IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

Present

Mr. Justice Iftikhar Muhammad Chaudhry, CJ.
Mr. Justice Javed Iqbal
Mr. Justice Sardar Muhammad Raza Khan
Mr. Justice Khalil-ur-Rehman Ramday
Mr. Justice Mian Shakirullah Jan
Mr. Justice Tassaduq Hussain Jillani
Mr. Justice Nasir-ul-Mulk
Mr. Justice Raja Fayyaz Ahmed
Mr. Justice Ch. Ijaz Ahmed
Mr. Justice Muhammad Sair Ali
Mr. Justice Mahmood Akhtar Shahid Siddiqui
Mr. Justice Jawwad S. Khawaja
Mr. Justice Anwar Zaheer Jamali
Mr. Justice Khilji Arif Hussain
Mr. Justice Rahmat Hussain Jafferi
Mr. Justice Tariq Parvez
Mr. Justice Ghulam Rabbani

CONSTITUTION PETITION NOS. 76 TO 80 OF 2007 & 59/2009,

AND

CIVIL APPEAL NO. 1094 OF 2009
(On appeal from the order dated 15.1.2009 passed by High Court of Sindh at Karachi in Const.P.No.355 of 2008)

AND

HRC NOS.14328-P TO 14331-P & 15082-P OF 2009

Dr. Mobashir Hassan	(Const.P.76/07)
Roedad Khan	(Const. P.77/07)
Qazi Hussain Ahmad	(Const.P.78/07)
Muhammad Shahbaz Sharif	(Const.P.79/07)
Muhammad Tariq Asad	(Const.P.80/07)
Syed Feroz Shah Gillani	(Const.P.59/09)
Fazal Ahmad Jat	(C.A.1094/09)
Shaukat Ali	(H.R.C.14328-P/09)
Doraiz	(H.R.C.14329-P/09)
Zulqarnain Shahzad	(H.R.C.14330-P/09)
Abid Hussain	(H.R.C.14331-P/09)
Manzoor Ahmad	(H.R.C.15082-P/09)

… … … Petitioners.

Versus

Federation of Pakistan, etc. … … Respondents.

For the petitioners : Mr. Abdul Hafeez Pirzada, Sr. ASC.
Mr. Salman Akram Raja, ASC.
Mr. Ejaz Muhammad Khan, AOR.
Assisted by:
Abdul Mujeeb Pirzada, Sr.ASC
Mr. M.Afzal Siddiqui, ASC
Mian Gul Hassan Aurangzeb, ASC
Mr. Sikandar Bashir Mohmand, ASC
Barrister Feroze Jamal Shah, Adv.
Mr. Hameed Ahmeed, Adv.
Mr. Mustafa Aftab Sherpao, Adv.
Mr. Sameer Khosa, Adv.
Mr. Umar Akram Chaudhry, Adv.
Malik Ghulam Sabir, Adv.
(in Const. P. 76/2007)

Mr. Muhammad Ikram Ch. ASC.
Mr. G. N. Gohar, AOR.
(in Const. P. 77/2007)

Dr. Farooq Hassan, Sr.ASC
Mr. Hashmat Ali Habib, ASC
Ch. Muhammad Akram, AOR
(in Const.P.78/07)

Mr. Ashtar Ausaf Ali, ASC
(In Const.P.79/07)

Mr. Tariq Asad, ASC (in person)
(In Const.P.80/07)

Mr. A.K. Dogar, Sr. ASC
(In Const.P.59/09)

Mr. Shahid Orakzai (in person)
(In CMA 4842/09)

Raja Muhammad Ibrahim Satti, Sr. ASC
(in CA.1094/2009)

NEMO (in HR.Cases)

For the Respondents:

For M/o Law : Mr. Kamal Azfar, Sr. ASC.
assisted by
Mr. K.K. Agha, ASC.
Raja Abdul Ghafoor, AOR.
(in Const.P.76-77/07)

		Raja Abdul Ghafoor, AOR. (in Const.P.78-80/07 & 59/09)
For the NAB	:	Dr. Danishwar Malik, PG. Mr. Abdul Baseer Qureshi, Addl: PG Dr. Asghar Rana, ADPG, Ch. Akhtar Ali, AOR. Mr. Naveed Ahsan, Chairman NAB
On Court Notice	:	Mr. Shah Khawar, Acting Attorney General for Pakistan. Assisted by: Agha Tariq Mehmood Khan, DAG. Mr. Dil Muhammad Alizai, DAG. Raja Aleem Abbassi, DAG.
For Govt. of Balochistan	:	Dr. Salahuddin Mengal, AG.
For Govt. of NWFP.	:	Mr. Zia-ur-Rehman, A.G. Mr. Zahid Yousaf, Addl. A.G. Mr. Naveed Akhtar, A.A.G.
For Govt. of the Punjab	:	Mr. M. Hanif Khattana, Addl: AG. Ch. Khadim Hussain Qaiser, Addl: AG.
For Govt. of Sindh	:	Mr. Yousaf Leghari, AG.
On Court's Call:	:	Malik Muhammad Qayyum, Sr. ASC Former Attorney General for Pakistan
		Mr. Justice (R) M. Riaz Kiani Secretary Law & Justice. Dr. Riaz Mehmood, Sr. Joint Secretary. Syed Nasir Ali Shah, Solicitor General.
		Mr. M. Salman Faruqui, Secretary General to the President.
Amicus Curiae	:	Mian Allah Nawaz, Sr. ASC. Mr. Shaiq Usmani Sr. ASC. Mr. M. Sardar Khan, Sr. ASC. Assisted By Mr. Idrees Ashraf, Adv.

Dates of hearing : 07th -10th & 14th - 16th December, 2009.

JUDGMENT

IFTIKHAR MUHAMMAD CHAUDHRY, CJ. – Constitution Petition Nos. 76 to 80 of 2007 and 59 of 2009 have been filed, challenging the constitutionality of the National Reconciliation Ordinance, 2007 [hereinafter referred to as "the NRO, 2007"], whereas Civil Appeal No. 1094 of 2009 (by leave of the Court), has been filed against the order dated 15th January 2009, passed by High Court of Sindh in Constitution Petition No. 355 of 2008, whereby the benefit of the NRO, 2007 has been declined to the appellant. Similarly, in Human Right cases, the applicants have prayed that the benefit of the NRO, 2007 may also be extended to them.

2. Brief facts, leading to filing of the listed petitions are that on 5th October 2007, the President of Pakistan [hereinafter referred to as "President"], while exercising his power under Article 89 of the Constitution of the Islamic Republic of Pakistan, 1973 [herein after referred to as "the Constitution"], promulgated the NRO, 2007 vide Ordinance No.LX of 2007.

3. The above Ordinance came under challenge, immediately after its promulgation, before this Court, by

invoking jurisdiction under Article 184(3) of the Constitution, in the listed Constitution Petitions, when, on 12th October 2007, after hearing the learned counsel for the petitioners at a considerable length and examining the case law, the Court passed an order, which is reproduced hereinbelow:-

> "These petitions have been filed under Article 184(3) of the Constitution of Islamic Republic of Pakistan, 1973 [herein after referred to as "the Constitution"] challenging the National Reconciliation Ordinance, 2007 (No. LX of 2007) [herein after referred to as "the impugned Ordinance"].
>
> 2. Mr. Salman Akram Raja, learned counsel appearing on behalf of petitioner in Constitution Petition No. 76 of 2007 argued that:-
>
> **a)** Section 7 of the impugned Ordinance being self-executory in nature amounts to legislative judgment, which is impermissible intrusion into the exercise of judicial powers of the State and thus falls foul of Article 175 of the Constitution which envisages separation and independence of the judiciary from other organs of the State.
>
> **b)** Legislative judgment cannot be enacted by the Parliament. [**Smt. Indira Nehru Gandhi v. Raj Narain** (AIR 1975 SC 2299)].
>
> **c)** By promulgating Section 7 of the impugned Ordinance, Article 63(1)(h) and 63(1)(l) of the Constitution have been made ineffective, as regards chosen category of people, therefore, it is *ultra vires* the Constitution as it amounts to defeat the constitutional mandates.
>
> **d)** Impugned Ordinance exhorts about or indemnifies a particular class of people i.e. public office holders from proceedings, actions and orders passed by the competent authorities, whereas no such powers are available to the Parliament or, for that

matter, to the President of Pakistan under Federal or Concurrent Legislative List. Further; the President is empowered only to pardon an accused person, under Article 45 of the Constitution, after passing of sentence by a Court of law, whereas by means of impugned Ordinance, the President has been empowered to indemnify or pardon an accused, against whom proceedings are pending before Investigating Agency or a Court of law or in appeal by giving a blanket cover.

e) The impugned Ordinance violates the provisions of Article 25 of the Constitution because it is not based on intelligible differentia, relatable to lawful objects, therefore, deserves to be struck down.

f) The impugned Ordinance is against the public policy because it also provides protection against future action in terms of its Section 7 and it had also rendered Articles 62 and 63 of the Constitution ineffective.

g) Sub-sections (2) and (3) of Section 494 of Cr.P.C. added by means of impugned Ordinance are contrary to provisions of Sub-section (1) of Section 494 of Cr.P.C. where it has been provided that cases can only be withdrawn with the consent of the Court, whereas, in newly added Sub-Sections, powers of the "**Court**" have been conferred upon the Review Boards of the Executive Bodies, therefore, these Sub-sections are also contrary to Article 175 of the Constitution.

and

No criteria has been laid down as to why the cases falling between the 1st day of January 1986 to 12th day of October 1999 have been covered under these provisions, inasmuch as definition of political victimization has not been provided in these Sub-sections, as a result whereof it has been left at the subjective consideration of Review Board/ Executive Bodies to determine the same. Thus such provisions cannot exist in any manner.

h) The impugned Ordinance has been promulgated in colorable exercise of Legislative powers and its various provisions have created discrimination among ordinary and classified accused, therefore, all these provisions tantamount to malice in law.

i) The provisions of impugned Ordinance are so overbroad that these have provided blanket cover to all the holders of public offices, including chosen representatives and ordinary employees, therefore, the object of national reconciliation cannot be achieved by allowing it to exist.

j) The provisions of Sections 4 and 5 of the impugned Ordinance are highly discriminatory in nature, therefore, are liable to be struck down.

k) Section 6 of the impugned Ordinance is contrary to the basic principles relating to annulment of judgments, even if passed in absentia, in accordance with existing law, according to which unless the basis for the judgment, in favour of a party, is not removed, it could not affect the rights of the parties, in whose favour the same was passed but when the Legislature promulgated the impugned Ordinance, in order to remove the basis on which the judgment was founded, such judgment shall have no bearing on the cases. [**Facto Belarus Tractor Ltd. v. Government of Pakistan** (PLD 2005 SC 605)]. Hence, provisions of the impugned Ordinance as a whole are against the concept of equality of Islamic Injunction, provided under Article 2A of the Constitution, therefore, on this score as well, deserves to be struck down being *ultra vires* the Constitution.

3. Mr. Muhammad Ikram Chaudhry, learned Sr. ASC for petitioner in Constitution Petition No. 77 of 2007, while adopting the above arguments, added that :-

i) The impugned Ordinance is purpose specific and period specific, therefore, violates Article 25 of the Constitution.

4. Dr. Farooq Hassan, Sr. ASC appearing in Constitution Petition No. 78 of 2007 on behalf of petitioner, while adopting the arguments raised by Mr. Salman Akram Raja, ASC contended that:-

i) The impugned Ordinance is contradictory to and violative of the United Nation's Convention Against Corruption, enacted in 2005 and ratified by Pakistan on 31st of August 2007.

ii) Under the Constitution, no indemnity or amnesty can at all be given to any one, except granting pardon in terms of Article 45 of the Constitution.

iii) Sections 2, 4, 5 and 6 of the impugned Ordinance are violative of the doctrine of trichotomy of powers.

iv) The impugned Ordinance has in fact changed the basic structure of the Constitution.

v) The impugned Ordinance has also violated the principles of political justice and fundamental rights because it allows plundering of national wealth and to get away with it. More so, it tried to condone dishonesty of magnitude which is unconscientious and shocking to the conscience of mankind.

5. Mr. M.A. Zaidi, AOR appeared on behalf of Mr. Muhammad Akram Sheikh, Sr. ASC in Constitution Petition No.79 of 2007 and adopted the above arguments of the learned counsel for the petitioners.

6. Mr. Tariq Asad, ASC appearing in Constitution Petition No. 80 of 2007 also adopted the above arguments, while adding that:-

a) The impugned Ordinance has been promulgated on the basis of personal satisfaction of the President of Pakistan but for extraneous reasons and to provide

> indemnity/immunity to the public office holders, therefore, is liable to be struck down.

7. Learned counsel appearing in Constitution Petition Nos. 76, 77 and 78 of 2007 prayed for suspension of operation of Sections 6 and 7 of the impugned Ordinance as according to their apprehension, both these Sections contain self-executory powers, therefore, if allowed to continue, the very object of filing of petitions will be frustrated because of extension of benefit to a public office holder, who intends to derive benefit out of the same.

8. It has been pointed out to them that ordinarily the provisions of a law cannot be suspended because this Court can only suspend a particular order, judgment or action, etc. However, we are inclined to observe in unambiguous terms that any benefit drawn or intended to be drawn by any of the public office holder shall be subject to the decision of the listed petitions and the beneficiary would not be entitled to claim any protection of the concluded action under Sections 6 and 7 of the impugned Ordinance, under any principle of law, if this Court conclude that the impugned Ordinance and particularly its these provisions are *ultra vires* the Constitution.

9. Issue notices to the respondents as well as to Attorney General for Pakistan as required in terms of Order XXVIIA CPC and Order XXIX Rule 1 of the Supreme Court Rules, 1980. As important questions of public/national interest have been raised in these petitions, therefore, a request be sent to Mian Allah Nawaz, ASC (former Chief Justice of Lahore High Court), Mr. Shaiq Usmani (former Judge of Sindh High Court) and Mr. M. Sardar Khan, former Attorney General for Pakistan, to appear and assist the Court as amicus curiae.

> Let these petitions be set for hearing for a date after three weeks."

4. Here it comes the episode of 3rd November 2007, when General Pervez Musharraf, the then President and also the Chief of Army Staff, proclaimed emergency in the country by means of Proclamation of Emergency Order, 2007 and apart from issuing Provisional Constitution Order, 2007, also issued Oath of Office (Judges) Order, 2007 and under the garb of these unconstitutional instruments, the Judges of Supreme Court, including Chief Justice of Pakistan, were restrained to perform their constitutional functions and many of them were put under house arrest, whereas, Abdul Hameed Dogar (the then Judge of this Court) took the oath of the office of Chief Justice of Pakistan along with four other Judges, out of eighteen Judges of this Court, on the same day i.e. 3rd November 2007.

5. It is pertinent to note that by means of Article 5 (1) of the Provisional Constitution Order, 2007 dated 3rd November 2007 and then under Article 270AAA of the Constitution, inserted through the Constitution (Amendment) Order, 2007, all the laws including the Ordinances, issued by the then President, which were in force at the time of revocation of the proclamation of

emergency, were provided permanency, as a result whereof the NRO, 2007 was also declared to be a permanent law.

6. On 6th February 2008, instant petitions were fixed before a Bench, comprising unconstitutional Chief Justice and four other Judges, when, on the request of the counsel, the same were adjourned for a date in office during last week of February 2008. Again, these matters were taken up on 27th February 2008 by the same Bench, when Dr. Mubashir Hassan (petitioner in Const. P.76/2007) requested for adjournment of the case on the ground that his counsel Mr. Abdul Hafeez Pirzada, Sr. ASC is undergoing medical treatment abroad. However, the Court, while dismissing Constitution Petition Nos.78, 79 & 80/2007 for want of prosecution, adjourned the Constitution Petition Nos. 76 & 77/2007, to a date in office, due to indisposition of the learned counsel but without providing opportunity of hearing to the counsel for the petitioners and without issuing notices to amicus curiae, proceeded to modify order dated 12th October 2007, to the following effect:-

> "The petitioners seek adjournment of these cases as their learned counsel (Mr. Abdul Hafeez Pirzada, Sr. ASC) is undergoing medical treatment abroad.
>
> 2. On the other hand, Malik Muhammad Qayyum, learned Attorney General for Pakistan has opposed the adjournment. He has further pointed out

that in view of the provisions of Article 270-AAA of the Constitution of Islamic Republic of Pakistan, 1973 and the detailed judgment passed by this Court in the case of Tikka Iqbal Muhammad Khan vs. General Pervez Musharraf (Constitution Petition No. 87 of 2007), the National Reconciliation Ordinance (No.LX of 2007), herein after referred to as 'the Ordinance', would continue in force.

3. These Constitution Petitions are adjourned to a date in office due to indisposition of the learned counsel for the petitioners. Meanwhile, in view of the rule laid down in the case of Federation of Pakistan vs. Aitzaz Ahsan (PLD 1989 SC 61), the observations made by this Court in Para 8 of the order dated 12.10.2007 in Constitution Petition Nos.76-80 of 2007 to the effect that *"however, we are inclined to observe in unambiguous terms that any benefit drawn or intended to be drawn by any of the public office holder shall be subject to the decision of the listed petitions and the beneficiary would not be entitled to claim any protection of the concluded action under Sections 6 and 7 of the impugned Ordinance, under any principle of law, if this Court conclude that the impugned Ordinance and particularly its these provisions are ultra vires the Constitution"* are deleted. Resultantly, the Ordinance shall hold the field and shall have its normal operation. The Courts and authorities concerned shall proceed further expeditiously in the light of the provisions of the Ordinance without being influenced by the pendency of these petitions."

7. It is to be noted that this Court vide judgment dated 31st July 2009, in the case of **<u>Sindh High Court Bar</u>**

Association v. Federation of Pakistan (PLD 2009 SC 879), declared the Proclamation of Emergency, 2007, Provisional Constitutional Order, 2007, Oath of Office (Judges) Order, 2007, Provisional Constitution (Amendment) Order, 2007 and the Constitution (Amendment) Order, 2007, to be unconstitutional, illegal and void *ab initio*. Consequently all the Ordinances (including the NRO, 2007) were shorn of the permanency, which was provided under Article 270AAA of the Constitution, as validated in **Tikka Iqbal Muhammad Khan v. General Pervez Musharraf** (PLD 2008 SC 178). But the Court, while adhering to the doctrine of constitutional trichotomy, referred the NRO, 2007 along with other Ordinances, to the Parliament for consideration to make them Act of the Parliament, or the Provincial Assemblies, as the case may be, with retrospective effect. The relevant paras from the said judgment are reproduced hereinbelow for ready reference:-

> "186. Proclamation of Emergency and PCO No. 1 of 2007 having been declared unconstitutional and *void ab initio* and the validity purportedly conferred on all such Ordinances by means of Article 270AAA and by the judgment in *Tikka Iqbal Muhammad Khan's case* also having been shorn, such Ordinances would cease to be permanent laws with the result that the life of such Ordinances would be limited to the period specified in Articles 89 and 128 of the

Constitution, viz., four months and three months respectively from the date of their promulgation. Under Article 89 of the Constitution, an Ordinance issued by the President, if not so laid before the National Assembly, or both Houses of Parliament, stands repealed on expiration of four months from its promulgation. Similarly, under Article 128 of the Constitution, an Ordinance issued by the Governor, if not so laid before the concerned Provincial Assembly, stands repealed on expiration of three months from its promulgation.

