. This question came up for detailed examination in the case of the Islamic Republic of Pakistan v. Abdul Wali Khan (PLD 1976 SC 57) with relevant portion at page 69 in which it is held as under:-

“It cannot be denied that so far as newspaper reports of contemporaneous events are concerned, they may be admissible, particularly where they happen to be events of local interest or of such a public nature as would be generally known throughout the community and testimony of an eye-witness is not readily available. The contemporary newspaper account may well 6e admitted in evidence in such circumstances as has often been done by Courts in the United States of America not because they may well be treated as a trustworthy contemporaneous account of events or happenings which took place a long time ago or in a foreign country which cannot easily be proved by direct ocular oral. testimony. Thus, if a person does not avail of the opportunity to contradict or question the truthfulness of the statement attributed to him and widely published in newspapers he cannot complain if that publication is used against him. Such an user would not be hit by the rule of hearsay.”

62. We are relying upon the reporting in the newspaper cuttings mentioned above to the limited extent of saying that the events had happened in Karachi in which killings took place as part of law and order situation which could not be controlled with the result that the citizens started feeling uneasy and insecure and the situation became very alarming, notice of which was taken not only by local newspapers but also by foreign newspapers and other organizations, which felt concerned and treated such killings at par with human rights violations. There is no denial that killings have not taken place. Whether these killings can be justified or not is to be determined by the Court of competent jurisdiction. The M.Q.M. has already filed Constitutional Petition No.46 of 1994 which is pending in the Supreme Court in which violation is alleged of several fundamental rights and other Articles of the Constitution with main emphasis upon the killings of their party men and workers by the administration and the law enforcement agencies. Since that case is pending and the matter is sub judice, for the disposal of the present petitions, it would suffice to put only limited reliance on newspaper cuttings and other material, which show that the killings have taken place showing failure of the Government in controlling law and order situation in Karachi. The-killings also show that not only the citizens have been killed but also members of the law enforcement agencies including Police, Rangers and Army. We are not required here to fix the blame or the responsibility as to who started it and who is responsible to what extent because these are questions which can be answered and findings can be given by the forums with competent jurisdiction. For us it is more than sufficient that both the Federal and the Provincial Government of Sindh have failed in their joint efforts to control the law and order situation in Karachi and Sindh in which there were large scale killings in which so many persons lost their precious lives.

63. Mr. Aitzaz Ahsan, learned counsel for the petitioner, contended before us that the ground of extra-judicial killings is not available to the President for dissolution of the National Assembly as the law and order situation is exclusive responsibility of the Provincial Government and even if the Federal Government came to the aid of the Provincial Government, the responsibility in essence was that of the Provincial Government, hence the Rangers were used in aid of the Provincial Government and section 131-A of Cr.P.C. was invoked for that purpose.

64. No doubt broad-based proposition of law is that law and order subject is normally Provincial responsibility but here this proposition is to be considered whether it can be used as the ground by the President for exercise of his power under Article 58(2)(b) of the Constitution to dissolve the National Assembly on the ground that a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. In the case of Federation of Pakistan v. Muhammad Saifullah Khan (PLD 1989 SC 166) it is held that law and order is indeed the responsibility of the Provincial Government which could be transferred to the National Assembly under the orders of the President under Article 234(1)(b) of the Constitution. This is so observed in that case by Shafiur Rehman, J. (as he then was). This argument was carried further in the case of Ahmad Tariq Rahim v. Federation of Pakistan (PLD 1992 SC 646) and contention was raised that if this ground of law and order situation is available, then before exercising the power of dissolution the President is to be satisfied that the Constitutional machinery has failed and that can happen only when alternative Constitutional remedies available under Articles 186(1), 233(1) or Article 184(1) of the Constitution have been availed. It is held by Shafiur Rehman, J, that all the alternative powers referred above are to be exercised by the President on the advice of the Prime Minister and he cannot do so on his own and in his discretion. It is, therefore, to be seen that here the President is exercising power given to him under Article 58(2)(b) and this power is to be exercised by him in his discretion where 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, hence he has to be objective and must have material to form his opinion in order to take the action as is contemplated under that provision.

65. What is important in this context is availability of material in support of the grounds and law and order situation can be one of many grounds which can be collectively and jointly considered by the President to form opinion objectively that the situation is such that the Government of the Federation cannot be carried on according to the provisions of the Constitution. It should also be considered that this power is given to the President in the Constitution and not only that but it is to be used by him or this power is to be exercised by him in his discretion for which his objective assessment of the situation is required but he cannot be equated with a Court of Law but only it is expected from him that he would act as per rules of prudence because he is exercising a very important power which has been conferred upon him by the Constitution and as held in the case of Muhammad Saifullah Khan (supra) the discretion exercisable by him is not absolute but is deemed to be qualified one and is circumscribed by the object of the law that confers it.

66. Mr. Aitzaz Ahsan has drawn our attention to my judgment in the case of Ahmad Tariq Rahim (supra) with relevant portion at page 719 wherein I have stated that in order to solve the problem of law and order in the Province, it was not necessary to dissolve the National Assembly and other Provincial Assemblies and dismiss the Governments at the Centre and the Provinces. This problem should have been sorted out within the four corners of the Constitution and law firstly by the Provincial Government, failing which by the Federal Government, which has been allowed several options in the Constitution. I would like to mention at the very outset that my judgment in that case was dissenting judgment and I had not agreed with the majority opinion but even then I had stated in my minority view that while exercising power under Article 58(2)(b) of the Constitution, discretion of the President is not absolute but is qualified one and he has to act on the material in support of the grounds and then form opinion in objective manner. The majority view was that there was adequate material in support of several grounds to justify the dissolution of the National Assembly and dismissal of the Federal and Provincial Governments, while I

took the contrary view and discussed material in support of each ground and came to the conclusion that the material was not sufficient to justify exercise of discretion. Each case is to be decided on its own merits and demerits keeping in view the peculiar facts and circumstances and in the instant case I am of the view that there is adequate material in support of the grounds on the basis of which discretion is exercised by the President in dissolving the National Assembly, This material in support of several grounds when considered collectively justifies the action that has been taken by the President,

67. On behalf of the respondents our attention was drawn to letter from Mat. Feroza Begum, M,P.A., addressed to the President of Pakistan (page 191 of Volume 1-A) in which she has stated that her son Hafiz Osama Qadri, who had affiliation with M.Q.M., was arrested by the police and she apprehended that he would be tortured and killed and the police might show him having been killed in a fake police encounter, Later while her son was still in custody, she was taken as Minister in the Sindh Cabinet and was administered oath after which she did not complain about her apprehension with regard to her son, It was argued on behalf of the respondents that she was administered oath under threats and duress that if she did not do so harm would come to her son and for that reason she kept mum and did not complain publicly. After administration of oath she was not given any portfolio and she was not allowed to come out from her house where heavy police guard was posted for her protection. In actuality she could not be reached by any person and could not make any complaint in public because of the fear that if she did so her son would be done to death. It was argued that it was such state of affairs and the President was in the knowledge of everything which was taking place in Karachi and in such circumstances he was fully informed about the events that were taking place and had formed his opinion. As against that it was pointed by the learned counsel for the petitioner that the letter of Mat. Feroza Begum does not show that it was placed before the President and he had applied his mind and passed any order on it. In this context I would like to say that the Supreme Curt took suo motu notice on the application of Waseem Akhtar, M.P.A, and the comment on this incident made in an article published in daily DAWN of Karachi. Proceedings were taken in hand in which Mr, Waseem Akhtar, Mst. Feroza Begum and Hafiz Osama Qadri appeared in the Court and supported the version of Mst. Feroza Begum as stated in the application addressed to the President. She reiterated that she was administered oath under duress and after such statements were recorded in the Court, she was relieved from ministership. We would like to leave this matter as it is for the reason that it is still sub judice in the Court and is pending with final orders yet to be passed.

68. Mr. Aitzaz Ahsan submitted before the Court that truck load of documents produced by the respondents in support of the grounds for dissolution could be returned as unnecessary and not admissible in evidence for various technical reasons, such as, that most of them were collected after November 5, 1996 when the order of dissolution was passed and they were not available before the President at the time when the order of dissolution was passed. Further, original authors of the documents have not been produced, affidavits of authenticity have not been produced, and so on and so forth, The learned counsel put these documents in 17 different categories. In this context it will be pertinent to point out that all what is necessary is that there was material before the President in support of the grounds on the basis of which he has passed the order of the dissolution of the National Assembly, The power given to the President under Article 58(2)(b) is the power which is to be exercised by him in his discretion. No doubt it is held that the President has to form his opinion objectively which is different from subjective satisfaction and the discretion is not absolute but is qualified one, but the said provision does not say that the President has to act as a Court of law and has to form opinion on the same lines as the Courts do and give adjudication on issues of facts and laws. There is difference between the exercise of discretion by the President as provided in the Constitution and the Court of law where documents are to be produced and admitted in evidence after stringent judicial scrutiny. The President is the Head of the State and the Prime Minister is the Head of the Government and powers of both are specified in the Constitution and both together exercise powers of the Federation but the cardinal principle is that in Parliamentary democracy as is provided in the Constitution the President is to act on the advice of the Prime Minister. It is in the day-to-day working of the Federation that the President comes to know about what is happening in the country and is to keep himself fully informed. So far newspaper cuttings are concerned, we have already relied upon the ratio in the case of Islamic Republic of Pakistan v. Abdul Wali Khan (supra) as stated in paragraph 63 of this judgment and here we are dealing with the ground of extra-judicial killings only. At later stage we shall discuss in detail ratios in the cases of Haji Muhammad Saifullah Khan, Khawaja Ahmad Tariq Rahim and Mian Muhammad Nawaz Sharif,

69, The record shows that in the order of dissolution the first ground is extra-judicial killings and there was material available before the President on the basis of which he acted as he had knowledge about such killings in his capacity as the President and he had attended some meetings also and felt concerned about the gravity of the situation. If some documents on the same subject of extra-judicial killings were produced later after the date of dissolution, then such documents can be used as corroboratory material and there is nothing wrong with relying upon such documents which only confirm the fact which was already in the knowledge of the President, Like in preventive detention cases subsequently discovered facts can be added to support the facts already stated, which are not treated as additional grounds but corroboration in support of the grounds already relied upon. In support of the proposition reliance can be placed on the cases of The State of Bombay v. Atma Ram Shridhar Vaidya (AIR 1951 SC 137) and Tarapada and others v. The State of West Bengal (AIR 1951 SC 174).

70. We are satisfied that so far the first ground of order of dissolution is concerned on the subject of extra-judicial killings, there was sufficient material before the President which was considered and more than adequate material has been produced in the Court before us which shows that there were killings going on in Karachi and Sindh to such an extent that the people started feeling unsafe and insecure and both the Federal and Provincial Governments of Sindh failed to control the situation and in consequence the President was justified in using that ground as the ground for dissolution of the National Assembly. We are not making any comments to justify the killings one way or the other or give them any legal cover but only say this much that there was adequate material in support of the ground for exercise of discretion by the President under Article 58(2)(b) in conjunction with the material on other grounds to justify the; conclusion that the Government of the Federation could not be run according to the provisions of the Constitution and there was failure of Constitutional machinery. Before we part with this ground it would be pertinent to mention that Mr. Aitzaz Ahsan, learned counsel for the petitioner, has pointed out paragraph 51 of the written statement filed by the respondents in which remark is made about the petitioner which is not couched in proper and dignified language which is normally used in the Court pleadings. The remark is as under: “It is strange that the petitioner who likes to portray herself as the daughter of the East and the darling of the West ....”. The objection is to the use of the words “darling of the West”. It was submitted by the counsel of the respondents that the word “darling” has been used in the sense of popularity of the person, which is a normal reference and no other meaning was intended. We are of the view that the use of the word “darling” should have been avoided particularly when the reference is in respect of the petitioner who is not only a lady but had remained the Prime Minister of Pakistan twice. In the circumstances we direct that from the written statement “darling of the West” be deleted.

71. The second ground in the dissolution order is the narration of very tragic incident on 20th September, 1996 at Karachi in which Mir Murtaza Bhutto, brother of petitioner Mohtarma Benazir Bhutto, was killed alongwith seven of his companions including Mr. Ashiq Jatoi, who was brother-in-law of another former Prime Minister Mr. Ghulam Mustafa Jatoi. Eight persons were killed apparently in an encounter with Karachi Police. Within days of the tragedy, petitioner, who was at that time Prime Minister of Pakistan, appeared on television and alleged that the Presidency and other agencies of the State were involved in the conspiracy. Later she denied that the Presidency and the Armed Forces were involved in the conspiracy. In the meantime the widow of late Mir Murtaza Bhutto and friends and supporters of their party accused the husband of the petitioner, the Chief Minister of Sindh, Director of Intelligence Bureau, and other high. officials of involvement in the conspiracy. In such circumstances situation had arisen in which powerful members of the Federal and Provincial Governments were allegedly involved, hence it became doubtful whether honest investigation would be done to bring to book the culprits and conspirators. We are not going into details whether this can be made as a ground or not for exercise of discretion by the President of power of dissolution of the National Assembly as contemplated under Article 58(2)(b) of the Constitution for the reason that after the said tragic murders, it has become a criminal case which is to be investigated as is contemplated strictly according to law aftbr which adjudication is to be given by the Court of Law of competent jurisdiction with regard to guilt or innocence of the accused persons. Not only investigation was taken in hand as is contemplated in the Criminal Procedure Code -but later a high-powered Tribunal of Enquiry has been set up consisting of three members from which two are serving Judges of the Sindh High Court and the third member is a serving Judge of the Supreme Court who is Chairman of the Trtbunal. Since the matter is pending before the Tribunal and the criminal case arising from said murders is also pending in the Court of law, we refrain from making any comments on this point which may prejudice the result of the case or findings of the Tribunal. We have said so in very specific terms in the short order also that because the matters are sub judice on the judicial side, we shall not make any comments on this ground.

72. The third ground in the order of the dissolution is that the judgment of this Court in the case of appointment of Judges in the superior Courts was ridiculed by the petitioner as Prime Minister of Pakistan in the National Assembly in her speech, which was repeatedly telecast. There was deliberate and wilful hesitation in the implementation of the judgment. Directions contained therein were implemented after a delay of six months and ten days and that too only when the President had informed the Prime Minister that if advice was not submitted in accordance with the judgment, then the President would himself proceed to fulfil the Constitutional requirements. By not implementing the judgment petitioner as Prime Minister violated Articles 190 and 2A of the Constitution. Before we go into the details of this ground, it would be pertinent to recapitulate the salient features of the judgment of this Court mentioned above. In the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) appointments of Judges in the High Courts and in the Supreme Court during the tenure of the Government of the petitioner were challenged on the ground that they had been made in contravention of the procedure and guidelines laid down in the Constitution and this Court was required 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 other co-related Articles. It was held that Articles 2, 2A and 227 in the Constitution have given Islamic character to the Constitution by fully securing the independence of the Judiciary and by providing that all existing laws should be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur’an and Sunnah. It was further held that appointments of Judges and the manner in which they are made have close nexus with the independence of the Judiciary. The short order was announced on 20th March, 1996 and detailed reasons were released on 3-4-1996 and both are published as Al-Jehad Trust v, Federation of Pakistan (PLD 1996 SC 324).

73. The salient features of the judgment in the case of appointment of Judges mentioned above are that the word “consultation” is defined as effective, meaningful, purposive, consensus-oriented leaving no room for complaint of arbitrariness or unfair play. recommendations made by the Chief Justice of the High Court and the Chief Justice of Pakistan in respect of appointments of Judges in the High Courts are to be accepted by the President/Executive in the absence of very sound reasons to be recorded. Acting Chief Justices are not consulates within the Constitutional scheme. Ad hoc Judges can be appointed in the Supreme Court only after the sanctioned strength is exhausted. Vacancies are to be filled ordinarily within 30 days and in extraordinary circumstances within 90 days. Senior most Judge in the High Court has legitimate expectancy to become Chief Justice and Additional Judges in the High Courts have legitimate expectancy to be made permanent Judges. Transfer of a Judge of the High Court without his consent and induction in the Federal Shariat Court is violative of Article 209. Ten years’ active practice as Advocate of the High Court is mandatory for a member of Bar for appointment as a Judge in the High Court as against enrolment simpliciter. Judge of the Supreme Court may not be sent as Acting Chief Justice of the High Court. After announcement of the short order, ` steps were taken towards implementation and in that context on 25-3-1996 the Full Court Meeting of the Supreme Court was held in which decision was taken not to include ad hoc Judges in the Roster of the Supreme Court till their regularisation or otherwise. Six Judges of the Supreme Court were affected. On 28-3-1996 two permanent Judges of this Court, who were working as Acting Chief Justices in the High Courts of Lahore and Sindh, were recalled to work in the Supreme Court. Two ad hoc Judges of this Court who were permanent Judges of the High Courts, were sent back to their respective High Courts. On the same day the then Prime Minister of Pakistan Mohtarma Benazir Bhutto in her speech in the National Assembly criticised the judgment of the Supreme Court in the case of appointment of Judges and that speech was televised repeatedly and also published in print media.

74. At this stage it would be pertinent to mention that the ground in the dissolution order is that the judgment of the Supreme Court in the case of appointment of Judges was ridiculed by the petitioner and there was deliberate and wilful hesitation in the implementation of the judgment and the directions contained therein were not implemented immediately and so on. In order to ascertain these facts it will be expedient to put the events after announcement of the short order in proper sequence date-wise so that it can be ascertained as to who did not approve of the judgment and ridiculed it and did not want to implement it or implemented it in parts with delay for some extraneous motive. We begin with the speech of the petitioner as Prime Minister which was made by her in the National Assembly on 28-3-1996 as mentioned in the preceding paragraph, extracts of which are reproduced hereunder:-

....Today I would like to make a statement in connection with the judgment announced by the Supreme Court in the case of Al-Jehad Trust v. The Federation of Pakistan on the appointment of Judges to the superior judiciary.

Unfortunately the last few days have seen the politicization of the Supreme Court order. The aim is to give an impression that a Constitutional or political crisis has emerged. At the outset, in categorical terms, I dispel the impression that a crisis of any nature, political, Constitutional or of administrative nature exists.

It is for the executive to implement the will of the people expressed through legislation in Parliament. It is for the judiciary to interpret the law and it is for the judiciary to interpret the Constitution.

But it is unfortunate that for the last couple of days, a storm of political rhetoric has been unleashed to try and gain petty political advantage without considering the serious consequences that flow from the announcement of the short order.

The Government had clearly stated that it was studying the short order and that it would make its response after the detailed reasons were recorded and delivered by the Supreme Court.

This was the response of a responsible Government, a Government alive to its Constitutional responsibilities and obligations, conscious of the political and administrative fallouts. The earlier position taken by the P.D. F. Government remains unaltered.

We are aware of the opinions of the jurists expressed through newspapers and otherwise. They opine that the short order goes beyond the pale of clear provisions of the Constitution. Articles 177 and 193 of the Constitution provide for the appointment of Judges. The appointment power lies with the President.

A consultative process is mentioned in the said Articles. Nowhere is it mentioned that the opinion of any of the consultes is binding on the President.

Article 203-C of the Constitution talks about the composition of the Federal Shariat Court where an appointment for two years or less does not require consent. Prima facie the short order is in conflict with the express words of the Constitution.

One of the most serious consequences which flows from the short order is on account of the combined reading of conclusions VI and XIII.

This is tantamount to opening a pandora’s box because Acting Chief Justices in the Supreme Court of Pakistan and the High Courts did not start being appointed in 1994 when Benazir Bhutto took over. They have been appointed under the 1973 Constitution ever since its enforcement.

Let me re-affirm that I am not here to give a critique of the short order of the Supreme Court. I am here to highlight some of the inter- twined strings that spin as a consequence of the short order.

To our view this is an order by the judiciary against the judiciary where Judges may face the unfortunate risk of being dragged into litigation.

Now a quandary arises as to what an executive is to do when an apex Court gives a judgment which many in the country believe may be violative of the Constitution.

We concede that the judiciary can interpret the Constitution. But, according to code of conduct, the judiciary must submit to the Constitution. The Constitution does not provide the judiciary the power to write and attach a mini-constitution or strike down Articles of the Constitution.

We in the Executive have sworn to preserve, protect and uphold the Constitution of the Islamic Republic of Pakistan.

Of course, Honourable Members, we must use the Constitutional mechanisms available and the Constitution does provide the mechanism. We will do what the Supreme Court decides, because that is the proper body to adjudicate such -matters.

We have, therefore, decided to invoke the advisory jurisdiction of the Supreme Court under Article 186 of the Constitution.

And finally with very deep regret I announce, because of all these men are also learned and experienced, Justice Sajjad Ali Shah appointed on 10-8-1978, consultes Acting Chief Justice Agha Ali Haider. Confirmation in the High Court on 10-8-1981 and there too we have Acting Chief Justice. “

75. Now the question arises whether the speech of the petitioner as the Prime Minister made on the floor of the National Assembly on the subject of the

judgment of the Supreme Court was proper or not so far its tenor and manner is concerned in which it was made. Secondly, whether it appears from the speech that the intention of the maker was to implement the judgment or had no intention of doing it and had expressed herself in that respect. Normally, even short order of the apex Court, when it is speaking order particularly when it contains specific directions, is to be acted upon without waiting for detailed reasons. In this case with the consent of the Prime Minister one acting and two ad hoc Judges of the Supreme Court were made permanent Judges on 28-3-1996 before release of detailed judgment. No doubt in the Parliament fair comment can be made on the judgment of the apex Court but that comment is to be made in good faith with bona fide intention and is to be made in the language which is temperate and manner which is befitting to the member of the Parliament. Article 63(1)(g) envisages that a person shall be disqualified from being elected or chosen as member of the Parliament if he is propagating any opinion which is prejudicial to the integrity or independence of the judiciary of Pakistan or which defames or brings into ridicule the judiciary or armed forces of Pakistan. Of course intention of the maker can be gathered from the tenor of the speech and also from the subsequent conduct.

76. It would be relevant here to produce extracts from some newspapers to show as to how this speech was viewed. The daily DAWN, Karachi, dated 29-3-1996 gave caption to the news item “Order hits 10 of Supreme Court’s own Judges, claims Prime Minister”. Other relevant extracts are reproduced as follows. “In a hard hitting speech in the National Assembly on Thursday, the Prime Minister made an almost clause to clause rebuttal of the Supreme Court’s short order while also insisting that the Government was in the process of implementing the verdict. The Prime Minister came down particularly hard on the verdict’s portions dealing with the curtailing of the executive’s powers of nominating Judges to the superior judiciary. She said that the Court had ruled that an acting Chief Justice was not a “consultee” as envisaged by the Constitution and, therefore, the Constitutional requirement of consulting a Chief Justice was. not fulfilled. She said if this reasoning were followed, then 10 out of 16 Supreme Court Judges, including Chief Justice Syed Sajjad Ali Shah, would stand disqualified as all of them, too, had been appointed as Additional Judges of different High Courts with the “consultation” of the then respective Acting Chief Justices.” The daily Muslim, Islamabad dated 29-3-1996 reported a news item with heading “Supreme Court cannot write a mini-Constitution: Prime Minister”, “Opposition would not allow bulldozing of judiciary: Nawaz”. It is mentioned therein “that the Government has begun implementing the Supreme Court judgment and had confirmed three ad hoc Judges of that Court this morning. Prime Minister Benazir Bhutto said that her Government would invoke the advisory jurisdiction of the apex Court under Article 186 of the Constitution on how to unravel some of the strands of the Constitution tangled by the verdict”. The daily Nawa-i-Waqt, Urdu, of Rawalpindi dated 29-3-1996 gave heading as “Judiciary has no right to make mini-constitution”. The daily Khabrain, Lahore dated 29-3-1996 published a news item with heading .

77.             The daily Pakistan, Lahore dated 29-3-1996 published a news item quoting Voice of Germany and B.B.C. and gave heading “Government maintains its stand on Supreme Court decision and is not prepared to give in”. It is further stated therein that while commenting on the speech remark is made that tone and manner of speech on an important national issue did not suit the Head of the Government as the same amounted to ridicule. It is further observed by the Voice of Germany that the analysts were of the view that it was apparent from the tenor and manner in which the Prime Minister made speech that the Government would not budge an inch from the stand it had taken in respect of the decision of the Supreme Court. The Frontier Post, Peshawar dated 29-3-1996 published a news item with heading “Prime Minister’s remarks against the Supreme Court judgment regretted’. Senator Hafiz Hussain Ahmad, Central Vice-President of Jamiat-e-Ulema Islam stated that the judgment of the Supreme Court upholding the dignity and supremacy of the judiciary is historical document and added that remarks of the Prime Minister in this connection are regrettable. He stated that the President of the country should not sign blindly on all the papers sent to him from the Prime Minister. He should act judiciously. The daily Jisarat (Urdu) dated 29-3-1996 carried headline “Prime Minister’s charge against the judiciary amounts to treason”, says Nawaz Sharif. He further stated that with the cooperation of the nation the judiciary will be protected and Benazir was deceiving the nation as she was not prepared to abide by the judgment of the Supreme Court. The daily Frontier Post, Peshawar dated 29-3-1996 published a news item with heading “Bhutto has declared war on judiciary, says Nawaz”. “He said Bhutto was not justified in saying that the Supreme Court Judges had given verdict in anger and haste. Nawaz questioned the claims of the Bhutto about her respect for the independence of judiciary”. “The Government has acted otherwise”, he claimed. Nawaz said “Bhutto had just dramatised the situation instead of resolving the crisis”. The daily Khabrain (Urdu), Lahore dated 30-3-1996 published a news item with heading “Government is courting death: Mushahid Hussain”. “The nation is shocked at the speech of Benazir full with poison against the judiciary”. .

78. On 28-3-1996 one acting and two ad hoc Judges of the Supreme Court were made permanent. On 3-4-1996 detailed reasons in support of the short order were released which is called detailed judgment. On 8-5-1996 meeting of the Committee of the Chief Justices was held in Islamabad. This Committee is composed of the Chief Justice of Pakistan and the Chief Justice of the Federal Shariat Court and the four High Courts. This meeting of the Committee was held to, consider ways and means to implement the judgment. The Chief Justices of the High Courts informed about the progress towards implementation of the judgment and the figures were released showing that in Lahore High Court from 40 Judges, cases of 31 required regularization including the five who were not confirmed. In the Sindh High Court from 19 Judges, cases of 16 required regularization. In Peshawar High Court from 15 Judges, cases of 9 required regularization. It was decided that the Chief Justices of the High Courts would send their recommendations in respect of regularization within 30 days of their appointment as permanent Chief Justice as is mentioned in the judgment. It was left open to the Chief Justices of the Federal Shariat Court and the High Courts to take proper action as they deemed fit and proper as to whether the affected Judges should be put on Rosters or not. The Chief Justice of the Sindh High Court recommended confirmation of one Additional Judge and likewise the Chief Justice of the Peshawar High Court also recommended confirmation of one Additional Judge. The Chief Justice of Pakistan agreed with the two Chief Justices and supported their recommendations but the Federal Government did not agree and instead of confirmation of the Judges, extended their terms of appointments as Additional Judges for six months vide two notifications issued on 4-6-1996. This was done in clear violation of judgment. The meeting of the Committee of the Chief Justices was called in the Lahore High Court on 6-6-1996 to survey the progress of the implementation of the judgment and regretted the delay which was being caused in the implementation of the judgment and in the finalisation of regularization of the Judges of the High Court. The Committee also deliberated the issue of extension of tenure of two Judges of the High Courts of Sindh and Peshawar by the Federal Government disregarding the joint recommendation of the Chief Justices and deferred further consideration for the next meeting (see page 175, Volume III-A of the written statement).

79. The next meeting of the Committee of the Chief Justices was held at Murree in the Lahore High Court Rest House on 13-6-1996. The minutes of the meeting are available at page 171 of Volume III-A which is annexed with the written statement and paragraph 3 of which is reproduced as under:-

“The Committee made survey of the progress made so far in the process of implementation of the judgment of the Supreme Court. It was unanimously resolved that as in the case of Supreme Court, which took decision to put off ad hoc Judges from the Roster who are surplus and in respect of whom a letter was written to the Federal Government to issue Notifications for revocation of their appointments, .on the same lines, those Judges in the Federal Shariat Court/High Courts in respect of whom it is recommended by us not to regularise their appointments should be laid off and no judicial work should be assigned to them until further steps are taken to bring about the finalisation in that direction. This laying off shall commence from first working day of the next week, i.e. 16th .Tune, 1996.”

80.          In consequence of the decision of the Committee of the Chief Justices ‘mentioned above, nine Judges from the Lahore High Court, five from the Sindh High Court, three from the Peshawar High Court and one from the Federal Shariat Court were laid off. On 19-6-1996 the daily Pakistan, Lahore published a news item that the laid off Judges had declared the decision of the Chief Justices Committee to be unconstitutional and sought time from the President for initiating legal battle. The laid off Judges were led by Justice Ahmad Saeed Awan. The daily Jasarat, Karachi dated 24-6-1996 published a news item with heading “the laid off Judges of the Lahore High Court rejected the decision of the Chief Justices Committee against their relieving of” quoting the Gulf News that “Justice Ahmad Saeed Awan, former Minister for Information, who is close confident of Prime Minister Benazir Bhutto, is meeting the affected Judges to prepare strategy. The Government has provided guards to Ahmad Saeed Awan as he feels danger from Advocates. According to internal sources of People’s Party, some Judges of higher judiciary are performing role of opposition which cannot be tolerated by the Government”

81.     The daily Jang, Rawalpindi dated 20-6-1996 published a news item that an attempt was made by the members of the Bar to prevent Mr. Justice Shafi Muhammadi, Judge of the Federal Shariat Court, from dealing with cases and Justice Shafi Muhammadi refused to stop the work and remarked that the Chief Justices Committee was encouraging “Harram” which means illegitimate earnings. Justice Muhammadi was stopped by the members of the Bar on the ground that he was a laid off Judge as per the judgment of the Supreme Court and the decision of the Committee of the Chief Justices but he refused on the ground that he was not subordinate of the Chief Justice of the High Court, or the Supreme Court but was allowed to work in the Federal Shariat Court by the Chief Justice of that Court. The daily Jang, Rawalpindi issued on 21-6-1996 carried a news item that Justice Shafi Muhammadi had been summoned to Islamabad to work in the Federal Shariat Court. It is stated therein that before going to Islamabad, Justice Shafi Muhammadi while talking to newspaper reporters stated that the Committee of the Chief Justices has no Constitutional sanction and, therefore, its decisions are not binding upon him. He further stated that the Chief Justice of the Federal Shariat Court had signed the minutes of the Committee of the Chief Justices but later he realised his mistake and allowed him (Justice Shafi Muhammadi) to continue working in the Court. He further stated that he has been asking Ulema whether it was not Harram that one should accept salary for the post but not perform duties. Criminal Petition No.26(S) of 1996 was filed in the Supreme Court before a Bench of two Judges for leave against the order of the Federal Shariat Court granting bail in appeal to the appellant before that Court who was convicted for offences under section 17(3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with section 397, P.P.C. and was sentenced to R.I. for seven years. During the proceedings it was brought to the notice of this Court that Mr. Justice Shafi Muhammadi in the order granting bail had criticised the judgment of the Supreme Court in the Judges case in an insolent manner which amounted to the contempt of the Court. Notice was issued to the Advocate-General and also to the senior members of the Bar for rendering assistance to the Court. This order was passed on 4-8-1996 and operation of paragraphs 2 to 13 of the impugned order passed by the Federal Shariat Court was suspended. On the next date, i.e. 8th August, 1996 the Bench of two Judges of this Court passed order which is reproduced as under:-

“Hearing of the main petition is adjourned to a date in office. Let notice be issued to Mr. Justice Shafi Muhammadi, working at present as Judge of the Federal Shariat Court, to appear in this Court in person on the next date of hearing to show cause why action should not be taken against him for contempt of the Court as contemplated under Article 204 of the Constitution read with sections 3 and 4 of the Contempt of Court Act, 1976 for making unwarranted adverse comments in an insolent manner in his order granting bail challenged in this petition which amounts to ridiculing and scandalizing this Court and its Judges.

This Court has already suspended operation of offending portions in the impugned order from paragraphs Nos.2 to 13. It is further directed that the offending portions shall not be published in any law journal, newspaper, magazine etc. Adjourned to a date during vacation subject to availability of Bench.”

82. The daily Nation, Islamabad published on 28-8-1996 reported that the

President of Pakistan had relieved Federal Shariat Court Judge Shafi Muhammadi. The relevant paragraph from the said news is reproduced as under: --

“Shafi Muhammadi as Judge of the Federal Shariat Court wrote adverse comment against the judgment of the Supreme Court in Judges’ appointment case. He ruled that it was not binding on the Federal Shariat Court and Prime Minister and President are also not under the Constitutional obligation to implement the judgment.

Taking cognizance of the adverse remarks, the Supreme Court held preliminary contempt proceedings against Shafi Muhammadi in which senior lawyers requested the Court to issue contemet of Court notice to him. Shafi Muhammadi was originally appointed Judge of the Sindh High Court by the present P.P.P. Government. Later, he was sent to the Federal Shariat Court by the President. Shafi Muhammadi was a staunch P.P.P. activist before he was elevated to the Bench. ‘I had served as Secretary-General of Sindh P.P.P. for many years and I also served as O.S.D. to Prime Minister during the last tenure of Benazir Bhutto’, Shafi Muhammadi told The Nation while confirming his resignation here on Tuesday. “

83.            On the other hand those Judges of the High Courts, whose appointments were declared invalid in the light of the judgment of the Supreme Court, still continued coming to the Courts and enjoyed perks and fringe benefits as the Federal Government had not issued notifications relieving them and in that context policy of dilly dally continued. On this subject the daily Nawa-i-Waqt Rawalpindi in issue of 4-8-1996 carried a news item saying that the Chief Justice of Pakistan expressed regrets that he had recommended appointment of Mr. Justice Munawar Ahmad Mirza, Chief Justice of the Balochistan High Court, as Judge of the Supreme Court but no action was being taken by the Federal Government and in such circumstances there was no representation of the Province of Balochistan in the Supreme Court. It is also stated therein that the affected Judges of the Lahore High Court were defying decision of the Committee of the Chief Justices, who were advised by the Governor of Punjab to resign. The Federal Government had offered some such Judges ambassadorships abroad and also important jobs in the Government so that conflict between the judiciary and the Government should come to an end. The last paragraph of this news item is reproduced as under:-

“One affected Judge of the Lahore High Court stated that if Prime Minister Benazir Bhutto asked them to tender resignations, then they would do so at once. This Judge admitted to the reporter of the Nawa-iWaqt that all the affected Judges would resign if they were asked to do so by the Prime Minister. This Judge also stated that all the affected Judges have one common stand and they would send their explanations to the Governor in writing. One Judge stated that on the charge of corruption he should be given opportunity to explain and then he would be able to prove that allegation is false.”

84.       The facts stated above, most of which are reproduced from the newspaper cuttings, are undisputed facts as they have not been denied. These facts as long as they are undisputed clearly show as to who was responsible for not implementing the judgment and at whose behest the affected Judges became defiant and refused to leave. As they say all roads lead to Rome, hence in this case also indisputably clear indications are that the petitioner felt aggrieved against the judgment of this Court to which she had taken very serious exception and did not want it to be implemented in totality. At her behest those Judges who were very close to her and belonged to her party, rallied round other affected Judges and openly delayed the process of finalisation in respect of relieving the affected Judges.

85. Against the judgment of the Supreme Court in the case of appointment of Judges, two civil review petitions were filed on 19-5-1996 by Federation of Pakistan through Secretary, Ministry of Law and Justice and the third civil review petition was filed by the Governor of Punjab on 21-5-1996. These were registered as Civil Review Petitions Nos.32, 33 and 34 of 1996. On 19-5-1996 a Reference was filed under Article 186 of the Constitution by the Federal Government which purported to have been filed by the President of Pakistan but was not signed by him. The memorandum of the Reference was sent back and it was refiled after signature of the President and was registered as Reference No.l of 1996. Daily Nawa-i-Waqt, Rawalpindi published news item on 24-5-1996 that the President had signed the Reference because it was legal requirement and also because the Supreme Court desired so. Perusal of the Reference and the three review petitions indicated that in the Reference six questions were asked which were identical with questions in the review petitions with difference in language only. The review petitions were fixed for hearing before a Full Bench of seven Judges at Lahore. It appeared that one day before announcement of the short order in the case of appointment of Judges, Additional Judges in the High Courts of Sindh and Lahore were made permanent by notifications. They were administered oath also before the announcement of the short order. On 3-7-1996 during hearing of the review petitions at Lahore order was passed by the Court directing the Federal Ministry of Law to produce on the next date of hearing papers relating to the confirmation of Additional Judges of Lahore and Sindh High Courts which was done one day before announcement of the short order on 20-3-1996. On 7-7-1996, which was the next date of hearing, record was not produced and Mr. Aitzaz Ahsan, learned Advocate Supreme Court for review petitioners, made a statement before the Court that he had instructions to say that if the Bench was not reconstituted he would withdraw the review petitions. No such application was filed in writing and oral request for reconstitution of the Bench was rejected by the Chief Justice in view of the case of Zulfiqar Ali Bhutto v. The State (PLD 1978 SC 125) and in the result the review petitions were dismissed as  withdrawn. The third Review Petition No.34 of 1994 which was filed by the Governor of Punjab was also dismissed as withdrawn for the same reason as the other two review petitions.

86.            On 21-4-1996 Civil Petition No.23 of 1996 was filed by Al-Jehad Trust through Mr. Wahabul Khairi, Advocate under Article 184(3) of the Constitution with prayer inter alia that in the appointment of Judges, apart from the Chief Justices of the High Courts and the Supreme Court, authority on behalf of the Federal Government should be exercised only by the President without consultation of the Prime Minister and any other view would run counter to the independence of judiciary. He had made in all 10 prayers which related to the functioning of the judiciary and had prayed that the record relating to appointments of Judges should be shown on demand to citizens and lawyers as a matter of right to information and should not be treated as privileged. He also prayed that a Judge of the High Court should not be appointed as Law Secretary and the Chief Justice of the High Court should not be appointed as Governor. Civil Petition No.54 of 1996 was filed on 26-8-1996 by Mr. Zafar lqbal Choudhry, Advocate Supreme Court, under Article 184(3) of the Constitution seeking protection and enforcement of his fundamental rights under Articles 4, 14 and 25 praying for declaration from the Court that the Prime Minister has no power/authority under Article 48 of the Constitution to interfere in any manner in the matters of appointments of Judges of the superior Courts. Special Reference No. l of 1996 was already pending when the President of Pakistan filed Special Reference No.2 of 1996 on 25-9-1996 under Article 186 of the  Constitution. In this Special Reference No.2 question was framed for opinion of the Supreme Court to the effect whether or not the powers of the President to make appointment of Judges in the Supreme Court and the High Courts under Articles 177 and 193 of the Constitution are subject to the provisions of Article 48(I) of the Constitution. In other words whether in the appointments of Judges in the superior Courts the President has to act in accordance with the advice of the Cabinet or Prime Minister, or not.

87.        References I and 2 of 1996 and Constitutional Petitions 23 and 54 of 1996 were placed for hearing on 9-10-1996. The Court was informed that the President of Pakistan had been pleased to appoint Mr. Shahid Hamid, Advocate Supreme Court, to represent him in all matters relating to Reference No. l of 1996. Mr. Shahid Hamid informed the Court that since in Reference No. l of. 1996 same questions have been raised which were raised in Review Petitions 3 to 34 of 1996 and since the said - review petitions have been dismissed r ; withdrawn, the President considers Special Reference No. l of 1996 to have  become infructuous, hence he has dissociated himself from that Reference. Qazi Muhammad Jameel, the then Attorney-General for Pakistan, present in the Court stated that the reference was filed on the advice of the Prime Minister and he as the Attorney-General representing the Federal Government had no instructions to withdraw the same, hence requested for time to obtain instructions. In Reference No.2 of 1996 Mr. Shahid Hamid appeared for the President and the learned Attorney-General stated that he had no concern with the Reference and requested for time to seek further instructions from the Federal Government. It was noticed that in Civil Petitions 23 and 54 of 1996 common point involved was interpretation of Article 48 to the effect whether advice of the Prime Minister was binding or not on the President in respect of appointments of Judges in the superior Judiciary, hence notices were issued to the learned Attorney-General for Pakistan as contemplated under Order 27-A, Rule 1, C.P.C. and also to the respondents in both the Constitutional petitions. The Court directed that further hearing of these matters would come up before a larger Bench and M/s. Sharifuddin Pirzada and S.M. Zafar, Senior Advocates Supreme Court, were requested to assist the Court as amicus curiae.

88.     These matters came up for hearing before a Bench of five Judges at Islamabad on 20-10-1996 and in the meantime Qazi Muhammad Jameel had resigned and was replaced by Syed Iqbal Haider who was appointed as Attorney General for Pakistan. Meanwhile request was made that since it was an important matter, the Presidents of the Bar Associations should be heard, hence the Presidents of the Supreme Court and the four High Court Bar Associations, Advocates-General of the Provinces, and the Vice-Chairman of Pakistan Bar Council were requested to assist the Court. On 5th November, 1996 Government of Prime Minister Mohtarma Benazir Bhutto was dismissed and the National Assembly was dissolved by proclamation of the President issued under Article 58(2)(b) of the Constitution. In the post-proclamation developments Mr. Shehzad Jehangir was appointed as Attorney-General and appeared in these cases and Mohtarma Benazir Bhutto requested the Court to allow her to appear as respondent in her private capacity and be represented by Syed Iqbal Haider.

These requests were allowed and finally after detailed hearing it was held that since the Constitution contemplates Parliamentary form of Government, advice of the Cabinet or the Prime Minister under Article 48(1) is attracted to the appointments of Judges as contemplated under Articles 177 and 193, which is further qualified by and subject to ratio decidendi contained in the judgment of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324). In the result Reference No.2 of 1996 was answered and the petitions were disposed of in terms stated above. The judgment mentioned above is published as case entitled AI-Jehad Trust v. Federation of Pakistan (PLD 1997 SC 84).

89. All what is stated above clearly shows that the petitioner as Prime Minister was dragging her feet and her object was not to implement the judgment, which she did not like and in the process was attracted violation of Articles 2A and 190 of the Constitution. There was deliberate delay and more than six months expired and in consequence recommendation for appointment of Mr. Ausaf Ali Khan as Judge of the Lahore High Court could not materialise as he attained the age of 62. Similarly, recommendation for confirmation of Justice Rana Baghwandas from Sindh High Court and Qazi Hamiduddin from Peshawar High Court jointly made by the Chief Justices of the High Courts and the Chief Justice of Pakistan was not accepted as laid down in the judgment of the Judges’ case, and their probationary period was extended for six months. Such acts cannot be deemed as delay but they indicate open defiance of the judgment of the Supreme Court which indicates violation of Articles 2A and 190 of the Constitution. So far ridiculing the judiciary is concerned, apart from what is stated above, the petitioner indulged in it deliberately and intentionally and is on the record having stated publicly and such news item is published in the newspapers that she would appoint Mr. Jehangir Badar, who was President of P.P.P. Punjab, as Chief Justice of Pakistan. Mr. Jehangir Badar, who was Senator at the relevant time, admitted that such proposal was made by the petitioner/Prime Minister which enhanced his respect but the proposal was not to be acted upon. This was reported in Daily Nawa-i-Waqt, Rawalpindi on 11-1-1996 and an editorial appeared in Nawa-i-Waqt on 12-1-1996 on this subject. .

90On 4-1-1996 the petitioner addressed Jacobabad and Nasirabad Bar Associations in Sindh and following extracts from her speech (pages 18 to 32 of Volume III-A) are reproduced as under:-

“We do not believe that the Judiciary has the right to alter or amend the Constitution, only the right to interpret it. That is why, we opposed the ‘Doctrine of Necessity’. That judgment gave the power to the dictator to amend the Constitution which was totally illegal and unconstitutional and stole from the people of Pakistan the right to amend the Constitution through their elected representatives. Thus, judicial restraint is the hallmark of an independent Judiciary free from political consideration devoted to interpreting the law.

I would like to mention to you, honourable members of the Jacobabad and Nasirabad Bars that you should judge for yourselves. You know the Constitution gives us the power to appoint anybody from the Jacobabad Bar as the Chief Justice of the Supreme Court or Chief Justice of the High Court. But we did not exercise the Constitutional power so far and instead we chose the Chief Justices from the existing lot of Judges.

You know distinguished members of the Bars, that every single Judge of the Supreme Court was nominated. Who is today the Judge of the Supreme Court was nominated after 1977. So, every single member of the Supreme Court has been made a Judge either by General Zia-ul-Haq or by Ghulam Ishaq Khan or by Mr. Nawaz Sharif. So, is it not an irony that they should call the Judges that they have appointed ‘Jiyalas’. These are people they had appointed. But I thought that let us try and strengthen the Constitution, and although the Constitution gives us this power I did not exercise it to take a Chief Justice from the Bar. You know Constitution also gives us the power to take Judges in the Supreme Court from the Bar. So far, we have not exercised that Constitutional right. I did not turn around and say that the Judiciary is full of ‘Payaras’, people appointed by Zia-ul-Haq, Ghulam Ishaq Khan and Nawaz Sharif. So, I will not appoint from the Bar, I will appoint from the Bench because I don’t want people who were tarnished by appointments by General Zia, a Martial Law dictator, or by a rigged Prime Minister. I did not do that, because I want to see institutions flourish, and only those who do not want to see institutions flourish, only those who do not want to see democracy flourish, who do not want to see the rule of law flourish, they distort the fact, but I am prepared to challenge them to take on fact. But each person in the Supreme Court of Pakistan has been made a Judge after 1977 either by General Zia-ul-Haq or by Mr. Nawaz Sharif or by Mr. Ghulam Ishaq Khan. So not one of them can be called a ‘Jiyala’. If any thing, he can be called a ‘Payara’, but they are not into calling ‘Jayalas’ or ‘Payaras’, because we believe that if a man becomes a Judge he should be above any political consideration and he should work according to his conscience, and he should work according to the Constitution. So, we do not do that. Even in the High Courts the Judges that we have appointed now are junior most Judges, and they will not attain senior most positions until ten to fifteen years are passed by. So, the entire, Judiciary so far, whether it is the Supreme ‘Court or the High Courts, is dominated largely by the people who were appointed in the long period between 1977 and 1993, and this is a period of almost 20 years.

When the Judiciary convicted Quaid-e-Awam to satisfy Gen. Zia in the charge of conspiring to murder a man who is still alive, they were the loser.

Then why do men make mistakes? Why do the Zias, the Ishaqs, the Anwarul Haqs make fatal errors? Because they are mortals. They get carried away by temptation. Temptation for power, for pomp, for fame, for fortune. They like to think of themselves as Messiahs when in fact they are pawns in the hands of political groups.

The real wisemen are those who stick to their Constitutional roles through thick and thin, through thunder and storm and thereby win respect in their own time and the time that comes after. “

91. On the ground of non-implementation of the judgment of the Supreme Court in the case of appointment of Judges enough material has been produced which has come on the record showing that Article 190 of the Constitution has been violated, which requires that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. The judgment of the Supreme Court was not implemented by the executive authority and as envisaged in our Constitution we have Parliamentary form of Government in which the head of executive authority is the Prime Minister and such executive authority of Federation is to be exercised by the President on the advice of the Prime Minister as is contemplated under Article 48 of the Constitution. Article 90 of the Constitution envisages that the executive authority of Federation shall be exercised by the President directly or through officers subordinate to him, in accordance with the Constitution. The question of interpretation of this Article came up for consideration in the case of Al-Jehad Trust and Reference No.2 of 1996 v. Federation of Pakistan (PLD 1997 SC 84) with relevant portion at page 133 contained in paragraph 65 in which it is held that Article 90 is to be read in conjunction with Article 48(1) of the Constitution on the same lines as is done in India in their Constitution in which the relevant Article is 53 read with Article 74 as the language in the relevant Articles in our Constitution has been borrowed and lifted from the Articles in the Indian Constitution mentioned above. The thrust of the argument is that since in both India and Pakistan Parliamentary form of Government is operative as contemplated in the Constitutions, hence executive authority of the Federation is to be exercised by the President on the advice of the Prime Minister.

92.           It is regrettable that in the hierarchy of executive authority resistance was made and judgment was not implemented by the petitioner as Prime Minister and as head of the Government and in the process Article 2A of the Constitution has also been violated which provides specifically that independence of the Judiciary shall be fully secured. There was so much dillydally and hesitation in the implementation of the judgment that finally the President was constrained to take stand that if the Prime Minister did not comply with the judgment he would do so on his own and only then compliance was made in connection with regularisation or otherwise of the affected Judges after delay of six months and ten days. In this connection example of non-compliance can be cited as Mr. Ausaf Ali Khan could not be appointed as Judge of the Lahore High Court, who was not confirmed earlier, and likewise Justice Qazi Hamiduddin also suffered because of reaching the age of superannuation. Another case of deliberate non-compliance and defiance is that there was joint recommendation by the Chief Justices of the High Courts and the Chief Justice of Pakistan for confirmation of Justice Rana Bhagwandas and Justice Javed Nawaz Khan Gandapur of Peshawar High Court and contrary to the recommendation and in violation of the guidelines laid down in the judgment, their probationary period was extended for six months. The President was justified in taking action on this ground under Article 58(2)(b) as the petitioner had violated her Oath as Prime Minister of Pakistan in which it was stated that she would discharge her duties and perform her functions honestly, to the best of her ability, faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law.

93. In Reference No.2 of 1996, reported as Al-Jehad Trust v. Federation of Pakistan and others (PLD 1997 SC 84), which was filed by the President of Pakistan seeking opinion of the Supreme Court on the interpretation of Article 48 of the Constitution on the point whether advice of the Prime Minister was binding on the President in respect of appointments in the superior Courts after the release of the judgment in the case of appointments of Judges, it was held that since our Constitution provides for Parliamentary form of Government, hence advice of the Prime Minister is binding on the President in respect of appointments in the superior Courts. During the hearing in the Court the argument was raised as to what would happen if the judgment of the Supreme Court in the appointment of fudges case was not implemented by the Prime Minister. Mr. S.M. Zafar, who was assisting the Court as amicus curiae, stated that in such a situation the President could be justified to invoke Article 58(2)(b) of the Constitution as non-implementation would be deemed to give rise to a situation in which it could be said that Government of the Federation could not be carried on in accordance with the provisions of the Constitution, and attention of the Court was invited to Article 204 of the Constitution which empowers the Supreme Court to punish any person who is scandalising the Court or otherwise does anything whcih tends to bring the Court into hatred or ridicule or contempt. It has been further observed in the opinion of the Reference that it is

expected that the President shall see to it that appointments of Judges in superior Judiciary are made strictly in accordance with the Constitutional scheme as contemplated under Articles 177 and 193 of the Constitution which are to be interpreted and read in conjunction with the judgment in the appointment of Judges’ case. It is, therefore, clear that action of the President on the ground mentioned above is justifiable on the basis of material produced and also in view of the observations made in the opinion of the Supreme Court in Reference No.2 of 1996.

94. The next ground in the order of dissolution is ridiculing of Judiciary which is described as sustained assault on the judicial organ of the State under the garb of Bill moved in the Parliament for prevention of corrupt practices. This Bill was approved by the Cabinet and introduced in the National Assembly without informing the President as required under Article 46(c) of the Constitution. The Bill proposed, inter alia, that on a move by 15 per cent. of total membership of the National Assembly, which came to 32 members, a Judge of the Supreme Court or High Court could be sent on forced leave on the charge of misconduct till the final disposal of the motion. It was further provided that if on reference made by the proposed Special Committee and Special Prosecutor appointed by Special Committee formed the opinion that the Judge was prima facie guilty of criminal misconduct, the Special Committee would refer the opinion to the National Assembly which could by passing of vote of no confidence remove the Judge from his office. Strangely enough this Bill was moved when the controversy with regard to non-implementation of the judgment by the Government of the petitioner was at height and it was a matter of common knowledge that her Government did not have support of two-thirds majority to carry out amendment in the Constitution. It was argued on behalf o-f the petitioner that this was an exercise of academic nature and was not intended to harass the Judges. There is no cavil with the proposition that the Parliament is competent to amend the Constitution in the manner prescribed therein. The question arises for consideration with regard to the timing of the Bill and the intention with which it was moved. The parties in the National Assembly in opposition criticised the Bill as aimed at ridiculing and humiliating the Judiciary. The learned counsel appearing for the petitioner could not satisfy the Court that the Bill,was introduced in good faith and with bona fide intention particularly when it was crystal clear to all that it could not be passed unless two-thirds majority in the National Assembly was available. It was also known to all that the judgment of the Supreme Court was not being implemented and dilatory tactics were being employed by the Government and in the result the process of regularization or not of affected Judges was being delayed.

95. We are satisfied that the intention in moving the Bill was not bona fide for making the amendment in the Constitution but was to harass the Judges of the superior Courts to show that the Government could move such amendment in the Parliament. This could also be viewed in the light of the fact that there is already provision in the Constitution in Article 209 which provides for Supreme Judicial Council which can take action in respect of Judges of the superior Courts on the ground of misconduct. It would be pertinent here to reproduce verbatim the Statement of Objects and Reasons of the Bill as under:-

“The People’s Government is committed to the concept of good governance, committed to check the menace of corrupt practices and committed to bringing true facts before the Nation. It is, therefore, necessary to provide fresh legislation to ensure that corruption is not made a pretext for disrupting democratic process and imposing dictatorship as was done through the Public and Representatives Offices (Disqualification) Act, 1949 (PRODA), the Elective Bodies (Disqualification) Order, 1959 (EBDO), and by issuing Martial Law Regulations setting up Disqualification Tribunals for oppressing the Parliamentarians. In order to ensure the supremacy of Parliament, and to expose, prosecute and punish across the board in an even, equitable and just manner. Upholding the Islamic principle, that no one is above the law and that there can be no discrimination between one set of people or another, one position or another or one institution between another, it has been decided to move the Constitution (Fifteenth Amendment) Bill, 1996.

2. The present Bill seeks to achieve the aforesaid objectives.”

96. Mr. Raza Rabani, the then Minister of State for Law and Justice, stated on the floor of the Assembly in respect of the above said Bill that Judge is not sacred cow that he should not be subjected to accountability. Mir Zafarullah Khan Jamali, M.N.A., stated that the decision of the Supreme Court on 20th March, 1996 has been criticised by the Government and now movement of the Bill of Accountability against the Judges has surfaced the intention of the Government. Reference can be made to the news item published in daily Jang, dated 22nd October, 1996. On 25th March, 1996 a news item appeared in the daily Nation, Lahore with caption “P.P.P. for treason cases against Supreme Court Judges”. It was stated therein that Parliamentary party of P.P.P. and its allied parties in the meeting termed the Supreme Court verdict in the appointment of Judges’ case as against the Government and advised the Government to institute a case of treason against the Judges who passed the judgment. Chaired by the Prime Minister Benazir Bhutto, and attended by 109 M.Ps., the meeting erupted in applause when M.N.A. from Lahore Arshad Ghurki suggested instituting treason cases against the Judges. Another news item appeared in daily Nation, Islamabad on 26th March, 1996 with caption “Government had a plan to arrest Judges, Akram Sheikh”. It is stated in this news item that the President of the Supreme Court Bar Association alleged that the Government had a plan to arrest the Judges night before the verdict in appointment of Judges’ case. It is further stated that there was meeting in which the Prime Minister called her aids and asked them “why cannot we arrest the Judges’. The plan was called off when some sensible persons advised not to take I such step. These news items as such are not denied but general objection is taken that reliance cannot be placed on newspapers cuttings. We are of the considered view that the Bill was introduced in the Assembly with mala fide intention of scaring and harassing the Judges in order to take revenge from them on account of 20th March judgment in the case of appointment of Judges, which the Government of the petitioner did not like and did not want to implement.

97. The next ground in the order of dissolution is that the Judiciary had not been fully separated from the Executive in violation of, the provisions of Article 175(3) of the Constitution and the deadline for such separation was fixed by the Supreme Court of Pakistan within which complete separation had not taken place. Time was stipulated for such separation under Article 175(3) which expired after it became mandatory for the Government to separate judiciary from the executive which was not done and in that connection writ petition was filed in the High Court which was allowed and time limit was set for such separation Against this decision appeal was filed in the Supreme Court by the Government of Sindh which was dismissed and the case is reported as Government of Sindh v. Sharaf Faridi and others (PLD 1994 SC 105). During the hearing of the appeal a high-powered committee was set up to undertake separation. In the judgment of this Court guidelines are laid down for financial independence of the judiciary and cut off date was also given for separation of judiciary from the executive with bifuracation of Judicial Magistrates and Executive Magistrates. It was held that the Judicial Magistrates would be under the control of the High. Courts and Executive Magistrates would be under the control of the administration and the Government. Provincial Governments then filed review petitions in this Court requesting for extension of time and those review petitions were heard by this Court. Other details were settled and the controversy arose with regard to sentence, it was agreed that the Executive Magistrates should be allowed trial of cases under the minor acts and limited power of imposition of sentence may be given to them but there was no consensus among the Provincial Governments as to the period of sentence to be allowed to be imposed by the Executive Magistrates. Attempt was made by some Provincial Governments to allow Executive Magistrates to impose sentence up to a period of three years and more in minor offences. Opportunity was afforded to the Provincial Governments to sort out this problem by developing consensus for a very short sentence to be imposed by the Executive Magistrates. The review petitions were dismissed and further time was not extended and it appears that the Federal Government passed Ordinance No.XL of 1996 with title “The Legal Reforms Ordinance, 1996” in which offences punishable with imprisonment with a term not exceeding three years have been made triable by the Executive Magistrates. This Ordinance was repromulgated on two occasions again. It is in this sense that the ground is raised in the order of the dissolution that the Judgment of the Supreme Court on the subject of separation of Judiciary from the Executive has not been complied with by the Federal Government in totality. The Federal Government was party to the proceedings in the Court and has failed to persuade the Provincial Governments to develop consensus among themselves with regard to sentence which should be allowed to be imposed by the Executive Magistrates in respect of cases triable under the minor acts. On the other hand the Federal Government has promulgated an Ordinance which is contrary to the spirit of the judgment of the Supreme Court.

98. The next ground in the dissolution order is telephone tapping and eavesdropping technics adopted in respect of Judges of the superior Courts, leaders of political parties and high ranking military and civil officials by the Government of the petitioner which was being done by the Intelligence Bureau and the reports and transcripts of telephone conversations were being sent directly to Prime Minister House for perusal of the Prime Minister. The petitioner has denied the allegation and claimed that she was herself victim of telephone tapping and she complained to the Defence Secretary, Communication Secretary and her own Military Secretary to find out the truth. She was so concerned with this illegal tapping that the Communication Ministry had placed an order for a 300-line tapping proof exchange for Constitutional functionaries of the State and the Armed Forces so that no such conversations could be tapped. It is further stated in the petition that on a few occasions she even brought this complaint to the notice of the President who did not bother much about these fears. This is all she had to say about telephone tapping so innocently as if as Head of Government she did not know who was doing the tapping and she had to complain to the Secretaries of her Government and her Military Secretary to find out the truth. She has not stated anything and has not denied specifically that tapping was not done by Intelligence Bureau which was functioning under her and was answerable to her. In the written statement stand is taken that telephone tapping of -the Judges is direct interference in the independent functioning of the Judiciary and is a grave violation of the principle of trichotomy of powers between the three pillars of the State, namely, Executive, Legislature and Judiciary, which are supposed to function in their own separate ambits but with cooperation and harmony in order to produce an efficient system of governance as is contemplated in the Constitution. The Federal Government as respondent No.2 in this petition has produced voluminous record to show telephone tapping and eaves-dropping by the Intelligence Bureau which works directly under the control of the Prime Minister. If at all phone tapping or eaves-dropping is to be allowed with legal justification, it can be done only when a grave risk to the security of the country is involved. It would be naive to think that the Supreme Court or the Judges of that Court posed such threat. The transcripts of recorded conversation on telephones of Judges used to be sent by the Intelligence Bureau operatives. in sealed covers to the Prime Minister House. Telephones of several Judges of the Supreme Court, Federal Shariat Court and the High Courts including their Chief Justices were being tapped. Telephones in the Chambers and the residences of the Judges who were hearing the case of  appointment of Judges were being tapped. The Chamber of the Chief Justice of Pakistan was bugged in addition to the tapping of the telephones in it.

99. Respondent No.2 has produced relevant material which is contained in Volume VI of the written statement. At page I of this volume is procedure which is adopted in the technical operations of telephone tapping. The recording obtained used to be transcribed under the supervision of Mr. Muhammad Akhlaq, Assistant Director, and transcriptions used to be selected and a summary was thus prepared by Mr. Muhammad Sadiq Malik, Deputy Director who was responsible for carrying these transcripts to the Prime Minister House and bringing them back after duly circulating the same to Major (Retd.) Muhammad Shabbir Ahmed, Ex-(JDG) and Mr. Masood Sharif Khan, ExDirector-General, Intelligence Bureau. There is statement of Mr. Shabbir Ahmed who has stated that he used to contact D.M.S. or A.D.C. to the Prime Minister on telephone who would make arrangements for entry through the gate of the Prime Minister House in official vehicle. There is statement of Mr. Muhammad Sadiq Malik, Deputy Director, in which it is stated all the files delivered by him used to be duly sealed and in double cover. The outer envelope used to be in the name of MS to the PM whereas the inner envelope used to be “for eyes only of the Prime Minister of Pakistan”. All the Judges were given code name B.M. which means Blind Man. B.M.1 was the Chief Justice, B.M.2 was the Registrar, B.M.3 was Justice Saleem Akhtar and so on. Such code names were given to the political leaders and high Government Officers also. After the dismissal of the Government of the petitioner, the telephones of the Chief Justice and other Judges in the Supreme Court building and residences were retrieved on December 4, 1996. Muhammad Afzal Haq, Director IB, has signed a written statement in which it is stated that under the orders of the superiors he carried out technical operations of the code names including B.M. Article 14 of the Constitution provides for dignity of man, and states that subject to law, the privacy of home, shall be inviolable. This fundamental right as contained in Article 14 covers guarantees that dignity of man and the privacy of his home shall be inviolable and this right stands violated by tapping of telephones and bugging devices. Verse 12 of Surrat Al-Hujurat reads as under:-

“O ye believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not on each other.”

It, therefore, appears that bugging and telephone tapping violates against privacy of citizens and is prohibited by Islamic traditions as well.

100. The next ground in the order of dissolution is corruption, nepotism and violation of rules in the administration of the affairs of the Government and its various bodies, 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 was sufficient in ‘itself to justify an order under Article 58(2)(b) of the Constitution. In any case the ground is too vague and too general in nature and could not be sustained. Such matters 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 isolated instances of corruption for which enough supportive material was not available and as against that in the instant case violation of rules and regulations in 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 in magnitude in both scale and nature of the corruption, nepotism and corrupt practices in question and the whole system of governance had been subverted and channels of administration polluted by a sustained abuse of power. It is, therefore, submitted that in the instant case there is overwhelming evidence to establish that person holding highest posts in the Government are guilty of corrupt practices and gross abuse of power which is a valid ground for concluding that Government cannot be carried on in accordance with the provisions of the Constitution. In the rejoinder petitioner has once again denied the allegation and demanded that the respondents be made to prove the allegation strictly.

101. In the order of dissolution on the ground of corruption, nepotism and violation of rules and regulations, purchase of Surrey Mansion in London by the petitioner’s spouse is not mentioned specifically but it is so mentioned in the written statement which has been filed by the respondents. The petitioner has filed affidavit in rejoinder in which this allegation is denied as absolutely false and untrue. Stand is further taken by the petitioner that it is quite amazing that the President should be prepared to invoke Article 58(2)(b) on the basis of mere hearsay and speculative reasoning based on some newspaper reports/documents that cannot yield any conclusive proof. It is further submitted that such newspaper stories provide no ground for assuming that the petitioner, or her husband, has bought any such property as is claimed in the written statement. Other documents obviously refer to the named consignee and not the petitioner. The petitioner has no connection with any of the properties or effects mentioned in the written statement with respect to his allegation. The petitioner is prepared to face any prosecution or trial with respect to this allegation. After all onus must remain on the respondents if they choose to press this allegation, to prove their case in a Court of competent jurisdiction  in which full and fair enquiry onthe facts can be undertaken. Mere surmises and inferences cannot suffice. It is, therefore, submitted that the petitioner reiterates vehemently her denial of. this allegation.

102. On 9-6-1996 Sunday Express of London published a news item under the banner headline “Bhutto’s Surrey Retreat”. It was further stated in the news item that the petitioner and her husband had acquired estate which is perfect hide away” worth £ 2.5 million standing on a 3.55 acre land and is known as Rockwood House. The property has its own private landing strip and indoor swimming pool with security system linked to Scotland Yard. If any alarm sounded at the estate, Scotland yard would send “armed response vehicles”. In Pakistani currency the property is worth 175 million rupees. On 16-6-1996 the daily Dawn published from Karachi reported that the shipments had been flown into England by PIA from Bilawal House for the Surrey Mansion. The petitioner’s husband applied for permission to build a stud farm on the estate for his polo ponies and the authorities had allowed construction of 63 stable on the estate. The petitioner and her husband threatened to sue the Sunday Express but did not do so. The respondents have supported this allegation by documents in written statement and it would be much better to refer the document as such. The respondents have filed four newspaper cuttings contained in Volume VII-E at pages 404, 405, 406 and 407. The first cutting is from Sunday Express dated 9-6-1996 and the name of the reporter is Oonagh Blackman. Heading of the news item is “Bhutto’s Surrey Retreat” and there is photograph of the petitioner along side the news item and underneath it, it is mentioned “hide away for Benazir”. Since the news item is very brief, it is reproduced as under:-

“Benazir Bhutto, Pakistan’s Prime Minister, has found a perfect hide away. The 42-year old oxford-educated leader and her husband, Asif Zardari, have bought a $ 2.5m mansion in Surrey.

The property, which has a private landing strip and indoor swimming pool stands in 355 acres on the edge of the village of Brook. It will provide an ideal retreat for Mrs. Bhutto when she wants to escape her troubled political life in Pakistan.

The house has been turned into a Surrey version of Fort Knox. There are laser beam alarms and security men in the grounds. Police sources said that if security alarms are sounded Scotland Yard will be informed and an armed response vehicle despatched immediately.

A contractor said: ‘ A plane flew over the property twice and guards reached for their guns’.”

103. The second news item again is in Sunday Express dated 15-6-1996 by the same reporter and the heading of the news item is “Bhutto in the firing line” and in this cutting there is photograph of the petitioner and also of Surrey Mansion. The third newspaper cutting is from daily Dawn dated 16-6-1996 with heading “Express set to publish Surrey House Photos” with relevant portion as under:-

“London, June 15: The Sunday Express, which last week revealed that a large house built with a landing strip and indoor swimming pool with 355 acres of surrounding park-land in Surrey, in South of England, has been purchased for the Bhuttos, has in the latest issue, just ready to go on the news stands, published photographs of the mansion with some other details which the paper says reinforce their story.

Prime Minister Benazir Bhutto strongly denied the report when it first appeared and was also carried by the Pakistan media. Her husband Mr. Asif Zardari said it was an effort to malign the family and that he was consulting his lawyers with the intention, of suing the Sunday Express.

The newspaper says that the property was purchased in October last year in the name of a company registered in the Isle of Man, as off shore British Crown dependency.

The Sunday Express claims that Mr. Asif Zardari is behind the purchase and they are not revealing all the details in their latest issue as they wish to keep some information with them in case Mr. Zardari decides to file a libel writ against them. “

The last cutting is of Sunday Express, dated 23rd June, 1996 with heading “Bhutto row rumbles on”. The first two paragraphs of this news item are reproduced verbatim as under:-

“Asif Zardari, husband of Pakistan’s Prime Minister, Benazir Bhutto, is at the centre of a planning dispute over his application to build an Arabian horse stud in the grounds of his mansion in Surrey, writes Oonagh Blackman.

 Keen polo player, Zardari, 43, has been refused permission for the stud but the local authorities have approved a second application to build 63 loose boxes on the estate. He is understood to be planning to keep his polo ponies in Britain.”

On this issue of Surrey Mansion the respondents have filed supportive documents which are contained in Volume VII-E. The first document is a fax which is at page 409 in the said volume and this fax message is dated 22-4-1996 which has been issued from the Ministry of Foreign Affairs and is addressed to PTA, Karachi and the contents are reproduced as under:-

“I have been directed to inform you that the personal luggage/effects are to be sent from the Prime Minister House (Bilawal House), Karachi to the High Commission of Pakistan, London. The luggage is contained in eight big packages and its size would be about one big truck load.

The above consignment is to be sent by PTA flight by Wednesday the 24th of April, 1996.

You are requested to kindly depute PTA representative to report of Ministry of Foreign Affairs, Camp Office, Karachi, at 1000 hours by 23rd of April, who would be introduced to the Prime Minister House (Bilawal House) for seeing and taking over the possession of the goods. We have requested the Pakistan Navy for its transportation from the Prime Minister House to the airport. The Customs authorities are sounded for the same.”

104. There is PTA Air Way Bill No.214-01635012, dated 25-4-1996 at page 410 of the same volume in which Bilawal House is mentioned as consignor and the consignee is Mr. Wajid Shamsul Hassan, High Commissioner of Pakistan. The consignment contained 36 items as per the list attached, which is at page 411. Perusal of the list shows that items of decoration, carpets, guns, swords, daggers, rugs, wooden furniture and paintings were sent. There is also copy of fax message sent by Ministry of Foreign Affairs, dated 24th April, 1996 to the High Commissioner in London in which it is stated that under the instructions of Prime Minister House, eight heavy cartons have been despatched for London, which will be carried by PTA Flight PK-707 on 28th April 1996, leaving Karachi at 1200 hours. Request was made to ensure its safe takeover at London for further necessary action. This message was sent by Nisarullah Baluch, Deputy Chief of Protocol and copies were sent to the Chief of Protocol, Ministry of Foreign Affairs, Islamabad and P.S. to Mr. Asif Ali Zardari, M.N.A.. At page 415 of this volume is letter from Wajid Shamsul Hassan to Cargo Manager, London, Heathrow, stating therein that Mr. Paul is authorised to collect on his behalf the personal effects received from Pakistan on PTA Flight No.PK-787 on Sunday, 28th April, 1996 under Airway Bill No.214-01635012. At page 416 of the same volume there is PTA Cargo Release Note dated 4-5-1996 showing shipment released to Mr. Paul Keating. at page 417 is PTA Airway Bill No.214-01629736 showing Mr. Paul as consignee. At pages 418 to 420 are extracts from Companies House London (corporate record regarding Grant Bridge Limited and Grant Bridge Contractors Limited) and at page 419 ar addresses of Mr. Paul Keating and Grant Bridge Limited. At pages 421 to 423 are invoices of Tpwnsends for the work done at Rockwood House sent to Grant Bridge.

At page 424 of the same volume is note from the telephone records of Ramina Properties Limited (Rockwood Estate) showing calls made from this number to Jawaid Pasha in Pakistan and U.K. It also shows the calls made from Telephone No.01428-685607 to Jawaid Pasha’s home number, his brother-inlaw’s number in Karachi as well as his office in Lahore, Pakistan. This note also shows the calls having been made from Rockwood to Jawaid Pasha’s mobile number as well as Asif Zardari’s mobile phone, details of which are enclosed in Annexures 12 to 17 which can be found at page numbers 425 to 430.

At page 432 is bill of international  calls showing such calls made from Rockwood Estate to several telephone numbers in Pakistan including one No.92300550243 which was in use of Asif Zardari but was issued in some other name. The telephone calls made from Rockwood estate to two numbers in Pakistan on the basis of bills produced clearly show connection of Jawaid Pasha and Asif Zardari with the property in question and sufficient documents have also been produced to show the connection of petitioner and her husband with the property in Surrey as consignments were sent from Bilawal House through Foreign Office and PIA and Mr. Wajid Shamsul Hassan, High Commissioner of Pakistan in London. There are names of the officers mentioned in the documents who had been working in the foreign office and PIA in London showing that they ‘had dealt with the transportation of the consignment in question from Prime Minister House. This in fact is overwhelming documentary evidence which has been produced. In the light of such documents produced by the respondents alongwith the written statement, if the petitioner chooses to issue a general disclaimer in her rejoinder by simply saying that she denies the suggestion that she or her husband has got any such property in England and the allegation is absolutely false and untrue, she can say so but the record speaks for itself that the petitioner is unable to deny the allegation unless she is able to prove that these documents are false. It is very clear that the authenticity of the documents is not called in question and the contents thereof are also not denied because the names of so many persons are mentioned in these documents who could come forward and own or deny the parts played by them in dealing with those consignments. The petitioner also did not sue Sunday Express in London for publishing the false news item with her photograph and of the property in question.

106. In the written statement in paragraph 255 at page 151 it is alleged that the petitioner’s father-in-law, Mr. Hakim Ali Zardari, and his wife had acquired property in France on 12-4-1990 for a total value of French Francs 6 millions and a huge sum was spent on repair work and reconstruction of the property. Another property by name “Manoir de la Reine Blanche” was purchased by the  but the date of the purchase is not mentioned. The date of the purchase of the first property mentioned is also 12-4-1990 which was in fact the first tenure of the petitioner as Prime Minister of this country and is irrelevant now when her Government has been dismissed by the President in her second tenure. We, therefore, exclude the documents from consideration produced by the respondents in support of the allegation of purchase of property in France by Mr. Hakim Ali Zardari and his wife.

107. In the written statement there is allegation that a sum of Rs.10 million was released by Bait-ul-Mal in favour of the then Interior Minister Maj.-Gen. (Retd.) Naseerullah Babar for disbursement among four thousand Bugti tribesmen who suffered on account of political persecution. Mr. Ahmad Sadik, Principal Secretary to the petitioner as Prime Minister presided over a meeting which was held in the Prime Minister’s Secretariat on 3-4-1994 and request was made for release of the amount mentioned above. The same was done. Similar request for such amount was made by way of further installment on 13-4-1996 which was allowed and the. cheque was issued in the name of the then Interior Minister. Later it was found that disbursement was not made to the right persons in a lawful manner. In one case 325 thumb-impressions were made by one person showing that an amount of Rs.16.25 lacs was received by him. In another case 265 thumb-impressions were of the same person showing receipt of the amount of Rs.13.25 lacs. In the third case 118 thumb-impressions of the same person accounted for receipt of the amount of 5.9 lacs. In the fourth case 114 thumb-impressions of one person were made for receipt of the amount of Rs.5.7 lacs. In another case 80 thumb-impressions of identical nature and of same person were used for receipt of the amount of 4 lacs. In such manner Rs.25 million drawn from Bait-ul-Mal were allegedly misappropriated. The respondents have produced documents in support of the allegation mentioned above and have produced Volume VII-G in that context. In the said volume at page No.2 is note showing that a meeting was held at Prime Minister Secretariat on 3-4-1994 which was presided over by the Principal Secretary to the Prime Minister at which decision was taken regarding Rs. l crore. At page 3 is Pakistan Bait-ul-Mal Cheque No.39 issued on 4-4-1994 in favour of Maj.-Gen. (Retd.) Naseerullah Babar, the then Interior Minister. At page 6 is note dated 5-4-1994 from Prime Minister’s Secretariat to Pakistan Bait-ul-Mal confirming the decision regarding release of the amount of Rs.l crore. At page 8 is Pakistan Bait-ul-Mal Cheque No.43 issued on 24-4-1994 in the name of Maj.-Gen. (Retd.) Naseerullah Babar, Interior Minister. There are also reports of Mr. Shoukat Ali, Inspector FIA (Handwriting Finger Expert) analysing Bait-ul-Mal fund distribution lists which are at pages 10, 11, 12, 12-A, 150 to 153 and 263 to 267. There are sample sheets from Bait-ul-Mal fund distribution lists at pages 42, 43, 98, 102, 142 and 330. At pages 371 to 373 is FIA note dated 24-11-1996 regarding Ms. Naheed Khan. In the rejoinder reply to this allegation is that the cheques issued to Maj.-Gen. Naseerullah Babar were handed over to the Governor of Balochistan and if disbursement has been found to be shady and faulty, then the Governor of Balochistan should be blameworthy and not Maj.-Gen. (Retd.) Naseerullah Babar.

108. Another case of misappropriation cited is that Ms. Naheed Khan, Political Secretary to the petitioner, and one Rehmatullah, the consultant to the petitioner, while the petitioner was the Prime Minister, forwarded lists of persons and had cheques issued for them for total amount of Rs.34,90,000. In gross violation of rules sums totalling to Rs.6.1717 million and 27.05 million were sanctioned 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, 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 De considered in the light of the fact that during the tenure of the petitioner as Prime Minister how rules of the procedure were being violated with impunity and how public money was being dealt with by persons who were very close to the petitioner. These incidents certainly show an element of lack of responsibility in the administration of the petitioner and could go a long way in satisfying the mind of the President that the Government of the Federation was not being run in accordance with the provisions of the Constitution.

109. On the ground of corruption, nepotism and violation of rules in the administration, in 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 person as Finance Minister. She appointed one Minister of State for Finance and a retired bureaucrat as advisor on finance. In that set-up petitioner herself assumed the responsibility and maintained complete control over the financial sector of the Federal Government. She took all the key decisions herself without involving anyone else. At the time when the petitioner took over as the Prime Minister of the country the economic situation was far from satisfactory and it was almost a gray area in which a lot had to be done. The petitioner and her Government promised to bring reforms in the economic sector for the betterment of the country and impression was given that for that reason the petitioner retained the portfolio of finance with herself. In the case of Habib Bank, United Bank, National Bank non-performing loans or bad debts stood at Rs.50.76 billion at the end of 1993. By 30-6-1996 this figure had increased to 66.647 billion which was an increase of 31 per cent. In the case of ADBP and IDBP the bad loans stood at Rs.5.712 billion and by 1996 this figure had risen to Rs.13.195 billion which was an increase of 131 per cent. The case of Development Finance Institutions (DFIs) was even worse. The bad debts skyrocketed from 6.12 billion to 16.396 billion which is an increase of 168 per cent. Colossal deterioration took place in the banks’ profitability. During the tenure of the petitioner as Prime Minister and Finance Minister, after lifting of ban on recruitment, 5028 appointments were made in National Bank. From the said appointments, 325 were made by Pakistan Banking and Finance Service Commission and 180 were made by Bank’s Recruitment Committee. The remaining 4523 were made on the basis of instructions received from the Prime Minister’s Secretariat and Ministry of Finance. In U.B.L. over 2500 nonexistent employees were shown on the bank’s pay role and under that garb crores of rupees were misappropriated. This is stated to be accomplishment of Mr. Aziz Memon who was not only the bank union leader but also P.P.P., M.N.A. In the last resort Mr. Memon had to be arrested. The State Bank of Pakistan noted sharp increase in expenditure of National Bank of Pakistan of which Mr. M.B. Abbasi was appointed as President who was very close to .the petitioner and her husband and on those lines a formal complaint was made to the Ministry of Finance. According to the complaint expenditure on residential telephones went up by 87 per cent. entertainment expenses increased by 57 per cent. and illegal donations went up by 67 per cent. Donations amounting to Rs.93.496 million were disbursed during the period from January to March, 1996 in violation of State Bank instructions and without obtaining approval from .the Board. A sum of Rs.553,032 million was spent on renovation and air-conditioning programme.

110. From June, 1993 to June, 1996 a sum of Rs.3.397 billion was written off. One of the beneficiaries was so-called Zardari Group comprising of Mr. Hakim Ali Zardari and Mr. Asif Ali Zardari and this Group managed to have a sum of Rs.10.07 million written off by Emirates Bank International, a foreign bank owned by a friendly Government. Mr. Zardari’s front man. Mr. Fauzi Ali Kazmi, got a write off from H.B.L. of Rs.121.90 million on 2-8-1995. The State Bank of Pakistan as required under the law used to send inspection reports of commercial banks to Ministry of Finance. Instructions were issued to the State Bank not to send inspection reports but only summaries. Eye-brows were raised why the petitioner in both of her tenures as Prime Minister retained for herself the portfolio of Finance Minister and did not appoint a full-fledged Finance Minister with relevant expert knowledge in the field. It is stated that all industries without exception function on the basis of bank financing and there is not a single large company in the country which can survive if all its bankers unanimously decide to recall the loans granted to it. This was the methodology to retain complete control on the economic and finance sectors. In support of what is stated above, the respondents have produced documents in volume VII-L which is annexed with the written statement. At pages 3 and 4 is report in Wall Street dated 20-11-1996 with caption “Bhutto undone by pride, sick economy”. At pages 113, 115, 117 and 120 are news reports regarding humiliation and assault of the Senior vice-president of the U.B.L. At page 131 is news report dated 2-6-1994 showing attempts by Ministers to shield Mr. Aziz Memon. At pages 149 and 150 is a chart showing position of infected portfolio of banks and D.F.Is. with particular reference to nationalised commercial banks. At pages 152 to 154 is letter dated 11-5-1996 of Governor of State Bank of Pakistan to Mr. V.A. Jafarey, Advisor to the Prime Minister of Pakistan for Finance. This letter highlights irregularities in the affairs of National Bank of Pakistan.

111. 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 in the rejoinder has said nothing at all excepting three lines in respect of Mr. Aziz Memon which are reproduced as under:-

“It is well known that even though Aziz Memon was a Governmentparty M.N.A., he was arrested during the petitioner’s tenure and the case is sub judice. No special treatment was meted out to 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 levelled by the respondents and the documents 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 anything to remedy the situation to save the nation and its economic ruination and disaster.

112. It is alleged in the written statement that Mr. Usman Farooqi was appointed by the petitioner’s Government as Chairman of Pakistan Steel Mills. Mr. Farooqi in December, 1995 ordered sale of 15,9000 tons of steel at the rate below the market price to certain favourites. The management of Steel Mills had set the price of relevant products at Rs.20,000 per ton and in violation thereof the sales were made at the rate of Rs.7,581 to Rs.9,282 per ton. The matter was raised before the National Assembly and Steel Dealers appeared before the Sanding Committee and offered to purchase the entire lot at double the price at which it .was being sold. The Standing Committee requested Steel Mills not to proceed with the matter but the Ministry of Industries gave signal to Pakistan Steel Mills to go ahead with the deals otherwise legal complications would arise. Mr. V.A. Jaffarey, Advisor to the Prime Minister for Finance, complained about the financial irregularities in the affairs of the Pakistan Steel Mills and mentioned specifically that there had been decline in the production, cash balances had declined from Rs.2,147 million to Rs.68 million, Pakistan Steel Mills had defaulted on payment to banks and Pakistan Steel Mills was demanding a subsidy of Rs.l billion in order to keep on going. Chairman Mr. Farooqi insisted upon carrying on with a false and frivolous publicity campaign to conceal the grim .fact. It was found that Mr. Farooqi was not qualified to the extent as he claimed and has forged his matric certificate.

113. In respect of the allegations the respondents have produced documents which are contained in Volumes VII-H and VII-E produced alongwith the written statement. At page 28 is letter of the Advisor, Finance, to Minister for Industries and Production dated 17-71996 highlighting the precarious position of Pakistan Steel Mills. At pages I to 14 of Volume VII-E are source reports of Pakistan Steel detailing irregularities, illegalities and malpractices in Steel Mills. At pages 17 to 29 in Volume VII-E are 4 letters from Steel Dealers to the Prime Minister and Minister for Production mentioning irregularities committed in the Pakistan Steel including concellation of 17 contract dealerships, selling products at discounts and cancellation of old orders. At pages 37 to 40 in Volume VII-E is letter dated 31-1-1996 from the National Assembly Secretariat to Secretary, Ministry of Production regarding various reports on the subject of irregularities in Pakistan Steel Mills. At pages 41 and 42 in Volume VII-E are letters from Pakistan Steel Dealers offering to purchase steel mills products and offered to deposit Rs.l crore as advance. At page 43 in the same volume is decision dated 1-2-1996 of the Standing Committee of the National Assembly to suspend delivery of steel products. At page 45 in the same volume is letter dated 6-2-1996 of the Ministry of Industries and Production to Pakistan Steel withdrawing the suspension order because of legal complications. At pages 52 to 69 in the same volume is report of enquiry dated 18-2-1993 regarding educational qualification of Mr. Usman Farooqi. At pages 66 to 67 in the same volume is letter dated 24-10-1988 of State Engineering Corporation (Pvt.) Ltd. to the Secretary, Ministry of Production regarding bogus Ph.D of Mr. Usman Farooqi. At pages 128 to 140 in Volume VII-E and at pages 6 to 9, 54 to 55, 65, 83, 87, 90 to 98 in Volume VII-H are letters of various dates in 1996 issued regarding irregularities being committed in Pakistan Steel Mills. At pages 388 to 390 in Volume VII-E is an article in magazine Newsline of August, 1996 with caption “The Big Steal: Contrary to Chairman Usman Farooqi’s claim that all is well in Pakistan Steel Mills, Government reports tell a different story”. Lastly, at page 1 in Volume VII-H is a news item in daily DAWN dated 8-2-1996 with caption “Cheap iron sheets for favourites”.

114. On the subject of Pakistan Steel Mills, allegations detailed in the written statement as mentioned above, have been supported by documents which are contained in two volumes annexed with the written statement. In the rejoinder the petitioner has not dealt with these allegations specifically and has chosen to mention something about Mr. Usman Farooqi and Mr. Sajjad Hussain describing in five lines only which are reproduced as under:-

“Usman Farooqi was appointed as Chairman Steel Mills as being the most Senior upon the transfer of Mr. Sajjad Hussain. Inquiry was initiated against the latter even during tenure of the petitioner’s Government. So, in neither case was there any favoritism. In any case if they are guilty of any defalcation, they must face the law. The National Assembly could not be dissolved on this ground.”

115. In paragraph 278 of the written statement it is alleged that in respect of export of sugar from the country, Commerce Ministry allowed allocation up to 2000 metric tones per person. The quota allocations were used as means of political patronage and enabled the allottees to enrich themselves many times over. In some cases, the original allottees were allowed by the Commerce Minister, Mr. Ahmed Mukhtar, to transfer the allocated amount to other persons. In such circumstances the chosen few were allowed to enrich themselves at the public expense. Documents in respect of export of sugar are produced in Volume VII-I which is appended with the written statement. At pages 96 and 97 in this volume is brief on export of sugar. At pages 98 and 99 is summary for Cabinet dated 15-12-1994 regarding export of sugar. At pages 105 and 106 is decision of the Cabinet dated 19-12-1994 allowing Pakistan Sugar Mills Association to export 300,000 tones of sugar. At page 107 is summary for Cabinet dated 17-8-1995 regarding export of sugar showing that against permission of 300,000 tones the Government issued export authorisations for 400,806 tones. At page 108 is decision of the Cabinet dated 21-8-1995 banning export of sugar. At page 109 is note from Secretary Commerce dated 25-1-1995 to PSO to the Prime Minister stating that the Prime Minister’s Secretariat may send “allocation” up to 2,000 metric tones. At pages 110 to 120 is list of persons granted permission to export sugar. At pages 125, 127, 139, 141, 143, 149, 169, 179, 183, 194, 196, 197, 201, 206, 208, 254, 256 are applications of persons who were granted permission to export, sugar/transfer permissions to others. On the subject of export of sugar the petitioner in rejoinder has stated that the Cabinet decision authorising export of sugar did not specify that all export must be done only by Sugar Mills, therefore, both industrial and commercial contractors could do so on equal basis. Sugar Mills could export only on the basis of crushing capacity, hence the remaining quota in that category was distributed by the Ministry of Commerce among the traders on the first come, first served basis. Allegation that political patronage enabled the allottees to enrich themselves is denied as baseless. It is further stated that transfer of quota to others was permitted in order to earn valuable foreign exchange. Further, in Volume VII-I at page 96 there is brief of export of sugar in which the decision of the Cabinet in Case No.579/27 of 1994 dated 9th December, 1994 is reproduced in which it is stated that sugar mills should be allowed to export up to 300,000 tons of sugar during the years 1994-95 in separate tranches. The Pakistan Sugar Mills Association, however, would have to give a public assurance that the price of sugar would not increase on account of the export. It is mentioned in the said brief that the decision did not envisage export of sugar by individual exporters other than the Sugar Mills. However, the Prime Minister Secretariat was allowed to send allocations up to 2000 metric tones per person.

116. As per written statement, on the orders of the petitioner, Textile Quota Policy was amended in order to provide for the discretionary allocations of textile quotas. Lists were received from the Prime Minister’s Secretariat by the Commerce Ministry of individuals and firms recommended by various legislators and party supporters of the petitioner’s Government. Quotas were allocated on this basis at the behest of the petitioner’s supporters both within and without Parliament. In this way rules and regulations were violated for political expediency and patronage. In support of this allegation documents are produced in Volume VII-I. At page 2 is decision of the Prime Minister dated 16-4-1994 for allocation of textile quota to “backward areas”. At pages 3 to 5 is the Chart of Premium in the market on the quota. At pages 6 to 10 is the list of quota recipients in Lahore, Islamabad, Rawalpindi and Karachi recommended by M.N.As., Ministers and political personages. As against this stand is taken in the rejoinder that quotas under discussion are increases in the annual quotas (Growth Quota) and not the actual quotas themselves. In the days of the Government of Mr. Nawaz Sharif 35 per cent. of Growth Quota used to be distributed through Textile Mills Association, Chairman of which Mr. Javed Ansari is political associate of Mr. Nawaz Sharif. Petitioner’s Government took the decision that 75 per cent. of the Growth Quota would be auctioned in the open market while 25 per cent. of the Growth Quota would be allocated to the industries located in the backward areas. Applications were to be scrutinized by the Committee which was composed of many Government functionaries. Lists of parties submitted in the documents of the respondents are termed by the petitioner as false and any connection of those persons with the petitioner is denied. It is also denied that the persons in the lists had any connection with her Ministers or associates. ‘

117. It is the case of the respondents in the written statement that on the subject of import of gold in the country, the Government of the petitioner gave M/s. Ary Traders, based in Dubai, monopoly to import gold into Pakistan. The Ministry of Commerce attempted to grant licences to other persons for import of gold but all such attempts were blocked by the abovementioned Company which became very powerful. This allegation is supported by documents produced by the respondents in Volume VII-I. At pages 33 to 35 is note whereby import of gold monopoly was granted to M/s. Ary Traders. At pages 40 and 41 is Annexure to the summary prepared for the Cabinet in which criteria recommended for firms to be allowed to import gold are mentioned. At pages 43 and 44 is noting by the Ministry of Commerce on scheme to allow import of gold opposing creation of monopoly. At pages 47 to 51 is summary for the Cabinet decision, and decision of E.C.C. on import of gold. At page 61 is note from Ministry of Commerce that Cabinet decision requires import of gold by 10 Companies. At page 67 is decision by the Secretary allowing import of gold to M/s. Ary Traders. At page 71 is exemption granted to Ary Traders from payment of 10 per cent. regulatory duty on import of gold. At pages 80, 90 and 91 is note from Commerce Minister desiring that two other firms also be given permission to import gold. At pages 92 to 95 is the order withdrawing permission given to two firms to import gold. At pages 88 and 89 there is note of Mr. Salman Farooqi, Secretary, Ministry of Commerce, opposing grant of import monopoly to Ary Traders. In the rejoinder M/s. Ary Traders have been defended as a good and bona’ fide party on the ground that the Caretaker Government entered into fresh transactions with that Company and arranged short term loan of US 120 million dollars through the good offices of that Company. The petitioner has also defended the policy of her Government in that respect by saying that other Companies were unable to fulfil the requirements of import of gold which could best be done only by Ary Traders. It is further stated that 3 per cent. ad valorem duty on the import of gold had failed to produce significant revenue, hence in such circumstances assessing a low but fixed duty on the import of gold had proved to be spectacularly successful, raising the amount of the country’s revenue collected by over 1,000 per cent. For such reasons assessing of additional 10 per cent. duty would have destroyed the very purpose of the exercise and led to renewed smuggling of gold. The reasons assigned by the petitioner do not appear to be satisfactory and convincing.

118. On the subject of rice export from Pakistan the stand taken in the written statement is that in 1995 without any public auction, notice or bidding, Rice Export Corporation of Pakistan received two bids for the purchase of a total of 500,000 tones of rice. One bid was from M/s. Rustal Trading, which is company of Mr. Riaz Laljee. The other bid was from the Government of Togo and the authorised representative of that Government was one Mrs. Huma Burney, who is also Director of Rustal Trading. At the relevant time the Corporation had no stock of rice available, nevertheless it entered into a binding contract to sell 500,000 tones at a price. The petitioner as Prime Minister took the decision that Corporation should purchase at the market price and then export it. Objection was raised that by doing so loss would occur to the Corporation amounting to $ 41 million and the objection was brushed aside on the ground that the purchase would be for the benefit of growers. Subsequently, the international market price also fell lower than the price agreed upon to sell the rice to Mr. Riaz Laljee. The buyers lifted the part of the rice and backed out and in the final analysis the Government suffered a loss of Rs.7,62,63,445. Documents have been produced in support of the assertion and are contained in Volume VII-1. At pages 289 to 293 is brief note on the Corporation’s sale contract for export of irri 6 rice to Government of Togo and M/s. Rustal Trading Limited. At page 314 is letter from Ministry of Commerce to the Corporation detailing the Cabinet decision in this regard. In the rejoinder stand is taken by the petitioner that the decision of the Cabinet to allow the Corporation to purchase rice at market price was for the benefit of Pakistani farmers and not for the aggrandizement of any individual and the Governments have to take such decisions in public interest. Plea is also taken that on this subject suits are pending in the Courts between foreign parties and the Government and the Corporation, hence the matter is sub judice in the Courts of law.

119. Some specific instances have been quoted attributing corruption and violation of rules in the written statement. The first such instance quoted is with regard to power policy adopted by the Government of the petitioner. In this connection it is stated that very huge projects costing billions of dollars were permitted which did not fit within the priorities of the Government and were also beyond our affordability. In view of the increase in the demand for electricity the Private Power Infrastructure Board (PPIB) of the Government of Pakistan asked WAPDA to purchase 1000 MW of power from KESC. PPIB which was set up by the Government of the petitioner for implementing the power policy was initially under the Ministry of Water and Power but after induction of Mr. Asif Zardari, husband of the petitioner, into the Cabinet as Minister of Investment, PPIB was transferred to his Ministry. WAPDA informed PPIB that it would be unable to purchase that much power as WAPDA would be surplus in power after purchasing from private power projects. Agreements between WAPDA and KESC on one side and private power projects on the other provide that once the projects have come on line, utilities would be liable to pay the projects for electricity equal up to 60 per cent. of their capacity even if no power at all was actually purchased. Such payments are called “Capacity Payments”. Apprehension was felt that both WAPDA and KESC would end up paying millions of dollars annually for power that they would not need and could not utilise. The Government rushed into giving permissions generously for setting private power projects. Decision was taken in March, 1996 to limit the total capacity of private power projects to 3000 MW. This decision was not honoured and was revised and the limit imposed was enhanced to 4500 MW. Stand is taken in the written statement in paragraph 283 that this was done with intention to accommodate. certain projects in which the petitioner and her spouse had special interest. In support of the proposition case of Liberty Power has been cited in which initially permission was to set up 121 MW capacity plant. In April, 1996 this was doubled and enhanced to 424 MW. In this manner even agreements executed with parties were subsequently modified for the benefit of such parties to make increase in default interest rates, to reduce obligations of sponsors in one form or the other and to increase in WAPDA’s financial responsibilities for compensation in case of delay in inter-connection facilities.

120. Mr. Ibrahim Elwan working in the World Bank had dealt with Liberty Power Project and Hubco Power Project in Pakistan. The Government of the petitioner gave full support to Mr. Elwan and the Liberty Power Project. The letter of support was issued long after the decision had been taken to cap all the projects. This project was allowed to use pipeline quality gas from the Qadirpur Gas Field which was against Government policy and interest of the country. The project was in fact given special concession in respect of the gas to the used by the power station. It was promised gas from the fields not yet discovered or developed. This was in complete violation of applicable rules and regulations. In paragraph 285 of the written statement facts are .mentioned as to how national grid (IV Circuit) was put to bid in such a haste that only six working days were given to bidders to put in their applications. This was done to oblige only one Company to succeed by excluding other Companies who could not participate and submit their applications because of paucity of time. Therefore, French Ambassador in Pakistan wrote a letter, dated 28th March, 1995 to the Executive Director PPIB by way of protest.

121. In support of what is stated above respondents have filed documents in Volume VII-M. On the subject of Indus Grid Project, 16 documents have been filed from which at pages 1 and 2 is Executive Summary in which it is mentioned that these documents show that bids for this transmission line project (about US $ 700 million) were invited in a haste. Only 8/9 days were given for submission of bids out of which four days were holidays. This time was not even enough to collect the documents by bidders from various countries as observed in one protest received from bidder. The then Minister for Water and Power had protested to the Prime Minister on this project. He had also stated that the decision of the E.C.C. allowing only 10 days for bidding was not correctly recorded. However, a Deputy Secretary of the Prime Minister’s Secretariat stated that the Prime Minister had seen the note submitted by the Minister for Water and Power and had been pleased to remark that the minutes of the E.C.C. meeting were correctly recorded. Other irregularities after bidding are also mentioned in this summary. At pages 3 and 4 is the letter of the Minister for Water and Power to the Prime Minister written on 30-3-1995. At pages 5 to 9 is decision by E.C.C. meeting recorded on 7-5-1995. At page 10 is letter of Prime Minister’s Secretariat in which request of the Minister for Water and Power for extension in date for submission of bids for transmission lines by private sector is refused on the ground that since six bids had already been received, no extension was to be allowed in the date for submission of bids. It is further observed in the said letter that L.O.I. should be finalised by PPIB before departure of the Prime Minister to U.S.A. At page 11 is letter of French Ambassador from which one paragraph is reproduced as under:-

“I, therefore, kindly request that you consider urgently an extension of the submission date. Should there be no extension, we could not consider this invitation of proposals as in conformity with international tendering rules and the position of the French Government, founding member of the World Bank (who may be approached for financing) and currently assuming the presidency of the European Union, could not be in a position to extend support whatever to this policy.”

At pages 12 and 13 is’ letter from Century Technology International dated 28-3-1995 addressed to the Prime Minister from which the last paragraph is reproduced:-

“We also avail of the opportunity and lodge our protest against such hasty call in of bids and in the meanwhile request your honour to order            extension by 6 months or at least 3 months. “

At pages 19 and 20 is letter from Asea Brown Bovery (Pvt.) Ltd. which is described as A.B.B. dated 29-3-1995 submitting proposal for transmission lines and grid station on born basis. At page 2.10 is letter of Hyundai to PPIB dated 25-3-1995 in which request is made for extension of last date of bidding. At pages 22 to 27 are two letters dated 1-9-1996 and 29-9-1996 of Minister for Water and Power to Mr. Asif Zardari on the subject of Indus Gas Project requesting review of the decision. At pages 28 to 31 is letter dated 4-4-1995 of PPIB to M/s. National Grid Company in U.K. which is a letter of support for establishment of 819 KM (500 KV) transmission line system (Package A). At pages 36 to, 38 is letter of PPIB to National Grid Company. At pages 39 to 55 is “Policy framework and package of incentives for private sector transmission line projects in Pakistan” prepared by Government of Pakistan. From pages 56 to 60 are newspaper cuttings. On this subject daily Dawn reported on 1-4-1995 in its Economic and Business Review that “advertisement for power lines smacks of kickbacks”. The daily News reported ~ on 3-4-1995 with heading “PP&IB’s haste in opening tenders for transmission lines”. At page 59 is a news item in daily Dawn dated 1-4-1995 with heading “Khan seeks delay in tenders’ opening”.

122. On the subject of Liberty Power Project there are 37 documents contained in Volume VII-M. At page 64 is decision dated 1-8-1994 of E.C.C. which is reproduced asunder:-

“The Economic Coordination Committee of the Cabinet considered the Summary, dated 22nd June, 1994 submitted by the Ministry of Water and Power and noted that the proposals contained in para. 3 of the Summary had already been approved by the Prime Minister.

The Ministry of Water and Power in consultation with the Special Assistant to the Prime Minister for Economic Sector should formulate proposals to encourage setting up of hydel and coal projects.

No fresh application should be entertained after achieving the target of 5000 MW through Private Sector except those based on hydel power or coal. “

At page 65 is a chart of private sector power projects for which performance guarantees were received. At pages 66 to 72 are letters dated 17-7-1995, 28-1-1996 and 12-5-1996 of PPIB to M/s. Infrastructure Capital Group. At pages 73 to 94 is “Policy framework and package of incentives for private sector power generation projects in Pakistan”. At pages 95 to 97 is the note dated 28-11-1995 of the vice-president of PPIB. At page 99 is summary for E.C.C. on the subject of Liberty Power Project alongwith Annexure. At pages 103 to 107 is summary for Cabinet on the subject of allocation of gas to Liberty Power Project. At pages 108 to 120 are letters from and to PPIB. At page 121 is decision of the cabinet which shows that proposal outlined in paragraph 5 of the summary dated 19-6-1996 was approved. At page 126 is decision of the Cabinet showing that summary dated 10th March, 1996 was considered by the Cabinet on the subject of gas allocation for Liberty Power Project and it was decided that the existing arrangements for the development of Habib Rahi Formation of Qadirpur Gas field should continue and the Premier Exploration Ltd., which was engaged in the development of the gas-field, should, in supersession of Cabinet decision in Case No.209-11 of 1995 dated 5-6-1995, now provide gas to the Liberty Power Project by the end of 1997. At page 128 is the letter of the Director (Gas), Ministry of Petroleum and Natural Resources, addressed to the Chairman, OGDC on the subject of allocation of gas to Liberty Power Project.

123. In the rejoinder filed by the petitioner at page 25 is subject of power policy, the first two paragraphs of which are as under:-

1. The P.D.F. Government Power Policy:

(i) Has been acclaimed the world over as model policy. During the World Bank Annual Meeting held in October 1994. In Madrid Spain  and in October, 1995 in Washington D.C. U.S.A. special sessions on infrastructure development and financing were held in which Pakistan Power Policy was tabled as a Model by all the experts.

(ii) The President of Pakistan himself participated in the formulation of the policy. The final draft of the policy before its submission to the Cabinet was presented to him at Aiwan-e-Saddar in March, 1994 by the members of the Task Force. The President was pleased to make some suggestions which were incorporated in the draft policy.

(iii) The Caretaker Adviser for Finance and Planning, Mr. Shahid Javed Burki, has personally praised this policy in several of his interviews in Latin America including the one which was published in the daily Nation of 13th August, 1996.

2. As far as signing of projects in excess of the demand for Electricity is concerned, it is to be pointed out that PPIB was given a mandate to induct 3000 MW from the private sector by the end of 8th Five-Year Plan i.e. 1998. This figure was based on the recommendation of Energy Wing of Planning Commission, WAPDA, Planning Department, and Atomic Energy Commission. - These three institutions do Demand/Supply analysis for the country. The Government approved the new energy Policy in March, 1994 based on the data/recommendations of these institutions. Incidentally, these figures of Demand/Supply coincided with the recommendations outlined in the 8th Five-Year Plan document which was formulated by Nawaz Sharif Government.”

124. On the subject of Liberty Power Project, in the rejoinder, allegation is denied that it was given any special consideration outside the approved policy framework. All agreements were signed by WAPDA-OGDC keeping in view their own respective interests and within the policy framework. Liberty Power Project was issued L.O.I. after the decision (to cap all imported fuel base power project) was taken because Government had decided that as a policy it will allow processing of a power project based on indigenous fuel such as low B.T,U. Gas, Coal and Hydel. Allegation that pipeline quality gas was allocated to this project by the Government is denied. About Mr. Ibrahim Elwan it is stated in the rejoinder that he left the World Bank on his own free-will and allegation of corruption with regard to him is denied on the ground that the investigation team of the World Bank exonerated Mr. Elwan of all the allegations which were made in the local newspapers. With regard to the inviting of bids from the firms in private sector for award of contract of transmission, stand is taken that since there was no consensus among the experts on the reports on which the contract should be given to the private sector and since the Prime Minister/petitioner was leaving in the first week of April, 1995 for official visit to U.S.A., it was decided that award for the transmission should be finalized before her departure as it was apprehended that various US firms would lobby with the  Prime Minister during the visit and she did not want to be pressurized from any quarter. It was decided by the Cabinet that award be finalized on open bid basis before Prime Minister’s departure and this allowed 10 days for the Companies to submit their bids. 14 Companies purchased tender documents on payment of Rs.50,000 non-refundable. The international consortium participated in the tender itself by providing substantial amount of bid guarantee which was an indication that they were serious bidders. This consortium consisted of leading power utilities of Canada, U.S.A., U.K. France, and Asia. The L.O.I. was issued to the lowest bidder which happened to be the world’s largest independent transmission company and U.K. National Transmission and Grid Utility. The rates which were offered by the UK Company were substantially lower than the estimated rates which were recommended by the committee of experts of WAPDA-NESPAK. It is submitted that the French Ambassador did write a letter to the Government protesting for the short time given for submission of bids but such letters are received from all key Ambassadors whenever the companies from their countries fail to win the contract.

125. When the Government engages itself in such large projects involving heavy funding by way of investment with the intention of encouraging the private sector particularly foreign countries to come forward, then it becomes all the more necessary to be more vigilant that everything is done strictly according to law, and rules and regulations and such transactions should be done in a manner after fulfilment of all the legal requirements so that the transactions appear to be absolutely transparent and valid and do not allow any room for criticism from any quarter. We are of the view that these projects were handled in a manner which was far from satisfactory and for that reason there was criticism and protest. Stand is taken by the respondents that PPIB was previously under the Ministry of Water and Power but after Mr. Asif Zardari was inducted in the Cabinet by the petitioner as Minister for Investment, the said Board was brought under his Ministry. In this context and particularly on the subject of Indus Gas Project there are three letters from Mr. Ghulam Mustafa Khar available in Volume VII-M which are very pertinent. The first letter, dated 30th March, 1995 is addressed by him to the Prime Minister on transmission policy with the request for extension of time for three weeks for receipt of bids. The second letter, dated 1st September, 1996 and the third letter, dated 29th September, 1996 are addressed by him to Mr. Asif Zardari. These letters are self-explanatory containing all the details as to how and why very short time was allowed for opening the bids, and as to how the meetings were held and where and in what manner and as to how the Minister had lodged protest for which he has given facts and figures and strong reasons. After reading these letters one comes to the conclusion that all was not well with Indus Grid Project and its usefulness and profitability becomes suspected clouding its transparency as well. It is in the light of these letters that the criticism in the newspapers is to be seen in conjunction with the letters of protest from French Ambassador and other Companies on the subject of short notice for opening of bids which was inadequate for Companies within and outside Pakistan to complete the formalities. These letters as stated above are in Volume VII-M which was produced in the Court alongwith the written statement after perusal of which rejoinder was drafted and submitted in the Court but in it there is no mention with regard to these letters from Mr. Khar. These letters as such are reproduced verbatim as under:-

“My Dear Prime Minister,

The Transmission Policy was approved by E.C.C. on 20th March, 1995 with the provision that there will be competitive bidding to attract the lowest bids for payments to be made by WAPDA. It was decided that the offers will be invited before the Prime Minister’s visit to U.S.A. so that the investors from U.S.A. are also attracted to Pakistan in this area. I am now flooded with scores of calls from within Pakistan pointing out that the advertisement issued by the PPIB requires the bids to be submitted within eight to nine days. I cannot believe that genuine competitive international bidding can be possible in this short time period. Unfortunately a wrong impression prevails that successful bidders have already -been selected. This was also the impression of the Canadian delegation which recently visited Pakistan. I have also received a letter from the French Ambassador with a strong protest that the closing date for the receipt of bids is short and would not permit fair competition.

2. I have received a copy of the decisions recorded in the case of Transmission System Policy for Power Sector (enclosed for ready reference). The minutes have not been accurately recorded. Whereas the invitation to bids is to be issued before the Prime Minister’s visit to U.S.A., there was no intention to finalize and award L.O.I./L.O.S. before Prime Minister’s departure date. I enquired from Ministry of Petroleum and Secretary Finance and both of them confirmed that the ECC only wanted that the bidding process to be initiated before the Prime Minister’s visit but never directed the completion of the process within 9 days.

3. It is my duty to protect the Government and your leadership from undue criticism. Your decision on competitive bidding for Transmission Policy is highly welcome and encouraging and feel that extending the last date for receipt of bids by 3 weeks would not adversely affect our Power Programme, and would lend the transparency and integrity of the process.

4. In the meantime, as promised by me to the French Ambassador, I am directing Ministry of Water and Power not to open the bids until such time as I receive your guidance in this regard.

With kindest personal regards,

Yours sincerely,

(Sd.)

(Malik Ghulam Mustafa Khar)

Mohtrama Benazir Bhutto. Prime Minister Islamic Republic of Pakistan, Islamabad.

Subject: REVIEW OF SOUTHERN CIRCUIT OF THE INDUS GRID PROJECT.

My dear Zardari Sahib,

I understand that a meeting was convened on the above subject on 29th August, 1996 under your Chairmanship which decided to overrule the submission of the Ministry of Water and Power and WAPDA regarding the implementation schedule of Southern Circuit and the proposal for its re-bidding. It may kindly be recalled that 1 had requested that the meeting may be postponed till I return from my field visit of the flood affected areas. I also understand that my request in this regard was also conveyed to you in the meeting as well. However, I was surprised that a decision has been taken despite my requests.

2. 1 am sure you are well aware of the background if the whole project and the fact that I had serious reservations about the way the entire project was bidded. I had serious concerns about the transparency in bidding/evaluation and award of contract to M/s. National Grid and I had also written a D.O. Letter to the Prime Minister at that time expressing my concerns. However, despite all this, the project processing continues to be proceeding in objectionable manner without due regard to the need, present load situation, cost to the exchequer and transparency. According to analysis based on present data, the Southern Circuit is not required before year 2003. As regards the financial aspects, the projected yearly payments for the Southern Circuit, alone up to year 2003 (on tariff profiles submitted by the sponsors) to be made to a National Grid would amount to US $ 294.2 million against an estimated cost of about $ 160 million. Why should we make payments for a capacity which is not needed and further, why at such exorbitant rates?

3. I write this letter to express my strong reservations and protest on the above decision as it is not in the jurisdiction of the Ministry of Investment to take such decisions and overrule the

Ministry of Water and Power who are the concerned Ministry on the technical subject.

4. I, therefore, request that the whole matter may be reconsidered and my views may be brought to the knowledge of E.C.C.

With best regards

Your sincerely, (Sd.)

(Malik Ghulam Mustafa Khar)

Mr. Asif Ali Zardari, Minister for Investment, Government of Pakistan, Islamabad. “

“Subject: TRANSMISSION LINE PROJECT INDUS GRID

My dear Asif,

Thank you very much for your letter of 8th September, 1996 related to above subject. I particularly thank you for writing me a detailed letter because it clarified to me how seriously you were being misinformed and how twisted information was being presented to you to achieve the objectives of some vested interests. I start with some of the comments and inferences drawn in the last paragraph of your letter. It was extremely surprising and frustrating to note that you had been given the impression that after the competent forum (ECC/Cabinet) had approved the project, it was ‘forced to confront issues which were (allegedly) raised only as an attempt to frustrate the sponsors rather than adjust to new realities’. Nothing can be so malicious and baseless. than such an information fed to you. The fact of the matter is that the policy for transmission was approved by E.C.C. on 20th March, 1995 following which bids process were done allowing about 8 days for bidding out of which 4 were holidays. Nowhere in the world, projects of the magnitude of over $ 700 million are bidded in such an absurd manner. It was a mockery of the whole process and tarnished our image. The World Bank, some foreign agencies, myself and some other conscientious persons raised objections to this entire exercise. However, despite our concerns and reservations, the letter of. support was awarded on 4th April, 1995 (it may be noted that the project was not approved by ECC or Cabinet who actually approved the policy). Subsequent to the issuance of the L.O.S., there was hardly any interaction of Ministry of Water and Power with M/s. NGC and PPIB on the subject. Even within the PPIB where the project was being handled, a very specific group was dedicated and in many cases the MD, PPIB was also not fully in picture about the affairs of the project. In fact the original letter of support was issued to the sponsors for two separate packages (‘A’ and ‘B’). Subsequently at some point in time, it was merged in one L.O.S. The approval of the Government was not taken. The evaluation of the bids was done without involving the Ministry of Water and Power and by a select group of PPIB as I stated above. Further, without the knowledge of the Ministry of Water and Power, M/s. NGC were told to concentrate efforts on one component namely Muzaffargarh-Gatti line. According to M/s. NGC, as they stated in one of the meeting chaired by your goodself, this resulted in diverting their attention and a loss of 5/6 months. Subsequently, M/s. NGC attributed this distraction as one of the main reasons for not achieving the financial close on the designated date. It was only after the expiry of the validity period of the L.O.S. that towards the end of April or early May, 1996 that the Ministry of Water and Power was brought in the picture. You could, therefore, very well see the truth. After issuance of L.O.S., the Ministry of Water and Power, did not make any intervention nor was it involved in any effective manner. How could, therefore, this Ministry, according to last paragraph of your letter, “confront issues which were raised only as an attempt to frustrate the sponsors rather than adjust to new realities”? Further, how could it be inferred that the decision of the “ECC/Cabinet being clearly violated in the project” by us? I hope, from the above, you would know as to who was responsible for deviations from ECC/Cabinet decisions!

2. 1 also see another piece of gross misinformation in your letter wherein it has been stated that “the Deputy Chairman took strong exception to the fact that a project which has been approved by the CCE at his recommendation has been altered without his knowledge”. First of all, it is too naive to observe that the recommendations to the Cabinet Committee of Energy or any other such forum were personal to anyone. Secondly, it is also equally dumb that the project “has been altered”. The fact of the matter is that M/s. NGC had failed to achieve financial close as per the L.O.S.. Technically, we should have cancelled the L.O.S.. However, sine the extension/renewal of the letter was under consideration, therefore, it was in the fitness of the things that before giving the renewal of L.O.S. the whole matter should be reviewed alongwith deviations which were made without the knowledge/approval of the Government. During this process, it was also considered that the new redlities which had emerged since 1994 including the revised level of new private generation up to 3000 MW, should be kept in view and the L.O.S., if issued again, should reflect our requirements. Towards this end, the project scope was under review. In fact, I had told you in one meeting that upon my instructions, the Ministry of Water and Power had prepared revised summary for submission to the ECC which is the competent forum. However, since some technical differences of opinion developed, I had asked the Ministry to withhold the summary till the matters were mutually discussed and an agreed position is evolved keeping in view the national interest. The whole exercise of the meetings that you took and the deliberations which followed, were an effort towards this end. It was all along the intent that after this process, we should be able to take a summary to ECC with least possible number of issues for their approval. Many projects in the past have been originally approved for a definite scope but they had to undergo revisions. The revised versions have been submitted to competent fora for approval. Same was situation in this case. With this in background, I think it was not worthy of Deputy Chairman who knows the project processing very well to make such remarks. that the project had been altered without his knowledge. I reiterate, after the deliberations this summary was to be submitted to ECC for approval.

3. On the technical side, unfortunately, the tendency seems to draw comparison with a public sector project in total disregard to the situation on the ground and an objective reassessment of our needs. Apparently, the technical views of WAPDA and Ministry of Water and Power have not been given due weightage. The Ministry of Water and Power and WAPDA had all along been of the view that instead of mincing with the history, the best approach would be to use the latest available information about the approved programme of private power generation of 3000 MW with their revised locations and carry out a forward looking load flow analysis. If the load flow and stability analysis justify additional circuits in the south, then the circuits south of Rahimyar Khan should be approved. If it does not, then we should not include it in the revised letter of support. In their view, the circuit was not needed before year 2003. The dichotomy pointed out in your letter, in the views of Ministry of Water and Power and WAPDA, also appears to be a misunderstanding of some of the technical comments by the non-technical participants in the meeting. The Ministry of Water and Power had also held the view, all along, that in case the circuit south of Rahimyar Khan was not urgent, we should not go ahead with it because the yearly payments required for the circuit up to year 2003 would add up to $ 294.2 million against the presently estimated costs by express of the order of US $ 160-170 million. This would be an unnecessary and unfair burden on the exchequer and, therefore, warrants very careful examination of the load flow studies before the issuance of the revised letter of support. Further, it was our view that if this position is accepted, we need not go ahead with the existing company for the southern circuit. Our view was that it should be rebidded.

4. Another aspect is that all along the case is being handled in very hasty manner. As I noted above, the initial bidding process was very embarrassing. The recent episode regarding approval was also processed in hot haste. You would recall that I had come to the Prime Minister’s House to attend the meeting convened by you on 27th August, 1996 on the subject project. However, in view of your occupation in another meeting with the bankers and my planned departure for the flood areas in the evening, the meeting was postponed. The meeting was then re-scheduled on 29th August, 1996 while I was still in the field. It would have taken me 2/3 more days to return to Islamabad as the flood situation had improved. I do not understand why was the meeting for the transmission line considered more urgent than the flood situation! However, I had directed both the Ministry of Water and Power and WAPDA to attend this meeting and present their point of view for consideration since I did not want to come in the way of your deliberations as long as they lead to a consensus. I had asked them to bring out my request for postponing the decision to the meeting in which I am present only if consensus was not reached. That is why, I believe, that my request was brought out in the meeting towards the end. Subsequently, the summary of ECC was also submitted in a very hasty manner. It was not allowed the usual circulation period for comments and was not shown on the agenda circulated by the Cabinet Division till the last documents received by my office. I think, it was included in the agenda on the last day. It is also interesting to note that the summary was considered by ECC on 9th September, 1996 while the minutes of the meeting were formally circulated on 10th September, 1996 which did not afford any time to WAPDA to react on its recording. You can very well-understand why I am not in agreement with this decision.

5. I have been bringing out my comments/reservations entirely in the national interest as it does not augur well, both internationally and domestically, to conduct business in a manner which can be objectionable and oblivious of our own determination of the extent of the infrastructure needed at this juncture. One can always feel safe by over building the infrastructure but a developing country like ours can hardly afford this luxury in my opinion. I have been and I will continue to abide by the decisions of the competent fora and whenever needed, we will go back to them for necessary changes. I also assure you of my fullest cooperation with the understanding that difference of views on national issues are included in the definition of cooperation. We can always, together, review them objectively and rationally.

With best regards,

Yours sincerely,

(Sd. )

(Malik Ghulam Mustafa Khar)

Mr. Asif Ali Zardari, Minister for Investment, Government of Pakistan, Islamabad.”

126. In the transaction of business in Oil and Gas Development Corporation, there were gross irregularities which have been highlighted in the written statement. A consultancy for studying dry holes, involving US $ 393,256 was awarded to M/s. Hydrocarbon Development Institute of Pakistan (HDIP) and M/s Improved Petroleum Recovery (IPR), which is a US Company, previously represented by Saif International, a Company owned by the Saifullah family, and at the relevant time of award Mr. Anwar Saifullah was himself Minister for Petroleum and Natural Resources. The proposal for the study was initiated by HDIP and IPR and was submitted to him and was approved by him on 13-6-1994. The Chairman, OGDC, wrote to the Secretary, Ministry of Petroleum and Natural Resources and copy of which was sent to PS to the Minister, stating that another firm was prepared to do the study at almost half of what was being paid to HDIP and IPR but no action was taken on that letter and direction was issued for awarding the contract to HDIP and IPR in violation of rules and procedure. Mr. Riffat Askari was Chairman of OGDC and on 15-11-1994 he signed a Memorandum of Understanding with Cooper & Lybrant to carry out a Reserves Evaluation Study of OGDC fields. Another MOU with Cooper was signed on 2-12-1994 during Mr. Askari’s visit to the United Kindom. The estimated cost was US $ 350,000. In spite of reservations of OGDC officers and other departments concerned, Mr. Askari awarded the contract to Cooper for the Reserves Evaluation Study worth US $ 2,500,000. 80 per cent of the total cost was released to Cooper even though no work at all had been done. The case file was sent to the Finance Department which disappeared and payments were made on the copy of the contract available with the department. Mr. Askari sold 2298 metric tons of scrap and 7461 assorted store items without public auction and at throwaway prices to the people of his choice. Ultimately, the loss suffered by OGDC on this account was to the tune of Rs.67,906,161.

127. Documents produced in support of irregularities in OGDC are contained in Volume VII-F. At pages 1 and 2 is the note on the subject of contract to evaluate OGDC’s recent exploration programme dry hole study and one thing notable is that it is mentioned therein that the proposal alongwith a brief note was submitted by the Director-General HDIP to the Minister for Petroleum and Natural Resources on 13-6-1994 and was approved on the same day by the Minister. It is also mentioned in paragraph 5 of the note that HDIP/IRP never maintained close liaison with the OGDC and when the study was completed, presentation was made to the Minister directly on 17-12-1995. OGDC was invited to participate on a very short notice which is against all norms of the industry. At page 15 is letter dated 11th October, 1994 by the Chairman, OGDC, to the Secretary, Ministry of Petroleum and Natural Resources complaining that the cost proposed by HDIP and IPR was too high compared to the market price and M/s. Intera Information Technologies (a world renowned company for this type of work) were ready to perform the study by selecting 30 dry holes approximately 10 wells in each sub basins over the entire drilling history in the basin in about US $ 200,000 which was about half of the cost proposed by HDIP and IPR. At pages 20 and 21 in the same volume is a brief of Consultancy Department on reserves evaluation study of OGDC fields by Cooper & Lybrant and its subcontractor Ryder and Scott. It is mentioned in this note that the contract was signed by Mr. Ainuddin Siddique, the then Executive Director (Finance) without vetting/involvement of the concerned department (Reservoir Engineering). The 50 per cent. payment was made as an advance and in the next three months, 30 per cent. of the remaining total payment was made. In this way the 80 per cent. payment was released even though no work had been done. At page 31 is OGDC’s note, dated 19th December, 1994 commenting adversely on Cooper and Lybrant’s proposed work plan. At page 32 is note, dated 7th December, 1996 from Manager (Stores) of the OGDC addressed to the Chairman on the subject of irregular sale of OGDC material. It is stated in the note that Mr. Rifat Askari, Ex-Chairman, OGDC, sold about 229 metric tons of scrap and 7461 assorted stores items to several persons at throwaway prices in violation of approved procedure/open auction. The Chairman OGDC could dispose of the material only through public auction which he did not do. He was empowered to order sale of scrap only up to Rs.5,00,000 (half million) while he sold material of more than twenty-three million rupees. The Chairman OGDC sold material to the persons/firms of his own choice and benefited them by selling the Corporation’s material at discretionary rates. In the result a loss to the tune of Rs.67,906,161 was suffered by OGDC.

128. In the rejoinder on the subject of OGDC the petitioner has defended the joint venture by HDIP and IPR which according to her was initiated in November, 1991 during the tenure of Mian Nawaz Sharif Government with final approval given by the Caretaker Government of Mr. Moeen Qureshi. The petitioner has denied any connection between Mr. Saifullah and IPR and further stated that OGDC sank 26 unproductive wells between July, 1991 and January, 1994 out of a total of 28 wells drilled causing a net loss to the exchequer of $ 104 million. It is further stated in the rejoinder that approval of the proposal by Mr. Saifullah on the same day is efficiency which is to be normally admired stating that there was, therefore, no doubt that the .contract was fully justified and that every bureaucratic requirement was fully met. It is claimed in the rejoinder that the letter of Chairman OGDC to the Secretary, Ministry of Petroleum and Natural Resources with copy to P.S. to the Minister was fabricated. The petitioner has wholeheartedly defended Mr. Anwar Saifullah and the joint venture between OGDC and HPIC and IPR and has stated nothing about ex-Chairman Mr. Rifat Askari. If OGDC was not lucky in digging of holes successfully and suffered loss on that account, it does not mean that the Corporation and the persons heading it would be justified to undertake projects and enter into transactions in utter disregard of rules and regulations. Violation of rules by others in the Ministries and Corporations should be discouraged by the Prime Minister as Head of the Government and not defended and encouraged.

129. Under the Cabinet decision C.D.A. was directed to give Government land worth Rupees 300 million to Dr. Javed Saifullah, the brother of Federal Minister Mr. Anwar Saifullah, in a joint venture for construction of a heart hospital on a plot of land measuring 12.5 `acres in Sector H-11 which was demarcated for hospitals. Those plots could be demarcated at reserve price for hospital in public sector. If hospital had to be run commercially on profit basis, then the plot could be sold at market rate through open auction. In Volume VII-K are documents produced by the respondents. At page 38 is summary for the Cabinet in which proposal was made for establishment of a private heart hospital in Islamabad by Dr. Javed Saifullah in collaboration with an American institute, namely, M/s. Meddling International. It was agreed in principle that the project be implemented as a joint venture with C.D.A. in which C.D.A. would provide land as its share of equity and in return employees of C.D.A. and Federal Government would get free treatment to a certain number of patients. In the rejoinder filed by the petitioner there is no response on this issue and mention is made about the allotment of plot by C.D.A. in the manner stated above by the decision of the Cabinet, which is defended.

130. Under the Capital Development Authority Ordinance, 1960 and Islamabad Land Disposal Regulations, 1993 same criteria of hospitals are made applicable to schools. If school is to be run in the private sector, the plot is to be disposed of at market price through open auction. The Chairman, C.D.A. prepared a proposal for allotment of such plots to “suitable” parties in relaxation of the regulations on the ground of “known performance” in the education field. It was proposed that if a school was to be operated by a Trust on non-profit basis, allotment should be at half the reserve price of Rs.2,000 sq. yard. The “competent authority” was pleased to approve amendment in the Regulations allowing for a further reduction in the rate for profit-oriented institutions (Rs.20,000 per sq. yard) and 50 per cent. of the reduced rate for non-profit institutions. Several meetings were held between Mrs. Shehnaz Wazir Ali, the Special Assistant, and the Chairman, C.D.A. and it was agreed that the rate to be charged from profit oriented organizations for the grant of a plot would be deduced to Rs.500 sq. yard and in the case of trusts and professional schools the rate was to be only Rs.250 per sq. yard. Ultimately nine institutions were selected for allotment of plots on concessionary rates and allotment letters were issued. From these institutions following four are worthmentioning.

Institution            Location (Size)           Head/Incharge                             Remarks

Sindh People’s  H-8/4 (3.5 acres)         Mrs. Benazir Bhutto                   Prime Minister

Welfare Trust   (Rs.250/sq. yd.)                       (Chairperson)

Educational       F-11/4 (3.7 acres)        Mrs. Nasra (Owner)                  Mother of Ms.

Trust Nasra      (Rs.250/sq. yd.)                                                                        Shehnaz Wazir

School                                                                                                   Ali

Wahid Public    F-10/2 (3.0 acres)        Miss Gul-e-Yasmin                    Sister of Ms.

School               (Rs.250/sq.yd.)                                   (Owner)                          Naheed Khan

Islamabad         F-11/4 (2.29 acres)      Mrs. B.A. Qureshi                      Wife of old PPP

Grammar School  (Rs.500/sq. yd.)        (Owner)                                          supporter

While the first three allottees are well-known, the fourth allottee Mrs. B.A. Qureshi has been described as wife of Mr. B.A. Qureshi, who was land manager of Mr. Z.A. Bhutto, Mrs. B.A. Qureshi is stated to be a teacher and in the first P.P.P. Government was promoted to Grade 22 in violation of rules and made the Head of Recruitment Cell. As a result of allotments mentioned above, C.D.A. would receive Rs.39.9 million while the reserve price of the plots was Rs.219 million. In this manner, by violation of rules, colossal loss was caused to the public exchequer. In Volume VII-K at pages 53 to 55 is C.D.A. note to the Principal Secretary to the Prime Minister on the subject of allotment of land for schools in Islamabad suggesting modification of Clause 5 of the existing Land Disposal Regulations, 1993. At page 56 is decision dated 31-7-1995 whereby the competent Authority approved the amendments and variations in the rates. At page 59 is note containing rates for disposal of land for private schools, trusts and professional schools.

131. In the rejoinder stand is taken by the petitioner that schools and cardiac hospital were planned by C.D.A. in view of the pressing need for such facilities in Pakistan. The hospital would have saved precious foreign exchange which is normally used for treatment abroad. No privileges were extended in the above projects and on the contrary the respondents have withheld the relevant record, Now so far the records are concerned, in support of the allegation, respondents have produced 15 documents describing the role played by C.D.A. in connection with the projects mentioned above. These documents are contained it Volume VII-K and E which have been appended alongwith the writer statement. The petitioner in her rejoinder has stated that she relied upon some documents produced by her in rejoinder Volume II. The documents on the particular subject are at pages 41 to 50. At page 41 is newspaper cutting from daily Dawn dated 9-12-1996 the heading of which is “No corruption complaint against Bhutto, Nawaz: Afridi”. This statement was issued by Caretaker Interior Minister Mr. Umer Afridi who stated that “Accountability cell set up at the interior ministry has so far not received any complaint of corruption against the deposed Prime Minister Benazir Bhutto and PML(N) President Mian Nawaz Sharif”. This statement was issued on 9-12-1996 and the Government of the petitioner was dismissed and the Assemblies dissolved on 5th November, 1996. At page 42 is newspaper cutting from daily Dawn dated 19-12-1996 which shows that the statement was made by Justice (Retd.) Ghulam Mujadid Mirza, Chief Ehtesab Commissioner, to the effect that the Ehtesab Commission had not received any case against the deposed prime Minister Ms. Benazir or her spouse Asif Ali Zardari or any other mainstream political figure. At page 43 is a news item from daily Khabrain dated 22-12-1996 which contains the statement of Malik Meraj Khalid, Caretaker Prime Minister, with heading that “The Caretaker Government has not been able to find out any clue of the corruption”. At page 44 is the English version of the same statement in the daily Nation, dated 22nd December, 1996 heading of which is “Meraj admits failure on accountability”. At page 45 is again the statement of the Caretaker Prime Minister in the daily News dated 22-12-1996 with heading “Entire nation is corrupt, says Meraj”. The second line of the heading is “Caretaker Prime Minister says many will be arrested in a couple of days”. At page 46 is extract from daily Khabrain dated 2-1-1997 which shows that the Caretaker Prime Minister Malik Meraj Khalid stated that on the basis of corruption, Assembly could not be dissolved. Underneath that heading perusal of the remaining contents shows that Malik Meraj Khalid also stated that the economic condition of the country was ruined and the country had to give in to the demands of the donors and further that the caretaker set up would go home after elections which were scheduled for 3rd February, 1997. this address was made by the Caretaker Prime Minister on the occasion of the dinner arranged by Banaspatee Ghee Association. Reliance placed by the petitioner on the newspaper cuttings in rejoinder Volume II does not show that the petitioner has been absolved of the charge of violation of rules by her and by C.D.A. under her instructions. Immediately after the caretaker set-up had taken over, they had set up the Accountability Cell. The Prime Minister and the Interior Minister did make some statements to that effect in the beginning and until that time they were able to find out material on the subject of corruption, efforts were being made to dig out material on that subject and such efforts met with success later. The statements of the Caretaker Prime Minister are to be viewed in the light of the background that there was demand from the people for accountability first and then elections but the Prime Minister was of the view that the 90 days’ time was not sufficient for completing the process of accountability, hence the elections should be held in time and the question of corruption of public representatives should be left to the people who would give finding at the time of voting. In any case in the written statement instances have been specified showing violations of rules and regulations 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 cuttings of the statements in which the Caretaker Prime Minister or the Interior Minister S had stated that initially they did not find material connecting the petitioner with S the acts of corruption. In the final analysis after perusal of the documents produced by the respondents along with the written statement and the reply of the petitioner in the rejoinder and the documents filed by her in support of her stance, it can be said that the charge framed by the respondents is adequately substantiated.

132. It is the case of the respondents that the petitioner had allowed setting up of a Cooperative Society for the benefit of her M.N.As. and the supporters for the allotment of plots to the parliamentarians. This was done in relaxation of rules. 192 plots of 100 sq. yards were given to the parliamentarians’ cooperative housing society in two sectors, F-10 and I-8. The plots were allotted to the parliamentarians at the rate of Rs.1,000 per sq. yard for sector I--8 and Rs.1,500 per sq. yard for sector F-10 in relaxation of C.D.A.’s reserve price of Rs.2,000 per sq. yard. This was also done in contravention of the ECC decision that no residential plot in Government scheme would exceed 600 sq. yards. The cooperative society did not even qualify as Government scheme. The Chairman of the cooperative society was the Minister of Housing and Works and although C.D.A. came under Cabinet Division but the summaries were prepared by the Ministry of Housing and Works. The piece of land measuring 16 acres at Shakarparian was earmarked for recreational and sports purposes as per the master plan. In violation of rules, brother-in-law of Mr. Asif Zardari, was given permission to build a five star hotel at that place in the name of M/s. Inter Hotel (Pakistan) Limited. The allottees were allowed to publish their own valuation which was fixed at Rs.310 million. It was decided that the project would be yet another joint venture to be undertaken by the C.D.A.. Out of Rs.310 million, Rs.150 million were to be treated as C.D.A.’s equity by the issuance of shares by the allottee company. No such shares were ever issued. Rs.150 million were payable by allottee company over a period of five years in semi-annual instalments alongwith mark-up. Subsequently, this period was extended to ten years and the mark-up was payable over a period of two years after initial ten years. Only Rs.10 million were deposited by the allottee company as earnest money with C.D.A.. In complete violation of rules M/s. Inter Hotel (Pakistan) Limited were given a piece of prime land for the construction of a five star hotel for a sum of Rs.10 million only and the land was 30 times more in worth.

133. Respondents have produced some documents in support of the allegations mentioned above, which are contained in Volume VII-K which is appended with the written statement. At pages 32 and 33 is summary for the cabinet prepared by the Ministry of Housing and Works for development of a housing scheme for parliamentarians prepared by Makhdoom Amin Fahim, Minister for Housing and Works and the Chairman of the Parliamentarians Cooperative Housing Society. At page 34 is the cabinet decision dated 18-9-1996 approving the scheme. At page 35 is the decision dated 23-8-1997 which is to the effect that maximum size of plots for individual housing units be kept at 600 sq. yards. At page 42 is bid of Inter Hotels (Pakistan) Limited for development of a five star hotel in joint venture arrangement with C.D.A.. At pages 45 to 51 is the offer of allotment by C.D.A. on joint venture basis. At page 44 is the schedule with names, addresses and description of the subscribers who have formed the said Company and at Serial No.2 is Mir Munawar Ali son of late Mir Maqbool Ali and his occupation is shown as business and his address is shown as resident of the 6th Commercial Street, Phase IV, DHA, Karachi. He is shown to be the owner of 500 shares. Mr. Aitzaz Ahsan, learned counsel for the petitioner, vehemently objected that Mir Munawar Ali is not related to Mr. Asif Zardari because his father’s name is different which is late Mir Maqbool Ali while the person related to Mr. Asif Zardari is Mir Munawar Ali Talpui son of Mir Allah Bux Talpur. That being so 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 then it is apparent that persons named in the schedule have been favoured out of way after violation of rules. No mention is made in the rejoinder with regard to the allotment of land to the parliamentarians. Therefore, that charge stands established.

134. In Volume VII-E at pages 153 onwards there are documents which need to be mentioned. At page 153 is PTV’s contract with the London based company signed by Ms. Rana Shaikh. At pages 154 to 156 is copy of the agreement dated 14-6-1996 and attention is drawn to Clauses 4 and 5 which are reproduced as under:-

“4. The Licensee will pay to the Licensor at the rate of US $ 80 per minute of PTV programme as royalty of the recorded and distributed programmes as per clause I except programmes related to News/current affairs.

5. The Licensor will pay to the Licensee at the rate of US $ 80 per minute of PTV programmes recorded and distributed as per clause to News and except programme related to News and current affairs as rental and marketing charges of the distribution in the U.K., Europe and U.S.A.”

Although these documents are included in Volume VII-E but in the written statement which is filed by the respondents no allegations have been made on the subject of PTV contract and for that reason there is no mention of this PTV contract in the rejoinder. In the circumstances no useful purpose would be served to consider these documents, hence they are excluded’ from consideration. In the same volume at page 159 there is a note on the subject of Karachi Port Trust in which mention is made of the allotment of land and at page 169 there is proposal to build Mauripur City Development at K.P.T. land, but these documents are not to be considered for the same reason that no mention is made about them in the written statement and for that reason the rejoinder is also silent. At pages 241 to 247 in the same volume are documents on the subject of F.M. Radio showing that three licences were given on the same day for Islamabad, Lahore and Karachi for setting up of F.M. Radio Stations. We do not feel inclined to consider these documents for the reason that there is no allegation in the written statement and for that reason there is no mention about this subject in the rejoinder.

135. In the order of dissolution there is allegation that innumerable appointments were made at the instance of members of the National Assembly in violation of the law declared by the Supreme Court that allocation of quotas to M.N.As. and M.P.As. for recruitment to various posts was offensive to the Constitution and the law and that all appointments were to be made on merits I honestly and objectively and in the public interest. The transfers and postings of the Government servants have similarly been made in equally large numbers at the behest of M.N.As. and other members of the ruling parties. The members have violated their oaths of office and the Government has not for three years taken any effective step to ensure that the legislators do not interfere in the orderly executive functioning of the Government. The petitioner in her petition . has denied the allegation as vague and general and further has taken the plea that I such unsubstantiated allegations cannot form the basis of any dissolution or punitive action. It is also asserted by the petitioner that in any case all appointments were duly advertised and the candidates interviewed and appointments made on merits. For transfers and postings of the Government servants the allegation is denied by the petitioner. As against that, in the written

 statement, the .respondents have stated that there are thousand of instances where appointments were made in complete disregard of the applicable rules and regulations. If even a sampling of the violation had been incorporated in the dissolution order, it would have run into several hundred pages. The whole system of appointments was in violation of rules and regulations. Vacancies were some times advertised and tests/interviews were held but in farcical manner. There were lists prepared in the Prime Minister’s Secretariat and the Establishment Division, and the names were supplied by the Ministers, Advisors and public representatives, and in that manner the lists were finalized and okayed and only had to be acted upon by the concerned departments and corporations in finalizing the appointments. At pages 1 to 7 are the names of Ministers, M.N.As., Senators, Advisors. Those names start from pages 1 to 267 and against each name there is number of recommended appointees. There is another list of 140 M.P.As. -and the number of appointees recommended by them is also given. In this way the total number of appointees recommended by these public representatives is 20407.

136. In Volume VII-A of the written statement from pages 128 to 133 are documents on the subject of appointments in Sui Northern Gas Pipelines Limited, to be referred hereinafter as SNGPL, on the directions received from the Federal Government. At page 128 is the note prepared by SNGPL on the subject of career-term appointments in subordinate cadre of unionized staff from 1994 to 1996. It is stated in the said note that after lifting of the ban, the Federal Government introduced centralized system of periodical recruitment in SNGPL. In this connection a meeting was held by the Chief Executive of SNGPL and other concerned management staff in which Mr. Siraj Shams-ud-Din, Additional Secretary, Prime Minister’s Secretariat, informed about the launching of a recruitment scheme by the Government in which advertisements would be made in the national/regional newspapers and applications would be invited for various positions. Vide letter dated 22-6-1994 recruitment procedure was circulated by the Ministry of Petroleum and Natural Resources in which advice was given that applications would be received by the Deputy Commissioners of the districts, the Ministries/Divisions/Autonomous Bodies/Subordinate Offices/Corporations and the posts would be filled up according to the recruitment rules after conduct of tests/interviews, as the case may be. Before finalisation of the results, the same would be sent to the Establishment Division for vetting/clearance. Accordingly, SNGPL made advertisements in various newspapers and applications received were sent to the Deputy Secretary, Ministry of Petroleum and Natural Resources (Mr. R.A. Hashmi). As a result of the advertisements, 1,43,970 applications were received from various Deputy Commissioners all over the country, which were got computerised by SNGPL on the basis of divisions obtained, domicile of the candidates, etc. to meet the requirements of telex message dated 22-8-1994 of the Ministry of Petroleum and Natural Resources. On receiving telephonic instructions from the Establishment Division, all the candidates were invited for interview on 27th, 28th and 30th September, 1994 through advertisement published in the newspapers on 26-9-1994. In this way SNGPL incurred an expense of Rs.12,11,763 on account of computerization, advertisements and allied expenses.

137. Before the interviews could be finalized, two lists of 108 and 176 candidates were received from the Prime Minister’s Secretariat through Establishment Division with instructions that names of the candidates be included in the list of successful candidates. The Managing Director, SNGPL, issued instructions accordingly. The Prime Minister’s Secretariat also instructed that 20 candidates who were already serving in SNGPL as Casual Employees were to be appointed on career-terms. The said nominations were also included in the list of selected candidates. Out of 496 positions in Part I of Phase I only 108 candidates were on merit. Another 118 persons were appointed on merit in part-2 of Phase-I after having conducted trade tests of persons who had earlier appeared in the interview held on 30th September, 1994 against/technical/skilled categories. 388 candidates were nominated by the Prime Minister’s Secretariat and further two lists containing nominations of 50 candidates were received from the Minister for Petroleum and Natural Resources vide Fax Messages dated 11-10-1994 -and 12-10-1994. In November, 1994, the Cabinet Secretariat also issued clearance of candidates selected vide their letter dated 13-11-1994 in response to the list of selected candidates which included 388 candidates nominated by the Prime Minister’s Secretariat and the Minister of Petroleum and Natural Resources. In the second phase of recruitment, SNGPL received about 39,000 applications. All the candidates were called for interview but before the process could be finalized a list of 169 persons was received from the Prime Minister’s Secretariat. 99 vacancies existed and 40 more were available as left over of Phase-I and 21 were included from Phase-III. Another five vacancies were allocated from the Managing Director’s Pool and in this manner 165 vacancies were made available. In the manner stated above, the directions from the Prime Minister’s Secretariat and the Minister for Petroleum and Natural Resources were complied with by providing employment to the recommendees and SNGPL exceeded its approved establishment of Career Term Subordinate employees by 1343 persons.

138. In Volume VII-A at page 150 is the Cabinet decision dated 13-5-1994 directing the Establishment Division to monitor recruitments in all Ministries/Divisions/Attached Departments/Subordinate Offices/Autonomous Bodies/Corporations. At pages 157 to 160 is the office memorandum dated 19-6-1994 from the Establishment Division regarding recruitment procedure. At page 218 is Establishment Division’s approval dated 13-11-1994 of the list of appointees sent by SNGPL for clearance. At pages 219 to 224 are lists dated 11-10-1994 and 15-10-1994 received from the Minister of Petroleum and Natural Resources to be given employment in SNGPL. At pages 233 to 239 is list dated 23-4-1995 of 169 nominees received from the Prime Minister’s Secretariat. At pages 254 to 268 is the list dated 27-10-1995 of 456 nominees received from the Minister by SNGPL for appointment as management trainees. At pages 269 to 285 are various letters/orders issued by the Minister ordering the appointment of management trainees. Likewise in Sui Southern Gas Company Limited also, appointments were made in illegal manner and there is a note at pages 289 to 291 on that subject. In Phase-1, 44 were appointed, in Phases 11 and III 195 persons were appointed, and appointments of 4257 persons were made on temporary basis.

139. In Oil and Gas Development Corporation also appointments were made in violation of rules on the basis of lists received from the Government. Against 53 vacancies,’ after advertisement, applications were received from 966 candidates and in that connection three lists containing 387 names of the candidates were received through the Establishment Division. While 8 lists containing 579 names were received directly from the Prime Minister’s Secretariat. In this manner appointment letters were issued to 869 candidates in three pbases on the recommendation of the Federal Government. In Pakistan Public Works Department also, for posts in BPS 1 to 15, 74 appointments were made in three phases on the verbal instructions from the Prime Minister’s Secretariat. WAPDA advertised 1138 posts in BPS 1 to 15 in July, 1994. A list of 431 candidates was received from the Establishment Division which was handed over to the WAPDA authorities with verbal instructions for their appointment. 360 appointments were made by creating additional posts, while 24 were appointed against advertised posts. Besides, 59 candidates were appointed on the verbal instructions of the Ministry of Water and Power. In November 1994, appointments were made in Phase-II. A list of 632 candidates was received from the Establishment Division through Ministry of Water and Power against which 545 candidates were issued letters of appointment. Additional list of 274 candidates was received from the Ministry of Water and Power against which 162 candidates were issued appointment letters. In KESC 203 appointments were made on the recommendation of the Federal Government. The State Life Insurance Corporation of Pakistan also obliged and appointed 192 persons from the list provided by the Prime Minister’s Secretariat. Pakistan Telecommunication Company also appointed 4424 persons from the lists supplied by the Prime Minister’s Secretariat. In Agricultural Development Bank of Pakistan, 742 appointments were made on the basis of directions received from the Government in violation of rules. 30 appointments were made by Civil Aviation Authority on the recommendation of the Government. 2053 appointments were made in PIA on the directions received from the Government. 883 appointments were made in the Pakistan Post Office on the recommendation of the Federal Government. 212 persons were appointed for political reasons in the Intelligence Bureau on the recommendation of the Federal Government in violation of rules. 4523 appointments were made in National Bank of Pakistan on the instructions of the Prime Minister’s Secretariat and Ministry of Fiilance. 211 persons were appointed in Utility Stores Corporation on the recommendation of the Government.