187. It may be noted that such Ordinances were continued in force throughout under a wrong notion that they had become permanent laws. Thus, the fact remains that on the touchstone of the provisions of Articles 89 and 128 read with Article 264 of the Constitution and section 6 of the General Clauses Act, 1897, only such rights, privileges, obligations, or liabilities would lawfully be protected as were acquired, accrued or incurred under the said Ordinances during the period of four months or three months, as the case may be, from their promulgation, whether before or after 3rd November, 2007, and not thereafter, until such Ordinances were enacted as Acts by the Parliament or the concerned Provincial Assembly with retrospective effect.

188. In the light of the above, the question of validation of such Ordinances would be required to be decided by the Parliament or the concerned Provincial Assemblies. **However, the period of four months and three months mentioned respectively in Articles 89 and 128 of the Constitution would be deemed to commence from the date of short order**

> **passed in this case on 31st July, 2009 and steps may be taken to lay such Ordinances before the Parliament or the respective Provincial Assemblies in accordance with law during the aforesaid periods. This extension of time has been allowed in order to acknowledge the doctrine of trichotomy of powers as enshrined in the Constitution, to preserve continuity, to prevent disorder, to protect private rights, to strengthen the democratic institutions and to enable them to perform their constitutional functions, which they were unconstitutionally and illegally denied under PCO No. 1 of 2007.** Needless to say that any validation whether with retrospective effect or otherwise, shall always be subject to judicial review on the well recognized principles of *ultra vires,* non-conformity with the Constitution or violation of the Fundamental Rights, or on any other available ground." **(emphasis provided)**.

8. It seems that the NRO, 2007 was laid before the National Assembly from where it travelled to the Standing Committee of the National Assembly on Law & Justice, where the matter was taken up in its meetings held on 29th & 30th October 2009, and subsequently, it was again brought on the floor of the National Assembly from where it was withdrawn as is evident from the documents placed on record. Details in this behalf, if needed, shall be considered subsequently.

9. These petitions remained pending in the office. In the meantime, another petition being, Civil Petition No.142-K of 2009 (now Civil Appeal No.1094/2009), was filed by one Fazal Ahmed Jat, praying therein that the benefit of the NRO, 2007 extended to the other accused of or convicted under the National Accountability Ordinance, 1999 [herein after referred to as "the NAO, 1999"] be also extended to him. The Constitution Petition Nos. 78, 79 & 80 of 2007, on the request of petitioner and with the consent of learned Acting Attorney General for Pakistan were restored on 7th, 14th & 8th October 2009, respectively. Meanwhile, Constitution Petition No. 59 of 2009 was also filed, challenging the vires of the NRO, 2007. Human Right Case Nos.14328-P to 14331-P & 15082-P of 2009 filed by several convicts, claiming the benefit of the NRO, 2007 were also clubbed with the other petitions on the subject.

10. In all the Constitution Petitions, almost same prayers have been made, however, for reference, prayer clause from one of the petitions i.e. Constitution Petition No.78 of 2007, filed by Qazi Hussain Ahmed, Amir Jamat-e-Islami, is reproduced hereinbelow for convenience:-

> "The Ordinance entitled 'National Reconciliation Ordinance, 2007' be declared as being utterly unconstitutional and violate both the Constitution,

law of the land, and International Treaties & the UN Law.

It is further prayed that it be declared that the said Ordinance enacted on 5th October is contrary to Law and the Constitution as being *mala fide*, *ultra vires* and *corum non judice* and of no consequential effect *ab initio.*

Any identical relief *pendente lite* due to the petitioner *ex debito justitae* be graciously granted."

11. In response to notices of hearing, no defence was put up on behalf of the Federation of Pakistan and others, including all the Federating Units as well as the National Accountability Bureau [herein after referred to as 'the NAB']. On 7th December, 2009, learned Acting Attorney General for Pakistan, however, placed on record a written statement before the Court, wherein significantly, in unambiguous terms, it was mentioned that *"the Federation of Pakistan reiterates as repeatedly stated by the Prime Minister of Pakistan Syed Yousaf Raza Gillani that Seventeenth Amendment is not valid, as much as it violates the basic features of the Constitution. Therefore, as Parliamentary Committee of both the Houses is in the process of preparing its recommendations"*. As far as the remaining clauses relating to supremacy of the Constitution and non-defending of the NRO, 2007 are concerned, same were incorporated therein as well. Accordingly, relevant

contents of the letter and the stand of the Federating Units and the NAB were reduced in writing, during the hearing, which is reproduced hereinbelow:-

> "Mr. Shah Khawar, Acting Attorney General for Pakistan, who is otherwise appearing in response to notice under Order XXVII-A CPC, has placed on record a written statement on behalf of Federation of Pakistan, relevant paras wherefrom, being No. 2&3, are reproduced hereinbelow:-
>
> > 2. *That the Federation believes in supremacy of the Constitution of 1973 and the Parliament.*
> > 3. *That the National Reconciliation Ordinance, 2007 was promulgated by the previous regime and I am under instruction not to defend it.*
>
> 2. Learned Advocates General of Sindh, NWFP & Balochistan, and Additional Advocate General Punjab, when enquired about their reaction in respect of statement, so filed by the Acting Attorney General for Pakistan, stated that they agree with the stance taken by the Federation of Pakistan. Learned Additional Prosecutor General NAB also adopted the above stance of the Federation of Pakistan."

12. During the course of hearing, Federation of Pakistan has submitted Civil Misc. Application Nos. 4875 & 4898 of 2009, of identical nature, wherein attention of the Court was drawn towards its earlier judgment passed in **Sindh High Court Bar Association's case** (PLD 2009 SC 879) and at pages 11 & 12 of the said applications, apprehension

of destabilization of the system was expressed in the following terms:-

> "If however, this Hon'ble Court wishes to rule upon wider issues other than those raised in the petition and prayer the Federation requests that fresh petitions be filed precisely stipulating these issues whereupon the Federation will seek instructions on such new petition.
>
> Pak Today is poised at the cross roads. One road leads to truly federal democratic welfare state with the balance of power between an Independent judiciary, a duly elected Govt. representing the will of the people a determined executive which is fighting the war against terrorism and poverty. The second road leads to destabilization of the rule of law. The people of Pakistan await your verdict."

As in above statement apprehension of destabilization of the system has been expressed, therefore, Mr. Kamal Azfar, learned Sr. ASC, who had filed the Applications, referred to hereinabove, was called upon to submit an affidavit, clarifying the stand taken by him. Surprisingly, he, verbally, contended that "apprehension of destabilization of the democratic system is from GHQ and CIA". The words so uttered by him are as follows:-

> "There are extra constitutional forces in Pakistan and outside Pakistan which are trying to destabilize this country. I say more openly, the dangers to Pakistan come from the CIA & GHQ."

The above statement on behalf of Federation was prominently noted by the leading newspapers. On the same day, learned Acting Attorney General once again made a categorical statement of accepting the decision, whatsoever, will be recorded by this Court. His such statement has also been recorded vide order dated 15th December, 2009, which is reproduced hereinbelow for convenience:-

> "Learned Attorney General for Pakistan has concluded his submissions, while reiterating his stand, taken on the first day of hearing that the Federal Government is not defending the NRO. ……..."

On the next date of hearing, another written statement was filed by Mr. Kamal Azfar, learned Sr. ASC, which reads as follows:-

"**STATEMENT**

In Compliance of the orders of the Hon'ble Supreme Court of Pakistan to appraise the Hon'ble Court as to how the Federation would interpret the wording "the second road leads to the destabilization of the rule of law", it is submitted as follows:-

(1) There is no mention of the wording 'threat to democracy' in the Statement.

(2) The Federation supports the Prosecution, in accordance with law, of persons alleged to have done wrong doing. The Federation does not oppose the Petitions seeking a declaration that the National Reconciliation Ordinance 2007 (NRO) is illegal and unconstitutional.

(3) With regard to the "wider issues" mentioned in paragraph No.9 these refer to those matters which were raised by the Petitioner's counsel during oral arguments and which find no mention whatsoever in the Petitions. For example, submissions made in respect of Articles 89 (in particular the alleged concept of "implied Resolution") and A.264 on the effect of Repeal.

(4) The Federation's view is that those who have benefited under the NRO should be proceeded against under the appropriate laws before the courts having the competent jurisdiction. As factual matters need to be determined by the Trial Courts.

(5) So far as my comments made yesterday before this Hon'ble Court concerning the threat from GHQ, the CIA and the contents of paragraph 9 of the CMA are concerned these were my personal views and were not made on the instructions of the Federation of Pakistan. As such I withdraw the same, which should not be considered by this Hon'ble Court in any manner whatsoever and the same should be deleted and expunged from the record.

(6) It is emphasized that the Federation of Pakistan holds this Hon'ble Court in the highest esteem and has the greatest respect for the same."

The above statement, filed on behalf of Federation of Pakistan, has disclosed the intention of Federation of Pakistan, particularly to the effect that those who have acquired benefit under the NRO, 2007 should be proceeded against under the relevant laws, before the Courts of competent jurisdiction, as factually matters need to be determined by the Trial Court. Learned Acting Attorney General for Pakistan and learned counsel appearing for

Federation of Pakistan have reiterated this stand, time and again, during the course of hearing.

13. Mr. Salman Akram Raja, ASC for the petitioner in Constitution Petition No. 76 of 2007, submitted as under:-

a) 'Reconciliation' is not a new phenomenon, as the same has been adopted in various jurisdictions of the World, going back right from the Fatah-e- Makkah, when a general amnesty was announced by the Holy Prophet (PBUH) for the people of Makkah, till 1995 when the same was provided in South Africa through Promotion of National Unity and Reconciliation Act of 1995. Although, in the NRO, 2007 the word 'national reconciliation' has been borrowed from the history but it has nothing to do with it, in any sense.

b) Section 7 of the NRO, 2007 is patently discriminatory on the ground that it has created unreasonable classification between the 'holders of public office' and the general public and then further created classification amongst the 'holders of public office' on the basis of time period, therefore, being promulgated in colourable exercise of legislative power, it is tantamount to malice in law.

c) The classifications made through the NRO, 2007 are overbroad as a wide array of

persons including politicians, bureaucrats, Army personnel and others have been included in it under the label of 'holders of public office'. It is inclusive on the basis of time specification, as it does not cover the cases/ proceedings initiated after 12th October 2007, as such, having irrational classification is liable to be struck down.

d) The NRO, 2007 provides indemnity and potential cover to a particular class of persons involved in criminal cases including the 'holders of public office' from the operation of law by withdrawing cases and termination of proceedings pending against them. This is tantamount to an affirmative action in favour of elite class.

e) Section 7 of the NRO, 2007 is self executory provision, which took effect on its own terms, with effect from 5th October 2007.

f) The NRO, 2007 although has lapsed on the expiry of its constitutional life but its effect is likely to remain intact, therefore, it has to be declared void *ab initio* and nullity in the eye of law.

g) The preamble of the NRO, 2007 is not in consonance with the text of the statute and do not reconcile with each other. [reliance placed on the cases of **Abdul Baqi v. Muhammad Akram** (PLD 2003 SC 163) and

Ghulam Mustafa Insari v. Govt. of the Punjab (2004 SCMR 1903)].

h) The NRO, 2007 is time specific as it has created further classification amongst its subject i.e. period commencing from 1st January 1986 to 12th October 1999, therefore, being not based on intelligible differentia relatable to lawful object, is violative of Article 25 of the Constitution and is liable to be struck down. [reliance placed on the case of **Govt. of Balochistan v. Azizullah Memon** (PLD 1993 SC 341)].

i) The provisions of Section 2 of the NRO, 2007 provides benefit to the persons involved in the cases of murder, rape, kidnapping for ransom and Hudood cases, therefore, it is *ultra vires* to Article 2A of the Constitution being violative of the Injunctions of Islam.

j) In view of Section 494 Cr.P.C., the permission to withdraw cases has to be given by the Court judiciously after due application of mind. By means of Section 2 of the NRO, 2007 sub-Sections (2) & (3) have been added in Section 494 Cr.P.C., whereby judicial powers of the Court have been vested in a Review Board (Executive body), which amounts to usurping such power of the Court, therefore, Section 2 of the NRO, 2007 is liable to be struck down

being violative of Article 175 of the Constitution, regarding separation of powers between Executive and Judiciary. [reliance placed on the cases of **Mehram Ali v. Federation of Pakistan** (PLD 1998 SC 1445), **Bihar v. Ram Naresh Pandey** (AIR 1957 SC 389), **Rahul Agarwal v. Rakesh Jain** {(2005) 2 SCC 377=AIR 2005 SC 910}, **Liyanage v. The Queen** {(1967) 1AC 259}, & **Brandy v. Human Rights Commission** (183 CLR 245)].

k) The NRO, 2007 is a special law, which cannot purport to amend the general law i.e. Cr.P.C., therefore, such attempt is not allowable. It is also against the principle that a temporary law cannot amend the permanent law, as the maximum life of an Ordinance is 120 days and no amendment can survive beyond that period and lapses with the lapse of temporary legislation. [reliance placed on the cases of **Government of Punjab v. Zia Ullah Khan** (1992 SCMR 602) & **Shabir Shah v. Shad Muhammad Khan** (PLD 1995 SC 66)].

l) Section 7 of the NRO, 2007 whereby the cases and proceedings pending against the 'holders of public office' have been declared to stand withdrawn and terminated, amounts to legislative judgment, as such it is violative of the principles of

independence of Judiciary and separation of powers as enshrined in Article 175 of the Constitution because it is impermissible intrusion in the domain of the judiciary. [reliance placed on the cases of **Govt. of Balochistan v. Azizullah Memon** (PLD 1993 SC 341) & **Smt. Indra Nehru Gandhi v. Raj Narain** (AIR 1975 SC 2299)].

m) Section 3 of the NRO, 2007 whereby the Representation of the People Act, 1976 has been amended, has no relevancy with the preamble of the NRO, 2007.

n) Sections 4 & 5 of the NRO, 2007 whereby the sitting members of the Parliament and Provincial Assemblies have been provided protection from arrest, without recommendations of Special Parliamentary Committee on Ethics, are no more in field, after expiry of the constitutional life of the NRO, 2007.

o) Section 6 of the NRO, 2007 whereby the orders or judgments passed by the Courts against an accused in absentia have been declared to be void *ab initio* and not to be acted upon, amounts to create a permanent hindrance in Article 63(1)(p) of the Constitution, as through the amendment in Section 31A of the NAO, 1999, certain persons, who were kept out of the

Parliament have been allowed to enter into the Parliament.

p) Section 7 of the NRO, 2007 also defeats the provision of Article 62(f) of the Constitution, as all the persons, against whom the cases or proceedings have been withdrawn or terminated would claim to be righteous and *Ameen*.

q) The provisions of the NRO, 2007 i.e. Sections 6 & 7, are contrary to the basic principle relating to annulment of judgments, because the proceedings, orders or judgments passed by the competent Court in accordance with the existing law in favour of a party, cannot be annulled through a legislative instrument unless the law, underlying the basis of such proceedings, orders and judgments, will be removed. [reliance placed on the case of **Fecto Belarus Tractor Ltd. v. Government of Pakistan** (PLD 2005 SC 605)].

r) The NRO, 2007 exhorts about or indemnifies a particular class of persons including the 'holders of public office', from proceedings, actions and orders passed by the competent authorities whereas neither the legislature nor the executive has power to grant pardon by promulgation of an instrument or an Act of amnesty, except the power of the President to grant such

> pardon to an accused person under Article 45 of the Constitution. Such indemnity or protection under the NRO, 2007 cannot be equated with the pardon.

He concluded his arguments while stating that the NRO, 2007 is bad in the eye of law whereby judicial functions have been vested in an executive body arbitrarily; it is, ex facie, might not be discriminatory but in fact it is discriminatory, promulgated in total violation of the constitutional provisions by the lawmaker, with *mala fide* intention. If it is allowed to remain on the statute book, it will be a permanent blot on conscience of nation.

14. Mr. Abdul Hafeez Pirzada, Sr. ASC also appeared on behalf of petitioner in Constitution Petition No. 76 of 2007 and submitted his formulations as under:-

a) The NRO, 2007 is, as a whole, void *ab initio*, non est and never took birth, therefore, nothing, which is the product of this Ordinance, or done in pursuance of this Ordinance or under it, ever came into existence or survived.

b) The NRO, 2007 is void because it is a fraud on the Constitution and transience well beyond the limited legislative power conferred by Article 89 of the Constitution

on the President, as the President cannot go beyond the limits circumscribed therein.

c) Word "reconciliation" has been defined in number of dictionaries but when the word 'national' is prefixed with it, its meaning becomes entirely different and it means "the reconciliation of the whole nation". The NRO, 2007 has no nexus with the 'national reconciliation' rather it has trampled over the fundamental rights of the entire nation of Pakistan. [referred to the concluding part of the **Preamble of the Constitution** to define the word 'national reconciliation'].

d) The NRO, 2007 is ex facie void for the reason that surprisingly its operation has been confined to a specific period commencing from 1st January 1986 to 12th October 1999.

e) The NRO, 2007 is void *ab initio* because it violates the dictum laid down by this Court in **Mahmood Khan Achakzai v. Federation of Pakistan** (PLD 1997 SC 426), improved upon in **Zafar Ali Shah v. General Pervez Musharraf** (PLD 2000 SC 869), wherein, after a great deal of efforts the Court virtually treated Article 4 of the Constitution as 'due process clause'.

f) The four salient features of the Constitution, identified in the judgments of this Court are; Parliamentary form of Government; Federating character of the State; Independence of Judiciary; and Fundamental Rights of the people along with Islamic provisions. Even the Parliament has no power to alter these salient features of the Constitution. The NRO, 2007 is clear invasion on the 3rd pillar of the State i.e. judiciary, without which the modern society cannot exist. [reliance placed on the case of **Zafar Ali Shah** (PLD 2000 SC 869)].

g) The NRO, 2007 is not only usurpation of judicial powers but also usurpation of constitutional powers of the Parliament.

h) The NRO, 2007 has directly violated and overridden the provisions of Articles 62 & 63 of the Constitution. It vitally affects the democratic rule in the country, by tampering and interfering with the qualifications and disqualifications of a candidate to be elected or chosen as a member of the Parliament and subsequent disqualification after having become the member of the Parliament.