140. In connection with appointments, which are violative of rules and particularly made on the basis of recommendations by the public representatives, President of Pakistan wrote to the Prime Minister that such appointments having been made or being made on the recommendations of M.N.As. and M.P.As. are violative of Rules 19 and 29 of the Government Servants (Conduct) Rules, 1964 and enquired from the Prime Minister as to what steps had been taken to curb the trend of approaching the public representatives which amounts to interference in the appointments of Government servants. Copy was sent to the Chairman Senate and the Speaker National Assembly and the Governors of the four Provinces. Such documents are available at pages 1639 to 1659 in Volume VII-D of the written statement. It appears that the President also pointed out that such appointments in that manner were being made in violation of rule laid down in the case of Munawar Khan v. Niaz Muhammad and others (1993 SCMR 1287) in which it is held that allocation of quota of posts to M.P.As. or M.N.As. was offensive.to the Constitution and the law as they were under oath to discharge their duties in accordance with the Constitution and the law. On the subject of appointments in violation of rules, which are specified in detail inl the written statement and volumes of documents appended therewith, the petitioner in rejoinder has commented very briefly by stating that firstly the material was not before the President when he passed the dissolution order, secondly the lists did not prove that the appointments were illegal, and thirdly that the official notes, orders and departmental rules have not been produced. Plea is taken that the departments do make such appointments, expand and fill up such vacancies. This is a bare denial in opposition to the documents which have been produced in support of the assertion in which facts and figures have been given and detailed notes have been prepared by the concerned departments, corporations and companies which are brought on the record alongwith other documents of supportive nature. These documents, which speak for themselves, clearly show that the lists were sent from the Prime Minister’s Secretariat by the persons named who were at the relevant time working in the Prime Minister’s Secretariat and there is no denial that those persons did not work in the Secretariat and did not forward the lists. These documents are sufficient to prove that the lists were prepared of the persons who were recommended by the public representatives and the same were processed in the Prime Minister’s Secretariat and sent to various departments and corporations for appointments and such appointment letters were issued in violation of rules and regulations. Hence the appointments were not made on merits. In fact all these appointments are to be made in the manner which is prescribed in the rules and regulations, and any other procedure adopted, which is a departure from the normal procedure, would amount to violation of the normal rules. The general principle laid down is that the Constitution is the supreme document to which all other laws are subordinate and the Federal Government and all other citizens are to act in accordance with the Constitution and the law and particularly on the subject of appointments, the laws, rules and regulations made in that context are to be followed in letter and spirit by all jointly and separately including the Head of the Government and all other functionaries. The Government must first set an example of following the law and the rules and then should expect others to do the same. Appointments in various grades in Government departments, Corporations and Companies are to be made strictly in accordance with the rules and regulations violation of which cannot be and should not be made by the Federal Government or any department thereof. The voluminous record produced by the respondents show very clearly ‘that the appointments were made illegally and in violation of rules and regulations on the recommendations of the public representatives and the Prime Minister’s Secretariat which is not a proof of good governance and would certainly come under the ground of violation of rules.

141. One ground mentioned in the dissolution order is that the petitioner took up in the Cabinet a Minister against whom criminal cases were pending, which the Interior Minister had refused to withdraw. At an earlier stage the Interior Minister had announced his decision to resign if the said person was inducted into the Cabinet. The petitioner in her petition has stated that the

charge was misconceived and the President was himself member of the Cabinet in which two of his colleagues were on trial on the false charges of murder. Apart from that, the petitioner has quoted two examples that Mr. Asif Zardari was appointed as Federal Minister by former President Ghulam Ishaque Khan when the cases were pending against him, and Mr. Mumtaz Ali Bhutto was appointed Caretaker Chief Minister against whom cases were pending and he was declared absconder in F.I.R. No.24 at Police Station Khanoat, District Dadu. It is also stated by the petitioner that this ground as such does not attract invocation of Article 58(2)(b) and entire National Assembly cannot be dissolved on account of involvement of one person. It is, therefore, stated by the petitioner that the Interior Minister did in fact resign but she persuaded him that person must be presumed innocent until he is declared guilty by the Court. In the written statement which has been filed by the respondents stand is taken that the three cases cited by the petitioner were in fact filed against two Ministers and a Chief Minister of Sindh by other Governments which were hostile, but in the instant case against Mr. Nawaz Khokhar cases were filed by the Government of the petitioner and later the same Government took him as Minister in the Cabinet in spite of opposition by the Interior Minister who had filed the cases and ‘refused to withdraw them and also threatened that he would resign in case Mr. Nawaz Khokhar was taken up as Minister in the same Cabinet. In the three cases cited by the petitioner the persons, against whom cases were filed, were not inducted as Ministers or Chief Minister by the same Government which had filed the cases. Therefore, there is no parallel between the case of Mr. Khokhar and the examples cited by the petitioner. The respondents have filed documents which are contained in Volume VIII. At pages 1 and 2 is F. I. R. No. l of 1995 filed by the Inspector FIA/SBC, Rawalpindi in which it is alleged that Haji Nawaz Khokhar as Chief Executive of N. Khokhar Textile Industry Limited alongwith other Directors took loan from the United Bank Limited, Islamabad, for financing of their Textile Mills, to be set up at Rawat, District Rawalpindi. The Bank sanctioned large sums as credit facilities and at the relevant time Haji Nawaz Khokhar was Deputy Speaker of the National Assembly and belonged to the ruling party. The loan amount with interest was not repaid within the stipulated time and the machinery imported was not got released from Karachi Port Trust in connection with which K.P.T. claimed heavy amount of Rs.4 crore as demurrage. In such circumstances a criminal case was filed against Haji Muhammad Nawaz Khokhar for offences under sections 406, 409, 417, 418 and 420, P.P.C. and section 3 of P.P.O. 16 of 1969. Alongwith F.I.R., copy of the challan and the order on the bail applications also have been filed. There are newspaper cuttings in which it is stated that Haji Nawaz Khokhar would not join Junejo League or P.P.P. and would form his own forward block in the same party which was Pakistan Muslim League (N). At page 23 there is newspaper cutting from daily Nawa-e-Waqt, dated 22nd May, 1995 highlighting the statement of Gen. Naseerullah Babar, Interior Minister, who declared that if the cases against Haji Muhammad Nawaz Khokhar were withdrawn and he was inducted in the Cabinet as Minister, then the former would resign. At page 24 is the notification, dated 31st` July, 1996 showing that the Prime Minister appointed 15 Ministers including Haji Muhammad Nawaz Khokhar at Serial No.3.

142. As against this, after perusal of the written statement and the documents in Volume VIII annexed therewith, the petitioner in the rejoinder has not contested this issue seriously except reiterating that there is age old maxim that a man is innocent until proved guilty, and introduced a new contention that the President himself administered oath of office to Mr. Nawaz Khokhar. This new contention is repelled on the ground that the President administered oath on the advice of the Prime Minister as is contemplated in Article 92(1) of the Constitution which provides that the President shall appoint Federal Ministers and Ministers of State from amongst the members of Parliament on the advice of the Prime Minister. Attention is also drawn to the use of word “shall” which is mandatory in nature in the abovementioned provision. In any case it is clear as daylight that our Constitution contemplates parliamentary form of Government in which the Prime Minister is Head of Government and can nominate any person who is member of Parliament to become a Minister. The decision of appointment is taken by the Prime Minister and not by the President, and the President simply performed his duty by administrating oath as is contemplated under Article 92(2) of the Constitution. It is argued before us that under Article 91(4) of the Constitution it is envisaged that the Cabinet, together with the Ministers of Sate, shall be collectively responsible to the National Assembly, and this requirement is violated if a Minister is taken in the Cabinet against whom another Minister refuses to withdraw cases, and both cannot be allowed to remain in the Cabinet because this would be violative of collective responsibility of the Cabinet to the National Assembly. At this stage we are not concerned with the question whether a member of the Parliament, against whom a criminal case is pending, can be made a Minister in the Cabinet or not and whether it is legally allowed or not in view of the contention that a person is to be presumed innocent until he is proved guilty by the Court, but the question before us for consideration is whether by doing so the case of good governance is advanced and promoted particularly in the light of Article 91(4) of the Constitution on the principle of collective responsibility of the Cabinet to the National Assembly. We are also not considering the question whether in such circumstances the cases should have been withdrawn and then such member should have been made Minister in the Cabinet because the withdrawal of the cases is to be made under the relevant provisions of the law and the whole legal procedure is to be complied with. It may be correct that this ground alone as such may not be sufficient to invoke Article 58(2)(b) to dismiss the Government and dissolve the National Assembly on the ground 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 material produced on this ground could be considered by the President in conjunction with the material produced on other grounds to arrive at a general finding 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 for that reason we have stated in the short order announced on 29th January, 1997 that sufficient material has been produced in support of the ground in the dissolution order on the subject of corruption, nepotism and violation of rules.

143. The last ground in the dissolution order is that in the matter of the sale of Burmah Castrol shares in PPL, and BONE/PPL shares in Qadirpur Gas Field, the President required the Prime Minister to place the matter before the Cabinet for reconsideration, which was not done for over a period of about four months in violation of the provisions of Articles 46 and 47 of the Constitution. We would not like to make any comment on this ground for the reason that on the same subject matter, Civil Suit No. l of 1996 has been filed in this Court by the Government of Balochistan under Article 184(1) read with Article 187 of the Constitution, which is pending. It may be mentioned that Article 184(1) contemplates that the Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments. In the suit declaration is sought from the Court that firstly the decision to issue a N.O.C. for the sale of Burma Castrol’s Shares in P.P.L. and to permit the sale of P.P.L.’s seven per cent. shares in the Qadirpur Gas Field is contrary to law and is of no legal effect. Secondly, that only the Council of Common Interest can take decisions as to the sale of Burmah Castrol’s shares in P. P. L. and as to the disposal of P. P. L.’s seven per cent. shares in the Qadirpur Gas Field. Thirdly, that if the Government of Pakistan is not willing to buy Burmah Castrol’s shaies in P.P.L., then the Government of Balochistan should be given the right of first refusal. Fourthly, that if the Council of Common Interests decides to dispose of the shares, then it can only be on the basis of open, fair and free bidding, or a public auction. In the circumstances, we are satisfied that on the same subject-matter the suit is pending in this Court, hence no useful purpose would be served by dilating on this ground in the petition.

144. It would not be out of place to mention with regard to the bulk of voluminous record produced in this case in the Court. The petition of the petitioner consists of two volumes. The first volume consists of 87 pages from which memorandum of petition runs into 42 pages. This volume also contains application for stay and production of some documents. The second volume of the petition has 110 pages containing the speech of the President and the speech of the Governor of Sindh and some newspapers cuttings. As against that the written statement filed by the respondents runs into 201 pages and also contains affidavits of Brigadier Ahmad Jehanzeb, Director-General Law, President’s Secretariat, and Mian Tayab Hasan, Secretary, Cabinet Division, who have confirmed the contents of the written statement. The respondents have filed 8 volumes alongwith the written statement, containing documents in support of the grounds mentioned in the order of dissolution. These volumes have been referred above in the judgment and have been described as volumes appended with the written statement. Volume I-A (566 pages) contains documents and newspapers cuttings relating to extra judicial killings in Karachi. Volume I-B (83 pages) relates to killings in police encounters in Karachi. Volume I-C (49 pages) covers killings in the Province of Punjab. On the second ground, which is murder of Mir Murtaza Bhutto and his companions in Karachi, the respondents have produced Volume-II (74 pages) and Volume II-B (64 pages). On the third ground of failure to implement the judgment of the Supreme Court in the Judges’ case, the respondents have produced Volume III-A (267) pages). On the fourth ground of introduction of a Bill in the National Assembly to harass the Judiciary, the respondents have produced Volume IV (21 pages). On the fifth ground of separation of judiciary from the executive, the respondents have not produced any separate volume containing documents. On the sixth ground of phone tapping and eaves dropping, the respondents have produced Volume VI (38 pages). On the seventh ground of corruption, nepotism and rules violation, the respondents have produced a separate set of 14 volumes described as Volumes VII-A to VII-N. Volume A contains pages 1 to 530. Volume B contains pages 531 to 1149. Volume C contains pages 1150 to 1608. Volume D contains pages 1609 to 1793. Volume E contains pages 1 to 488. Volume F contains pages 1 to 48. Volume G contains pages 1 to 373. Volume H contains pages 1 to 205. Volume I contains pages 1 to 326. Volume J contains pages 1 to 50. Volume K contains pages 1 to 68. Volume L contains pages 1 to 170. Volume M contains pages 1 to 183. Volume N contains pages 1 to 283. The eighth ground in the order of dissolution relates to Mr. Nawaz Khokhar and the principle of collective responsibility regarding which the respondents have produced Volume VIII with pages 1 to 24. The ninth ground in the order of dissolution relates to Burma Castrol Shares in P.P.L. regarding which the respondents have produced Volume IX containing pages 1 to 83. Against the written statement, the petitioner has filed rejoinder comprising three volumes. Volume I contains pages 1 to 37, Volume II contains pages 1 to 62 and Volume III contains pages 1 to 103. Additionally, the petitioner has also filed index of objections (27 pages) to the admissibility of the documents filed by the President. In this manner the grand total of pages and documents filed in the volumes produced by both the parties comes to 4780. With great patience and meticulous care, the counsel representing both the parties took us through the documents in this voluminous record and in this context remark made by Mr. Aitzaz Ahsan at one point of time sounded very appropriate when he said that the respondents have produced a truck-load of documents, most of which was objected to by him on the ground of inadmissibility. We have already dealt with the objection of inadmissibility of the documents in the preceding paragraphs of this judgment, hence there is no need to reiterate that finding at this stage again.

145. Mr. Aitzaz Ahsan, learned counsel for the petitioner, raised three main contentions. Firstly, that the President while dismissing the Government of the petitioner and dissolving the National Assembly, was actuated with malice in law and in fact. Secondly, that what is the scope and expanse of Article 58(2)(b) of the Constitution as expounded in the cases of (1) Federation of Pakistan v. Muhammad Saifullah Khan (PLD 1989 SC 166), (2) Kh. Ahmad Tariq Rahim v. Federation of Pakistan (PLD 1992 SC 646) and (3) Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 SC 473). Thirdly, the evaluation of evidence keeping in view the objections raised to the admissibility of the documents. The third and the last contention has already been dealt with and answered in paragraphs 61 and 62 of this judgment. So far allegation of malice is concerned, it is submitted on behalf of the petitioner that respondent Sardar Farooq Ahmad Khan Leghari was nominated by her as P.D.F. candidate and was elected as President of Pakistan, but later there was a turning point when the opposition parties levelled allegations of corruption against the President as he was alleged to have made a fictitious land deal, while he was Federal Finance Minister in the past, with Mr. Younus Habib of Mehran Bank, and the President thought that the petitioner and her husband were instrumental in that campaign of vilification. Secondly, the President began to show utter disregard for the petitioner and started sending messages to the Parliament and filed Reference in the Supreme Court without consulting her. Thirdly, that while the petitioner was recovering from the shock and grief of the tragedy in which her brother Mir Murtaza Bhutto was brutally murdered in Karachi, the President filed a Reference in the Supreme Court on a Saturday which was a closed holiday. Fourthly, that the President also sent letters to the Governors of Sindh and Punjab complaining about law and order situation. Fifthly, that the President wrote to the petitioner informing her that he was not accepting any more resignations by the Judges affected by the judgment of the Supreme Court and required her to denotify them. So far the allegation of malice is concerned, the same is denied by the President in the written statement in which it is stated that a Judicial Commission was set up to enquire into the affairs of Mehran Bank Limited and the Commission was composed of five Judges and was presided over by Mr.Justice Abdul Qadeer Choudhry, Judge of the Supreme Court, and the other four members were Mr. Justice Zia Mehmood Mirza, Judge of the Supreme Court, Mr. Justice (Retd.) Z. A. Channa, former Judge of the High Court of Sindh, Mr. Justice Nazir Ahmad Bhatti, Judge, Federal Shariat Court, and Mr. Justice Qazi Muhammad Farooq, Judge of the Peshawar High Court. 1n the report of the Commission, it is stated in clear terms that it is the confirmed opinion of the Commission, based on the evidence before it, that the allegations against the President are unfounded. So far other allegations mentioned by the petitioner against the President on the question of malice are concerned, they are answered in the written statement and have been specifically dealt with in paragraphs 10 to 15 of this judgment, perusal of which shows that the allegation of malice is denied and stand is taken that the .President after taking oath of his office as such severed his connections with Pakistan People’s Party and resigned from the membership and after that performed his Constitutional role as President of the country and did not bear any ill-will or malice against the petitioner or any other person. The President did not become bitter, hostile or adversarial to the petitioner at any time and there was no “timing” in his actions of filing the Reference’in the Supreme Court on a Saturday on which the office of the Supreme Court remained opened or his messages to the Houses of the Parliament or his letters to the Governors of Sindh and Punjab or his letter to the petitioner on the subject of resignations of the affected Judges of the superior Courts. We are satisfied with the explanation given by the President in the written statement and are of the considered view that the allegations with regard to malice both in law and in fact alleged against the President are unfounded.

146. The most important point for consideration in this case is the interpretation and the scope of Article 58(2)(b) of the Constitution. The relevant provision is reproduced 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) ...........................

(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.”

In this provision two words used are very pivotal in nature which purport to define the scope of this provision and the powers of the President in that respect. It is apparent that action can be taken under this provision by the President in his discretion for which he has to form “opinion” which is at lesser pedestal than “satisfaction”. One can form opinion without touch of finality as

opinion lacks the element of absolutism and can always be differentiated from satisfaction which has a touch of finality containing the element of absolutism. In other words it can be said that opinion has lesser responsibility than satisfaction from the point of view of burden of proof. For satisfaction proof is required but for opinion some thing lesser than proof is required. For example, after seeing the clouds one may form the opinion that it may rain, but this may not come true as it was just an opinion without a touch of finality. On the other hand after seeing a wet road from a window one can say that it has rained today. Satisfaction has touch of finality for which proof has been considered. On this line of reasoning it can be said that for opinion, evidence may not be conclusive, definitive and overwhelming. The President has to form opinion on the basis of material which may include knowledge of official transactions with which he has some nexus and the Court must not substitute its own opinion with the opinion of the President, nor can the Court sit in appeal on the opinion of the President. In such circumstances opinion of the Court differs from the opinion of the President because in forming the opinion the Court has to examine the evidence and some times has to record the evidence including examination-in-chief, cross-examination and re-examination as happens in the proceedings before the Court of law for which proper procedure is prescribed. The word “satisfaction” has been examined in detail by this Court in the case of Saeed Hussain v. Pyar Ali (PLD 1976 SC 6) with relevant portion at page 30 as under:-

‘ .... ‘Satisfaction’ is by no means a term of art and appears to have been used in its ordinary dictionary sense. ‘Satisfaction’ is the existence of a sate of mental persuasion much higher than a mere opinion and when used in the context of judicial proceedings has to be arrived at in compliance with the prescribed statutory provision and other legal requirements. Far from being a subjectively or capriciously arrived at conclusion, it presumes observance of certain well-settled judicial principles and is a firm state of mind admitting of no doubt or indecision or oscillation. To be ‘satisfied’ with a state of things is to be honestly convinced in one’s own mind. According to Black’s Law Dictionary apart from the ‘legal satisfaction’, which is a term of art and connotes discharge of a claim, debt or legal demand, to satisfy in the ordinary sense is to convince. Satisfactory evidence has been explained as sufficient evidence meaning an amount of proof which ordinarily satisfied an unprejudiced mind beyond a reasonable doubt. In Corpus Juris Secundum ‘satisfy’ has been held to be synonymous with, ‘convince beyond a reasonable doubt’ and ‘satisfaction’ has been explained as a state of mind, which connotes a sense of certainty, and conviction or release from suspense, doubt or uncertainty. According to Oxford English Dictionary ‘to satisfy’ means to furnish with sufficient proof or information or to assure or set free from doubt or uncertainty to convince. “

It is the light of the legal position stated above that one has to consider as to how the President is supposed to form his opinion for taking action contemplated under Article 58(2)(b) which stands at lesser pedestal than satisfaction. Whereas the opinion of the President is not legal opinion formed by the Court, hence the President cannot be equated with the Court of law so far the degree of proof is concerned in forming his opinion. It is in this context that the material available before the President for forming such opinion is to be considered whether it was sufficient or not to help him to form such opinion. Relying upon the judgment in the case of Islamic Republic of Pakistan v. Abdul Wali Khan (PLD 1976 SC 57), we have rejected the objection raised on behalf of the petitioner that newspapers cuttings could not be relied upon by the President or he had to satisfy himself on each ground to such an extent that if there was no solid proof as is required in the Court of law, he could not form the opinion.

147. The scope of Article 58(2)(b) can be understood more clearly only after one traces the historical background of this provision. Before partition the Indo-Pak Sub-continent was governed under the Government of India Act, 1935, section 19 whereof empowered the Governor-General to dissolve the Federal Assembly in his discretion. After gaining independence, both the countries,

India and Pakistan, adopted the Government of India Act, 1935 for continuation of legal order till they enacted their own Constitutions. After independence, in Pakistan, Governor-General, Mr. Ghulam Muhammad, dissolved the Constituent Assembly vide Proclamation dated 24th October, 1954 on the ground that the Constitutional machinery had broken down and the Constituent Assembly had lost the confidence of the people and could no longer function. Moulvi Tamizuddin Khan, who was President of the’ Constituent Assembly, feeling aggrieved, filed a Constitutional petition in the Chief Court of Sindh, which was allowed, and the Federation of Pakistan filed appeal in the Federal Court, which was also allowed and the judgment is reported as Federation of Pakistan v. Moulvi Tamizuddin Khan (PLD 1955 FC 240). What is pertinent to point out is that in the Government of India Act, 193.5 it was discretion of the Governor-General to dissolve the Federal Assembly which discretion he could exercise from time to time and no other requirement was mentioned in the said provision, may be for the reason that India was being governed by Great Britain as a colony where the Governor-General was always an Englishman who represented the sovereign King or Queen and therefore was given complete discretioa to dissolve the Federal Assmebly whenever he felt it necessary to do so. Pakistan succeeded in its first attempt to promulgate the Constitution of 1956 which contemplated parliamentary form of Government and Article 50(1) of that Constitution provided that the President may summon, prorogue or dissolve the National Assembly and shall, when summoning the Assembly, fix the time and place of the meeting. It is obvious that the words “in his discretion” were not used and instead the word “may” was used to enable the President to summon, prorogue or dissolve the National Assembly. In 1958 President Iskandar Mirza used this power, dissolved the National Assembly and dismissed the Government of Prime Minister Feroze Khan Noon after abrogating the Constitution of 1956. He appointed General Ayub Khan as Chief Martial Law Administrator who later replaced Mr. Iskandar Mirza as President and Chief Martial Law Administrator. President Ayub Khan then gave the country his own Constitution of 1962 which was made by him and which allowed presidential form of Government. In 1969, President Ayub Khan invited General Yahya Khan, Commander-in-Chief of Pakistan Army to take over the administration and perform his Constitutional role in consequence whereof the latter declared martial law and abrogated the Constitution. President Aga Muhammad Yahya Khan conceded the demand of Awami League and abolished the principle of parity between East Pakistan and West Pakistan and held general elections on the basis, of adult franchise and one man one vote. He abolished One Unit in West Pakistan and in the result four provinces of Punjab, Sitdh, N.-W.F.P. and Balochistan re-emerged. In the result of the elections, Awami League in East Pakistan won with thumping majority of 160 out of 300 seats in the National Assembly. In West Pakistan, Pakistan People’s Party secured 81 seats and the remaining seats were secured by other political parties. General Aga Muhammad Yahya Khan held parleys with Shaikh Mujib-ur-Rehman of Awami League in the East Pakistan and Mr. Zulfiqar Ali Bhutto of Pakistan People’s Party in the West Pakistan, which did not succeed and there was law and order situation in which military action was taken, and finally war broke out between India and Pakistan as India supported the militants of Awami League morally and materially in East Pakistan. In the aftermath of the war, we lost East Pakistan which declared unilaterally its independence as Bangladesh.

148. Mr. Zulfiqar Ali Bhutto held talks with other political parties which had representation in the National Assembly and with their consensus the Constitution of 1973 was promulgated contemplating parliamentary form of Government answerable to the National Assembly. It was provided in the Constitution that in the Governmental set-up, all actions would be taken in the name of the President but the Chief Executive shall be the Prime Minister. The President shall act on the advice of the Prime Minister in all the matters which advice shall be binding on him in all respects. Obviously, in this Constitution, provision was not allowed empowering the President to dissolve the National Assembly and dismiss the Government of the Prime Minister in his discretion. On the contrary Clause (3) of Article 48 required that, for validity, orders of the President would be countersigned by the Prime Minister. Article 58 in the Constitution provided that 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 48 hours after the Prime Minister has so advised. It was further provided that for a period of 15 years or three general elections, whichever was longer, vote of no confidence had to be deemed to have failed unless passed by two-third majority of the total membership of the National Assembly. In such circumstances, originally, the Constitution of 1973 contemplated parliamentary form of Government with a very powerful Prime Minister as Head of the Government, and the President as Head of State held ceremonial office with no powers. Later, in 1977, premature elections were held in the country in which P.P.P. of Mr. Zulfiqar Ali Bhutto won, but the results were not accepted by the opposition parties on the ground of rigging and they refused to participate in the elections for Provincial Assemblies. The people came out in the streets, protests and strikes were held, and damage was caused to the public and private property. Finally, on 5th July, 1977, General Ziaul Haq, Chief of Army Staff, imposed martial law and dismissed the Government of Mr. Zulfiqar Ali Bhutto and also dissolved the National Assembly and the Provincial Assemblies. Begum Nusrat Bhutto, the wife of Mr. Zulfiqar Ali Bhutto, filed a Constitutional petition in the Supreme Court in which the validity of martial law was challenged. The decision of the Court is reported as the case of Begum Nusrat Bhutto v. Chief of Army Staff and others (PLD 1977 SC 657). This Court validated the take over of the administration of the country by the Chief of Army Staff on the basis of State necessity which was treated as Constitutional deviation till holding of elections. The elections were held on non-party basis on 25-2-1985 and the Constitution was revived on 10-3-1985. ‘General Ziaul Haq took oath as President on 23-3-1985 and the Eighth Amendment was inserted in the Constitution on 11-11-1985 which also included Article 58(2)(b)

empowering the President to dissolve the National Assembly in his discretion. It   appears that this was so done for the reason that President Ziaul Haq wanted to strike balance between the powers of the President and the Prime Minister in the Parliamentary form of Government in, the absence of any provision in the Constitution to remedy the situation in which the Constitutional machinery has failed and in spite of that extra powerful Prime Minister could continue on the basis of support of his majority party and could be removed only when vote of no confidence was passed against him, chances of which were very slim.

149. Article 58(2)(b) was inserted in the Constitution on 11-11-1985 which envisages that the President may also dissolve the National Assembly in his discretion where 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. As a result of the I elections which were held in 1985 on non-party basis, Mr. Muhammad Khan Junejo was nominated by the President as Prime Minister who later obtained vote of confidence in the National Assembly. Thsre arose differences between the President and the Prime Minister and finally on 29-5-1985 President Ziaul Haq exercised his power under Article 58(2)(b) and dismissed the Government of Mr. Muhammad Khan Junejo and dissolved the National Assembly. Haji Muhammad Saifullah, who was member of the National Assembly, and some other members of the Provincial Assembly filed writ petitions in the Lahore High Court challenging the validity of the proclamation and such petitions were allowed holding that the order of dissolution was unsustainable in law, but relief in the shape of restoration of Assemblies and the Cabinets was not granted. Hence both the parties came to the Supreme Court and this Court did not interfere with the judgment of the High Court on the ground, inter alia, that the national interest must take precedence over rights of individuals and passed the following short order:-

“We, however, emphasise that the general elections scheduled for the 16th and the 19th November 1988, shall be held on the said dates and an opportunity be thus afforded to the people of Pakistan to choose their own representatives in a free, fair and impartial election.

Accordingly, these appeals stand disposed of in the above terms.”

150. The decision of the Supreme Court in the case of Federation of Pakistan v. Muhammad Saifullah Khan and others is reported in PLD 1989 SC 166. It was for the first time that Article 58(2)(b) required detailed examination by the Court with regard to its interpretation and gauging of its real scope and particularly of discretion exercisable by the President. Argument was raised by the Attorney-General for Pakistan before this Court that Article 58(2)(b) was to be read in conjunction with Article 48(2) which provided that discretion exercised by the President as empowered by the Constitution shall not be called in question on any ground whatsoever. This Court expressed the opinion that it was not possible to hold that action of the President under Article 58(2)(b) was not open to question by the Court and was beyond their jurisdiction. It was held that the Court could question the action of the President in dissolving the National Assembly to find out whether it was based on facts or not. “Discretion” and formation of “opinion” had to be based on facts and reasons which are objective realities. The discretion can be exercised by the President when machinery of the Government has broken down completely and its authority eroded and the Government cannot be carried on in accordance with the provisions of the Constitution. It was held by this Court that discretion conferred by Article 58(2)(b) on the President cannot, therefore, be regarded as absolute one but is to be deemed as qualified one in the sense that ~ it is circumscribed by the object of law that confers it. After laying down the scope, this Court heal that the order of dissolution passed by President Ziaul Haq was not sustainable for following reasons. Firstly, that there was no material in support of the grounds. Secondly, that the Caretaker Prime Minister was not appointed. Thirdly, that ,the oath of Ministers was altered. Having held so, relief in the writ jurisdiction was refused on the ground that it was discretionary and could not be granted in national interest which had preference over the interests of the individuals. It was so held for the reasons. Firstly, that the dissolution of the National Assembly by the President as contemplated under Article 58(2)(b) of the Constitution in essence is appeal from legal to political sovereign as. the right of dissolution is right of appeal to the people. Secondly, that Mr. Muhammad Khan Junejo, the deposed Prime Minister, did not turn to\_ the Court but had decided to seek the mandate of the people. Thirdly, that the whole Governmental machinery was in motion and in full gear making preparations for holding of elections. Fourthly, that the National Assembly, which was dissolved, was initially elected on non-party basis in which Pakistan People’s Party and other mainstream political parties did not participate on account of ban and in the fresh elections to be held all the political parties could participate. It was in such circumstances and for such reasons that the order of dissolution was declared as illegal and unsustainable in law and even then relief under the Constitutional jurisdiction was not allowed in the best national interest to enable the people, who are political sovereign, to exercise their right of vote and elect their public representatives for the Assemblies.

151. The salient features highlighted in the judgment of Muhammad Saifullah Khan’s case are that the discretion of the President is not absolute but is to be deemed as qualified one and is circumscribed by the object of law that confers it. Secondly, that the Court can go into the question whether the discretion is exercised justifiably or not and whether there is material in support of the grounds. In other words discretion is put in strait jacket and is made open to judicial review. Thirdly, emphasis is on the fact that exercise of discretion to dissolve the National Assembly is closely co-related with appeal to the electorate which is to be done within 90 days as provided under Article 48(5) of the Constitution. It may be mentioned here in passing that in the case of Haji Muhammad Saifullah, President Ziaul Haq read the proclamation of dissolution which contained only three grounds to the effect firstly, that law and order in the country had broken down resulting in tragic loss of innumerable valuable lives as well as loss of property. Secondly, the honour and security of the citizens of Pakistan had been rendered totally unsafe, Thirdly, that situation had arisen in which the Government of the Federation could not be carried on in accordance with the provisions of the Constitution. In fact, no material was produced in support of these grounds and no instances were quoted. In such circumstances the Court came to the conclusion that the order of dissolution could not be upheld but the National Assembly and the Government were not restored and in the national interest preference was given to holding of elections in which all the political parties could participate and for which the Governmental machinery was in full gear.

152. Second time the power under Article 58(2)(b) was exercised by President Ghulam Ishaq Khan who by Proclamation dated 6th August, 1990 dissolved the National Assembly and dismissed the Government of Prime Minister Benazir Bhutto who did not challenge the order of dissolution in the Court herself but it was made by one of the Ministers namely, Khawaja Ahmad Tariq Rahim who filed writ petition in the Lahore High Court which was dismissed and the petition for leave to appeal was filed in the Supreme Court which was dismissed. The decision of the Supreme Court is reported as Kh. Ahmad Tariq Rahim v. Federation of Pakistan (PLD 1992 SC 646). In this case, in the order of dissolution passed by the President, five main grounds were specified and material was also produced in support thereof. The grounds were: Firstly, that there was scandalous horse-trading for political gain in the National Assembly; secondly, that the Federal Government bypassed the Council of Common Interests and National Finance Commission; thirdly, that there was corruption and nepotism in the Federal Government and its authorities and corporations including banks; fourthly, that the Federal Government had failed to protect the Province of Sindh from internal disturbances; and fifthly, that the Government of the Federation violated the Constitution by ridiculing the superior Judiciary and by misusing the statutory corporations and banks for political ends and personal gaints. The case was heard by the Full Bench of 12 Judges of this Court and by majority (10 to 2) the order of dissolution was upheld after consideration of the material produced In support of the grounds mentioned in the order. The leading judgment was authored by Shaft-ur-Rehman, J. (as he then was) and the relevant paragraph drawing conclusions is reproduced verbatim as under;-

“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 fight a reelection. 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 representatives. 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 worldly 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’. The other enumerated evils contained in first ground precede, accompany or follow the defection. That there had been taking defections has not been seriously disputed, nor the fact that the defectors were quite often rewarded with posts and prizes. 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 Commons 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.

It is true that some of the grounds like (c), 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 alongwith grounds more relevant like (a) and (b) which by themselves are sufficient to justify the action taken.”

153. For the third time this Court got again an opportunity of examining the scope of Article 58(2)(b) of the Constitution when President Ghulam Ishaq Khan vide Proclamation, dated 18th April, 1993 dismissed the Government of Prime Minister Mian Muhammad Nawaz Sharif and dissolved the National Assembly. A Constitutional petition was filed directly in this Court under Article 184(3) of the Constitution which was heard by Full Bench of 11 Judges. By majority (10. to 1), it was held that the order of dissolution was not sustainable and was struck down and in consequence the Government of Mr. Nawaz Sharif and the National Assembly were restored. So far as the question with regard to the scope of Article 58(2)(b) is concerned, it was held by this Court that discretion of the President is not absolute but is deemed to be qualified one and is circumscribed by the object of law that has conferred it. Further, opinion can be formed objectively on the basis of material which must have nexus with the grounds of the order of dissolution. In the case of Mian Muhammad Nawaz Sharif (supra) one very glaringly distinguishable feature is that during the hearing, the Attorney-General for Pakistan conceded very candidly that the main reason which induced the President to dissolve the National Assembly was the speech delivered on April 17, 1993 by the Prime Minister on Radio and Television. In the said speech the Prime Minister accused the Presidency of hatching conspiracies with disgruntled public representatives to destabilize the Federal Government. According to the Attorney-General, the speech of the Prime Minister amounted to subversion of the Constitution and was nothing short of call for agitation against the head of State. In the circumstances, there was stalemate and dead-lock between the two highest Constitutional Functionaries of the State, rendering impossible the carrying on of the Federation in accordance with the provisions of the Constitution, hence the President had no alternative but to dissolve the National Assembly. Mr. Justice Dr. Nasim Hasan Shah, Chief Justice (as he then was), in his leading judgment has observed at page 562 of the report that the plea taken on behalf of the President was not tenable and was based upon incorrect appreciation of the role assigned to the President in the Constitution and of the powers vested in him after the Eighth Amendment was inserted in the Constitution. Highlighting the provisions in the Constitution after introduction of the Eighth Amendment increasing the powers of the President for making appointments in his discretion of the Chief Election Commissioner, the Chairman, Federal Public Service Commisi5ion and the Chairman Joint Chiefs. of Staff Committee, the learned Chief Justice arrived at final conclusion which is contained in paragraphs at page 567 of the report which are reproduced as under:-

“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(1)) 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 he 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 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 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 rancor, ill-will and incompatibility of temperament, no dead-lock, 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. 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.”

It is, therefore, manifest that in the case of Mian Muhammad Nawaz Sharif (supra) the Attorney-General for Pakistan himself conceded that the only base for order of dissolution was the speech of the Prime Minister, hence other grounds mentioned in the said order of dissolution became insignificant particularly when the Court has given clear cut majority opinion (10 to 1) with regard to the roles to be played by the President and the Prime Minister in the Constitutional scheme which contemplates parliamentary form of Government with cardinal principle contained in Article 48 that the advice of the Prime Minister is binding on the President. It was for this reason that we had said specifically in our short order announced by us earlier in this case that the petitioner is not entitled to the benefit of restoration of her Government as per ratio in the case of Mian Muhammad Nawaz Sharif (supra) for the reason that in that case the Attorney-General pressed into service only one ground, i.e. speech of the Prime Minister, while in the case of the petitioner several grounds have been specified in the order of dissolution in support of which voluminous record containing material and documents has been produced. It is the Material in support of the grounds which is to be considered in each case and which may vary from case to case at the time of evaluation by the Court.

154. At this stage it would be pertinent for me to point out that 1 have been consistent in my interpretation of Article 58(2)(b) and its limits and scope. I have always said so in many judgments that Article 58(2)(b) though added by the Eighth Amendment is integral part of the Constitution and could be removed or repealed by the Parliament according to the procedure prescribed in the Constitution. Apart from that, in each case of dissolution of the Assembly by the President and dismissal of the Government of the Prime Minister, I have stated that .the discretion is not absolute but is qualified and the President has to be objective in assessment of the situation and everything depends upon the material which is produced in support of the ground. In the case of Khawaja Ahmad Tariq Rahim (supra) I considered the material in detail in support of each ground and came to the conclusion that the material in support of each ground was insufficient and the President acted with mala fide intention. In the case of Mian Muhammad Nawaz Sharif (supra) I discussed the material in support of each ground and concluded that it was sufficient and further I was of the view that the speech of the Prime Minister on electronics media was an admission in itself that the Federal Government could not be run in accordance with the provisions of the Constitution on account of deep-seated ill-will and distrust between the President and the Prime Minister but on both these occasions contrary view of the majority prevailed which is binding as is correctly laid down.

155. The question whether advice of the Prime Minister is binding on the President in respect of appointments of Judges of the superior Courts came up for detailed consideration in the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1997 SC 84). In fact there was Reference from the President seeking opinion of this Court under Article 186 of the Constitution under the Advisory Jurisdiction for answer to the same question which had become necessary after the announcement of judgment of this Court in Constitutional Petition No.29 and Civil Appeal No.805 of 1995 announced on 20th March, 1996, which judgment is reported as Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324). In that case, by majority decision (4 to 1), it was held that the word “consultation” used in Articles 177 and 193 of the Constitution means consultation which is effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrainess or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of the 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. After the announcement of the judgment in the case of Appointment of Judges, there were some difficulties, hence the President felt constrained to make a Reference to this Court seeking opinion whether in such appointments the advice of the Prime Minister is binding on him or not. Both Constitutional Petitions 23 and 54 and Reference No.2 of 1996 are governed by judgment, dated 4th December, 1996 which is published as Al-Jehad Trust v. Federation of Pakistan and Reference No.2 of 1996 (PLD 1997 SC 84). The Constitutional petitions and the Reference were heard by a Bench of five Judges of this Court and unanimous finding is that the advice of the Prime Minister to the President as contemplated under Article 48 of the Constitution is binding on the President in respect of appointment of Judges in the superior Courts as provided under Articles 177, 193 and 197 subject to the judgment in the case of Appointment of Judges in which definition of the word “consultation” is given by the Court. The decision of this Court reported in PLD 1997 SC 84 is also consistent with the line of reasoning adopted in Mian Muhammad Nawaz Sharif case (supra) in which it was held that the Constitution of 1973 contemplated parliamentary form of Government in which the Prime Minister is the Head of the Government and advice of the Prime Minister as contemplated under Article 48 is binding on the President.

156. Mr. Aitzaz Ahsan, learned counsel for the petitioner, contended before us that power under Article 58(2)(b) can be exercised by the President only when situation has arisen of same magnitude and gravity as in 1977 when there was complete break-down of Constitutional machinery and martial law had to be imposed. It was further submitted by him that this was so for the reason that Article 58(2)(b) was added to the Constitution by the Eighth Amendment in 1985 to strike balance between the powers of the President and the Prime Minister so that the President should be able to dismiss the Government of the Prime Minister and dissolve the National Assembly in a situation in which the Constitutional machinery has failed warranting or justifying imposition of martial law. According to the learned counsel Article 58(2)(b), being substitute of martial law, should be invoked in very extreme situation in which imposition of martial law is justified as the situation was in 1977 when there was complete break-down of Constitutional machinery and people had come out on streets in protests and agitation and there were strikes and public and private property was damaged and so many persons were killed. Mr. Aitzaz Ahsan, in support of the proposition, has drawn our, attention to the case of Begum Nusrat Bhutto v. Chief of Army Staff (PLD 1977 SC 657) with relevant portion at page 701 of the report. At this page we find observations of the Court made on the basis of the material brought to the notice of the. Court by M/s A. K. Brohi and Sharifuddin Pirzada appearing for the respondents. The material produced was in the shape of official reports, decisions and newspapers cuttings of which judicial notice was taken. The material confirmed the events which are described at pages 701 and 702 of the report and reproduced as under:-

“(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 leader of the Pakistan National Alliance and the temporary suspension of the Movement against the Government, officials charged with maintaining law and older continued to de 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 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 and educational activities in the country stood seriously disrupted, with incalculable damage to the nation and the country.”

157. We are of the view that in the case of Begum Nusrat Bhutto (supra) question of attraction of Article 58(2)(b) was not involved because at that time there was no such provision in the Constitution of 1973 while on the other hand situation had arisen in the manner described in the reported case in which the Constitutional machinery find failed, hence martial law was imposed, validity of which was challenged before the Supreme Court. It was held by the Supreme Court that on the basis of doctrine of State necessity, it was justified and treated as Constitutional deviation because this time with the imposition of martial law the Constitution was held in abeyance and not abrogated as it was in the first two cases when martial law was imposed. The promise was made by the Chief Martial Law Administrator to hold general elections as soon as possible. After the judgment of this Court in the reported case mentioned above, the Constitution was revived and the elections were held and thereafter by Eighth Amendment, Article 58(2)(b) was added. No doubt the situation in 1977 was very dangerous and the Constitutional machinery had failed and there was no other way out nor any remedy was available in the Constitution, hence martial law was imposed.

158. Article 58(2)(b) provides a remedial measure which h takes care of situation in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. The remedy is that the President can dismiss the Government of the Prime Minister and dissolve the National Assembly and hold elections within 90 days. In such circumstances; against the dissolution of the National Assembly, appeal is heard by the people who can cast their votes and bring back the same Government and the same National Assembly or not and elect other members, who can bring about or set up new Government. All this is done within 90 days. Now the question arises as to who is going to decide whether such situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. This is to be decided by the President whose Constitutional role and supervisory powers have been increased and improved by the Eighth Amendment. As President, he is consulted in Governmental affairs and the Prime Minister is supposed to apprise him of all the legislative measures which are proposed to be taken by the Government. It is the duty of the Prime Minister under Article 46 to communicate to the President all decisions of the Cabinet relating to the administration of the affairs of the Federation and proposals for legislation. In Article 58(2)(b) the words stalemate, dead-lock or complete breakdown of Constitutional machinery are not mentioned and what is mentioned in very clear language is the fact that the situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. Shafi-ur-Rehman, J. (as he then was) in the case of Federation of Pakistan v. Haji Muhammad Saifulleh Khan has construed the import of Article 58(2)(b) at pages 212 and 213 of the report and the relevant paragraph is reproduced as under:-

“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 the case of Khawaja Ahmad Tariq Rahim v. Federation of Pakistan, the same learned Judge while interpreting Article 58(2)(b) has stated at page 664 of the report as under:-

“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 the methods extra-Constitutional.”

The same learned Judge held in the case of Mian Muhammad Nawaz Sharif v. Federation of Pakistan (PLD 1993 SC 473) with relevant portion at page 579 from which pertinent portion is reproduced as under:-

“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.”

159. In the case of Nawaz Sharif (supra), Chief Justice Dr. Nasim Hasan Shah (as he then was) in his judgment has held that for interpretation of Article 58(2)(b) of the Constitution, the view taken in Saifullah’s case is to be adopted which is to the effect that the President can dismiss the Government and dissolve the National Assembly in his discretion only when there is complete breakdown of Constitutional machinery. This judgment is singed by two Judges, namely, Abdul Qadeer Choudhry, J. (as he then was) and Fazal Ilahi Khan, J. Saad Saood Jan, J. (as he then was) has written his own note but has agreed with the majority view that the dissolution order was not sustainable as the preconditions were not satisfied. Ajmal Mian, J., in his separate note has agreed on the question of scope of Article 58(2)(b) with Shaflur Rehman, J. (as he then was) and held that the law is already laid down on the subject in the judgments in the case of Saifullah and Tariq Rahim and also in the case of Federation of Pakistan v. Aftab Ahmad Khan Sherpao (PLD 1992 SC 723). Muhammad Afzal Lone, Muhammad Rafiq Tarir, Saleem Akhtar, JJ. (as they then were) have given finding in favour of complete breakdown of Constitutional machinery for invocation of Article 58(2)(b) as has been held in Saifullah’s case. Saiduzzaman Siddiqui, J. has held in his separate note that no hard and fast rule can be made as each case is to be decided on its own facts and after keeping in view the findings in both the cases of Muhammad Saifullah and Tariq Rahim and has reached the conclusion which is reproduced as under:-

“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 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 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 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”.

160. Constitution is the supreme law of the land to which all laws are subordinate. Constitution is an instrument by which Government can be controlled. The provisions in the Constitution are to be construed in such a way which promotes harmony between different provisions and should not render any particular provision to be redundant as the intention is that the Constitution should be workable to ensure survival of the system which is enunciated therein for the governance of the country. It is held in opinion of the Supreme Court in Special Reference No. l of 1957 (PLD 1957 SC 219) that effect should be given to every part and every word of the Constitution. Hence, as a general rule, the Courts should avoid a construction which renders any provision meaningless or inoperative and must lean in favour of a construction which will render every word operative rather than one which may make some words idle and nugatory. In support of the proposition, reference can also be made to the cases of State v. Zia-ur-Rehamn (PLD 1973 SC 49) and Federation of Pakistan v. Saeed Ahmad Khan (PLD 1974 SC 151). In the case of Nawaz Sharif also, on the subject of interpretation of the Constitution, it is held that, while interpretation of the Constitution, it is held that, 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. In the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324), it is held that approach of the Court while interpreting a Constitutional provision has to be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. Court’s efforts should be to construe the provision 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 the case of Khalid Malik v. Federation of Pakistan (PLD 1991 Karachi 1) on the subject of interpretation of the Constitution a very pertinent observation is made at page 68 which is reproduced as under:-

“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.”

161. Article 58(2)(b) was inserted in the Constitution on 11-11-1985 by the Constitution (Eighth Amendment) Act, 1985. The . background of this amendment was that President Ziaul Haq wanted to strike balance between the powers of the President and the Prime Minister, hence some extra-powers were given to he President to be used by him in his own discretion including the abovementioned provision. President Ziaul Haq himself invoked Article 58(2)(b) and exercised power thereunder and dismissed the Government of Prime Minister Muhammad Khan Junejo who was nominated by him. At the time when this discretion was exercised by the President, the situation was not like 1977 in which the people had come out on the streets and there were riots, protests and strikes in which 241 civilians were killed and 1195 were injured and on a very large scale there was destruction of property including shops, hotels, banks, cinemas and railway bridges. On the other hand Prime Minister Muhammad Khan Junejo had just returned to Islamabad from the foreign tour of China, South Korea and Philippines, which was very successful, when the reporters of the newspapers were informed that the President was addressing a press conference and they rushed there where the President read out the proclamation under Article 58(2)(b) dismissing the Government of Mr. Muhammad Khan Junejo and dissolving the National Assembly. Likewise on 6-8-1990 the Government of Mohtrama Benazir Bhutto was dismissed and the Assembly was dissolved by President Ghulam Ishaq Khan and at that time also the situation was not like in 1977 and the people had not come out on the streets. In the same way, President Ishaq Khan dismissed the Government of Prime Minister Nawaz Sharif on 18-4-1993 but the people had not come out in the streets and the situation was not like the one in 1977. In any case what is to be seen is the language used in Article 58(2)(b) which provides that the President may dissolve the National Assembly in his discretion where in his opinion a situation has arisen in which the Government of the Federation cannot be carried on in accordance with he provisions of the Constitution and an appeal to the electorate is necessary. It is manifest that in the language used in this provision, there is no mention of total breakdown of Constitutional machinery or a deadlock or stalemate, but these words have been used in the judgements in Saifullah and Tariq Rahim’s cases. In Saifullah’s case a very strict view has been taken that this provision can be invoked only when- there is complete breakdown of Constitutional machinery, while in Tariq Rahim’s case somewhat milder view is taken that this provision can be invoked when there is actual or imminent breakdown of Constitutional machinery or there is a failure to observe numerous provisions of the Constitution creating an impression that the country is governed not so much by the Constitution but by methods extra-Constitutional.

162. Both these interpretations in the two cases mentioned above are reconcilable as per the meaning of the words, dead-lock, stalemate and breakdown in the dictionaries. The meaning of these three words in two English dictionaries is as under:-

BBC English Dictionary                                                            Chambers’ Twentieth Century

by HaMer Collins                                                         Dictionary by A.M. Macdonald

                                                                                    OBE BA (Oxon)

Breakdown                                                                              Breakdown

When a machine or a                                                    A stoppage through accident

vehicle breaks down, it                                                 collapse: disintegration.

stops working. When a

system, plan or dissolution

breaks down, it fails

because of a problem or

disagreement.

Deadlock                                                                                 Deadlock

A state of affairs in an                                                   The case when matters have become

argument or dispute in                                                   so complicated that all is at a

which neither side is                                                      complete standstill

willing to give in, and so

no agreement can be

reached. The meeting

between management and

unions ended in dead-lock.

Stalemate                                                                                 Stalemate

A situation in which neither                                            An unsatisfactory draw resulting

in an argument or contest                                              when a player not actually in check

can win or in which no                                                  has no possible legal move (chess):

progress is possible. Five                                              an inglorious deadlock.

hours of talks between the

two Governments have

failed to break the stalemate

over Northern Ireland.

It therefore, appears that stalemate and dead-lock mean more or less same thing, while breakdown can be on account of stalemate or dead-lock, and stalemate and dead-lock can include or can occur on account of breakdown as .well. Hence meaning of these words are interchangeable. Therefore, the views taken in both the cases of Saifullah and Tariq Rahim can be read in conjunction with each other while interpreting Article 58(2)(b) and in that connection the Court has to see whether there is enough material in support of the grounds for dissolution and the President was right in his opinion and has exercised his discretion justifiably and in that exercise the President is not to be equated with Court of law but it can be expected from him that he would act within the rules of prudence and fairplay. The correct interpretation will be that which is made keeping in view the findings in both the cases of Haji Saifullah and Tariq Rahim on this point. Even otherwise this is a remedial provision in the Constitution which prevents the country from plunging into the disaster as was witnessed in 1977 and if the President is of the opinion that a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution, then this provision can be invoked because this is a much better provision to prevent martial law. After the dismissal of the Government remedy of elections is available, and such elections can be held within 90 days in which the people have to return their verdict on the question of dissolution of the Assembly and dismissal of the Government. The order of dissolution is also subject to judicial review of the Court.

163. Now if the language used in Article 58(2)(b) is to be constrned liberally not in favour of the President but against him who is supposed to exercise his discretion as allowed by the Constitution, even then in every situation in which it is not possible for the Government of the Federation to be carried on in accordance with the provisions of the Constitution, there will be a stalemate, dead-lock and breakdown of the Constitutional mechanism which may be not on the same lines and not on the same scale and not with same gravity and not of the same magnitude as in 1977 which warranted imposition of martial law. For example the Supreme Court has rendered a judgment giving interpretation of Articles of the Constitution relating to appointment of Judges in the superior Courts and it is held that the President has to act on the advice of the Prime Minister in respect of appointments of Judges in the superior Courts subject to the judgment of the Supreme Court and if the Prime Minister refuses to comply with the judgment, then the situation can be called a dead-lock because the Prime Minister by not complying with the judgment also violates Article 190 of the Constitution which envisages that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. The Prime Minister also violates his/her oath of office which is to the effect that “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  That I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan”. If the Prime Minister ridicules the judiciary, then there is violation of Article 63(1)(g) which does not allow propagating any opinion affecting the integrity or independence of the judiciary of Pakistan which amounts to bringing into ridicule the judiciary or the Armed Forces of Pakistan. If such thing is done by any member of the Parliament, then

such member could be ,disqualified from being elected as member of the Parliament as is contemplated under Article 63(1) of the Constitution. Other examples are telephone tapping, extra-judicial killings and so on, which can give rise to the impression that the country is governed not so much by the Constitution but the methods extra-constitutional. In every case what is to be seen is the material in support of the grounds mentioned in the order of dissolution. In the instant case under consideration before us. more than sufficient material has been produced which has been considered by us in great detail. In this context an important and pivotal point is that the Prime Minister as Head of the Government has to see that the Government of the Federation is carried on in accordance with the provisions of the Constitution and if this is not done, then it would amount to failure of Constitutional machinery creating deadlock and stalemate.

164. There is sufficient material available in the record produced by the respondents in support of the following grounds mentioned in the order of dissolution:-

(1)        Extra-judicial killings.

(2)        Non-implementation of the judgment of the Supreme Court in the case of Appointment of Judges.

(3)        Harassment of Judges by introduction of the Bill in the National Assembly proposing to send a Judge on forced leave if 15 per cent of the total members of the National Assembly moved a complaint of misconduct against the Judge.

(4)        Non-separation of Judiciary from the Executive as required under Article 175(3) of the Constitution within the time stipulated which was also set by the Supreme Court in the judgment.

(5)        Violation of Article 14 by tapping the telephones of the Judges, leaders of political parties and high-ranking military and civil officials.

(6)        Corruption in the Government Departments and Corporations, and making of appointments in violation of rules and regulations.

We have declined to consider the material in respect of the grounds on the subject of murder of Mir Murtaza Bhutto and sale of Burma Castrol Shares in P.P.L. and Bone/PPL Shares in Qadirpur Gas Field for the reason that the cases are pending in the Courts of law and, therefore, such matters are sub judice. We have excluded from consideration the material in support of the allegation against Mr. Hakim Ali Zardari for having purchased property in a foreign country which has no nexus with the Government of the petitioner as the transactions took place earlier than that period. We have also held that so far allegation against Mr. Nawaz Khokhar and his inclusion in the Cabinet in spite of resistance and opposition by the Interior Minister is concerned, the material is not sufficient and this ground in itself is not adequate for dissolution of National Assembly but it can be considered alongwith the material produced on the other grounds as it does not promote and advance good governance.

165. Lastly, we take up the question of maintainability of this petition which has been directly filed in this Court under Article 184(3) of the Constitution. The objection with regard to the maintainability was taken up for hearing, but it was decided that the same can be heard alongwith the merits as was so held in the case Mian Muhammad Nawaz Sharif (supra). This petition is filed by the petitioner who was Prime Minister and her Government was dismissed and the National Assembly was dissolved vide Proclamation, dated 5th November, 1996 under Article 58(2(b)’of the Constitution validity of which has been challenged. The petitioner has claimed infringement of her fundamental right provided under Article 17 of the Constitution, which pertains to fundamental right of freedom of association. Clause (2) of Article 17 provides that every citizen, not being in service of Pakistan, shall have the right to form or to be a member of a political party subject to any reasonable restrictions imposed by law. Objection was raised that the fundamental right under Article 17(2) is limited to the right of a citizen to -form or be a member of a political party and nothing more than that. This objection was raised in the case of Mian Muhammad Nawaz Sharif (supra) and was rejected on the ground that there is corresponding need to re-evaluate the essence and soul of fundamental rights as originally provided in the Constitution, which are to be construed in consonance with the changed conditions of the society and must be viewed and interpreted with a vision to future. On this principle of interpretation the import of rights in U.S.A. Constitution on the subjects of Right of Assembly and Right of Association has been expanded and enlarged by the U.S. Supreme Court on the basis of doctrine of penumbra which also can be called judicial activism. This principle was acted upon in the case of Ms. Benazir Bhutto v. Federation of Pakistan PLD 1988 \_”‘\_’ 416 and the scope of Article 17(2) was extended from right to form or be a member of a political party to also to operate as a political party. In other words it was held that functioning is implicit in formation of the party. In the second case of Ms. Benazir Bhutto v. Federation of Pakistan (PLD 1989 SC 66) the fundamental right in Article 17(2) of the Constitution was extended from the right to form or be a member of a political party to the right to participate in and contest election. In the case of Mian Muhammad Nawaz Sharif (supra) this fundamental right as contemplated under Article 17(2) of the Constitution has been extended from the right to form or be a member of a political party to the right of that political party to contest elections under its banner and after successfully contesting the elections the right to form the Government and to complete its normal tenure and if it is removed before the completion of such tenure, then it would constitute infringement of this fundamental right. In the case of Mian Muhammad Nawaz Sharif (supra), it is held that the petition in the Supreme Court was maintainable. Additionally, we are of the view that for infringement of fundamental right as contained in Article 17(2) of the Constitution in the extended form, writ petition in the High Court can also be filed and in spite of availability of remedy in the forum of the High Court, a petition directly filed in the Supreme Court under Article 184(3) is also maintainable for the reason that dissolution of National Assembly under Article 58(2)(b) and dismissal of the Government is to be followed immediately with general elections to be held within 90 days as contemplated under Article 48(5) of the Constitution and in-between the two events the time left is only 90 days in which the question of validity of order of dissolution is to be decided by the competent forum for which direct petition in the Supreme Court is more ideal. Convenient and efficacious. In the case of Kh. Ahmad Tariq Rahim v. Federation of Pakistan and others (PLD 1992 SC 646) the order of the dissolution was challenged in the High Court and the petition was dismissed and against the said decision of the High Court petition for leave to appeal was filed in the Supreme Court which came to be heard after expiry of 90 days within which the elections were held and in consequence whereof another Government was formed and the petition was disposed of by this Court later in point of time after elections and formation of another Government. Such a situation could have been avoided if the petition had been filed directly in the Supreme Court.

166. For the facts and reasons stated above, we dismiss the petition for the reason that sufficient material has been produced by the respondents in support of the grounds in the order of the dissolution. Material is sufficient in support of the grounds specifically mentioned above and collectively sufficient for all the grounds except where expressly excluded to justify the action of the President under Article 58(2)(b).

167. In the end. before we part with this judgment, we express our profound appreciation of very able and valuable assistance rendered by Mr. Aitzaz Ahsan, learned counsel for the petitioner, Mr Khalid Anwar, learned counsel for the respondents, Mr Shehzad Jehangir, learned Attorney-General for Pakistan, and all other learned Advocates who appeared in this case. We also have a word of praise for the members of the staff who rendered very valuable assistance to the Court painstakingly by working overtime outside the normal working hours.

(Sd.)

Sajjad Ali. Shah, C.J.

(Sd.)

Fazal Ilahi Khan, J

I have already recorded my reasons separately

(Sd. )

Irshad Hasan Khan, J

(Sd.)

Raja Afrasiab Khan, J

MUNAWAR AHMED MIRZA, J.---I agree with the conclusions and observe that material on record in conjunction with each ground enumerated above, accumulatively constituted adequate justification for the President to dissolve National Assembly; by virtue of power contained in Article 58(2)(b) of the Constitution.

(Sd.)

Munawar Ahmed Mirza, J.

SALEEM AKHTAR, J.--Past midnight on 5th November, 1996 at about 1-00 a.m. the President of Pakistan passed order under Article 58(2)(b) of the Constitution of the Islamic Republic of Pakistan, 1973, dissolving the National Assembly and consequently the Prime Minister and the Cabinet ceased to hold office. Thereafter, the orders for dissolution of the Provincial Assemblies were also passed by the Governors of the Provinces on different dates. The order of dissolution under Article 58(2(b) of the Constitution, which is fourth in succession from the year 1988, reads as follows:-

“DISSOLUTION ORDER

“Whereas during the last three years thousands of persons in Karachi and other parts of Pakistan have been deprived of their right to life in violation of Article 9 of the Constitution. They have been killed in Police encounters and Police custody. In the speech to Parliament on 29th October, 1995 the President warned that the law enforcing agencies must ensure that there is no harassment of innocent citizens in the fight against terrorism and that human and legal rights of all persons are duly protected. This advice was not heeded. The killings continued unabated. The Government’s fundamental duty to maintain law and order has to be performed by proceeding in accordance with law. The coalition of political parties which comprise the Government of the Federation are also in power in Sindh, Punjab and N.-W.F.P. but no meaningful steps have been taken either by the Government of the Federation or at the instance of the Government of the Federation, by the Provincial Governments to put an end to the crime of extra judicial killings which is an evil abhorrent to our Islamic faith and all canons of civilized Government. Instead of ensuring proper investigation of these extra judicial killings and punishment for those guilty of such crimes, the Government has taken pride that, in this manner, the law and order situation has been controlled. These killings coupled with the fact of widespread interference by the members of the Government, including members of the ruling parties in the National Assembly, in the appointment, transfer and posting of officers .and staff of the lawenforcing agencies, both at the Federal and Provincial levels, have destroyed the faith of the public in the integrity and impartiality of the

law-enforcing agencies and in their ability to protect the lives, liberties and properties of the average citizen.

And whereas on 20th September, 1996 Mir Murtaza Bhutto, the brother of the Prime Minister, was killed at Karachi alongwith seven of his companions including the brother-in-law of a former Prime Minister, ostensibly in an encounter with the Karachi Police. The Prime Minister and her Government claim that Mir Murtaza Bhutto has been murdered as a part of a conspiracy. Within days of Mir Murtaza Bhutto’s death the Prime Minister appeared on television insinuating that the Presidency and other agencies of State were involved in this conspiracy. These malicious insinuations, which were repeated on different occasions, were made without any factual basis whatsoever. Although the Prime Minister subsequently denied that the Presidency or the Armed Forces were involved, the institution of the Presidency, which represents the unity of the Republic, was undermined and damage caused to the reputation of the agencies entrusted with the sacred duty of defending Pakistan. In the events that have followed, the widow of Mir Murtaza Bhutto and the friends and supporters of the deceased have accused Ministers of the Government, including the spouse of the Prime Minister, the Chief Minister Sindh, the Director of the Intelligence Bureau and other high officials of involvement in the conspiracy which, the Prime Minister herself alleges led to Mir Murtaza Bhutto’s murder. A situation has, thus, arisen in which justice, which is a fundamental requirement of our Islamic Society, cannot be ensured because powerful members of the Federal and Provincial Governments who are themselves accused of the crime, influence and control the lawenforcing agencies entrusted with the duty of investigating the offences and bringing to book the conspirators.

And whereas on 20th March, 1996 the Supreme Court of Pakistan delivered its judgment in the case popularly known as the Appointment of Judges case. The Prime Minister ridiculed this judgment in a speech before the National Assembly which was shown more than once on nation-wide television. The implementation of the judgment was resisted and deliberately delayed in violation of the Constitutional mandate that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. The directions of the Supreme Court with regard to regularization and removal of Judges of the High Courts were finally implemented on 30th September, 1996 with a deliberate delay of six months and ten days and only after the President informed the Prime Minister that if advice was not submitted in accordance with the judgment by end (of) September, 1996 then the President would himself proceed further in this matter to fulfil the Constitutional requirement. The Government has, in this manner, not only violated Article 190 of the Constitution but also sought to undermine the independence of the judiciary guaranteed by Article 2A of the Constitution read with the Objectives Resolution.

And whereas the sustained assault on the judicial organ of State has continued under the garb of a Bill moved in Parliament for prevention of corrupt practices. This Bill was approved by the Cabinet and introduced in the National Assembly without informing the President as required under Article 46(a) of the Constitution. The Bill proposes inter alia that on a motion moved by fifteen per cent. of the total membership of the National Assembly, that is any thirty-two members, a Judge of the Supreme Court or High Court can be sent on forced leave. Thereafter, if on reference made by the proposed special committee, the Special Prosecutor appointed by such Committee, forms the opinion that the Judge is prima facie guilty of criminal misconduct, the special committee is to refer this opinion to the National Assembly which can, by passing a vote of no confidence, remove the Judge from office. The decision of the Cabinet is evidently an attempt to destroy the independence of the judiciary guaranteed by Article 2A of the Constitution and the Objectives Resolution. Further, as the Government does not have a two-third majority in Parliament and as the Opposition Parties have openly and vehemently opposed the Bill approved by the Cabinet, the Government’s persistence with the Bill is designed not only to embarrass and humiliate the superior judiciary but also to frustrate and set at naught all efforts made, including the initiative taken by the President, to combat corruption and to commence the accountability process.

And whereas the judiciary has still not been fully separated from the executive in violation of the provisions of Article 175(3) of the Constitution and the dead-line for such separation fixed by the Supreme Court of Pakistan.

And whereas the Prime Minister and her Government have deliberately violated, on a massive scale, the fundamental right of privacy guaranteed by Article 14 of the Constitution. This has been done through illegal phone-tapping and eaves-dropping techniques. The phones which have been tapped and the conversations that have been monitored in this unconstitutional manner includes the phones and conversations of Judges of the superior Courts, leaders of political parties and high-ranking military and civil officers.

And whereas corruption, nepotism and violation of rules in the administration of the affairs of the Government and its various bodies, authorities and corporations has become so extensive and widespread that the orderly functioning of Government in accordance of  the provisions of the Constitution and the law has become impossible and in some cases, national security has been endangered. Public faith in the integrity and honesty of the Government has disappeared. members of the Government and the ruling parties are either directly or indirectly involved in such corruption, nepotism and rule violations. Innumerable appointments have been made at the instance of members of the National Assembly in violation of the law declared by the Supreme Court that allocation of quotas to M.N.As. and M.P.As. for recruitment to various posts was offence to the Constitution and the law and that all appointments were to be made on merit, honestly and objectively and in the public interest. The transfers and postings of Government servants have similarly been made, in equally large numbers, at the behest of members of the National Assembly and other members of the ruling parties. The members have violated their oaths of office and the Government has not for three years taken any effective steps to ensure that the legislators do not interfere in the orderly executive functioning of Government.

And whereas the Constitutional requirement that the Cabinet together with the Ministers of State shall be collectively responsible to the National Assembly has been violated by the induction of a Minister against whom criminal cases are pending which the Interior Minister has refused to withdraw. In fact, at an earlier stage, the Interior Minister had announced his intention to resign if the former was inducted into the Cabinet. A Cabinet in which one Minister is responsible for the prosecution of a Cabinet colleague cannot be collectively responsible in any manner whatsoever.

And whereas in the matter of the sale of Burmah Castrol Shares in PPL and BONE/PPL shares in Qadirpur Gas Field involving national assets valued in several billions of rupees, the President required the Prime Minister to place the matter before the Cabinet for consideration /reconsideration of the decisions taken in this matter by the E.C.C. This has still not been done, despite lapse of over four months, in violation of the provisions of Articles 46 and 48 of the Constitution.

And whereas for the foregoing reasons, taken individually and collectively, I am satisfied 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.

Now therefore, in exercise of my powers under Article 58(2)(b) of the Constitution I Farooq Ahmad Khan Leghari, President of the Islamic Republic of Pakistan do hereby dissolve the National Assembly with mmediate effect and the Prime Minister and her Cabinet shall cease to hold office forthwith.

Further, in exercise of my powers under Article 48(5) of the Constitution I hereby appoint 3rd February, 1997 as the date on which general elections shall be held to the National Assembly. “

The petitioner being the Prime Minister at the time of dissolution of the National ‘ Assembly, filed this petition under Article 184(3) of the Constitution challenging the legality and validity of this order. The main ground of attack was that Article 58(2)(b) in view of various judgments of this Court, has a narrow scope and none of the charges have any nexus with it. The law and order situation and the allegations of extra judicial killings are provincial subjects and as they related only to the Province of Sindh, in the light of the Governor’s speech there was no breakdown requiring any intervention. So far Charge No.2 is concerned, it was submitted that the matter is sub judice in the trial Court and it has no nexus with Article 58(2)(b). As regards charge No.3, it was stated that the judgment dated 20-3-1996 passed by the Supreme Court in the Judges case has been implemented and there was no dead-lock on 5-11-1996 or on preceding days. The Constitution Amendment Bill was a proposal under consideration which could be modified and had to pass several legislative stages and the President had the option , to oppose it as required by Article 75 of the Constitution. It was contended that separation of judiciary has been made as required by law and in this regard reliance was placed on the observations made in the Judges case. As regards phone-tapping it was stated that there is no evidence of the petitioner’s involvement, who was also subject to the same tapping. It was further submitted that in view of the judgment in Kh. Ahmed Tariq Rahim’s case it is a perennial problem on which National Assembly cannot be dissolved. As regards charge No.7 regarding corruption and nepotism, support was sought to be drawn from the judgments of this Court in Haji Muhammad Saifullah Khan, Kh. Ahmed Tariq Rahim and Mian Muhammad Nawaz Sharif and it was contended that these charges have no nexus with Article 58(2)(b) and cannot be a ground for dissolution of the National Assembly. It was further submitted that there is no evidence or proof of all these allegations and that only 12 cases have been pin-pointed in respect of which correct position cannot be ascertained on the record withheld by the President, which will show the falsity of the charges and that till then not a single prosecution case had been filed on the charges of corruption. As regards the collective responsibility of the Cabinet and the Members of the National Assembly is concerned, it was contended that it is misconceived and a person must be presumed innocent till he is found guilty and that it has no nexus with dissolution of the National Assembly. Referring to the cases of PPL and BONE it was stated that the cases are sub judice and that they are not germane to and have no nexus to Article 58(2)~b) of the Constitution.

2. A detailed reply was filed by the respondents in which volumes of  documents relating to each charge were filed. Mr. Aitzaz Ahsan, learned counsel for the petitioner, raised preliminary objection that the documents cannot be relied upon as they include documents which were not before the President at the time opinion was formed as required by Article 58(2)(b). They were collected after the order of dissolution had been passed. The documents are unsigned having no evidentiary value, most of them are press reports and press clippings, which cannot be treated authentic documents or proof of facts stated therein and that in most of the documents the name of the author or signatory is not available. These were the objections relating to exclusion of documents which according to the learned counsel if accepted, majority of the evidentiary value in support of the dissolution order will fall to the ground and there will be no material on which the President could form the opinion.

3. It is contended that under Article 58(2)(b) the President can dissolve the National Assembly only when the Government of the Federation cannot be carried on in accordance with the Constitution and an appeal to the electorate is necessary. According . to the learned counsel for the petitioner the words “cannot” are crucial for interpretation of this provision. If the Constitution is not followed, then the remedies mentioned in it should be resorted. He further contended that unless there is a complete breakdown of the Government machinery as it happened in pre-martial law period in 1977, the National Assembly cannot be dissolved. According to the learned counsel, Article 58(2)(b) would be attracted only if there is a total breakdown of the Constitutional machinery and no remedy is provided in the Constitution. The situation prevailing immediately on imposition of martial law was described in Begum Nusrat Bhutto PLD 1977 SC 643 at 701 as follows:-

“(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 io Khyber and assumed very serious proportions;

(3)        That the disturbances resulting from mis 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 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 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 and educational activities in the country stood seriously disrupted, with incalculable damage to the nation and the country.”

These situations were of extreme nature which justified imposition of martial law, a step not contemplated by the Constitution, an extra-constitutional course taken by the army, not in the normal legal course which without validation or condonation would have remained unconstitutional. According, to Mr. Khalid Anwar, Article 58(2)(b) does not contemplate only one situation as contended by Mr. Aitzaz Ahsen, but there may be numerous reasons due to which Government of the Federation cannot be carried on in accordance with the Constitution. This term has been interpreted in various judgments of this Court and the High Courts which requires examination. In Federation of Pakistan v. Muhammad Saifullah Khan PLD 1989 SC 166, the National- Assembly was dissolved on five grounds. Nasim Hasan Shah, J. (as he then was) observed:-

“The first four grounds stated in the order for dissolution, were, as already noticed, extraneous having no nexus with’ the preconditions prescribed by Article 58(2)(b) of the Constitution empowering the President to dissolve the National Assembly in his discretion. As for the fifth and last ground, namely, that ‘a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution’ nothing was shown either before the High Court or before us that the machinery of the Government of the Federation had come to a standstill or such a breakdown had occurred therein which was preventing the orderly functioning of the Constitution. Indeed, it appears that the first mentioned four grounds are the basis for the assertion made in the last-mentioned ground that the Government could not be carried on in, accordance with the provisions of the Constitution. But as observed already all the first mentioned four grounds were extraneous to and had no nexus with the preconditions prescribed by Article 58(2)(b). Hence, ‘in the eyes of law, no basis existed on which the President could form the opinion ‘that a situation had arisen in which the Government of Pakistan cannot be carried on in accordance with the provisions of the Constitution and as an appeal to the electorate is necessary’. But unless the President be of the said ‘opinion’, he cannot pass an order of dissolution even in exercise of his discretion because under sub-clause (b) of clause (2) of Article 58 his ‘opinion’ in this behalf is a condition precedent to the exercise of the discretion. Thus, if it can be shown that no grounds existed on the basis of which an honest opinion could be formed, the exercise of the power would be unconstitutional and open to correction through judicial review (see Ghulam Jilani v. Government of West Pakistan PLD 1967 SC 373 at page 393).”

As regards the situation which had arisen calling for an intervention under Article 58(2)(b), it was observed:-

“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.”

Shafiur Rahman, J. at page 212 of the report observed as follows:-

“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 dead-lock 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. “

Mr. Khalid Anwar has contended that the words ‘stalemate’ and ‘deadlock’ have not been used in Article 58(2)(b), but. these concepts have come by judicial interpretation. The words ‘dead-lock’ and ‘stalemate’ have been used with reference to the observance of the provisions of the Constitution. A deadlock can be caused due to non-observance or breach of the Constitution in such a manner that the Government seems to be carried on in violation of the provisions of the Constitution, However, every breach or stray violation may not attract Article 58(2)(b), but whether the breach and its effect have nexus with the said Article, depends upon the nature of breach and the circumstances in which it has been caused.

4. The principle and interpretation made by Shafiur Rahman, J. was further explained by him in Kh. Ahmed Tariq Rahim PLD 1992 SC 626 at page 664 as follows:-

“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.”

It can thus be seen that apart from the fact that Article 58(2)(b) can be used where there is a complete dead-lock and stalemate in observance of the provisions of the Constitution it can be invoked in circumstances where there exists constant, repeated and continued failure to observe the provisions of the Constitution to the extent that it creates an impression on a prudent man of ordinary intelligence that the Government of the Federation is not carried on in accordance with the provisions of the Constitution, but by extra-Constitutional methods and devices. The opinion of Shafiur Rahman, J. represented the majority opinion. However, Rustam S. Sidhwa, J. agreeing with Shafiur Rahman, J. observed as follows:-

“To hold that because 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.

The main question that arises is when it can be said that a situation has arisen in which the Government of the Federation or a Province cannot be carried on in accordance with the provisions of the Constitution. In Muhammad Sharif v. Federation of Pakistan PLD 1988 Lah. 725 at 777, I had the opportunity to examine this matter in respect of the dissolution of the National Assembly, where I stated inter alias-

The expression ‘Government of the Federation’ is not limited to any one particular function, such

as the executive, the legislative, or the judicial, but includes the whole functioning of the Federal Government in all its ramifictions. It cannot be forgotten that sub-clauses (a) and (b) of clause (2) are juxtaposed together and, therefore, sub-clause (b) has to be read in harmony with the intention behind sub-clause (a), in short whether a political issue has arisen demanding the ascertainment of the will of the people as regards the continuance of the National Assembly. thus, where the National Assembly is be set with internal dissensions and problems and the party allegedly in power does not have a clear majority, or. having tenuous support from its members, is not able to carry on the functions of the Government with confidence, and is avoiding to take important decisions, which require to be taken, for fear that it may be outvoted, in case a debate is held in respect thereof, a situation can be stated to have arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. A few further instances can also be given, such as, where the Government has been defeated in the Assembly and the Prime Minister does not want to step down, or political groupings are such that even attempts by the President to form a coalition Government and get a working majority have not been successful and no alternative Government can be formed.

In that case I was dealing with the case of a majority party having undisputed majority seats and voting strength, which was firmly in the saddle, running its affairs smoothly and carrying on the functions of the Government with confidence. The situations visualised above relating to failure of Constitutional machinery were, therefore, given in the context of that case. However, when the said case travelled to the Supreme Court., this Court, by majority view in the Federation of Pakistan v. Muhammad Saifullah Khan PLD 1989 SC 166, held that unless it could be shown that 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, dissolution could not be ordered. At another place it held that unless the machinery of the Government of the Federation had come to a standstill or such a breakdown had occurred therein which prevented the orderly functioning of the Constitution, dissolution could not be ordered. With respect, I would submit that the test laid down is too strict and rigid. It forgets that the provision is also preventive. One does not have to wait till the whole machinery of the Government collapses or comes to a standstill or so serious a breakdown occurs which prevents the orderly functioning of the Government, before ordering a dissolution. What is required is that the breakdown is imminent, as partial, dislocation has begun, or the breakdown has actually taken place and as a last resort interference is required to ultimately restore representative Government. Each case should, therefore, be left to be dealt with on its own merit. There could be many situations which could lead to or where there is an actual failure of Constitutional machinery, such as where the party in power having tenuous support from its members, is not able to carry on the functions of the Government effectively, or a deliberate dead-lock created by a party or a group of parties or dead-lock arising from an indecisive electoral verdict has constantly impaired or made the smooth running of the Government practically impossible, or where no party in the Legislature is in a position to form a Government, or the party in power is guilty of or attempting internal subversion, or where a Government is being continuously conducted in utter disregard of the Constitution, or there is a mass uprising or civil disturbance or complete breakdown of law and order due to public opinion being against the party in power at the Federal or Provincial level. Apart from assuming such situations can arise, it would not be proper to lay down any parameters or tests to determine under what circumstances this Court would accept a given case as one falling in the category of breakdown of Constitutional machinery, other than deal with each case on its own merits as and when it comes up on the basis of material placed before the Court to show what facts were before the President or. the Governor when he formed the opinion and whether the same had a proper nexus with the requirements of the Constitutional provision.

Whilst stating with some diffidence the types of situations where the power can be exercised, it must be stated that this power is meant to be used by the President impartially and objectively and only as a last resort to restore some balance and order in the Government, within the compass of established Parliamentary practice, and not in a way as may give the impression that it is to displace a political party in power or to rob the Federation or the Provinces of their autonomy to rule within the respective spheres allowed to them by the Constitution. The exercise of various powers under the Constitution does not guarantee that they will be exercised correctly, or that the elected representatives at the Federal or the Provincial level will perform their functions free from all human or legal errors and defects. All Government actions are not free from catastrophic errors of judgment or dismal failures of action. The functional ability of a ruling party to govern does not merely fail if some provision of the Constitution is violated or not performed or ill performed. With political strategy and choices, in a house divided between many political parties, being mauled or mutilated by conflicting interests, it may not be possible to take even simple decisions.”... ... ... ...

The total material presented to the Court showing the difficulty of the party in power having tenuous supports from its members, in not being able to carry on the functions of the Government with confidence and responsibility, the deliberate deadlock created by a party or group of parties or deadlock arising from an indecisive electoral verdict or some other situation constantly impairing or making. the smooth running of the Government practically impossible, or no party in the Legislature being in a position to form the Government, internal subversion attributable to the party in power, the continuous running of the Government in utter disregard of the Constitution, the total rejected by the people of the party in power exemplified by continuous mass processions, strikes and unrest on a national or provincial scale, are basically situations which have a nexus with the failure of the Constitutional machinery. Other stray, or a number of, violations of the Constitution unless by themselves so grave that a Court could come to no other conclusion but that they alone directly led to the breakdown of the functional working of the Government, would not constitute valid grounds. However, where one of the basic situations constituting breakdown of Constitutional machinery, as stated above, is present, violations of the Constitution, where they have contributed to or been the cause of the breakdown, could be treated as valid supportive factors to the decision. Non-compliance of general law, failure to hold or call meetings under the provisions of the general law, misuse of the authority or resources of the Federation or of the Provinces or of statutory or autonomous bodies, unauthorised or irregular interference

in Service matters and disruption in their regular and orderly working, some failure to maintain law and order; or the resultant effects arising from such situations, such as the climate of uncertainty if any created thereby, the sense of insecurity created at different levels of administration, the rejection by the people of some actions of the party in power, creation of some threats to law and order, the weakening of the judicial process, would not normally provide grounds for action under Articles 58(2)(b) or 112(2)(b) of the Constitution, though they may, with other factors, provide to the Court the total picture showing some of the other matters that attended the breakdown, or to show the resultant effects arising therefrom. This Court cannot sit in appeal over a dissolution order or substitute its findings for the opinion of the President, but a dividing line would have to be kept in mind between certain basic situations which can be treated as leading to the breakdown of the Constitutional machinery and as having nexus with the provisions of the two Articles of the Constitution that provide for dissolution, strong Constitutional violations which the Courts may hold as directly leading to the breakdown of the functional working of the Government and other peripheral Constitutional violations which contribute to or may be the cause of the breakdown and can be used a supportive factors where basic situations exist. , This is apart from the question of quantum or sufficiency of the material, over which this Court has no concern. “

It can thus be seen that in Muhammad Saifullah Khan’s case, scope, principles and parameters for exercise of power under Article 58(2)(b) were laid down. But in Kh. Ahmed Tariq Rahim’s case within the same parameters various instances which . may - lead to stalemate and deadlock in observance of the provisions of the Constitution were enumerated, though not exhaustive were instructive.

5. In the same context reference was made to Aftab Ahmed Khan Sherpao’s case PLD 1992 SC 723. While considering the observations of Shafiur Rehman, J. in the. case of ‘Khawaja Ahmed Tariq Rahim, Ajmal Mian, J. at page 789 elucidated as follows:-

“It is evident from the abovequoted extracts that the formation of opinion should be founded on some material, and that the  ground(s) should have nexus with the grounds mentioned in Articles 58 and 112 of the Constitution. The question, whether grounds exist for dissolving Assembly, is to be examined objectively and not subjectively by the repository of the power in question. It is also apparent that if it can be shown that no ground existed on the basis of which an honest opinion could be formed, the exercise of the power would be unconstitutional and open to correction through judicial review.”

Further at page 790, while referring to State of Rajasthan and others v. Union of India AIR 1977 SC 1361, it was further observed:-

“Bhagwati, J. in his opinion, has observed that in the absence of any provision in the Constitution that defeat of the ruling party in a State in the Lok Sabha election cannot by itself, without anything more, support the inference that the Government of the State cannot be carried on in

accordance with the provisions of the Constitution. However, at the same time, he held that the above. Proclamation was justified for the following reasons:--

‘It is axiomatic that no Government can function efficiently and effectively in accordance with the Constitution in a democratic set-up unless it enjoys the goodwill and support of the people. Where there is a wall of estrangement which divides the Government from the people, and there is resentment and antipathy in the hearts of the people against the Government, it is not at all unlikely that it may lead to instability and even the administration may be paralysed. The consent of the people is the basis of democratic form of Government and when that is withdrawn so entirely and unequivocally as to leave no room for doubt about the intensity of public feeling against the ruling party, the moral authority of the Government would be seriously undermined and a situation may arise where the people may cease to give respect and obedience to Governmental authority and even conflict and confrontation may develop between the Government and the people leading to collapse of administration. These are all consequences which cannot be said to be unlikely to arise from such an unusual state of affairs and they may make it impossible for the Government of the State to be carried on in accordance with the provisions of the Constitution. Whether the situation is fraught with such consequences or not is entirely a matter of political judgment for the executive branch of the Government. But it cannot be said that such consequences can never ensue and that the ground that on account of total and massive defeat of the ruling party in the Lok Sabha Elections, the Legislative Assembly of the State has ceased to reflect the will of the people and there is complete alienation between the Legislative Assembly and the people is wholly extraneous or irrelevant to the purpose of Article 356, Clause (1). We hold that on the facts and circumstances of the present case this ground is clearly a relevant ground having reasonable nexus with the matter in regard to which the President is required to be satisfied before taking action under Article 356, Clause (1).’

‘In my opinion, the above approach of Bhagwati, 1. does not run counter to the reasoning of this Court in the case of Federation of Pakistan v. Haji Muhammad Saifullah Khan (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 Advisers 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’. “

According to Mr.Khalid Anwar the view expressed in Muhammad Saifullah Khan’s case was modified in Kh. Ahmed Tariq Rahim and Sherpao cases. As I have observed earlier the last two cases provide instances, factors, situations and circumstances which fall within the terms ‘stalemate, total breakdown of the Constitutional machinery, and non-observance of the provisions of the Constitution’. Stalemate or breakdown is the result of incidents, occurrences, causes, happenings, conduct and several other factors which may lead to it. Such. causes and instances may be many and several but the limitation is that it may result in stalemate, breakdown and serious violations of the provisions of the Constitution adversely affecting the functioning of the Government according to the Constitution.

6. The celebrated judgment in Mian Muhammad Nawaz Sharif v. Federation of Pakistan and others PLD 1993 SC 473 has thrown light on preceding judgments. Nasim Hasan Shah, C.J. referring to the observation of Shafiur Rehman in Haji Muhammad Saifullah Khan observed that ‘no Assembly can be dissolved 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’. This observation though follows Muhammad Saifullah Khan’s case does not deviate from Aftab Sherpao’s case. It was on this principle that the ground for dissolution was put to test and it was held that the President having lost his neutrality, the speech of the Prime Minister did not create a breakdown of the Constitutional machinery nor in such circumstances it could be concluded that the Government could not be carried on in accordance with the provisions of the Constitution. Saad Saood Jan, J. referring to Article 58(2)(b) observed as follows:-

“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 1988 SCMR 1996 and Khawaja Ahmad Tariq Rahim v. Feddration of Pakistan PLD 1992 SC 646.

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 Khawaja 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 brings is 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’. “

Ajmal Mian, 1. while interpreting Article 58(2)(b) of the Constitution relied on the observations of Nasim Hasan Shah, J. (as he then was), Shafiur Rehman, J. and his observation in Aftab Ahmed Khan Sherpao quoted above. Sajjad Ali Shah, J. (as he then was) also followed Haji Muhammad Saifullah Khan and Khawaja Ahmed Tariq Rahim by observing that:-

“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 quality-wise than material produced in Khawaja Ahmed Tariq Rahim’s case and same yardstick 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 Khawaja Tariq Rahim by this Court.”

The learned counsel for both the parties have referred to Khalid Malik v Federation of Pakistan PLD 1991 Kar. 1 where after referring to Saifullah’: case, I had observed:-

“The first consideration, therefore will be whether situation has arisen in which Government cannot be carried on in accordance with the provisions of the Constitution and law. Where a Government cannot be run in accordance with the provisions of the Constitution then it indicates the failure of the Constitutional machinery. Such situation arises when the writ of the Government is not enforceable, a climate of uncertainty and diffidence has been created on different levels of administration, there is general floutation and disrespect to the organs and departments of the State; the institutions, organs and authorities constituted under the Constitution and the law, flout of law, external aggression bringing the entire machinery of the Government at a standstill; internal disturbances, insurgency, revolt, rebellion or civil war and economic crises which may paralyse the life and administration. Another situation may cover it when the Legislature no longer reflects the wishes or views of the electorate and they are at variance. There is large scale civil disobedience movement in which Government servants and employees of corporations, companies, banks and authorities connected with the day to day administration of the State refuse to cooperate and subject refuses to pay taxes. The majority ruling power refutes, violates or refuses to run the Government according to Constitution and law. The writ of Government is no longer respected and is not enforceable. These are some situations during which machinery of the Government cannot be run in accordance with the Constitution. No exhaustive list can be provided but it entirely depends on the circumstances, facts and events which may happen. “

It was pointed out by Mr. Khalid Anwar that no appeal was filed against this judgment and it has attained finality. From the aforestated observation and discussion, it crystallises that the President does not possess unfettered or unlimited power under Article 58(2)(b). It is restricted and circumscribed by preconditions set out in the judgments referred above. First he has to form opinion objectively on the material before him having nexus with the preconditions laid down by Article 58(2)(b) sufficient to satisfy any prudent man of normal intelligence that the Government cannot be carried on in accordance with the provisions of the Constitution and appeal to electorate is necessary. Thereafter, the President may exercise discretion to dissolve the Assembly. The situation which arises and leads to formation of opinion that the Government cannot be carried on in accordance with the Constitution may not be restricted to anyone solitary instance of war-like conditions as contended by Mr. Aitzaz Ahsan. There may be various and many situations some of which have been identified in the afore-referred judgments as it is not possible do give an exhaustive list. Human nature, conduct, tactics, strategy, mechanism and political manoeuvring always change, fluctuate and create unpredictable situations to which Article 58(2)(b) may be applied. We affirm the principles laid down in Nawaz.Sharif’s case and declare that no deviation has been made from it. Those principles have been applied to a set of facts, which have formed basis for forming an opinion that in such situation Government cannot be carried on in accordance with the Constitution.

7. The first ground has already been mentioned in the order of dissolution. The petitioner has denied that over the last three years thousands of persons in Karachi and other parts of Pakistan have been deprived of their right to life in violation of Article 9 of the Constitution. According to the petitioner it is not cogent or relevant and relates to the Provinces as law and order is not within the Federal domain. It was further pleaded that observation about Karachi is directly in conflict with the unambiguous assertions of the Governor of Sindh Province Mr. Kamaluddin Azfar contained in his speech made on 12-9-1996 in the National Defence College, Karachi. In the address to Parliament dated 29-10-1995 the President had warned Law Enforcement Agencies asking them to ensure that there was no harassment of innocent citizens in the fight against

terrorism and that fundamental rights of people will be protected. It was stated that this speech has been referred, but the statements of November 2, 1994, December 17, 1994, March 29, 1995, May 30, 1995 and May 13, 1996 have not been referred. The speech was authored by him in disregard of the proposed draft provided by the Government. The President wrote no letter complaining about alleged extra-judicial killings to the petitioner or the Interior Ministry. He was satisfied with the manner the Government of Sindh was handling it what he called “mini-insurgency in Karachi”. Most of the persons killed, according to the petitioner, “were hardened criminals absconding from charges of kidnapping for ransom, dacoities, multiple murders, bomb blasts and torture in captivity.” Judicial inquiries were also held. It was stated that if the Provincial Governments fail in their duty, the National Assembly should not be visited with penalty. The Federal Government has no authority to investigate into any such incident whatsoever and if it had purported to do so, that indeed could have been a grievous breach of Constitutional set-up, which responsibility is in the hands of the Provinces. It was further pleaded that no law permits the Federal Government to assume to itself in any such eventuality the powers and authority of the Provincial Governments, and that “the complaint would have been valid if the Federal Government had indeed done so”. The Government of Sindh had set up over hundred judicial commissions of inquiry into the extra-judicial killings and many reports have been finalized. 2000 police constables had been sacked and 146 police officers had been proceeded against. It was further pleaded that the Federal Government had also entered into negotiations with M.Q.M. so as to bring peace to the city of Karachi, which was appreciated by the President. It was denied that these killings coupled with the fact of widespread interference by the members of the Government including members of the ruling parties in the National Assembly in the appointments, transfers and postings of officers and staff of law enforcement agencies both at Federal and Provincial levels, had destroyed the faith of the public in the integrity and impartiality of the law enforcement agencies and in their ability to protect the lives, liberties and properties of the average citizens. It was termed as a wide and general statement implicating the members of the National Assembly without giving any specific detail of such allegations. The respondents filed written statement and pleaded that no one can seriously dispute that the situation in Karachi was seriously disturbed. The extra judicial killings did take place and that as a result of the illegal and unconstitutional measures adopted by the Federal and the Provincial Governments the disturbance in Karachi had been reduced to a considerable extent. It was commented that “do ends, even if desirable, justify or permit the adoption of any and all means, howsoever, illegal.” It was further stated that “peace, in a manner of speaking, returned to Karachi, but it is the peace of the graveyard.” The city’s mortuaries were filled with the victims of the previous Government’s crime against humanity. Citizens were deprived of life and liberty without any pretence of law simply so that some bureaucrat may be able to file a report to the Prime Minister’s satisfaction that “untoward incidents” no longer take place. As regards petitioner’s claim that law and order being the Provincial subject and not within the Federal purview, could not validly form basis for the dissolution order, it was pleaded that Article 148(3) of the Constitution expressly provides that it is the duty of the Federation to inter alia protect every Province against internal disturbances and to ensure that the Government of the Province is carried on in accordance with the provisions of the Constitution. In the circumstances and prevailing conditions at Karachi, the Federal Government had a clear Constitutional obligation to discharge under Article 148(3). It was emphatically pleaded that not only was the Federal Government completely in the know what was happening in Karachi, it was inextricably controlling and masterminding the entire operation, first triggering off the violence by its policies and then by resort to systematic brutality and repression. It was pleaded that the structure of the Constitution is Federal and it would be futile to pretend that the political reality of the same party being in power at the Federal and Provincial levels is irrelevant and has no Constitutional implications. It was stated that the speech of Mr. Azfar referred to and relied upon by the petitioner does not in any place refute or contradict what is stated in the dissolution order. In fact Mr. Azfar has specifically taken note of the elimination “of an M.Q.M. terrorist” in an “armed encounter”. It was pleaded that Mr. Azfar’s speech relied upon by the petitioner in any event belies her claim that the Federal Government had nothing to do with the situation in Karachi. He was appointed Governor by the petitioner and performed his functions on the basis of his perception of himself as an appointee of the Federal Government and on the advice of the Chief Minister. It was for this reason that he lauded the operations carried out in Karachi and stated that lasting credit was due to the Prime Minister of Pakistan Mohtarama Benazir Bhutto for keeping firm hand at the helm. It was stated that in 1994 as well as in 1995 the President had expressed his dissatisfaction over the handling of the Karachi situation. Referring to the news items mentioned by the petitioner it was pleaded that the report was a perforated analysis carried out by journalists and provocative titles were given for which the respondent

obviously cannot be held answerable.    -

8. Having referred to the pleadings, we now consider the arguments of the learned counsel for the parties, which are more or less reproduced in the pleadings. The main contention of the learned counsel for the petitioner was that there was no material available for satisfaction of the President particularly on the point of extra judicial killings in which the Federation of Pakistan was not involved and could not be held responsible as the same was a Provincial Subject.

9. It may be pointed out that M.Q.M. had filed an application to be joined as a party, notice of which was issued to the petitioner, who filed a short reply denying all the allegations and also raised objection that M.Q.M. cannot be joined as a party as none of its Fundamental Rights have been affected nor anyone of its members had been elected to the National Assembly.

10. We have heard Dr. Farooq Hasan, learned counsel for M.Q.M.. He contended that the M.Q.M. had filed Constitution Petition No.46 of 1994 against custodial killings and extra judicial killings of which documents in several volumes were filed. Volumes 17 and 22 give details of custodial and extra judicial killings. The respondents have also filed same or similar documents giving facts uptodate. It was contended that the first ground entirely relates to extra-judicial killings of the members of M.Q.M. in Karachi and, therefore, it is a necessary party because any judgment passed on this aspect of the case will directly affect the petition which had been filed in the year 1994. Volumes of documents filed before us give the dates, names and addresses of the persons, who were murdered, tortured and kidnapped. Many were killed by the Rangers, Police and paramilitary force. the learned counsel referred to the statement of the President, Prime Minister and the Interior Minister. The detailed negotiations between the petitioner’s Government and the M.Q.M. on 11-7-1995 after which letters were exchanged to show that the petitioner and the Federal Government were fully acquainted and had knowledge of all the happenings. They were full participants and actors in extra judicial killings and tortures committed by the law enforcement agencies. These facts have not been specifically denied except a general and vague denial in reply to this application. During the course of hearing Mr. Khalid Anwar also referred to most of the documents and incidents recounted by Dr. Farooq Hasan. We, therefore, after hearing the view point of M.Q.M., without making it a party, proceeded with the matter.

11. In support of the first ground in the Order of Dissolution the respondents have filed volumes of documents consisting of material available in public domain regarding extra judicial killing and official documents consisting of letters, inquiry reports, notifications, regular reports, Cabinet/Committee decisions and notes. Mr.Khalid Anwar has referred to the summary of the report of Amnesty International based in U.K. on Pakistan entitled Human Rights Crisis in Karachi issued in February, 1996, which reads as follows:-

“Amnesty International continues to urge the Government of Pakistan to adopt measures to stop the large-scale human rights violations which are regularly reported from Karachi, the capital of Sindh. The organization has received reports of hundreds of cases of unlawful detention, torture, deaths in custody, extra-judicial executions and ‘disappearances’, mainly in Karachi, but also in other cities of the Province. According to official figures, some 1,770 people were killed in Karachi in 1995; these include members of different political parties, law enforcement personnel and apolitical residents of Karachi, including women and children.

While law enforcement personnel appear to be responsible for some of these human rights violations, there is strong evidence that armed opposition groups have also perpetrated torture, hostage-taking and killings in Karachi. Amnesty International continues to appeal to armed opposition groups to refrain from abusing the fundamental rights of people in Karachi to life and the security of the person, to end hostage taking, torture and arbitrary killings. The organization again calls on these groups to observe minimum standards of humanitarian law which forbid such abuses.

The high rate of political killings over the last months is strong evidence of the failure of the Government’s strategy to protect political activists, journalists and ordinary residents of Karachi from human rights abuses. Indeed, in some cases, those in authority appear to have condoned abuse,: by some armed opposition groups. Amnesty International believes that the Government must act consistently and lawfully to end human rights abuses by armed opposition groups and send a clear signal that all those responsible for such abuses will be brought to justice.

The human rights abuses perpetrated by armed opposition groups may never be used by law enforcement personnel as an excuse to ignore national and international human rights safeguards and to commit human rights violations themselves, to torture, kill or to ‘disappear’ people described by the Government as ‘terrorists’. Amnesty International calls on the Government of Pakistan to set up independent and impartial inquiries into every single report of unlawful detention, torture, death in custody, extra-judicial execution and ‘disappearance’ and. to ensure that every member of the law enforcement agencies found to be responsible for such human rights violations is brought to justice. Only if the self-perpetuating cycle of violence, in which human rights abuses continue to be perpetrated without punishment and in which impunity facilitates further violations, is broken, can people in Karachi again live in safety and dignity and enjoy their fundamental rights.

The present paper first describes the political context in which human rights abuses are committed in Karachi; it then documents reported cases of arbitrary arrest, torture, deaths in custody, extra-judicial executions, ‘disappearances’ allegedly committed by law enforcement personnel and the human rights abuses allegedly perpetrated by armed opposition groups. It also focuses on the lack of protection given to people reporting human rights abuses in Karachi and the immunity enjoyed by perpetrators of human rights abuses. The concluding section sets out Amnesty International’s concerns and its recommendations to the Government and to armed opposition groups. The appendix contains an analysis of the Government’s responses to a statement issued by Amnesty International on the human rights situation in Karachi in August, 1995.”

Another report dated 17-8-1995 reads as follows:-

“Every day a dozen deliberate and arbitrary killings are reported from Karachi--in July the city’s death toll was a staggering 279, according to Amnesty International.

Against this backdrop of escalating violence, Amnesty International today held the Government of Pakistan responsible for serious human rights violations committed in the context of concerted campaign for law and order in the city.

‘The Government is simply not doing enough to protect innocent citizens from targeted killings by armed opposition groups,’ Amnesty International said. ‘Armed opposition groups should respect minimum humanitarian standards, but if they don’t the Government should not use their violence as an excuse to commit torture or killings.’

In recent days, several people have reportedly been extra-judicially executed. Farooq Putney and three other workers of the Mohajir Qaumi Movement (M.Q.M.) were shot dead on 2nd August by police in what was described as an ‘encounter’. Family members, however, claimed that the men were earlier arrested from their homes.

Every day both party activists and citizens not involved in politics die as a result of targetted killings by armed groups few of whom are ever held to account. Dead bodies, blindfolded with their hands bound, showing marks of torture or mutilation are often dumped in the streets of Karachi indicating the torture that caused their deaths.

During police sweeps, hundreds of people were reportedly arrested in the last few weeks; some were blindfolded and beaten then released within a short period but an unknown number of people continue to be held.

Reports of arrests of family members of wanted persons belonging to various political parties continue to be received. The victims are mainly family members of M.Q.M. activists, but families of members of other parties are reportedly affected as well.

Several people have reportedly ‘disappeared’ in custody. These include Rais Fatima, a 26 years old M.Q.M. activist, who on 4th June in Karachi boarded a train for Lahore never to arrive there. Qamar Mansoor Siddiqui, a M.Q.M. parliamentarian who had accompanied her, also disappeared but on 7th July the Lahore High Court, hearing a habeas corpus petition, was told that Qamar had been arrested on 20th June by the Federal Investigation Agency on charges of sedition. Despite High Court orders, lawyers have not been given access to the prisoner in Adiala Jail in Rawalpindi, contact with Qamar could have thrown light on Rais Fatima’s whereabouts.

Other ‘disappeared’ persons include detained M.Q.M: workers who are often transferred to unknown prison locations. Three such prisoners, including an M.Q.M. Senator, Zahid Akhtar, who had been secretly transferred from Peshawar Jail to Rawalpindi’s Adiala Jail were later shown on T.V. confessing various acts of terrorism.

Amnesty International fears that these detainus--kept during such periods of unacknowledged detention and before such ‘public confessions’--may be subjected to torture and ill-treatment and calls for an end to such practices.

People who have spoken up against the alleged collusion of the Government with a faction of the M.Q.M. the M.Q.M. Haqiqi, have not been protected against threats and harassment. Farooq Sumar had in May accused the Government of an ‘alliance with crime’ by condoning the criminal activities of the Haqiqi group of the M.Q.M.. On the basis of his complaint, the Home Ministry ordered the’ arrest of the Haqiqi leader, Afaq Ahmed Khan, which was rescinded upon the personal intervention by the Sindh Chief Minister.

The non-Governmental Human Right Commission of Pakistan confirmed that Sumar and members of his family ‘face a serious threat to their lives and security’, nevertheless no protective steps were taken by either the Federal or Provincial Government. Continued impunity enjoyed by armed political groups has emboldened them to further harass and threaten those who seek to stop them.

Amnesty International urges the armed opposition groups to refrain from hostage-taking, torture, and deliberate and arbitrary killings. The organization also calls on the Government to set up independent and impartial inquiries into every single case of torture, death in custody and extra-judicial execution reported.

Amnesty International believes that all persons who are not charged with a recognizable criminal offence, such as relatives of wanted persons, should be immediately and unconditionally released. The Government should also ensure that political prisoners held on criminal charges are treated in accordance with international standards for fair trial, granting them prompt and regular access to family, lawyers and appropriate medical attention. No one should be held in unacknowledged detention and subjected to torture. “

In Human Rights Watch World Report, 1996 relating to Pakistan, it was stated that ‘throughout 1995, all parties to the conflict continually committed serious human rights violations---. This created an environment of rampant lawlessness, disorder, and official corruption in Karachi, a city of twelve millions where militants and abusive security forces enjoyed virtual freedom from accountability for illegal actions”. It further reports:-

“The Government demonstrated a lack of resolve to deal with Karachi’s chronic security crisis and to enforce the rule of law uniformly. Rather, State intelligence agencies reportedly continued sponsorship of the Haqiqi faction, which was responsible for the most egregious acts of violence, intimidation, and extortion in the city. Human rights groups accused Government forces particularly the Paramilitary Rangers and the police, of endemic civil rights violations against suspected members and supporters of the M.Q.M., including indiscriminate house-to-house searches in targetted areas, random firing in riot-torn neighbourhoods, arbitrary arrests and detentions, torture, custodial deaths, and extra- judicial executions. M.Q.M. members also engaged in killings of opponents, torture, kidnapping, robbery, and extortion.

On September 14, Farhan Effendi, a field correspondent for the Karachi-based Urdu daily, Parcham, was arrested by the Paramilitary Rangers, reportedly severely beaten, and kept in detention blind-folded with his hands tied behind his back. Parcham is considered sympathetic to the views of the M.Q.M., and, although Effendi was charged with the illegal possession of a fire-arm and involvement in terrorist activities, his arrest was widely viewed as an attempt to intimidate the press. Bux Ali Jamali, a reporter for the newspaper Kawish, suffered a fate similar to Effendi’s after he wrote stories critical of Government development initiatives in Nawabshah, the hometown of Bhutto’s husband, Asif Zardari.  ‘Politically motivated abuse of the State’s judicial and law enforcement mechanisms was a common feature of Pakistan’s political landscape during 1995. The Bhutto Government resorted to preventive detentions and spurious lawsuits to promote its own political agenda and to sideline political opponents.”

Reference was also made to Index published by Writers and Scholars International which reported that in the year 1995:-

“The recent escalation of violence - more than 1000 dead this year, over 400 in the last six weeks - is overwhelmingly the result of the Governments latest offensive to crush the M.Q.M. as an organised political force. (Index 3/1995). Well-armed Mohajir dissidents the Haqiqi, operate in collusion with the police and the paramilitary Rangers. Ten-20 people, mostly innocent civilians, are killed every day. Districts of Karachi like Orangi, Landhi and Korangi are under siege, their inhabitants arrested, tortured and butchered at random.”

Organization Mondiale Countre La Torture (OMCT) “World Organization Against Torture” based at Geneva sent a request dated 13-11-1995 to the President of Pakistan, the Prime Minister and the Law Minister expressing its grave concern over a number of extra judicial executions, torture and harassment of Mohajir Qaumi Movement (M.Q.M.) members by law enforcement agencies and para-military forces in Karachi. It states that:-

“On 17th October, 1995, the Preedy Police Mobile arrested Mr. Nadeem, 27 years of age, and Mr.Muhammad Tahir, during the night. Mr. Tahir was tortured to death and Mr.Nadeem is still held in custody.

On 25th October, 1995, at 1 p.m. Mr.Muhammad Sajid, 22, and Mr. Muhammad Yamin, 21, both active workers of M.Q.M. Unit 125, Orangi Town, were arrested by police and para-military forces, tortured, then taken to Orangi Town Police Station and shot. On 26th October, 1995, at 4 p.m. the plain clothed Paramilitary Rangers arrested Mr. Azhar Mohani, Incharge M.Q.M. Unit 178, Sector North Nazimabad and tortured him for two days before he died due to the savage treatment.

Antenna International also fears for the life of Mr. Muhammad Rafique, 32, a sympathiser of M.Q.M. Unit 142, who was arrested two months ago from his house by the Paramilitary Rangers and Police and has not been heard of since.

According to the information we have received, none of the above people were in any way breaking any law before or at the moment of their arrest.”

In another report dated 8-11-1995 it also gives the names of persons, time, place and date when they suffered death in custody, extra-judicial execution, arrest and torture.

Human Rights Commission of Pakistan gives its initial finding on the killing in an “Encounter” of Fahim Commando and three others on October 10, 1995 which reads as follows:-

`”The Human Rights Commission of Pakistan conducted an initial inquiry into the killing in the early hours of October 10, 1995, of  M.Q.M. activists (described by the authorities as terrorists) Faheem Commando, Zeeshan Haider Abidi, Yousuf Rehman and an unidentified man who was later identified as Faheem’s brother, Mufeez Farooqi, and has the following observations to make, says a statement  issued by Zohra Yusuf, Secretary-General, and Saleem Asmi, Vice Chairperson of the Commission .

.. ... ...That the first three were arrested by C.I.A. Jamshed Quarters on August 6 and were sent to jail after interrogation;

... ... ...That they were brought out of the jail and taken to the Airport Police Station around 3 p.m. on October 9;

... ... ...That they, as well as Mufeez, were taken in a van by an Airport Police Party headed by S.H.O. Anwar Ahmed Rao to a house in Nazimabad in the small hours of October 10, where, the authorities claim, the police party came under heavy gunfire from the said house, resulting in the instant death of all four of the detenus;

...The Faheem’s brother, Mufeez, who went unidentified on the day, .of the killing, was later identified first as one Altaf Qureshi and then as Khurshid Anwar, was arrested earlier this month in Rawalpindi where he had been living with his mother;

... ... ...That the initially unidentified body was recognised by relatives  as that of Mufeez four days later. Faheem and Mufees’s mother claims that the body was recognised only when relatives were attracted by photographs of the slain men in newspapers. The mother and a relative who brought the bodies to the Edhi Centre could not recognise Mufeez because, as she and relatives maintain, his face had been disfigured through torture and gunshots, and also, because they could not imagine that he would be brought down from Rawalpindi to die.

The H.R.C.P. interviewed a number of people in the area where the killing occurred. Its findings are:

... That all four detenus were handcuffed and fettered and chained together; .. That the house the police claim the van was fired upon had been unoccupied for the past three years and the family which lived there is now in the U.S;

... That eye-witnesses claim the street had been blocked by scores of heavily armed men in Shalwar-Kameez and wearing cross-ammunition belts, and not even the municipal sanitarymen were allowed in;

... That all the victims had multiple bullet wounds, including some in the head and eyes;

... That no member of the escorting police party was hit, not even slightly;

.. That Faheem, Zeeshan and Yousuf were all in judicial lock-up and no official version offered a credible explanation how they were taken out of jail or on whose authority;

... That how could the unknown assailants, as the authorities claim, open such heavy fire in the small hours of the morning, from a house that had remained locked and deserted for three years, and when the street had already been blocked at both entrances by heavily armed police (or Rangers) men?

In the light of the above, the H.R.C.P. is constrained to conclude that the official version of an ambush or a shootout could not be given any credence and that the killings of October 10 were part of what appears to be the law enforcement agencies’ on-going practice of eliminating those they consider are hardened criminals or terrorists.”

Minutes of Sitting of Thursday, 15th February, 1996 of European Parliament taking note of reports of Amnesty International and Human Rights Commission of Pakistan resolved on situation in Sindh that:-

The European Parliament.

A. deeply concerned by the widespread public disturbances in the urban centres of Pakistan’s Sindh Province, especially in the cities of Karachi and Hyderabad, where human rights abuses and violence have been committed on all sides, notably by the Altaf and Haqiqi factions of the Mohajir Qaumi Movement (M.Q.M.) and the security forces, as well as by criminal gangs, which have led to thousands of deaths in recent years, including members of the security forces, and have left the Province in a state of chronic insecurity.

B. having regard to the Amnesty International Report of 17th August, 1995, the Report of the Human Rights Commission of Pakistan of 19th October, 1995 and to the Annual Report of 1995 of Human Rights Watch, as regards the situation in the urban centres of Sindh Province.

C. profoundly disturbed at the imprisonment or restriction under house arrest of M.Q.M. representatives in the Sindh Provincial Assembly and the Pakistan Senate.

D. convinced that the troubles are causing damage to all communities in urban Sindh, including the Mohajirs, and are detrimental to Pakistan’s economy and social progress.

1. Condemns the killing of innocent people, the use of, torture and other human rights abuses, whether committed by members of the M.Q.M. factions or by Pakistani security forces, and especially deplores attacks on members of the families of M.Q.M. political leaders and Government officials;

2. Ask the Government of Pakistan to do all in its power to control those elements in the security forces that engage in human rights abuses and to plan the training of the security forces to respect human rights and democratic freedoms;

3. Appeal to the leaders of both factions of the M.Q.M. to seek to play a full and positive role in the prevention of further violence;

4. Believes that the settlement of the Mohajir issue can only come about through fully peaceful and democratic methods and calls on the authorities to release or lift restrictions on the M.Q.M. elected representatives and to. seek to arrange meetings to resolve the problem of Mohajir rights in a peaceful manner;

5. Considers that a decrease in violence is a necessary condition for the effectiveness of free and fair elections in the Province, which should allow the urban population representation at all levels commensurate with its size;

6. Asks the Commission and the Council, together with the member States to offer support to the Pakistan Government through measures to promote mutual understanding between the local population in the Sindh urban areas;

7. Instructs its President to forward this resolution to the Commission, the Council, and the Government and Parliament of Pakistan and the Provincial Assembly of Sindh.

Reference was made to the statement by Nicholas Burns, issued by Office Spokesman of U.S. State Department dated -12-1995 which reads as follows:-

“Political violence in Pakistan largest city and most important port, Karachi, has claimed approximately 1800 lives since the beginning of this year. In recent months, the violence has taken an extremely disturbing turn, with a sharp increase in reported extra-judicial killings and the targetting of family members of Government officials and M.Q.M. political leaders. Several weeks ago, the brother of Sindh Chief Minister Abdullah Shah was killed in a terrorist attack while traveling through an M.Q.M. controlled area of Karachi. More recently, the tortured and bullet riddled bodies of two close relatives of M.Q.M. leaders Altaf Hussain were discovered in Karachi on December 9, after the two individuals were alleged-to have been taken into police custody. The security forces have denied having custody of the two individuals prior to their deaths. We understand that Prime Minister Bhutto has ordered an investigation into the incident.

We are deeply concerned by the escalating cycle of violence in Karachi and particularly by the sharp increase in reported extra judicial killings, extortion and custodial deaths by security forces. The United States deplores the senseless murder of family members of Government and political leaders. We continue to believe that the best way to end the current violence in Karachi is at the bargaining table and urge the GOP and M. Q. M. to resume talks.”

Mr. Khalid Anwar has also referred to the Handout No.3036 dated 19-10-1994 issued by the Government of Sindh, which is reproduced hereunder:-

THIRD ROUND OF NEGOTIATIONS BETWEEN GOVERNMENT AND M.Q.M.

Karachi, October 19: The third round of talks between M.Q.M. (A) and Government was held here today and both the sides were agreed on ten points.

According to official source, a four-member M.Q.M. team included Mr. Shoaib Bukhari, Kazi Khalid, Tariq Javed and Ajmal Dehlvi, while the Government side was represented by Sindh Senior Minister, Syed Parvaiz Ali Shah.

The ten important points which were agreed upon included, scrutiny of cases filed against M.Q.M. leaders and workers, return of goods confiscated during P.P.P. tenure, restoration of political activities of M.Q.M. within legal premises, provisions of guards on demand of Haqparast’s elected members and Senators, restoration of telephone connections, provision of all the legal facilities to interned leaders and workers, provision of special grants from Federal and Provincial Governments for the reconstruction of Karachi city.

It was also agreed that the F.I.Rs. not registered against leaders and workers of M.Q.M. and facing fear for their arrest, kidnapping, raids and victimizations due to which they cannot return to their houses, would be allowed to return their homes and no harassment of any sort will be carried out against them.

It was also decided that Government will take swift measures to withdraw all the false cases registered against M.Q.M. leaders and workers, and minor cases will be withdrawn immediately.

During the meeting, it was also agreed upon that for the restoration o1 peace, patrolling by the police and law enforcing agencies will be intensified, Stringent measures will be taken to curb the activities of the anti-social elements.

Date for the next round will be decided after mutual consultation. “

It was pointed out that on 1-11-1993, Government of Sindh issued proclamation under section 54 of the Code of Criminal Procedure fixing head money on the accused named therein. This notification was challenged by Mst. Raisa Farooq in the High Court of Sindh, which by its judgment dated 5-10-1993 allowed it with the following observation:-

“We have been greatly disturbed by the use of the words ‘elimination’, ‘liquidation’ arid ‘head money’ in the summary dated 2810-1992 moved by the Home Department of the Chief Minister. There is no provision in Pakistan law which authorises the Government to fix ‘head money’ for arrest or production of an accused or even a proclaimed offender, dead or alive. This would, in our view, amount to give a licence to kill or to use the words  in the Summary licence to ‘eliminate’ or ‘liquidate’ any accused or proclaimed offender. Such decisions are not only patently illegal but can create extreme serious situations. Such proposals and decisions must be condemned and it should be ensured that the same are never repeated.”

However, in spite of this judgment the Government of Sindh issued a proclamation on 2-1-1995 notifying names of 16 persons as proclaimed offenders and fixing ‘head money’ ranging between 2 lac to 15 lac.

The respondents referred to a large number of newspapers reports and magazines particularly Newslines of March, 1995 to show that extra-judicial killings and custodial killings were so large in number and rampant that they attracted the local and foreign journalists, newspapers, associations and human rights bodies who raised similar voice of protest. The press clippings and copies

of magazines give photographs of killing and torture and also mention full details of the victims. It makes a horrible reading. The Herald of March 1996 published a special report on the alarming rise in extra judicial killings entitled “The Politics of Murder” by Ghulam Hasnain and Hasan Zaidi, which stated that “The sharp rise in ‘encounter’ over the last three months in which dozens of

M.Q.M. activists have been killed, seems to reflect one chilling fact: the Police and Rangers in Karachi have been given a free hand to arrest, judge and execute anyone suspected of involvement in terrorism”.

12. The admissibility of press clippings and newspaper reports was considered in Islamic Republic of Pakistan v. Abdul Wali Khan PLD 1976 SC 57 where the following observation was made:-

“So far as newspaper reports are concerned, the learned Attorney General has sought to rely upon them on the ground that they being contemporaneous reports of events and/or speeches which if not controverted or denied more or less at the same time must be treated as correct. He has, in this connection, referred us to Volume 29 of the American Jurisprudence (2nd Edn.), page 989, where the learned commentators have stated that where “proof is made that one usually reads a newspaper and that it has probably been brought to his attention, the newspaper may be offered in evidence for the purpose of showing that such person had notice of its contents, especially when better proof cannot be produced. Also, when it is shown that a person is author of, or otherwise responsible for, statements or articles in newspapers, they may of course be used against him.

The authority cited in support of this view is Dunlop v. United States 165 US 486 41 Led 799) where official acts of a Governor required to be made public were published in a newspaper. The publication was admitted in proof of the existence of facts stated in the Governor’s proclamation.

The same learned commentator, however, concedes that ‘newspapers or newspaper articles are not ordinarily admissible as evidence of the facts stated therein’. Nevertheless, it cannot be denied that so far as newspaper reports of contemporaneous events are concerned, they may be admissible, particularly where they happen to be events of local interest or of such a public nature as would be generally known throughout the community and testimony of an eye-witness is not readily available. The contemporary newspaper account may well be admitted in evidence in such circumstances as has often been done by Courts in the United States of America not because they are ‘business records’ or ‘ancient documents’ but because they may well be treated as a trustworthy contemporaneous account of events or happenings which took place a long time ago or in a foreign country which cannot easily be proved by direct ocular oral testimony.

The Courts in this country have also accepted newspaper reports in certain circumstances. Thus, in the case of Sher Muhammad v. The Crown PLD 1949 Lah. 511 Munir, J. (as he then was) accepted articles published in a daily newspaper the contents of which were not denied by the Crown. The learned Judge took the view that ‘where there is no affidavit by the Crown the facts stated in the newspaper report must be accepted as correct’. Thus, if a person does not avail of the opportunity to contradict or question the truthfulness of the statement attributed to him and widely published in newspapers he cannot complain if that publication is used against him. Such an user would not be hit by the rule of hearsay.”

Hamoodur Rahman, C.J. while taking note of the observation of the learned Attorney-General that as far as incidents which took place in a foreign country or speeches which were made thereby any of the leaders of the National Awami Party are concerned, the exclusionary rule on the ground of hearsay should be relaxed as is done in the Courts of U.S.A. because witnesses required to prove such facts would ordinarily be unaccessible and certainly beyond the reach of the Court’s subpoena. It was observed:-

“We do not dispute the force of these contentions of the learned Attorney-General. we were ourselves conscious of these difficulties and it is for this reason that we have, as already indicated, decided to relax this rule in the cases of reports of incidents or events which took place in foreign countries or of reports of speeches or statements made there if they have not been contradicted. Similarly, articles published in foreign newspapers will also on similar grounds of necessity be admissible in these proceedings.”

The above rule laid down by Hamoodur Rahman, C.J. has consistently been followed in our Courts. In the present day media revolution, accessibility and investigative nature of reporting, unless the report is immediately contradicted or is palpably false and is contradicted by some similar contemporaneous reports G the Courts and Tribunals and persons, who are not required to form an opinion on the basis of strictly proved evidence as required by law of evidence, can rely upon such reports. Applying the above principle on the present case, we find that many of the reports originate from foreign countries which though available were not contradicted. The press reports appearing with regard to extra judicial killings/custodial killings and torture have remained uncontradicted except in few cases. The reports of the agencies regularly sent to superior authorities which have been filed and have not been denied do support and corroborate the news items published in the newspapers. Many newspapers carried names, photographs and address of the persons killed in custody, but it was not   contradicted nor any valid . explanation given by the Government. The respondent has filed a list of persons with their names and addresses, who are alleged to have been killed during the relevant period by the agencies or by rival groups, There is nothing on record that any one of those persons has wrongly been listed or that he is available or that those persons did not exist at all and are fake entries, The list of such persons was provided to the Government during the proceedings filed by M.Q.M. earlier in which the petitioner was also a party. Although it has been denied. but no systematic and organized material has been produced on record to nullify it. The magazines, newspapers and articles published are indicators of happenings on a particular date. The opinion or the expression of knowledge of author, who has known and observed and written articles are all such materials which may help in forming the opinion.

13. Extra-judicial killings or custodial deaths cannot be justified as valid, legal or proper. Explanation had been given that these persons whose numbers are few and not so huge as claimed by the respondent or M.Q.M. were hardened criminals and were killed during encounters. Even hardened criminals have a right to be prosecuted and charges be proved against them according to law. Who is to decide that a particular person under arrest is a terrorist or a hardened criminal. This is not the authority of the executive or any agency to decide it beforehand and start operation to kill him. It is the domain of the Court to decide the offence committed by a particular person and according to the law we are governed. a person alleged to have committed any crime shall be treated as innocent till the Court announces its verdict holding him guilty. This principle has been provided to safeguard the interest of the accused and also to protect the citizens from the highhandedness of the investigatings/police authorities. When the agencies charged with the duty to protect the life and property of the citizens indulge in extra-judicial killings, then starts State terrorism in which the police authorities, the Rangqrs or any other agency is permitted by an executive order to execute, eliminate or kill a, particular person. The crime becomes more heinous where persons are arrested under any charge, false or true, and then they are killed while in custody of the police/Rangers. This law of jungle cannot be’ allowed to be perpetuated nor any civilized Government can be allowed to continue with it without any check. Such acts violate Article 9 of the Constitution which confers, protects and preserves life, liberty and property of the citizens. The Law of Nations does not allow to kill even an enemy soldier except in battle. So it is only in war that the persons who are fighting facing each other can be killed, but it does not permit the killing wholesale or en mass or even an individual if he is not in the battlefield. Even the P.O.Ws. are not allowed to be killed. The cases of Faheem Commando. Parvaiz and five deaths in Sukkur alleged to be during encounter with the Rangers/Police are selective cases from amongst the large number of instances and material filed to substantiate the claim. In Faheem Commando’s case the allegation made by the victim’s family is that he had been taken into custody and was killed while in custody. A judicial inquiry was instituted through a Magistrate, but the concerned S.H.O, did not appear and report was submitted in an inconclusive form, The fact that a large number of persons were arrested and a large number of police officials were sacked, clearly demonstrates that there have been fake encounters and also killings in custody of the police. Such acts by the State machinery violate Fundamental Rights under which a person is entitled to be treated according to law and equally before law, The human dignity is inviolable and that the right to life cannot be taken away except as provided by law. There is no law to justify such an act perpetrated by the State machinery.

14. Besides the press reports, clippings, magazines and articles published therein, Mr. Khalid Anwar has referred to official documents, which according to him clearly prove involvement of State agency in acts of extra judicial killings and torture. He further pointed out that from these documents it will be quite clear that the Federal Government, the Prime Minister, the Interior Minister and the high Army Officers were fully aware of the situation and the day-to-day happenings at Karachi. He has referred to confidential reports from the Lt’.-Col. for Director-General, Headquarters Pakistan Rangers, Sindh, addressed to the Military Secretary to the Prime Minister and endorsed for information to the Interior Ministry, Military Operation Directorate, G.H.Q., Rawalpindi, Military Intelligence Directorate, G.H.O., Rawalpindi. The report was sent on the law and order situation in Sindh by-weekly. The first report on record is dated 20-2-1995 sent by Lt.-Col. for Director-General. It gives list of persons who were killed as a sequence of terrorist activities, the killing of M.Q.M. Altaf Group and.M.Q.M. Haqiqi Group which according to the report were due to rivalry between the two factions. There is a reference of one police encounter on 1-2-1995 in which one Jan Muhammad belonging to M.Q.M. was arrested and pistol was recovered. Such reports were regularly sent to these authorities, who used to pass necessary orders. Reference has been made to a secret report on the activities of M.Q.M.(A). It speaks of reliable contact being made with a senior leader of M.Q.M.(A) to discuss the various issues concerning situation in Karachi. The task covered the “alleged, extra judicial killings and discrimination against M.Q.M.”. It reads that M.Q.M.(A) leadership has expressed concern about alleged extra-judicial killings of party activists and demanded cessation of such actions before resumption of parleys with the Government. M.Q.M, insisted that in future the repetition of such incidents should be investigated by a Judge of the High Court. M.Q.M. leadership is critical regarding the press statements of Prof. N.D. Khan in which the Government offered to shift arrested M.Q.M. activists from Islamabad to Karachi and release them on bail detaining MPAs, Senators of the party provided M. Q. M. resumed negotiation with the Government. From this report it can be inferred safely that the Government authorities were negotiating promises and settlement talks with M.Q.M.(A), but they were insisting stoppage of extra judicial killings. This note was sent to the Secretary, Ministry of Interior. It further goes on to state that M.Q.M. leaders are critical about the role of the Interior Minister, the Rangers and same police officials who are allegedly alienating Mohajirs and creating hatred in their minds. This note seems to have been placed before the then Prime Minister, who put a note on it and referred it to the Interior Ministry. On the memorandum/information report, which was referred to the Secretary, Ministry of Interior, it is stated, “let us wait for instructions from Prime Minister if not received by 25/6, direct arrest of two by Rangers and F.I.A. for interrogation by G.I.T”. The persons referred are Mushtaq Tanoli, S.H.O. who is stated to be in connivance with Javed T.T. and other terrorists/criminals of M.Q.M.(A) area, who is also alleged to have released some terrorists. Reference has been made to a letter of Mst. Feroza Begum addressed to the President of Pakistan, wherein she stated that her son Hafiz Osama Qadri was arrested by police some days earlier as reported in the newspaper from Clifton area, but it was so declared after few days. She expressed her apprehension that he would be treated severely and that may cause his death or even the police may kill him and then declare it a police encounter which fake practice is prevailing nowadays. She complained that as he is Mohajir, no justice will be provided to him, rather the clerks could be awarded with cash and other perks and privileges. This letter, which was addressed to the President was marked for necessary action. Similar letter was received by the Hon’ble Chief Justice of Pakistan, who had ordered for registration of case under Article 184(3) of the Constitution in which proceedings have already been taken. Altaf Hussian, the founder and leader of M.Q.M. also sent a letter dated 6-4-1996 to the President in which he made complaint about “cold-blooded murders of the innocent and helpless Mohajir youths under the facade of police encounters or curbing terrorism”. He mentioned the shocking incident of Muhammad Shakir, who was 18 years old and was arrested on 19-2-1996 around 4-00 a.m. The raiding party was led by S.H.O. Zeeshan Kazmi of New Karachi Police Station, who also arrested Shakir’s brothers, namely, Abdul Wasim and Abdul Nadim and one cousin Muhammad Iqbal during the same raid. Shakir’s mother Mst. Rabia Begum filed Habeas Corpus Petition No.299 of 1996 in the High Court of Sindh for the unlawful arrest of her sons. In spite of the Court order passed on 26-2-1996 to produce the detenus, they were not produced. Zeeshan Kazi demanded Rs.2,00,000 for release of the detenus otherwise they would be killed in fake encounter. Mst. Rabia Begum was unable to pay the money and Zeeshan Kazmi, who had arrested the detenus from the area of Jauharabad Police Station shifted them to New Karachi Police Station. The S.H.O. picked up Shakir from lock-up of New Karachi Police Station, took him to Sharafabad area and extra judicially executed him after inflicting him brutal torture in custody for about one and a half month. It was stated that his cousin Muhammad Iqbal was still in custody of the S.H.O., New Karachi Police Station. He demanded action by the President against Benazir Bhutto, the then Prime Minister, Nasirullah Khan Babar, Interior Minister and S.H.O. Zeeshan Kazmi for committing murder of innocent helpless Mohajirs. A detailed list of extra-judicial executions of six M.Q.M. workers was also provided which included the names of Muhammad Shakir, aged 18 years. Shahid Iqbal aged 23 years, Kaleem aged 18 years, Muhammad Aslam, aged 20 years, Hafeez Ahmed aged 27 years and Syed Anwar Ali aged 25 years. All of them were arrested or kidnapped by the police, Rangers/Agencies and were killed after torture. Full particulars of these persons and places of arrest have also been mentioned. A list dated 22-4-1996 consisting of the names of the deceased, 26 in number, giving the date of killing, has also been provided, who are alleged to have been killed in police custody or police encounter or in judicial custody for which judicial inquiry had been ordered. This list was handed over to J.S.P. in a meeting held in Secretariat ‘S’ Block under the State Minister for Law and Justice. In about 10 cases police had been exonerated. In one case on the recommendation of the Inquiry Officer, explanation was called for from Inspector Muhammad Anwar, which was found to be sati§factory. In most of the cases inquiry depended on the evidence of the police officials. Only in one case of Muhammad Tahir recommendation was made to register cases against the police officials. In case of Tariq Taimur, no poisonous substance was found in the Chemical Examiner’s Report. death had occurred due to vomiting secondary to injuries. The note at the foot of the list reads as follows:-

“NOTE

There are also three high profile cases:-

(i)         Farooq Patni alias Farooq Dada and his three accomplices killed in police encounter on 2-8-1995;

(ii)        Fahim Farooqi @ Fahim Commando and his 2 accomplices, viz. Syed Zeeshan Hyder Abidi @ Shahani, and Yusif Rehman @ Rizwan were killed in police encounter on 10-10-1995;

For them no judicial inquiry was ordered. “

Similar list was also provided by the Government of Sindh regarding the position in Hyderabad in which names of three persons were given. In two cases inquiry was pending while in the third one it had been completed and case had been registered against the police officials and charge-sheeted before the trial Court. The case is pending. There are regular reports giving summary of major terrorist/criminal events in Karachi Division and interior of Sindh, which were sent to the Interior Minister directly and also to the G.S. (Int.) Branch, G.H.Q.. From these reports, two facts are clearly established: that there have been killings allegedly during police encounters, which were challenged publicly alleging to be false and were nothing but extra judicial killing - modus operandi being to arrest the victims, keep them in different police stations without registering case against them and then publish report that those persons have been killed in encounter with the police; and secondly that such operation was supervised and monitored by the Interior Minister and Mohtrama Benazir Bhutto, the then Prime Minister to whom regular reports were sent. The

incidents in respect of these persons were found in the newspaper clippings, press reports and monthly or weekly or by weekly magazines, which were regularly or specially covering such events.

15. There is enough relevant material on record which by any standard of admissibility. and proof can be taken into consideration which proves that extra judicial killing was indiscriminately carried on, in some of the cases inquiry was held and police was held responsible and their story of encounter had turned out to be false and fake. In the petition it has been pleaded that the complaints regarding extra judicial killings would have been valid if the Federal Government would have indeed done so. It also states that 2000 policemen were sacked for extra-judicial killings. From these two admissions in the pleading it turns out that if the Federal Government is involved in such extra judicial killing, then it cannot shirk its responsibility even though the subject may be the responsibility of a Province. Secondly, the fact that action was taken against 2000 policemen clearly shows that there was excess of a high magnitude, which compelled the authorities to take an extraordinary action. This also speaks of the general nature of police excesses carried on at the behest of Government officials. It is, therefore, to be seen whether the Federal Government was involved in this action or not. Earlier it has been observed that the Prime Minister and Ministry of Interior were monitoring and receiving information regularly and passing orders about the operation, killing and torture in Sindh. The learned counsel for the respondents has referred to following documents to show that the Federal Government was directly involved in it:-

(a)        Notification issued by the Government of Pakistan, Ministry of Interior and Narcotics Control dated 22-2-1995 according to which the Headquarters Pakistan, Rangers, Sindh (South), Karachi constituted under the Pakistan Rangers Ordinance, 1959 has been declared as an attached department of the Federal Government under the Interior Ministry.

(b)        Notification dated 17-5-1995 issued by the Government of Sindh and copy endorsed to the Secretary,, Ministry of Interior, which assigns specific role to the Pakistan Rangers (Sindh) and its component units. Relevant portions are reproduced here:--

‘(v) Specifically for Karachi, Pakistan Rangers (Sindh) will remain available as a back-up reserve to be deployed in sizeable numbers in case of large scale disorder and rioting. The Rangers will function in support of the Police and prepare to take over certain areas where the situation warrants presence of a well trained strike force.

(vi) In Karachi, some of the pickets on rooftops and on ground will be taken over by this Force. Even certain areas can be allocated in the Pakistan Rangers for this purpose.

(vii) The Force will have its own independent intelligence network and un-specific operations. However, in order to cover the procedural and legal formalities, they will invariably be accompanied by a Police officer of the Local Police Station or a Magistrate..

(c)        Letter dated 24-6-1996 from the Home Secretary, Government of Sindh, addressed to the Secretary, Interior Division, Government of Pakistan, which states that the “Law and order situation in Sindh has improved, but the Government of Sindh has decided to continue to entrust part of the responsibilities for the maintenance of public peace and security to the officers of the Federal Government (Pakistan Rangers) under Article 177 of the Constitution and section 131-A of the  Cr.P.C., 1898 for an additional period of 12 months”. It further states as follows:-7.

“Details of the functions of Pakistan Rangers will be worked out mutually by the officers of the Federal and the Provincial Government and the mechanics and modalities of the performance of such functions shall be worked out with the consent of the Provincial Government of Sindh. “

(d)        Notification issued by the Government of Pakistan, Ministry of Interior dated 20-7-1995, copy endorsed to the Home Secretary, Government of Sindh, which reads as follows:-

‘S.R.O. 451. In .exercise of the powers conferred by section 10 of the Pakistan Rangers Ordinance, 1959 (West Pakistan Ordinance No.XIV of 1959 and in supersession of Notification No.SRO 545(1)92, dated 21st May, 1992, the Federal Government is pleased to confer and impose the powers and duties of Police Officers with regard to arrest and search of any person(s) provided for in Chapter V of Code of criminal Procedure, 1898 (Act V of 1898), or any, other law for the time being in force on every member of Pakistan Rangers Sindh whenever called for duty or to reinforce the Police and Civil Administration for the maintenance of law and order throughout the Province of Sindh.

(Sd.)

MAHER SHER MUHAMMAD,

            SECTION OFFICER”

(e)        Cabinet decision dated 27-7-1995, which reads as follows:--

“(viii) The Cabinet placed on record its appreciation of the excellent work done by the Rangers and Police in coping with the law and order situation in Karachi.

A copy was forwarded to the Joint Secretary, Interior Division .

(f) A directive issued by the Prime Minister’s Secretariat informing about the direction issued by the competent Authority i.e. The Prime Minister, relevant portion of which is reproduced below:-

(ii) Lists may be obtained by the Ministry of Interior of terrorists/criminals arrested in the Army crackdown and bailed out by the Sindh High Court. Since it has been desired that they should be rearrested the Ministry of Interior in coordination with the Sindh Government should take necessary action in this regard.

……………………………

(viii) Ministry of Interior should direct D.G. Pakistan Rangers (Sindh) to constitute special arrest teams.

2. In view of the above immediate necessary action may be taken and a report in this regard be sent to this Secretariat by 28th February, 1995, for information of the Prime Minister. “

It is dated 24-2-1995 and copy was endorsed to the Secretary Interior.

These official documents prove that the situation at Karachi and operation through the Rangers and the police of Sindh which resulted in extrajudicial killings and torture was monitored, operated and examined by the Federal Government. Therefore, all actions done, taken or suffered would be at the responsibility of the Federal Government as well. The Provincial Government was equally a party to all such actions in implementing the directions.

16. This leads us to the question whether in the wake of such illegal and unconstitutional acts, the Government could be said to be carried on in accordance with the provisions of the Constitution. The Constitution guarantees Fundamental Rights, which are inviolable. Under Article 9 every person in Pakistan is guaranteed a “right to life” and he cannot be deprived of life and liberty except in accordance with law. Thus, it is a sacred right, which cannot be violated, discriminated or abused by any authority. The concept of life as used in the Constitution was considered by me in Shehla Zia v. WAPDA (PLD 1994 SC 693) where I had observed as follows:-

“The word ‘life’ is very significant as it covers all facets of human existence. The word ‘life’ has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.”

It was further observed:-

“The Constitutional Law in America provides an extensive and wide meaning to the word ‘life’ which includes all such rights which are necessary and essential for leading a free, proper, comfortable and clean life. The requirement of acquiring knowledge, to establish home, the freedoms as contemplated by the Constitution, the personal rights and their enjoyment are nothing but part of life. A person is entitled to enjoy his personal rights and to be protected from encroachments on such personal rights, freedom and liberties. Any action taken which may create hazards of life will be encroaching upon the personal rights of a citizen to enjoy the life according to law. “

In Employees of the Pakistan Law Commission v. Ministry of Works 1994 SCMR 1548 it was observed:-

“It is thus clear that Article 9 of the Constitution which guarantees life and liberty according to law is not to be construed in a restricted and pedantic manner. Life has a larger concept which includes the right of enjoyment of life, maintaining adequate level of living for full enjoyment of freedom and rights.”

The object of guaranteeing Fundamental Rights and providing for their enforcement under Article 184(3) is intended to promote social, economic and cultural conditions, which promote life, liberty and dignity. The right to life, therefore, not only guarantees genuine freedom, but freedom from wants, illiteracy, ignorance, poverty and above all freedom from arbitrary restraint from authority. The right to life includes the right of personal security and safety, the right to have clean and lawful administration, the right to have honest and incorruptible actions by the authorities. - All Government authorities, civil, military or paramilitary are bound by the Constitution to enforce, respect and protect such rights and do not have the authority, power or right to destroy it, trample it or make a mockery of such right. All persons who are found responsible for such actions and violations must suffer prosecution and should be brought to book according to law. The right to life includes the right to live with respect, honour and dignity. Even a person, who violates any law, has the right to be treated and dealt with according to law. If a person is denied the right to life, then all rights which emanate from being a living human being also vanish. In a State where extra judicial killings are made at the orders of the Government at the helm of affairs, it cannot be treated as Constitutional, legal or civilized. The evidence and instances are so enormous that the President was justified in forming the opinion after being satisfied that the Government cannot be carried on and is not being carried on according to the provisions of the Constitution. Such extra-judicial killings, seizure and search not only violate the right to life, but impinge on the dignity of man and privacy of home as conferred by Article 14 of the Constitution. Such actions also violate Article 25 as the victims being citizens of Pakistan cannot be discriminated and have to be treated according to law and given equal protection of law.

16. The learned counsel for the petitioner has contended that there was no evidence or material before the President for satisfying himself about the extra judicial killings, custodial deaths, arrest and torture. According to the learned counsel the documents relied upon are inadmissible in evidence and cannot be made basis for forming opinion under Article 58(2)(b). The petitioner in her rejoinder has given 17 categories of documents and one category was added during arguments contending that in view of Haji Muhammad Saifullah PLD 1989 SC 166 and Mian Muhammad Nawaz Sharif PLD 1993 SC 473 they should be disregarded and discarded. In this regard it should be noted that while considering this aspect of the case one has to distinguish between material and evidence produced in Court. Article 58(2)(b) requires the President first to form his opinion that the Government cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. This Article does not provide whether the basis for forming such opinion should be evidence as required in a Court of Law or material having nexus with the reasons mentioned in the Dissolution Order, sufficient to form an opinion. In almost all the preceding judgments interpreting Article 58(2)(b) the consensus seems to be that there should be sufficient material available to the President before forming the opinion. In none of the cases this Court has required, proved evidence according to the Qanun-e-Shahadat or repealed Evidence Act to be the basis for forming opinion by the President. It, therefore, does not require the standard of proof of evidence as required during a trial in the Court of Law. It is significant that all the judgments of this Court and the High Courts have ruled that there should be material having nexus with Article 58(2)(b) sufficient to satisfy the President before forming the opinion. This does not mean that the material relied upon be vague, irrelevant, false, forged, concocted or which did not exist at the time of forming opinion. The material should be trustworthy prima facie authentic relating to the incidents, events and happenings relied or referred on the basis of which a person of ordinary prudence, intellect and knowledge is able to form the same opinion. As most of the material produced includes newspaper clippings, magazines and published articles, it is to be considered how far they can be taken into consideration for forming opinion. The learned counsel for the petitioner has referred to Mian Muhammad Nawaz Sharif PLD 1993 SC 473 at 657 where Saad Saood Jan, J. observed:-

“Ground (d) contains allegations of maladministration, 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 subject to (of) 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.”

Ajmal Mian, J. while dealing with the charge of harassment against the opponents of the Government, political and personal rivals, relatives and mediamen in support of which copies of personal complaints and certain news items were produced, observed:-- .

“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.”

Further while considering the charge of not taking the Cabinet in confidence before issuing Ordinances and in matters of policy although particulars of such Ordinances and policy’matters were not enumerated it was observed, “but from the newspapers clippings it appears that one or two Ministers who had resigned, had raised grievance to the effect that there was a kitchen cabinet for attending the important matters and they were not consulted”. This shows that press clippings were considered. In this judgment, Shaflur Rehman, J. referring to the extensive material filed by the petitioner of the period antecedent to the impugned action has mentioned all those documents which were placed on record. They include correspondence, judgments, extracts from World Bank reports, comparative statement of References and Sale Prices, List of Cement Plants with buyers’ names, analysis and evaluation of deficit financing, comments on President’s Speech, press clipping from March, 1993 to May, 1993 on economic progress and investment and on the basis of it foreign investment,. press clippings showing the active role of the Presidency in obtaining resignations from the Ministers and M.P.As. thereby politically destabilizing the Government, press release, press clippings of the Advice and guidance afforded by the President to the Prime Minister for running the Government, harassment of journalists, sedition case against “The News”, complaints and press clippings relating thereto, press clippings reproducing the

complaint of the widow of late Gen. Asif Nawaz, press clippings showing how frequently between October, 1992 and March, 1993 the National Assembly could not function for want of quorum, press clippings regarding newspapers comments and comments of opposition leaders with regard to 12th Amendment and the victimization of the opposition, list of 12 cases of the President’s observation on irregularities/lapses on the part of the Federal Government, press clippings with regard to 8th Amendment, privatization and other complaints, press clippings mostly of persons opposed to the Prime Minister, charge-sheet prepared by the Opposition against the Government, complaints of harassment of journalists, press clippings about the performance of Government during 1991-93 etc. From this short list of documents it is obvious that press clippings, magazines, comments published in newspapers were considered, accepted, examined and taken note of and not excluded from consideration. Muhammad Afzal Lone, J. referring to the large number of clippings observed as follows:-

“From these Press clippings an inference was justifiably sought to be drawn by the learned counsel that the respondent 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. It was specifically urged that the Pakistan Muslim League 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 counterblast. “

Sajjad Ali Shah, J. (as he then was) while considering the charge of maladministration, corruption and nepotism considered all the documents filed in Court including the press clippings, news items, articles and reports and held that there were sufficient materials in support of this ground of dissolution. No exception was taken to exclude press clippings and magazines produced by the parties. Saiduzzaman Siddiqui, J. expressed his opinion as follows:-

“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 press 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.”