AND

The Article 62 of the Constitution applies only at the time of filing of nomination

papers or contesting elections, however, Article 63 of the Constitution continues to be in force even after a candidate has been elected as a member of the Parliament and he can be removed by the writ of *quo warranto*, by the Speaker of the National Assembly through reference or by the Chief Election Commissioner. This Court in number of judgments has held that conviction awarded in absentia is void, but this view needs to be revisited on the touchstone of Article 63(1)(*p*) of the Constitution because how a person can become a member of the Parliament if he is an absconder.

i) Through the promulgation of the NRO, 2007, the conscience of the Constitution has been divorced. There are mixed constitutional and moral aspects and one cannot divorce the morality from the Constitution. [reliance placed on the cases of **R.S.Jhamandas v. Chief Land Commissioner** (PLD 1966 SC 229) and **Benazir Bhutto v. Federation of Pakistan** (PLD 1988 SC 416)].

j) Even a validly enacted Ordinance does not necessarily have to have the statutory life of 120 days because before the expiry of the same, the National Assembly can strike it down through a resolution. In the case of

NRO, 2007 the National Assembly has refused to own this law, even after expiry of its statutory life and this is tantamount to its rejection by the Parliament.

k) The Constitution envisages for trichotomy of powers between the executive, legislative and judicial organs of the State. The NRO, 2007 is a clear intrusion by the legislature into the sphere of the judiciary, as such liable to be struck down being violative of doctrine of trichotomy of powers.

l) The Judiciary is custodian of the Constitution and the fundamental rights. It is the superior observer of what is happening and to see that there is no transgression in the separation of power. It has its legal obligation, based upon the principle of checks and balances. That is why the Judiciary has not been made part of the State under Article 7 of the Constitution, which has to be read with Article 175 of the Constitution.

m) The preamble of the NRO, 2007 poses the official avowed reason to promulgate this Ordinance, which is not the real object behind its promulgation as it was a deal between two persons, for their personal objectives and even the persons representing the people of Pakistan at that time in the Parliament, were not made

aware of it. Therefore, it cannot be said a 'national reconciliation' as there is total variance between the opening statement and the contents of the Ordinance.

n) The Constitution does not make an Ordinance a permanent law unless it is made an Act of Parliament. Applying the principle enshrined in Section 6 of the General Clauses Act, 1897, there are two types of repeals; first one is 'deeming repeal' and the other is 'actual repeal' and this Court has to consider both of them accordingly. Therefore, in order to save an Ordinance, the law has to be enacted retroactively by the Parliament. But, this Court could not extend the life of the Ordinance beyond the constitutional life i.e. 120 days. More so, since the Article 270AAA of the Constitution has been declared null and void by means of judgment in **Sindh High Court Bar Association's case** (PLD 2009 SC 879), the NRO, 2007 has lost its permanency, provided by the said Article.

o) The Executive has to act intelligently and responsibly in classifying actions, which ought to be saved under temporary law, particularly when fundamental rights are involved. The NRO, 2007 is a **'bill of attainder'** against the people of Pakistan

which violates their fundamental rights enshrined in the Constitution and the spirit of Article 4 of the Constitution has been destroyed, which has been equated with the 'due process clause'. [reliance placed on the case of **Jamat-i-Islami Pakistan v. Federation of Pakistan** (PLD 2000 SC 111)].

Learned counsel concluded his arguments. However, when questioned about the consequences, in case the Court ultimately comes to the conclusion that the NRO, 2007 is void *ab initio* being *ultra vires* the Constitution, he replied that the consequence would be that the beneficiaries of the NRO, 2007 shall be relegated to the position as prevailing on 4th October 2007, prior to promulgation of the NRO, 2007.

15. Dr. Mubasher Hassan (petitioner in Constitution Petition No. 76/2007) appeared and stated with special permission of the Court that when the two organs of the State, as defined in Article 7 of the Constitution, become incapable of performing their duties entrusted to them under the Constitution, it is incumbent upon the third organ i.e. judiciary to come forward for rescue of the State.

16. Mr. Ikram Chaudhry, ASC for the petitioner in Constitution Petition No. 77 of 2007, appeared and argued that:-

a) The NRO, 2007 is person specific, purpose specific and period specific, therefore, it violates the provisions of Article 25 of the Constitution.

b) The Judiciary has been vested with important function of supervising the other organs of the State that is why Article 7 of the Constitution purposely excluded it from the definition of the State.

c) The primacy and supremacy of the Chapter of fundamental rights remain the salient feature of the Constitution and when laws are examined on the touchstone of various provisions of the Constitution, Article 8 comes into play which provides that any law inconsistent with or in derogation of fundamental rights is void.

d) The NRO, 2007 does not meet the criterion, laid down in Article 89 of the Constitution, particularly with regard to 'satisfaction' of the President, which should always be fair, just and never arbitrary, therefore, the NRO, 2007 having inherent mischief in it, as it conceives to protect the interest of a particular person, is a bad law.

e) Article 89 of the Constitution does not save the President from its intents and the purposes as in view of Article 5 of the Constitution he is bound to follow the law.

> Therefore, the promulgation of the NRO, 2007 is clear violation of Article 4 & 25 of the Constitution. [reliance placed on the case of **Jibendra Kishore, etc. v. Province of East Pakistan** (PLD 1957 SC 9)].

While concluding his arguments he referred to '**United Nations Convention Against Corruption**', **'Al-Farooq'** by Allama Shibli Noumani, **'Grammar of Politics'** by Harold J. Laski, **'Spirit of Liberty, Papers & Addresses of Learned Hand'** by Irving Dilliard, **'The Supreme Court, America's Judicial Heritage'** by Patricia C. Acheson. He lastly argued that if the Court comes to the conclusion that the impugned Ordinance is bad law, then the consequential relief would be the restoration of all the cases to their original stage.

17. Dr. Farooq Hassan, Sr. ASC appearing for the petitioner, in Constitution Petition No.78 of 2007, submitted his written formulations, while adding that:-

a) The NRO, 2007 is void being violative of the fundamental rights contained in Article 25, 9 and possibly Articles 14, 24, 2 & 2A of the Constitution.

b) The NRO, 2007 is the result of abuse of power, mala fides, and *corum-non-judice* as its objects are clearly outside the purview of

ordinary and normal law making authority of the President under Article 89 of the Constitution, as such it is void in entirety.

c) The NRO, 2007 amounts to subversion of the Constitution as it is the result of a deal between the dictator and next set of rulers. [referred to clippings of different newspapers].

d) The subject matter of the NRO, 2007 is not found in either of the Legislative lists provided in Fourth Schedule of the Constitution, as such it is *ultra vires* the Constitution.

e) Under the International Treaties i.e. **"United Nations Convention Against Corruption"**, to which the Pakistan is also a signatory, no law can be passed which provides protection to corruption and corrupt practices.

He concluded his arguments while saying that the property of the Government is the property of the people of Pakistan, which has been misappropriated by the persons to whom protection has been provided under the NRO, 2007 therefore, it is liable to be struck down.

18. Mr. Tariq Asad, ASC for the petitioners in Constitution Petition No. 80 of 2007 argued that Article 89 of the Constitution referred to 'satisfaction' of the President

which would be either 'subjective' or 'objective'. On the basis of material, available on record, there were no such circumstances to promulgate the NRO, 2007 therefore, the 'subjective' satisfaction of the President is missing, as such it becomes the 'objective' satisfaction, which is justiciable and subject to judicial review by the Court. [reliance placed on **State of Rajasthan v. Union of India** (AIR 1977 SC 1361), **A.K. Roy v. Union of India** (AIR 1982 SC 710) and also to definition of the words 'satisfaction' & 'subjective' from **Black's Law Dictionary**].

19. Raja Muhammad Ibrahim Satti, Sr. ASC, appearing for appellant in Civil Appeal No. 1094 of 2009, while defending the NRO, 2007 made his submissions as follows:-

a) It is nobody's case that the President has no power to promulgate the Ordinance under Article 89 of the Constitution or the said Article is redundant.

b) The NRO, 2007 was validly promulgated as the pre-conditions for promulgation of an Ordinance by the President, under Article 89 of the Constitution were fulfilled.

c) It is the duty of the Court to interpret the Constitution and to adjudge the validity of a law, whether proper assistance has been rendered or not. [reliance placed on

Federation of Pakistan v. M. Nawaz Khokhar (PLD 2000 SC 26) & **Ghulam Hassan v. Jamshaid Ali** (2001 SCMR 1001)].

d) During the statutory life of the NRO, 2007 both the Houses of the Parliament did not disapprove it through any resolution and allowed it to continue, therefore, if the Court ultimately comes to the conclusion that it was validly enacted and the benefits derived from its operation are allowed to continue, then the appellant shall also be entitled for the same benefit.

20. Mr. A.K. Dogar, learned Sr. ASC for the petitioner in Constitution Petition No. 59 of 2009, stated that his arguments are two fold i.e. on factual plane as well as on legal plane. On factual plane he argued that:-

The NRO, 2007 is a power sharing deal between the then President and the head of a political party. [reliance placed on the books i.e. '**Reconciliation, Islam, Democracy and the West'** by late Mohtarma Benazir Bhutto and **'the Way of the World'** by Ron Suskind].

On legal plane, he made the following submissions:-

a) The NRO, 2007 is the result of abuse of 'public office' for private gain.

AND

Because, corruption vitiates like fraud, which vitiates all transactions, therefore, the NRO, 2007 stands vitiated by the effect of abuse of public office for private gain.

AND

The NRO, 2007 is a document which is *non est*. It is like a still born which dies in mother's wombs. [reliance placed on **Zafar Ali Shah's case** (PLD 2000 SC 869) & **Black's law Dictionary** for the definition of 'corrupt'].

b) Though Article 89 of the Constitution empowers the President to promulgate an Ordinance but Article 48(1) of the Constitution provides that such power lies with the Prime Minister and his Cabinet, who have to advise the President, therefore, the President cannot in his individual capacity issue an Ordinance, or enter into some negotiations and then issue an Ordinance. [reliance placed on **Tirathmal v. The State** (PLD 1959 Karachi 594)].

c) The Ordinance making power, vested in the President, is a legacy of the British Rule, because in both kinds of democracies i.e. in the Parliamentary form of Government in UK and the Presidential form of Government in America, such power does not exit. This power is anti-democratic and only provided in the Constitutions of

Pakistan and India, who remained under the British rule for such a long period.

d) Gen. Pervez Musharraf was not constitutionally elected President, therefore, within the meaning of Article 89 of the Constitution, he had no such power to issue such Ordinance because he seized power by force and was self imposed President through Legal Framework Order, 2002 and 17th Amendment. [reliance placed on **Sindh High Court Bar Association's case** (PLD 2009 SC 879)].

e) By virtue of Article 264 of the Constitution, a law, which is repealed can give rise to rights and obligation but not a law which does not exist from its very inception (as per statement of learned Attorney General) and is still born, therefore, under the NRO, 2007 no rights exist.

f) This Court has no Ordinance issuing power, therefore, it could not give life to the NRO, 2007 which has lapsed on 5th February 2008 and this Court, could only extend its time under the law of necessity and not otherwise.

g) The circumstances mentioned in the preamble of the NRO, 2007 itself are of permanent nature and do not require any immediate, emergent and quick treatment.

h) A law cannot be amended through the Ordinance because it is violation of Articles 238 & 239 of the Constitution.

i) Withdrawal from prosecution, as provided in Section 2 of the NRO, 2007 without hearing the complainants in the cases of murder, rape, etc. is violation of the principles of natural justice as such no such amendment can stay. [reliance placed on **Zia Ullah Khan's case** (1992 SCMR 602)].

j) Section 4 of the NRO, 2007 by means of which immunity has been provided to sitting members of the Parliament from arrest, offends Articles 24 & 25 of the Constitution.

k) Helping the rich and powerful persons, who have misappropriated millions of rupees, as against the victims of exploitation, is violation of Article 3 of the Constitution.

l) With the advancement of civilizations, the moral and ethical codes have been converted into enforceable legal formulations. [reliance placed on **D.S. Nakara's case** {(1983) 1 SCC 305 = AIR 1983 SC 130} and **Sindh High Court Bar Association's case** (PLD 2009 SC 879)].

Learned counsel, while concluding his arguments stated that there are two enemies of mankind i.e. desire of wealth and

desire of power and time is witness to it. According to him the NRO, 2007 is destructive to the entire nation.

21. Mr. Shahid Orakzai, appearing in Civil Misc. Application No. 4842 of 2009 in Constitution Petition No. 76 of 2007, argued that:-

a) Any Ordinance promulgated by the President under Article 89 of the Constitution lapses on the day when the National Assembly is dissolved either by the President, Prime Minister or due to expiry of its constitutional term. [relied upon Article 76(3) of the Constitution].

b) While issuing an Ordinance by the President, the advice of the Prime Minister or Cabinet is necessary in view of Article 48 of the Constitution and in absence of such advice, it will be the act of an individual.

c) The word 'or' used in Article 70 (1) means that a bill can be placed before the Parliament, regarding only one subject, either from the Federal Legislative List or from the Concurrent Legislative List and not regarding subjects from both the lists. As the NRO, 2007 contains the subjects of both the Legislative lists, therefore, it is violative of Article 70 (1) of the Constitution.

d) Through the NRO, 2007 amendment has been made in the Cr.P.C. which has more application in the Provinces, as such the consent of Provincial Governments was necessary, while making such amendment. Therefore, the NRO, 2007 is violative of Article 142(c) of the Constitution.

e) The word 'any' used in Article 70 of the Constitution, means 'similar and more than one', therefore, the Ordinance cannot make laws relating to more than one subject at a time.

f) The word 'any' used in Article 184(3) of the Constitution refers to violation of one of the fundamental rights, therefore, the jurisdiction of this Court under the said provision would be attracted if only one fundamental right has been infringed and the same would not be available in a case which involved violation of more than one fundamental rights. Now this Court has to examine which one of the fundamental rights has been infringed by the NRO, 2007.

22. Mr. Ashtar Ausaf Ali, ASC appearing for petitioner in Constitution Petition No.79 of 2007 adopted the arguments rendered Mr. Abdul Hafeez Pirzada, Sr. ASC. However, he placed on record some material in support of his petition.

23. Mr. Shah Khawar, Acting Attorney General for Pakistan, reiterated the stance taken by the Federal Government in the written statement dated 7th December 2009, to the effect that the NRO, 2007 was promulgated by the previous regime and he is under instructions not to defend it. He further stated that whatever decision will come, it will be honoured by the Government. On Court's query about the consequences, if ultimately the NRO, 2007 is declared to be void *ab initio*, he replied that let allow these petitions and let the law take its own course.

24. Mr. Kamal Azfar, learned Sr. ASC appeared and reiterated the stand taken in the statement dated 15th December 2009, to the effect that the Federation does not oppose the petitions seeking a declaration that the NRO, 2007 is illegal and unconstitutional.

25. Learned Advocates Acting General of the Provinces adopted the arguments of the Attorney General for Pakistan. However, except Advocate General Sindh, all the other Advocates General filed statements, stating therein that neither any Review Board was constituted nor the benefit of the NRO, 2007 was extended to any under trial accused, except those who were accused under the NAO, 1999.

26. Mr. M. Sardar Khan, Sr. ASC appeared as *Amicus Curiae* argued as follows :-

a) The NRO, 2007 is not only inconsistent with fundamental rights enshrined in Article 25 of the Constitution but also is in conflict with other provisions of the Constitution such as Article 175. Therefore, it is not a valid law rather it is a bad law.

b) The NRO, 2007 is violative of Article 5 of the Constitution, which postulates that it is inviolable obligation of every citizen to obey the Constitution and the law.

c) Promulgation of the NRO, 2007 is intentional violation of Article 8(2) of the Constitution, which provides that the State shall not make any law which takes away or abridges the fundamental rights conferred by the Constitution, if it does so, then it shall be void.

d) The NRO, 2007 is violative of Article 2A of the Constitution which requires that the authority, which is conferred, is to be exercised in accordance with the Constitution and within the limits prescribed by the Almighty.

e) The provisions of the NRO, 2007 i.e. Sections 2, 3, 4, 6 & 7, are void and invalid for being against the Injunctions of Islam, violative of the mandate of Article 175 of

the Constitution, and repulsive to the provisions of Article 62 & 63 of the Constitution as it has given way to the ineligible persons to enter the Assemblies and to become public representatives.

f) The object of this law for all intents and purposes does not seem to be 'reconciliation' but to pave way and facilitate to those persons charged with corruption, plunders of national wealth and fraud, to come back, seize and occupy the echelons of power again. Its aim seems to legalize corruption and the crimes committed by those in power in the past.

g) Courts have been deprived by virtue of this law of their judicial functions by conferring powers on administrative bodies.

h) The NRO, 2007 is not only a discriminatory law but it has also been applied discriminately, therefore, liable to be struck down. [reliance placed on **Sabir Shah v. Shad Muhammad Khan** (PLD 1995 SC 66)].

j) Section 3 of the NRO, 2007 although is very innocent, but it has no nexus with the reconciliation. It is merely a cosmetic provision just to give colour of respectability to the NRO, 2007 and has no nexus with its preamble. [referred to

Section 40 of the Representation of the People Act, 1976.]

27. Mian Allah Nawaz, Sr. ASC also appeared as *Amicus Curiae*. He, after elaborating the philosophy of morality, theory of law, theory of kleptocracy and the philosophy of the Constitution, contended as follows:-

a) The NRO, 2007 is not a good law as it violates the intrinsic value of the law and intrinsic value of behaviors, therefore, liable to be struck down, otherwise it would create anarchy and greed in the society.

b) Any law which flagrantly violates the theory of basic instincts and promotes the theory of satanic instincts should be struck down, otherwise the society will be swamped by the satanic instincts.

c) The protection of the fundamental rights of the people is the soul of the Constitution. The NRO, 2007 is violative of the basic soul of the Constitution.

d) The NRO, 2007 is classical manifestation of theory of kleptocracy, as it has been promulgated for the benefit of two persons, one who wanted to remain in power and the other who wanted to come to power.

e) The NRO, 2007 is so bad and kleptocratic in nature that neither any provision of the

Constitution validates it nor any law gives conscious to it.

f) The actions taken and the benefits derived from the NRO, 2007 cannot be protected on the touchstone of Article 264 of the Constitution, as it is not applicable to the NRO, 2007 which is not just void but immoral. [reliance placed on **Ram Prasad v. Union of India** (AIR 1978 Raj. 131) and **Bachan Singh v. State of Punjab** (AIR 1982 SC 1325)].

While concluding his arguments he added that in case the NRO, 2007 is declared void *ab initio* then as a consequence whereof all the cases, which have been withdrawn under the NRO, 2007 will take rebirth.

28. Mr. Shaiq Usmani, Sr. ASC appeared as *Amicus Curiae* and made his submissions as follows:-

a) The NRO, 2007 cannot be justified on the ground that it was just an amnesty because even if it be considered so, it is not legitimate, as legitimate amnesty is one, which is accountable.

b) The NRO, 2007 is violative of Article 8 of the Constitution, therefore, liable to be struck down.

c) The NRO, 2007 being discriminatory, is violative of Article 25 of the Constitution,

therefore, is liable to be struck down. [reliance placed on the case of **I.A. Sherwani v. Government of Pakistan** (1991 SCMR 1041)].

d) The NRO, 2007 is void *ab initio* as it is violative of the salient features of the Constitution and the principle of trichotomy of powers.

e) The NRO, 2007 is violative of Article 89 of the Constitution.

He concluded his arguments while adding that the then Attorney General apparently had no authority to correspond with the foreign authorities for withdrawal of proceedings, as such if something contrary to law is done, the person, who has done so, is liable to be proceeded against.