From the aforestated analysis it is clear that Ajmal Mian, J. before whom press clippings in respect of a particular charge were not even referred, refused to rely upon them but did not observe that as a\_ rule press clippings, magazines and published news items should in all cases be excluded from consideration. In fact while dealing with the other charge, he relied on press clippings. The consensus is that such documents could be considered without requiring strict proof as required by the Law of Evidence applicable to trial of cases. The authentic and’ uncontradicted news items published in the newspapers or magazines of contemporaneous events can form basis for drawing inferences and have been accepted as material for forming opinion.

17. The next ground relates to assassination of Mir Murtaza Bhutto in 20-9-1996. It has been stated that the petitioner appeared on television insinuating that the President and other State agencies were involved in the conspiracy leading to the assassination. This was repeated several times and Army was also maligned. However, as the matter is sub judice and the Criminal Court has taken cognizance of the matter and Inquiry Commission headed by a Judge of the Supreme Court having two member Judges of the High Court is proceeding with it, it will not be appropriate to deal with it or to make any observations on it.

18. The third ground is that the Prime Minister ridiculed the judgment of 20th March, 1996 passed by the Supreme Court in a speech before the National Assembly, which was shown more than once on nationwide television. The implementation of the judgment was resisted and deliberately delayed in violation of the Constitutional mandate and the directions of the Supreme Court with regard to the regularization and removal of High Court Judges were finally implemented on 30-9-1996 with a deliberate delay of six months and 10 days and only after the President informed the Prime Minister that if advice was not submitted in accordance with the judgment by the end of September, then the President himself would proceed further in the matter to fulfil his Constitutional obligation. The petitioner in her petition has denied the allegation of having ridiculed the judgment. It was pleaded that whatever she said was in the nature of comment on the judgment and the learned authors of the judgment were themselves broadminded enough not to take action upon any statement made by the petitioner and how could the President do so. It was also pleaded that without prejudice a speech made by a Prime Minister in a forum that has elected her, the President cannot form basis of dissolution of the entire Assembly. It is pleaded that even otherwise the speeches in Parliament are matters of internal complaint in the House and no complaint or grievance can be made with respect to them. A chart has been given showing in what manner the Federal Government implemented the judgment, the last date of implementation being 30-9-1996. It was also pleaded that the Government had filed review petition, but the fact remains that it was subsequently withdrawn. It was also pleaded that besides the learned Chief Justices, the Governors of the respective Provinces were also Constitutional consultees. They had to give their opinion also and although they were advised on or about 10-7-1996 to expedite their consideration, they were in a quandary. A dispute had been raised by some of the affected Judges concerning the observations of the learned Chief Justices of the High Courts with respect to allegations/insinuations of corruption and/or the findings of the number of years that some had practised in the High Courts. The Governors felt themselves obliged to give definite opinions as these were serious matters affecting the reputation and character of those concerned. It was pleaded that these pre-occupations may have led to some delay, but it cannot be said to have been unjustified. Reference has also been made to the correspondence between the Hon’ble Chief Justice and the President, who sought and obtained the views of the Prime Minister and then transmitted these to the Chief Justice. It was also pleaded that there were other issues not specifically dealt with in the judgment and required resolution. These included the mode of resignation/termination of the affected’ Judges after scrutiny, the retrospective appointment of two Judges, the appointments of the Provincial Chief Justices, particularly of Mr. Justice Nasir Aslam Zahid to the Supreme Court or the High Court.

19. The respondents in their written statement have denied the averments made in the pleadings that the decision in the Judges’ case had been implemented and could not form basis for the Dissolution Order. It was pleaded that instead of speedily obeying the orders of the Court and implementing the judgment, the petitioner’s Government used every trick in the book to delay, hinder, obstruct and impede the implementation of the judgment. The decision left no room for doubt as to who had to be appointed Chief Justice, yet several weeks passed before appointments were made. Thereafter, the Chief Justice of Pakistan and the Chief Justices made recommendations as to who among the Additional Judges in the High Courts were to be confirmed. However, for weeks and months on ends, no action was taken by the petitioner’s Government on one pretext or the other. These included the filing of review petition and reference on frivolous grounds. Finally the Chief Justices were compelled to take action and it was decided that all those persons not recommended for confirmation would not be assigned any work. Still the petitioner’s Government remained unmoved. The result of the Government’s failure was that several persons continued to draw salaries from the public exchequer and enjoyed all the personal emoluments of superior Courts Judges without doing any work at all. Finally the President was impelled to take action and informed the petitioner that in case her Government did not take action, he would be forced to act on his own. This brought about result overnight and necessary notifications were issued.

20. The learned counsel for the petitioner contended that as the implementation had been completed by 30-9-1996, there was no ground for dissolution on this basis. He further contended that similar charge ‘was levelled against the petitioner when her Government was dismissed in the year 1990, but the High Court overlooked the charges and did not propose to take any action for ridiculing the judiciary. He referred to Khalid Malik’s case PLD 1991 Kar. 1 in which while taking note of this fact, it was observed that the Judges had shown grace and did not take any action, but it does not mean that if once it is overlooked, it should always be overlooked. To ridicule the judiciary in any manner exhibits the greatest disrespect to an Institution which is a pillar in the State management and is a Constitutional organ with powers conferred on it particularly to preserve, protect and defend the Constitution. It also interprets the Constitution and the law and can declare a law void and actions taken by the executive and in certain cases by the Legislature to be without jurisdiction and of no legal effect. From the facts stated in the petition and the written statement filed by the parties, it is clear that judgment dated 20-3-1996 had in clear terms spelt out the manner in which the Judges were to be appointed in the superior Courts. There was no ambiguity and to say so that certain points required consideration is nothing but a subterfuge to camouflage the real controversy. The petitioner’s conduct in the National Assembly by making speech, which was repeatedly telecast on the national media, was derogatory and she ridiculed the entire judiciary. Sometimes when any speech is televised the words may not be offensive, but the tenor, the tone and gesture of the speaker makes it more objectionable. It did not behove of any person muchless the Prime Minister of the country to ridicule the institution of judiciary, which is the custodian of law and saviour of the people’s rights. All the institutions of the State, be it Legislature, Executive or the Judiciary, deserve full respect and cannot be ridiculed publicly or privately. The question that the judgment had been implemented though late creates serious objection why the judgment was not implemented within the time fixed by the Court. There was a dead-lock in the judiciary. Every organ of the State is bound to assist and obey the order of the Courts. If it wants any clarification about any ambiguity or is aggrieved by it, the law provides a course for it, which should be adopted. A judgment cannot be publicly ridiculed nor can anybody under the garb of fair comment criticise a judgment to degrade the judiciary and Judges in the eyes of public. Any person ridiculing the judgment, or judiciary making disparaging remarks about the Judges and their conduct in Court could be hauled up for contempt of Court. However, the elected representatives of the Houses have more burden to share because under the Constitution Article 63 clearly provides that any person if he propagates any opinion or acts in any manner prejudicial to the integrity or independence of the judiciary of Pakistan, shall be disqualified from being elected, chosen as and from being a member of the Majlis-e-Shoora (Parliament). Any person who has ridiculed the judiciary would be disqualified even from seeking election to any of the Houses or being a member of a House. In the petition reference has been made about the appointment of Mr. Justice Nasir Aslam Zahid to the Supreme Court or the High Court to show that there were some lacunae in the judgment which had caused delay. This was clearly a misconception and deliberate attempt to delay the implementation. Mr. Justice Nasir Aslam Zahid had wrongly and unconstitutionally been made a Judge of the Federal Shariat Court at a time when he was Chief Justice of the High Court of Sindh. After the judgment he was to be reinstated as Chief Justice of Sindh, but notification was issued for his appointment in the Supreme Court and not as Chief Justice of the High Court of Sindh. It was timely intervention by the Hon’ble Chief Justice and the President, without creating any precedent for future and to save the situation which was deliberately created by the petitioner that they agreed Mr. Justice Nasir Aslant Zahid to be appointed as Judge of the Supreme Court. This clearly shows in what manner and how persistently attempts were made to refuse, retard and delay the implementation of the judgment dated 20-3-1996.

21. The learned counsel for the respondents pointed out that a bill for amendment of the Constitution was introduced without informing the President regarding accountability in which provisions were made in respect of the Judges of the superior Courts. According to section 15 of the Bill which provided for impeachment of the Judges of the Superior Courts, if 15 per cent. of the total membership of the National Assembly make a reference against a Judge for his removal, he would immediately proceed on leave and shall remain on leave till the disposal of the motion. By this manner 32 members could control the destiny of a Judge. Although the petitioner did not have sufficient strength in the House for carrying the bill, yet such a provision at that particular time when the relations with the judiciary were not cordial, was made with the obvious intention to harass the judiciary, to create fright amongst the Judges and to demoralise them in discharge of their official functions. The learned counsel for the petitioner contended that it was merely a bill which was moved and the same could have been amended or may not have been passed, but the fact remains that the introduction of the Bill at such a crucial time merely exhibits the motive for introducing such a Bill. It could not seriously have been intended to be passed because there was no possibility for such an event. It was not even brought to the notice of the President as required by Article 46. The Bill was also approved by the Cabinet and copy was not sent to the President. It was not circulated amongst the members as the Bill was to be placed before the National Assembly the same day. What was the hurry for introducing this Bill at such a juncture. It speaks volumes of mala fide intention which one can draw. We can take judicial notice of the fact that during proceedings of Judges’ case and even thereafter, Judges and their families were harassed. It is a matter of record which the newspapers have carried in bold letters. I do not want to burden the record by giving those instances, but this reference is sufficient in this regard. In our view there was sufficient material on record with regard to judiciary that the President I in order to save the violation of the Constitution and to save the damage which was being caused to the judiciary as an institution discovered the National Assembly and dismissed the Government. In this regard it may also be stated that the judgment passed earlier with regard to separation of judiciary from the executive has also not been implemented in letter and spirit Ordinances were issued in which the Executive Magistrates have been given powers to try cases in which sentences do not exceed three years. It has been made clear time and again in several judgments of this Court that after the separation of judiciary from the executive, the executive authority or the Executive Magistrates cannot try, adjudicate or pass any sentence against any person. Such act would be coram non judice. The executive authorities can pass such sentence or order only if they are properly authorised under law by the High Court concerned.

22, We now take up the sixth ground of the Dissolution Order which reads as follows:-

“And whereas the Prime Minister and her Government have deliberately violated, on a massive scale the fundamental right of privacy guaranteed by Article 14 of the Constitution. This has been done through illegal phone-tapping and eaves-dropping techniques. The phones which have been tapped and the conversations that have been monitored in this unconstitutional manner includes the phones and conversation of Judges of the superior Courts, leaders of political parties and high-ranking military and civil officers.”

The petitioner denied the charge stating that she “never authorised any phonetapping”. The petitioner pleaded that she herself and all her Ministers and Secretaries, were victims of phone-tapping and complaint was made to the Secretary, Communication and Defence Secretary requiring investigation. The Ministry of Communications had placed order for a 300 lines tapping proof exchange for Constitutional functionaries of the State and the Armed Forces. On few occasions she had complained to the President as well. In the written statement filed by the respondents, it has been pleaded that illegal activities like phone-tapping and eaves-dropping were being carried on systematically and on a large scale. It was done by the Intelligence Bureau (IB) which works directly under the Prime Minister. It was denied that the phone-tapping and eavesdropping was not authorised by the petitioner. It has been pleaded that if at all, phones ought only to be tapped if questions of national security are involved but it seems that the petitioner regarded the Supreme Court as a grave risk to. the security of Pakistan. Several times a week, and sometimes daily, transcriptions of those recorded conversations in which the petitioner had a special interest for any reason, were delivered by the IB operatives to the Prime Minister in a sealed envelope. It has further been pleaded that “the sheer magnitude of the phone tapping involved is staggering. For example, in the case of Judges, not only were the telephone numbers at the Judges rest houses in Islamabad and Murree under surveillance, but several important personalities were also subjected to eaves-dropping. Bugs were planted in the Chamber of the Hon’ble Chief Justice and in the Judges rest house. Apart from the judiciary the office and residence of Mr. Wasim Sajjad, Chairman Senate was also bugged. Other persons under surveillance were Mr. Hamid Nasir Chatha whose room in the Punjab House was bugged. Besides this telephones of Justice Mir Hazar Khan Khoso, Maulana Fazalur Rahman, Malik Meraj Khalid, Syed Yousuf Raza Gillani, Syed Zaffar Ali Shah, Ghulam Mustafa .Jatoi, Mir Zafarullah Khan Jamali, Gohar Ayub, Porf. Khurshid Ahmed and many other M.N.As. and Senators and officers were also tapped. The code names were given, viz..for Judges Blind Man (BM), Mr. Wasim Sajjad, Wiseman, Maulana Fazalur Rahman, Wolf, Mian Nawaz Sharif, Guest, Raja Nadir Parvez, Panther. ,

23. From the pleading it is clear that the charge of phone-tapping and eaves-dropping has not been categorically denied, but it has been pleaded that the petitioner is also a victim of the same in respect of which she had complained even to the President. It means that though phone-tapping and eavesdropping were objectionable, immoral and unconstitutional and illegal acts of the concerned authorities of which the President was made aware, continued unhindered. There is no dispute that the entire exercise was carried out by the IB working directly under the Prime Minister. It was as far back as the year 1950 when Rules of Business (1950) were framed under Government of India Act, 1935. Item 14 of Schedule II of the Rules related to the functions of IB and joint cypher Bureau. In the Rules of Business of 1973 framed under the Constitution of 1973, IB has been shown at Item No. 14 of the Schedule II of the Rules. Thus, the IB has been working as a Department of. the Government, but it was conferred the status of a Division of the Federal Government by the President as stated in the letter of the Cabinet Secretary dated 26-9-1972. During process in the Human Rights Case No.33 of 1996, our learned brother Saiduzzaman Siddiqui, J. has observed that Maj. (Rtd.) Abdur Rauf Raja, Director Establishment produced a “top secret letter of the Cabinet Secretary dated 16-8-1974 laying down the procedure for phone tapping in exceptional cases.

24. Factually voluminous record exists which shows that such illegal activities were being carried on systematically on a large scale. The transcript of those recorded conservations having special interest of the petitioner were delivered by the officials of IB to her in sealed envelope. During the fag-end of the hearing the learned counsel for the petitioner filed a document purported to be an unattested affidavit of Masud Sharif dated 25-1-1997 who as Director General, IB headed it from 16-6-1994 to 5-11-1996. It has been stated that he was “responsible to  the Government of Pakistan for numerous aspects related to national security” which “warranted close observation of various spheres of national life”. He further stated that in the day-to-day discharge of duties he had to “resort to technical operations (including monitoring) in civilian sphere of our national life”, which were “always ordered by me personally” and were “devoid of any mala fide”.

This is a self-serving statement in which evasive and vague averments have been made. Whatever may be the stand taken by the petitioner or the ex -Director-General, Intelligence Bureau, no authority has been shown which prompted the IB and its officials to tap or carry out eaves-dropping of the telephones, be it of Judges, high-ranking officials, legislators or even -a man from the general public. As none of the officials had the authority to carry out such an act, the entire exercise was in violation of the law and the Constitutional rights guaranteed to the citizens of Pakistan. It violates the privacy of person, be it in home or office and injures the dignity of man as no respectable man would like his telephone or his private talks to be heard muchless in a stealthy and calendestine manner by using electronic devices.

25. Before proceeding to the legal and Constitutional aspects, it is necessary to first ascertain whether the petitioner was at all aware of the tapping and eavesdropping carried on by the IB. The respondents have filed statement of Muhammad Afzal Haq, Director IB, which gives an account how the tapping of telephones was carried out and the transcriptions were given to him and one Muhammad Ashraf Bhatti. he was supposed to convey the verbal instruction of Mr. Muhammad Shabbir Ahmed, JDG-A/T for monitoring and operations to Mr. Sadiq Malik, Deputy Director and Mr. Ghulam Nabi, Inspector of Technical Wing. Mr: Muhammad Sadiq Malik, Deputy Director (TV-III) has stated about the procedure. According to him, important points in the transcript used to be selected and summary was prepared by Mr. Muhammad Sadiq Malik, who was responsible to carry these transcripts to the Prime Minister and bring those back after duly circulating the same to Major (Rtd.) Muhammad Shabbir Ahmed, Ex-JDG(T) and Mr. Masood Sharif Khan, Ex. DGIB. He has been detailed by Mr. Shabbir Ahmed, JDG(T) to prepare summary of telephone tapping/monitoring and for delivery to the Prime Minister’s House. He admitsto have prepared and delivered them to the Prime Minister’s House in the presence of D.M.S. When the said file was seen by the Prime Minister, Sub. Azim used to call him on telephone to collect it and he used to go and collect it. He used to deliver sealed envelopes given to him by Mr. Muhammad Ashraf Bhatti, PS to JDG(T) to the Prime Minister’s House and no receipt was taken at the time when the file was handed over or received back. This statement was made by Muhammad Sadiq Malik on 9-12-1996 while Ghulam Nabi made statement on 10-12-1996 and Muhammad Afzal Haq’s statement is dated 18-11-1996. Mr. Aitzaz Ahsan, the learned counsel contended that these documents were not before the President when he passed .the Order of Dissolution as all of them are dated after 5-11-1996. These documents are statements, which were obtained later in respect of incidents and happenings which occurred before the Dissolution Order was passed. As stated above, from the pleadings it seems clear that the acts of telephone-tapping and eavesdropping were within the knowledge of the petitioner and the President. The IB working directly under the Prime Minister cannot be expected to work in a manner which is not authorised by the Prime Minister or any other responsible officer authorised by the Prime Minister. The statements obtained from the officers of IB at a later date would not discredit the authenticity of the facts stated therein. If the happening of certain incidents or occurrence of a certain act is established and is in the knowledge of the President before the date of dissolution, then in respect of those incidents and occurrences or about their happenings, documents and material can be obtained at a later stage. This will not render the Order or Dissolution as illegal. These documents were not before the President at the time of passing of Dissolution Order, but the fact remains that the incidents and occurrences referred therein did exist before 5-11-1996 and were within the knowledge of the President as well as the petitioner. From these statements a link is established between the petitioner and the illegal and unconstitutional act of tapping phone and eaves-dropping. In this background, the Constitutional and legal aspects which require consideration are of serious nature as they involve violation of the Fundamental Rights guaranteed by the Constitution. The tapping or eaves-dropping of citizens to whatever class, group or status they may belong, is not only an offence under the Telegraph Act, but it also offends against Articles 9 and 14 of the Constitution. Article 14 is directly involved which reads as follows:-

“14.--(1.) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

(2) No person shall be subjected to torture for the purpose of extracting evidence.”

Article 14 guarantees to protect dignity of man and the privacy of home which shall be inviolable subject to law. This provision providing for the dignity of I man as a Fundamental Right, is unparalleled in the Constitution and hardly ‘ Constitutions of few countries provide for it. Dignity of man is not only provided by our Constitution, but according to our history and belief, under Islam great value has been attached to the dignity of man and the privacy of home. If a person intrudes into the privacy of any man, pries on the private life, it injures the dignity of man, it violates the privacy of home, it disturbs the peace and tranquillity of the family and above all it puts such person to serious danger of being blackmailed. Such acts are not permissible under law and if any occasion arises for such operation, then it can be only in cases of defence and national security. This question came up for consideration in Kh. Ahmed Tariq Rahim, v. Federation of Pakistan PLD 1991 Lah. 78 in which M. Mahboob Ahmed, J. (as he then was) observed as follows:-

“Article 14 of the Constitution guarantees that the dignity of a man and, subject to law, the privacy of home, shall be inviolable. This Fundamental Right was flagrantly violated and disregarded by tapping the telephones of highly respectable persons including dignitaries like Chairman of the Senate and Speaker of National Assembly. Even the members of the Government party including the petitioner, who was the Minister for Parliamentary Affairs, were not spared. This act was not only in derogation of the fundamental right but was also violative of what had been ordained by Allah Almighty in Sura A1 Hujurat, Verse 12:

Translation

“O ye believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: And spy not on each other.”

The right to privacy of citizens is not only guaranteed by the Constitution but has its foundations in Qura’nic Injunctions and Islamic traditions. “

26. Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. Here the Constitution guarantees against any attack on life or liberty of a person subject to law. The word ‘life’  has been interpreted in Shehla Zia’s case PLD 1994 SC 693 that it is not restricted to animal life or vegetative life. It carries with it the right to live in a clean atmosphere, a right to live where all Fundamental Rights are guaranteed, a right to have rule of law, a right to have clean and incorruptible administration to govern the country and the right to have protection from encroachment on privacy and liberty. With this definition of the word ‘life’ one would not deter to state that telephone-tapping and eaves-dropping mar the protection afforded and guaranteed to the right to life. It infringes the secrecy and privacy of a man which may ultimately be a source of danger and insecurity. In this way the liberty guaranteed to a person is also invaded, restricted and circumvented. Therefore, if this exercise is to be considered from any angle, be it Constitutional, legal or moral, no justification can be afforded for such reprehensible act by the official or the persons at the helm of governance of the country. History is replete with incidents when on breach of such rights Governments have been toppled. Not too far is the incident of Watergate when the President of America for conducting and interfering with the telephones and communications system of the Opposition had to resign and he was thrown out of office.

27. The list of persons whose telephones were tapped and were under surveillance consists of Judges of the superior Courts including the Chief Justice of Pakistan, Chief Justice of the Federal Shariat Court, Chief Justice of the High Court of Balochistan, Chief Justice and Judges of the High Courts of Lahore and Sindh, rest houses and Chambers of the Judges were all subjected to such illegal act which will make a respectable nation to hang its head in shame. Not only the members of the superior judiciary, but legislators, journalists, members of the opposition and even the Government party members, Government officials and many others who mattered or not in governance of the country were put under surveillance.

28. The tapping and eaves-dropping of the telephones of the Judges of the superior or the subordinate Courts interferes in the discharge of duties and decision of cases, which a Judge is bound to do under law and the Constitution. A bug was planted in the Chambers of the Hon’ble Chief Justice of Pakistan wherever he was, bugs were also planted in the Judges’ rest houses, their privacy in home, Chambers or in the rest houses was all under surveillance by illegal intrusion. It is a matter of common knowledge that the Judges while hearing the cases in a Bench usually discuss the merits and demerits in chambers and in privacy. They also dictate their judgments in their Chambers where no intrusion or interference is allowed. By tapping and bugging the Chambers and homes of the Judges, interference is made in the proper discharge of duties which is wholly destructive of the independence of judiciary and its ability to function as a coordinate branch and pillar of the State.

29. Mr. Khalid Anwar, learned counsel for the respondents has referred to American Jurisprudence, 2nd Edition, Vol. 74 in which it has been stated that it is unlawful to intercept, reveal the existence of and disclose or divulge the contents of, wire or oral communications, unless the interceptor has previously obtained an order of a Court permitting a wiretap or other interception of the communication, or one party has consented to the interception. This rule is a result of interpretation of Fourth Amendment to the, Constitution of the Untied States, which secures the right of a person in his house against “unreasonable search and seizure”. The words “unreasonable search and seizure” have been interpreted to cover interception of the telephone. Relevant passage is reproduced as under:-

“Under acts of Congress and State legislation, it is unlawful to intercept, reveal the existence of, and disclose or divulge the contents of, wire or oral communications, unless the interceptor has previously obtained an order of a Court permitting a wiretap or other interception of the communication, or one party has consented to the interception. A violation of such statutes is a criminal offence, the communication may not be received in evidence, and a civil action for damages may lie. By way of exception, a Federal Statute provides that it shall not be unlawful for an officer, employee, or agent of the F.C.C., in the normal course of his employment and ii? the discharge of monitoring responsibilities exercised by the Commissions in the enforcement of Chapter 5 of title 47 of the United States Code, to intercept a wire communication or oral communication transmitted by radio, or to disclose or use the information thereby obtained. There are also limited exceptions on monitoring of calls by employees of communications common carriers.

The principal basis for striking down State statutes allowing, or for restricting the permissible scope of, wiretaps and electronic eavesdropping on conversations, is the Fourth Amendment to the Constitution of the United States, which provides: ‘The right of the people to. be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oaths or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.’ A wiretap of a conversation over a telephone or an electronic listening device which enables others to overhear oral statements which the speaker intends to be private, constitutes a search and seizure’ of a ‘thing’ under the Amendment.”

It can be observed that the Courts in the Untied States have extended the meaning of “unreasonable search and seizure” to cover telephone-tapping and eaves-dropping, but we have not to go too far to seek such interpretation as our Constitution in clear terms guarantees that the dignity of man and subject to law, the privacy of home, shall be inviolable and further that no person shall be deprived of life or liberty save in accordance with law. One may on strict interpretation of the words “the privacy of home” say that such guarantee is restricted to privacy of home and not office or any other premises outside home. This would be a restricted, illogical and completely out of context interpretation. The Constitution is to be interpreted in a liberal and beneficial manner which may engulf and incorporate the spirit behind , the Constitution and also the Fundamental Rights guaranteed by the Constitution. The dignity of man and privacy of home is inviolable, it does not mean that except in home, his privacy is vulnerable and can be interfered or violated. Home in literal sence will mean a place of abode--a place where a person enjoys personal freedom and feels secure, The emphasis is not on the boundaries of home but the person who enjoys the right wherever he may be. The term ‘home’ connotes meaning of privacy, security and non-interference by outsiders which a person enjoys. According to Ballentine’s Law Dictionary, “in ancient law French, the word (home) also signified a man”. It also defines as “sometimes including not only at place of abode, but also support and maintenance”. We are of the opinion that wider meaning should be given to the word ‘home’. The term ‘privacy of home’ also symbolises the security and privacy of a nature which a person enjoys in his home. The term “privacy of home” cannot be restricted to the privacy in respect of home, the privacy within the four walls of the home. It refers to the privacy, which is sacred and secure like the privacy a person enjoys in his home. Such privacy of home a person is entitled to enjoy wherever he lives or works, inside the premises or in open land. Even the privacy of a person cannot be intruded in public places.

30. The inviolability of privacy is directly linked with the dignity of man. If a man is to preserve his dignity, if he is to live with honour and reputation, his privacy whether in home or outside the home has to be saved from invasion and protected from illegal intrusion. The right conferred under Article 14 is not to any premises, home or office, but to the person, the man/woman wherever he/she may be.

31. Mr. Khalid Anwar has referred to a judgment of the U. S. Supreme Court in Charles Katz v. United States 389 US 347 = 19 L Ed. 2d. 576 = 88 S Ct 507. According to the summary of facts, the petitioner in this case was convicted in the U.S. District Court for the Southern District of California of transmitting wagering information by telephone. During the trial, on defendant’s objection the Government was permitted to lead evidence of his end of telephone conversations, overheard by F.B.I. agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he placed his calls. The Government stressed “the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye - it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than individual in a business office, in a friend’s apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication”.

“The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, Olmstead v. United States 277 US 438, 457, 464, 466, 72 L ed 944, 947, 950, 951, 48 S Ct 564, 66 ALR 376; Goldman v. United States, 316 US 129, 134-136, 86 L ed 1322, 1327,1328, 62 S Ct. 993, for that Amendment was thought to limit only searches and seizures of tangible property. But ‘the premise that property interests control the right of the Government to search and seize has been discredited’. Warden v. Hayden, 387 US 294, 304, 18 L ed 2d 782, 790, 87 S Ct. 1642. Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any ‘technical trespass under ... ...local property law.’ ... ... ‘...Once it is recognized that the Fourth Amendment protects people - and not simply ‘areas’ - against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure’. It was concluded that ‘the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling. The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus, constituted a ‘search and seizure’ within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance. “

32. In a recent judgment of Supreme Court of India in People’s Union for Civil Liberties (PUCL) v. The Union of India and another (1996 (9) SCALE 318) a petition was filed under Article 32 of the Constitution of India, which is equivalent to Article 184(3) of our Constitution by a voluntary organisation, in the wake of the report on “Tapping of politicians phones” by the Central Bureau of Investigation (CBI), which was published in the “Mainstream”, Volume XXIX, dated March 26, 1991, authenticity of which was not challenged. Section 5(2) of the Indian Telegraph Act, 1885 provided that on the occurrence of any public emergency, or in the interest of public safety, the Central Government or a State Government or any Officer specially authorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order. The proviso excluded the applicability in respect of press messages intended to be published in India of correspondents accredited to the Central Government or a State Government. From the provisions of this Act it is clear that such power was to be exercised on the occurrence of a public emergency or in the interest of items mentioned above which include sovereignty and integrity of India and security of the State as well. Section 7 provided for making of rules by the Central Government. The learned Judge observed that the word ‘life’ and the expression “personal liberty” in Article 21 of the Constitution include the right to privacy as part of the right to life. Referring to the judgment of Field, J. in Munn v. Illinois (1877) 94 U.S. 113, 142, and Wolf v. Colorado (1949) 338 US 25 where giving an extended meaning to the word ‘life’ as aforestated it was further observed that “our Constitution does not in terms confer any like Constitutional guarantee. Nevertheless, these extracts would show that an unauthorised intrusion into a person’s home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man - an ultimate essential of ordered liberty, if not of the very concept of civilisation.” It was further observed:-

“An English Common Law maxim asserts that ‘every man’s house is his castle’ and in Semayne’s case (1604) 5 Coke 91, where this was applied, it was stated that ‘the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose’. We are not unmindful of the fact that Semayne’s case was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of ‘personal liberty’ which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

In our view clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no ‘law’ on which the same could be justified it must be struck down as unconstitutional. “

It was finally concluded that right to privacy is a part of the right to life and personal liberty enshrined in Article 21 of the Indian Constitution. Once the facts in a given case constitute privacy, Article 21 is attrapted. The said right cannot be curtailed except according to the procedure established by law. It was also observed that the right to privacy by itself has not been identified under the Constitution. “But the right to hold a telephone conversation in the privacy of one’s home or office without interference can certainly be claimed as “right to privacy”. Conversations on the telephone are often of an intimate and confidential character. Telephone-conversation is a part of modern man’s life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man’s private life. Right to privacy would certainly include telephone conversation in the privacy of ones home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law”.

33. Another aspect of the case in terms of the Constitutional provision cannot be ignored that once any person’s telephone is subjected to eavesdropping, tapping, intrusion or interference of any kind, it interferes with the f right of free speech and expression. Normally a person talking on telephone always presumes that his voice is heard only by the person at the other end of the telephone. The telephonic system itself presumes that except the speaker and the listener no one else can hear the talks from one end to the other. This ensures privacy and freedom of speech and a person in the presence of others may not be able to talk so freely or to express himself without any restriction or hesitation. Therefore, the. tapping and eaves-dropping of telephone also infringes Article 19 which guarantees that every citizen shall have the right to freedom of speech and expression subject to any reasonable restriction imposed by law in the interest of glory of Islam or the ,integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign State, public order, decency or morality or in relation to contempt of Court, commission or incitement of an offence. Restricting to the case of judiciary only, it seems strange how and on what principle the IB could tap, tape or eavesdrop the telephones of the Judges as there is no allegation of their being suspects, anti-State or, anti-social. More amazing is the fact that reports of such tapped conversation were regularly transmitted to the petitioner, which were examined or read by her, but no action was taken against those agencies which clearly prove her direction for and participation in such act which encouraged the IB Authorities to continue such illegal act. In our country, hardly there is any effective law, to check this menace and illegal act of the IB. Section 25 of the Telegraph Act prohibits illegal tapping and eavesdropping, but the punishment is only of three years. No procedure has been laid down for regulating the tapping, taping or eavesdropping of private or official telephones. Mere S.R.Os., official directions, rules or orders of the President, Prime Minister, Ministers, or other members of the executive cannot permit or validate violation of the Constitutional provisions. So long proper law is not legislated in this field which tray protect the violation of Constitutional rights, we direct that in future whenever any telephone is required to be tapped, taped, intruded or eaves-dropping exercise is to be carried on, it should be done with the prior permission of the Supreme Court or by a Commission constituted by the Supreme Court which shall examine each case on its merits. The permission if granted by the Supreme Court, or the Commission as the case may be, shall not exceed a period of six weeks and shall be reviewed immediately on expiry of six weeks. Reverting to the case we find that tapping of telephones and eaves-dropping of any person is reprehensible, immoral, illegal and unconstitutional act which the authorities finding that there is no clear provision to stop it, have indulged in such illegal activities. Our Constitution in clear terms gives guarantee against such violation. Therefore, we declare such acts as unconstitutional and appropriate mode for its regulation should be legislated. Till such time it is duly regulated by any legislative act, we are justified to issue such direction to protect violation of Fundamental Rights. This ground alone was sufficient to dissolve the National Assembly.

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 Constitution and the law had become impossible. Public faith in the integrity and honesty of the Government had disappeared. The members of the Government and the ruling parties were either directly or indirectly involved in such corruption, nepotism and violation of rules. The petitioner in her petition has pleaded that the allegations are vague, misconceived and are denied. In the written statement it has been pleaded that the charge is neither vague nor general nor undefined. The systematic manner in which .the entire Governmental process was undermined and subverted and the nominees of the supporters and advisers of the petitioner were accommodated provides sufficient proof. It was further pleaded that the matters referred to in the seventh ground of the Dissolution Order could not be dealt with through the judicial system because the Courts can only deal with one particular case or situation at a time, but where the violations of law are systematic, widespread and pervasive, where the Government is being run contrary to Constitutional and other applicable provisions, then even the judicial system is rendered helpless. Therefore, only realistic and plausible solution is the one resorted to by the President in terms of Article 58(2)(b). In the written statement, specific instances of corruption have also been given, some of which are mentioned, hereunder.

35. According to the respondents on 9-6-1996 the Sunday Express, a leading weekly newspaper, published a news report concerning the petitioner and her spouse under the banner headlines “Bhutto’s Surrey Retreat”. It was reported that the couple had acquired what was described as a “perfect hideaway”: a L 2.5 million Mansion, known as Rockwood House, standing on a 355-acre estate. It was reported that the property had its own private landing strip, indoor swimming pool and that the security system on the estate was linked directly to Scotland Yard, the United Kingdom’s Premier Police Division. If any alarm sounded at the estate, an “armed response vehicle” would, according to the newspaper, be. despatched at once to the estate.

36. On 16-6-1996, a leading English Daily Dawn reported further details regarding the Surrey property. According to the Dawn, shipments had been flown into England by PIA, inter alia, from Bilawal House and were destined for the Surrey Mansion. These included items such as antique guns and decoration pieces. The Sunday Express also reported that the petitioner’s spouse had applied for permission to build a stud farm on the estate for his polo ponies, which was rejected, by the local authorities have given permission to construct 63 stables on the estate. It was pleaded that overwhelming evidence was available and that even the Federal Interior Minister Gen. Nasirullah Khan Babar was unable to deny that the Prime Minister was the true owner of the Surrey property, which was reported in the Business Recorder of 26-8-1996. The petitioner and her spouse threatened to sue the Sunday Express, and although the newspaper, in effect, invited them to do so, no such action was ever commenced. Further evidence in support of this charge mentioned in the written statement is that on 22-4-1996 the Deputy Chief of Protocol in the Ministry of Foreign Affairs faxed a message from the Ministry’s Karachi Office to the Managing Director, PIA informing him that “personal luggage/effects” were to be sent from the “Prime Minster House (Bilawal House”) to Pakistan’s High Commission in London. The effects were in 8 big packages and the Managing Director of PIA was asked to depute someone to take charge of the effects for shipment. A copy of the fax was sent to the Naval Headquarters requesting Navy to arrange for the transportation of the effects from Bilawal House to the airport. On 24-4-1996 the Deputy Chief of Protocol faxed a message to Pakistan’s High Commissioner in Great Britain informing him that, “under instructions of Prime Minister House” 8 heavy cartons were being despatched by a PIA flight to London, leaving Pakistan on 28-4-1996. The High Commissioner was requested to ensure safe takeover at London for further necessary action. Mr. Wajid Shamsul Hasan, the High Commissioner was the consignee while consignor was shown as Bilawal House. The cargo of 8 cartons containing 45 separate items was sent under Airway Bill No. 214-0163512. On. arrival of the cargo on 28-4-1996 a declaration for the release of the cargo was entered the same day with British Customs Authorities by the Pakistan’s High Commission. According to the declaration the cargo, described as 8 pieces of household effects, weighing 3450 kgs. was for the personal use of the High Commissioner. On 2-5-1996 Mr.Wajid Shamsul Hasan addressed a letter to the Cargo Manager, PIA, London authorising one Mr. Paul to collect on behalf of the High Commissioner the personal effects which had arrived at London under Airway Bill No.214-0163512. It was released on Mr. Paul on or about 2-5-1996 giving Mr. Paul’s Surname P. Keating. By another Airway Bill No.214-01629736 further 13 cartons weighing 5410 kgs. were shipped to London from Lahore via PIA by one Saroosh Yaqoob Mehdi. The consignee of the cargo was also Mr. Paul whose address on the airway bill was shown as “15-Grove, Luton, Bedfordshire, London U.K.”. This Cargo was again described as personal effects.

37. The interior design work at Rockwood House was at least in part assigned to a company called Townsends. These contractors from time to time sent various invoices for the work done to a company doing such work, called Grantbridge, whose address was shown on the invoices. According to the report of Companies House, London, there are two companies, one is Grantbridge Ltd. and the other is Grantbridge Constructors Ltd. The registered address of the Grantbridge is the same as shown on the invoice issued by PIA in respect of Rockwood House. Both these companies have a common directorship and one of the directors is Mr. Paul whose address is shown in the corporate record as “15, Grove Road, Luton, Bedfordshire”. The same address appears on Airway Bill No.214-01629736 of which Mr. Paul was the consignee and was despatched from Lahore. It was also pleaded that both the shipments were received by the same person and all the cartons were declared to have contained personal effects, which show .a direct link between the petitioner and her spouse with the entire transaction. It has further been pleaded that telephonic record clearly shows calls being made from Rockwood House to telephone numbers being used by, among others, Mr. Asif Ali Zardari and Mr. Javaid Pasha, one of his closest aides and cronies, which establishes interest/link between the petitioner and her spouse and Rockwood House. These facts create the impression that in purchase and owning or acquiring Rockwood House the petitioner and her husband are involved and therefore it has been pleaded by the respondents that the question arises: how such valuable and costly property can be purchased by the petitioner and her husband who cannot explain the income for such expenditure? It has further been pleaded that likewise the petitioner’s father-in-law has also purchased property in France for a total value of French Franc 6 million. The disclosed wealth of the petitioner, her husband and father-in-law, according to the respondents, does not justify and does not even remotely allow for purchase of such property abroad. The pleading concludes that the possible answer is that like Rockwood Estate, the properties of Hakim Ali Zardari were also purchased on the basis of sources acquired illegally and through gross misuse of power.

38. Another instance is that by means of Pakistan Bait-ul-Mal Act, 1991, a fund known as the Bait-ul-Mal has been created for the purpose inter alia to provide financial assistance to the destitute and needy widows, orphans, invalid, infirm and other needy persons. On or about 24-3-1994, the Interior Minister, Maj.-Gen. (Retd.) Nasirullah Babar, one of the most powerful Cabinet Ministers and one very close to the petitioner and her spouse, wrote a secret letter to the Chairman (Ameen) of the Bait-ul-Mal demanding the release of Rs.10 million ostensibly for the relief of 4000 Bugti tribesmen allegedly displaced by reason of political persecution. A similar letter was also received by the Chairman (Ameen) from the Deputy Secretary, Social Welfare and Special Education Division, Government of Pakistan directing the Bait-ul-Mal to comply with the orders of the petitioner to provide assistance to the tribesmen in terms as aforesaid. Thereafter, a short notice meeting was called in the Prime Minister’s Secretariat on 3-4-1994. The meeting was presided over by Mr.Ahmed Sadiq, who was serving the petitioner as her Principal Secretary. The meeting urged the Chairman (Ameen) to provide the promised relief of Rs.10 million and to make a plea before the Board of Management of the Bait-ul-Mal to relax its procedure and provide a further amount of Rs.10 million. On 4-4-1996 cheque No.39, drawn on the State Bank of Pakistan, was issued by the Bait-ul-Mal for a sum of Rs.10 million. The cheque was issued in the personal name of the Interior Minister, i.e. Naseerullah Babar. It was despatched the same day to the Interior Minister and receipt thereof was duly acknowledged on 6-4-1996. It was encashed the same day. On the same day, a “Secret/Most Immediate” letter was also received by the Bait-ul-Mal from the Prime Minister’s Secretariat confirming that the Bait-ul-Mal had agreed to the immediate release of Rs.10 million and that Rs.10 million would be released after the approval of the Board

39. On 13-4-1996, the Chairman (Ameen) of the Bait-ul-Mal wrote to the Secretary, Special Education and Social Welfare Division, Government of Pakistan, informing him that the case of further instalment i.e. The next Rs.10 million would come up before the next Board of Management meeting scheduled to be held on 16th or 17th of April. The meeting of the Board duly rubber stamped the decision already taken, and because of the urgent nature of the case and with the blessing of the Chairman (Ameen), a second cheque.No.43 dated 24-4-1996 drawn on the State Bank of Pakistan for Rs.10 million was also issued in the personal name of the Interior Minister. Thereafter, the Bait-ul-Mal received evidence purporting to show that the ids released had been disbursed to Bugti tribesmen. The statement produced consisted of lists of thousands of names of alleged recipients alongwith the following information: the father’s/husband’s name; in some cases, the Identity Card number of the recipient, the amount received and, most significantly, the thumb-impression of the recipient. Most of the alleged recipients were shown as not having any identity cards. However, far more significantly, an examination by technical experts has revealed that in most of the cases, the thumb-impressions are all of one person. For example, in one case 325 thumb-impressions are all of one person, which means that Rs.16.25 lac were received by one person. In another, 265 thumb-impressions are of the same person meaning that the person concerned received Rs.13.25 lac. In a third, 118 thumb-impressions are the same and the person who affixed his thumb-impression re ceived Rs.5.9 lac. In a forthcase, 114 thumb-impressions are identical indicating that the person received Rs.5.7 lac. In yet another case, 80 thumb-impressions are all identical and this person, thus, received Rs.4.0 lac. In other words, it is obvious that the lists of alleged recipients are bogus and have been created and concocted for the express purpose of stealing Bait-ul-Mal funds.

40. It has been pleaded that Rs.20 million disbursed personally to the Interior Minister has been misappropriated. The manner in which disbursement was obtained from the Bait-ul-Mal indicates the real story behind the scene. In order to support the charge it was further stated that Ms. Naheed Khan, Political Secretary of the petitioner and one Rehmatullah, Consultant to the petitioner while she was Prime Minister, are also involved in gross violation of rules and got sanctioned Rs.6.171 million and Rs.27.05 million from the Bait-ul-Mal. It is alleged that Ms. Khan forwarded a list of 55 names to the Bait-ul-Mal without the proper procedure being followed in these cases, collected cheques totalling Rs.34,90,000 on 1-9-1995 on behalf of these persons.

41. It has been pleaded that the petitioner kept the portfolio of Finance Ministry with the intention to secure benefits which, if Finance Minister is there and the influence which such Minister can exercise in such a position, may not be possible. The role of the State Minister for Finance was restricted largely to making budget speech in the Parliament without effective say in the affairs of the Ministry. Mr. V.A. Jaffery served as adviser to the Ministry of Finance and had been in operational charge of all routine policy matters. Reference has been made to the conditions which prevailed in the banks. In the case of Habib Bank Ltd., United Bank Ltd. and National Bank of Pakistan, bad debts, nonperforming loans (bad debts) stood at Rs.50.76 billion at the end of 1993. By 30-6-1996 this figure increased to Rs.66.647 billion. In the case of ADBP and IDBP, the bad debts of Rs.5.712 billion, by 1996 sky-rocketed to Rs.13.195 billion. The Development Finance Institutions’ bad debts swelled from Rs.6.12 billion to Rs.16.396 billion. Liquidity position was also deteriorating to an alarming extent figures of which have been quoted and ultimately U.B.L. had to be taken over by the State Bank to save it from bankruptcy. It is further pointed out that recruitments in the banks followed the same sorry trend as in the public sector in general. In N.B.P. 5028 appointments were made. Out of these, a paltry 325 were made by the Pakistan Banking & Finance Service Commission. Another 180 were made by the bank’s recruitment committee. The rest (4523) were appointed on the basis of instructions received from the Prime Minister’s Secretariat and the Ministry of Finance. In the case of U.B.L., illegal recruitments, were taken even one step further: over 2,500 “ghost” i.e. nonexistent employees were shown on the bank’s pay rolls and crores of rupees were taken away in their names under the aegis of Mr. Aziz Memon, who was not only Bank’s union leader, but also a P.P.P., M.N.A. The State Bank complained about the National Bank of Pakistan to the Ministry of Finance pointing out the sharp increase in the expenditure incurred by the bank headed by Mr. M.B. Abbasi, known to be close to the petitioner and her spouse. The expenditure on telephones went up by 87 % , and entertainment expenses increased by 57 % . Donations amounting to Rs.93.496 million were disbursed during the period from January to March, 1996 and most were violative of State Bank instructions. Rs.553.032 million were spent on a renovation and airconditioning programme. Similarly loans were written off in a massive manner. From June, 1993 to June, 1996, Rs.3.397 billion were written off. The State Bank, as required by law, used to regularly send inspection reports regarding commercial banks to the Ministry of Finance which pointed out to the illegalities and to the worst condition prevailing in the banks. The Ministry of Finance directed the State bank on 28-1-1996 not to send detailed inspection reports, but only summaries. The State Bank was also asked to take back copies of the reports already submitted. Thus, the Ministry of Finance did not want to have unbearable record.

42. The affairs of Pakistan Steel Mills have also been stated where gross mismanagement was carried on under the chairmanship of Mr. Usman Farooqi. It has been stated that Mr. Farooqi in or about December, 1995 ordered the sale of 15,900 tons of steel at rates well below the market price to certain select favourites, who were offered the products at prices ranging between Rs.7,581 to Rs.9,282 per ton although the Steel Mills management had set the prices of the relevant- products at Rs.20,000 per ton. As the matter was raised before the National Assembly, the steel dealers appeared before the relevant standing committee and offered to purchase the entire lot for double the price at which it was sold. On 30-1-1996 the standing committee requested the Steel Mills not to proceed with the matter. However, on 6-2-1996 the Ministry of Industries issued a letter allowing Pakistan Steel to go ahead on the ground that if the deals were not allowed to go through, legal complications would arise. Thus, the public exchequer was deprived of crores of rupees. Even Mr. V.A. Jaffery, petitioner’s adviser for finance complained on 17-7-1996 about the severe financial deterioration in the Steel Mill’s condition. He pointed out the decline in production and cash balance had declined from Rs.2147 million to a paltry Rs.68 trillion, the mills had defaulted on payments to banks, but no action was taken against Mr. Usman Farooqi.

Another instance of corruption is given about the export of sugar which was allowed from Pakistan which created a public noise. On 25-1-1995 the Prime Minister’s Secretariat was informed by the Commerce Ministry that the former may send allocations up to 2000 metric tons per person to the Ministry. Thereafter, a number of persons and firms, who were not Sugar Mill owners, were allowed quotas to export sugar. These quota allocations were used as means of political patronage and enabled the allottees to enrich themselves. In some cases original allottees of quotas were allowed by the relevant Minister to transfer the allocated amount to other persons contrary to the Cabinet decision. Likewise, reference has been made to Textile quota Policy, which was amended in order to provide for the discretionary allocations of textile quotas. Lists were received from the Prime Minister’s Secretariat of individuals and firms recommended by various leaders and party supporters. Quotas were allocated on this basis to and/or at the behest of the petitioner’s supporters both within and outside the Parliament in complete violation of rules and regulations. In the written statement reference has also been made to decision of the Government to allow M/s. Ary Traders giving them the monopoly to import gold. Similar instances in rice export have also been mentioned in which the bidders were managed in such a way that in effect there was only one bidder Although RECP had no rice, it entered into a binding contract to sell 500,000 tons at a price well below the then prevailing international market price. The petitioner personally as Prime Minister took the decision that RECP should purchase the rice at the market price. Although it was pointed out that this would entail a staggering loss of US $ 41 million for RECP, the petitioner casually brushed aside this objection on the pretext that it would be for the benefit of growers. In the transaction RECP suffered a loss of Rs.7,62,63,445. In the written statement the power policy of the petitioner’s Government has also been made subject to criticism, which according to the respondents, was only to benefit certain foreigners and it has been pointed out that agreements signed by both WAPDA and KESC with the private power projects provide that once the projects have come on line, the utilities would be liable to pay the projects for electricity equal to up to 60 % of their capacity even if no power at all were actually purchased. It was concluded that such policies not merely ensured that there would be excess capacity in the country, both WAPDA and KESC would end up paying millions of dollars annually for power that they would not need and could not utilize. Reference has also been made to the case of Liberty Power Project. Amongst the instances quoted, OGDC also finds place, which was subjected to gross abuse of power and corrupt practices. A consultancy for studying dry holes involving US $ 393,256 was awarded to M/s. Hydrocarbon Development Institution of Pakistan (HDIP) and M/s. Improved Petroleum Recovery (IPR). IPR is a US company, which was previously represented by Saif International, a company owned by the Saifullah family, and Mr. Anwar Saifullah was the Minister for Petroleum and Natural Resources, the Ministry which controls OGDC. The proposal for the study was initiated by HDIP and IPR and was submitted to the Minister for Petroleum and Natural Resources on 13-6-1994. He approved it the same day. On 11-10-1994 the Chairman OGDC wrote a letter stating that another firm had also submitted a proposal which would cost almost half of what HDIP and IPR were charging. This letter was not replied by the Secretary. On 27-11-1994 OGDC received a directive to complete the process of awarding the consultancy to HDIP and IPR. The contract was awarded in complete violation of existing procedures and norms. Similar instances of irregularities have been mentioned in respect of Mr. Riffat Askari, Chairmam OGDC on 15-11-1994 with Cooper and Lybrand (“Cooper”) in USA. Another M.O.U. was signed on 2-12-1994 during Mr. Askari’s visit to the United Kingdom and both the M.O.Us. were for the same work. Mr. Askari awarded a contract to the Cooper for the Reserves Evaluation Study worth US$ 2,500,000 and 50% of the total amount was paid by OGDC as advance and in neat three months another 30% was also paid out. Thus, 80% of the total cost was released to Cooper even though no work at all had been done. The files sent to the Finance Department were missing and payments were made on only a copy of the contract available with the Department. It also points out that Mr. Riffat Askari sold 2298 metric tons of scrap and 7461 assorted store items without public auction and at throwaway prices to the people of his choice causing loss to the OGDC estimated at Rs.67,906,161. Instances of corruption and malpractices in C.D.A. have also been mentioned in detail in which plots were allotted at a reduced price to Dr. Javed Saifullah, brother of the Federal Minister Anwar Saifullah in relaxation of the rules. Similar transactions were also made notably one is respect of Sindh People’s Welfare Trust of which the petitioner was the Chairperson, Educational Trust Nasra School of which mother of Ms. Shehnaz Wazir Ali was a beneficiary, Wahid Public School of which the sister of Ms. Naheed Khan was the owner and Islamabad Grammar School owned by Mrs. B.A. Qureshi wife of old P.P.P. supporter. It has been stated that as a result of allotments aforestated, C.D.A. would receive in total an amount equal to approximately Rs.39.9 million. However, the reserve price of these plots is Rs.219 million and the market price is Rs.329 million. Likewise attempt was made to set up a cooperative housing society that would allot plots to parliamentarians on the concessional rates in which majority of the parliamentarians had applied. A 16 acre piece of land at Shakarprian was allotted to M/s. Inter Hotels (Pakistan) Ltd., a company in which, among others, Mr. Asif Zardari’s brother-in-law had an interest, although it had been earmarked for recreational and sports purposes in the Islamabad’s Master Plan and it was decided that the project would be a joint venture undertaken by the C.D.A. as in the earlier transactions regarding hospitals and schools with 50% quota of C.D.A. The land was given to-them almost free.

43. The question whether corruption can be made a ground for dissolving the National Assembly has assumed great importance particularly at a time when it has plagued 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:-

“The word ‘corruption’ has nowhere been defined but it has diverse meanings and far-reaching effects on society, Government and people. It is always used in a sense which is completely opposite to honesty, orderly and actions performed according to law. It covers a wide field and can apply to any colour of influence, to any officel 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 self or some 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 this extent that even routine works which should be done without any approach or consideration are commonly known to be done only on consideration. 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 Rahman 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 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.’

The degeneration in all walks of life emanates from corruption of power and corruption of liberty. Corruption breads 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 confidently and without reservation assert that at the political level Ministers, legislators, 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 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.

1 he spread of corruption and bribe culture is so wide that even rumours and concocted stories assume the proportion of general belief. Corruption cripples the Government and Administration. It paralyses 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. Where corruption is of enormous nature affecting major spheres of life and it is a 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 SC 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) and (b) which are by themselves sufficient to justify the 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 provision”. I had reiterated my views quoted above, but further observed that the observations in Ahmed Tariq Rahim are binding. Now is the time to reconsider this aspect of the case thoroughly as in my view in Mian Muhammad Nawaz Sharif’s 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 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 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 paralysed. 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 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 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 has 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 the 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 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 people. It also breeds inefficiency and encourages indiscipline. What makes it more serious that such appointees and the nominees of the party in power give an 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 1, available has not been distributed amongst the needy and poor as required by law. A political milage has been sought at the cost of Bait-ul-Mal. In reminds me of an incident of Umar-bin Abdul Aziz. While he was working at night in a candle light, a person visited him. Umar extinguished the candle and said that while he was talking privately and not officially, he would not use the candle of Bail-ul-Mal. They talked together in darkness. Similar incident is attributed to Emperor Aurangzeb as well. This is the sense and standard of responsibility and honesty of the rulers and sanctity of Bail-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 above give a general impressibe 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 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.

44. Mr. Aitzez Ahsan, learned counsel for the petitioner contended that as under Article 58(2)(b) two ingredients are required to be satisfied and the President in the impugned order has not given, any reason for the second condition, namely, appeal to the electorate is necessary, the order of dissolution is illegal. The learned counsel-has referred to Mian Muhammad Nawaz Sharif’s case and relied on the observation of Saiduzzaman Siddiqui, J. that Article 58(2)(b) contemplates two conditions, namely, (1) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and (2) an appeal to the electorate is necessary. It was also observed that “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”. It was further observed as follows:-

“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.”

From the above observations it is clear that there should be some material having nexus with Article 58(2)(b) to the satisfaction of the President on the basis of which opinion can be formed that an appeal to the electorate is necessary. However, there can be several situations and examples on the basis of which an opinion can be formed as required. The impugned order after giving the facts ; and the materials further recites that “And whereas for the foregoing reasons, taken individually and collectively, I am satisfied 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”. Therefore, the grounds stated in the order have individually and collectively been taken to form opinion that an appeal to the electorate is necessary. The grounds have already been analysed in detail. The only question to be seen is whether on their basis President could form an opinion that an appeal to the electorate is necessary. The extra judicial killing, ridiculing judiciary, corruption, bribery, withdrawal of money from Bait-ul-Mal and the banks and similar instances which have been given, show that the people had lost faith in the services, the administration and in the impartiality and legality of the Assembly as well. The members of the Assembly are not required to remain mute spectators of violations of the Constitution and infraction of Fundamental Rights at a massive-scale. They have their duty to discharge as required by the Constitution. In these circumstances, the President was justified in forming an opinion that an appeal to the electorate was necessary.

45. It is not necessary that for each of the grounds of Article 58(2)(b) separate grounds and materials may be stated under each category. If the material is common and both the ingredients can be satisfied, the requirement would be fulfilled.

46. For the foregoing reasons, by a short order which is an Annexure to this judgment and forms part of it, the petition was dismissed.

(Sd.)

SALEEM AKHTAR, J

(Sd.)

           FAZAL ILAHI KHAN, J

IRSHAD HASAN KHAN, J.---I have had the privilege of going through the illuminous judgment proposed to be delivered by my learned brother Saleem Akhtar, J. I respectfully agree with the conclusions arrived at by my learned brother that the petition merits dismissal on the basis of the material produced before the Court on behalf of the President which has nexus with the grounds mentioned in the impugned order of dissolution as well as grounds specified in Article 58(2)(b). However, in view of the importance of the controversy raised herein and the fact that I am unable to share the observations of my learned brother that the averments made in various newspapers/press reports could be considered as proof of extra judicial killing as well as other grounds in the dissolution order, I am recording my opinion separately in support of the short order, dated 29th January, 1997 dismissing the petition against the dissolution of National Assembly.

The material, including newspaper clippings etc., relied upon by the President in dissolving the Assembly is, of course, relevant and can be 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 but not a strict proof of the matters stated therein as if adjudicated in a IA regular trial.

2. Mohtarma Benazir Bhutto, the petitioner herein, is the ousted Prime Minister of the Islamic Republic of Pakistan. She has presented before this Court a petition under Article 184(3) of the Constitution seeking the enforcement of Fundamental Right 17 which guarantees to her, 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. Her grievance is that the President by invoking his powers under Article 58(2)(b) of the Constitution and dismissing her from the office of Prime Minister and her Cabinet and by dissolving the National Assembly of which she was the majority party leader, has violated this guaranteed Fundamental Right. His action is mala fide, hostile, motivated by vindictiveness to harm the petitioner in her office, career, person, reputation and dignity and thus violative of Articles 9, 14 and 17 of the Constitution.

3. The relief claimed by her is in the following terms:--

“(i)        Declare that the so-called dissolution of the National Assembly of Pakistan by the President on 5-11-1996 is wholly without lawful authority, unconstitutional, arbitrary, mala fide, void, inoperative and of no legal effect, and that the said National Assembly still exists in the eyes of Constitution and law;

(ii)        That the Cabinet headed by the petitioner as the Prime Minister is constitutionally still in existence and she continues to be the Prime Minister of Pakistan;

(iii)       All the steps taken, appointments made, laws framed including the issuance of any order or Ordinance by the President after 5-11-1996 are without lawful authority;

(iv)       That persons purporting to hold the Offices as the Prime Minister, Ministers, etc. have not been constitutionally appointed as such and they have no authority in law to act as the Prime Minister and Ministers;

(v)        Without prejudice to above and in the alternative the respondents Nos. l and 2 be directed to fulfil their obligations with regard to the appointments of the petitioner as the Prime.Minister and that all actions should be taken in accordance with advice of the Prime Minister and her Cabinet to be constituted in accordance with the provisions of the Constitution;

Any other relief which this honourable Court deems fit and proper may also be granted.”

4. It would be advantageous to .reproduce the impugned order passed by Mr. Farooq Ahmad Khan Leghari, the President of Pakistan, respondent No.l herein, on the midnight of 5th November, 1996 at 1-00 a.m. whereby the National Assembly of Pakistan was dissolved and the- Prime Minister and her Cabinet were dismissed. The dissolution order reads as follows:-

“The President Dissolution Order”

WHEREAS during the last three years thousands of persons in Karachi and other parts of Pakistan have been deprived of their right to life in violation of Article 9 of the Constitution. They have been killed in Police encounters and police custody. In the speech to Parliament on 29th October, 1995 the President warned that the law enforcing agencies must ensure that there is no harassment of innocent citizens in the fight against terrorism and that human and legal rights of all persons are duly protected. This advice was not heeded. The killings continued unabated. The Government’s fundamental duty to maintain law and order has to be performed by proceeding in accordance with law. The coalition of political parties which comprise the Government of the Federation are also in power in Sindh, Punjab and N.-W.F.P. but no meaningful steps have been taken either by the Government of the Federation or, at the instance of the Government of the Federation, by the Provincial Governments to put an end to the crime of extra judicial killings which is an evil abhorrent to our Islamic Faith and all canons of civilized Government. Instead of ensuring proper investigation of these extra judicial killings, and punishment for those guilty of such crimes, the Government has taken pride that, in this manner, the law and order situation has been controlled. These killings coupled with the fact of widespread interference by the members of the Government, including members of the ruling parties in the National Assembly, in the appointment, transfer and posting of officers and staff of the lawenforcing agencies, both at the Federal and Provincial levels, has destroyed the faith of the public in the integrity and impartiality of the law-enforcing agencies and in their ability to protect the lives, liberties and properties of the average citizen.

And whereas on 20th September, 1996 Mir Murtaza Bhutto, the brother of the Prime Minister, was killed at Karachi alongwith seven of his companions including the brother-in-law of a former Prime Minister, ostensibly in an encounter with the Karachi Police. The Prime Minister and her Government claim that Mir Murtaza Bhutto has been murdered as a part of a conspiracy. Within days of Mir Murtaza Bhutto’s death tip Prime Minister appeared on television insinuating that the Presidency and other agencies of State were involved in this conspiracy. These malicious insinuations, which were repeated on different occasions, were made without any factual basis whatsoever. Although the Prime Minister subsequently denied that the Presidency or the Armed Forces were involved the institution of the Presidency, which represents the unity of the Republic, was undermined and damage caused to the reputation of the agencies entrusted with the sacred duty of defending Pakistan. In the events that have followed, the widow of Mir Murtaza Bhutto and the friends and supporters of the deceased have accused Ministers of the Government, including the spouse of the Prime Minister, the Chief Minister Sindh, the Director of the Intelligence Bureau and other high officials of involvement in the conspiracy which, the Prime Minister herself alleges led to Mir Murtaza Bhutto’s murder. A situation has thus arisen in which justice, which is a fundamental requirement of our Islamic Society, cannot be ensured because powerful members of the Federal and Provincial Government who are themselves accused of the crime, influence and control the law-enforcing agencies with the duty of investigating the offences and bringing to book the conspirators.

And whereas on 20th March, 1996 the Supreme Court of Pakistan delivered its judgment in the case popularly known as the appointment of Judges case. The Prime Minister ridiculed this judgment in a speech before the National Assembly which was shown more than once on nation-wide television. The implementation of the judgment was resisted and deliberately delayed in violation of the Constitutional Mandate that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court with regard to regularization and removal of Judges of the High Courts were finally implemented on 30th September, 1996 with a deliberate delay of six months and ten days and only after the President informed the Prime Minister that if advice was not submitted in accordance with the judgment by end September 1996 then the President would himself proceed further in this matter to fulfil the Constitutional requirement. The Government has, in this manner, not only violated Article 190 of the Constitution but also sought to undermine the independence of the judiciary guaranteed .by Article 2A of the Constitution read with the Objectives Resolution.

And whereas the sustained assault on the judicial organ of State has continued under the garb of a Bill moved in Parliament for prevention of corrupt practices. This Bill was approved by the Cabinet and introduced in the National Assembly without informing the President as required under Article 46(c) of the Constitution. The Bill proposes inter alia that on a motion moved by fifteen per cent. of the total membership of the National Assembly, that is any thirty-two members, a Judge of the Supreme Court or High Court can be sent on forced leave. Thereafter, if on reference made by the proposed special committee, the Special Prosecutor appointed by such Committee, forms the opinion that the Judge is prima facie guilty of criminal misconduct, the special committee is to refer this opinion to the National Assembly which can, by passing a vote of no confidence, remove the judge from office. The decision of the Cabinet is evidently an attempt to destroy the independence of the judiciary guaranteed by Article 2A of the Constitution and the Objectives Resolution. Further, as the Government does not have a two-third majority in Parliament and as the Opposition Parties have openly and vehemently opposed the Bill approved by the Cabinet, the Government’s persistence with the Bill is designed not only to embarrass and humiliate the superior judiciary but also to frustrate and set at naught all efforts made, including the initiative taken by the President, to combat corruption and to commence the accountability process.

And whereas the judiciary has still not been fully separated from the executive in violation of the provisions of Article 175(3) of the Constitution and the dead-line for such separation fixed by the Supreme Court of Pakistan.

And whereas the Prime Minister and her Government have deliberately violated, on a massive scale the fundamental right of privacy guaranteed by Article 14 of the Constitution. This has been done through illegal phone-tapping and eaves-dropping techniques. The phones which have been tapped and the conversations that have been monitored in this unconstitutional manner includes the phones and conversations of Judges of the superior Courts, leaders of political parties and high ranking military and civil officers.

And whereas corruption, nepotism and violation of rules in the administration of the affairs of the Government and its various bodies, authorities and corporations has become so extensive and widespread that the orderly functioning of Government in accordance of the provisions of the Constitution and the law has become impossible and in some cases, national security has been endangered. Public faith in the integrity and honesty of the Government has disappeared. Members of the Government and the ruling parties are either directly or indirectly involved in such corruption, nepotism and rule violations. Innumerable appointments have been made at the instance of members of the National Assembly in violation of the law declared by the Supreme Court that allocation of quotas to M.N.As. and M.P.As. for recruitment to various posts was offensive to the Constitution and the law and that all appointments were to be made on merit, honestly and objectively and in the public interest. The transfers and postings of Government servants have similarly been made, in equally large numbers, at the behest of members of the National Assembly and other members of the ruling parties. The members have violated their oaths of office and the Government has not for three years taken any effective steps to ensure that the legislators do not interfere in the orderly executive functioning of Government.

And whereas the Constitutional requirement that the Cabinet together with the Ministers of State shall be collectively responsible to the National Assembly has been violated by the induction of a Minister against whom criminal cases are pending which the Interior Minister has refused to withdraw. In fact, at an earlier stage, the Interior Minister had announced his intention to resign if the former was inducted into the Cabinet. A Cabinet in which one Minister is responsible for the prosecution of a Cabinet colleague cannot be collectively responsible in any manner whatsoever.

And whereas in the matter of the sale of Burmah Castrol shares in PPL and BONE/PPL shares in Qadirpur Gas Field involving national assets valued in several billions of rupees, the President required the Prime Minister to place the matter before the Cabinet for  consideration /reconsideration of the decisions taken in this matter by the ECC. This has still not been done, despite lapse of over four months, in violation of the provisions of Articles 46 and 48 of the Constitution.

And whereas for the foregoing reasons, taken individually and collectively, I am satisfied 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.

Now, therefore, in exercise of my powers under Article 58(2)(b) of the Constitution I Farooq Ahmad Khan Leghari, President of the Islamic Republic of Pakistan do hereby dissolve the National Assembly with immediate effect and the Prime Minister and her Cabinet shall cease to hold office forthwith.

Further, in exercise of my powers under Article 48(5) of the Constitution I hereby appoint 3rd February, 1997 as the date on which general elections shall be held to the National Assembly.

(Sd.)

(Farooq Ahmad Khan Leghari), President.”

5. The grievance of the petitioner in nutshell is that despite the fact that the Government was running smoothly in accordance with the Constitution, there was no dead-lock or stalemate, the President passed an order purporting to be under Article 58(2)(b) of the Constitution of the Islamic Republic of Pakistan, 1973, dissolving the National Assembly and dismissing her and the Cabinet on 5-11-1996.

6. It was contended by Mr. Aitzaz Ahsan, learned counsel for the petitioner that the impugned order reflects malice both in law and in fact of the President and that in any case, it’ is outside the scope and extent of Article 58(2)(b) as interpreted in the cases of Haji Muhammad Saifullah Khan (PLD 1989 SC 166), Khawaja Ahmad Tariq Rahim (PLD 1992 SC 646) and Mian Muhammad Nawaz Sharif (PLD 1993 SC 473). He submitted that the President while passing the impugned order has proceeded on the erroneous assumption that the Prime Minister was subordinate to him. In support of his contention reliance was placed on observations made by Shafiur Rehman, J. in Mian Nawaz Sharif’s case, that the Prime Minister is only responsible to the National Assembly and the element of subordination so far as the office of the Prime Minister viz-a-viz that of the President is concerned, does not exist. He further submitted that the grounds in the dissolution order have no nexus with Article 58(2)(b) of the Constitution, inasmuch as, these provisions could be invoked when there is a state of war in the country, life has completely paralysed and the conditions are such as were prevalent in 1977 which had brought the country to the brink of disaster necessitating Martial Law but none of the conditions prevalent in 1977 are present today. In support of his contention reliance was placed to the various passages in the following cases. In the case of Haji Muhammad Saifullah Khan (PLD 1989 SC 166) Shafiur Rehman, J. had observed:-

“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 machanism, a stalemate, a deadlock and ensuring the observance of the provisions of the Constitution. The historical perspective in which such a provision found a place in the Constitution reinforces this interpretation.”

Reference was also made to the speech of the then Law Minister contemporaneously explaining the purpose and object resulting in the provisions of Article 58(2)(b), he said:-

“We have placed a check on the President that where the condition as I have submitted many a time in the Hon’ble House, these conditions as realized in 1977. 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. “

In Khawaja Ahmad Tariq Rahim’ case (PLD 1992 SC 646) A.S. Salam, J. in his minority view observed:-

 “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, presidency, National Legislature, Governors, Provincial  Assemblies, Courts etc. If there were defaults or defects, violation of  flaw, these were matters to be attended to by the President and his Cabinet. They had to work in unison. The President cannot throw the bucket and dissolve the National Assembly and call the nation in twenty  months time to go back to polls. Elections cost money and turmoil. Poor country can hardly afford the luxury with no prospectus of any improvements. Exercise of authority or power demands careful, cool assessment with foresight.”

While dilating on the exercise of Article 58(2)(b) Rustam S. Sidhwa, J. at page 690 observed:-

 “All Government actions are not free from catastrophic errors of judgment or dismal failures of action. The functional ability of a ruling  party to govern does not merely fail if some provision of the Constitution is violated or not performed or ill-performed. With political strategy and choices, in a house divided between many political parties, being mauled or mutilated by conflicting interests, it may not be possible to take even simple decisions.”

7. Mr. Aitzaz Ahsan strongly relied upon various observations in the below mentioned judgments of this Court relating to the exercise of the powers of the President under Article 58(2)(b) of the Constitution. In Federation of Pakistan v. Haji Muhammad Saifullah Khan (PLD 1989 SC 166 at page 188) Nasim Hasan Shah, 1. observed:--

“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.”

It was further observed at page 189 in the above judgment:

“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.”

In Khawaja Ahmad Tariq Rahim’s case (PLD 1992 Supreme Court 646 at page 664) Shafiur Rahman, J. observed:-

 “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 If 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 the case of Mian Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 Supreme Court 473) reliance was placed on the, following observations at page 567, by Nasim Hasan Shah, C.J. (as he then was):-

“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(1) 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 was further observed:-

“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.”

At page 647, Saad Saood Jan, J. observed:-

“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 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.”

At page 792 Muhammad Rafiq Tarar, J. observed:--

“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 ....?”

It was further observed at page 798:-

 “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.”

At page 799 it was observed:-

“It will be seen that the dead-locks 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.”

“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.”

It was further observed at page 815:-

“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 page 861 Saiduzzaman Siddiqui, J. observed:-

“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 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 fide 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 dead-lock in the working of the Government, will not be covered in the situations contemplated under

‘           Article 58(2)(b) of the Constitution.”

8. Relying on the aforesaid observations in the judgments referred above, Mr. Aitzaz Ahsan argued that Mohtarma Benazir Bhutto was still the leader of the House commanding confidence of a majority of the members when the Assembly was dissolved on 5th November, 1996. The Government was running smoothly in accordance with the Constitution and there was no dead-lock or stalemate. The situation before November 5, 1996 was not so grave as was the case in 1977, when the life was totally paralysed in the wake of P.N.A. Movement and the Civil Government had to hand over the control of the major cities to the Army. In the case in hand, prior to the dissolution of the Assembly, the Constitutional institutions and the State machinery were working in accordance with the Constitution and there was no fault in the functioning of the Legislature. He argued that the dissolution of the Assembly can take place not on failure to observe one of the provisions of the Constitution but in case of total breakdown of Constitutional machinery in view of the latest judgment of this Court in the case of Mian Muhammad Nawaz Sharif (supra). It was further submitted that the case of the petitioner is in pari materia with the case of Mian Muhammad Nawaz Sharif (supra), therefore, following the rule of consistency, the petitioner is also entitled to the same relief as was given in the aforementioned case. Mr. Aitzaz Ahsan, in the alternative, argued that even if the State machinery was not functioning in accordance with the Constitution, the President should have taken some remedial steps to rectify the alleged defects and errors before taking the extreme action of dissolving the Assembly and that in any case the grounds stated in the dissolution order have no nexus with the provisions of Article 58(2)(b) of the Constitution. He further argued that the President had withheld the material and provided only those documents to the Court which were to his advantage and even those voluminous documents are irrelevant and inadmissible, therefore, should be excluded from consideration and if that is done there is nothing left on record to support the dissolution order. He denied all the allegations levelled in the dissolution order.