29. Arguments addressed on behalf of the learned counsel appearing in support of petitions, inter alia, are that the NRO, 2007 be declared *ultra vires* the Constitution, void *ab initio* and *non-est*. During the course of arguments, they persuaded the Court to test the constitutionality of the NRO, 2007 in view of provisions of the Constitution

30. The learned Acting Attorney General for Pakistan, counsel for the Federation and the NAB as well as Advocates General of Punjab, Sindh, Balochistan & NWFP,

did not oppose the petitions and consistently reiterated the stand that they were not supporting the NRO, 2007.

31. It is a settled practice of the Courts that legal proceedings are not undertaken merely for academic purposes unless there are admitted or proven facts to resolve the controversy. As it has been pointed out hereinabove that till 12th October, 2007, when the petitions were filed, presumably, the benefit of the NRO, 2007 was not extended to any of the parties. Therefore, learned Prosecutor General, NAB and the Provincial Governments through their Advocates General were called upon to place on record accurate information of the accused persons, who had drawn benefit under Sections 2, 6 and 7 of the NRO, 2007. In response to Court's order, learned Advocate General Sindh placed on record the list of the persons, whose criminal cases falling under Sections 302, 307, 324, 365, 381, 381-A PPC, Section 16 of Offences of Zina (Enforcement of Hadood) Ordinance, 1979 and Section 14, 17(3) and 20 of Offences Against Property (Enforcement of Had) Ordinance, 1979, etc. were withdrawn. According to him more than 3000 criminal cases were withdrawn under Section 494 Cr.P.C. providing the benefit of Section 2 of the NRO, 2007 to approximately 8000 accused persons involved in above said heinous crimes. The statement of facts also showed the manner in which

these cases were withdrawn. Similarly, the NAB through its Prosecutor General and Additional Prosecutor General also placed on record the list of beneficiaries (accused), who derived benefit under Sections 6 and 7 of the NRO, 2007. As per the list, 248 persons were extended benefit of the NRO, 2007 and the cases or proceedings pending against them, within and outside the country, were withdrawn or terminated. The authenticity of such details furnished by the NAB was required to be verified from them but unfortunately accurate list or details of the cases registered within and outside the country under the NAO, 1999, despite repeated directions of the Court, were not furnished. However, the Chairman and others brought on record the material, on the basis of which, cases on the basis of requests for mutual assistance and civil party to proceedings on request of Federal Government were withdrawn on the request of the then Attorney General for Pakistan. It is pertinent to mention here that the material information regarding the fact that the Ministry of Law & Justice, on the request of one of the Advocates of a beneficiary, had not conceded for issuance of directions for withdrawal of such cases, was withheld by them. More so, the Secretary General and Military Secretary of the President as well as Secretary to President (public side) also appeared on Court's call and

when asked, placed on record their written statements, mentioning therein that no file, regarding permission to withdraw such cases and proceedings, was available in the office of the President.

32. It is to be observed that except in the Province of Sindh, in all other Provinces, no accused or convict has been extended the benefit of Section 2 of the NRO, 2007, therefore, learned Advocates General were quite comfortable in making statements in this regard. However, in the list furnished by the NAB, there were names of persons belonging to various Provinces, who had been extended the benefit of Sections 6 & 7 of the NRO, 2007.

33. Before dilating upon the respective arguments of the petitioners' counsel, we consider it appropriate to mention here that while hearing **Sindh High Court Bar Association's case** (PLD 2009 SC 879), which has been decided on 31st July, 2009, detailed reasons of which were released later, a fourteen member Bench of this Court, when confronted with the proposition i.e. 'whether the Court, itself, can give decision that as the permanency attached to temporary legislation i.e. an Ordinance, through unconstitutional provision of Article 270AAA of the Constitution, should examine itself or the matter should be left for the Parliament to examine them'; there was no

difficulty in declaring that Ordinance would stand repealed at the expiration of four months and three months, under Articles 89 and 128 of the Constitution, as the case may be. *Prima facie*, there was no justification for placing such legislations before the Parliament but on having taken into consideration the principle of trichotomy of powers, coupled with the fact that on the basis of *bona fide* apprehension, all the Ordinances, issued during the period, when the emergency was imposed in the country, commencing from 3rd November, 2007 up to 15th December, 2007, and all those temporary legislations, which were in force on 15th December 2007, were not placed before the Parliament, after attaining perpetuity through Article 270AAA of the Constitution, because such Ordinances had conferred rights and obligations upon the parties; therefore, it was considered appropriate to strengthen the Parliament, by sending these Ordinances for making them the Acts of the Parliament with retrospective effect, so the benefit derived by the masses, could also be protected. Relevant paras from the **Sindh High Court Bar Association's case** (PLD 2009 SC 879) have already been reproduced hereinabove. This is a fact that National Assembly, having 342 Members, who represent the nation, did not agree to make the NRO, 2007 as an Act of the Parliament, with retrospective effect, and ultimately it was

withdrawn from the Assembly vide letter dated 7th December, 2009. Contents of the said letter are reproduced hereinbelow for convenience:-

> "In continuation of this Secretariat's D.O. letter of even number, dated the 7th December, 2009 on the above subject, it is to state that report of the Standing Committee on National Reconciliation Ordinance, 2007 was finalized but before its approval by the Chairperson of the Committee, the Minister concerned had withdrawn the Bill under Rule 139 of the Rules of Procedure and Conduct of Business in the National Assembly, 2007 with the consent of the Honorable Speaker.
>
> 2. The minutes of the meeting of the Committee and draft report are submitted herewith."

We must mention here that this Court cherishes the democratic system and the will of the electorate. It also wants the Federation to remain strong and stable.

34. Admittedly, as it has been discussed hereinabove that, neither the Federation of Pakistan nor the Provincial Governments have defended the NRO, 2007 before this Court. It is also to be borne in mind that Constitution envisages the trichotomy of powers amongst three organs of the State, namely the legislature, executive and the judiciary. The legislature is assigned the task of law making, the executive to execute such law and the judiciary to interpret the laws. None of the organs of the State can encroach upon

the field of the others. [**State v. Ziaur Rahman** (PLD 1973 SC 49), **Federation of Pakistan v. Saeed Ahmad Khan** (PLD 1974 SC 151), **Government of Balochistan v. Azizullah Memon** (PLD 1993 SC 341), **Mahmood Khan Achakzai v. Federation of Pakistan** (PLD 1997 SC 426), **Liaquat Hussain v. Federation of Pakistan** (PLD 1999 SC 504), **Syed Zafar Ali Shah v. General Pervez Musharrf** (PLD 2000 SC 869), **Nazar Abbas Jaffri v. Secy: Government of the Punjab** (2006 SCMR 606), **Sindh High Court Bar Association's case** (PLD 2009 SC 879), **Smt. Indra Nehru Ghani v. Raj Narain** (AIR 1975 SC 2299) and **Minerva Mills Ltd. v. Union of India** (AIR 1980 SC 1789)].

35. Necessary inference can be drawn that the National Assembly and the Senate (the Parliament), which were required to approve or otherwise the NRO, 2007, and the same was sent along with other Ordinances to them, to make it an Act of the Parliament, with retrospective effect, did not consider it to be a valid temporary legislation, being an Ordinance promulgated under Article 89 of the Constitution on 5th October 2007.

36. Another factual aspect, relevant for disposal of these petitions and examination of the constitutionality of the NRO, 2007 pertains to the date of its promulgation i.e. 5th

October, 2007, which seems to be the result of a deal between the representatives of a political party and the then President /Chief of Army Staff, General Pervez Musharraf, who was about to contest election for another term, in uniform, for the office of the President, as it is apparent from uncontroverted news, appeared in Daily Dawn dated 5th October, 2007 (Friday), referred to by Mr. Abdul Hafeez Pirzada, Sr. ASC, which reads as under:-

FOUNDED BY QUAID-I-AZAM MOHAMMAD ALI JINNAH

DAWN

http://DAWN.com Vol. LXI No. 274 Lahore, Ramazan 22, 1428 Friday, October 5, 2007 26 PAGES Rs 13.00

•PPP legislators not to resign •58-2(b), third-time premiership issues to be addressed later

IT'S A DONE DEAL

By M. Ziauddin

LONDON, Oct 4: A visibly confident Benazir Bhutto told a crowded press conference here on Thursday that she expected the proposed national reconciliation ordinance to be promulgated later in the evening to satisfy most of her party's vital concerns and therefore, she said the PPP had decided not to resign from the assemblies before the presidential elections due on October 6.

She implied that the year-long talks between her party and the military-led government of President Pervez Musharraf for a peaceful transition from military dictatorship to civilian democracy had finally culminated in a power-sharing 'deal' between the two.

She disagreed with a suggestion that she would be violating the spirit of democracy by participating in the election of a uniformed general.

She said her party could still boycott the elections without resigning and it could also vote for its candidate Makhdoom Amin Fahim and in her opinion none of these actions amounted to according legitimacy to the election of an in-service general.

When a foreign correspondent asked if she thought it was legitimate for a serving Chief of Army Staff to contest elections, Ms Bhutto said the issue was being considered by the courts and she would like to go by their verdict.

She said that all contentious issues, including the matter of indemnity, delaying an understanding with the government had been sorted out and that she expected the verbal accord reached on Wednesday night between her team consisting PPP president Makhdoom Amin Fahim and Rehman Malik and government negotiators would be given legal cover through the proposed National Reconciliation Ordinance. She clarified that the indemnity would apply across the board to all the governments that ruled the country between 1988 and October 12, 1999, including the governments of Nawaz Sharif.

She did not spell it out in so many words but an understanding seems to have also been reached between her and President Musharraf on her demand that the bar on her and Nawaz to contest for the post of prime minister for the third time be lifted and a balance be introduced in the powers between the president and the prime minister by withdrawing the Article 58(2)b.

On the issue of presidential powers she said this matter would come up for discussion when after the general elections a civilian Musharraf would be seeking a vote of confidence from parliament

During the press conference she kept on insisting that until and unless the ordinance was not promulgated she would continue to keep her fingers crossed as, according to her, there were many a slip between the cup and the lip.

She did not disagree with a questioner who said something to the effect that it was actually a US-sponsored national reconciliation effort, but insisted that if it had not been for the people of Pakistan who supported her in the country at the grass roots through all these years and through the thick and thin, no amount of US facilitation would have helped her to remove the hurdles in the way of her return to Pakistan and lead her party in the general elections hopefully on a level-playing field.

"Those very people who did not want even to talk to me want me back in the country today and join them in forming a moderate coalition against extremism, militancy and terrorism, and Musharraf has also agreed to doff the uniform after election," she added.

When asked what had happened between Thursday and Wednesday night when she gave the impression that the talks had stalled, she said General Musharraf had said he wanted national reconciliation. "We want it too. We believe the nation should leave the past behind

Continued on Page 3

Final draft of 'reconciliation' ordinance approved

By Ahmed Hassan

ISLAMABAD: The final draft of the National Reconciliation Ordinance, approved by the government and the Pakistan People's Party, has been sent to the federal cabinet for assent. After approval by the cabinet it will be sent to the president for promulgation on Friday.

Sources said that the ordinance was altered to accommodate the viewpoint of the Muttahida Qaumi Movement which wanted the indemnity period to begin from 1985 and bring in its purview all political workers who had been charged but not convicted during the period.

The sources said that President General Pervez Musharraf, Prime Minister Shaukat Aziz, the attorney-general and the president's negotiating team remained in conference with the aides of Benazir Bhutto till 3am on Thursday and finalised the draft which was then sent to the law ministry for vetting. Its language was also discussed with Ms Bhutto's legal aide Senator Farooq Naik.

At an iftar hosted by Prime Minister Aziz, President Musharraf is reported to have faced a volley of questions from PML lawmakers about the future of the party if PPP entered into a power-sharing deal.

The president reportedly called a closed-door session at the PM House and briefed ministers and senior Leaguers on details of talks with Ms Bhutto and assured them that PML's status would not be compromised despite a deal with the PPP.

The sources quoted President Musharraf as saying that the government was trying to achieve consensus and reconciliation for the sake of harmony on important national issues in the best interest of the country.

However, a large number of PML leaders are reported to be against the parameters laid down in the ordinance which would not only give indemnity to Ms Bhutto but also to MQM chief Altaf Hussain.

Earlier, PML legislators Tasnim Nawaz Gardezi, Ali Akbar Vance, Safdar Shakir and a former federal minister in Nawaz Sharif's cabinet, Capt Haleem Siddiqui, called on Chaudhry Shujaat Hussain and expressed their reservations over the ordinance.

Mr Gardezi, a former federal minister, is reported to have told the party chief that the entire PML politics had been based on anti-PPP sentiments and if the party was forced to ally with that party, it would lose its vote bank as well as political support.

EJAZ MOHAMMED KHAN

37. Mr. Abdul Hafeez Pirzada, Sr. ASC also referred to the book "**Reconciliation: Islam, Democracy and the West"** by late Mohtarma Benazir Bhutto, and read its

different pages to substantiate the authenticity of the above news item. Similarly, Mr. A.K. Dogar, learned Sr. ASC also referred to the book "**The Way of the World**" by Ron Suskind and read its different pages to establish that the NRO, 2007 was nothing but the result of a deal between the two individuals.

38. It is equally important to note that candidature of General Pervez Musharraf, to contest the election for the office of the President, in uniform, was challenged before this Court, by invoking jurisdiction under Article 184(3) of the Constitution, in the case of **Jamat-e-Islami v. Federation of Pakistan** (PLD 2009 SC 549), when a nine member Bench, disposed of the same as per majority view of 6 to 3, wherein, as per the majority view, petitions were held not maintainable within the contemplation of Article 184(3) of the Constitution, whereas, as per the minority view of three Hon'ble Judges of this Court namely Mr. Justice Rana Bhagwandas (as he then was), Mr. Justice Sardar Muhammad Raza Khan and Mr. Justice Mian Shakirullah Jan, all the petitions were held maintainable under Article 184(3) of the Constitution and were accepted. Against the acceptance of nomination papers of the General Pervez Musharraf by Election Commission of Pakistan, another Petition under

Article 184(3) of the Constitution was filed by Justice (R) Wajih-ud-Din Ahmed, being Constitution Petition No.73 of 2007. However, this petition was under consideration before eleven members Bench, when, on 3rd November, 2007, emergency was proclaimed in the country, which now has been declared unconstitutional, illegal, *mala fide* and void *ab initio* vide judgment dated 31st July 2009 in **Sindh High Court Bar Association's case** (PLD 2009 SC 879).

39. There is another principle of law, which casts duty upon this Court to the effect that it should normally lean in favour of constitutionality of a statute and efforts should be made to save the same instead of destroying it. This principle of law has been discussed by this Court on a number of occasions. Reference in this behalf may be made to the cases of **Abdul Aziz v. Province of West Pakistan** (PLD 1958 SC 499), **Province of East Pakistan v. Siraj-ul-Haq Patwari** (PLD 1966 SC 854), **Inam-ur-Rehman v. Federation of Pakistan** (1992 SCMR 563), **Sabir Shah v. Shad Muhammad Khan** (PLD 1995 SC 66), **Multiline Associates v. Ardeshir Cowasjee** (PLD 1995 SC 423), **Tariq Nawaz v. Government of Pakistan** (2000 SCMR 1956), **Asif Islam v. Muhammad Asif** (PLD 2001 SC 499) and **Federation of Pakistan v. Muhammad Sadiq** (PLD 2007 SC 133). This

principle has been appropriately dealt with in the case of **Elahi Cotton Mills Ltd. v. Federation of Pakistan** (PLD 1997 SC 582) in the following terms:-

> "that the law should be saved rather then be destroyed and the Court must lean in favour of upholding the constitutionality of legislation, keeping in view that the rules of constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of a constitutional provision."

40. M/s Salman Akram Raja, ASC, Abdul Hafeez Pirzada, Sr. ASC, A.K. Dogar, Sr. ASC and M. Sardar Khan, Sr. ASC (Amicus Curiae) explained the objects and the purposes of the 'national reconciliation' in the name of which the NRO, 2007 was promulgated. According to them, the NRO, 2007 would have been a valid legislation, had it promoted the national reconciliation in the country, but unfortunately it was the result of a deal between two persons for their personal objectives. Inasmuch, the persons representing the people of Pakistan, at that time, in the Parliament, were not made aware of it, as it was enacted on 5th October, 2007, through an Ordinance, issued under Article 89 of the Constitution, which is a temporary legislation, instead of enacting it through the Act of Parliament. They

further stated that the NRO, 2007 is a power sharing deal between the then President and the head of a political party. This fact is evident from the contents of the two books; first is "**Reconciliation: Islam, Democracy and the West"** by late Mohtarma Benazir Bhutto and second is "**The Way of the World"** by Ron Suskind. Mr. M. Sardar Khan, learned Amicus Curiae has gone to the extent that the object of this law, for all intents and purposes, does not seem to be reconciliation but to pave the way and facilitate the persons, charged for corruption and corrupt practices, plundering of national wealth and commission of fraud, to come back, to seize and occupy the echelons of power again and to legalize corruption and crimes committed by those in power in past.

41. Mr. Abdul Hafeez Pirzada, Sr. ASC relied upon the proceedings of the National Assembly available in the shape of collection under the heading **"Constitution Making in Pakistan"** and contended that the Constituent Assembly, at the time of framing the Constitution of Pakistan, 1973, had taken all possible measures, to ensure that, on the basis of participation of the chosen representatives from all over the country, the document i.e. the Constitution, should be promulgated with national reconciliation. He further contended that in South Africa through promulgation of

"Promotion of National Unity and Reconciliation Act, 1995, a historic bridge was provided between the past of a deeply divided society, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans, irrespective of color, race, etc. He further stated that although in the NRO, 2007 the word 'national reconciliation' has been borrowed from the history but it has nothing to do with the national reconciliation.

42. As it has been noted hereinabove that the NRO, 2007 was promulgated, reportedly, as a result of deal, as is too evident from the contents of the newspaper 'Daily Dawn' dated 5th October, 2007, which has already been referred to hereinabove and the said report so published in this newspaper, has not, so far, been contradicted. It is well settled by the time that, in forming the opinion, generally, as to the prevailing state of affairs, having bearing on the issue involved in a case, reports of the relevant period, from electronic and print media, can be taken into consideration. In this behalf we are fortified with the judgments in **Islamic Republic of Pakistan v. Abdul Wali Khan** (PLD 1976 SC 57), **Raja Muhammad Afzal v. Ch. Muhammad Iltaf Hussain** (1986 SCMR 1736), **Benazir Bhutto v. Federation of Pakistan**

(PLD 1988 SC 416), **Muhammad Nawaz Sharif v. Federation of Pakistan** (PLD 1993 SC 473), **Benazir Bhutto v. President of Pakistan** (PLD 1998 SC 388), **Benazir Bhutto v. President of Pakistan** (PLD 2000 SC 77), **Pakistan Lawyers Forum v. Federation of Pakistan** (PLD 2004 Lahore 130, **Muhammad Shahbaz Sharif v. Federation of Pakistan** (PLD 2004 SC 583), **Watan Party v. Federation of Pakistan** (PLD 2006 SC 697) and **Sindh High Court Bar Association's case** (PLD 2009 SC 879).

43. We are conscious that non-denial of a solitary newspaper report, or even more reports for that matter, may not, in appropriate cases, form the basis of an opinion, one way or the other, therefore, we rely upon the written word of the late Mohtarma Benazir Bhutto herself. That will have more authenticity.

44. Relevant extract from the book "**Reconciliation: Islam, Democracy and the West"** by late Mohtarma Benazir Bhutto, as relied upon by M/s Abdul Hafeez Pirzada and A.K. Dogar, Sr. ASC are also reproduced hereinbelow for ready reference:-

> "In August I called PPP leaders to New York. There we discussed giving General Musharraf a "nonpaper" of what we expected. Makhdoom Amin Fahim gave the "nonpaper" to General Musharraf on August 18. The "nonpaper" said that unless there

was movement, by the end of August both sides would be free to go their own ways. General Musharraf and I had a long conversation over the phone that night. He said he would send a team to see me at the end of August.

The August team met me in London at my flat in Queens Gate. They discussed a whole new constitutional package. We increased the political price for the new package. They said they would come back in two days. They didn't. As the deadline approached for calling off talks, I got a call that the deadline would be extended. It was, but there was silence from the Musharraf camp.

The PPP and I met in London in September, and I announced that the date of my return to Pakistan would be given on September 14, 2007 from all the capitals and regions of Pakistan. I wanted the date announced from my homeland. The talks with Musharraf remained erratic. He didn't want us resigning from the assemblies when he sought reelection. There wouldn't be much difference in his winning whether we boycotted or contested, but we used this to press him to retire as army chief. He cited judicial difficulties. It was a harrowing period. After many, many late-night calls, he passed a National Reconciliation Order, rather than lift the ban on a twice-elected prime minister seeking office a third time, which he said he would do later. In exchange for the NRO, we reciprocated by not resigning from the assemblies, although we did not vote for him. We knew the matter still had to be decided by the Supreme Court. We thought Musharraf took the wrong decision to seek reelection from the existing

> Parliament, that it would only compound the crisis. But he had made his choice."

45. It appears from the above extract of the book, itself, of late Mohtarma Benazir Bhutto that the NRO, 2007 was designed to benefit a certain class of individuals against whom cases were registered between 1st January, 1986 to 12th October, 1999 subject to the scheme laid down therein. Thus we, *prima facie*, hold that the NRO, 2007 was not promulgated for achieving the object of national reconciliation as according to its substantive provision i.e. Section 2, it was meant to extend benefit to the accused persons, against whom cases were registered between 1st January, 1986 to 12th October, 1999, subject to the scheme laid down therein. Likewise, under Section 7 of the NRO, 2007, the cases against 'holders of public office', involved in the offences, inside and outside the country, deemed to have been withdrawn, including the proceedings, initiated under Section 33 of the NAO, 1999 outside the country, through request for mutual assistance and civil party to proceedings, by the Federal Government, before the 12th October, 1999. These two provisions, abundantly, make it clear that the NRO, 2007 has extended benefit only to the criminals, involved in the minor or heinous crimes and 'holders of public office' involved in corruption and corrupt practices, as

such it cannot be considered to be a legislation for achieving the object of national reconciliation.

46. We have yet to see a law *pari materia* with the NRO, 2007 according to which an accused, who being 'holder of public office', indulged into corruption and corrupt practices, plundering and looting of national wealth, etc., has been extended the benefit of withdrawal of his cases from the Court of competent jurisdiction. In order to understand the word 'reconciliation' reference may be made to **'Black's Law Dictionary'** wherein it has been defined as *'restoration of harmony between persons or things that had been in conflict'*. Likewise in **'*Corpus Juris Secundum*'** the word 'reconciliation' has been defined as '*the renewal of amicable relations between two persons who had been at enmity or variance usually implying forgiveness of injuries on one or both sides; it is treated, with respect to divorce'*. The word 'reconciliation' has been defined in **'Advanced Law Lexicon' 2005 Ed.** as *'the restoration to friendship and harmony; renewal of amicable relations between two person having been in conflict; literally the restoration of friendly relations after an estrangement'*. As it has been argued by Mr. Abdul Hafeez Pirzada, Sr. ASC that when the word 'national' is prefixed with the word 'reconciliation', its meaning changes absolutely from its

ordinary dictionary meanings, and 'national reconciliation' means 'the reconciliation of the entire nation'. Therefore, keeping in view the fact, noted hereinabove, that the NRO, 2007 was the result of deal between two individuals for their personal objectives, coupled with its dictionary meaning, it cannot be called 'national reconciliation'.

47. Mian Allah Nawaz, learned Sr. ASC has also placed on record the thesis by Barrister Saifullah Ghouri on **'The Acquiescence of UK Courts to Foreign Legislation in Particular the NRO'**, in which, he while discussing the NRO, 2007, has made the reference to **'National Commission for Forced Disappearance'** in Argentina; **'Indian Residential Schools Trust and Reconciliation Commission'** in Canada; **'National Truth & Reconciliation Commission'** and **'National Commission on Political Imprisonment & Torture'** in Chile; **'United Nations Truth Commission'** in El. Salvador; **'Reconciliation & Unity Commission'** in Fiji; **'Truth & Reconciliation Commission'** in South Africa; **'Truth & Reconciliation Commission'** in South Korea; **'Greensboro Truth & Reconciliation Commission'** and **'Joshua Micah Marshall'** in USA; etc. Interestingly, none of these commissions have dealt with the financial and ordinary crimes but amazingly the NRO, 2007 is the only law, wherein

cases pertaining to ordinary and financial crimes, committed by the accused and 'holders of public office', who indulged themselves into corruption and corrupt practices, have been declared to be withdrawn or terminated.

48. For the foregoing reasons, we are of the opinion that the NRO, 2007 was not promulgated for 'national reconciliation' but for achieving the objectives, which absolutely have no nexus with the 'national reconciliation' because the nation of Pakistan, as a whole, has not derived any benefit from the same. Contrary to it, it has been promulgated for achieving the individuals' reconciliation, explained before this Court with the help of admitted evidence, noted hereinabove.

49. Learned counsel appearing for the petitioners stated that the NRO, 2007 has violated the provisions of Articles 4, 8, 25, 62(f), 63(1)(p), 89, 175 and 227 of the Constitution, therefore, it may be declared void *ab initio* with all consequences, likely to flow after declaring it so.

50. There is no cavil with the proposition that Article 8 of the Constitution provides that 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; and the State shall not make

any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void. Needless to observe that Article 8 of the Constitution is covered under Chapter I of the Constitution, which deals with fundamental rights. Article 25 of the Constitution, being one of the important Articles of the Constitution, professes that all citizens are equal before law and are entitled to equal protection of law.

51. At this stage, reference to Article 4 of the Constitution is also necessary, which deals in respect of the rights of individuals to be dealt with in accordance with law. This Article of the Constitution is not placed in the Chapter of fundamental rights, perhaps on account of its implications, as is evident from the language employed therein; namely, to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be and of every other person for the time being within Pakistan. So, a uniform protection of law, being an inalienable right of every citizen and the person, who is, for the time being within Pakistan, has been provided under this Article. Nexus of Article 4 of the Constitution can conveniently be made with Article 25 of the Constitution or

any other Article, relating to fundamental rights, including Article 9 of the Constitution.

52. It is important to note that on proclamation of emergency, fundamental rights, guaranteed under Articles 15, 16, 17, 18, 19 & 24, of the Constitution, can be suspended in terms of Article 233 of the Constitution, but during the emergency, the provisions of Article 4 of the Constitution remain operative. The phrase 'rule of law' has been used since the time of Aristotle, in the fourth century B.C.; it has meant different things to different authors and theorists; Aristotle's concept of rule of law is contained in his simple saying: "the rule of law is to be preferred to that of any individual" – In other words, the rule of law is anathema to the rule of men; in the words of the Constitution of the State of Massachusetts, it means "a government of law and not of men"; in brief, it means supremacy of law. **[Comparative Constitutional Law** by Hamid Khan & Muhammad Waqar Rana (page 48)**]**. The prominent Jurist **A.V. Dicey** in his work **"Law of the Constitution"** said that 'rule of law' was one of the main features of the Constitution of United Kingdom. He highlighted the following three distinct concepts:-

i) No man is punishable or can be lawfully made to suffer in body or goods except for

a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of restraint.

ii) When we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (which is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

iii) The general principles of the constitution (as for example the right to personal liberty, or the right to public meeting) are with us as the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution. ……"

Elaborating upon the second concept Dicey commented: "with us every official, from the Prime Minister down to constable or a collector of taxes, is under the same

responsibility for every act done without legal justification as any other citizen." He further wrote on the second concept that "the rule of law" in this sense excludes the idea of any exemption of officials or other from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals……..; the notion which lies at the bottom of the administrative law known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies."

53. The above concepts of 'rule of law' highlighted by **A.V. Dicey**, have been noted with approval by the eminent Jurists of our country. Reference may be made to the book "**Access to Justice in Pakistan**" by Justice Fazal Karim. The above concepts have been discussed more elaborately by him in his another book "**Judicial Review of Public Actions**". Looking in depth to the concept of "rule of law" one can conveniently follow that:-

i) The rule of law excludes arbitrariness; its postulate is 'intelligence without passion' and 'reason freed from desire';

ii) Wherever we find arbitrariness or unreasonableness there is denial of the rule of law;

iii) What is a necessary element of the rule of law is that the law must not be arbitrary or irrational and it must satisfy the test of reason and the democratic form of policy seeks to ensure this element by making the framers of the law accountable to the people.
[Bachan Singh v. State of Punjab (AIR 1982 SC 1325)].

Therefore, now we have to consider as to whether a law, which is inconsistent with the fundamental rights, is liable to be declared void to the extent of such inconsistency. Article 13 of the Indian Constitution is *pari materia* to Article 8 of the Constitution of Pakistan and according to the former, "all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void". This Article is covered by Part-III of the Indian Constitution, which deals with the fundamental rights. More so, Article 14 of the Indian Constitution deals with one of the fundamental rights i.e. 'equality before the law', whereas in our Constitution, Article 25 deals with the said subject.

54. As far as jurisdiction of this Court to examine the constitutionality of a law is concerned, there is no dispute either. Sub-Article (1) of Article 8 of the Constitution uses the word 'inconsistent' purposely, regarding any law which was promulgated in the past or is in existence presently. Whereas, sub-Article 2 of Article 8 of the Constitution debars the State not to make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void. Same is the position in the Indian Constitution, as it has been noted hereinabove. So, inconsistency or contravention of a law passed, or the existing law, shall be examined to the extent of violation of fundamental rights and such laws are not void for other purposes.

55. As far as the term 'void' is concerned, it has been defined in **Black's Law Dictionary**, 7th Edn. (1999), as "of no legal effect; null." **Corpus Juris Scecundum**, Vol.92 at pp 1021 to 1022 defines 'void" as follows:-

> "The word 'void' may be used in what is variously referred to as its literal, absolute, primary, precise, strict, and strictly accurate sense, and in this sense it means absolutely null; null and incapable of confirmation or ratification; of no effect and incapable of confirmation; of no force and effect; having no legal force or binding effect, having no legal or binding force; incapable of

> being enforced by law; of no legal force or effect whatever; that which has no force and effect; without legal efficacy, without vitality or legal effect; ineffectual; nugatory; unable in law to support the purpose for which it was intended". (emphasis added).

56. The expression 'void' has also been commented upon in **Province of East Pakistan v. M.D. Mehdi Ali Khan** (PLD 1959 SC 387), **Syed Abul A'la Maudoodi v. Government of West Pakistan** (PLD 1964 SC 673), **Bhikaji Narain v. State of M.P.** (AIR 1955 SC 781). This Court in **Haji Rehmdil v. Province of Balochistan** (1999 SCMR 1060) defines that "term "void" signifies something absolutely null, incapable of ratification or confirmation and, thus, having no legal effect whatsoever". Similarly, the word 'void *ab initio*' has been defined in **Black's Law Dictionary**, 7th Edn. (1999) as "null from the beginning".

57. However, the powers of this Court to examine the constitutionality of a law have been discussed in number of judgments at number of times. Reference in this behalf may be made to **Fauji Foundation v. Shamimur Rehman** (PLD 1983 SC 457 at 596), **Benazir Bhutto's case** (PLD 1988 SC 416 at 485), **Azizullah Memon's case** (PLD 1993 SC 341 at 354), **Government of NWFP v. Muhammad Irshad** (PLD 1995 SC 281 at 296), **Civil Aviation Authority v. Union of**

Civil Aviation Employees (PLD 1997 SC 781 at 796), **Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan** (PLD 1998 SC 1263 at 1313 & 1357), **Wattan Party v. Federation of Pakistan** (PLD 2006 SC 697 at 731) and **Pakistan Muslim League (N) v. Federation of Pakistan** (PLD 2007 SC 642 at 671, 675, 676).

58. It is important to note that as per the command of Article 4 of the Constitution all the citizens without any discrimination shall be dealt with in accordance with law, so enforcement of the law leaves no room for creating any distinction between the citizens, except a particular class, on the basis of intelligible differentia. The principle challenge to the NRO, 2007, is of its being discriminatory in nature. It is the case of the petitioners' that the NRO, 2007, being violative of Article 25 of the Constitution, deserves to be declared void *ab initio*, non est, thus never took birth, therefore, nothing, which is the product of the NRO, 2007 or done in pursuance of it or under it, ever came into existence or survive. It is also contended that the NRO, 2007 is void because it is a fraud on the Constitution. According to the learned counsel for the petitioners, the NRO, 2007 has violated the dictum laid down by this Court in **Mahmood Khan Achakzai's case** (PLD 1997 SC 426) improved upon in **Syed Zafar Ali Shah's case** (PLD

2000 SC 869), wherein, after a great deal of efforts, the Court eventually came to treat Article 4 of the Constitution as 'due process clause'. So far as the provision of Article 25 of the Constitution is concerned, it has been discussed time and again by this Court in a good number of cases, reference to which may not be necessary, except the one i.e. **Azizullah Memon's case** (PLD 1993 SC 341), wherein inconsistency of the provisions of Criminal Law (Special Provisions) Ordinance, 1968 were examined on the touchstone of Articles 8 and 25 of the Constitution, and ultimately appellant's (Government of Balochistan) appeal was dismissed, declaring the Criminal Law (Special Provisions) Ordinance, 1968, to be void being inconsistent with the fundamental rights enshrined in Article 25 of the Constitution. In this judgment, with regard to 'reasonable classification', following two principles have been highlighted:-

> "in order to make a classification reasonable, it should be based:-
>
> a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;
>
> b) that the differentia must have rational nexus to the object sought to be achieved by such classification."

As far as 'intelligible differentia' is concerned, it distinguishes persons or things from the other persons or things, who have been left out. The Indian Supreme Court, while relying upon the statement of Professor Willis in **Charanjit Lal v. Union of India** (AIR 1951 SC 41), observed that *"any classification which is arbitrary and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed"*. Same principle has been highlighted in **Shazia Batool v. Government of Balochistan** (2007 SCMR 410).

59. Thus, keeping in view the above principles and the definition of classification "intelligible differentia" means, in the case of the law differentiating between two sets of the people or objects, all such differentiations should be easily understood as logical and lucid and it should not be artificial or contrived.

60. It may be noted that the NRO, 2007 has extended benefit to three categories of persons in the following manner:-

1) By virtue of amendment of Section 494 Cr.P.C. the cases of accused persons, including the absconding accused, involved in criminal cases, for political reasons or through political

victimization, initiated between 1st January, 1986 to 12th October, 1999 including those against whom, judgments have been pronounced by the Trial Court, were to be withdrawn.

2) By adding clause (aa) in Section 31A of the NAO, 1999, it is declared that an order and judgment passed by the Court in absentia against an accused is void *ab initio* and shall not be acted upon.

3) By inserting Section 33F in the NAO, 1999, the proceedings under investigation or cases pending in any Court including a High Court and the Supreme Court of Pakistan, initiated by or on a reference by the NAB, inside and outside Pakistan, including the proceedings initiated under Section 33 (ibid) by making requests for mutual assistance and civil party to proceedings, by the Federal Government, before the 12th day of October, 1999, against 'holders of public office' stood withdrawn and terminated and such 'holders of public office' shall also not be liable for any action in future as well under this Ordinance for acts having been done in good faith before the said date.

61. Now the constitutionality of amended Section 494 Cr. P.C. (Act V of 1898) by means of Section 2 of the NRO,

2007 shall be examined. It would be appropriate to reproduce Section 494 Cr.P.C in its original form hereinbelow:-

> "**494. Effect of withdrawal from prosecution.** Any Public Prosecutor may, with the consent of the Court, before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried, and upon such withdrawal:
>
> (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;
>
> (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences.

In above provision, emphasis is upon "effect of withdrawal from the prosecution with the consent of the Court". A plain reading of above provision categorically provides for an important role of the Court as without its consent, no effect of withdrawal from prosecution shall take place. In **Saad Shibli v. State** (PLD 1981 SC 617), it has been observed as follows:-

> "It follows therefore, that on disclosure of satisfactory objective grounds, relatable to public policy, or public peace, and administration of justice, an application under Section 494 Cr.P.C., for seeking Court's permission to withdraw from the prosecution can be filed. The Court's duty is

> to ensure that such a course "is not an attempt to interfere with the normal course of justice for illegitimate reason or purposes"– AIR 1957 SC 389 or that Courts "own functioning is not thereby pre-empted"– PLD 1977 SC 451."

To extend the benefit of the NRO, 2007 following amendment was made in Section 494 Cr.P.C. which is reproduced hereinbelow:-

> "2. Amendment of section 494, Act V of 1898.
>
> In the Code of Criminal Procedure, 1898 (Act V of 1898), section 494 shall be renumbered as sub-section (1) thereof and after sub-section (1) renumbered as aforesaid, the following sub-section (2) and (3) shall be added, namely:
>
> > "(2) Notwithstanding anything to the contrary in sub-section(1), the federal government or a provincial government may, before the judgment is pronounced by a Trial Court, withdraw from the prosecution of any person including an absconding accused who is found to be falsely involved for political reasons or through political victimization in any case initiated between 1st day of January, 1986 to 12th day of October, 1999 and upon such withdrawal clause (a) and clause (b) of sub-section (1) shall apply.
> >
> > (3) For the purposes of exercise of powers under sub-section (2) the federal government and the provincial government may each constitute a review board to review the entire record of the case and furnish recommendations as to their withdrawal or otherwise.
> >
> > (4) The review board in case of Federal Government shall be headed by a retired judge of the Supreme Court with Attorney-General and Federal Law Secretary as its members and in case of Provincial Government it shall be headed by a retired judge of the high court with

> Advocate-General and/or Prosecutor-General and Provincial Law Secretary as its members.
>
> (5) A review board undertaking review of a case may direct the public prosecutor or any other concerned authority to furnish to it the record of the case."