9. Mr. Khalid Anwar refuted the arguments of Mr. Aitzaz Ahsan on interpretation of Article 58(2)(b) of the Constitution that it could only be attracted if there was a stalemate or dead-lock or complete breakdown of Constitutional machinery. He argued that if the situation as in 1977 crops up Article 58(2)(b) is attracted. If there can be other situations, then the Court will decide what those situations are. He argued that the majority view in Haji Muhammad Saifullah Khan’s case was that unless it could be shown that the machinery of the Government had broken down completely, its authority eroded and the Government cannot be carried on in accordance with the provisions of the Constitution, dissolution could not be ordered. It was also held that unless the machinery of the Government of the Federation had come to a standstill or such a breakdown had occurred therein which prevented the orderly functioning of the Constitution, dissolution could not be ordered. However, this view was modified in the case of Khawaja Ahmad Tariq Rahim (supra). Rustam S. Sidhwa, J. observed at page 690:-

would submit that the test laid down is too strict and rigid. It forgets  that the provision is also preventive. One does not have to wait till the whole machinery of the Government collapses or comes to a standstill or so serious a breakdown occurs which prevents the orderly functioning of the Government, before ordering a dissolution. What is required is that the breakdown is imminent, as partial dislocation has begun, or the breakdown has actually taken place and as a last resort interference is required to ultimately restore representative Government. Each case should, therefore, be left to be dealt with on its own merit. “

Rustam S. Sidhwa, J. under para. 15 of the said report also quoted with approval the interpretation of a similar provision of the Indian Constitution (Article 356) in the case of State of Rajasthan (AIR 1977 SC 1361 at para. 40), wherein it was held that this provision is both preventive and curative and that the same position is in our Constitution. It was observed:-

“Preventive, so as to prevent failure of 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.”

Shafiur Rahman, J. at page 664 observed:-

“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 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. “ ,

10.       A bare perusal of Article 58(2)(b) of the Constitution would show that for exercising power the requirement is not ‘satisfaction’ of the President that 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 but that of formation of ‘opinion’ to the same effect. The framers of the Constitution deliberately chose a lesser word of ‘opinion’ instead f ‘satisfaction. For example, under sub-clause (b) of clause (1) of Article 199 of the Constitution, on the application of any person the High Court may issue an appropriate writ, if it is ‘satisfied’ that no other adequate remedy is provided by law. Similarly, under Articles 232 and 233 of the Constitution relating to proclamation of emergency on account of war, internal disturbances etc. and power to suspend fundamental rights etc. during emergency period, there is a concept of Presidential satisfaction and not that of formation of opinion. Where the resident is so satisfied he can assume power of Provincial Government, Whereas under Article 58(2)(b), the requirement is not ‘satisfaction’ but formation of ‘opinion’ by the President. There is, thus, clear distinction as to the connotation of these two words. For formation of ‘opinion’ lesser burden of proof is required than that of ‘satisfaction’. It is not to be based on overwhelming and conclusive evidence but on some material on the basis of which a reasonable man can form an opinion that the Government of the Federation cannot be run in accordance with the Constitution. The standard of proof in the form of material to support the charges cannot be the same as required for the proof of a criminal charge. On the other hand, ‘satisfaction’ is the existence of a state of mental persuasion much higher than a mere ‘opinion’ and when used in the context of judicial proceedings has to be arrived at in compliance with the prescribed statutory provisions. Support can also be had from the case of Durgadas v. Rex (AIR (36) 1949 Allahabad 148), wherein it was held:-

“Satisfaction only means that the detaining authority was in fact satisfied, or, in other words, honestly satisfied and not a dishonest satisfaction, which will be no satisfaction at all. The satisfaction has to be on the consideration of the materials available to the detaining authority which may not be legal evidence.”

In the case of S.S. Yusuf v. Rex (AIR (37) 1950 Allahabad 69), it was observed:-

“If the authority to be satisfied is convinced that the actions of the detenu, though they relate to private property in the past, give an indication that he will so conduct himself in the future as to cause prejudice to public safety or public order, it is not for the Court to sit in judgment over this. The satisfaction may depend upon materials available to the detaining authority which may not be legal evidence at all. Thus, it might well be that the Government has in its archives materials for showing what the repercussions of actions such as those complained of will be upon the economic stability of the State and might form its opinion upon material, upon which Courts of law are not expected to act.”

Reference may also be made to Mqhit Lal Pandit v. The State (AIR (38) 1951 Patna 439(2), wherein it was held:-

“For passing an order for detention it is really the satisfaction of the Magistrate which is necessary. If the police have sufficient material to . satisfy him he can act under the Act, even though there is no detailed evidence of the type on which a Court of law can convict an accused. Hence, the fact that the police were unable to furnish a detailed report till a date very near the one on which the order was passed cannot lead to the inference that the order was passed mala fide in the absence of materials.”

The President can, therefore, exercise his power under Article 58(2)(b) of the constitution if there is some material before him showing that the affairs of the Government of the Federation cannot be run in accordance with the Constitution. The words ‘stalemate’ or ‘deadlock’ do not appear in the provisions of Article 58(2)(b)., These concepts are to be read in the said Article in view of the process of judicial pronouncements referred above. Shafiur Rehman, J. in the case of Haji Saifullah Khan (supra), while examining the scope of power reserved for the President in Article 58(2)(b) of the Constitution, observed as follows:-

“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:-

a situation has arisen in which the Government of the Federation cannot be carried or. in accordance with the provisions of the Constitution; and

(2)        an appeal to the electorate is necessary; would in fact amount to a failure to discharge a duty ordained by the Constitution itself.”

11. Clearly, for formation of an opinion, the President can take note of what the world says about State terrorism or other affairs of the Government. Of, course, for forming opinion on the basis of such information he has to apply his independent mind. Contemporaneous acts can also be looked into by the President. He can also take judicial notice of press reports. Refer Islamic Republic of Pakistan v. Abdul Wali Khan (PLD 1976 SC 57). The admissibility of such a material was also considered in Mian Muhammad Nawaz Sharif v. Federation of Pakistan (PLD 1993 SC 473), wherein Saiduzzaman Siddiqui, J. observed:-

“Both sides have filed large number of press cuttings and relied on them to show the prevailing political climate in the country during predissolution 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 ;nay be taken into consideration for forming an opinion generally as to the prevailing state of affairs at the relevant time. The press 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.”

Muhammad Afzal Lone, J. as well as Sajjad Ali Shah, J. (as he then was) while examining the grounds of the dissolution order in Mian Muhammad Nawaz Sharif’s case (supra) also took into consideration the press clippings, news reports and other relevant material.

12. It would, therefore, be seen that the rule laid down by Hamoodur Rehman, C.J. in Abdul Wali Khan’s case (supra), has consistently been followed in our Courts and the press reports etc. have all along been relied upon, not as a, strict proof of the matters stated therein as required by the law of evidence during a trial in a Court of law, but as a part of the material on the basis of which a person of ordinary prudence would conclude that the matters and the events narrated therein did occur.

13. This Court has, however, no concern with the quantity or sufficiency of the material nor can it sit in appeal on dissolution order passed by the President provided that the grounds stated therein have nexus with Article 58(2)(b) of the Constitution. The Court is merely required to examine as to whether or not the President has exercised his power in accordance with the provisions of Article 58(2)(b) and that the action taken by him is bona fide and in doing so the Court is not required to hold an enquiry into the charges levelled in the dissolution order, as if it was a criminal Court. Refer Federation of Pakistan v. Aftab Ahmad Khan (PLD 1992 Supreme Court 723), wherein Ajmal Mian, J. observed at 787:-

“I am mindful of the fact that a Court cannot sit as a Court of appeal while examining an order of the nature in issue, nor it can substitute its opinion nor it can go into the question of sufficiency of material provided that the material relied upon has nexus with the grounds mentioned in the impugned order, which in turn should have nexus with the grounds mentioned in Article 112(2)(b) of the Constitution manifesting application of mind by the repository of power.”

It was further observed at page 789:

“It is evident from the above quoted extracts that the formation of opinion should be founded on some material, and that the ground(s) should have nexus with the grounds mentioned in Articles 58 and 112 of the Constitution. The question, whether grounds exist for dissolving Assembly, is to be examined objectively and not subjectively by the repository of the power in question. It is also apparent that if it can be shown that no ground existed on the basis of which an honest opinion could be formed, the exercise of the power would be unconstitutional and open to correction through judicial review.”

Also refer to T.N. Educational Deptt. Ministerial and General Subordinate Services Assn. v. State of T.N. (AIR 1980 SC 379), wherein the Court refused to interfere in the administrative functioning of the State in the absence of arbitrariness or mala fides. It was observed:-

“All life including administrative life, involves experiment, trial and error, but within the leading strings of fundamental rights, and, absent unconstitutional ‘excesses’, judicial correction is not right.”

“The Court cannot substitute its wisdom for Government’s save to see that unreasonable perversity, mala fide manipulation, indefehsible arbitrariness and like infirmities do not defile the equation for integration.”

In the case of Tata Cellular v. Union of India ((1994) 6 SCC 651), it was observed:-

“Judicial review is concerned with reviewing not the merits of the decision but the decision-making process itself. It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision but in judicial review the Court is basically concerned with the decision taking process because even otherwise the Court is hardly equipped to review the merits of the decision. The Court rightly remarked that it is not the function of the Court to act as a superboard or with the zeal of a pedantic school master substituting its judgment for that of the administrator.

The duty of the Court in exercising the power of judicial review is, thus, to confine itself to the questions:-

(1)        Whether a decision-making authority exceeded its powers?

(2)        Whether the authority has committed an error of law?

(3)        Whether the authority has committed a breach of the principles of natural justice?

(4)        Whether the authority has reached a decision which no reasonable person would have reached?

(5)        Whether the authority has abused its powers?

Thus the judicial review of administrative actions can be exercised on the following grounds:-

‘(1)       Illegality. --This means that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it.

(2)        Irrationality.--This means that the decision is so outrageous in its defiance of logic or of accepted moral standards that no sensible person could have arrived at such a decision.

Procedural impropriety.--This means that the procedure for taking administrative decision and action must be fair, reasonable and just.

            Proportionality.--This means is any administrative decision and action the end and means relationship must be rational.

(5)        Unreasonableness.--This means that either the facts do not warrant the conclusion reached by the authority or the decision is partial and unequal in its operation.

Thus, the modern trend in the area of judicial review is towards, judicial restraint. “

Reference may be made to Administrative Law by Sir William Wade & Christopher Forsyth, Seventh Edition, 1994, page 400, wherein it has been observed:-

“This is not therefore the standard of ‘the man on the Clapham omnibus’. It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is now commonly called ‘ Wednesbury unreasonableness’, after the now famous case in which Lord Greene MR. expounded it as follows:-

“It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word ‘unreasonable’ in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington, LJ in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into  consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another. “

14. In his judgment in Aftab Ahmad Khan Sherpao’s case (supra), Shafiur Rehman, J. observed at page 747:-

“It was not disputed by any of the parties before the High Court that the Governor had, apart from passing a formal order, made the announcement of the same in Press Conference which had found wide publicity in the press next morning. It was a contemporaneous act. There being no dispute with regard to it, the Court could refer to it for looking to the grounds disclosed then and sustained afterwards. “ (Underlining is mine).

In the case of Chairman, East Pakistan Railway Board, Chittagong and District Traffic Superintendent v. Abdul Majid Sardar, Ticket Collector (PLD 1966 Supreme Court 725), this Court observed:-

“           acts performed and orders made by public authorities deserve due regard by Courts and every possible explanation for their validity should be explored and the whole field of powers in pursuance to which the public authorities act or perform their function examined and only then if it is so found that the act done, order made or proceeding undertaken is without lawful authority should the Courts declare them to be of no legal effect.”

The same view was reiterated in Lahore Improvement Trust, Lahore through its Chairman v. The Custodian, Evacuee Property, West Pakistan, Lahore (PLD 1971 SC 811) in the following words:-

“Another principle attracted in the case is that before an order passed by a public authority is struck down it is the duty of the Court to explore every possible explanation for its validity and examine the entire field of powers conferred on the authority in pursuance to which the impugned order has been passed. See the Chairman, East Pakistan Railway Board, Chittagong and another v. Abdul Majid Sardar, Ticket Collector PLD 1966 SC 725. It was remarked in this judgment:-

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To satisfy the requirement of this rule it is the duty of the Court to examine the entire record pertaining to the action taken, order passed and proceedings undertaken which are challenged as without lawful authority under Article 98 of the Constitution. Otherwise grave miscarriage of justice may take place in the exercise of this beneficial jurisdiction.”‘

The rule laid down in the case of Kh. Ahmad Tariq Rahim (supra) still holds the field and has been extensively quoted with approval in the case of Mian Muhammad Nawaz Sharif v. Federation of Pakistan (PLD 1993 SC 473), as is apparent from the following passages. Ajmal Mian, J. referring to the observations of Shafiur Rehman, J. in the case of Kh. Ahmad Tariq Rahim (supra) observed at pages 677 and 678, in the following terms:-

“22. The above sub-clause (b) of clause (2) of Article 58 of the Constitution is pertinent to the point in issues. 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 Kh. Ahmad Tariq Rahim (supra), wherein Shafiur 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 rastic 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 exercise able by the President only on the advice of the Pritpe 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 1) or Article 184(1) 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 alterative 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’.”

It was also observed at page 679 in the following terms:-

“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), Kh. 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. “

At page 680, Ajmal Mian, J. referred to the following construction placed by him on the expression “cannot be carried on” in the case of Aftab Ahmad Khan 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 the 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.”

It was observed at page 687:-

“In Kh. 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. “

At page 703 Ajmal Mian, J. also referred to the observations of Rustam S. Sidhwa, J. in the case of Kh. Ahmad Tariq Rahim (supra) dilating upon the status of the President and the Prime Minister under the Constitution. Ajmal Mian, J. also took note of the observations in the case of Kh.-Ahmad Tariq Rahim (supra) at pages 713 and 714 in the following terms:-

“In the case of Kh. Ahmad Tariq Rahim (supra), in the majority view on ground (2) which was somewhat identical to above ground ‘c’ the following finding was recorded:-

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. “

At page 714 it was further observed:

“44. In Kh. Ahmad Tariq Rahim’s case (supra), in spite of the insistence of the two Provinces and filing of legal proceedings by them and intercession of the President, neither CCI nor NFC were operating. “

It was further observed at page 717:-

“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 Kh. Ahmad Tariq Rahim’s case warranting to press into service Article 58(2)(b) of the Constitution. “

Sajjad Ali Shah, J. (as he then was), in his minority judgment, also reiterated the guidelines laid down in the cases of Haji Muhammad Saifullah Khan and Khawaja Ahmad Tariq Rahim (supra). It was observed at page 785:-

“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.”.

Muhammad Rafiq Tarar, J. also referred to the majority view reported in Kh. Ahmad Tariq Rahim’s case (supra) at page 791. Notice was also taken of the view expressed by Rustam S. Sidhwa, J. at page 687/D of the case of Kh. Ahmad Tariq Rahim (supra):-

“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.”

Muhammad Rafiq Tarar, J. referred to the case of Kh. Ahmad Tariq Rahim (supra) at page 799. It was observed in paragraph 40 of the report in Mian Muhammad Nawaz Sharif case (supra) as follows:-

“It will be seen that unlike the order of dissolution of the former National Assembly in 1990 (Khawaja 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 Rehman, 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. “

15. Saleem Akhtar, J. also referred to Ahmad Tariq Rahim’s case (supra) at pages 810, 812, 814, 834, 835, 838 and 842.

16. In his judgment, Saiduzzaman Siddiqui, J. also referred to the case of Kh. Ahmad Tariq Rahim (supra) at pages 858, 860 and 861. It was observed at pages 871 and 872 of the report as follows:-

“No doubt there appears to be a similarity in the pharaseology used in the grounds of Dissolution Orders in the case of Khawaja Ahmad Tariq Rahim and in the present case (Mian Muhammad Nawaz Sharif’s case) but mere similarity in the words or phraseology can neither be determinative factor nor a test for identity of the substance of the grounds in the two cases.”

It was further observed:-

“The situation obtaining at the time of dissolution of National Assembly in Kh. Ahmed Tariq Rahim’s case (supra), therefore, is in no way comparable with the situation in the present case.”

17. In the case of Mian Muhammad Nawaz Sharif (supra) the entire case hinged on the speech of Mian Muhammad Nawaz Sharif as observed by Nasim Hassan Shah, C.J. at page 562 of the report in the following terms:-

“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 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 harmoney thereafter. This stalemate, this deadlock between the two highest Constitutional functionaries in the State rendered the carrying on of the Federation in 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.”

The finding recorded by this Court against the aforesaid ground on dissolution o”. Nasim Hasan Shah, C.J. held at page 569 of the report:-

“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 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.”

judgment, Shafiur Rehman, J. also referred to Kh: Ahmad Tariq Rahim’s upra) at page 615 of the report as follows:-

“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 longar represents and to fight a reelection. 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

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meantime, the aerector flourishes and Continues to enjoy all the worldly gains. The third is that it destroys 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.”

18. It is difficult to enumerate exhaustively the circumstances which may t indicate the failure of the Constitutional machinery within the ambit of Article 58(2)(b). It depends upon the facts and circumstances of each case. The principles laid down in Mian Muhammad Nawaz Sharif’s case (supra) still hold the field. These principles do not envisage dissolution of the National Assembly on ground of complete breakdown of the Constitutional machinery alone.

In Khalid Malik v. Federation of Pakistan (PLD 1991 Karachi 1), some situations have been cited during which machinery of the Government cannot be run in accordance with the Constitution. These situations are as follows:-

“(1)      When the writ of the Government is not enforceable, a climate of uncertainty and diffidence has been created on different levels of administration;

(2)        There is general floutation and disrespect to the organs and departments of the State;

(3)        The institutions, organs and authorities constituted under the Constitution and the law, flout the law;

(4)        External aggression bringing the entire machinery of the Government at a standstill;

(5         Internal disturbances, insurgency, revolt, rebellion or civil war and economic crises which may paralyse the life and administration;

(6)        When the Legislature no longer reflects the wishes or views of the electorate and they are at variance;

There is large scale civil disobedience movement in which Government servants and employees of corporations, companies, banks and authorities connected with the day to day administration of the State refuse to cooperate and subject refuses to pay taxes; and

(8)        The majority ruling power refute , violates or refuses to run the Government according to Constitution and law.”

19. I am unable to subscribe to the view of Mr. Aitzaz Ahsan that Article 58(2)(b) can be invoked only when there is a state of war in the country, life has completely paralysed and the conditions are such as were prevalent in 1977 which had brought the country to the brink of disaster necessitating martial law. Clearly, the President in his discretion may dissolve the National Assembly where he forms an opinion on the basis of material before him having direct nexus with the conditions laid down in Article 58(2)(b), 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. In Khawaja Ahmad Tariq Rahim’s case (supra), it was held by majority that once the evil is identified, remedial and corrective measures within the Constitutional framework must follow. There is also no force in the submission of Mr. Aitzaz Ahsan that the President should have resorted to alternate Constitutional remedies before taking a drastic step of dissolving the National Assembly. This Court has earlier observed in the case of Khawaja Ahmad Tariq Rahim (supra) that no alternate remedy was available to the President but the alternate constitutional remedies are only available to the Prime Minister on whose advice the President has to act.

20. Let me now deal with the grounds of dissolution in seriatim to examine whether the material produced in support of these grounds has direct nexus with the dissolution order and Article 58(2)(b) of the Constitution.

(1)        Extra-judicial killings in Karachi and other parts of Pakistan. Mr. Aitzaz Ahsan, learned counsel for the petitioner argued that the charge of extra-judicial/custodial killings is misconceived and contrary to the facts. It has no nexus with the dissolution of the National Assembly in terms of Article 58(2)(b) of the Constitution, inasmuch as, law and order is not a subject in the Federal domain. It relates to the Provinces. Challenging the observations in the dismissal order about extra-judicial killings in Karachi, reliance was placed upon the speech of Mr. Kamal-ud-Din Azfar, Governor of Sindh, delivered at the National Defence College on 12th September, 1996 on “Karachi” in which the law and order situation in the province of Karachi was described as follows:-

“The situation in Karachi when I was commissioned as Governor Sindh in mid 1995 is given in Annexures ‘A’ and ‘B’. The situation today is also shown in the slides. There is a sea change.”

The law and order situation in whole of the Sindh Province particularly  in Karachi is well under control and has shown a tremendous improvement since August, 1995. The downward trend in the killings of citizens and members of law enforcing agencies including police personnel at the hands of terrorists has been maintained by effective  measures. I take pride in saying that the number of such killings has  been brought down from 276 during the month of June, 1995 to only 4 during the month of June, 1996. In June, 1995, 37 policemen were killed in Karachi the figure for June 1996 is zero. This improvement in the overall law and order situation is primarily the result of better  intelligence and relentless efforts on the part of police which worked

 day and night without being complacent for. a single moment for the accomplishment of this gigantic task. “

Reference was also made to an Article written by Mr. Kamal-ud-Din Azfar, published in the newspaper in Karachi under the title “Karachi: Problems and Prospects” in which the Governor had claimed that he situation in Karachi had returned to normal and the people who had left Karachi were returning and had referred to three one-day cricket international matches held in Karachi terming them as a proof of peace in Karachi. The Governor had also claimed that killings had decreased by 90 per cent., for which the credit should go to Mohtarma Benazir Bhutto. The Governor also appealed to the people to elect Mohtarma Benazir Bhutto for another term to weed out this disease.

Mr. Aitzaz also referred to the address of the President of Pakistan dated 14th November, 1994 and that of 29th October, 1995 to the joint session of the Parliament (MajIis-i-Shoora), to contend that the President did not express any dissatisfaction over the law and order problem in Karachi. On the contrary, he praised the policy of the Government in this regard.

Reference was also made to an interview of the President to a Gulf newspaper, in which he had said that terrorism existed for more than a decade but now the situation had improved. This interview was stated to be given in Medina and after performing Haj but four months, thereafter, the Federal Government was accused of custodial killings.

As to the allegations, “instead of ensuring proper investigation of these extra judicial killings, and punishment for those guilty of such crimes, the Government has taken pride that, in this manner the law and order situation has been controlled”, Mr. Aitzaz argued that the Federal Government had no authority to investigate into any such incident, in that, such a matter is an exclusive responsibility of the Province. He asserted that no law permits the Federal Government to assume to itself, in such eventuality, powers and authority of the Provincial Government. However, the Government of Sindh set up over a hundred Judicial Commissions to enquire into the alleged extra judicial killings and reports of many have been finalised, on the basis whereof or other information, 2,000 police constables were sacked and 100 police officers were proceeded against.

21. Mr. Aitzaz Ahsan further contended that the Federal Government has also entered into negotiations with Mohajir Qaumi Movement (hereinafter referred to as MQM) for brining peace in Karachi. This gesture was highly appreciated by the President in his address to the Parliament on 29th October, 1995. He also objected to the production of over 5000 pages of documents by the respondents in support of the dissolution order on the ground that many of the documents were made and/or collected after the date of the dissolution order.

22. Mr. Khalid Anwar presented voluminous documents before the Court alongwith the written statement in support of charges of extra-judicial killings, comprising reports from Pakistan Rangers Headquarters, Karachi to Prime Minister and to Interior Minister/Ministry of Interior, giving details and particulars of law and order situation in Sindh; report on “Activities of MQM(A)” from the records of the Ministry of Interior, containing file-nothing of the petitioner as Prime Minister; report of the Intelligence Bureau to Interior Minister regarding activities of Mir Murtaza Bhutto’s supporters (copies to the Prime Minister); telephone tapping of a ‘Dawn’ journalist to Minister of Interior; Intelligence Bureau’ Bureau’s report as to activities of S.H.O., P.I.B. Colony, Karachi; notifications issued by the Federal Government conferring powers of police officers on Rangers operating in Sindh; letters issued by the Sindh Government entrusting duties/functions under section 131-A of the Cr.P.C. on Pakistan Rangers; notification issued by Sindh Government assigning specific role and duties to Pakistan Rangers; letter dated 18-7-1996 issued by the Government of Pakistan, entrusting functions/duties and powers of police officers to Pakistan Rangers; notification dated 22-2-1996 whereby Headquarters, Pakistan Rangers, Karachi was notified as attached Department of Ministry of Interior; a Cabinet decision recording appreciation of work done by Rangers and police regarding law and order situation in Karachi on 24-7-1995; a decision dated 24-2-1995 taken by ‘competent authority’ as to law and order situation in Sindh and communicated by Prime Minister’s Secretariat; decisions of the Defence Committee of the Federal Cabinet; a portion relating to law and order situation from the material sent by the Federal Government to the President for preparation of the address to the Parliament in 1995; list giving details/status of judicial inquiries relating to extra judicial killings and custodial deaths; report regarding disciplinary action taken against police officers in Sindh for extra-judicial killings and custodial deaths dated 3-12-1996; six judicial inquiries relating to police encounters/custodial killings in which police was held responsible but no action was taken and judicial inquiry dated 28-2-1996 regarding death of Faheem Commando and others.

.           Material available in the public domain relating to extra judicial killings in Karachi, was also produced before the Court which consisted of Case PAK 13-11-1995, World Organisation against Torture; initial findings dated 19-10-1995 with regard to police encounter of Faheem Commando and three others; Minutes of meeting dated 15-11-1996 of the European Parliament; a handout dated 19-10-1994 as to third round of negotiations between M.Q.M. and the Government; statement by a spokesman dated 11-12-1995 of U.S. State Department; a letter dated 12-10-1995 of Acting Director, Office of Pakistan, Afghanistan and Bangladesh affairs, U.S. Department of State; a report published by the Human Rights Commission of Pakistan in the daily “The News” titled “Pakistan rights body condemns custodial deaths” dated 29-2-1996; a report dated 22-3-1995, titled “Frankenstein’s monsters’ terrorise Karachi” published in “The Guardian” a newspaper of England; a report dated 26-3-1995 titled “Bhutto lets Karachi killings run out of control” published in another newspaper of England namely “Independent on Sunday”; a report dated 12-3-1996 titled “Police take their turn in Karachi’s war of terror” published in newspaper “The Guardian”; another report of this newspaper titled “Finger of blame for Pakistan violence shifts to Government” published on 2-3-1996; International Herald Tribune published a report dated 9-2-1995 with the title “One of these Benazir Bhuttos Isn’t Nice”; a report published by a Pakistani magazine “Newsline” in February, 1996 titled “Licence to Kill? The unprecedented rise in extra-judicial killings has further brutalised Karachi’s ongoing conflict”; a letter dated 24-11-1995 from U.K. Foreign and Commonwealth Office to Mr. Piara S. Khabra, Member of British Parliament; Judgment of Sindh High Court dated 5-10-1993 in Civil Petition No.2926 of 1992 (Mst. Raisa Farooq v. Government of Sindh and others) declaring notification of “head money” as unlawful; notification issued by Sindh Government declaring “head money” for 16 criminals totalling Rs.167 lacs; 1995 Human Rights Report on Pakistan; a report regarding “State of Human Rights in 1994” by Human Rights Commission of Pakistan; a report by “Newsline” a Pakistani magazine published monthly, titled “Encounter of another kind”; Note by the Editor of the “Newsline” referring to HRCP’s Report on Human Rights in Pakistan in 1995; an interview of Zohra Yusuf, SecretaryGeneral, HRCP, giving estimate of extra judicial killings in 1996 (up to February) published by the “Newsline”; “The case of Faheem Bhoora” published by Herald in March, 1996; Amnesty International’s report titled “Pakistan: Human Rights Crisis in Karachi”; Human Rights Commission of Pakistan’s newsletter: “HRCP questions police version in Faheem killing”; a report titled “Death File” published by the “Newsline”; a report published by “Dawn” titled “Leghari stresses need for dialogue”.

Material in respect of extra judicial killings and custodial deaths in Punjab was also produced before the Court which comprised a statement regarding persons killed in police encounters in Punjab in 1994-96; illustrative cases of police encounters; newspaper reports dated 18-10-1995 and 7-9-1996 in which Chief Minister, Punjab (PDF Government) justified police action; newspaper report dated 18-8-1996 in which Senior Minister, Punjab of P.D.F. Government justified police action; a statement as to persons killed in custodial deaths in the Punjab and judicial inquiries in respect thereof and illustrative cases of custodial deaths.

24. Dr. Farooq Hasan has also moved an application on behalf of M.Q.M. for being impleaded as party in the petition as a respondent. He has also placed numerous documents before the Court, some of which are common which have been produced by Mr. Khalid Anwar, to contend. that during the period spreading between July. 1995 to December, 1995 the administration of Mohtarma Benazir Bhutto unleashed the most terrible infliction of torture and suffering on the rank and file of the M.Q.M. leading to widespread furore over her Government’s policies. Dr. Farooq Hassan argued that Parliament of Westminster as well as the European Parliament introduced Resolutions emphatically criticising the Administration of Mohtarma Benazir Bhutto and voiced serious concerns about the loss of human life at the hands of the Government functionaries at Karachi. Newspaper reports were also relied upon to contend that the actions of extra judicial killings were not objected to by the petitioner. He particularly highlighted the sad aspect of extra-judicial killings of detainees relating to the murders of several workers or members of the M.Q.M. who were done to death after a Court had formally asked the law enforcing agencies of the petitioner to hand them over to jail authorities. The material relied upon by M.Q.M. is; a report published by Amnesty International under the title “Human rights crisis in Karachi” in February, 1996; another report captioned “Pakistan Government fails to live up to Human Rights rhetoric” published by Amnesty International; an appeal to the Caretaker Government to restore Human Rights Watch’s in Pakistan by Amnesty International; Human Rights World Report, 1996; United Nation Commission on Human Rights’ Report prepared by Special Rapporteur, Mr. Niqel S. Rodley, after his visit to Pakistan in 1996; Notices of Motions, dated 18th July, 1996 of House of Commons; Notices of Motions. dated 13th July, 1995 of House of Commons; Notices of Motion, dated 10-5-1994 of House of Commons; Minutes of the Sitting dated 15th February, 1996 of European Parliament; a report dated 30-5-1995 titled as “Tortured M.Q.M. men brought to Court blindfolded” published by daily “Dawn”; a report published by “Financial Times” captioned “Throwing the rascals out” dated 6-11-1996; a remand report under section 167, Cr.P.C. dated 26-9-1995; and application for medical treatment in the Court of Special Judge, Karachi dated 26-9-1995; a news report captioned “Spooks who become Benazir’s Achilles’ hell” dated 14-11-1996; a report published by “The Guardian” a newspaper of England titled “Bhutto’s conspiracy warning borne out” dated 5-11-1996; a report published by “The Daily Telegraph” dated 6-11-1996 titled “bungling Benazir”; a news published by “Dawn” dated 9-11-1996 captioned “Benazir’s column and M.Q.M.”: a report published by “The Times” dated 6-11-1996 under the caption “The Sword Falls”; and a report published under the title “A Primer on the perils of Foreign Aid” by “The Wall Street Journal” dated 2-10-1996.

25. Dr. Farooq Hasan also referred to a number of statements made by the then Interior Minister Mr. Naseerullah Babar and instructions given by the petitioner to him regarding operation being carried on against M.Q.M. activists, published in several. newspapers/journals etc.

The learned counsel referred to a news reported in a weekly ‘ Nai Duniya’ dated 20-26th February, 1996 in which a statement given by the Interior Minister was to the following effect:

Another news captioned as “Terrorists killed in real encounters” published in “Dawn” dated 28-1-1996; “The News” dated 23-1-1996 published a news showing Cabinet’s satisfaction over Karachi situation; the same newspaper in its December 30, 1995 publication reported a news titled “Karachi operation extended for six months”; Jang”, Karachi reported a news with the following heading: . on 30th December, 1995; a report published in daily “Public” Karachi dated 16-12-1995 regarding arrest of boys and girls from Karachi and their shifting to Sanghar Jail on the allegations of terrorism; a news reporting a statement of the Interior Minister as to operation in Karachi, published in daily “Jurrat” dated 14-12-1995; “The Star” dated 10-12-1995 published a report titled as “Chief Minister goes into emergency meeting on law and order”; a report published in daily “Awam”, Karachi dated 10-12-1995 regarding arrests of underground M.Q.M. activists from Lahore and Rawalpindi; a statement made by the Interior Minister alleging Beharis’ involvement in terrorism publihed in daily Nawa-iWaqt, Karachi dated 8-12-1995; a report showing ‘six months’ extension in Karachi Operation’ by the petitioner, published in daily “Public”, Karachi dated 6-12-1995; a report published in daily “Aagaz”, Karachi dated 2-12-1995 captioned as:

“Public Evening”, Karachi dated 21-11-1995 published a report captioned:

“The News” dated 18-11-1995 published a news titled as “Beanzir on ‘secret mission’ to Sindh”; a news published under the heading:

in daily “Nawa-i-Waqt” dated 17-11-1995; a news under the title “Babar hints at extension of Karachi operation” published in “The News” dated 15-11-1995; a report captioned “Government seeking to break vote bank of M.Q.M..” published in “The News” dated 10-11-1995; a report which was capitioned as:

published in “Evening Special” dated 6-11-1995; a news published in “The News” dated 5-11-1995 under the title “Police Commandos rushed to Karachi” by its correspondent from Hyderabad; a report titled “Prime Minister defends Babar’s action in Karachi” Published in “The News” dated 3-11-1995; “Dawn’s” report captioned “Babar briefs Leghari on Karachi carnage” publisbed on 3-11-1995; a report published in daily “Awam”, Karachi dated 3-l1-1995 showing Britain’s demand of facts about M.Q.M.; a report published in daily. “fang”, Karachi on 2-11-1995 under the title:

a statement made by Mr. Naseerullah Babar, the then Interior Minister published in daily “Jang”, Karachi on 1-11-1995 under the caption:

a news published on 31st October, 1995 in the daily “News” titled “Mohani killed in encounter” says Babar”; another statement urging people to come out of their houses, made by the interior Minister, published in daily “Qaumi Akhbar”,

Karachi dated 19-10-1995; a reported titled: ,

            “Qaumi Akhbar”, Karachi dated 11-10-1995; another published in the daily statement made by the Interior Minister Mr. Naseerullah Babar published on 7th October, 1995 in the daily Nawa-i-Waqt that M.Q.M. is not in a position to give call for strikes; yet another statement was relied upon which was made by the Interior Minister and published in the daily Nawa-i-Waqt dated 2-10-1995 stating:

on 26-9-1995 ,the Interior Minister’s another statement was published in the daily Jang, Karachi in which he said: Operation in Karachi will continue for further three months; a report titled:

published in daily Jang, Karachi on 24-9-1995; a briefing to the Prime Minister in which the then Interior Minister said:

published in daily Public, Karachi dated 12-9-1995; in the same newspaper,

on 5-9-1995, published an instruction to the Interior Minister from the petitioner in which the petitioner said:

another statement made by the then Interior Minister published by Dawn on 4-9-1995 under the caption: “Trouble makers to be shot at sight: Babar”; “Shoot on sight” orders in Karachi” was the title of a news published in “The News” dated 4-9-1995 which was a statement made by the Interior Minister Mr.Naseerullah Babar; a report titled

published in the daily Nawa-i-Waqt on 2-9-1995; a news report published in the daily Nawa-i-Waqt dated 2-9-1995 captioned in the following words:

the daily “Jang”, Karachi dated 2-9-1995 also reported the matter under the heading:

a news report published in the daily “Pakistan”, Lahore 1-9-1995 containing the following words in its caption  was also relied upon; another news report under the title published in daily Hurriyat, Karachi dated 1-9-1995; a report published in daily Jang, Karachi on 26-8-1995 containing the following words:

was a statement made by the petitioner; a news report of daily Nawa-i-Waqt dated 24-8-1995 published under the caption:

another statement of the Interior Minister published in the daily “fang”, Karachi, dated 23rd August, 1995 in which he stated:

a report of daily “Public”, Karachi dated 19-8-1995 titled:

a comment given by the Chief M.Q.M. negotiator, Ajmal Dehlvi on the Interior Minister’s Press Conference, published in “The News” dated 13-8-1995 captioned ‘Babar trying to create psychological harassment’; a daily “Evening Special”, Karachi dated 9-8-1995 published a report under the title:

a report published in “The Nation” dated 6-8-1995 captioned “Babar says he will also send more ‘gifts’ to terrorists”; under the same heading a news published by “Daily News” dated 6-8-1995; another statement of the Interior Minister containing the following words in its caption:

published in daily “Nawa-i-Waqt”, Karachi dated 6-8-1995; the same newspaper’s another report dated 5-8-1995 having the following title:

a report published in “Dawn” dated 3-8-1995 titled “Reward for police party” in which the petitioner was reported to have announced a cash reward of Rs.1.00,000 for the police patty which took part in an encounter in which Farooq Dada and his three accomplices were killed. The then Chief Minister had also announced a reward for that police party of the same amount; a statement of the Interior Minister Mr. Naseerullah Babar published in daily “Jang”, Karachi dated 2-8-1995 stating that there was no need for further operation in Karachi; another statement of Mr. Naseerullah Babar published in “The News”

dated 2-8-1995 under the title: “Saner elements in M.Q.M. will initiate real politics: Babar”; an instruction from the President to the then Interior Minister published in the daily “fang”, Karachi dated 1-8-1995 under the caption:

a report published on 26th July, 1995 in “The Frontier Post” captioned “Cabinet decides to continue Karachi operation”; a statement of Mr. Naseerullah Babar published in daily Nawa-i-Waqt Karachi of July, 1995 captioned:

another statement published in daily “Jang”, Karachi dated 24-7-1995 of Mr. Naseerullah Babar under the title:

a report published in daily Jang, Karachi dated 22-7-1995 containing a statement of the then Interior Minister on its heading in the following words:

a statement given by the, petitioner, published in daily “Khabrain”, Lahore dated

20-7-1995 under the title:

a news report published in daily “fang”, Karachi dated 19-7-1995 containing a statement of the then Interior Minister as its heading in the following words:

another statement of Mr. Naseerullah Babar, the then Interior Minister published in daily “Khabrain”, Lahore dated 19-7-1995 under the caption:

the same newspaper in its 13th July, 1995 publication reported a news under the title:

a report titled “Babar on Sabzwari’s death” published in “Daily News” dated 9-7-1995; a report captioned “major objectives achieved: Babar” published by “Dawn” on 8th July, 1995; a news item published in daily ‘Jurrat’, Karachi dated 2-7-1995 under the title:

“Gulf News” publication dated 8th June, 1995 reporting about operation in Karachi under the caption “Babar hints at launching grand operation against terrorists”; a report titled “Babar hints at ‘grand operation in Karachi after Muharram” published by “The News”, dated 8th June, 1995; another news item published in “The News” dated 6-6-1995 captioned “Kharal rules out dialogue with M.Q.M.; “The News” in its publication dated 3-6-1995 reported another news under the heading: “PPP ready for ‘all out war’ with M.Q.M.: Mukhtar”; and “Dawn’s” Bureau Report published on 2nd June, 1995 under the caption: “Prime Minister warns M.Q.M. against ‘subversion”‘.

26. I have considered the material in support of the order of dissolution on the first ground of extra judicial killings in the light of the respective contentions of the parties and the case-law discussed above. The President has formed the opinion objectively on the basis of the material having nexus with the first ground mentioned in the impugned order which, in turn, has nexus with the grounds laid down in Article 58(2)(b) of the Constitution, manifesting conscious and bona fide application of his mind. This has been repeatedly held by this Court, as discussed in the preceding paragraphs, - that a Court cannot sit as a Court of appeal while examining the order of dissolution of the Assembly under the Constitution nor it can substitute or go into the question of sufficiency or otherwise of the material relied upon by the President, provided the material forming the basis of his opinion has nexus with the grounds of the dissolution order as well as Article 58(2)(b). Newspaper clippings etc. can be relied upon as material in support of the grounds of dissolution. The President can also produce corroborative or confirmative material in support of the grounds which has been made available after the order of dissolution.

27. As to the contention of Mr. Aitzaz Ahsan that the extrajudicial/custodial killings have no nexus with the dissolution of the National Assembly, inasmuch as, law and order is not a subject in the Federal Domain, suffice it to say that Article 148(3) of the Constitution provides, “It shall be the duty of the Federation to protect every Province against external aggression and internal disturbances and to ensure that the Government of every Province is carried on in accordance with the Constitution”. Clearly, in view of the disturbed situation in Karachi, leading to flames of violence, terror and counter terror, extortion and counter-extortion, the Federal Government ought to have discharged its Constitutional duty in the Province of Sindh in respect of law and order/internal disturbances. I am also unable to agree with Mr. Aitzaz Ahsan that the Federal Government had no authority to investigate into any incident of extra-judicial killings. The powers of the Federal Government are clearly spelt out in clauses (1) and (4) of Article 149 of the Constitution which reads thus:-

“(1)’

The executive authority of every Province shall be so exercised as not to impede or prejudice the exercise of executive authority of the Federation, and the executive authority of the Federation shall extend to the giving of such directions to a Province as may appear to the Federal Government to be necessary for that purpose.

(4)        The executive authority of the Federation shall also extend to the giving of directions to a Province as to the manner in which the executive authority thereof is to be exercised for t.,e purpose of preventing any grave menace to the peace or tranquillity or economic life of Pakistan or any part thereof.”

Reading of Articles 149 and 143 together would clearly show that the Federal Government was fully empowered under the Constitution to take necessary action to discharge its Constitutional obligations. As regards the contention of Mr. Aitzaz Ahsan that as a result of judicial enquiries into the alleged extrajudicial killings, the Government of Sindh had sacked 2,000 police constables and 100 police officers were being proceeded against, Mr. Khalid Anwar placed documents on record to contend that he dismissal of police constables over 2,000 and proceedings against police officers (146) are, in fact, a mere concoction, inasmuch as, the previous P.P.P. Government had taken action in only four cases involving a total of seven police personnel. Any other cases of dismissal were normal departmental proceedings unrelated to extra judicial killings. It is further pointed out that none of the four cases involved any police “encounters”. these were all cases of custodial killings and even these four cases did not involve any so-called “terrorists” or “unidentified snipers”. However, the allegations against the Federal Government are that it was itself instrumental in bringing about that very state of affairs which, it was Constitutionally under obligation and empowered to control.

28. I have gone through the addresses of the President of Pakistan dated 14th November, 1994 and that of 29th October, 1995 to the joint session of the Parliament relied upon by Mr. Aitzaz Ahsan to refute the grounds stated in the dissolution order in respect of extra-judicial killings. The President’s address to the Parliament in 1994 did not relate to the issue of extra judicial killings. The mere fact that the President in his address commended something done by the Government does not mean that he commended everything done by the Government. The addresses of the President merely compile the killings that went on in Karachi over the relevant period without asserting that the killings carried out by the law enforcement agencies were lawful or in accordance with law. As to the speech of Mr. Kamal-ud-Din Asfar, as Governor of Sindh, suffice it to say that he was appointed by the petitioner’s Government, he performed his functions on the basis of his perception of himself as an appointee of the Federal Government and on the advice of the Chief Minister. The President, however, on the basis of the material available before him formed the opinion in respect of ground No.l ibid which has clear nexus with Article 58(2)(b), therefore, no exception can be taken to it merely on the basis of speech of Mr. Kamal-ud-Din Asfar, Governor of Sindh, delivered at the National Defence College on 12th September, 1996 or on the article written by him as referred to and relied upon by Mr. Aitzaz Ahsan to contradict what is stated in the dissolution order. As stated above, in these proceedings, this Court is not sitting as a Court of appeal nor it can substitute or go into the question of sufficiency or otherwise of the material relied upon by the President having clear nexus with the impugned order.

29. As regards the second ground on the subject-matter of Mir Murtaza Bhutto’s murder, brother of the petitioner, I would refrain from expressing any opinion on the issue as the matter is sub judice before the Tribunal of Inquiry.

30. As to the third ground relating to failure to implement the decision in the Judges’ case and ridiculing of judiciary, Mr. Aitzaz Ahsan submitted that whatever the petitioner said was a fair comment on the judgment and the learned authors of the judgment were themselves broad-minded enough not to take any umbrage upon any statement made by the petitioner. How could the President do so? He further submitted that whatever the petitioner said on the floor of the National Assembly was a matter for the record, and it was for the President to show how it amounted to ridiculing. Without prejudice to the foregoing submission, Mr. Aitzaz Ahsan argued that a speech by a Prime Minister in a forum that has elected her and the President, and that is representative and sovereign, cannot form the basis of the dissolution of the entire Assembly otherwise no House would survive. It was submitted that speeches in the Parliament are a matter of the internal proceedings of the House and no grievance can be made in regard thereto. These are Constitutionally protected.

As to the implementation of the judgment, Mr. Aitzaz Ahsan argued that concrete steps were taken by the petitioner to implement the judgtxtent. In brief, his submission was that the inferences drawn by the President were wholly untenable and unjustified and that there was no violation of Article 2A or 190 of the Constitution.

31. Mr. Khalid Anwar vehemently argued that the petitioner’s failure to speedily and effectively implement the decision was not only flagrant breach of Government’s obligation under Article 190 of the Constitution but also a deliberate blow aimed at undermining the independence of the judiciary.

Article 190 of the Constitution expressly provides that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. Mr. Aitzaz Ahsan has also not disputed that it is indubitably the obligation of all executive authorities including the Federal Government to obey and execute both in letter and spirit, all orders, directions and decrees of the Supreme Court. The Judges’ case involved matters of fundamental Constitutional importance, namely, the manner in which Judges to the superior judiciary were to be appointed. The judiciary being one of the main pillars of the State, the manner in which, and the persons by whom, vacancies in the High Courts and the Supreme Court are to be filled, is a question of vital importance for the governance of the country. This Court issued detailed instructions as to how appointments were to be made in the High Court and Chief Justices appointed. There was no room for any doubt or ambiguity. A specific timetable was laid down within which the judgment was to be implemented. Yet, several weeks passed before the required appointments were made. The Government filed Review Petition and Reference but the same were abruptly withdrawn during the course of their hearing. It was only with the greatest reluctance that the judgment was finally implemented and that too was done incompletely. This behaviour of the Federal Government was not limited to an isolated act of non-implementation of the Supreme Court judgment in Judges’ case but series of decisions, statements and actions were taken targetting the judiciary. The civilization of a country is measured by the respect the Government has for the judiciary. The respect and dignity accorded to and enjoyed by the Apex Court is one of the key intangibles on which the fate of a nation rests. It is for this reason that it is absolutely vital that those who hold high public office must, at all times, act in a manner that encourages and causes others to respect the rule of law and the superior judiciary, rather than in a manner that encourages the reverse. If the superior Courts are unable to or are prevented from, performing their Constitutional duties and functions, the result will be the unravelling of the very fabric of the nation. As provided under Article 184(1) of the Constitution disputes between two or more governments can only be resolved by Supreme Court. It is. therefore. absolutely vital that the orders of the Supreme Court be obeyed and enforced speedily by the executive and legislative branches.

Regarding the petitioner’s claim that she did not ridicule the judiciary, Mr. Khalid Anwar has referred to various statements made by her appearing in the newspapers reports as well as to her speech in the National Assembly on 28-3-1996 to contend that her utterances were contumacious and cannot be described as a fair comment.

32. I have examined the speech delivered by the petitioner in the National Assembly. It is wholly immaterial whether or not this Court has taken any official notice on the petitioner’s comment qua the impugned order of the President. The question involved herein is whether executive branch can be allowed to disregard the orders of this Court and express displeasure in respect thereof in public fora including the National Assembly. the answer is in the negative.

33. The protection referred to by the petitioner is only available to an individual member from criminal or civil sanctions. The judgment rendered by this Court cannot be ridiculed in the garb of fair comment. After scrutinizing the material on record in support of third ground, I am of the view that the petitioner’s belated implementation in the case of appointment of Judges was violative of Articles 190 and 2A of the Constitution and the material relied upon by the President has nexus with ground No.3.

34. Regarding fourth ground, relating to assault on the judicial organ of State in the garb of a Bill moved in Parliament for prevention of corruption practices, Mr. Aitzaz Ahsan contended that mere moving of a motion or a Bill in Parliament cannot form the basis of any punitive action. He further submitted that even if the allegations were true and the entire responsibility for it could be placed on the petitioner, it could still not be a sufficient ground for the dissolution of the National Assembly, in that, in the light of judgment of this Court in the case of Haji Saifullah Khan (supra), the mere failure to comply with any particular provision of the Constitution does not justify the dissolution of the entire Assembly. As to the lapse on the part of the petitioner in not informing the President regarding moving of a Bill, as required under Article 46(c) of the Constitution, Mr. Aitzaz Ahsan submitted that the Acting Cabinet Secretary was admonished in the following Cabinet meeting as it was the duty of the Cabinet Secretariat to bring the Bill to the notice of the President. It was further contended that if at all there has been a lapse on the part of the petitioner on one occasion that does not justify the dissolution of the National Assembly. He further, argued that the Government was not prompted to move the Bill on account of any two-thirds majority or the lack of it. The Bill was moved taking into account the National demands from all sections of the population in the hope that a consensus would develop on this issue. It was also urged that the Bill was only a proposal and it had to go through several stages of consideration and reconsideration in the two Houses and their Committees before it could become an Act and that too after consent, therefore, the impugned dissolution of National Assembly on this plea amounts to a breach of the privilege and domain of Parliament and is, thus, in violation of the Constitution. He submitted that the fourth ground of dissolution was not bona fide and the impugned order suffers from mala fide intent.

35. Mr. Khalid Anwar refuted the petitioner’s claim arguing that what was of importance was not the fact that the Bill was not law or even that the petitioner’s Government did not command the necessary majority in Parliament, what was of critical importance was what the petitioner’s move showed about her attitude and intentions concerning the judiciary, one of the three pillars of the State. Mr. Khalid Anwar argued that the Federal Government despite its clear Constitutional obligation not only defied the Supreme Court’s verdict in the Judges’ case but on the top of that came the Bill wherein the defunct Prime Minister had expressed her desire, as manifested in the Bill that she should be the one to, in effect, decide who would sit as a Judge of the High Court or the Supreme Court and she would be the one to decide as to when and how a Judge would be removed from the High Court or the Supreme Court. He submitted that the Bill was not so much a move to amend the Constitution, it was effectively a declaration of war against the judiciary. It sought to confer the power on 33 M.N.As. to suspend a Judge of the High Court or the Supreme Court. Mr. Khalid Anwar submitted that when the executive openly defies the Supreme Court and makes crystal clear its intention to bring the judiciary “to heel’, then the Constitution has clearly. been thrown out of balance. Giving an illustration, Mr. Khalid Anwar submitted that if a car is going downhill, and the driver, instead of applying the brake, presses the accelerator, one does not have to wait to see the crash to tell what will inevitably happen. In the circumstances of the case, he argued, the President and the nation did not have to wait for the petitioner’s blow to fall on the judiciary to know that it was inevitably being contemplated. It was argued that even the Minister of State for Law joined in the attack, inasmuch as, on 22nd October, 1996, the daily Jang reported the Minister as blustering that the Judges were not “sacred cows” that they could not be touched. Mr. Khalid Anwar further submitted that in recent months, there had been mounting criticism directed against the petitioner and her husband as to corruption in the affairs of Government, therefore, partly, in order to divert attention away from herself and partly, in order to try and browbeat the Judges, the petitioner deliberately chose to raise the bogey of corruption in the judiciary. He vehemently pleaded that it is a well-settled Constitutional doctrine that there should be no attacks on the judiciary by the other branches of the State and certainly not for partisan political motives. It is for this reason that, inter alia, Article 68 prohibits any discussion in Parliament with respect to the conduct of a Judge of a superior Court with respect to the discharge of his duties. Mr. Khalid Anwar argued that the law being applied by the petitioner was that of the jungle, with the executive lion being pitted against the judicial lamb. In these circumstances, it was inevitable that the conclusion drawn was that the Government was not being, and could not be, carried on in accordance with the Constitution.

36. There appears to be great force in the submissions of Mr. Khalid Anwar. I am unable to agree with Mr. Aitzaz Ahsan that a Bill being moved with the purpose of undermining the independence of the judiciary could be regarded as Parliament’s privilege. There is also no force in the submission that the mechanism proposed in the Bill prevails in other Parliamentary systems including India. In no system of democracy, a tiny minority of Legislators have the right to send a Judge packing nor does the power to remove Judges vest in only one House, where there are two legislative Chambers. In India, a Judge of the Supreme Court can only be removed from office by the procedure laid down in Article 124(4) of the Indian Constitution which provides as under:-

,.          “A Judge of the Supreme Court shall not be removed from his office  except by an order of the President passed after an address by each       House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved  misbehaviour or incapacity.”

The same procedure is applicable for the removal of Judges of the High Courts. The majorities as are required to remove a Judge are the same as required by the Indian Constitution for its amendment. The procedure to remove a Judge is even more stringent since the required majorities must be obtained in the same session of the Indian Parliament; there is no such requirement in respect of a Bill to amend the Constitution. Thus, if the Bill presented by the petitioner were to be even conceptually similar to the Indian provisions, it sought at least to have provided the same procedure for removal of a Judge from office as is laid down in Article 236 to amend the Constitution. It is not understandable why the President was kept in the dark about a major Constitutional Bill in face of Article 46 of the Constitution which envisages Constitutional duty upon the Prime Minister to communicate to the President all decisions of the Cabinet relating to the administration of the affairs of the Federation and proposal for the legislation. The reference to the “admonishing’ of the Cabinet Secretary is not relevant, in that, the obligation cast by Article 46 of the Constitution is on the Prime Minister and not on the Federal Government. In any case, any lapse on the part of the Acting Cabinet Secretary or failure to comply, the provisions of Article 46(c) of the Constitution would lie on the petitioner in view of the wellsettled principles of Ministerial responsibility.

37. The procedure whereby a Bill becomes an Act of Majlis-e-Shoora (Parliament) is not relevant for present purposes. The question involved is whether a small minority in the National Assembly can dictate who would sit as a Judge of the Supreme Court and the High Courts. ‘The Bill aimed to make Judges of superior Courts hostages to the whim and pleasure of the Government of the day, forcing them at all times to look over their shoulders to watch out for the inevitable blow. In any case, the claim of the petitioner that the Government  was open to discussion in all aspects of the Bill clearly indicates that the Government was not serious in having presented it in the first place. As discussed above it was not a case of amendment simpliciter. Viewed in the overall perspective, the Bill was designed to embarrass and humiliate the superior judiciary. These are the reasons in support of this ground as stated in the short order that “Constitution Fifteenth Amendment Bill was introduced in N the Parliament for initiating the process of accountability against the Judges by sending the Judges of the superior Courts on forced leave if fifteen per cent. of the members moved a motion against them. This Bill ran counter to Article 209 of the Constitution which is already in existence for taking action against Judges before the body of Supreme Judicial Council”.

38. Regarding fifth ground that the judiciary has still not been fully separated from the executive in violation of the provisions of Article 175(3) of the Constitution and the dead-line for such separation fixed by the Supreme Court of Pakistan, Mr. Aitzaz Ahsan argued that the ground was misconceived and could not be a basis for the dissolution of the Assembly. He vehemently submitted that a High-Powered Committee was formed consisting of all the Chief Secretaries, the Advocates-General, and the Principal Secretary to the Prime Minister. Some of the meetings of this Committee were also attended by the Chief Ministers, Provincial and Federal Law Ministers. Bypassing the Federal Law Ministry, the President himself desired that Mr. Shahid Hamid (Caretaker Defence and Establishment Minister) be associated with this Committee. His proposals were in fact tilted in favour of the executive. In one of the final meetings of this Committee, the President himself presided and took decisions. The petitioner was not a part of that meeting. Mr. Aitzaz Ahsan further submitted that the Law Reforms Ordinance, 1996 was promulgated before the cut-off date prescribed by the Supreme Court itself. Subsequently all Provinces issued notifications required under the Ordinance of its promulgation. The Ordinance was laid in the National Assembly and passed in a record period of eight days. Mr. Aitzaz Ahsan submitted that initially the 1973 Constitution provided for separation between executive and the judiciary in three years. This period was extended to 5, and finally 14 years but no Government bothered to apply this provision. Only the petitioner’s Government had the privilege of implementing the judgment delivered by this Court in Government of Sindh v. Sharaf Faridi (1990 SCMR 91). Without prejudice to the above submissions, Mr. Aitzaz Ahsan argued that the subject-matter of the charge wag on the Concurrent List and was the responsibility of the Provinces. No action could be taken against the Federal Government, less so the National Assembly, on this charge, which was wholly extraneous to the objects and purposes of Article 58(2)(b).

39. Mr. Khalid Anwar contesting the claim of the petitioner argued that her Government had failed in its obligation in this regard. He submitted that the composition of the ‘High-Powered Committee’ referred to by the petitioner itself indicated that the Federal Government was fully involved in the matter. He further argued that the ‘putative’ ‘tilt’ in ‘favour’ of the executive gratuitously attributed to Mr. Shahid Hamid was wholly irrelevant and immaterial and had been inserted in order to indirectly cast aspersions on the President. It was next argued that the Chief Justices’ Committee expressed its dissatisfaction with the pace of the separation of the judiciary from the executive and the inordinate delay in the appointment of Judicial Magistrates to fill in the existing vacancies. Mr. Khalid Anwar argued that a matter on the Concurrent List was as much the responsibility of the Federation as of the Provinces. Separation of the judiciary and the executive that eoncerns all of Pakistan, a Constitutionally mandated requirement, was a matter, peculiarly, well-suited for the attention of the Federation and its Government. Without prejudice to the above Mr. Khalid Anwar submitted that the same coalition (the PDF) was in power both in the Centre and in the three of the four Provinces and, therefore, there was no impediment at all in the way of speedy compliance of the orders of the Supreme Court.

40. The arguments of Mr. Khalid Anwar appear to be quite valid and sound. I also find that there was no impediment at all in the way of speedy compliance of the orders of this Court made in Sharaf Faridi’s case (supra). It is not disputed that the Chief Justices’ Committee expressed its dissatisfaction with .the pace of the separation of the judiciary from the executive. Compliance with the orders of the Supreme Court, after repeated defiance, is no compliance in letter and spirit. In any event, the Chief Justices’ Committee’s dissatisfaction with the pace of the implementation created serious problems, in that, the same person at one and the same time was exercising both executive and judicial functions, for example, the Deputy Commissioner acts in a judicial capacity as District Magistrate while simultaneously exercising executive and administrative powers. Clearly, complete separation of judiciary from the executive is being delayed and by law Executive Magistrates are given powers to sentence to imprisonment for three years, which is against the spirit of the judgment in Sharaf Faridi’s case as stated in the short order. Thus, visualized the material available on record in support of the fifth ground has clear nexus with the grounds of dissolution.

41. Sixth ground of dissolution relates to illegal and unconstitutional phone tapping and eaves-dropping. Mr. Aitzaz Ahsan specifically denied the charge. He submitted that the petitioner never authorised any phone-tapping. In fact, some times she herself felt that she was a victim of phone-tapping. She was under the impression that all her Ministers and Secretaries were tapped. She complained to the Defence Secretary, Communications Secretary and her Military Secretary, and was keen to find out the truth. At least, on one occasion, her Military Secretary had written to the Secretary Communications that the Prime Minister’s phones were being tapped and required him to investigate. Mr. Aitzaz Ahsan further submitted that the petitioner was so concerned with this illegal phone-tapping that the Communications Ministry had placed an order for 300-line tapping proof exchange for Constitutional functionaries of the State and the Armed Forces so that no such conversation could be tapped.

42. Mr. Khalid Anwar has placed on record numerous documents in support of sixth ground. He produced before the Court a document showing procedure followed by Intelligence Bureau operatives regarding illegal phone tapping and eaves-dropping which is as follows:-

-           BT used to be assembled in the Operations Cell under the supervision of Mr. Ghulam Nabi, Inspector.

-           The assembled B.Ts. used to be handed over to field staff who used to install the same under the supervision of Mr. Afzal Haq, Deputy Director-General, Rawalpindi at the respective target places.

-           The device used to be operated with the help of special, equipment installed at the Listening posts.

-           The recording obtained through these technical devices used to be transcribed as a special arrangement under the supervision of Mr. Muhammad Akhlaq, Assistant Director.

-           The important points from the transcript used to be selected and a summary was thus prepared by Mr. Muhammad Sadiq Malik, Deputy Director.

-           Mr. Muhammad Sadiq Malik, Deputy Director was also responsible to carry this transcrips to Prime Minister House and bringing those back after duly circulating the same to Major (Retd.) Muhammad Shabbir Ahmed, Ex-JDG (T) and Mr. Masood Sharif Khan, Ex-DGIB. “

A statement of Muhammad Sadiq Malik, Deputy Director, IB, dated 9-12-1996, as also produced before the Court which reads as follows:-

            “I am serving in Technical wing of IB HQ since about 4 years. Later, I   was detailed by Mr. Shabbir Ahmed, JDG(T) to prepare summary of Telephone-tapping/monitoring and for delivery to Prime Minister’s House. All these Summaries were prepared under my supervision and delivered by me to the Prime Minister House in presence of D.M.S. When the said file was seen by the Prime Minister, Sub. Azim used to call me on telephone to collect it and I used to go and collect it.

            The file was delivered on regular basis, before going I used to contact D.M.S. or A.D.C. over telephone that I want to come over and they used to inform at the gate (P.M. House) and I used to go in official vehicle.

Earlier no number was given to the file, but once one file was delayed i.e. not returned from Prime Minister, thereafter, it was decided to give a number on the file cover. After sometime it was observed that pages were being removed from the file. This was reported to the then

JDG(T), who instructed that in future the pages should be numbered. So this practice was continued.

On return I used to check the file and found that many pages were missing. It was reported to JDG(T), who said. that these pages were handed over to Director-General IB by Prime Minister so there is nothing to worry.

 I used to also deliver sealed envelopes given to me by Mr. Ashraf Bhatti (PS to JDG(T)) to the Prime Minister House. It may be mentioned here that no receipt was taken at the time when the file in  question was handed over or received back. The summary file was returned by Prime Minister, whereas the files given to me by Ahsraf Bhatti, mostly didn’t come back from Prime Minister.

             To keep our record, a register was maintained for this purpose.

When the Director-General IB was present in Islamabad, a duplicate copy of the summary was sent to him, which he after checking used to return it with his remarks.

At times I was given an envelope with number to be delivered and hand-written receipt was given to me to get the signatures. I used to hand over this to Sub. Azim and obtained his signatures on the receipt, which on return I handed over the receipt to Ashraf Bhatti.

Note:

All the files delivered by me as mentioned above where duly sealed in    double cover. The outer envelope was in the name of M.S. to the Prime Minister whereas the inner was in the name of “For Eyes Only, The Prime Minister of Pakistan”. When it was received back was sealed by  tape in single envelope i.e. for “Eyes Only”. At times Sub. Azim used to `”U to write Director-General IB on it. After opening it the cover was  destroyed. The files with 2 signs or remarks were handed over to JDG(T) for action at his end.

It may be pointed out that summary No.269/144, +la+140-A to 140-D, delivered on 4-11-1996 around 2015 hours has not been returned. ‘

                                                                                                (S.d.)

                                                                                    (Muhammad Sadiq Malik)

                                    Deputy Director (To III)

                                    9-12-1996.”

The next was a List of names and telephone numbers of the persons whose telephones were tapped/bugged and conversations taped illegally including Judges of the superior Courts, leaders of political parties and high-ranking military and civil officers, which is as under:-

“LINES ON BOARD WITH B.Ts” OPERATION CELL

S.No.   Phone No.       Name of Target         Started on                                    Closed on

1.         213767     Mr. Sajjad Ali Shah        22-11-1995                             4-11-1996

                              Chief Justice.

2.         212183    Rest House, F-5               22-11-1995                             4-12-1995

                            Minister’s Colony

3.         820613           -do-                           22-1-1996                               11-2-1996

4.         220403            -do-                        16-1-1996                                   11-3-1996

5.         212280            Judges (Rest House   23-3-1996                                20-5-1996

                                                     F-5)

6.         215100                        -do-            -   do                                                  -do

7.         212705            C.J., N.-W.F.P.           -do-                                               -do-

8.         218897                        -do-     -             do-                                             -do-

9.         821677               Senator Nasreen        12-4-1996                                        -

                                           Jalil

10.       224533            Mr. Wasim Sajjad        10-4-1996                             11-6-1996

11.       215631            Mr. Hamid Nasir          20-9-1995                            22-5-1996

                                        Chattha

12.       280693            Justice Khoso               21-3-1996                          20-5-1996”

Besides, following persons’ telephones were also taped on different dates by the Intelligence Bureau’s personnel during the petitioner’s Government:-

Operation Cell

Code Name                                        Target

BM means

Blind Man

BM-                                            Syed Sajjad Ali Shah, CJ Pak (Office)

BM-1B                                     -do- (Residence)

BM-1C                                     -do-

BM-1D                                     -do-

BM-lA                                      Judges Rest House, E-7, Islamabad

BM-5                                        -do

BM-2                                         Mr. Ashiq Hussain, Registrar, SC

BM-3                                         Justice Salim Akhtar

BM-4                                         Justice Mukhtar Jenjo

BM-10                                       -do-

BM-11                                      -do- (Residence)

BM-8                                         Justice Fazal Ilahi

BM-9                                         Justice Raja Afrasiab Khan

BM-13                                       Justice Ajmal Mian

BM-17                                       Justice Saiduzzaman Siddiqui

BM-21                                       Justice Fazal Karim (office) &

                                                   R-5 Rest House (Residence)

BM-24                                       Justice Muhammad Munir

BM-25                                       Justice Sh. Riaz Ahmad

BM-29                                       Justice Hazar Khan Khoso

Smooth Operator                       Mushahid Hussain, PML(N)

Octopus                                    Ch. Akhtar Ali, MNA MPL(J)

Wolf                                          Maulana Fazlur Rehman, President JUI(F)

Wiseman                                   Mr. Wasim Sajjad, Chairman Senate

Sea Weed                                  Senator Nasreen Jalil (M.Q.M.)

Hot Bed                                     Ms. Saba (M.Q.M.)

Movie-I                                        Khawaja Ejaz Sarwar, Information

                                                   Advisor to the President (Office)

OG-28-B                                     -do- (Residence)

Movie-2                                     Mr. Shamsher Ali Khan, Secretary to the

                                                President (Residence)

Movie-3                                   -do- (Office)

J.T.1                                        Mr. Ghulam Mustafa Jatoi

J.T.2                                                    -do-

SECRET

CODE NAME:                                                TARGET

Guest                                                   Mian Nawaz Sharif, President PML(N)

Evening Star                                         Mr. Afzal Khan, EX-CM, N.-W.F.P.

Panther                                                 Raja Nadir Pervez, PML(N)

LIST OF NAMES FROM ISLAMABAD AND FOUR PROVINCES WHOSE TELEPHONES WERE TAPED.

JUDICIARY:

 1.                                                     Mr. Justice Sajjad Ali Shah, Chief Justice of Pakistan.

2.                                                         Mr. Justice Fazal Ilahi.

3.                                                         Mr. Justice Raja Afrasiab.

4.                     Mr. Justice Nazir Ahmed Bhatti, Chief Justice, Federal Shariat Court

LAHORE:

1.                                             Mr. Justice Sheikh Riaz Ahmed.

2.                                             Mr. Justice Khalil-ur-Rehman Ramday.

3.                                             Mr. Justice Rashid Aziz.

4.                                             Mr. Abdul Sattar Najam, Advocate-General Punjab.

5.                                             Chief Justice (Retd.) Justice Dr. Nasim Hasan Shah

6.                                             Mr. Justice (Retd.) Manzoor Hussain Sial.

QUETTA

l .                                             Mr. Justice Munawar Ahmed Mirza, Chief Justice

Balochistan

KARACHI:

1.                                             Chief Justice Sindh High Court, Karachi

2.                                             Residence of Chief Justice of Pakistan at Karachi

3.                                             Residence of Mr. Justice Nasir Aslam Zahid,

            at Karachi.

4.                                             Residence of Mr. Justice Amanullah Abbasi,

            at Karachi.

5.                                             Residence of Mr. Justice Ghous Muhammad

Judge Sindh High Court, Karachi.

PRESIDENCY:

1.                                             Mr. Ejaz Sarwar, Information Advisor

            to the President.

2.                                             Mr. Shamsher Ali Khan, Secretary to the President.

NATIONAL .ASSEMBLY:

1.                                             Syed Yousuf Raza Gilani, Speaker.

2.                                             Syed Zafar Ali Shah, Deputy Speaker

SENATE:

1.                                             Mr. Waseem Sajjad.

CHIEF MINISTER HOUSE. LAHORE:

1.                                             Following telephones numbers were taped,

                                                6305033          14-9-1995

                                                6367440                      -do-

                                                6373766          18-9-1995

                                                6316656          28-9-1995

CHIEF MINISTER HOUSE, QUETTA:

1.                                 Imran Gichki, Press Secretary to C.M.

2.                                 Mr. Saeed Ahmed Hashmi, Advisor to C.M

IMPORTANT POLITICIANS:

I .                                 Mian Nawaz Sharif, President PML(N)

2.                                 Maulana Fazal-ur-Rehman, President JUI(F).

3.                                 Mr. Ghulam Mustafa Jatoi, President NPP.

4.                                 Raja Zafar-ul-Haq, Senator.

5.                                 Ch. Shujaat Hussain, Senator.

6.                                 Mir Balkh Sher Mazari, Ex-Caretaker Prime Minister.

7.                                 Kh. Ahmed Tariq Rahim, Presently Governor Pb.

8.                                 Mir Zafarullah lamali, Caretaker C.M. Balochistan.

9.                                 Begum Abida Hussain, Presently Minister.

10.                               Professor Khursheed Ahmad, Senator.

11.                               Mr. Gohar Ayub, MNA

12.                               Mr. Sartaj Aziz, Senator.

13.                               Ch. Akhtar Ali, MNA, PML (J).

14.                               Mir Afzal Khan, Ex-CM, N.-W.F.P

15.                               Mrs, Nasreen Jalil, Senatetor M.Q.M.

16.                               Fiza Junejo, PML (J).

17.                               Kh. Asif, MNA.

18.                               Mr Aslam Khattak

19.                               Senator Hadi

20.                               Mr lshtiaq Azhar, Senator, M.Q.M

21.                               Col.(Retd.) Ghulam Sarwar Cheema.

22.                               Mr Abu Bakr Sheikhani.

23.                               Sahibzada Yaqoob Ali khan

24.                               Presently Foreign Minister

24.                               Gul Andaz Abbadi, (JI).

25.                               Main Aslam. (JI).

26.                               Co. A.K. Ehsanullah (JI)

27.                               Sheikh Aftab, Senator (M.Q.M.).

28.                               Commander Khalil-ur-Rehman, Senator.

29.                               Mulana Ghafoor Haidri (MNA)

30.                               Dr. Basharat Jazbi.

31.                               Mr Mushahid Hussain, PML(N).

32.                               Mr M. Ramzan (JI) (Residence Islamabad).

33.                               Raja M. Akhlaq (JI) Kuri Sher, Islamabad.

34.                               Farrukh Jamil (JI) (Residence Islamabad)

35.                               Sheikh Rasheed Ahmed (MNA).

36.                               Mr. Ejaz-ul-Haq (MNA).

37.                               Maulana Jalil, Amir JI, Rawalpindi City

38.                               Dr. Liaquat Ali (JI).

39.                               General (R) Hameed Gul.

40.                               General (R) Aslam Baig.

41.                               Allama Sajid Naqvi (TJP).

42.                               Mrs. Nelofar Bakhtiar.

43.                               Nazim-i-Kashmir,

44.                               Mr. Saleem Cheema.

45.                               Main Manzoor Ahmed Watoo.

46.                               Mr. Tariq Chaudhary, Senator.

47.                               Mr. Asghar Khan.

48.                               Mr. Zahid Mazari.

49.                               Mr. Liaquat Baloch

50.                               Raja Riaz.

51.                               Haji Ghulam Ahmad Bilaur (ANP)

52.                               Haji Muhammad Adeel (ANP).

53.                               Mr. Jafar Khan Mandokhel, Provincial Finance Minister.

54.                               Mr. Khuda-e-Noor (JWP)

55.                               Sardar Yaqoob Nasir, Senator PML(N).

56.                               Mr. Amanulla Kunnaui QWP)

57.                               Mr. Shamim Afridi, Finance Secretary QWP)

58.                               Mr. Iqbal Sheikh (M.Q.M.)

59.                               Nawab Bugti House.

60.                               Mr. Ajmal Dehlvi, Newspaper “AMAN”, Karachi

61.                               Mr. Khaliq-uz-Zaman, Senater

62.                               Professor Ghafoor Ahmed.

63.                               Mr. Ansar Burney,

64.                               Syed Laiq Ali.

65.                               Mubarak Yammani.

66.                               Mr. Muhammad Dawood

67.                               Mr. Chanesar Khan

68.                               Mr. Muhammad Nasik Wala.

69.                               Hajra Begum.

70.                               Mr. Muhammad Jumma.

71.                               Mr. Asim Hafeez,

72.                               Mr. Khuda Bukhsh Bizenjo

73.                               Mr. Amjid Hussain.

74.                               Mr. Mahmood A. Haroon, Ex-Governor.

75.                               Maulana Shah Ahmed Noorani JUP (Residence).

76.                               Mr. Saifullah

GOVERNMENT FUNCTIONARIES:

1.         Mr Azhar Sohail, DG, APP.

2          Deputy Secretary Finance Division (Islamabad’s Residence)

3          Mr Masud Ahmed Sheikh, SG, Ushr & Zakat, 32 Civil Centre Melody

            Islamabad.