A cursory glance on amended Section 494 Cr.P.C. leads to conclude that powers of the Court under Section 494 (1) Cr.P.C were conferred upon the Review Board, to be constituted by the Federal Government and the Provincial Government, composition of which has been provided under sub-Section (4) of Section 494 Cr.P.C. In simple words consent of the Court has been replaced with the recommendations of the Review Board i.e. an executive body, for all intent and purposes. The Review Board on whose recommendations, all the cases, in which judgment has not been pronounced by the Trial Court, are to be withdrawn from the prosecution, including the cases of absconding accused, who were found to be falsely involved for the political reasons or political victimization. Essentially, declaring a person absconder is the job of the Trial Court, after submission of challan and observing codal formalities under Sections 87 and 88 Cr.P.C. As far as involving a person falsely for political reasons or through political victimization, is concerned, it is a question which could only be examined by the Court of law, before whom challan has been submitted

because once a challan is filed, the accused can be discharged or acquitted under Cr.P.C., if there is no evidence against the accused, as the case may be, or by applying for quashment of the case under Section 561-A Cr.P.C. or approaching the Revisional Court for terminating the proceedings, if the same are not founded on correct disclosure of information for involvement of the accused. However, as far as absconding accused is concerned, prima facie, he is considered to be fugitive from law. Therefore, without surrendering to the Court, legally no concession can be extended to him by the executive authority. Surprisingly, action initiated under the NRO, 2007 in terms of above provision is tantamount, in clear terms, to deny the independence of judiciary, which is hallmark and also one of the salient features of the Constitution, as it has been held in **Syed Zafar Ali Shah's case** (PLD 2000 SC 869). Relevant paras therefrom are reproduced hereinbelow for convenience:-

> "We are of the considered view that if the Parliament cannot alter the basic features of the Constitution, as held by this Court in Achakzai's case (supra), power to amend the Constitution cannot be conferred on the Chief Executive of the measure larger than that which could be exercised by the Parliament. Clearly, unbridled powers to amend the Constitution cannot be given to the Chief Executive even during the transitional period even on the touchstone of `State

> necessity'. We have stated in unambiguous terms in the Short Order that the Constitution of Pakistan is the supreme law of the land and its basic features i.e independence of Judiciary, federalism and parliamentary form of government blended with Islamic Provision cannot be altered even by the Parliament. Resultantly, the power of the Chief Executive to amend the Constitution is strictly circumscribed by the limitations laid down in the Short Order vide sub-paragraphs (i) to (vii) of paragraph 6."

It may be noted that as far as independence of Judiciary is concerned its security has been provided by the Constitution itself in Article 2A of the Constitution but the principle and concept of the same shall be discussed after examining the constitutionality of various provisions of the NRO, 2007 including the one which is under discussion.

62. In order to decide the issue of withdrawal of criminal cases, registered against the accused persons, during the specific period, commencing from 1st January, 1986 to 12th October, 1999, Mr. Yousaf Leghari, Advocate General Sindh was called upon to place on record the details of all cases. However, except furnishing one list of the cases, he could not handover the list of all other cases, which according to his statement, noted by this Court vide order dated 14th December 2009, is to the effect that the Department has not

been able to get a detailed list/ names of absconders, whose cases were recommended by the Review Board and thereafter withdrawn under amended Section 494 Cr.P.C. In respect of other Provinces, neither any benefit of the NRO, 2007 was extended to any of the accused, nor was any Provincial Review Board constituted, as submitted by the Advocates General of the respective Provinces. However, a perusal of the material so furnished by the Advocate General Sindh, reveals that Provincial Review Board constituted under the above provision of amended Section 494 Cr.P.C., examined criminal cases on 9th October 2007 and has drawn the conclusion on the same day that after having gone through the available record and bearing in mind the provisions contained in the amended Section 494 Cr.P.C. the Board is of unanimous view that all the cases were falsely registered and for political reasons, therefore, it would be futile exercise to keep them pending particularly when most of the cases are very old and there is hardly any cogent evidence to connect the accused with the alleged offences, as none of them would result in conviction, if tried by the respective Courts, as such, notwithstanding the fact that any one of the accused has been declared absconder, the Board recommended the Provincial Government that those cases may be withdrawn forthwith. Exact figure of such cases has

not been brought on record but as per verbal statement of the learned Advocate General Sindh, there were more than three thousand cases which have been withdrawn, in which about eight thousand accused were involved. We fail to understand whether hundreds of cases can be decided within few hours, for the purpose of making recommendations by the Provincial Review Board. Therefore, inference would be that just to fulfill the formality, meeting of the Board was convened in order to get recommendations for the withdrawal of cases. The list so made available by the learned Advocate General Sindh indicates that the cases including the criminal cases, involving murder, attempt to murder, dacoity, kidnapping for ransom, robbery, gunrunning, theft, extortion, etc. have been recommended by the Board for withdrawal forthwith. Needless to observe that after the amendment in PPC, in pursuance of judgment of this Court in **Federation of Pakistan v. Gul Hassan Khan** (PLD 1989 SC 633), the cases pertaining to Qisas, Diyat, Arsh, etc. were not allowed to be compounded without the permission of the victim or the heirs of deceased and even if such permission is sought by entering into compromise, under Chapter XVI of the PPC, no withdrawal or compromise of such cases is permissible in non-compoundable cases. Interestingly, in the list, submitted by

the learned Advocate General Sindh, there are cases, relating to offences, which are non-compoundable and even the Court of law, before whom matter is subjudice, is not empowered to make recommendations for withdrawal of the same or allowed to enter into compromise. Admittedly, the victim or heirs of the deceased, in body-hurt cases, covered by Chapter XVI PPC, had an inalienable right to be heard by a Court of law, as sometimes permission is accorded by the Court to compound the offence, subject to payment of Diyat, Daman, Arsh, etc., as the case may be. But by substituting the Court with the Review Board, mandatory procedure of law has been compromised. At this juncture, reference to the following para from the **Hakim Khan v. Govt. of Pakistan** (PLD 1992 SC 595) would not be out of context:-

> 19. As regards the merits of the question involved in the case, the punishments of death awarded were not by way of Qisas. The sentences of death awarded were under Ta'zir. Just as a sentence of Ta'zir is imposed on State's command and not as a right of the individual under God's law, the State as represented by the President, has and continues to have in respect of Ta'zir punishments, the right of commutation, remission etc.

As per the above principle of law, no question of pardon arises if the punishment of Qisas has been awarded. However, in respect of Ta'zir, the President continues to

enjoy the power to grant pardon. It is further observed that in terms of Articles 45 and 2A of the Constitution, the Court has no power to apply the test of repugnancy by invoking Article 2A of the Constitution for striking down Article 45 of the Constitution. This principle has been highlighted by the seven member bench of this Court in the case of **Abdul Malik v. The State** (PLD 2006 SC 365). Relevant para therefrom is reproduced hereinbelow for convenience:-

> 23. It was argued that the power enshrined in the afore-referred Article is violative of the spirit of Article 2A of the Constitution. Any theological debate in this context is unnecessary as Article 2A is not a self-executing provision and unless there is proper legislation or amendment in the Constitution, the provision as it stands has to be given effect to. The power of the President to grant pardon, reprieve or respite and to remit or suspend commute any sentence is a power which is given to Heads of the States in most of the Constitutions of the world. The import and ambit of this provision were considered by this Court in Bhai Khan v. State PLD 1992 SC 14 wherein at page 25, it was held as under: -
>
>> "The exercise of the discretion by the President under Article 45 is to meet at the highest level the requirements of justice and clemency, to afford relief against undue harshness, or serious mistake or miscarriage in the judicial process, apart from specific or special cases where relief is by way of grace alone, as for instance to celebrate an event or when a new President or Prime Minister is installed, where relief or clemency is for the honour of the State. In the former case, the discretion has to be exercised with care, keeping

> in mind the duty to maintain justice, so as to prevent the erosion of the deterrent effect that judicial punishment must retain. The scope of the power of the President under Article 45 is basically discretionary, in view of Article 48(2) of the Constitution. The power under Article 45 being at the apex and unfettered, the President, whilst commuting a sentence (on a number of counts) or different sentences, can order the commuted sentences to run concurrently inter se and/or concurrently with any other or others imposed by the Court."

63. No assertion could be made by either of the parties about the punishment to an accused, whose case has been withdrawn despite likelihood of his getting punishment under Qisas or Ta'zir. The Court, trying an accused for a particular crime, based on a particular charge, prayed against him by the prosecution, has no reasons to enter into discussion whether on account of political victimization, he has been involved in the case or otherwise; because the Court is required to decide the case on merits, in exercise of its jurisdiction, following the consistent principles of administration of justice in criminal cases that if no case is made out on merits, it is free to discharge or acquit the accused without waiting for conclusion of the trial.

64. The amendment in Section 494 Cr.P.C. has not only undermined the independence of judiciary by substituting the Court, before whom the trial of an accused was pending, with the Review Board, but, at the same time,

had also created discrimination with the accused, who were facing trial prior to 1st January, 1986 or had been charged for the offence after 12th October, 1999. The preamble of the NRO, 2007 coupled with any of its substantive part, had not disclosed the reasons, calling for so called 'national reconciliation' in between this period, presuming that an accused, facing charge entailing major penalty of death, is not entitled for discharge, by means of extra judicial forum, or for the same treatment, if he has committed the crime after 13th October, 1999, and up till now. We have posed a question to ourselves i.e. whether there had been no political victimization after 12th October, 1999 uptill now, on account of which accused persons were involved falsely in the commission of the offence but we could not succeed in getting the answer of the same except observing that specific dates were incorporated in the NRO, 2007 for achieving specific object as well as the specific purpose, which has been highlighted by one of the learned counsel, whose argument in this behalf has been noted hereinabove.

65. Somehow, the Indian Supreme Court had to face with identical situation in **Rajender Kumar v. State** (AIR 1980 SC 1510). As per the facts of the case, the Government of India, in exercise of powers conferred by Section 196(1)(a) of

the Code of Criminal Procedure 1973, and Section 7 of the Explosive Substances Act, 1908, by its order dated 6th September, 1976 accorded sanction for the prosecution of George Mathew Fernandes alias George Fernandes, Chairman of Socialist Party of India and Chairman of All India Railwaymen's Federation and 24 others, for alleged offences under Sections 121-A & 120-B of Indian Penal Code, read with Sections 4, 5 and 6 of Explosive Substances Act, 1908 and Sections 5(3)(b) and 12 of the Indian Explosives Act, 1884, on the allegations that after the issuance of the proclamation of Emergency on 25th June, 1975 by the President of India in exercise of the powers conferred by clause (1) of Article 352 of the Constitution, George Mathew, sought to arouse resistance against the said emergency by declaring that the said emergency had been "clamped" on the country by the "despotic rule" of Smt. Indira Gandhi, Prime Minister of India and to entertain an idea that a conspiracy be hatched with the help of the persons of his confidence, to over-awe the Government and in pursuance of the conspiracy do such acts which might result in the destruction of public property and vital installations in the country. On 24th September, 1976 the Deputy Superintendent of Police, Special Police Establishment Central Bureau of Investigation, filed a charge-sheet in the Court of the Chief Metropolitan

Magistrate, Delhi, against the said accused persons for the offences mentioned in the order sanctioning the prosecution. Besides the accused, who were sent up for trial, two accused, namely, Shri Bharat C. Patel and Rewati Kant Sinha were granted pardon by the Court and were examined as approver under Section 306(4) Cr.P.C., notwithstanding the fact that the case was exclusively triable by the Court of Session. Out of 25, two accused namely Ladli Mohan Nigam and Atul Patel were declared proclaimed offenders by the Court. At that stage, on March 26, 1977, N. S. Mathur, Special Public Prosecutor filed an application under section 321 of the Criminal Procedure Code 1973, for permission to withdraw from the prosecution. On the same day the Chief Metropolitan Magistrate, expressed the opinion that it was "expedient to accord consent to withdraw from the prosecution", granted his consent for withdrawal from the prosecution. One Dr. Rajender Kumar Jain, an Advocate, filed a petition in the High Court of Delhi, under Section 397 of the Criminal Procedure Code for revision of the order of the Chief Metropolitan Magistrate giving his consent to the Special Public Prosecutor to withdraw from the prosecution, but the same was dismissed on the ground that the applicant had no locus standi. Dr. Rajender Kumar Jain filed appeal before the Supreme Court of India, after obtaining special

leave from the Court, mainly on the ground that the Public Prosecutor had abdicated his function and had filed the application at the behest of the Central Government without applying his mind, and that S. N. Mathur who had filed the application for withdrawal from the prosecution was not the Public Prosecutor, in-charge of the case and the application was therefore, incompetent. The Supreme Court, ultimately, while dismissing the petitions for leave to appeal, concluded as under:-

> 25. Before bidding farewell to these cases it may be appropriate for us to say that Criminal justice is not a plaything and a Criminal Court is not a play-ground for politicking. Political fervour should not convert prosecution into persecution, nor political favour reward wrongdoer by withdrawal from prosecution. If political fortunes are allowed to be reflected in the processes of the Court very soon the credibility of the rule of law will be lost. So we insist that Courts when moved for permission for withdrawal from prosecution must be vigilant and inform themselves fully before granting consent. While it would be obnoxious and objectionable for a Public Prosecutor to allow himself to be ordered about, he should appraise himself from the Government and thereafter appraise the Court the host of factors relevant to the question of withdrawal from the cases. But under no circumstances should he allow himself to become anyone's stooge.

The provision of Section 2 of the NRO, 2007, is also contrary to the dictum laid down in **Saad Shibli's case** (PLD 1981 SC 617), wherein it has been held as under:-

> 13. A bare reading of this section discloses that the statute conferring the power of withdrawal on the Public Prosecutor prescribes no guidelines and indicates no controlling features, except that such a power can be exercised before the judgment is pronounced and is subject to "consent of the Court". From such a general dispensation certain consequences necessarily follow. In the first place, the power conferred is of the widest amptitude but not so wide as to amount to a fiat or ipsi dixit of the Public Prosecutor. Such a limitation necessarily follows the requirement of "consent of the Court." It has been held that "where Court's permission is sought or required, such a motion seeks the active exercise of the sound judicial discretion of the Court" (22 A C J S 7). Judicial discretion of the Court is required to be exercised according to reasonably well settled principles, which are capable of being formulated and applied as standards by higher Courts when entertaining appeals against the manner in which they have been exercised. In this sense, therefore, "judicial" refers to the exercise of discretion in accordance with "objective" standards as opposed to subjective considerations of policy and expediency."

66. Above discussion, in the light of the facts disclosed by the learned Advocate General Sindh, persuades us to hold that the classification amongst the accused persons, facing trial during the specific period i.e. 1st January

1986 to 12th October 1999, is based on arbitrariness and no reasons have been disclosed in the NRO, 2007 for entering into so called 'reconciliation' with particular group of accused persons, except in the name of 'national reconciliation' on the pretext that the cases were politically motivated against them. Therefore, the NRO, 2007 to the extent of discussion on Section 2, is arbitrary and irrational as it has failed the test of reason to conclude in its favour that it is not a bad law. Similarly on the basis of intelligible differentia for reasonable classification, the differentiation has not been understood logically and it seems that for specific purpose, an artificial grouping was made, causing injustice to the accused persons, who were placed in the same position and instead of achieving the 'national reconciliation' the NRO, 2007 had served the purpose of 'individual reconciliation'.

67. It has been argued by one of the learned counsel i.e. Mr. Abdul Hafeez Pirzada, Sr. ASC that by means of Section 6 of the NRO, 2007, a new provision i.e. (aa) has been added in Section 31A of the NAO, 1999 and stated that this provision is contrary to Article 63(1)(p) of the Constitution, for the reason that if 'holder of public office' is an absconder, in view of conviction recorded against him in absentia under

Section 31A of the NAO, 1999, such 'holder of public office' is not competent to sit in the Parliament on the basis of his conviction as well as morality. Therefore, by promulgation of Section 6 of the NRO, 2007, conscience of the Constitution has been divorced. Reliance in this behalf has been placed by him upon **Jamal Shah v. Election Commission** (PLD 1966 SC 1) and **Benazir Bhutto v. Federation of Pakistan** (PLD 1988 SC 416). On the Court's question, he replied that if Section 6 of the NRO, 2007 is declared void for these two reasons, then the convicts must surrender before the will of the Constitution. He added that this is the mandate of the Constitution. According to him if Article 63(1)(p) of the Constitution could not be considered to be self-executory then no other provision of the law could be so dealt with.

68. It would be advantageous to reproduce hereinbelow Section 31A of the NAO, 1999:-

> "31A. Absconding to avoid service of warrants Whoever absconds in order to avoid being served with any process issued by any Court or any other authority or officer under this Ordinance or in any manner prevents, avoids or evades the service on himself of such process or conceals himself to screen himself from the proceedings or punishment under this Ordinance shall be guilty of an offence punishable with imprisonment which may extend to three years notwithstanding the provisions of section 87 and 88 of

> Code of Criminal Procedure, 1898, or any other law for the time being in force."

The above Section has been amended by means of Section 6 of the NRO, 2007, which reads as under:-

> "**6. Amendment of section 31A, Ordinance XVIII of 1999.**
>
> In the said Ordinance, in section 31A, in clause (a), for the full stop at the end a colon shall be substituted and thereafter the following new clause (aa) shall be inserted, namely:-
>
> > "(aa) An order or judgment passed by the Court in absentia against an accused is void *ab initio* and shall not be acted upon."

As far as Article 63(1)(p) of the Constitution, referred to by the learned counsel, relating to disqualification for becoming the member of the Parliament, is concerned, it provides that a person shall be disqualified from being elected or chosen, as and from, being a member of the Majlis-e-Shoora (Parliament) if he has been convicted and sentenced to imprisonment for having absconded by a competent Court under any law for the time being in force. On Court's query, NAB has provided the list of the persons, convicted under Section 31A of the NAO, 1999 because we wanted to ascertain whether there is any case of convict/absconder who has been extended benefit of this provision. In view of available material, it was considered appropriate to examine

the constitutionality/ vires of this provision of the NRO, 2007 as well.

69. It is important to note that this Court has earlier granted relief to the convicts under Section 31A; firstly in an unreported judgment in **Gulzaman Kasi v. The State** (Criminal Appeal No. 269 of 2003), wherein allegation against the appellant was that he in his capacity as the Minister for Development Government of Balochistan/ Chairman, Quetta Development Authority, in connivance with Mr. Abdus-Saleem Durrani, Director General, converted a plot meant for school/play ground, into six residential plots and allotted the same to their close relatives and associates and thereby committed offence under Section 9(b) of the NAO, 1999. The learned Bench of three Hon'ble Judges of this Court, has held that the impugned conviction of the appellant cannot be sustained for two reasons; firstly that trial in absentia has been declared violative of Article 9 of the Constitution in **Mehram Ali v. Federation of Pakistan** (PLD 1998 SC 1445); and secondly appellant was subsequently arrested in the matter and was tried on the allegations which form subject matter of the reference, in which he was convicted in absentia; his appeal was dismissed by High Court of Balochistan and his Criminal Petition No. 68-Q of 2003 is pending decision before this Court and would be

decided along with this appeal; therefore, the convict was released.

70. It is to be noted that this case is distinguishable from the case relating to disqualification of a person being elected as a member of the Parliament, or from being a member of the Parliament, because the question as to whether he has been rightly convicted in absentia or otherwise, is to be decided by the Court of law and the powers of the Court could not be substituted or conferred according to Section 6 of the NRO, 2007 on the legislature to declare that an order or judgment passed by a Court of competent jurisdiction in absentia is void *ab initio* and shall not be acted upon. It may also be kept in mind that; firstly Section 6 of the NRO, 2007 is general in its nature and benefit of the same can be derived by a candidate for becoming the member of the Parliament, or a member of the Parliament, or by other ordinary person; secondly, it has not been made applicable for a specific period. Therefore, if it being an amended provision continued to remain intact for all the times to come, conviction in absentia under Section 31A of the NAO, 1999 shall be void and for all practical purposes Section 31A of the NAO, 1999 shall be deemed to have been annulled. Before proceeding further, it is necessary to answer that the observation made in **Mehram Ali's case** (PLD 1998

SC 1445) and in **Gulzaman Kasi's case** (Criminal Appeal No. 269 of 2003) could have not been made in view of the distinctive facts, namely, in the said case Court was authorized to remove the accused from the Court on his misbehaviour and in his absence the trial was concluded and he was sentenced to death, therefore, it was considered violation of Article 9 of the Constitution. Be that as it may, Hon'ble same Judge of this Court i.e. Mr. Justice Tassaduq Hussain Jillani, in his subsequent judgment in the case of **Manzoor Qayyum v. The State** (PLD 2006 SC 343) has held as follows :-

> "6. The question whether the petitioner had absconded, "in order to avoid being served with any process issued by any Court or any other authority or officer under this Ordinance" would be a question of fact to , be decided by the Trial Court in the light of the material brought before it. The reference by learned counsel for the petitioner to a judgment of the Karachi High Court, Noor Muhammad Khatti and others v. The State 2005 PCr.LJ 1889 may not be relevant at this stage before this Court. It rather contains instructive guidelines for a Trial Court seized of a case under section 31-A of the NAB Ordinance. In the said case, the learned Karachi High Court delved at length on the scope of the afore-referred section, the nature of evidence the prosecution has to produce to prove the avoidance of service of notice or of execution of warrants particularly when an accused allegedly leaves the

country. But having observed all this, the Court directed the appellant to appear before the Trial Court "as and when required by the said Courts for further proceedings in accordance with law". In the case of N.M.V. Vellayappa Chettiar v. Alagappa Chettiar AIR (29) 1942 Madras 289, a trial Magistrate had issued warrants of attachment and proclamation on account of non-appearance of the accused and the same were set aside by the High Court but the main complaint pending before the said Magistrate was not interfered with. The High Court held as under:-

> "It is obvious that when the Magistrate was informed that the petitioner had already left India, the orders for attachment and proclamation are without jurisdiction, unless he was satisfied that the accused was willfully absconding, knowing of the warrant. He could not have known of the warrant which was issued after he had left India. When it was clear that the accused had left India in March, it could not possibly be said that he absconded or that he is concealing himself so that the warrant cannot be executed, which is a condition precedent under S.87, Criminal P.C. for the issue of a proclamation. It is also a condition precedent for the issue of attachment under S.88. It was at first said that the petitioner was still in India and that he is concealing himself somewhere in India. If this is so, the action of the Magistrate would be perfectly justified. I asked the complainant whether he would state so in an 'affidavit, and I gave him an opportunity of stating it in an affidavit. In the affidavit filed by him he has not contradicted the statement made on behalf of the petitioner that he left India in March. Under these circumstances, I hold that the orders of proclamation and attachment are without jurisdiction and as such they are set aside."

7. In the instant case as well, the learned High Court while setting aside the conviction under section 31-A of NAB Ordinance, left the matter to Trial Court to

> decide it afresh. The precise question which the learned Trial Court would be seized of now is whether the allegation of absconsion or avoidance of service of the process of the Trial Court is borne out from the record or material placed before it or not. This Court would not pre-empt the function of the Trial Court. In these circumstances, the judgment of the learned High Court is unexceptionable. However, the petitioner would be within his right to move an application under section 265-K, Cr.P.C. and if such an application is moved, the learned Trial Court shall decide the same on merit with independent application of mind within 15 days of its presentation as assured by learned Deputy Prosecutor General of NAB."

71. On having gone through the above judgment, it is crystal clear that offence falling within the mischief of Section 31A of the NAO, 1999 is distinct offence, from the allegations made in the reference, which was filed against an accused and if the convict has been acquitted in the reference or the reference has been withdrawn, even then the conviction under Section 31A of the NAO, 1999 remain operative and the convict has to avail remedy, for getting it set aside, by approaching the next higher judicial forum, as envisaged under Section 32 of the NAO, 1999.

72. As discussed above, conviction in absentia is a final order, therefore, no other forum can declare such

conviction as void, except a judicial forum, that too, by filing an appeal. But in instant case, as it has been pointed out hereinabove, by amending a law, such conviction has been declared void, therefore, the amendment in Section 31A of the NAO, 1999 by inserting clause (aa), by means of Section 6 of the NRO, 2007, is declared void being against the provisions of Section 31A read with Section 32 of the NAO, 1999, which provides remedy to the convict to file appeal.

73. There is another judgment in the case of **The State v. Aftab Ahmed Khan Sherpao** (PLD 2005 SC 399), in which appeal filed by the State against the acquittal of the respondent, has been dismissed, inter alia, for the reason that the respondent convict under Section 31A of the NAO, 1999, voluntarily surrendered himself before the High Court, where appeal against his conviction was pending; he was acquitted of the charge under Section 31A by the High Court, which was considered to be unexceptional and the State appeal was dismissed. This Court in another judgment in **State v. Naseem-ur-Rehman** (2004 SCMR 1943) in respect of the respondent, convicted under Section 31A of the NAO, 1999 observed that it was obligatory upon the convict to approach the Court; first of all he should surrender to the order of his imprisonment, meaning thereby that on

surrendering before the Court he should be taken into custody and the Court might order for his release in appeal and if such person is not taken into custody or not admitted to bail, then he will be deemed to be fugitive from law and would not be entitled to any relief.

74. The above discussion poses another important question, namely, whether the legislature by means of an enactment can undo the effect of the judgment in which the person has been convicted for an offence and if he is 'holder of public office', his such conviction is a disqualification to be elected as a member of the Parliament, or to be a member of the Parliament, under Article 63(1)(p) of the Constitution? In this behalf the simple answer would be that with reference to a person, who intended to become the member of the Parliament, or is a member of the Parliament, no legislation is possible to grant him relief in presence of the provisions of the Constitution, being a parent law. It is well settled by the time that no legislation on any subject is permissible which is against the specific provision of the Constitution. In this behalf we are fortified with the judgment in **Wattan Party v. Federation of Pakistan** (PLD 2006 SC 697), wherein it has been held as under:-

> "……………… Besides it is an accepted principle of the Constitutional jurisprudence that a Constitution being a

> basic document is always treated to be higher than other statutes and whenever a document in the shape of law given by the Parliament or other competent authority is in conflict with the Constitution or is inconsistent then to that extent the same is liable to be declared un-Constitutional. This is not for the first time that a law like Ordinance 2000 has come for examination before the Court as in the past a number of laws were examined and when found against the Constitution the same were declared void and of no legal effect. …………………… (emphasis provided).

75. It is also important to note that this law has opened the door of the Parliament, for the persons, convicted in absentia, as the disqualification for a person to become a member of Parliament and for a member of Parliament under Article 63(1)(p) of the Constitution has been removed by means of clause (aa) inserted in Section 31A of the NAO, 1999, a person, who has been convicted under Section 31A of the NAO, 1999, in absentia, with a stigma of a convict, has been made qualified to enter into the Parliament, contrary to the Constitutional provisions as well as law laid down in the case of **Abdul Baqi v. Muhammad Akram** (PLD 2003 SC 163).

76. As far as nullifying the effect of a judgment by means of a legislation is concerned, there are certain limitations including the one i.e. by amending the law with

retrospective effect, on the basis of which the order or judgment has been passed, thereby removing the basis of the decision. Reference in this behalf can be made to **Tofazzal Hossain v. Province of East Pakistan** (PLD 1963 SC 251), **Tirath Ram Rajindra Nath v. State of U.P.** (AIR 1973 SC 405), **Mamukanjan Cotton Factory v. Punjab Province** (PLD 1975 SC 50) and **Misrilal Jain v. State of Orissa** (AIR 1977 SC 1686). However, in the case of **I.N. Saksena v. State of Madhya Pradesh** (AIR 1976 SC 2250), following principle has been laid down:-

> "Firstly, whether the legislature possesses competence over the subject matter, and, secondly, whether by validation the legislature has removed the defect which the courts had found in the previous law. To these we may add a third. Whether it is consistent with the provisions of Part III of the Constitution.

It is to be noted that the NAB has placed on record the material pointing out the names of the beneficiaries, who have derived benefit under Section 6 of the NRO, 2007 but applying the test laid down hereinabove, we can safely conclude that the insertion of clause (aa) in Section 31A of the NAO, 1999 is without lawful authority, as it has not amended the original Section 31A of the NAO, 1999, which is still intact with all its consequences and effects. It is pertinent to mention here that the language used in an enactment must

show the intention of the lawgiver that it would apply with retrospective effect and shall be deemed always to have been so inserted in the respective statute. In this behalf reference may be made to **Fecto Belarus Tractor v. Government of Pakistan** (PLD 2005 SC 605). Relevant para therefrom is reproduced hereinbelow for convenience:-

> 54. Besides, the language used in both the Ordinances manifests clear intention of the law giver that it would apply with retrospective effect and shall be deemed always to have been so inserted in respective statutes. Identical language was used in section 5 of the Finance Act 1988 in pursuance whereof section 31-A was inserted in the Customs Act,1969 with retrospective effect. This Court had occasion to examine this provision of law in Molasses Trading and Export (ibid). Relevant paras, therefrom read as under:-
>
> > "……..Before considering this question it would be appropriate to make certain general observations with regard to the power of validation possessed by the legislature in the domain of taxing statutes. It has been held that when a legislature intends to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to have taken place effectively. It will not be sufficient merely to pronounce in the statute by means of a non obstante clause that the decision of the Court shall not bind the authorities, because that will amount to reversing a judicial decision rendered in exercise of the judicial power which is not within the domain of the legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances. One of the accepted modes of

achieving this object by the legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The legislature can even give its own meaning and interpretation of the law under which the tax was collected and by "legislative fait" make the new meaning binding upon Courts. It is in one of these ways that the legislature can neutralize the effect of the earlier decision of the Court. The legislature has, within the bounds of the Constitutional limitations, the power to make such a law and give it retrospective effect so as to bind even past transactions. In ultimate analysis, therefore, the primary test of validating piece of legislation is whether the new provision removes the defect which the Court had found in the existing law and whether adequate provisions in the validating law for a valid imposition of tax were made…………………………………………………
……… it is clear from the provisions of section 5 of the Finance Act, 1988 that by the device of the deeming clause the newly-inserted section 31-A is to be treated as part and parcel of the Act since its enforcement in 1969. Undoubtedly, therefore, the section is retrospective in operation. It is agreed on all hands that the well-settled principles of interpretation of statutes are that vested rights cannot be taken away save by express words or necessary intendment. It also cannot be disputed that the legislature, which is competent to make a law, has full plenary powers within its sphere of operation to legislate retrospectively or retroactively. Therefore, vested rights can be taken away by such a legislation and it cannot be struck down on that grounds. However, it has also been laid down in Province of East Pakistan v. Sharafatullah PLD 1970 SC 514 that A statute cannot be read in such a way as to change accrued rights, the title to which consists in transactions past and closed or any facts or events that have already occurred. In that case that following postulation has been made:-

> "In other words liabilities that are fixed or rights that have been obtained by the operation of law upon facts or events for or perhaps it should be said against which the existing law provided are not to be disturbed by a general law governing

> future rights and liabilities unless the law so intends."

This is an important principle which has to be kept in mind in the context of the present case. Reference may also be made to another principle followed is several decisions but to quote from Mehreen Zaibun Nisa v. Land Commissioner, Multan (PLD 1975 SC 397) where it was observed:

> "When a statute contemplates that a state of affairs should be deemed to have existed, it clearly proceeds on the assumption that in fact it did not exist at the relevant time but by a legal fiction we are to assume as if it did exist. The classic statement as to the effect of a deeming clause is to be found in the observations of Lord Asquith in East End Dwelling Company Ltd. V. Finsbury Borough Council (1952)AC 109) namely:-
>
> > 'Where the statute says that you must imagine the state of affairs, it does not say that having done so you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

However, in that case aforesaid principle was subjected in its application to a given case to condition that the Court has to determine the limits within which and the purposes for which the legislature has created the fiction. It has been quoted from an English decision that "When a statute enacts that something shall be deemed to have been done which in fact and in truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

77. The examination of the above principle abundantly makes it clear that since the basis of the judgment, in respect of conviction in absentia under Section

31A of the NAO, 1999, has not been removed, pointing out any defect in the same by the legislature, therefore, the legislature, by means of an enactment, could not give a judgment that conviction in absentia was void *ab initio*, rather for the purpose of declaring such judgments void *ab initio*, it was incumbent upon the legislature to have repealed Section 31A of the NAO, 1999 because on the basis of the same the absconder accused were convicted. More so, to nullify the effect of a judgment, by means of a legislative enactment, we have to examine the nature of each judgment separately and individually but in instance case *omni bus* type order has been passed, declaring all the judgments recorded under Section 31A of the NAO, 1999 as void *ab initio*, without pointing out any defect in the same. Under the civil administration of justice, plethora of case law is available on the point that how an effect of a judgment can be nullified or neutralized, particularly the judgment in which, on the basis of existing laws, the Courts have come to the conclusion that the tax was not recoverable but the Government by issuing a legislation, with retrospective effect, has removed the defect in the law, thereby nullified the effect of the judgment, as a result whereof the Government continued to effect the recovery of tax. This is in respect of the civil matters, but in the criminal administration of justice we have not succeeded

in laying hand on such identical principles, applied in civil cases, on the point, therefore, we have to rely upon **Treaties on the Constitutional Limitation** by Thomas M. Cooley, wherein it has been held as follows:-

> "If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it not according to the judicial, but according to the legislative judgment. But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is the best, most decorous and suitable that could have been adopted or not.
>
> If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry."

78. However, in respect of criminal cases, this issue has to be approached differently than the matters relating to civil disputes, payment of taxes, etc. The legislative authority,

ordinarily is not required to enter into the domain of judiciary. It has been noted, time and again, that under the scheme of the Constitution, the judiciary has an independent role, amongst three organs of the State, as it has been held in **Mahmood Khan Achakzai's case** (PLD 1997 SC 426), **Mehram Ali's case** (PLD 1998 SC 1445), **Liaquat Hussain's case** (PLD 1999 SC 504) and **Syed Zafar Ali Shah's case** (PLD 2000 SC 869). Relevant extracts from the last mentioned judgment are reproduced hereinbelow for convenience:-

> "210. The independence of Judiciary is a basic principle of the constitutional system of governance in Pakistan. The Constitution of Pakistan contains specific and categorical provisions for the independence of Judiciary. The Preamble and Article 2A state that "the independence of Judiciary shall be fully secured"; and with a view to achieve this objective, Article 175 provides that "the Judiciary shall be separated progressively from the executive". The rulings of the Supreme Court in the cases of Government of Sindh v. Sharaf Faridi (PLD 1994 SC 105, Al-Jehad Trust (supra) and Malik Asad Ali v. Federation of Pakistan (PLD 1998 SC 161), indeed, clarified the constitutional provisions and thereby further strengthened the principle of the independence of Judiciary, by providing for the separation of Judiciary from the executive, clarifying the qualifications for appointment of Judges of the High Courts, prescribing the procedure and the time frame for appointment of Judges, appointment of Chief Justices and the transfer of a Judge from a High Court to

the Federal Shariat Court. Furthermore, the Supreme Court judgments in the cases of Mehram Ali and Liaquat Hussain (supra) are also in line with the above rulings, in as much as, they elaborated and reiterated the principle of judicial independence and the separation of Judiciary from the executive.

211. In a system of constitutional governance, guaranteeing Fundamental Rights, and based on principle of trichotomy of powers, such as ours, the Judiciary plays a crucial role of interpreting and applying the law and adjudicating upon disputes arising among governments or between State and citizens or citizens' inter se. The Judiciary is entrusted with the responsibility for enforcement of Fundamental Rights. This calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society.

212. The Constitution makes it the exclusive power/ responsibility of the Judiciary to ensure the sustenance of system of "separation of powers" based on checks and balances. This is a legal obligation assigned to the Judiciary. It is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals. To do so, the Judiciary has to be properly organized and effective and efficient enough to quickly address and resolve public claims and grievances; and also has to be strong and independent enough to dispense justice fairly and impartially. It is such an efficient and independent Judiciary which can foster an appropriate legal and judicial environment where there is peace and security in the society, safety of life, protection of property and guarantee of essential

> human rights and fundamental freedoms for all individuals and groups, irrespective of any distinction or discrimination on the basis of cast; creed, colour, culture, gender or place of origin, etc. It is indeed such a legal and judicial environment, which is conducive to economic growth and social development."

The above principle has been reiterated in **Sindh High Court Bar Association's case** (PLD 2009 SC 879), with approval.

79. Undoubtedly, the legislative authority has to perform those functions, which have been recognized by the Constitution. There is no such provision on the basis of which a judgment can be annulled, except in civil cases, that too, subject to following the principles laid down hereinabove. As far as matters relating to criminal administration of justice are concerned, where a judgment has been announced on the basis of law, the legislative authority cannot annul such judgment without pointing out any flaw in the law, which is the basis of such a judgment; as in the instant case, no amendment has been made in the original text of Section 31A of the NAO, 1999, therefore, it would lead us to the conclusion that the judgment pronounced under the law, by a Court of competent jurisdiction, is a judgment which has been pronounced legally, according to the mandate, conferred upon the Court and such judgment or order cannot be annulled by means of

an enactment. It is well settled principle of law that upon feeling aggrieved by any judgment pronounced in the criminal administration of justice, the aggrieved person has been provided with the remedies to invoke the jurisdiction of the higher Courts, within the hierarchy. Similarly, in the case in hand, if a person is aggrieved by an order of conviction/sentence recorded against him under Section 31A of the NAO, 1999, he has remedy under Section 32 of the NAO, 1999 to file an appeal before the High Court.

80. As it has been noted hereinabove that if the legislative authority is not aggrieved, in any manner, by the judgment pronounced by the Courts discharging its functions under Section 31A of the NAO, 1999, the said judgment could only be set aside, varied, suspended as per the procedure laid down in the NAO, 1999 and not by enforcing or adopting legislative measures. In this behalf, this Court, in **Abdul Kabir v. State** (PLD 1990 SC 823), has highlighted this aspect, in the following manner:-

> "……………… A conviction is complete as soon as the person charged has been found guilty by a Court of competent jurisdiction. During the pendency of an appeal, appellate Court may suspend the sentence under section 426, Cr.P.C. So execution of sentence of petitioner is suspended and not his conviction which remains operative till it is set aside by the higher

> appellate Courts. Pendency of the appeal for decision does not ipso facto mean that the conviction is wiped out. The appellate Court has no authority under section 426 to suspend the conviction. Conviction and sentence connote two different terms. Conviction means proving or finding guilty. Sentence is punishment awarded to a person convicted in criminal trial. Conviction is followed by sentence. It cannot be accepted as principle of law that till matter is finally disposed of by Supreme Court against convicted person, the conviction would be considered as held in abeyance. This interpretation is not in consonance with the spirit of law and against logical coherence. The suspension of sentence is only a concession to an accused under section 426, Cr.P.C. but it does not mean that the conviction is erased. Therefore, in view of the fourth proviso, the third proviso to section 497(1), Cr.P.C. is not attracted to the case of the petitioner."