4          Ministry of WSG & Envir. PB, Islamabad.

Major-General (Retd) Safdar Ali Khan, P.M. Research & Analysi Standing Committee.

6.         Mr Hamza Badin, SSP (Quetta)

7.         Mr Muhammad Riaz, SSP.

8          Mr Nayyar Agha, Home Secretary.

9.         Mr Ahmed Maqsood Hamedi, Additional Chief Secretary’s Residence

            (Karachi)

10        Commissioner of Income-tax, Companies Zone, 4.R. No. 324, Main

            Income-tax Building, Karachi.

11.       Mr Wajid Durrani, SSP’S Residence at South Karachi

12.       Mr Baber Khatak, DIG, DIG Special Branch Offfice, Karachi.

13        Mr. Umar Morio, D.I.-G., Office of D.I.-G. Traffic, Karachi

14        Mr Ibrahim Khalil, DSP’s Residence.

15        Mr A.D Khawaja, SSP (Residence)

OTHERS:

1.         Sindh House

2          Punjab House

3          Jamaat-e-Islami Office

4          Punjab House, Rawalpindi

5.         Nawab Bugti House,

6          Sindh Secretariat, Sindh Assembly Building, Karachi etc.”

A statement made by Mr. Ghulam Nabi, an Inspector of Intelligence Bureau, dated 10-12-1996, regarding retrieval of bugging devices is as follows:

“SECRET”

Sub:- RETRIEVAL OF BTs/MODIFIED TELEPHONE:

The undersigned was entrusted to undertake the following retrievals:

(a)        Chief Justice Supreme Court of Pakistan, office (the retrieval was made on 04 December, 1996 in the presence of the Registrar Supreme Court of Pakistan Mr. Farooqi).

(b)        Seven BTS from the rest room of the Judges (the retrieval was made on 8th December, 1996 in the presence of the Registrar Supreme Court of Pakistan Mr. Farooqi).

(c)        Chairman Senate, Residence (the retrieval was made on 9th December 1996 in the presence of the Chairman Senate and his personal staff).

(d)        This way a total of nine BTs/ modified telephones have been retrieved so far.

(2)        Submitted for your kind information please

                  (Sd.)

            (Ghulam Nabi),

Inspector (Operation)

                        10-12-1996. “

Director (Tech).”

Statements made by Mr. Muhammad Afzal Haq, Director IB dated 18-11-1996 and 10-12-1996 were also produced before the Court which are as follows:

“TOP SECRET”

“I was posted as Deputy Director, Intelligence Bureau, Jhelum in January, 1993 and was called during May, 1995, alongwith some other officers to IB headquarters, Islamabad. I was asked to carry out interrogations of M.Q.M. suspects as part of a J.I.T. comprising o1 I.B., I.S.I. and F.I.A. I.B. arranged necessary technical coverage for the interrogation as well as to cover their meetings with visitors. The technical coverage was also extended to the political detenus like Sheikh Rashid and Mr. Shahbaz Sharif etc. In the meantime, I was posted to CI-Field, Islamabad, but remained attached with technical wing and was entrusted with the job of technical operations by the them JDG (T). In February, 1996, 1 was posted as Director District Rawalpindi, and later appointed as Acting Deputy Director-General, Rawalpindi in June, 1996. Even in this capacity under order of the then JDG(T), I remained associated with technical operations at IB Headquarters till 5-11-1996. The operation “Night mare” was terminated in the morning of 5-11-1996.

During the period of my association with technical operations, all actions were undertaken on the explicit orders from the then JDG(T).l acted in good faith and carried out all the instructions of the superior officers to the best of my capacity without any mala fide intentions or ulterior motives. During all these technical operations laid down procedures were followed as per practice in vogue. Most of the Jobs were undertaken on verbal orders/ instructions as is the practice in our department. The monitoring reports were prepared and processed and communicated by the officers and staff of Technical Wing for the information of concerned superior officers.

The technical operations conducted by technical wing under direction of the then JDG(T), some of which I can now recall are listed below:

            a          B.M

            b          Movie

            c          Night mare

            d          Financial Times

            e          Wiseman

                        OG 28-B

            g          M.R

            h.         W. H.

            j.          Nighting Gale

            k.         Hot Bed

            i.          Seeweed.

At times I used to convey the instructions of the then JDG(T) regarding monitoring and operations to Mr. Sadiq Malik, DD(CIS) and Mr Ghulam Nabi, Inspector Operations. I also conveyed the directions of the then JDG(T) to Mr. Muhammad Younis (Director North) to prepare copies of the operation BM, Movie, Night Mare and OB-28 B. Mr.Muhammad Younis was also assigned the job by the then JDG(T) to transcribe certain reports. as per procedure in vogue, the reports of these operations were prepared by the transcribers i.e. Mr. lkhlaa and Mr. Mahmud. These transcriptions given either to me or to Mr. Ashraf Bhatti (PS to the then JDG(T)) for the consumption of senior officers. These reports alongwith other monitoring reports prepared by Mr. Sadiq Malik, DD(CIS) were sent to Prime Minister.

An advertisement was got published through a contract in daily Jang, dated 1-11-1996, against JI with regard to its Dharna Programme on the orders of the then JDG(T). Copy of the advertisement is attached herewith.

As is evident, all actions were done as part of duty in accordance with official procedures, departmental practices and norms of service. All along I acted in good faith with a view to safeguard the interest of service and the organisation.

(Sd.)

(Muhammad Afzal Haq)

            Director

During year 1995, 1 was posted as Deputy Director Jhelum, when I was called to IB Headquarters, Islamabad, where I reported to JDG(A/T) for duty, with reference to some assistance rendered to technical wing. In the meantime, I was formally transferred to Islamabad and later to Rawalpinid Divisional Office. During all the period, my services were requisitioned by JDG-A(T) (Mr. Muhammad Shabbir Ahmed) if and when required.

As far as I can recall from my memory the following operations were being conducted by technical wing at that time in connection to which my assistance was sought, like providing of access etc.: -

S. No.              Operation                                                         Target

1.         BM                                                      Chief Justice of Pakistan

2          BM                                                      Rest House of Supreme Court of

                                                                        Pakistan (did not yield results)

3          Wiseman                                              Mr. Wasim Sajjad (did not yield

                                                                                    required results).

4          Night mare                                           Mr. Shahid Hamid (Short term

                                                                        operation in hotel terminated on

                                                                        5-11-1996).

5          Financial Times                                     Mr. Sartaj Aziz (Only monitoring)

6          Falcon  Sh. Rashid Ahmad.

7          Movie                                                  Mr. Shamsher Ali and Mr. Ejaz

                                                                        Sarwar of President House (Only

                                                                        monitoring).

During normal course of my duty, at times, I was supposed to convey the verbal instructions of Mr. Muhammad Shabbir Ahmad (JDG-A/T) for monitoring and operations of Mr. Sadiq Malik, Deputy Director and Mr. Ghulam Nabi, Inspector of Technical Wing.

The line product of operation Movie and Night mare was prepared by Mr. Ikhlaq and Mr. Mahmud (Transcriber) where as all other monitoring reports were prepared by Mr. Sadiq Malik for the consumption of authorities.

An other operation, which I can recall is the publication of posters/advertisements in paper against Dharna Programme of JI. (1996) .

Certified that the above activity/operations were carried out under the directions of Mr. Muhammad Shabbir Ahmad JDG (A/T) and were completed under his supervision and command as part of my normal duty.

(Sd.)

(Muhammad Afzal Haq),

Director 10-12-1996.”

43. It would advantageous to first refer to some case-law on the issue of phone-tapping/eaves-dropping, etc. In Manzoor Ahmad v. The State (1990 MLD 1488), it was held:-

“5. After hearing the learned counsel for the parties and perusing he record, I find that there is substance in the submission of the learned counsel for the petitioner that in view of Article 14 of the Constitution eaves-dropping, tapping stealthily, photographing something inside the house are invasions on privacy and as such is not permissible under the Constitution as well as in Islam...”

In United States v. United States District Court for the Eastern District of Michigan (407 US 297, 32 L Ed 2d 752, 92 S Ct 2125) under Headnote No.6 it was observed:-

“The broad and unsuspected Governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguafds.”

Reference may be made to A. v. France (1993) 17 EHRR 462) in which at the instigation of a third party, a telephone conversation between that third party and the applicant was recorded by a police officer. During that coversation plans were discussed for the commission of a crime for which the applicant was later charged but eventually acquitted, there being no case to answer. The applicant challenged the illegality of the tape-recording in the National Courts up to the Court of Cassation though unsuccessfully but did not bring a separate civil action for damages. She complained of a violation of her right to respect for private life and correspondence within the meaning of Article 8 of the Convention. It was unanimously held: “that there had been a violation of Article 8”. Article 8 of the Convention provides as follows:-

“ 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society to the interests of National security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

It was held in the said report at paragraph 35:-

“Moreover, the fact that the discussion allegedly concerned the preparations for a crime has no bearing on the finding that the recording complained of constituted interference in the applicant’s private life. Telephone conversations, just like correspondence by letter, are in principle confidential in every State governed by the rule of law, and this confidentiality which surrounds them in principle places them in the area of private life. A telephone conversation does not cease to be private merely because its content concerned or may concern matters of public interest. If the field protected by Article 8 were limited to those aspects of private life in which the public authorities have no interest that provision would be largely divested of its substance. Furthermore, the decision to tap telephone lines or record telephone conversations is necessarily taken before the content of the conversation is known with certainty. Lastly, the fact that the recording complained of was made for the purpose of collecting evidence of a plan to commit a criminal offence is a consideration relevant to the question whether the interference is justified, but does not disprove the very existence of that interference.”

In the case of Huvig v. France (1990) 12 EHRR 528), it was observed as under:-

“In the course of the judicial investigation the Investigating Judge authorised a senior police officer to have the applicants’ business and private telephone lines tapped. The applicants complained of a violation of Article 8 of the Convention.

Held unanimously, ‘that there had been a breach of Article 8’ . “

In the case of Malone v. United Kingdom (1984) 7 EHRR 14, the applicant, an antiques dealer, was prosecuted for offences relating to dishonest handling of stolen goods. During the trial it emerged that the applicant’s telephone had been tapped by the police acting on the authority of a warrant issued by the Home Secretary .... In its report, the Commission found violations of Articles 8 and 13 (see (1983) 5 EHRR 385). It was held, unanimously, by the Court, that there had been a breach of Article 8. In Klass and others v. Federal Republic of Germany (1978) 2 EHRR 214), although telephone conversations were not expressly mentioned in paragraph 1 of Article 8, the Court considered, as did the Commission, that such conversations were covered by the notions of ‘private life’ and ‘correspondence’ referred to by that provision. The case of Charles Katz v. United States (1967) 389 US 347), was also referred. The summary of the case is that:-

“Defendant was convicted in the United States District Court for the Southern District of California of transmitting wagering information by telephone. At trial the Government was permitted, over the defendant’s objection, to introduce evidence of his end of telephone conversations, overheard by F.B.I. agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he placed his calls. The Court of Appeals for the Ninth Circuit affirmed. (389 F2nd 130).

On certiorari, the Supreme Court of the United States reversed. In an opinion by Stewart, J., expressing the views of seven members of the Court, it was held that antecedent judicial authorization, not given in the instant case, was a Constitutional precondition of the kind of electronic surveillance involved.

Douglas, J., with the concurrence of Brennan, J., joined the Court’s opinion, rejecting, however, the view expressed by White, J., in his concurring opinion that no antecedent judicial authorization is necessary for electronic surveillance if the President of the United States or the Attorney-General has authorized electronic surveillance as required by National Security.

Harlan, J. also concurred, joining in and elaborating on the opinion of the Court.

White, J. also joined the opinion of the Court Black, J. dissented on the ground that eaves-dropping carried on by electronic means does not constitute a ‘search’ or ‘seizure’ within the meaning of the Fourth Amendment.

Marshall, J. did not participate.”

It was further observed in the aforesaid report:-

“The attaching by F.B.I. agents, of an electronic listening and recording device to the outside of a public telephone booth from which a suspect placed his call, constitutes a violation of the Fourth Amendment’s prohibition of unreasonable searches and seizures, in the absence of an antecedent order judicially sanctioning such surveillance upon the officers’ presentation of their estimate of probable cause and requiring them to observe precise limits and to notify the authorizing Magistrate in detail of all that has been seized.”

Reference was also made to United States v. Richard M. Nixon (974) 418 US 683). The summary of the case is as follows:-

“A grand jury of the. United States District Court for the District of Columbia indicted named individuals, charging them with various offences, including conspiracy to defraud the United States and to obstruct justice; the graind jury also named the President of the United States as an unindicted co-conspirator. At the instance of the duly appointed special prosecutor, the District Court issued a third-party subpoena duces tecum, directing the President to produce, for use at the pending criminal trial, certain tape recordings and documents relating to his conversations with aides and advisors. The President moved to quash this subpoena on the ground that the subpoenaed materials were within his executive privilege against disclosure of confidential communications. The District Court denied the motion 337 F Supp 1326) and the President appealed to the United States Court of Appeals for the District of Columbia Circuit.

On certiorari and cross-certiorari before judgment of the Court of Appeals, the United States Supreme Court dismissed, as improvidently granted, the writ of certiorari granted the President upon his crosspetition for the purpose of reviewing the authority of the grand jury to name him as an unindicted coconspirator. As to the merits, the Supreme Court affirmed the order of the District Court.”

It may also be advantageous to, reproduce the following observations in the aforesaid report:

“The production, under a subpoena duces tecum issued in a criminal case by a United States District Court directing the President of the .United States, to produce, prior to trial, certain tape recordings relating to his conversations with aides and advisors, is not subject to an

objection to the admissibility of the recordings as hearsay, where most of the tapes apparently contain conversations to which one or more of the defendants named in the indictment are a party and their declarations may be admissible under the hearsay rule. “

It was further observed:-

“In the performance of assigned Constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others; however, it is emphatically the province and duty of the judicial department to say what the law is.”

44. Mr. Khalid Anwar, learned counsel for the respondents also referred to the Historic Documents . of 1974 Impeachment Articles (US Constitution) wherein A Committee of the House of Representatives, acting in a capacity only once before paralleled in American history, voted July 27-30 to recommend the impeachment of President Richard M. Nixon on the grounds of obstruction of justice, abuse of power and contempt of Congress”. That committee had launched an impeachment probe in response to charges that the Watergate Scandal traced a path to the President’s Oval Office. A majority of the committee approved that, “Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of Constitutional Government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States. Wherefore Richard M. Nixon, by such conduct, warrants impeachment and trial, and removal from office”.

Reference was also made to the passage from American Jurisprudence, Second Edition, Volume 74, 1974 on the subject of ‘Interception And Divulgence Of Communications: Wiretapping’. Under paragraph 209 thereof it was observed:-

“Under acts of Congress and State legislation, it is unlawful to intercept, reveal the existence of, and disclose or divulge the contents of, wire, or oral communications, unless the interceptor has previously obtained an order of a Court permitting a wiretap or other interception of the communications, or one party has consented to the interception. A violation of such statutes is a criminal offense, the communication may not be received in evidence, and a civil action for damages may lie.”

In Constitutional and Administrative Law by Wade and Bradley it was observed:

“It is only in exceptional cases that blame should be attached to the individual civil servant and it follows from the principle that the Minister alone has responsibility for the actions of his department that the individual civil servant who has contributed to the collective          decision of the department should remain anonymous .   The responsibility of Ministers to Parliament consists of a duty to account for what they and their departments are doing.”

In Constitutional Practice by Rodney Brazier, it was observed:-

“If a Minister lies to Parliament, or so conducts himself as to raise an arguable case that National security could have been thereby compromised, or conducts his financial affairs other than with scrupulous care, or---through doing none of those things---through his behaviour makes it impossible for him to carry out his departmental duties because of the attentions of the press, then (regardless of how loyal the Prime Minister may be) he will have to go.

A Minister is responsible for the general conduct of his department: more precisely, he may have to pay the price for political misjudgment within it. What amounts to misjudgment may be a matter of opinion, and guidance can be difficult to formulate. A marginal case is provided by the preliminaries to the Falklands conflict. The Foreign Secretary, Lord Carringtion, and two of his ministerial colleagues, Mr Atkins and Mr. Luce, felt compelled to resign in 1982 after the Argentinian invasion of the Falkland Islands because they considered that the Foreign and Commonwealth Office had not adequately judged Argentina’s intentions. The Prime Minister did not want to accept their resignations, but the three Ministers persisted and left the Administration. “

45. A bare perusal of the record produced before this Court shows that illegal phone-tapping and eaves-dropping techniques have been adopted by the Government of the petitioner on a massive scale in violation of the fundamental right of privacy granted by Article 14 of the Constitution. Mr Khalid Anwar was right in contending that for our Constitutional set-up to function properly, it is vital that no organ should unlawfully encroach Upon any other. Each organ of the State can function best and discharge its Constitutional obligations meaningfully, only if it is ensured that any one or more of the other organs are not attempting to interfere or pry into its affairs. If the executive interferes in the judiciary in any manner, including the illegal tapping of Judges’ phones and the bugging of their Chambers and the recording of their conversations, then the autonomy and independence of the judiciary has been effectively impaired, either potentially or actually. If the privacy of the Judges and their communications is not ensured, then it is not possible for them to discharge their duties in the manner envisaged and mandated by the Constitution. Each pillar or the State must have the assurance that its correspondence and communications will not be illegally intercepted or interfered with. This is especially so in the case of the judiciary. The executive is the biggest litigant before the Courts. Thousands of petitions are pending before the Courts where ordinary citizens and other persons are seeking redress against the Government and protection of the judiciary against its highhandedness. In the circumstances, the potentially devastating consequences of any interception of judicial communications can be imagined. Clearly, the material available before the President shows that there was a systematic intrusion into and violations of the rights of the judiciary as an institution. The illegal activities of phone-tapping and eaves-dropping was done by the Intelligence Bureau (IB) which works directly under the control of the Prime Minister. The illegal phone-tapping was not only done in the case of judiciary but the phones of high Government functionaries, political leaders including those in opposition were also tapped and their conversation were recorded in violation of Article 9 of the Constitution which provides that no I person shall be deprived of life or liberty save in accordance with law aria Article 14 which reads as under:-

“14.--(1) The dignity of man and, subject to law, the privacy, of home,: shall be inviolable. .

(2) No person shall be subjected to torture for the purpose of extracting evidence.”

Article 19 of the Constitution was also violated by resorting to tapping of telephones eaves-dropping, which provides that every citizen shall have the right to freedom of speech and expression subject to any reasonable restriction imposed by law in the interest of glory of Islam or the integrity, security or defence of Pakistan or any part thereof, friendly relations with foreign State, public order. decency or morality or in relation to contempt of Court, commission or incitement of an offence. Section 25 of the Telegraph Act also prohibits illegal phone tapping and eaves-dropping.

46. Seventh ground relates to corruption, nepotism and violation of rules in the administration of the affairs of the Government end its various bodies, authorities and corporations etc.

Mr Aitzez Ahsan submitted that this ground is in utter disregard of the judgment rendered in the case of Mian Muhammad Nawaz Sharif (supra) wherein it was ruled that allegations of corruption, nepotism and violation of rules, even though reprehensible, did not constitute a ground that was sufficient in itself to justify an order under Article 58(2)(b) and in any case the allegation is vague and general. It cannot be sustained. It was argued that National Security has been endangered by destablisation caused by the dissolution of the National Assembly. It was further submitted that mere unsubstantiated allegations cannot form the basis of any dissolution or punitive action. If that be the case, the President ought to have resigned, in that, which applies to the National Assembly or the Government must also apply to the President. Mr. Aitzaz Ahsan denied that the transfers and postings of Government servants have been made at the behest of the members of the National Assembly and other members of the ruling parties. He submitted that all the appointments were duly advertised and the candidates were interviewed and appointments made on merit and that, in any case, if there was any odd case of violation of rules that was not in pursuance of the Government policy or orders. He further submitted that the Establishment Division had itself reported to a recent Cabinet meeting that all the appointments were in 4der and in accordance with the rules. In any case, there were adequate remedies against any alleged violation of the rules in any particular case. Those matters could easily have been taken to the Courts. The Lahore High Court has intervened in one such matter with respect to Provincial appointments. It could have been done in respect of Federal appointees as well if there had been any large scale grievance or petitions in this behalf but the remedy of dissolving the entire National Assembly was no solution nor was it sanctioned by the Constitution. Mr. Aitzaz Ahsan also argued that the President also interfered in the matter of appointments in particular with respect to Dera Ghazi Khan, by insisting upon the appointments of unqualified persons of that Division. The precise submission was that this ground as well was not germane to the exercise of power under Article 58(2)(b).

47. Mr. Khalid Anwar argued that the petitioner has failed to appreciate the nature of allegations levelled in the seventh ground of dissolution, inasmuch as, where corruption, nepotism, and the violation of the applicable rules and regulations has been carried out on a widespread, pervasive and systematic basis, then such charges can form the basis under Article 58(2)(b). Mr. Khalid Anwar submitted that in the present case, there was a difference in magnitude, in both the scale and nature of corruption, nepotism and violation of rules with the result that the whole system of Government has been subverted and the channels of administration polluted by a sustained abuse of power whereas in the case of Mian Muhammad Nawaz Sharif (supra) there were discrete instances of corruption and rules’ violation. It was contended that in all the cases where this Court had occasion to consider whether corruption or abuse of power per se could warrant action under Article 58(2)(b) the position was that the charges were not supported by credible evidence but were mainly based on newspaper stories and reports and similar allegations. Even there, this Court held that corruption charges could play an ancillary role. In the instant case, Mr. Khalid Anwar respectfully submitted that enough credible material exists to establish, at least prima facie, that there was gross abuse of power by the persons holding the highest posts in the Government. Quoting specific instances of corruption and abuse of powers Mr. Khalid Anwar drew the attention of the Court to paragraphs 243 to 293 of the written statement filed by the respondent which is reproduced hereunder:-

“243. That on 9-6-1996, the Sunday Express, a leading weekly newspaper (and the sister publication of the Daily Express, one of the largest circulation papers in the United Kingdom), published an astounding news report concerning the petitioner and her spouse. Under the banner headlines ‘Bhutto’s Surrey Retreat’, the newspaper reported that the couple had acquired what was described as a “perfect hideaway’: a £ 2.5 million mansion (known as Rockwood House) standing on a 355 acre estate. The newspaper reported that the property had its own private landing strip and indoor swimming pool, and that the security system on the estate was linked directly to Scotland Yard, the United Kingdom’s premier police division. If any alarm sounded at the estate, an “armed response vehicle” would, according to the newspaper, be despatched at once to the estate. (It may be noted that at today’s exchange rates, Rockwood House would have cost approximately Rs.175 million).

244. That on 16-6-1996, one of Pakistan’s leading English dailies, Dawn, repoted further details regarding the Surrey property. According to the paper, shipments had been flown into England by PIA, inter alia, from Bilawal House and were destined for the Surrey Mansion. These included items such as antique guns and decoration pieces. In yet more reporting on the subject, the Sunday Express reported that the petitioner’s spouse had applied for permission to build a stud farm on the estate for his polo ponies. While this application was rejected, it was reported that permission had nevertheless been granted by the local authorities to construct 63 stables on the estate. Subsequent to the press reports, further evidence also became available which conclusively established that the Surrey property is owned by the petitioner and her spouse. This evidence was so overwhelming that even the Federal Interior Minister felt unable to deny that the Prime Minister was the true owner of the Surrey property. He has been reported in the Business Recorder of 26-8-1996 as having said as follows:-

‘1 am not certain’ was Naseerullah Babar’s reply to the question if he was sure that Surrey Mansion has not been purchased by Prime Minister Benazir Bhutto and her spouse Asif Ali Zardari. ‘The beneficiary has not been named; and also purchasing property abroad is not unlawful’, he added.”

245. That the petitioner and her spouse have loudly proclaimed their innocence in the matter and have been vehement in their denials of owning or having anything to do with the Surrey property. They have threatened to sue the Sunday Express, and although the newspaper, in effect, invited them to do so, no such action was ever commenced. The threats of legal action were only for local consumption (and the local press); the petitioner obviously felt (and rightly so) that litigation would only lead to more revelations and further scandal. The question relevant for present purposes, however, is what does the documentary evidence show? Does it support the petitioners’s disclaimer of not owning the property known as Rockwood House and having nothing to do with it? Or, does it show something else again? It is to the examination of the paper trial that the respondents now turn.

246. That on 22-4-1996, the Deputy Chief of Protocol in the Ministry of Foreign Affairs faxed a message from the Ministry’s Karachi Office to the Managing Director, PIA, informing him that ‘personal luggage/effects’ were to be sent from the ‘Prime Minister House (Bilawal House)’ to Pakistan’s High Commission in London. The effects were in 8 big packages that would add up to a truck load. The Managing Director was asked to depute someone from PIA to take charge of the effects for shipment. The fax was also copied to Naval Headquarters with the request that The Navy arrange for the transporation of the effects from Bilawal House to the airport.

247. That on 24-4-1996, the Deputy Chief of Protocol faxed a message to Pakistan’s High Commissioner in Great Britain informing him that, ‘under instructions of Prime Minister House’ 8 heavy cartons were being despatched by a PIA flight to London, leaving Pakistan on 28-4-1996. The High Commissioner was requested to ensure ‘safe takeover at London for further necessary action’. It may be noted that the High Commissioner was the selfsame Mr. Wajid Shamsul Hasan, who would (as was seen in the paras. (supra) later also prove useful to the petitioner in the matter of the British detectives investigating Mir Murtaza’s murder. A copy of this fax was endorsed to the Private Secretary to Mr. Asif Ali Zardari.

248. That the cargo of 8 cartons (containing 45 separate items) was sent under Airway Bill No.214-01635012. The consignor was shown as ‘Bilawal House’ and the consignee was the aforesaid Mn Wajid Shamsul Hasan. When the cartons arrived at London, a declaration for the release of the cargo was entered the same day (i.e. 28-4-1996) with British Customs Authorities by Pakistan’s High Commission. According to the declaration, the cargo (described as ‘8 pieces household effects, weight 3450 kgs.’) was for the personal use of the High Commissioner, Mr. Wajid Shamsul Hasan. (Mr. Wajid Shamsul Hasan, it may be pointed out, is a former journalist who was directly appointed by the petitioner to the post of High Commissioner).

249. That on 2-5-1996, Mr. Wajid Shamsul Hasan addressed a letter to the Cargo Manager, PIA, London authorising a certain Mr. Paul to collect on behalf of the High Commissioner the personal effects that had arrived at London under Airway Bill No.214-163512. According to the release note in respect of the cargo, it was released to the aforesaid Mr. Paul on or about 2-5-1996. The release note also gave Mr. Paul’s surname, i.e. p.

250. That by means of Airway Bill No.214-01629736, a further 13 cartons weighing 5410 kgs. were shipped to London from Lahore via PIA by one Saroosh Yaqoob Mehdi. The consignee of the cargo was also Mr. Paul whose address was shown on the Airway Rill as ‘ 15Grove, Luton, Bedfordshire, London, U.K.’. This cargo was again described as personal effects.

251. That the interior design work at Rockwood House had, at least in part, been assigned to a company called Townsends. These contractors from time to time sent various invoices for the work done to a company doing such work, called Grantbridge, whose address was shown on the invoices as ‘Unit 10, Belvue Business Centre, Belvue Road, Northholt, Middlessex UB5 5QQ’. It appears that all these invoices were promptly settled.

252. That a search at Companies House, London (which is the English equivalent of the Registrar, Joint Stock Companies) has revealed two companies by the name of Grantbridge. One is Grantbridge Ltd. and the other is Grantbridge Contractors Ltd. The registered address of Grantbridge Ltd. is the same as shown on the invoices issued by Townsends in respect of Rockwood House. Both these companies have a common directorship. One of the directors is a Mr. Paul Keating, whose address is shown in the corporate records as at “15, Grove Road, Luton, Bedfordshire”. This is the same address as appears on Airway Bill No.214-01629736, the consignee of which was ‘Mr. Paul’.

253. That this chain of evidence and events directly and irrefutably links the petitioner to Rockwood House. The evidence may be summarized as follows. Two consignments are sent to London from Pakistan. One is sent directly from Bilawal House and is consigned to Mr. Wajid Shamsul Hasan, the petitioner’s political appointee as Pakistan’s High Commissioner in Great Britain. The consignment is cleared by one Mr. Paul who is directly authorised by the High Commissioner in this regard. The release note identifies Mr. Paul as being Mr. Paul Keating. The second consignment is sent from Lahore and is consigned to one Mr. Paul. That this gentleman is the same Mr. Paul Keating authorised. by the High Commissioner is established by the fact that the consignee’s address given on the airway bill of the second consignment is the same as appearing in the corporate records maintained at Companies House in respect of Mr. Paul Keating. Mr. Keating is shown as being a director of, and shareholder in, a company called Grantbridge Ltd. This company receives invoices from Townsends, which has been hired to do work at Rockwood House. The invoices are marked to ‘Grantbridge’ and the address given on the invoices is the registered address of Grantbridge Ltd. In other words:-

“(a)       The petitioner sent several heavy cartons of so-called ‘personal effects’ weighing thousands of kgs. from Pakistan to London. This was a false description since it contained item such as decoration pieces and antique guns.

(b)        The shipments were all received by the same person, Mr. Paul Keating. In one case, he was directly the consignee; in the other, he was the authorised nominee of the consignee, who is Pakistan’s High Commissioner. This same Mr. Keating is the director in that very company which is involved in some supervisory capacity in the refurbishing and/or renovation and/or decoration of Rockwood House.

It may further be noted that the telephonic records also clearly show calls being made from Rockwood House to telephone numbers being used by, among others, Mr. Asif Ali Zardari and Mr. Javaid Pasha, one of his closest aides and cronies. This also clearly establishes the interest/link between the petitioner and her spouse and Rockwood House.

254. It is submitted that on these facts, it is clear that the petitioner and her spouse have indeed, notwithstanding the vehemence of their false denials, acquired Rockwood House and are, or were at the relevant time, busy in having it refurnished and also decorated with, inter alia, effects being sent from Pakistan. Several questions arise: how could the petitioner afford to purchase Rockwood House? Where did the resources for this acquisition come from? How could persons who pay a pittance of income-tax and wealth tax afford to spend £ 2.5 million pounds on just the purchase of the property (leaving aside entirely the money being spent on its interior decoration). Its annual maintenance cost alone would by far exceed the petitioner’s known or declared sources of income. The only possible answer is that this money has been acquired illegally and through corrupt practices. In other words, the person who held the office of the Prime Minister of Pakistan, and

her husband, who was soon to become a Cabinet Minister, acquired resources through corrupt and illegal means which were then splurged on, among other things, the purchase of a palatial mansion in England. It is submitted that when the head of the Government herself is openly guilty of such actions, then it is inconceivable that the Govrnment of the Federation is being, or can be, carried on in accordance with the provisions of the Constitution. The Prime Minister also set an example to be followed by other members of her Government. The respondents now turn to other instances of abuse of power by or at the very least, with the knowledge, if not active connivance, of the petitioner and her spouse.

255. That like the petitioner and her spouse, her in-laws had also been busy acquiring properties worth millions of dollars abroad. The petitioner’s father-in-law, Mr. Hakim Ali Zardari (who was not merely an M.N.A., but the Chairman of the Public Accounts Committee in the National Assembly) and his wife acquired a property in France as far back as on 12-4-1990 for a total value of French Franc 6 millions. A sum of Ff 1 million were spent on urgent repair work on, and reconstruction of, the property. The property, known as the “Manoir de la Reine Blanche” (and located at Chemin departmental 921, Mesnil Lieubray (76780) is a Renaissance style mansion, with grounds, a swimming pool and garage, and occupying an area of 1.99 hectares. The couple are also the owners of another property in France at Mormanville, Hameau. Again, the question arises: from whence came the wealth to acquire such properties? The antecedents of Mr. Hakim Ali Zardari are well-known. His disclosed wealth, or that of his wife, does not even remotely allow for the purchase of such property even in Pakistan, let alone abroad. The only possible answer is that like Rockwood Estate, these properties were also purchased on the basis of resources acquired illegally and through a gross abuse of power.

256. That by means of the Pakistan Bait-ul-Mal Act, 1991 (Act I of 1992); ‘the Act’), a fund, known as the Bait-ul-Mal has been created for the purpose, inter alia, ‘to provide financial assistance to destitute and needy widows, orphans, invalid, infirm and other needy persons’.

257. That on or about 24-5-1994, the Interior Minister, Maj.-Gen. (Retd.) Naseerullah Babar, one of the most powerful Cabinet Ministers and one very close to the petitioner and her spouse, wrote a secret letter to the Chairman (Ameen) of the Bait-ul-Mal demanding the release of Rs.10 million ostensibly for the relief of 4000 Bugti tribesmen allegedly displaced by reason of political persecution. A similar letter was also received by the Chairman (Ameen) from the Deputy Secretary, Social Welfare and Special Education Division, Government of Pakistan “directing” the Bait-ul-Mal to comply with the orders of the petitioner or provide assistance to the tribesmen in terms asaforesaid.

258. That thereafter, a ‘short notice’ meeting was called in the Prime Minister’s Secretariat on 3-4-1994. The meeting was presided over by the ubiquitous Mr. Ahmed Sadiq, who was serving the petitioner as her Principal Secretary. The meeting ‘urged’ the Chairman (Ameen) to provide the promised ‘relief’ of Rs.10 million and to make a ‘plea’ before the Board of Management of the Bait-ul-Mal to ‘relax’ its procedure and provide a further amount of Rs.10 million.

259. That the very-next day (i.e. 4-4-1996), a Cheque No.39. drawn on the State Bank of Pakistan, was issued by the Bait-ul-Mal for a sum of Rs.10 million. The cheque was issued in the personal name of the Interior Minister, i.e., Naseerullah Babar. The Cheque was despatched the same day to the Interior Minister and receipt thereof was duly acknowledged on 6-4-1996. It was encashed the same day. On the same day, a ‘Secret/Most Immediate’ letter was also received by the Bait-ul-Mal from the Prime Minister’s Secretariat, ‘confirming’ that the Bait-ul-Mal had agreed to the immediate release of Rs.10 million and that Rs.10 million would be released after the approval of the Board of Management.

260. That on 13-4-1996, the Chairman (Ameen) of the Bait-ul-Mal wrote to the Secretary, Special Education and Social Welfare Division, Government of Pakistan, informing him that the case of ‘further instalment’ (i.e., the next Rs.10 million) would cc>ine up before the next Board of Management meeting scheudled to be held on 16th or 17th of April. The meeting of the Board- duly rubber stamped the decision already taken, and because of the ‘urgent nature of the case’ and with the ‘blessing’ of the Chairman (Ameen), a second cheque (being No.43 dated 24-4-1994, drawn on the State Bank of Pakistan) for Rs.10 million was also issued. This cheque was also personally in the name of the Interior Minister.

261. That thereafter, the Bait-ul-Mal received ‘evidence’ purporting to show that the funds released had been disbursed to Bugti tribesmen. The statement produced consisted of lists of thousands of names of alleged recipients, alongwith the following information the father’s/husband’s name; in some cases, the Identity Card number of the recipient, the amount received and, most significantly, the thumbimpression of the recipient.

262. That most of the alleged recipients were shown as not having any Identity cards. However, far more significantly, an examination by technical experts has revealed that in most of the cases, the thumb-impressions are all of one person. For example, in one case, 325 thumb-impressions are all of one person. (This means that Rs.16.25 lacs were received by one person). In another, 265 thumb-impressions are of the same person (meaning that the person concerned received Rs.13.25 lacs). In a third, 118 thumb-impressions are the same (and the person who affixed his thumb-impression received Rs.5.9 lacs). In a fourth case, 114 thumb-impressions are identical (indicating that the person received Rs.5.7 lacs). In yet another case, 80 thumb-impressions are all identical (and this person thus received Rs.4.0 lacs). In other words, it is obvious that the lists of alleged recipients are bogus and have been created and concocted for the express purpose of stealing Bait-ul-Mal funds.

263. That there can thus be no conceivable doubt that the Rs.20 million disbursed personally to the name of the Interior Minister has been misappropriated. The manner in which the disbursement was obtained from the Bait-ul-Mal was indication enough. However, the documentary evidence relating to the purported recipients leaves no doubt at all on the point. Through gross abuse and misuse of power, the petitioner’s Government was responsible for the illegal appropriation of Rs.20 million from a fund meant exclusively for the aid of needy and destitute persons. In other words, persons holding the highest public offices in the land deliberately set about not merely denuding the public exchequer, but those very funds which were meant for the most impoverished and indigent sectors of society ... ... not merely the Awam (referred to in almost every public speech of the petitioner) but the poorest of the Awam.

264. That the Bait-ul-Mal was also subjected to the tender mercies of the redoubtable Ms. Naheed Khan, the Political Secretary to the petitioner and one Mr. Rehmat Ullah, a ‘consultant’ to the petitioner while she was Prime Minister. Ms. Khan forwarded a list of 55 names to the Bait-ul-Mal and, without the proper procedures being followed in these cases, collected cheques totalling Rs.32,90,000 on 1-9-1995 on ‘behalf’ of these persons. In gross violation of the rules, sums totalling Rs.6.171 million and Rs.27.05 million were sanctioned on the ‘directions’ received from. Ms. Khan and Mr. Rehmat Ullah respectively.

265. That as was only to be expected, the financial sector was a particular target for corruption and the abuse of power by the petitioner and her Government. Before describing some of the more glaring instances of how official power was misused and abused, certain facts must be kept in minA. Firstly, the petitioner herself chose to be the Finance Minister of Pakistan. As is evident, the post of the Finance Minister is, after that of the Prime Minister, perhaps the most important and sensitive post in the Government. Thus, to a considerable extent, all meaningful power in the Government was concentrated, not merely factually, but also legally and administratively, in the person of the petitioner. One reason why the petitioner chose to retain this key post was the enormous powers of patronage and influence that are directly available to the Minister of Finance. As Finance Minister, the petitioner could take all ‘key’ decisions herself without having to involve anyone else. Constitutionally speaking, the petitioner’s decision to be Finance Minister had one very important consequence. A key feature of a system of parliamentary democracy is the concept, of Ministerial responsibility. What this means is that a Minister is, Constitutionally and legally, responsible before the National Assembly for all that is done by his Ministry and its officials. Even if the Minister may not, in a specific case, be factually responsible for any wrongdoing (or even aware, at the relevant time, of that which is being done), he must assume legal (i.e., Constitutional) responsibility for what has been done. Thus, the petitioner, quite apart from her responsibilities as Prime Minister, was also directly responsible (in the sense indicated above) for all decisions taken and all actions done by and in the Ministry of Finance. (In fact, as has already been seen, and will further become clear, the petitioner was in most cases, also directly and factually involved in or responsible for, at the least fully cognizant of the illegalities being committed and the manner in which power was being abused.

266. That secondly, while there was a Minister of State for Finance, his role was restricted largely, if not exclusively, to making the Budget Speech in Parliament. He appears to have had no effective say in the affairs of the Ministry. Thirdly, like her first term in office, Mr. V.A. Jaffery served the petitioner as her Adviser to the Ministry of Finance. while Mr. Jaffery appears to have been in operational charge of all routine policy matters, it seems that he essentially rubber stamped all key decisions taken by the petitioner as Finance Minister. In any case, the ultimate responsibility was hers.

267. That the banking system is the single most important part of the financial sector. especially in a developing economy (where capital is scarce, and resource mobilization an acute problem), it is vital to have a healthy vibrant banking industry. Upon assuming office, the petitioner and her Government had made loud noises and virtuous promises as to how the financial and banking sectors would be cleansed and sanitised. The previous Government had been fiercely criticised and its- policies castigated as having pampered the chosen few. The petitioner and her Government chanted the mantra of transparency and promised a completely new deal. As always, the reality was the devastating opposite.

268. That as is self evident, of all Government Ministries, it is the Ministry of Finance which has the most direct dealings with, and impact on the banking sector. Important policies are formulated by the Ministry of Finance and its decisions have a major impact on all banks. (These are not only those decisions which affect banks directly, but also those which have a more general impact on the economy; the banking sector, after all, can hardly be healthier than the economy of which it is a part). How have the Banks in Pakistan fared under the petitioner’s tenure as both Prime Minister and Finance Minister? On all grounds, and by all methods of reckoning, the situation deteriorated not merely from bad to worse, but to the completely desperate. In the case of Habib Bank Ltd. (“iBL’), United Bank Ltd. (‘UBL’) and National Bank of Pakistan (‘NBP’), the non-performing loans (bad debts) stood at Rs.50.76 billion at end 1993. By 30-6-1996, this figure had increased to Rs.66.647 billion, an increase of 31 % . In the case of the ADBP and IDBP, the bad debts stood at Rs.5.712 billion; by 1996, this figure had skyrocketed to Rs.13.195 billion, an increase of 131 % . The case of the Development Finance Institutions (‘D.F.Is.’) was even worse: bad debts had ballooned from Rs.6.12 billion to Rs.16.396 billion, an increase of 168 % .

269. That all banks are required under the Banking Companies Ordinance, 1962 to mandatorily maintain a liquidity ratio of 30% (this provision is statutory). This figure is one of the most sensitive indicators of a bank’s health. In the case of U.B.L., when the Bank was taken over by the State Bank of Pakistan from the management sanctioned and approved by the petitioner, on 18-4-1996, the liquidity ratio had plummeted to 20.26 % . In the case of H. B. L. , from 30-11-1995 up to 30-6-1996 (the latest date for which the relevant figures are available), the liquidity ratio remained below the required 30% . (Only N.B.P. was able to maintain the required ratio, but this was only because N.B.P. both performs treasury functions for the Government of Pakistan and acts as the agent of the State Bank of Pakistan. It, thus, has access to funds not available to other banks). The net worth of the banks was also wiped out during the period of the petitioner’s Government. In the case of H.B.L., the equity at end 1995 stood at a negative figure of Rs.18.468 billion. In the case of U.B.L., the relevant negative figure was Rs.5.849 billion.

270. That the deterioration in the banks’ profitability tells the same sad tale. A bank’s profitability is normally measured by the ratio of the pretax profits to the bank’s deposits. In the case of H.B.L., the ratio slipped from 0.48% in 1993 to 0.29% in 1995, a decline of about 50%. In the case of N.B.P., the ratio dipped over the same period from 2.42 % to 1.48 % , a decrease of about 50 % . The case of U . B. L. was worst of all. In 1993, the bank had a profitability ratio of 0.28%. In 1995, the bank declared a loss of about Rs.570 million. For the first time in the history of Pakistan, a nationalised bank had actually declared a loss on its balance-sheet.

271. That recruitments in the banks followed the. same sorry trend as has been noted in a previous section regarding the public sector in general. In N.B.P., after the lifting of the ban on recruitment, 5028 appointments were made. Out of these, a paltry 325 were made by the Pakistan Banking and Finance Service Commission. Another 180 were made by the Bank’s Recruitment Committee. The rest, a staggering figure of 4523, were appointed on the basis of instructions received from the Prime Minister’s Secretariat and the Ministry of Finance. In the case of U.B.L., illegal ‘recruitments’ were taken even one step further: over 2500 ‘ghost’ (i.e., non-existent) employees were shown on the bank’s payrolls. Crores of rupees were thus skimmed off by means of this scam. All of this was done under the aegis of Mr. Aziz Memon, who was not only the bank’s union leader, but also a P.P.P. M.N.A. Subsequently, U.B.L. had to be taken over by the State Bank of Pakistan when it was on the verge of collapse and its attempted privatization, in violation of all applicable principles and procedures, had fallen through, and at the latter’s insistence Mr. Memon was finally arrested. (It may also be noted that one of Mr. Memon’s mapy ‘achievements’ was to strip naked a senior officer of the Bank and publicly humiliate him before the staff).

272. That on 11-5-1996, because of the horrendous deterioration in NBP’s position (which, as noted, occupies a special position among banks), the State Bank of Pakistan was constrained to forward a formal complaint to the Ministry of Finance. among other things, the State Bank noted the sharp increase in the expenditures being incurred by the Bank. (It may be noted that at the relevant time, N.B.P.’s. President was Mr. M.B. Abbasi, who was well-known to be close to the ruling couple). According to the complaint, expenditures on residential telephones went up by 87 % , entertainment expenses increased by 57 % and illegal ‘donations’ were up by 67%. It was noted that ‘donations’ amounting to Rs.93.496 million were disbursed during the period from January to March, 1996 and most were violative of State Bank instructions. Further, without obtaining approval from its Board, N.B.P. spent a staggering Rs.553.032 million on a renovation and airconditioning programme. A number of other instances of wasteful expenditure were also highlighted. Needless to say, no action was taken either against Mr. Abbasi or to rectify the situation.

273. That there was also a massive write off of loans during the period of the petitioner’s Government. This is particularly bizzarre since the petitioner has been trumpeting loudly about how this evil should be rectified. From June, 1993 to June, 1996, a sum of Rs.3.397 billion was written off. This was of course in complete contrast to the public statements emanating ad nauseam from the petitioner and her Government. It is interesting to note that one of the many beneficiaries was the so-called ‘Zardari Group’ comprising of Mr. Hakim Ali Zardari and Mr. Asif Ali Zardari. This group (for reasons not difficult to discern) managed, 23-1-1995, to have the sum of Rs.10.07 million written off by Emirates Bank International, a foreign bank owned by a friendly Government. One wonders exactly how this feat of financial legerdemain was achieved. Mr. Zardari’s front man, Mr. Fauzi Ali Kazmi, had no difficulty in getting Habib Bank to write off Rs.121.90 million on 2-8-1995.

274. That the State Bank of Pakistan, as required by law, used to regularly send inspection reports regarding commercial banks to the Ministry of Finance. The news coming out of these reports was of course uniformly bad, and getting worse. In an attempt to evade responsibility, and in violation of law, the Ministry of Finance directed the State Bank on 28-1-1996 not to send detailed inspeetion reports, but only summaries. The State Bank was also asked to take back copies of the reports already submitted. In other words. the Ministry of Finance wanted neither to see ‘evil’ nor to hear it. Unfortunately, no steps were taken to prevent ‘evil’ from being done in the first place. The State Bank pointed out that it was its statutory duty to forward the inspection reports to the Government.

275. That all of the foregoing was the direct result of the policies adopted by the petitioner’s Government, and more specifically, by the Ministry of Finance. Thus, the petitioner is liable and responsible for the virtually complete collapse of the financial sector in Pakistan both by virtue of her being Prime Minister and Finance Minister as well. The all important question arises as to why the petitioner was determined to retain the Finance portfolio in both her tenures of office. The answer is simple. It is the Finance Ministry which appoints the heads of the banks and financial institutions. It is the Finance Ministry which enjoys vast powers of financial patronage. It is the Finance Ministry which can convert paupers into millionaires overnight. It is the Finance Ministry which can also carry out the reverse process by the simple expedient of ordering the banks and financial institutions to recall loans overnight. All industries, without exception, function on the basis of bank financing. There is not a single large company in the country which can survive if all its bankers unanimously decide to recall the loans granted to it. This is precisely what was done by way of political victimization of the petitioner’s political rivals. It was in this, the power to enrich and the power to impoverish, that the charm of the Finance Ministry lay for the petitioner. There is nothing in her past career to indicate that she had the financial expertise to run this enormously difficult and complex ministry; and indeed, it was for precisely this reason that the services of a pliable retired bureaucrat like Mr. Jaffery were utilised. But the key decisions were the petitioner’s and those of her spouse who, here as elsewhere, acted as her alter ego. Hers was the formal responsibility and his was the effective power.

276. That the manner in which the affairs of Pakistan Steel Mills, located at Karachi, were grossly mismanaged under the Chairmanship of Mr. Usman Farooqi (who was appointed by the petitioner’s Government) are well-known to all. The allegations of corruption against Mr. Farooqi are also no secret. For present purposes, however, one instance directly involving the Ministry, may be referred to. among his many corrupt practices and decisions, Mr. Farooqi in or about December, 1995, ordered the sale of 15,900 tons of steel at rates well below the market price to certain select ‘favourites’ (the total amount that would have been received by Pakistan Steel was approximately Rs.10 crores). Although only a short while earlier, the Steel Mill management had set the prices of the relevant products at Rs.20,000 per tonne, the ‘favourites’ were offered the same products at prices ranging between Rs.7,581 to Rs.9,282 per tonne. The deals were so scandalous that the matter was raised before the National Assembly.. Steel dealers appeared before the relevant standing committee and offered to purchase the entire lot for double the price at which it was being sold. On 30-1-1996, the standing committee requested the Steel Mills not to proceed with the matter. However, on 6-2-1996, the Ministry of Industries issued a letter allowing Pakistan Steel to go ahead with the deals on the entirely specious ground that if the deals were not allowed to go through, ‘legal complications’ would arise. In other words, the public exchequer was effectively robbed of crones of rupees. (The beneficiaries of the transaction (and it is not hard to guess exactly who they might have been) of course, became richer overnight by several crores of rupees).

277. That the situation in Pakistan Steel came to such a pass that even Mr. Jaffery, the complaisant Adviser for Finance was constrained to write to the Minister for Production on 17-7-1996 complaining about the severe financial deterioration in the Steel Mills’ condition. The Adviser noted that although: (a) there had been a decline in production; (b) cash balances had declined from Rs.2,147 million to a paltry Rs.68 million; (c) Pakistan Steel had defaulted on payments to banks; (d) the Mills were demanding a subsidy of over Rs.l billion in order to keep going; the Chairman, Mr. Farooqi insisted upon carrying on with a false and frivolous publicity compaign to conceal the grim facts. Despite this devastating indictment by her own Adviser, the petitioner nevertheless failed to take any action against Mr. Usman Farooqi. (It may incidentally also be noted that although Mr. Farooqi pretends to hold a doctoral degree from the United States, his degree has been obtained from a ‘fly-by-night’ institute and, even more remarkably, after only a 15 days visit to the States. It was also conclusively established that Mr. Farooqi had forged his metric certificate). The petitioner was, and must be, held to be fully responsible for the state of affairs in Pakistan Steel and the Government’s complete failure to take any steps to rectify the situation.

278. That during the tenure of the petitioner’s Government, it was decided that from time to time the export of sugar would be allowed from Pakistan. A great deal of public noise was made to the effect that the entire procedure for the grant of allocations for export would be ‘transparent’. As always, this was intended only to hide the fact that underneath the veneer, it was business as usual. The decision as initially taken, did not envisage any export of sugar by anyone than the sugar mills. However, on 25-1-1995, the Prime Minister’s Secretariat was informed by the Commerce Ministry that the former may send allocations up to 2000 Metric tonnes per person to the Ministry. Thereafter, a number of persons and firms (who were not sugar mills) were allowed quotas to export sugar. The intent was obvious. The quota allocations were used as means of political patronage and enabled the allottees to enrich themselves many times over. In some cases, the original allottees were ‘allowed’ by the Commerce Minister, Mr. Ahmed Mukhtar, to ‘transfer’ the allocated amount to other persons. In other words, in a manner wholly contrary to even the putative Cabinet decision, the chosen few were allowed to enrich themselves at the public expense.

279. That on the orders of the petitioner, the Textile Quota Policy was also ‘amended’ in order to provide for the discretionary allocations of textile quotas. Lists were received from the Prime Minister’s Secretariat by the Commerce Ministry of individuals and firms ‘recommended’ by various Legislators and party supporters of the petitioner’s Government. Sometimes, individual ‘recommendations’ would also be made. Quotas were allocated on this basis to and/or at the behest of the petitioner’s supporters both within and without Parliament. Again, applicable rules and regulations and norms of Government, were sacrificed at the altar of political expediency and patronage and power was grossly abused to satisfy the desire for pelf and privilege. Unfortunately for the people of Pakistan, the desire was insatiable.

280. That there was hardly an important decision taken by the petitioner and her Government in relation to the business/financial sector that did not smack of arbitrariness and abuse of power, and smell strongly of corruption. For example, the petitioner’s Government decided to liberalize the import of gold in the country. However, a Dubai-based company, with carefully obscured antecedents, M/s. ARY Traders, was given the monopoly to import gold into Pakistan. The financial implications of this decision need not be spelt out. Anyone who had the exclusive licence to legally bring in gold into Pakistan was guaranteed an ever-flowing income stream of millions. Although the decision to issue licences was ostensibly advertised, the entire process was carefully stage managed in order to ensure that, at the end, a monopoly licence for the import of gold was given to M/s. ARY Traders. This firm was so powerful that when, at a subsequent stage, the Finance Ministry levied a 10 % regulatory duty on the import of gold, it had no difficulty in getting the decision reversed. Although on a couple of occasions, the Ministry of Commerce attempted to grant licences for the import of gold to other persons as well, all such attempts were blocked in one way or another. Who were the real beneficiaries of the decision to grant this monopoly? It was certainly not the man on the street. In the petitioner’s world, only those close to the fount of power could be ‘blessed’ in this manner.

281. That equally scandalous was the manner in which rice exports from Pakistan were dealt with. The right to export about half of all rice exports from Pakistan during a year were given, in effect, to one man and at a price well below that prevailing in the international markets. In or about September, 1995, without any public auction, notice or bidding, RECP received two ‘bids’ for the purchase of a total of 500,000 tonnes of rice from RECP (this is approximately half of Pakistan’s rice exports). One bid was from M/s. Rustal Trading, a company of one Mr. Riaz Laljee, who has now gone underground. The other bid was ostensibly from the Government of Togo. However, the authorised representative of the said Government was one Ms. Huma Burney, who is also a director of Rustal Trading. Thus, in effect, there was only one bidder in the field. Although RECP had no rice available (since RECP begins procuring rice only in November), it nevertheless entered into a binding contract to sell 500,000 tonnes at a price well below the then prevailing international market price. The question now arose of procuring the rice to meet this commitment. RECP procures rice at the official support price, which is well below the market price. Nevertheless, the petitioner personally as Prime Minister took the unprecedented decision that RECP should purchase the rice at the market price. Although it was pointed out that. this would entail a staggering loss of US $ 41 million for RECP, the petitioner casually brushed aside this ‘objection’. The pretext given was that it would be for the benefit of growers. The obvious answer to this frivolous reason is that nothing prevented the growers from selling their rice in the open market -- why should RECP buy rice at a high price and then sell it at a low price and there incur a loss of US $ 41 million. Ironically, RECP was only able to procure muchless price than the stipulated quantity. Subsequently, the international market price collapsed, and fell even below the price at which RECP had agreed to sell the rice to Mr. Riaz Laljee. The buyers only lifted a part of the rice and backed out, and RECP was left holding substantial stocks of rice that had been purchased at the far higher, earlier rates. The estimated loss to the exchequer was Rs.7,62,445.

282. That the petitioner’s Government took exceptional pride in its power policy. If there was one policy above all which was pointed out with pride by the Government, it was the policy in relation to private power plants. Yet, what was the reality? Projects whose total cost would be several billions of dollars were permitted without any concern over, and far in excess of, Pakistan’s priorities or needs or ability to pay. (That the real reason why demand for electricity had plummeted sharply in Pakistan was due to the virtual closure of the textile and other important industrial sectors during the petitioner’s tenure is another story). KESC was forced to accede to so many power plants that in the beginning of 1995, the Power Projects Implementation Board (‘PPIB’) of the Government of Pakistan asked WAPDA to purchase 1000 MW of power from KESC, which was expected to be in excess by this amount by the year 2000, (It maybe noted that PPIB had been set up specifically by the petitioner’s Government for implementing the power policy. Initially, PPIB was under the Ministry of Water and Power. However, after Mr. Asif Zardari had been inducted into the Cabinet as Minister of Investment, PPIB was transferred to the Ministry of Investments). WAPDA informed PPIB that it would be unable to purchase this much power, as WAPDA itself would be surplus in power because of the private Power Projects coming up and from which WAPDA would be forced to purchase power. It may be noted that the agreements signed by both WAPDA and KESC with the private power projects provide that once the projects have come on line, the utilities would be liable to pay the projects of electricity equal to up to 60% of their capacity even if no power at all were actually purchased (such payments are known as ‘capacity payments’). Thus, the Government’s policies not merely ensured that there would be excess capacity in the country; both WAPDA and KESC would end up paying millions of dollars annually for power that they would not need and could not utilize. This could easily mean the financial ruin of these organizations.

283. That matters came to such a pass that even the PPIB was forced to acknowledge ‘reality to some extent. Hitherto, the Government had rushed headlong into giving permissions for setting private power projects. A decision was taken in March, 1996 to limit the total capacity of private power projects to 3000 MW. However, like all decisions taken by the petitioner’s Government, this was honoured more in the breach than in the observance. Within a month, in April, 1996, the decision was ‘revised’, and the limit imposed was enhanced to 4500 MW. This was done apparently to accommodate certain projects in which the petitioner and her spouse had a ‘special’ interest. In the case of one project, Liberty Power, the initial permission given had been to set up a 212 MW capacity plant. In April, 1996, this was suddenly doubled and enhanced to 424 MW. Quite separately from the above, decisions were also taken in respect of several to allow the agreements to be modified in terms that wire even more beneficial for the projects (and their sponsors). Such amendments included (but were not limited to) substantial increase in default interest rates; reduction in the sponsors’ obligations in one form or another; and increase in WAPDA’s financial responsibilities for compensation for the project in case of delay in inter-connection facilities.

284. That the case of Liberty Power Project, already referred to above, deserves particular mention. One of the key persons involved in this project is Mr. Ibrahim Elwan, who has the dubious honour of being the first person in the history of the World Bank who was asked to leave that institution after a full-fledged corruption investigation. Before his exit from the World Bank, Mr. Elwan was the officer responsible for the Hubco Power Project in Pakistan (which was being funded in large part by the World Bank). The petitioner’s Government gave full support to Mr. Elwan and the Liberty Power Project. In particular: (a) the Letter of Support was issued for the project long after a decision had been taken to ‘cap’ all projects and not allow any further power projects; (b) they were allowed to use pipeline quality gas from the Qadirpur Gas Field, which is against Government policy and the interests of the country. The project was in fact given special concessions in respect of the gas to be used by the power station. Not only were specific gas fields, or parts thereof, ‘allocated’ for the project, the Government of Pakistan guaranteed it full supply of gas by, inter alia, promising it gas even from fields not yet discovered and/or fully developed. This was in complete violation of all the applicable rules and regulations.

285. That the contract for the national grid (IV Circutt), a multi-million dollar proposition was put to bid, but only 6 working days were given to bidders to put in their applications. Given the complexity of the entire matter, the voluminous technical details involved, and the copious documentation required to be filed, it should not have been possible for anyone to put in a proper-bid. However, one company was able to do so. Thus, it was obvious that the entire matter had been stage managed to allow just that company to make an effective bid. The reasons (and ‘rewards’) for orchestrating the entire matter are not difficult to discern. The French Government, for one, fiercely resented this flagrant display of corruption. The French Ambassador wrote a strong letter of protest to the Government of Pakistan. Thus, it can be seen that one aspect of this open corruption was to place a strain on the country’s relations with a friendly foreign country.

286. That OGDC, the premier gas and petroleum development and exploration body in the country, was also subjected to the gross abuse of power and corrupt practices that was the characteristic (one may even say, the trade-mark of the petitioner’s Government. A consultancy for studying dry holes, involving US $ 393,256, was awarded to M/s. Hydrocarbon Development Institution of Pakistan (‘HDIP’) and M/s. Improved Petroleum Recovery (‘IRP’). IPR, a US company, was previously represented by Saif International, a company owned by the Saifullah family, a scion (Mr. Anwar Saifullah) was the Minister for

Petroleum and Natural Resources, the Ministry that controls OGDC. IPR is now managed by a former employee of Saif International. The proposal for the study was initiated by HDIP and I.P.R. and was submitted to the Minister for Petroleum and Natural Resources on 13-6-1994. He approved it the same. day. On 11-10-1994, the Chairman OGDC wrote a letter to the then Secretary of the Ministry, stating that another firm had also submitted a proposal which would cost almost half of what HDIP and IPR were charging. This letter was not replied to by the Secretary. On 27-11-1994, OGDC received a ‘directive’ to complete the process of awarding the consultancy to HDIP and IPR. On 17-12-1994, in gross violation of the existing procedures and norms, the contract was awarded as ‘directed’.

287. That during a visit to the U.S.A., Mr. Riffat Askari, the then Chairman OGVC, on 15-11-1994 signed a Memorandum of Understanding (‘MOU’) with Cooper & Lybrand (‘Cooper’) to carry out a Reserves Evaluation Study of OGDC fields. The estimated costs were not stated but it was specifically provided that OGDC was to pay for the costs of Cooper’s employees visits to Pakistan. Another MOU with Cooper was signed on 2-12-1994 during Mr. Askari’s visit to the United Kingdom. The estimated cost was US $ 350,000. Both the MOUs were for the same work. In spite the reservations of the OGDC officers concerned, and bypassing the departments concerned Mr. Askari awarded a contract to Cooper for the Reserves Evaluation Study worth US $ 2,500,000. Fully 50% of the total amount was paid by OGDC as an advance, and in the next three months, another 30% was also paid out. Thus, 80% of the total cost was released to Cooper, even though no work at all had been done. The case file sent to the Finance Department (which was to authorise the payments) went missing, and the payments were made on only a copy of the contract available with the Department.

288. That during 1994-95, the then Chairman, Mr. Riffat Askari, sold 2298 metric tons of scrap and 7461 assorted store items without public auction and at throwaway prices to people of his choice. The estimated loss to OGDC of this blatant violation of the applicable procedures is Rs.67,906,161. ‘

289. That another area of ‘interest’ for the petitioner and her Government was the Capital Development Authority (C.D.A.). Several examples exist of how there was a gross abuse of power in the affairs of the C.D.A. Before turning to certain specific instances, the following points need be noted. CDA is a body corporate created by and under the Capital Development Authority Ordinance, 1960 (Ord. XXIII of 1960; hereinafter ‘the Ordinance’). The powers and duties of the C.D.A. are comprehensively set forth in the Ordinance itself. Under section 51 of the Ordinance, read with section 49 thereof, C.D.A. has formulated the Islamabad Land Disposal Regulations, 1993 (‘the Regulations’). these regulations stipulate the manner in which land in Islamabad is to be disposed of. Finally, although C.D.A. is administratively under the Cabinet Division, the Government does not have any power, whether under the Ordinance or otherwise, to ‘relax’ any regulations made by the C.D.A. or applicable to the disposal of land within its purview.

290. That in or around March, 1996, Dr. Javed Saifullah, the brother of Federal Minister Mr. Anwar Saifullah, approached the C.D.A. with a proposal to set up a heart hospital on a plot of land measuring 12.5 acres in sector H- I 1 demarcated for hospitals. The C.D.A. requires that plots demarcated for hospitals be disposed of at the reserve price if the hospital is to be in the public sector, but at commercial, market rates through open auction if the hospital is to be run on a profit basis. (The hospital proposed by Dr. Saifullah was to a commercial operation, i.e., run for profit). At a meeting held in the Prime Minister’s Secretariat on 3-6-1996, it was agreed that the project would be set up as a joint venture between the C.D.A. and the private sponsors. This was doubly impermissible, for C.D.A. is not authorised to enter into any such business ventures and nor could it embark upon joint ventures. The ‘equity’ to be put in by the C.D.A. would be the land, the market value of which was about Rs.300 millions. In other words, the sponsors would, in effect, get the land for free with the C.D.A. being left to rely only on the remote possibility that Dr. Javed Saifullah would show a profit in his books of account. The Cabinet Division recorded its reservations about the ‘decision’ taken in the Prime Minister’s Secretariat and proposed among other safeguards, that the sponsors should be asked to pay for the land in terms as agreed concerning another hospital project. However, when the matter went to the Cabinet on 16-9-1996, it was ordered that the C.D.A. should allocate the land for the hospital ‘as its share of equity in the proposed joint venture’. Thus, in a gross abuse of power, and violation of applicable regulations, and in a patently obvious example of nepotism, the Cabinet decided to give Government land worth Rs.3,000 million effectively free to the brother of a Cabinet Minister.

291. That plots demarcated for use as schools are to be disposed of by the C.D.A. in the same manner as hospitals, namely, that if the school is to be run in the private sector, the relevant plot is to be disposed of at the market price through open auction. On 13-6-1995, the then Chairman of the C.D.A. prepared a ‘proposal’ whereby such plots would be allotted to ‘suitable’ parties in ‘relaxation’ of the Regulations. The ‘proposal’ further stated that out of all the applications received by the C.D.A., 9 applicants should be given preference for their ‘known performance’ in the educational field. It was also proposed that if the school were to be operated by a trust operating on a non-profit organization, the allotment should be at half the reserve price of Rs.2000 per sq. yard. (It may be noted that the reserve price is usually well below the market price of the plot). This ‘proposal’ was marked to the Principal Secretary to the Prime Minister. On this, the Principal Secretary wrote back that the ‘proposal’ to be put up should be ‘in line with the decisions’ taken at the meeting held on 7-6-1995 (i.e., even prior to the proposal itself). Accordingly, a revised ‘proposal’, was sent to the Principal Secretary by the Chairman on C.D.A.. The revision was apparently ‘in line’ with decisions already taken. On 31-7-1995, the decision of the ‘competent authority’ was communicated to the C.D.A. The ‘competent authority’ was pleased to, inter alia, approve the amendment of the Regulations to allow for the sale/lease of plots by allotment, and to allow for a further reduction in the rate proposed (Rs.2,000 per sq. yard) in the case of ‘profit oriented’ institutions in consultation with the Principal Secretary of, and the Special Assistant to, the Prime Minister, and the Chairman of the C.D.A.. ‘Non-profit’ institutions were allowed a further concession of obtaining plots at 50% of the reduced rate. As a result of meetings held between Ms. Shehnaz Wazir Ali, the Special Assistant and the Chairman, C.D.A., it was agreed that the rate to be charged from ‘profit-oriented’ organizations for the grant of a plot would be reduced to Rs.500 per sq. yard, and in the case of trusts and ‘professional’ schools, the rate was to be only Rs.250 per sq. yard. In other words, plots worth millions were to be allotted at literally throw away prices that were to be one-fourth the reserve price, and in some cases, only one-eighth the reserve price. Ultimately, 9 institutions were selected for the allotment of plots on these concessionary terms and allotment letter issued. The following institutions require special mention:

Institution .        Location (Size) Head Incharge Remarks

Sindh Peoples’  H-8/4 (3.5        Mrs. Benazir     Prime

Welfare            acres (Rs.         Bhutto  Minister

Trust    250/sq.yd.)       Chairperson

Educational       F-11/4 (3.7      Mrs. Nasra       Mother of

Trust Nasra      acres) Rs.250   (Owner            Mrs. Shehnaz

School’ sq.yd.)              Wazir Ali

Wahid Public    F-10/2 (3.0      Miss Gul-e-                  Sister of

School  acres (Rs.250   Yasmin (Owner)           Ms.

            sq.yd.)              Naheed

                                    Khan

That while the first three allottees require no explanation, it may be stated with reference to the fourth that Mr. B.A. Qureshi used to be Mr. Z.A. Bhutto’s land manager. Mrs. B.A. Qureshi is a teacher, who in the first P.P.P. Government was promoted to Grade-22 in violation of the rules. and made the head of the Recruitment Bureau. As a result of the allotments aforesaid, C.D.A. will receive, in total an amount equal to approximately Rs.39.9 million. Just the reserve price of these plots is Rs.219 million and the market price is Rs.329 million. Thus, the illegal acts of the petitioner’s Government and the decision to make allotments to the petitioner herself and her cronies have directly resulted in a loss of several crore rupees.

292. That one scheme concocted by the petitioner’s Government to benefit her M.N.As. and supporters in Parliament was the setting up of a cooperative society that would allot plots to ‘Parliamentarians’. In purported ‘relaxation’ of applicable rules and regulations (which did not allow for any such allotment), it was decided that 192 plots of 1000 sq. yards each would be made available to the Parliamentarian Cooperative Housing Society in two different sectors, F-10 and I-8. While the reserve price of plots was Rs.2,500 sq. yds. the Parliamentarians would be allotted these plots at the concessionary rates of Rs.1,000 per sq. yard for sector I-8 and Rs.1,500 per sq. yard for sector F-10. Thus, even if compared only with the reserve price, the public exchequer stood to lose Rs.249 million as a result of these concessionary allotments to the Parliamentarians. It may also be noted that an ECC decision of as far back as 1977 had laid down that no residential plot in a Government scheme could exceed 600 sq. yards. Although in fact, the cooperative society did not even qualify as a Government scheme, it was treated as such and this decision was also ‘relaxed’ for the benefit of the Parliamentarian. The Chairman of the cooperative society wasp the Minister of Housing and Works. Although, as noted, the C.D.A. comes under the Cabinet Division, in violation of the rules, the summary for this particular decision was prepared not by the Cabinet Division, but by the Ministry of Housing and Works.

293. That a 16 acre piece of land at Shakarparian had as per Islamabad’s Master Plan, been earmarked for recreational and sports purposes. In violation of the rules, M/s. Inter Hotels (Pakistan) Ltd., a company in which among others, Mr. Asif Zardari’s brother-in-law had an interest was given permission to build a five star hotel at the site. The allottees were allowed to put their own valuation to the land, which the C.D.A., 9 applicants should be given preference for their ‘known performance’ in the educational field. It was also proposed that if the school were to be operated by a trust operating on a non-profit organization, the allotment should be at half the reserve price of Rs.2000 per sq. yard. (It may be noted that the reserve price is usually well below the market price of the plot). This ‘proposal’ was marked to the Principal Secretary to the Prime Minister. On this, the Principal Secretary wrote back that the ‘proposal’ to be put up should be ‘in line with the decisions’ taken at the meeting held on 7-6-1995 (i.e., even prior to the proposal itself). Accordingly, a revised ‘proposal’, was sent to the Principal Secretary by the Chairman on C.D.A.. The revision was apparently ‘in line’ with decisions already taken. On 31-7-1995, the decision of the ‘competent authority’ was communicated to the C.D.A. The ‘competent authority’ was pleased to, inter alia, approve the amendment of the Regulations to allow for the sale/lease of plots by allotment, and to allow for a further reduction in the rate proposed (Rs.2,000 per sq. yard) in the case of ‘profit oriented’ institutions in consultation with the Principal Secretary of, and the Special Assistant to, the Prime Minister, and the Chairman of the C.D.A.. ‘Non-profit’ institutions were allowed a further concession of obtaining plots at 50% of the reduced rate. As a result of meetings held between Ms. Shehnaz Wazir Ali, the Special Assistant and the Chairman, C.D.A., it was agreed that the rate to be charged from ‘profit-oriented’ organizations for the grant of a plot would be reduced to Rs.500 per sq. yard, and in the case of trusts and ‘professional’ schools, the rate was to be only Rs.250 per sq. yard. In other words, plots worth millions were to be allotted at literally throw away prices that were to be one-fourth the reserve price, and in some cases, only one-eighth the reserve price. Ultimately, 9 institutions were selected for the allotment of plots on these concessionary terms and allotment letter issued. The following institutions require special mention:

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48. Mr. Khalid Anwar also repudiated the claim of the petitioner that the charges of the rules having been violated in the matter of appointments, postings and transfers were vague and unsubstantiated. Mr. Khalid Anwar submitted that the entire exercise of appointments in violation of rules and regulations had been refined into a system known informally as the Centralized Posting System. In most instances, the system worked in the following manner: in the various organisations, bodies and authorities under the control of the Federal Government, vacancies in the various posts/cadres would be sometimes ostensibly advertised and tests/interviews held. However, each organisation or body would receive a list of persons from the Prime Minister’s Secretariat and/or the Establishment Division, or from some close Adviser of the Prime Minister. The persons on these lists had to be mandatorily inducted in service regardless of their performance in the rests/interviews. The number of such inductees, varied from case to case, but in many cases ranged up to more than two-third of the total posts or vacancies that had been advertised. All the persons so “selected” would be inducted into service. Thus, although the charade and form of advertisement and tests, etc. was maintained, the reality was far different. All organizations, bodies and authorities knew that they were simply going through empty motions in their recruitment process: the real and effective decision was being taken elsewhere and would be “notified” in due course. All manner of posts, from the highest to the lowest and most menial were subjected to the system that had been evolved by the petitioner and her Government. No job was too lowly to escape their attention. Mr. Khalid Anwar further submitted that most of the “selections” of names made for inclusion in the lists sent out in the manner described above, were made on the recommendations of the petitioner, and her supporters and advisers, both within and outside the Government and Parliament. In fact, detailed lists were maintained with reference to each M.N.A., Senator and M.P.A. whose “nominees” were ‘accommodated” in this manner. All of this was part of a centralised and computerized system maintained at the Prime Minister’s Secretariat.

49. Mr. Aitzaz Ahsan submitted in rebuttal that the allegations contained in the written statement are false and none has been substantiated and the relevant record has been selectively presented in order to mislead the Court. Material evidence relevant to the defence of these charges has been withheld in many cases. He asserted that the Caretaker Prime Minister and his colleagues in the Federal Government have issued repeated statements that they have found no evidence of corruption, and therefore, they cannot be allowed to plead the contrary in this Court. He submitted that the President mentioned one specific and alleged charge of corruption in the Dissolution Order, being the Eighth Ground concerning PPL-BONE, no other specific allegation or charge was made in this behalf, therefore, much of the written statement in this respect is an afterthought, an attempt to improve his position. He further submitted that the documents pertaining to these allegations were collected after the Dissolution Order, and therefore, cannot be taken into consideration by this Court and, in any case, the instances of alleged corruption are extraneous to the Dissolution Order in the light of principles laid down in the cases of Haji Saifullah Khan and Mian Muhammad Nawaz Sharif (supra). He submitted that the President appears to have acted on mere hearsay and adversarial newspaper statements which are not sufficient basis to come to any such conclusion or to invoke Article 58(2)(b).

50. After considering the detailed submissions of the learned counsel for the parties, I hold that the newspaper cuttings can be relied upon as material in support of the dissolution of the National Assembly. However, as stated above, I this Court has no concern with the quantity or sufficiency of the material nor can Q it sit in appeal on dissolution order passed by the President, provided the material relied upon has nexus with the grounds mentioned in the impugned order which in turn has nexus with Article 58(2)(b) manifesting application of mind by the President as in the instant case.

51. It is true that charges of corruption, nepotism and violation of rules per se cannot form the basis for action in terms of Article 58(2)(b), although these charges can serve an ancillary role and function as stated in the cases referred to by Mr. Aitzaz Ahsan. Mr. Khalid Anwar was, however, right in contending that where corruption, nepotism and the violation of the applicable rules and regulations have been carried out on a widespread, pervasive and systematic R basis, then such charges can validly form the basis for action under Article 58(2)(b). The cases relied upon by Mr. Aitzaz Ahsan in this behalf are distinguishable.

52. The Eighth ground of the dissolution order is in the following terms:-

“And whereas the Constitutional requirement that the Cabinet together with the Ministers of State shall be collectively responsible to the National Assembly has been violated by the induction of a Minister against whom criminal cases are pending which the Interior Minister has refused to withdraw. In fact, at an early stage, the Interior Minister had announced his intention to resign if the former was inducted into the Cabinet. A Cabinet in which, one Minister is responsible for the prosecution of a Cabinet colleague cannot be collectively responsible in any manner whatsoever. “ .

53. Mr. Aitzaz Ahsan argued that the charge is misconceived, inasmuch as, the President has himself been a member of a Cabinet wherein two of his own colleagues were under trial on the false charge of murder. In April, 1993, the President as Caretaker Finance Minister requested the then President Ghulam Ishaque Khan to appoint Mr. Asif Ali Zardari as Federal Minister even though there were cases pending against Mr. Asif Ali Zardari in those days. He also referred to the appointment of Mr. Mumtaz Ali Bhutto as Caretaker Chief Minister, Sindh, notwithstanding the fact that Mr. Mumtaz Bhutto was himself an accused in a criminal case and absconder in F.I.R. No.24 at Police Station Khanoth, District Dadu, undertrial in the Court of the Judge Special Court, II, S.T.A., Hyderabad. He further argued that if there were differences among the members of the Cabinet the National Assembly could not be dissolved. It was asserted that the President himself administered oath of office to Mr. Nawaz Khokhar. He did not exercise his power to seek the reconsideration, by the petitioner of her decision to include Mr. Nawaz Khokhar in her Cabinet but administered oath to him. It was further argued that a person is innocent until proved guilty. That is the salutary principle of law and justice, therefore, this ground was not relatable to the objects of Article 58(2)(b).

54. Mr. Khalid Anwar refuted the petitioner’s assertion as misleading and without substance. He submitted that the examples quoted by the petitioner were distinguishable, inasmuch as, in the cases referred to by the petitioner, the cases were registered against the person concerned not by the Government of which he was, or became a member, but by some other Government. As regards Mr. Nawaz Khokhar, it was urged, that the case against him was registered by the petitioner’s own Government. Furthermore, not only was this case not withdrawn when Mr. Nawaz Khokhar became a Minister, the Interior Minister promised that the case would be diligently prosecuted. Commenting on the salutary principle that a person is presumed innocent till proven guilty, he submitted that this principle was applicable to proceedings before a Court of law in a criminal trial and not in these proceedings.

It is fundamental to the system of Parliamentary democracy that the Cabinet is collectively responsible to the National Assembly. This principle is also enshrined in Article 91(4) of the Constitution which provides:-

“The Cabinet, together with the Ministers of State, shall be collectively responsible to the National Assembly. “

Clearly, under the doctrine of collective responsibility, the Ministers are collectively and as a body, known as the Cabinet, are responsible to the National Assembly. The individual Ministers do not have the choice of agreeing only with some Government decisions and not others. If a Minister disagrees with a policy or decision taken by the Cabinet even then he must in public as well as before the National Assembly give it his full and unstinting support. If he finds it impossible to accept or abide by the decision, or to support it, he must then resign from office. A Minister’s choice to remain in the Cabinet is tantamount to his accepting responsibility for all Cabinet decisions and Government policies.

In support of the above doctrine Mr. Khalid Anwar referred to the following passage entitled “Ministerial responsibility for departmental maladministration” from Wade and Bradley: Constitutional and Administrative Law, Eleventh Edition, pages 120-121:--

“Since parliamentary criticism of a department must be directed to a Minister, then the Minister may be said to be responsible to Parliament for the acts and omissions of the civil servants in his department. Two questions arise: (a) is the Minister bound to take responsibility for every piece of maladministration within his department?; and (b) if serious maladministration is found to have occurred, is the Minister under a duty to resign? In 1954, the Crichel Down affair gave rise to much discussion of these two issues.

‘Farm land in Dorset known as Crichel Down had been acquired under compulsory powers from several owners by the Air Ministry in 1937. After the war, the land was transferred to the Ministry of Agriculture, for whom it was administered by a commission set up under the Agriculture Act, 1947. while the future of the land was being considered. Lieutenant-Commander Marten, whose wife’s family had previously owned much of the land, asked that it be sold back to the family. Misleading replies and false assurances were given when this and similar requests were refused, and a. seriously inaccurate report was prepared by a junior civil servant which led the Ministry to adhere to a scheme which it had prepared for letting all the land to a single tenant. Inadequate financial information was supplied to the headquarters of the Ministry: When conservative M.Ps. took up Marten’s case with the Minister of Agriculture Sir Andrew Clark QC was appointed to hold an inquiry. His report established that there had been muddle, inefficiency, bias and bad faith on the part of some officials named in the report. A subsequent inquiry to consider disciplinary action against the civil servants reported that some of the deficiencies were due as much to weak Organisation within the Ministry as to the faults of individuals.

During a Commons debate on these reports, the Minister of Agriculture, Sir Thomas Dugdale, resigned. Speaking in the debate, the Home Secretary, Sir David Maxwell Fyfe, reaffirmed that a civil servant is wholly and directly responsible to his Minister and can be dismissed at any time by the Minister a ‘power nonetheless real because it is seldom used’. He went on to give a number of categories where differing considerations apply.

(1)    A Minister must protect a civil servant who has carried out his explicit order.

(2)  Equally a Minister must defend a civil servant who acts properly in accordance with the                policy laid down by the Minister.

(3) Where an official makes a mistake or causes some delay, but not on an important issue of policy and not where a claim to individual rights is seriously involved, the Minister acknowledged the mistake and he accepts the responsibility although he is not personally involved. He states that he will take corrective action in the department.

(4) Where action has been taken by a civil servant of which the Minister ;disapproves and has no previous knowledge, and the conduct of the ;official is reprehensible there is no obligation on a minister to endorse ,what he believes to be wrong or to defend what are clearly shown to be errors of his officers. He remains, however, Constitutionally responsible to Parliament for the fact that something has gone wrong, but this does not affect his power to control and discipline his staff.” He also referred to “Constitutional Practice” by Rodney Brazier, wherein it was observed at pages 136-137:- “Attention may now be turned to individual responsibility. Broadly, each Minister is individually accountable for (a) his private conduct, (b) his general conduct of his department, and (c) acts done (or things left undone) by civil servants in his department. Responsibility for (a) and (b) is somewhat clearer than for (c).

It remains the case that a higher standard of private conduct is required of Ministers than of others in public life, a major reason for this today being that the popular press and the investigative journalism of its more serious rivals will make a wayward Minister’s continuance in office impossible. The Profumo Affair in 1963 shows that a Minister who deliberately lies to the House of Commons cannot remain in the Government. Mr. John Profumo was Secretary to State for War, and his extra-marital affair with Miss Christine Keeler, who was also sharing her sexual favours with a Soviet naval attache in reality, a Soviet intelligence officer), additionally raised for some people possible security questions---certainly for the Opposition, which did not wish to found its attack openly on the morality of his sexual behaviour. Mr. Profumo denied in the Commons that there had been any impropriety between him and Miss Keeler, he could not stand the strain caused by that lie, and later resigned. Lord Lambton’s resignation as a Minister and M.P. ten -years later, when it was revealed that he had used the services of a prostitute---of which encounters photographs and tape recordings existed---could again be linked to a possible national security risk: after all, he was Parliamentary Under-Secretary of State for Defence for the R.A.F. at the time. The resignation the following day of Earl Jellicoe, the Lord Privy Seal and Leader of the House of Lords, who owned up to having done the same thing, had no obvious security aspect, but he clearly thought that he had fallen below the standard of personal conduct required of a Minister. Ten years later still Mr. Cecil Parkinson resigned as Secretary of State for Trade and Industry. Into the public domain had come the fact that his former Secretary was expecting his child, together with her assertion that twice he had promised to obtain a divorce and to marry her, and had failed to try to do so. At first the Prime Minister strongly maintained that this was an entirely private matter which had no bearing on Mr. Parkinson’s ministerial life, but the press. cared nothing about his ministerial life and so hounded him about the affair that he could no longer function effectively as a Minister, and resigned. He was summoned back to the Cabinet in 1987. In a way the press has made it unnecessary to judge the morality of a Minister in Mr. Parkinson’s position.

In summary, if a Minister lies to Parliament, or so conducts himself as to raise an arguable case that national security could have been thereby compromised, or conducts his financial affairs other than with scrupulous care, or---though doing none of those things---through his behaviour makes it impossible for him to carry out his departmental duties because of the attentions of the press, then (regardless of how loyal the Prime Minister may be) he will have to go.

A Minister is responsible for the general conduct of his department: more precisely, he may have to pay the price for political misjudgment within it. What amounts to misjudgment may be a matter of opinion, and guidance can be difficult to formulate. A marginal case is provided by the preliminaries to the Falklands conflict. The Foreign Secretary, Lord Carrington, and two of his ministerial colleagues, Mr. Atkins and Mr. Luce, felt compelled to resign in 1982 after the Argentineans invasion of the Falkland Islands because they considered that the Foreign and Commonwealth Office had not adequately judged Argentina’s intentions. The Prime Minister did not want to accept their resignations, but the three Ministers persisted and left the administration. “

Be that as it may, in my humble view, this charge alone cannot form the basis for action in terms of Article 58(2)(b). However, in view of the charge and its nature, if read in conjunction with the other grounds, it is relevant for action under the aforesaid Article.

56. Ninth ground of dissolution order relates to the violation of the provisions of Articles 46 and 48 of the Constitution in the matter of sale of Burmah Castrol shares in PPL, and BONE/PPL shares in Qadirpur Gas Field. I would refrain from recording any finding on this ground for the reason that the matter is sub judice before this Court in some other proceedings.

57. These are the reasons in support of our short order, dated 29th January, 1997 recording the following findings:

“Firstly, we do not accept the contention of Mr. Aitzaz Ahsan that the President can invoke Article 58(2)(b) to dissolve the National Assembly only in such a grave situation in which Martial Law can be imposed as in 1977, and there is complete breakdown of Constitutional machinery. We are of the view that under the said provision, the President in his discretion may dissolve the National Assembly where he forms opinion on the basis of material before him having nexus with the dissolution order and Article 58(2)(b), that situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and appeal to the electorate is necessary. In support of the proposition reference can be made to the case of Khawaja Ahmad Tariq Rahim v. Federation of Pakistan and another PLD 1992 SC 646 in which it is held by majority that 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. There may be occasion for the exercise of such 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. The theory of total breakdown of Constitutional machinery as the only ground for dissolution of National Assembly has been rejected in the case of Mian Muhammad Nawaz Sharif v. Presiden• of Pakistan PLD 1993 SC 473.

Secondly, it is not correct to say as submitted by Mr. Aitzaz Ahsan, counsel for the petitioner that her case is on all fours with the case of Mian Muhammad Nawaz Sharif (supra), hence she is also entitled to the same relief of restoration as was given in that case. In the case of Mian Nawaz Sharif it was conceded by the Attorney-General for Pakistan that the dissolution order was mainly based upon the speech made by the deposed Prime Minister on 17-4-1993 on electronic media which was an act of subversion and further that session of National Assembly was called hurriedly and the President thought that it was done to initiate proceedings of impeachment against him. In such circumstances, it was held that the dissolution order was not sustainable.

Thirdly, it is not correct to say that the material produced in support of the grounds of the dissolution in its totality must be present before the President at the time of forming opinion and must be scrutinized by him in detail. It would be sufficient if there is material having nexus with the order of dissolution and Article 58(2)(b) before the President after perusal of which he forms his opinion and passes order of dissolution and further there is nothing wrong with production of corroborative or confirmatory material in support of the grounds which has been made available after the date of the order of dissolution.

Fourthly, newspaper cuttings can be relied upon as material in support of the grounds.

Fifthly, in the instant case the order of dissolution on the first ground of extra judicial killings sufficient material has been produced, which has been properly and justifiably considered.

Sixthly, we do not feel inclined to give any finding on the second ground in the dissolution order on the subject of murder of Mir Murtaza Bhutto, brother of the petitioner, and his seven other companions for the reason that the matter is sub judice before the Tribunal of Enquiry set up which is being presided over by a Judge of this Court and also F.I.Rs. have been filed which are being investigated in accordance with the law.

Seventhly. enough material is produced in support of the third ground with regard to the belated implementation of the judgment in the case of appointment of Judges, which is short of total compliance. By this nonimplementation Articles 190 and 2A of the Constitution are violated. There is also adequate material produced by the respondents to show that the petitioner in her speech before the National Assembly had ridiculed the judgment of the Supreme Court in the Judges’ case which was telecast also repeatedly and in order to harass the Judges of this Court, Constitution (Fifteenth Amendment) Bill was introduced in the Parliament for initiating the process of accountability against the Judges by sending the Judges of the superior Courts on forced leave if fifteen per cent of the members moved a motion against them. This Bill ran counter to Article 209 of the Constitution which is already in existence for taking action against Judges before the body of Supreme Judicial Council. Complete separation of judiciary from the executive is being delayed and by law Executive Magistrates are given powers to sentence to imprisonment for three years, which is against the spirit of the judgment.

Eighthly, there is sufficient material available on the record in support of the fifth ground showing that under the orders of the petitioner telephones of the Judges of the Supreme Court, leaders of the political parties and high-ranking military and civil officials were being taped and transcripts sent to the petitioner for reading.

Lastly, there is also enough material produced in support of the fifth ground in the dissolution order which covers the subject of corruption, nepotism and violation of rules.”

In view of the above reasons I uphold the order of dissolution of the National Assembly and the Cabinet passed by the President and dismiss the petitions.

58. Before parting with the judgment I must express my deep appreciation for the valuable assistance rendered by Mr. Aitzaz Ahsan, Mr. Khalid Anwar and Dr. Farooq Hassan in resolving the controversy raised herein.

(Sd.)

Irshad Hasan Khan, J

ZIA MAHMOOD MIRZA, J.---By an order dated 5th November, 1996 passed in exercise of his powers under Article 58(2)(b) of the Constitution, President of Pakistan dissolved the National Assembly with immediate effect and directed that “the Prime Minister and her Cabinet shall cease to hold office forthwith”. By the same order, the President in exercise of his powers under Article 48(5) of the Constitution appointed 3rd February, 1997 as the date for holding General Elections to the National Assembly. For facility of reference, the Dissolution Order passed by the President is reproduced hereunder in extenso:-

“THE PRESIDENT

DISSOLUTION ORDER

Whereas during the last three years thousands of persons in Karachi and other parts of Pakistan have been deprived of their right to life in violation of Article 9 of the Constitution. They have been killed in Police encounters and Police custody. In the speech to Parliament on 29th October, 1995 the President warned that the law enforcing agencies must ensure that there is no harassment of innocent citizens in the fight against terrorism and that human and legal rights of all persons are duly protected. This advice was not heeded. The killings continued „..-h-1 The Government’s fundamental duty to maintain law and order has to be performed by proceeding in accordance with law. The coalition of political parties which comprise the Government of the Federation are also in power in Sindh, Punjab and N.-W.F.P. but no meaningful steps have been taken either by the Government of the Federation or, at the instance of the Government of the Federation, by the Provincial Governments to put an end to the crime of extra judicial killings which is an evil abhorrent to our Islamic faith and all canons of civilized Government. Instead of ensuring proper investigation of these extra judicial killings, and punishment for those guilty of such crimes, the Government has taken pride that, in this manner, the law and order situation has been controlled. These killings coupled with the fact of widespread interference by the members of the Government, including members of the ruling parties in the National Assembly, in the appointment, transfer and posting of officers and staff of the law-enforcing agencies, both at the Federal and Provincial levels, has destroyed the faith of the public in the integrity and impartiality of the law-enforcing agencies and in their ability to protect the lives, liberties and properties of the average citizen.

And whereas on 20th September, 1996 Mir Murtaza Bhutto, the brother of the Prime Minister, was killed at Karachi along with seven of his companions including the brother-in-law of a former Prime Minister, ostensibly in an encounter with the Karachi Police. The Prime Minister and her Government claim that Mir Murtaza Bhutto has been murdered as a part of a conspiracy. Within days of Mir Murtaza Bhutto’s death the Prime Minister appeared on television insinuating that the Presidency and other agencies of State were involved in this conspiracy. These malicious insinuations, which were repeated on different occasions, were made without any factual basis whatsoever. Although the Prime Minister subsequently denied that the Presidency or the Armed Forces were involved, the institution of the Presidency, which represents the unity of the Republic, was undermined and damage caused to the reputation of the agencies entrusted with the sacred duty of defending Pakistan. In the events that have followed, the widow of Mir Munaza Bhutto and the friends and supporters of the deceased have accused Ministers of the Government, including the spouse of the Prime Minister, the Chief Minister Sindh, the Director of the Intelligence Bureau and other high officials of involvement in the conspiracy which, the Prime Minister herself alleges led to Mir Murtaza Bhutto’s murder. A situation has thus arisen in which justice, which is a fundamental requirement of our Islamic Society, cannot be ensured because powerful members of the Federal and Provincial Government who are themselves accused of the crime, influence and control the law-enforcing agencies entrusted with the duty of investigating the offences and bringing to book the conspirators.

And whereas on 20th March, 1996 the Supreme Court of Pakistan delivered its judgment in the case popularly known as the Appointment of Judges case. The Prime Minister ridiculed this judgment in a speech before the National Assembly which was shown more than once on nation-wide television. The implementation of the judgment was resisted and deliberately delayed in violation of the Constitutional Mandate that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. The directions of the Supreme Court with regard to regularization and removal of Judges of the High Courts were finally implemented on 30th September, 1996 with a deliberate delay of six months and ten days and only after the President informed the Prime Minister that if advice was not submitted in accordance with the Judgment by end September, 1996 then the President would himself proceed further in this matter to fulfil the Constitutional requirement. The Government has, in this manner, not only violated Article 190 of the Constitution but also sought to undermine the independence of the judiciary guaranteed by Article 2-A of the Constitution read with the Objectives Resolution.

And whereas the sustained assault on the judicial organ of State has continued under the garb of a Bill moved in Parliament for prevention of corrupt practices. This Bill was approved by the Cabinet and introduced in the National Assembly without informing the President as required under Article 46(c) of the Constitution. The Bill proposes inter alia that on a motion moved by fifteen per cent. of the total members, a Judge of the Supreme Court or High Court can be sent on forced leave. Thereafter, if on reference made by the proposed special committee, the Special Prosecutor appointed by such Committee, forms the opinion that the Judge is prima facie guilty of criminal misconduct, the special committee is to refer this opinion to the National Assembly which can, by passing a vote of no confidence remove the Judge from office. The decision of the Cabinet is evidently an attempt to destroy the independence of the judiciary guaranteed by Article 2A of the Constitution and the Objectives Resolution. Further, as the Government does not have a two-third majority in Parliament and as the Opposition Parties have openly and vehemently opposed the Bill approved by the Cabinet, the Government’s persistence with the Bill is designed not only to embarrass and humiliate the superior judiciary but also to frustrate and set at naught all efforts made, including the initiative taken by the President, to combat corruption and to commence the accountability process.

And whereas the judiciary has still not been fully separated from the executive in violation of the provisions of Article 175(3) of the Constitution and the dead-line for such separation fixed by the Supreme Court of Pakistan.

And whereas the Prime Minister and her Government have deliberately violated, on a massive scale the fundamental right of privacy guaranteed by Article 14 of the Constitution. This has been done through illegal phone-taping and eaves-dropping techniques. The phones which have been taped and the conversations that have been monitored in this unconstitutional manner includes the phones and conversations of Judges of the superior Courts, leaders of political parties and highranking military and civil officers.

And whereas corruption, nepotism and violation of rules in the administration of the affairs of the Government and its various bodies, authorities and corporations has become so extensive and widespread that the orderly functioning of Government in accordance of the provisions of the Constitution and the law has become impossible and in some cases, national security has been endangered. Public faith in the integrity and honesty of the Government has disappeared. Members of the Government and the ruling parties are either directly or indirectly involved in such corruption, nepotism and rule violations. Innumerable appointments have been made at the instance of members of the National Assembly in violation of the law declared by the Supreme Court that allocation of quotas to MNAs and PMAs for recruitment to various posts was offensive to the Constitution and the law and that all appointments were to be made on merit, honestly and objectively and in the public interest. The transfers and postings of Government servants have similarly been made, in equally large numbers, at the behest of members of the National Assembly and other members of the ruling parties. The members have violated their oaths of office and the Government has not for three years taken any effective steps to ensure that the legislators do not interfere in the orderly executive functioning of Government.

And whereas the Constitutional requirement that the Cabinet together with the Ministers of State shall be collectively responsible to the National Assembly has been violated by the induction of a Minister against whom criminal cases are pending which the Interior Minister has refused to withdraw. In fact, at an earlier stage, the Interior Minister had announced his intention to resign if the former was inducted into the Cabinet. A Cabinet in which one Minister is responsible for the prosecution of a Cabinet colleague cannot be collectively responsible in any manner whatsoever.

And whereas in the matter of the sale of Burmah Castrol shares in PPL and BONE/PPL shares in Qadirpur Gas Field involving national assets valued in several billions of rupees, the President required the Prime Minister to place the matter before the Cabinet for consideration/reconsideration of the decisions taken in this matter by the ECC. This has still not been done, despite lapse of over four months, in violation of the provisions of Articles 46 and 48 of the Constitution.

And whereas for the foregoing reasons, taken individually and collectively, I am satisfied 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.

Now therefore in exercise of my powers under Article 58(2)(b) of the Constitution I Farooq Ahmad Khan Leghari, President of the Islamic Republic of Pakistan do hereby dissolve the National Assembly with immediate effect and the Prime Minister and her Cabinet shall cease to hold office forthwith.

Further, in exercise of my powers under Article 48(5) of the Constitution I hereby appoint 3rd February, 1997 as the date on which general elections shall be held to the National Assembly.

(Sd.)

(Farooq Ahmad Khan Leghari),

President

No. 178/ 1 /President dated 5th November, 1996. “

2. Mohtrama Benazir Bhutto, former Prime Minister of Pakistan challenged the legality/validity of the aforementioned Dissolution Order through a Constitutional Petition (C.P. No.59 of 1996) filed directly in this Court under Article 184(3) of the Constitution. Similarly, Syed Yousaf Raza Gillani, Speaker of the National Assembly also invoked original jurisdiction of this Court under Article 184(3) of the Constitution through Constitutional Petition No.58 of 1996 to call in question the order of the President dissolving the National Assembly. Both the petitions were heard’ together and dismissed by majority of 6 to 1 on 29th January, 1997 through a short order passed after the hearing was concluded, for which reasons were to be recorded later. I disagreed with the majority view and recorded my dissent in a separate short order saying that “in my humble view for which I shall record reasons later on, the order dated 5th November, 1996 impugned in these petitions cannot be sustained, with the result that the National Assembly, the Prime Minister and the Cabinet stand restored.” The short order passed by majority of 6 to 1, however, recorded the following findings/reasons for upholding the order of dissolution passed by the President and dismissing the petitions:-

“Firstly, we do not accept the contention of Mr. Aitzaz Ahsan that the President can invoke Article 58(2)(b) to dissolve the National Assembly only in such a grave situation in which Martial Law can be imposed as in 1977 and there is complete breakdown of Constitutional machinery. We are of the view that under the said provision, the President in his discretion may dissolve the National Assembly where he forms opinion on the basis of material before him having nexus with the dissolution order and Article 58(2)(b), that situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and appeal to the electorate is necessary. In support of the proposition reference can be made to the case of Khawaja Ahmad Tariq Rahim v.. Federation of Pakistan and another (PLD 1992 SC 646) in which it is held by majority that 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. There may be occasion for the exercise of such 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. The theory of total breakdown of Constitutional machinery as the only ground for dissolution of National Assembly has been rejected in the case of Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 SC 473).

Secondly, it is not correct to say as submitted by Mr. Aitzaz Ahsan, counsel for the petitioner, that her case is on all fours with the case of Muhammad Nawaz Sharif (supra), hence she is also entitled to the same relief of restoration as was given in that case. In the case of Nawaz Sharif it was conceded by the Attorney-General for Pakistan that the dissolution order was mainly based upon the speech made by the deposed Prime Minister on 17-4-1993 on electronic media which was an act of subversion and further that session of National Assembly was called hurriedly and the President thought that it was done to initiate proceedings of impeachment against him. In such circumstances it was held that the dissolution order was not sustainable.

Thirdly, it is not correct to say that the material produced in support of the grounds of the dissolution in its totality must be present before the President at the time of forming opinion and must be scrutinized by him in detail. It would be sufficient if there is material having nexus with the order of dissolution and Article 58(2)(b) before the President after perusal of which he forms his opinion and passes order of dissolution and further there is nothing wrong with production of corroborative or confirmatory material in support of the grounds which has been made available after the date of the order of dissolution.

Fourthly, newspaper cuttings can be relied upon as material in support of the grounds.

Fifthly, in the instant case in the order of dissolution on the first ground of extra-judicial killings sufficient material has been produced, which has been properly and justifiably considered.

Sixthly, we do not feel inclined to give any finding on the second ground in the dissolution order on the subject of murder of Mir Murtaza Bhutto, brother of the petitioner, and his seven other companions for the reason that the matter is sub judice before the Tribunal of Enquiry set up which is being presided over by a Judge of this Court and also F.I.Rs. have been filed which are being investigated in accordance with the law.

Seventhly, enough material is produced in support of the third ground with regard to the belated implementation of the judgment in the case of appointment of Judges, which is short of total compliance. By this non-implementation Articles 190 and 2A of the Constitution are violated. There is also adequate material produced by the respondents to show that the petitioner in her speech before the National Assembly had ridiculed the judgment of the Supreme Court in the Judges’ case which was telecast also repeatedly and in order to harass the Judges of this Court, Constitution Fifteenth Amendment Bill was introduced in the Parliament for initiating the process of accountability against the Judges by sending the Judges of the Superior Courts on forced leave if fifteen per cent. of the members moved a motion against them. This Bill ran counter to Article 209 of the Constitution which is already in existence for taking action against Judges before the body of Supreme Judicial Council. Complete separation of judiciary from the executive is being delayed and by law Executive Magistrates are given powers to sentence to imprisonment for three years, which is against the spirit of the judgment.

Eighthly, there is sufficient material available on the record in support of the fifth ground showing that under the orders of the petitioner telephones of the Judges of the Supreme Court, leaders of the political parties and high ranking military and civil officials were being taped and transcripts sent to the petitioner for reading.

Lastly, there is also enough material produced in support of the fifth ground in the dissolution order which covers the subject of corruption, nepotism and violation of rules.

For the facts and reasons stated above, we uphold the order of dissolution passed by the President and dismiss the petitions.”

3. Mr. Justice Saleem Akhtar has since written the reasoned judgment in support of the short order aforementioned and copy of the judgment has been supplied to me which I have perused very minutely. Having already disagreed with the majority view expressed in the short order, I now proceed to record the reasons for my taking a different view from that of the majority.

4. The impugned order of the President dated 5th November, 1996, dissolving the National Assembly and making other consequential directions (hereinafter called the dissolution order) was passed in purported exercise of his powers under Article 58(2)(b) of the Constitution of Islamic Republic of Pakistan. Article 58 in its relevant aspect reads as under:-

“58.--(1) 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)        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.”

Under clause (1) of Article 58, President is bound to dissolve the National Assembly if so advised by the Prime Minister and in case he fails to do so, the Assembly shall stand dissolved automatically at the expiration of fortyeight hours after the Prime Minister has so advised. Under clause (2), however, the President has been empowered to dissolve the National Assembly in his discretion, in two situations, firstly when in his opinion, 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 and secondly 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 has become necessary.

5. In order to examine the validity of the dissolution order, it appears necessary to ascertain the true import and scope of Article 58(2)(b) and to determine the nature and extent of the power conferred on the President thereunder. The provision in question has already been considered/interpreted in a number of cases decided by this Court and some of the High Courts. First case in the Series is Khawaja Muhammad Sharif v. Federation of Pakistan (PLD 1988 Lahore 725) wherein was challenged the order dated 29th May, 1988 passed by the then President of Pakistan (General Muhammad Zia-ul-Haq) dissolving the National Assembly elected in the year 1985 and dismissing the Cabinet headed by the then Prime Minister Muhammad Khan Junejo. The order impugned was struck down by a Bench of five learned Judges of Lahore High Court including the learned Chief Justice holding, inter alia, that four out of five grounds given by the President for dissolving the Assembly were vague, general or nonexistent and had no nexus with the situation specified in Article 58(2)(b) and the fifth ground namely 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” was not supported by any material. It was, of course, held by the High Court that the Presidential order passed under Article 58(2)(b) was open to judicial review. Reliance in this behalf was placed on non obstante clause in Clause (2) of Article 58 which it was observed excluded the immunity from justiciability provided in Clause (2) of Article 48 to the Presidential Orders passed in his discretion. Validity of the order passed by the President under Article 58(2)(b) though in his discretion was accordingly held to be justiciable. Chief Justice of the High Court (Mr. Justice A.S. Salam) held that the ‘discretion’ and the formation of ‘opinion’ have to be based on facts and reasons which are objective realities, “the President cannot exercise his powers under the Constitution on wish or whim. He has to have facts, circumstances which can lead a person of his status to form an intelligent opinion requiring exercise of discretion of such a grave nature that the representatives of the people who are primarily entrusted with the duty of running the affairs of the State are removed with a stroke of the pen. His action must appear to be called for and justifiable under the Constitution if challenged in a Court of Law.” Mr. Justice Rustam S. Sidhwa, a learned Member of the Bench dealt with the historical background of the Eighth Amendment and pointed out the reason for conferring the power on the President to dissolve the National Assembly in his discretion stating that “A reference to the Debates held in the National Assembly relating to the Constitution (Eighth Amendment) Bill shows that the power granted under sub-clause (b) of clause (2) of Article 58 was to specifically meet the type of necessity that had arisen in 1977 when the President had no power to dissolve the National Assembly, even though the mood of the whole country was against it - - - - - - - “ (Underlining is mine). The learned Judge also addressed himself to the question as to when can it be said that ‘the situation contemplated by Article 58(2)(b)- has arisen i.e. that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and held “The expression Government of the Federation” is not limited to any one particular function, such as the executive, the legislative, or the judicial, but includes the whole functioning of the Federal Government in all its ramifications. - - - - - - - - - - - - - - - - -. Thus, where the National Assembly is beset with internal dissentions and problems and the party allegedly in power does not have a clear majority, or having tenuous support from its members, is not able to carry on the functions of the Government with confidence, and is avoiding to take important decisions, which require to be taken, for fear that it may be outvoted, in case a debate is held in respect thereof, a situation can be stated to have arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. A few further instances can also be given, such as, where the Government has been defeated in the Assembly and the Prime Minister does not want to step down, or political groupings are such that even attempts by the President to form a coalition Government and get a working majority have not been successful and no alternative Government can be formed”. The learned Judge proceeded to observe ‘what is intended by the language of sub-clause (b) of clause (2) is the failure of the functional working of the National Assembly, through Ministers belonging to the majority party, because they are not able to run the Government with confidence and courage.” According to the learned Judge, what is covered by sub-clause (b) “is the functional working of the party in power, for where it has strength, it effectively controls legislative and executive functions, and where it is weak, it cannot effectively do so. The primary condition, therefore, is whether the circumstances are such that the functional working of the National Assembly is impaired; for if the party in power commands the widest support in the National Assembly, it has the right to run the Government, and where it has no such support, or has lost it, it must leave”.

6. The matter then came up before this Court in an appeal filed by the Federation against the aforementioned judgment of the Lahore High Court and in the case of “Federation of Pakistan v. Muhammad Saifullah Khan” (PLD 1989 SC 166), Nasim Hasan Shah, J. (as he then was) in his leading opinion expressed for the Court referred to the history of the legislation and the debates and the speeches made by the Prime Minister and the Law Minister in the National Assembly in connection with the Constitution (Eighth Amendment) Act, 1985 leading to the adoption of Articles 48 and 58 in their present form and observed: “Thus the intention of the slaw-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”.

The learned Judge further proceeded to observe that the discretion conferred on the President by Article 58(2)(b) of the Constitution could not be regarded as absolute “but is to be deemed to be qualified one, in the sense that it is circumscribed by the object of the law that confers it”. It was also held by the learned Judge that reading 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. It was observed that before exercising his discretion, the President has to form an opinion objectively that a situation of the kind envisaged in Article 58(2)(b) has arisen necessitating the grave step of dissolving the National Assembly. The learned Judge further proceeded to hold that the immunity envisaged by Article 48(2) if at all available to the action taken under Article 58(2) “can possibly be in relation to the exercise of his ‘discretion’ but not in relation to his ‘opinion’.” It was observed that the opinion of the President must be founded on some material. With respect to the grounds for dissolution of the Assembly, it was held that the first four grounds stated in the order for dissolution were extraneous having no nexus with the preconditions prescribed by Article 58(2)(b) of the Constitution and as for the fifth ground namely “a situation has arisen in which the Government of the Federation cannot be carried on in . accordance with the provisions of the Constitution”, nothing was shown that the machinery of the Government of the Federation had come to a standstill or such a breakdown had occurred therein which was preventing the orderly functioning of the Constitution. (Underlining is mine).

Shafiur Rahman, J. who recorded a separate note in the abovereferred case of Haji Saifullah interpreted the expression in subclause (b) of Article 58(2) viz ‘The Government of the Federation cannot be carried on 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’, 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. “

It appears that the learned Judge also took note of the following statement of the Law Minister made at the relevant time seeking to explain the “purpose and object” of the amended provision of Article 58(2)(b):-

“We have placed a check on the President that where the condition as I have submitted many a time in the Hon’ble House, these conditions as realized in 1977. 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.”

Having interpreted the provision as aforesaid, the learned Judge proceeded to hold that the reasons given in the impugned order of the President were extraneous to the conditions laid down in sub-clause (b) for dissolving the National Assembly and consequently, the impugned order of the President dissolving the National Assembly was unsustainable.

7. The law laid down by this Court in the aforenoted case of Haji Saifullah (PLD 1989 SC 166) was followed in the cases of Ahmed Tariq Rahim v. Federation of Pakistan (PLD 1991 Lahore 78) and Khalid Malik v. Federation of Pakistan (PLD 1991 Karachi 1) though in both these cases, the order of dissolution of National Assembly dated 6th August, 1990 passed by Mr. Ghulam Ishaq Khan, the then President of Pakistan, under Article 58(2)(b) of the Constitution was upheld on merits. It may be stated incidentally that the Assembly which was dissolved by the then President on 6th August, 1990 was elected in October, 1988 and the present petitioner Mohtrama Benazir Bhutto was the leader of the House in that Assembly and consequently the Prime Minister of Pakistan. In the Lahore case (PLD 1991 Lahore 78), relying on Haji Muhammad Saifullah’s case, it was held that the opinion formed by the President that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution, can be subjected to scrutiny through judicial review and in case the President chooses to state the grounds for the action taken, the Court can examine the same to find out whether or not there is any nexus between the grounds and the preconditions envisaged by Article 58(2)(b) of the Constitution empowering the President to dissolve the National Assembly in his discretion. It was also held that the President can validly dissolve the National Assembly in case of failure of Constitutional machinery which may result from internal subversion or dissension; the deadlock arising from indecisive electoral verdict and political polarization which makes it impossible for the Government to be carried on in accordance with the provisions of the Constitution or where the Government is being conducted in disregard of the Constitution and the law. 1t was found by the learned Judges of High Court that the President was justified in 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. This opinion, it was observed, could validly and reasonably be formed from, amongst others, the following acts of commission and omission of the Federal Government:-

(i)         No substantial legislative work had been and could be carried on by the Government in the National Assembly inter alia for the reason that the Government had virtually no representation in the Senate. During its twenty months’ tenure, out of fifty Ordinances/Bills presented before the National Assembly only fifteen could be passed by the Parliament while the remaining thirty-five were not processed and allowed to lapse.

(ii)        The Federal Government miserably failed to perform its obligation under Article 148(3) of the Constitution to protect the Province of Sindh against internal disturbances which continued unabated and assumed serious proportions beyond the control of the Provincial Government. Despite repeated advice of the President, clear view expressed by the Governor of Sindh and opinion of the then Attorney General, resort to the provisions of Article 245 of the Constitution was not made resulting in colossal loss of life and property thereby endangering the integrity and solidarity of Pakistan.

(iii)       The Constitution envisages Pakistan as an Islamic Federal Republic, wherein the Federal Government and the Federating Units have welldefined powers and sphere of operation. A mechanism is in built in the Constitution to resolve disputes between the Federation and its units and between the units inter se. Inaction on the part of the Federation in resolving such disputes may endanger the Federal structure of the State itself. In this regard one of the important institutions is the Council of Common Interests constituted under Article 153 of the Constitution. It formulates and regulates policies in relation to matters in Part II of the Federal Legislative List and entry 34 (Electricity) in the Concurrent List (refer Article 154), supervises and controls the related institutions and is also required to determine the rates at which net profits are to be calculated in terms of Article 161. The documents on record reveal that the Federal Government despite repeated demands by three out of four Federating units and unanimous resolution of the Senate, failed to call a meeting of the Council of Common Interests resulting in polarisation and confrontation between the Federation and two Federating units which eventually obliged them to file a suit against the Federation in the Supreme Court of Pakistan.

(iv)       The formation of the National Finance Commission, another important institution, required to be set up under Article 160 of the Constitution for distribution of revenues between the Federation and the Provinces was unnecessarily delayed with the result that not a single meeting could be convened thereby depriving the Federating units to have redress of their grievances.

(v)        The provincial autonomy guaranteed by the Constitution was eroded by launching People’s Works Programme in a manner contrary to Article 97 of the Constitution without any legislative backing.

(vi)       Article 14 of the Constitution guarantees that the dignity of man and subject to law, the privacy of home shall be inviolable. This fundamental right was flagrantly violated and disregarded by tapping the telephones of highly respected persons, including dignitaries like the Chairman of the Senate and Speaker of National Assembly. Even the members of the Government party were not spared, petitioner being one of those whose telephones were taped.

(vii) Important Constitutional organs of the State like the Senate and superior Judiciary were publicly ridiculed and brought into disrespect. Even the legal existence and validity of the Senate was disputed by the Federal Government.

(viii) Misuse by the Federal Government of Secret Service Funds running into crores of rupees and unauthorised use of aircrafts belonging to P.A.F. and P.I.A. for transportation of M.N.As. at the time of NoConfidence Motion.

(ix)       Wholesale and indiscriminate appointments in the Civil Services of Pakistan and the Services under the Statutory Corporations in violation of law.

It was further held by the learned Judges of the High Court that the grounds which prevailed with the President for passing the order of dissolution of the National Assembly had direct nexus with the pre-conditions prescribed by Article 58(2)(b) of the Constitution and that there was material available with the President on the basis of which he could form an opinion that 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.

In the case of Khalid Malik decided by Karachi High Court, it was held that while the discretion vested in the President under Article 58(2)(b) tray not be open to judicial review, the process of opinion-forming is judicially reviewable. It was observed that the President has to first form an opinion objectively with regard to the pre-conditions mentioned in Article 58(2)(b) and thereafter he may exercise his discretion one way or the other. It was held by Karachi High Court, of course, following the view expressed in Saifullah’s case that the President could only dissolve the National Assembly “when he is of the opinion that either Constitutional mechanism has broken down or a stalemate or deadlock has occurred which rendered the observance of the provisions of the Constitution impossible or impracticable” though it was observed that it was difficult to define with precision the circumstances in which it could be said that the Constitutional mechanism has broken down or a stalemate has developed or a deadlock has taken place. On facts/merits, it was found that the grounds of horse-trading and corrupt practices of the House were fully supported by the material on the record and bore reasonable nexus to the conditions prescribed by Article 58(2)(b). It was also found that non-convening of the meetings of Council of Common Interests and National Finance Commission and the launching of People’s Works Programme in the absence of appropriate legislation were in contravention of Constitutional provisions. It was also observed that despite all warnings, Federal Government failed to discharge its Constitutional obligation of safeguarding the life, liberty, honour and property of the inhabitants of Province of Sindh and declined to take action under Article 245 of the Constitution. The ground regarding the situation in the said Province, it was observed, not only bore the nexus with the preconditions mentioned in Article 58(Z)(b) but there was also ample material before the President in support of this ground. Saleem Akhtar, J (as he then was) as a learned Member of the Bench which heard and decided Khalid Malik’s case observed in his separate note that the President’s power to dissolve the National Assembly under Article 58(2)(b) was not unfettered but was circumscribed by the preconditions imposed by the Constitution and that this power is to be exercised sparingly and in extreme circumstances when the Constitutional machinery is paralysed. It was observed that “The main embargo imposed on exercise of this power is that the President has to first form his opinion on the basis of the material before him that the Government machinery cannot be run in accordance with the Constitution. Heavy responsibility has been placed on the President to first form an opinion about the breakdown of the machinery and in this regard he has to consider the facts and material before him”. It was further observed that the Court has the power to examine the formation of opinion by the President and to satisfy itself that the opinion was formed on such materials which had the nexus with the dissolution order and on the basis of which such an opinion could honestly and reasonably be formed. The learned Judge pointed out certain situations indicative of the failure/breakdown of Constitutional machinery.

8. It appears that the judgment of Karachi High Court in Khalid Malik’s case remained unchallenged but the case of Ahmed Tariq Rahim was brought before this Court in a petition for leave to appeal which bore no fruit and was dismissed refusing leave to appeal. Two of the learned Judges constituting the Bench (Mr. Justice A.S. Salam and Mr. Justice Sajjad Ali Shah (as they then were), however, held that the order of dissolution of National Assembly passed by the President was not sustainable in law and under the Constitution though they also eventually declined the relief of restoration of the Assembly for the reasons stated in their separate dissenting notes. Mr. Justice Shafiur Rehman speaking for the majority and Rustam S. Sidhwa, J in his separate note concurring with S. Rehman, J upheld the judgment of the Lahore High Court. Mr. Justice Shafiur Rahman who authored the leading judgment representing the majority view in the case of Ahmed Tariq Rahim v. Federation of Pakistan (PLD 1992 SC 646) re-examined the scope and the extent of the power conferred on the President under Article 58(2)(b) of the Constitution and held as follows:-

“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.”

On merits, the learned Judge (Shafiur Rahman J.) upheld the first two grounds of dissolution namely, (i) the utility and efficacy of the National Assembly as a representative institution was defeated by internal dissensions and frictions; persistent and scandalous ‘horse-trading’; corrupt practices and inducement; failure to discharge substantive legislative business and the National Assembly having lost the confidence of the people and (ii) failure of the Federal Government to convene the meetings of the Constitutional Institutions like Council of Common Interests and National Finance Commission despite the persistent demands of the Provinces and the intercession of the President with the result that the disputes regarding the claims of the Federating units could not be sorted out thereby jeopardizing the very existence and sustenance of the Federation and held that both these grounds were sufficient to justify the dissolution order. Other grounds were not specifically dealt with. It was, however, observed that some of the grounds like corruption and nepotism in the Federal Government, its functionaries and Authorities and Agencies and other corporations, misuse of authority resources and agencies of the Government of the Federation including statutory corporations etc. for political purposes and personal gain and undermining of the Civil Services of Pakistan by disregarding the provisions of the Articles 240 and 242 “may not have been independently sufficient to warrant such an action” though they can be invoked, referred to and made use of alongwith the grounds more relevant like the aforementioned two grounds.

Mr. Justice Rustam S. Sidhwa in his separate note recorded in the case of Ahmed Tariq Rahim (PLD 1992 SC 646) referred to the legislative history of the provisions relating to the failure of Constitutional machinery as contained in Articles 58(2) and 112(2) of our Constitution traceable to the Government of India Act, 1935, sections 45 and 93 whereof also provided for failure of Constitutional machinery and observed that “these provisions, as would appear from the debate that took place in the House of Lords, were enacted to prevent internal subversion, because one section of the Congress Party had declared its intention to enter the Legislatures only in order to wreck them from within, since they fell far short of the Party’s demand for full self-Government. In the debate on the Bill, the Marquess of Lothian desired to add the following words to para. (1) of section 45-- “or the subversion of the institutions set up by this Act”, so as to arm the Governor-General with powers to intervene in the event of any attempt being made to subvert the principles of responsible Government and substitute for them some form of party dictatorship. However, the proposed amendment was withdrawn on the assurance of Marquess of Zetland that the Governor-General would be able to deal with such a matter under section 45. Sections 45 and 93 appeared in separate Chapters in the 1935 Act headed “Provisions in case of failure of Constitutional Machinery”. The said two sections were omitted after Pakistan came into being in 1947. Later Constitutional documents of 1956, 1962, 1972 and 1973 did not incorporate provisions to deal with failure of Constitutional machinery as provided in the 1935 Act. It was not till the revival of the Constitution of 1973 Order, 1985 (P.O. 14 of 1985) and the Constitution (8th Amendment) Act, XVIII of 1985, were passed that such provisions found their way in the 1973 Constitution. The present Articles 58(2)(b) and 112(2)(b), which in some measure reproduce the language of sections 45 and 93 of the old Government of India Act, 1935, enable both the Federation and the Provinces to deal with cases of failure of Constitutional machinery and to thereby ensure that their respective Governments are carried on in accordance with the provisions of the Constitution. “

The provisions of Articles 58(2)(b) and 112(2)(b), it was further observed, “refer to situations which have arisen in which the Government cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary. The word “cannot” 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. Taking the case at the strictest level, one would imagine that these provisions become applicable when a breakdown has actually occurred or is on the very brink of happening and that the level of requirement is beyond the test of imminence and that the transgression is of such a magnitude that nothing short of an appeal to the electorate is necessary.” Proceeding further, however, the learned Judge observed that if too stringent tests are applied, the situation of 1977 may repeat itself with the President holding out for a total collapse and the Martial Law stepping in for failure on his part to control imminent breakdown. He then relying upon a case from Indian jurisdiction, the State of Rajasthan’s case (AIR 1977 SC 1361) wherein an identical provision, Article 356 of the Indian Constitution was held to be both preventive and curative observed: “The same position obtains for these two provisions in our Constitution. Preventive, so as to prevent failure of 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”. It was, however, emphasized by the learned Judge that in the peculiar background of political developments in this country which for half of its life had remained under Martial Law and the other half under a Presidential system and a variety of Parliamentary systems with questionable dismissals of Governments for political gain and power, these two provisions, i.e. Articles 58(2)(b) and 112(2)(b), would have to be construed in their circumscribed sense to cover only the cases of failure or breakdown of Constitutional machinery, or else it would lead to Constitutional dictatorship. With reference to the law declared by this Court in the case of Haji Muhammad Saifullah (PLD 1989 SC 166) viz. that the dissolution of the Assembly could not be ordered unless it could be shown that 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 and/or the machinery of the Government of the Federation had come to a standstill or such a breakdown had occurred therein which prevented the orderly functioning of the Constitution, the learned Judge observed that “the test laid down is too strict and rigid. It forgets that the provision is also preventive. One does not have to wait till the whole machinery of the Government collapses or comes to a standstill or so serious a breakdown occurs which prevents the orderly functioning of the Government, before ordering a dissolution. What is required is that the breakdown is imminent, as partial dislocation has begun, or the breakdown has actually taken place and as a last resort interference is required to ultimately restore representative Government. Each case should therefore be left to be dealt with on its own merit. There could be many situations which could lead to or where there is an actual failure of Constitutional machinery, such as where the party in power having tenuous support from its members, is not able to carry on the functions of the Government effectively, or a deliberate deadlock created by a party or a group of parties or deadlock arising from an indecisive electoral verdict has constantly impaired or made the smooth running of the Government practically impossible, or where no party in the Legislature is in a position to form a Government or the party in power is guilty of or attempting internal subversion, or where a Government is being continuously conducted in utter disregard of the Constitution, or there is a mass uprising or civil disturbance or complete breakdown of law and order due to public opinion being against the party in power at the Federal or Provincial level”. In para. 19 of his judgment at page 691 of the report) Mr. Justice Sidhwa reiterated the aforementioned situations and observed that these are the basic situations which have a nexus with the failure of the Constitutional machinery. “Other stray, or a number of violations of the Constitution unless by themselves so grave that a Court could come to no other conclusion but that they alone directly led to the breakdown of the functional working of the Government, would not constitute valid grounds.- ------------------------------------------- - - - -- -- - - - - Non-compliance of general law, failure to hold or call meetings under the provisions of the general law, misuse of the authority or resources of the Federation or of the Provinces or of statutory or autonomous bodies, unauthorised or irregular interference in service matters and disruption in their regular and orderly working, some failure to maintain law and order; or the resultant effects arising from such situations, such as the climate of uncertainty if any created thereby, the sense of insecurity created at different levels of administration, the rejection by’ the people of some actions of the party in power, creation of some threats to law and order, the weakening of the judicial process, would not normally provide grounds for action under Articles 58(2)(b) or 112(2)(b) of the Constitution, - - - - - - - - -- - - - - - - -. “ The learned Judge pointed out that a dividing line would have to be kept in mind between certain basic situations which can be treated as leading to the breakdown of the Constitutional machinery and as having nexus with the provisions of the two Articles of the Constitution that provide for dissolution, strong Constitutional violations which the Courts may hold as directly leading to the breakdown of the functional working of the Government and other peripheral Constitutional violations.

Turning to the grounds given by the President for dissolution of the National Assembly, the learned Judge (Sidhwa, J.) found only two of the grounds as having nexus with Article 58(2)(b) in the light of the criteria laid down by him. The first ground related to the inability/failure of the National Assembly to carry out any substantive legislative business and it having lost the confidence of the people owing the persistent and scandalous ‘horse-trading’ and the second ground referred to the failure of the Government 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 which created extreme bitterness and political deadlock between the Federation and the Provinces. Both these grounds it was observed were the basic situations leading to the breakdown of the Constitutional machinery and as such had direct nexus with Article 58(2)(b). With respect to the first ground, it was noted that the Pakistan People’s Party though had emerged as the largest single party in 1988 Elections, it did not have an overall majority in the National Assembly. It formed coalition Government and thus secured majority in the National Assembly but had little support in the Senate where it had only two members which fact coupled with the open political confrontation between the coalition Government and the opposition had made it practically impossible for the coalition Government to carry on legislative business.

As regards the other grounds pressed into service by the President for ordering the dissolution of National Assembly such as demeaning the Senate and the Judiciary, allotment of the plots to MNAs to secure their loyalties, use of Air Force planes for political purposes, the allegations of corruption, favouritism and nepotism, taping of telephones in violation of fundamental rights, misuse of public funds, disbursal of public funds and loans by way of favours and the employment of persons in services in violation of statutory. rules and regulations, the view taken by the learned Judge was that these grounds did not justify the dissolution of the Assemblies. Similarly, interference in the matters of appointment, posting and transfers of civil servants and the launching of People’s Works Programme by the Federal Government in violation of the provisions of the Constitution too were held to be the matters which did not give the President a valid basis to dissolve the National Assembly as the aggrieved parties could take recourse to the remedies provided in law and the Constitution.

Mt. Justte Sajjad Ali Shah (presently the Chief Justice of this Court) in his dissenting opinion recorded in the aforementioned case of Ahmad Tariq Rahim accepted the legal prosition regarding the scope of the President’s power and Assembly as enunciated in the case of Haji Muhammad Saifullah (PLD 1988 SC 166) and particularly referred to the exposition/interpretation of Article 58(2)(b) by Nasim Hasan Shah, J. and Shafiur Rahman, J. holding that the order of dissolution of Assembly can be passed by the President only when the machinery of the Government has broken down completely and its authority eroded and that the provision in question “concerns itself with the breakdown of Constitutional mechanism, a stalemate, a deadlock in ensuring the observance of the provisions of the Constitution”.. He then proceeded to examine the grounds for dissolution of the National Assembly and the materials in support thereof in the light of the said legal position and the history of Constitution making in our country to which he made brief reference in paras. 7 to 10 of his judgment and held with reference to the first ground of the dissolution of the Assembly viz the utility and efficacy of National Assembly as a representative institution was defeated by internal dissensions and frictions, persistent and scandalous horse-trading and by failure to discharge substantive, legislative functions, “if that Government survived for 22 months, it could have survived for the remainder of the term unless shown that dissolution was justifiable and is for reasons which are covered by the requirements laid down in Haji Saifullah Khan’s case and the Constitutional machinery had failed and the Government was unable to run”. Proceeding further, it was held that the grounds mentioned in the dissolution order were neither individually nor collectively sufficient to justify the dissolution of the Assembly as they “do not, fulfil and satisfy criteria laid down in the case of Haji Saifullah Khan supra.” It was also observed that within the framework of the Constitution, several other remedial measures were available. which could have been taken by the President by invoking Articles 54 and 56, 186 and 232 to 237 instead of resorting to the dissolution of National Assembly.

            9.         In the case of Muhammad Nawaz Sharif v. Federation of Pakistan and others (PLD 1993 SC 473), validity of the Presidential order dated the 18th of April, 1993 dissolving the National Assembly was examined by this Court with reference to the provisions, of Article 58(2)(b) as construed/interpreted in the case of Haji Muhammad Saifullah and in the context of Parliamentary system of Government envisaged in our Constitution and it was held that the impugned order of the President was not within the ambit of the powers conferred on him under Article 58(2)(b) of the Constitution. Nasim Hassan Shah, C.J. who presided over the Bench hearing the petition of the deposed Prime Minister filed directly in this Court examined the validity of the dissolution order with reference only to one ground of dissolution namely the speech of Mr. Muhammad Nawaz Sharif, the then Prime Minister made on 17th April, 1993, which according to the dissolution order amounted to the subversion of the Constitution and which it was observed was the main reason which induced the President to dissolve the Assembly. It was contended by the then learned Attorney-General appearing for the respondent that after the speech in question delivered by the then Prime Minister, the relations between the two highest executive authorities namely the President and the Prime Minister became so gravely strained that it was not possible for them to work in harmony thereafter and the stalemate and the deadlock created between the two rendered the carrying on of the Federation in accordance with the provisions of the Constitution impossible. The President had, therefore, acted legally and properly in dissolving the National Assembly in exercise of the powers conferred on him under Article 58(2)(b) of the Constitution. Repelling this contention, the learned Chief Justice held that in view of the role assigned to the President in the Constitution, he is expected to conduct himself with utmost impartiality and neutrality and since the then President had ceased to be neutral, the speech of the Prime Minister could not be made a valid bias for the impugned action. It was further observed that the President and the Prime Minister being the highest Constitutional functionaries of the State ‘are expected to work in harmony and in close collaboration for the efficient running of the affairs of the State” and that their roles being defined in the Constitution, 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 Oath taken by them, while accepting their high office”.

Shafiur Rehman, J. who, it appears, wrote the main/leading judgment in the case noted that Article 58(2)(b) in so far as it empowers the President to destroy the Legislature and remove the chosen representatives, confers an exceptional power provided for an exceptional situation and, therefore, it must receive the narrowest interpretation as was placed on it in the case of Haji Muhammad Saifullah (PLD 1989 SC 166). He then examined various grounds mentioned in the impugned dissolution order and found 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”. As regards the charge of subversion of the Constitution based on the Prime Minister’s speech of 17th of April, 1993, it was observed that “such an indictment and verdict given in a Constitutional document is a political career killer. Such a finding could 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 allegations of corruption, maladministration etc., it was held, “are independently neither decisive nor within the domain of the President for action under Article 58(2)(b) of the Constitution. These are , wholly extraneous and cannot sustain the impugned order”.

Saad Saood Jan, J. in his separate note reiterated the exposition of the nature an extent of the power vesting in the President under Article 58(2)(b) of the Constitution rendered in the earlier cases of Haji Saifullah and Ahmad Tariq Rahim and observed that the most important precondition laid down in Article 58(2)(b) for exercise of power thereunder is that the 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 learned Judge further observed that the word ‘ cannot’ 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 powers 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”. As regards the grounds given by the President in support of the dissolution order, it was held 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)” and as such the impugned order was not sustainable.

Like-wise, the other learned Judges constituting the Bench who recorded their separate notes/detailed reasons in support of the short order of the Court allowing the petition in the case of Muhammad Nawaz Sharif (Ajmal Mian, J., Muhammad Afzal Lone, J., Muhammad Rafique Tarar, J., Saleem Akhtar, J., and Saiduzzaman Siddiqui, J.) also held that the grounds/reasons forming the basis of the dissolution order had no nexus with the conditions prescribed in sub-clause (b) of Article 58(2) of the Constitution or/and were not substantiated by any cogent evidence.

Mr. Justice Muhammad Rafique Tarar examined the matter in somewhat different perspective and from a different angle in the context of the status and respective powers/functions of the President, the Cabinet and the Prime Minister provided in the Constitution and observed that the President being a part of the Government of the Federation cannot blame the Prime Minister and the Cabinet alone for any unwise, illegal or even unconstitutional acts. “If the President thinks that the Cabinet and 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”. It was further observed by the learned Judge that the President has ho power to remove the Prime Minister or dismiss the Cabinet so long as the Prime Minister commands the confidence of the majority of the members of the National Assembly and that what he is not permitted to do directly, he cannot do indirectly by dissolving the National Assembly under the cloak of the powers conferred by Article 58(2)(b). It was also noted with reference to the provisions of Articles 91(5) and 58(2)(x) of the Constitution that even if the Prime Minister fails to obtain a vote of confidence from the National Assembly or a vote of no-confidence is passed against him, President shall not dissolve the National Assembly without first ascertaining that no other member of the Assembly enjoys the confidence of the majority of the members. In this view of the matter, the learned Judge held that the dissolution of the National Assembly must be strictly covered by Article 58(2)(b) that is to say, before the President dissolves the National Assembly, he must be satisfied that the Government of the Federation is “in a state of check-mate or a deadlock”, the state of “helplessness” of the Cabinet unchecked or brought about by the National Assembly or some outside force against which even the National Assembly cannot afford protection or cure. The learned Judge pointed out that in 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 other majority members whether in the opposition or with the treasury or independents as also to the people in general for no fault of theirs which is not permissible. The learned Judge observed in para. 34 of his opinion “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”. For instance when the Cabinet is outvoted on any vital question or a major issue. The learned Judge summed up his conclusions in para. 38 reproduced hereunder:--

“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.”

Mr. Justice Muhammad Raflque Tarar and Mr. Justice Saiduzzaman Siddiqui also addressed themselves to the second jurisdictional requirement stipulated in Article 58(2)(b) namely, the necessity of an appeal to the electorate. Mr. Justice Tarar took the view that the circumstances relied on by the President should not only show that the situation has arisen 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” which, it was observed, means that the extreme measure of dissolution must not be resorted to if another alternative is available. While dealing with this aspect of the matter, Mr. Justice Saiduzzaman Siddiqui held that the two conditons mentioned in Article 58(2)(b) viz. “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” are distinct and separate conditions and existence of both is a sine qua non for exercise of power by the President to dissolve the National Assembly. It was further held by the learned Judge that the second ,condition i.e. “an appeal to electorate is necessary”, implies that the Assembly has lost its representative character which may happen when either the majority of the members have resigned or floor-crossing and horse-trading have become the order of the day.

10. The propositions/principles emerging from the foregoing survey of the case-law may broadly be summed up as follows:-

(1)        President is empowered under clause (2) of Article 58 to dissolve the

            National Assembly in his discretion.

(2)        The discretion conferred on the President by Article 58(2) is not absolute but is fettered/circumscribed by pre-conditions/prerequisites prescribed in sub-clause (b) viz. 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’.

(3)        That before ordering the dissolution of National Assembly in exercise of his discretion, the President is obliged to form an opinion, honestly and objectively, as to the existence of preconditions mentioned in sub clause (b) of Article 58(2).

(4)        That the formation of opinion must be founded on some material placed before and duly considered by the President at the time when he formed the opinion.

(5)        That the grounds/circumstances forming the basis of the opinion must have direct and reasonable nexus with the preconditions prescribed in Article 58(2)(b).

(6)        If not the exercise of discretion, at least the formation of’’ opinion by the President necessitating the exercise of power is open to’ judicial review.

(7)        That the provision empowering the President to dissolve the National Assembly in his discretion being drastic in nature. is to be construed strictly and this-power must be exercised sparingly and only in an extreme situation when no other option is available within the framework of the Constitution.

(8)        That the situation envisaged in sub-clause (b) of Article 58(2) viz. that the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution contemplates a situation where the machinery of the Government is completely broken down and its, authority eroded and the Government cannot be carried on in accordance with the provisions of the Constitution (as held in the case of Haji Muhammad Saifullah (PLD 1989 SC 166), breakdown of Constitutional mechanism, a stalemate, a deadlock in ensuring the observance of the provisions of the Constitution (as interpreted/explained by Shafiur Rahman, J. in his separate note recorded in the case of Haji Muhammad Saifullah); or as observed in Ahmed Tariq Rahim’s case (PLD 1992 SC 646) where there is an actual or imminent breakdown of the Constitutional machinery, where there takes place extensive, continued and pervasive failure to observe numerous provisions of the Constitution creating an impression that the country is governed by extra-Constitutional methods.

11. Relying heavily on Haji Saifullah’s case (PLD 1989 SC 166) for the interpretation of the expression ‘situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution’ in Article 58(2)(b), Mr. Aitzaz Ahsan, learned counsel for Mohtrama Benazir Bhutto, the petitioner in C.P. 59 of 1996 argued that the power to dissolve the National Assembly available under Article 58(2)(b) can only be exercised when the machinery of the Government has completely broken down, its authority eroded and there is breakdown of the Constitutional machinery resulting in a state of deadlock and stalemate. According to the learned counsel, the provision in question was designed to be invoked and exercised in a situation of grave national crisis leading to the total breakdown of Constitutional machinery like the one which arose in the aftermath of the general elections held in March, 1977 and ultimately culminated in the imposition of Martial Law. That situation, it -was submitted, has been highlighted in Begum Nusrat Bhutto’s case (PLD 1977 SC 657) at pages 701-703 as follows:-

(1)  That from the evening of 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 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 deadlock 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 and educational activities in the country stood seriously disrupted, with 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.s 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’s 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. It is again a fact that even this declaration did not 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 crises in the country leading to a breakdown 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.

Learned counsel also referred to pages 727 and 728 of the report where it was observed: “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 Government of Mr. Bhutto.

There was complete breakdown 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 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.

Precise argument of the learned counsel was that it was to meet a situation of the kind that had arisen in 1977 that clause 2(b) was added to Article 58 empowering the President to dissolve the 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 and it was in that context that this provision was interpreted in the case of Haji Saifullah Khan to mean that an order of dissolution by the President can be passed 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 was also pointed out by Mr. Aitzaz Ahsan that when determining the scope and the meaning of Article 58(2)(b) and the extent of the power conferred on the President thereunder, this Court had referred to the debate held in the National Assembly and the speeches made by the then Prime Minister and the Law Minister before the Constitution (Eighth Amendment) Bill was passed and Article 58(2)(b) in its present form was adopted. The Law Minister, in his speech (reproduced in para. 6 ante) explaining the purpose and object of the amended provision of Article 58(2)(b) pointedly referred to the conditions prevailing in the year 1977 and stated “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.

Argument of the learned counsel for the petitioner, of course, was that there was no breakdown of the machinery of the petitioner’s Government or of the Constitutional machinery nor was there any deadlock or stalemate in the functioning of the Government. Petitioner as the leader of the House (National Assembly) enjoyed the confidence of the majority of the M.N.As. All the Constitutional Authorities were functioning normally and in accordance with the provisions of the Constitution and even if there was any violation of some of the Constitutional provisions (in the perception of the President) but not rendering the functioning of the Federal Government impossible, that would not justify the drastic action of dissolving the National Assembly.

12. Mr. Khalid Anwar, learned counsel for the respondents repudiating the argument of the petitioner that Article 58(2)(b) is attracted only when there is complete breakdown of the machinery of the Government or breakdown of Constitutional machinery resulting in a deadlock or a stalemate contended that the words ‘stalemate’ and ‘deadlock’ do not appear in sub-clause (b) of Article 58(2). These words only came up through judicial process/interpretation. Learned counsel submitted that Shafiur Rehman, J. who had used these words while interpreting Article 58(2)(b) in the case of Haji Saifullah Khan later clarified/modified his earlier view holding in the case of Ahmed Tariq Rahim (PLD 1992 SC 646) that the power under Article 58(2)(b) could be exercised even when the breakdown of Constitutional machinery was imminent. Learned counsel referred to the following observations of Shafiur Rahman, J. at pages 664-665 of the, Report:-

“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.”

Learned counsel also referred to the opinion separately recorded by Rustam S. Sidhwa, J. in the case of Ahmed Tariq Rahtm (supra) and pointed out that he (Sidhwa, J.) had observed therein that the test laid down in the case of Haji Muhammad Saifullah viz that unless it could be shown that the machinery of the Government had broken down completely, its authority eroded and the Government could nor ire carried on in accordance with the provisions of the Constitution, dissolution of the Assembly could not be ordered, was too strict and rigid as one does not have to wait till the whole machinery of the Government collapses or comes to a standstill or so serious a breakdown occurs which prevents the orderly functioning of the Government, before ordering a dissolution. It was submitted that Sidhwa, J. had also taken the view that the action under Article 58(2)(b) could be taken when the breakdown of the Constitutional machinery was imminent. Reliance was also placed by the learned counsel for the respondents on the observations made in case of Aftab Ahmed Khan Sherpao (PLD 1992 SC 723), in support of his contention that the dictum in Haji Saifullah’s case is not to be rigidly followed. It was pointed out that Ajmal Mian, J. had observed in case of Aftab Sherpao that the words “a situation has arisen in which the Government of the Province cannot be carried on in accordance with the provisions of the Constitution” were of wide import and would be attracted to a case where a Government in order to remain in power has to purchase the loyalties of the MPAs 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, as such a Government could not be said to be carried on in accordance with the provisions of the Constitution.

Precise contention of the learned counsel was that the view taken, by this Court in the case of Haji Muhammad Saifullah that an order of dissolution of the Assembly can be passed by the President only when the machinery of the Government is broken down completely and its authority eroded has been modified in the cases of Ahmed Tariq Rahim (PLD 1992 SC 646) and Aftab Ahmed Khan Sherpao (PLD 1992 SC 723) and consequently, the dissolution of the Assembly could legitimately be ordered by the President when in his opinion the breakdown of the Constitutional machinery was imminent. Learned counsel further contended that in the case of Muhammad Nawaz Sharif (PLD 1993 SC 473), the judgment in Ahmed Tariq Rahim’s case has been unanimously reiterated and upheld and the original theory propounded in the case of Haji Muhammad Saifullah rejected.

13. The scope of Article 58(2)(b) no doubt appears to have been somewhat expanded in the case of Ahmed Tariq Rahim (supra) so as to bring within the mischief of the said provision not only the actual but also imminent breakdown of the Constitutional machinery and it was also observed therein by Shaflur Rehman, J. (who wrote the leading judgment for the majority in the said case) that there may be occasion for the exercise of power under Article 58(2)(b) when there takes place extensive, continued and pervasive failure to observe not one but numerous provisions of the Constitution creating an impression that the’ country is governed not so much by the Constitution but by methods extra Constitutional. It may be of interest to note, however, that before expressing this view, Shafiur Rehman, J. had referred to section 45 of Government of India Act, 1935 which also contained the expression ‘ a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of this Act’ and noted that this provision. was commented upon by the authors of “the Constitutional Law of India & England” (J.N. Varma and M.M. Gharekhan) as hereunder:-

“Breakdown of the Constitution:

569. When this Act was on the anvil, Parliament expressed the opinion that the safe running of the Government of India must be sufficiently ensured. A situation might arise in which the working of the Constitution as laid down by the Act was either impracticable or impossible. It is with a view to meet such a situation that section 45 has been enacted. The wording of this provision, it must be remarked, is both unique and unusual. There is no precedent for it either in England or the Federal Dominions or the United States of America; and the use of the term ‘Constitutional machinery’ is altogether novel to Constitutional Law. “

Shafiur Rahman, J. had also referred to the following remarks in Seervai-Basu’s Commentary on the Constitution of India, Sixth Edition, Volume ‘O’ at page 17 with regard to the scope and meaning of the. aforenoted expression in section 45:-

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“See also the earlier Report of the Simon Commission, Vol.II (para.65), where the two expressions ‘breakdown of the Constitutional system’ and ‘the Government of a Province cannot be carried out in accordance with the provisions of the Statute’ were used as referring to the same situation, and as instances of such situation were mentioned - ‘complete inability to form or maintain