In the case in hand, without any reasonable justification, both, the conviction and the sentence, have been declared void, by adding clause (aa) in Section 31A of the NAO, 1999, which definitely is against the norms and the principles of justice.

81. The legislature is competent to legislate but without encroaching upon the jurisdiction of the judiciary. If, it is presumed that the insertion of clause (aa) in Section 31A of the NAO, 1999, by means of Section 6 of the NRO, 2007, is constitutionally valid even then it would be tantamount to

allow the legislature to pronounce a judicial verdict against an order or judgment of a competent Court of law, declaring the same to be void *ab initio*. Therefore, following the doctrine of trichotomy of powers, the action of the legislative authority, whereby clause (aa) has been inserted in Section 31A of the NAO, 1999, by means of the NRO, 2007, would be considered to be a step to substitute the judicial forum with an executive authority. Thus, it would not be sustainable being contrary to the principle of independence of judiciary, as mentioned in Article 2A of the Constitution, which provides that independence of judiciary shall be fully secured read with Article 175 of the Constitution, which lays down a scheme for the establishment of the Courts, including the superior Courts and such other Courts as may be established by law. In the case in hand, except an appeal under Section 32 of the NAO, 1999 to the High Court of the Province, no other remedy is available to a convict against his conviction/sentence, to get it set aside. For convenience, Section 32 of the NAO, 1999 is reproduced hereinbelow:-

> **32. Appeal [and revision]:**
>
> (a) Any person convicted or the Prosecutor General Accountability, if so directed by Chairman NAB, aggrieved by the final judgement and order of the Court under this Ordinance may, within ten days of the final judgement and order of the Court prefer an appeal to the High Court of the Province where the Court is situated:

> Provided that no appeal shall lie against any interlocutory order of the Court.
>
> (b) All Appeals against the final judgement and Order filed before the High Court will be heard by a Bench of not less than two judges constituted by the Chief Justice of the High Court and shall be finally disposed of within thirty days of the filing of the Appeal.
>
> (c) No revision shall lie against any interlocutory order of the Court.

Thus, no other forum including the legislature is empowered to declare an order or judgment, whereby conviction has been recorded under Section 31A of the NAO, 1999, to be void *ab initio* except in civil cases pertaining to the tax matters, etc., as discussed above. As far as Articles 2A and 175 of the Constitution are concerned, they furnish guarantee for securing the independence of judiciary. This is not the only case in which we are confronted with such situation. Right from the case of **Government of Sindh v. Sharaf Faridi** (PLD 1994 SC 105) to **Mehram Ali's case** (PLD 1998 SC 1445), followed by in **Liaquat Hussain's case** (PLD 1999 SC 504), this Court has always interpreted Article 175 of the Constitution read with one of the items of the Objective Resolution, which has been enshrined in Article 2A of the Constitution, guaranteeing independence of judiciary.

The observations made above are not in derogation to the powers of the Parliament. There may indeed be cases in which Parliament may, by appropriate

legislation, and by manifestation of appropriate intent and use of language, be competent to nullify the effect of a judgment in the given circumstances of the case. This, however, is not such a case as an unspecified number of convictions, on differing facts and evidence, are sought to be set aside in one swipe. This is going beyond legislative competence and Parliament itself wisely decided not to intervene to make permanent a temporary law (Ordinance) by enacting as an Act of Parliament. We are only endorsing the will of the elected representatives in following their intent.

82. It may also be noted that Article 203 of the Constitution is also another important provision of the Constitution which provides that each High Court shall supervise and control all Courts subordinate to it. In this context following para from the **Mehram Ali's case** (PLD 1998 SC 1445), being advantageous is reproduced hereinbelow:-

> "11. From the above case-law the following legal position obtaining in Pakistan emerges:-
>
> (i) That Articles 175, 202 and 203 of the Constitution provide a framework of Judiciary i.e. the Supreme Court, a High Court for each Province and such other Courts as may be established by law.
>
> (ii) That the words "such other Courts as may be established by law" employed in clause (1) of Article 175 of the Constitution are relatable to the

subordinate Courts referred to in Article 203 thereof.

(iii) That our Constitution recognizes only such specific Tribunal to share judicial powers with the above Courts, which have been specifically provided by the Constitution itself Federal Shariat Court (Chapter 3-A of the Constitution), Tribunals under Article 212, Election Tribunals (Article 225). It must follow as a corollary that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution.

(iv) That in view of Article 203 of the Constitution read with Article 175 thereof the supervision and control over the subordinate judiciary vest in High Courts, which is exclusive in nature, comprehensive in extent and effective in operation.

(v) That the hallmark of our Constitution is that it envisages separation of the Judiciary from the Executive (which is founded on the Islamic Judicial System) in order to ensure independence of Judiciary and, therefore, any Court or Tribunal which is not subject to judicial review and administrative control of the High Court and/or the Supreme Court does not fit in within the judicial framework of the Constitution.

(vi) That the right of "access to justice to all" is a fundamental right, which right cannot be exercised in the absence of an independent judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. The Courts/Tribunals which are manned and run by executive authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution can hardly meet the mandatory requirement of the Constitution.

(vii) That the independence of judiciary is inextricably linked and connected with the process of appointment of Judges and the security of their tenure and other terms and conditions."

83. It is to be borne in mind that as per the dictum, laid down hereinabove, the intervention by the executive, contrary to the principles of independence of judiciary, has been declared unconstitutional. Reference in this behalf, if needed, may be made to short order in **Mehram Ali's case** (PLD 1998 SC 1445) dated 15th May 1998, which is reproduced hereinbelow for ready reference:-

> "For the reasons to be recorded later on, we dispose of the above cases as under:-
>
> > (i) Section 5(2)(i) is held to be invalid to the extent it authorises the officer of Police, armed forces and civil armed forces charged with the duty of preventing terrorism, to open fire or order for opening of fire against person who in his opinion in all probability is likely to commit a terrorist act or any scheduled offence, without being fired upon;
> >
> > (ii) section 10 of the Anti-Terrorism Act, 1997, hereinafter referred to as the Act, in its present form is not valid; the same requires to be suitably amended as to provide that before entering upon premises which is suspected to have material or a recording in contravention of section 8 of the Act, the concerned officer of Police, armed forces or civil armed forces shall record in writing his reasons for such belief and serve on the person or premises concerned a copy of such reasons before conducting such search;
> >
> > (iii) section 19(10)(b) of the Act, which provides for trial of an accused in absentia on account of his misbehaviour in the Court, is violative of Article 10 of the Constitution and, therefore, is declared as invalid;
> >
> > (iv) sections 24, 25, 27, 28, 30 and 37 of the Act are also not valid in their present form as they militate against the concept of independence of judiciary and Articles 175 and 203 of the Constitution. They need to be amended as to vest the appellate power in a High Court instead of

> Appellate Tribunal and to use the words "High Court" in place of "Appellate Tribunal";
>
> (v) section 26 of the Act is not valid in its present form as it makes admissible the confession recorded by a police officer not below the rank of a Deputy Superintendent of Police as it is violative of Articles 13(b) and 25 of the Constitution and that the same requires to be suitably amended by substituting the words 'by a police officer not below the rank of a Deputy Superintendent of Police' by the words 'Judicial Magistrate';
>
> (vi) that the offences mentioned in the Schedule should have nexus with the objects mentioned in sections 6, 7 and 8 of the Act;
>
> (vii) section 35 of the Act in its present form is not valid as it militates against the concept of the independence of judiciary and is also violative of Articles 175 and 203 of the Constitution and, therefore, it needs to be suitably amended inasmuch as the power to frame rules is to be vested in the High Court to be notified by the Government;
>
> (viii) section 14 of the Act requires to be amended as to provide security of the tenure of the Judges of the Special Courts in consonance with the concept of independence of judiciary."

Subsequent thereto, Article 175 of the Constitution has been interpreted in **Liaquat Hussain's case** (PLD 1999 SC 504). As per the facts of this case, petitioner Liaquat Hussain challenged the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 promulgated on 20th November, 1998 whereby the civilians were to be tried by the Military Courts for the civil offences, mentioned, inter alia, in the schedule of the Ordinance, on various grounds concerning the jurisdiction of the Courts to discharge judicial

functions. The Court, while taking into consideration the principles highlighted in **Mehram Ali's case** (PLD 1998 SC 1445) observed as follows:-

> "15. The above-quoted extract from the above judgment in the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445), indicates that it has been inter alia held that our Constitution recognises only such specific Tribunals to share judicial power with the Courts referred to in Articles 175 and 203, which have been specifically provided by the Constitution itself, like Federal Shariat Court (Chapter 3-A of the Constitution), Tribunals under Article 212, Election Tribunals (Article 225) and that any Court or Tribunal which is not founded on any of the Articles of the Constitution cannot lawfully share judicial power with the Courts referred to in Articles 175 and 203 of the Constitution. Admittedly the Military Courts to be convened under section 3 of the impugned Ordinance do not fall within the category of the Courts referred to in the above Articles. This was even so contended by the learned Attorney-General as reflected from his arguments reproduced hereinabove in para. 11. Neither the above Military Courts nor the personnel to man the same qualify the other requirements spelled out in the case of Mehram Ali reproduced hereinabove in para.14.
>
> The question which needs examination is, as to whether by virtue of invocation of Article 245 of the Constitution for calling the Armed Forces to act in aid of civil power, the impugned Ordinance could have been promulgated for convening Military Courts in terms of section 3 thereof. This will, inter alia involve

the determination as to the meaning and import of the expression "The Armed Forces shall.........and, subject to law, act in aid of civil power when called upon to do so" used in clause (1) of Article 245 of the Constitution. I may, at this stage, reproduce the above Article 245 of the Constitution, which reads as follows:

> "245. Functions of Armed Forces.-(1) The Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.
>
> (2) The validity of any direction issued by the Federal Government under clause (1), shall not be called in question in any Court.
>
> (3) A High Court shall not exercise any jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article 245:
>
> Provided that this clause shall not be deemed to affect the jurisdiction of the High Court in respect of any proceeding pending immediately before the day on which the Armed Forces start acting in aid of civil power.
>
> (4) Any proceeding in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil powers and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting."

It may be highlighted that the original Article 245 comprised what is now clause (1) thereof. Clauses (2) to (4) were added by the Constitution (Seventh Amendment) Act, 1977 (Act 23 of 1977) with effect from 21st April, 1977.

It may be stated that the above-quoted clause (1) imposes two Constitutional duties on the Armed Forces

to be performed upon the direction of the Federal Government:

(i) To defend Pakistan against external aggression or threat of war; and

(ii) subject to law, act in aid of civil power when called upon to do so.

Whereas clause (2) thereof lays down that the validity of any direction issued by the Federal Government under clause (1) shall not be called in question in any Court.

It may further be noticed that clause (3) thereof provides that a High Court shall not exercise any jurisdiction under Article 199 in relation to any area in which the Armed Forces of Pakistan are, for the time being, acting in aid of civil power in pursuance of Article, but subject to the proviso that the jurisdiction of the High Court is not to be affected in respect of the proceedings pending immediately before the day on which the Armed Forces start acting in aid of civil power.

It may also be pointed out that clause (4) thereof lays down that any proceedings in relation to an area referred to in clause (3) instituted on or after the day the Armed Forces start acting in aid of civil powers and pending in any High Court shall remain suspended for the period during which the Armed Forces are so acting."

84. It is worth mentioning that in the above referred case, Military Courts were established to try the civilians to meet the challenge of terrorism, inter alia, for one of the reasons that the cases of terrorists are not being disposed of

expeditiously. This Court declared that the trial of the civilians under the impugned Ordinance, so far as it laid down the establishment of the Military Courts, was unconstitutional. Contents of the operative para from the short order dated 17th February, 1999 are reproduced hereinbelow:-

> "After hearing the learned counsel for the petitioners, the petitioners in person, the learned Attorney-General for Pakistan and the learned Advocate-General, Sindh, for the reasons to be recorded later, we are of the view that Ordinance No.Xll of 1998 as amended up to date in so far as it allows the establishment of Military Courts for trial of civilians charged with the offences mentioned in section 6 and the Schedule to the above Ordinance is unconstitutional, without lawful authority and of no legal effect and that the cases in which sentences have already been awarded but the same have not yet been executed shall stand set aside and the cases stand transferred to the Anti-Terrorist Courts already in existence or which may hereinafter be created in terms of the guidelines provided hereunder for disposal in accordance with the law. The evidence already recorded in the above cases and the pending cases shall be read as evidence in the cases provided that it shall not affect any of the powers of the Presiding Officer in this regard as is available under the law. The above declaration will not affect the sentences and punishments already awarded and executed and the cases will be treated as past and closed transactions."

To ensure expeditious disposal of the case, the guidelines have also been provided under para 3, which reads as under:-

> "3. Since we are seized of these petitions in exercise of our Constitutional jurisdiction under Article 184(3) of the Constitution, we lay down the following guidelines which may contribute towards the achievement of the above objective:
>
> (i) Cases relating to terrorism be entrusted to the Special Courts already established or which may be established under the Anti-Terrorism Act, 1997 (hereinafter referred to as A.T.A.) or under any law in terms of the judgment of this Court in the case of Mehram Ali and others v. Federation of Pakistan (PLD 1998 SC 1445);
>
> (ii) One case be assigned at a time to a Special Court and till judgment is announced in such case, no other case be entrusted to it:
>
> (iii) The concerned Special Court should proceed with the case entrusted to it on day to day basis and pronounce judgment within a period of 7 days as already provided in A.T.A. or as may be provided in any other law:
>
> (iv) Challan of a case should be submitted to a Special Court after full preparation and after ensuring that all witnesses will be produced as and when required by the concerned Special Court;
>
> (v) An appeal arising out of an order/judgment of the Special Court shall be decided by the appellate forum within a period of 7 days from the filing of such appeal:
>
> (vi) Any lapse on the part of the Investigating and Prosecuting Agencies shall entail immediate disciplinary action according to the law applicable;
>
> (vii) The Chief Justice of the High Court concerned shall nominate one or more Judges of the High Court for monitoring and ensuring that the cases/appeals are disposed of in terms of these guidelines;

> (viii) That the Chief Justice of Pakistan may nominate one or more Judges of the Supreme Court to monitor the implementation of the above guidelines. The Judge or Judges so nominated will also ensure that if any petition for leave/or appeal with the leave is filed, the same is disposed of without any delay in the Supreme Court;
>
> (ix) That besides invoking aid of the Armed Forces in terms of sections 4 and 5 of the A.T.A., the assistance of the Armed Forces can be pressed into service by virtue of Article 245 of the Constitution at all stages including the security of the Presiding Officer, Advocates and witnesses appearing in the cases, minus the process of judicial adjudication as to the guilt and quantum of sentence, till the execution of the sentence."

Inter alia, mechanism was provided for appointment of monitoring teams by the Chief Justice of the High Court concerned, who were required to nominate one or more judges of the High Court for monitoring and ensuring that the cases/appeals shall be disposed of in terms of these guidelines. However, Chief Justice of Pakistan was also allowed to nominate one or more Judges of the Supreme Court to monitor the implementation of the above guidelines and to ensure that if any petition for leave to appeal or any appeal with the leave is filed, the same is disposed of without any delay in the Supreme Court, etc.

85. Essentially, the above guidelines/directions for expeditious disposal of cases were issued by this Court, in exercise of its powers under Article 187 of the Constitution, which provides that Supreme Court shall have power to

issue such directions, orders or decrees, as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document. This Article of the Constitution has been interpreted in so many cases. However, reference is being made only to **Sabir Shah's case** (PLD 1995 SC 66). Relevant para therefrom is reproduced hereinbelow for convenience:-

> "10. The Supreme Court is the apex Court. It is the highest and the ultimate Court under the Constitution. In my view the inherent and plenary power of this Court which is vested in it by virtue of being the ultimate Court, it has the power to do complete justice without in any manner infringing or violating any provision of law. While doing complete justice this Court would not cross the frontiers of the Constitution and law. The term "complete justice" is not capable of definition with exactitude. It is a term covering variety of cases and reliefs which this Court can mould and grant depending upon the facts and circumstances of the case. While doing complete justice formalities and technicalities should not fetter its power. It can grant ancillary relief, mould the relief within its jurisdiction depending on the facts and circumstances of the case, take additional evidence and in appropriate cases even subsequent events may be taken into consideration. Ronald Rotunda in his book "Treatise on Constitutional Case Substance" (Second-Edition), Volume 2 at page 90 has stated that "The Supreme Court is an essence of a continual Constitutional convention". The jurisdiction

and the power conferred on the Supreme Court does empower it to do complete justice by looking to the facts, circumstances and the law governing a particular case. Article 187 does not confer any jurisdiction. It recognises inherent power of an apex Court to do complete justice and issue orders and directions to achieve that end. Inherent justification is vested in the High Court and subordinate Courts while dealing with civil and criminal cases by virtue of provisions of law. The inherent jurisdiction of this Court to do complete justice cannot be curtailed by law as it may adversely affect the independence of judiciary and the fundamental right of person to have free access to the Court for achieving complete justice. This enunciation may evoke a controversy that as Article 175(2) restricts Article 187 it will create conflict between the two. There is no conflict and both the Articles can be read together. The conflict in the provisions of the Constitution should not be assumed and if apparently there seems to be any, it has to be interpreted in a harmonious manner by which both the provisions may co-exist. One provision of the Constitution cannot be struck down being in conflict with the other provision of the Constitution. They have to live together, exist together and operate together. Therefore, while interpreting jurisdiction and power of the superior Courts one should look to the fundamental rights conferred and the duty cast upon them under the Constitution. A provision like Article 187 cannot be read in isolation but has to be interpreted and read harmoniously with other provisions of the Constitution. In my humble view this Court while hearing appeal under a statute has the jurisdiction and power to decide the question of vires of the statute

> under which the appeal has arisen and can even invoke Article 184(3) in appropriate cases."

86. This Court, while hearing the petition under Article 184(3) of the Constitution, enjoys ample powers under Article 8 of the Constitution, to declare any law inconsistent with the fundamental rights conferred by the Constitution or to examine the constitutionality of such law, on the touchstone of any other provision of the Constitution. While exercising its constitutional powers, conferred upon this Court under various provisions of the Constitution, including Articles 184, 185, 187(1) and 212(3), it also enjoys enormous powers of judicial review. Besides, it is well settled by the time that the Apex Court had always been vested with inherent powers to regulate its own authority of judicial review, inasmuch as in **Zafar Ali Shah's case** (PLD 2000 SC 869) this Court has elaborately discussed the powers of judicial review, in the following terms:-

> "216. Judicial power means that the Superior Courts can strike down a law on the touchstone of the Constitution, as this Court did in Mehram Ali's and Sh. Liaquat Hussain's cases. The nature of judicial power and its relationship to jurisdiction are all allied concepts and the same cannot be taken away. The concept of judicial review was laid down in the United States by Chief Justice John Marshal in the case William Marbury v. James Medison (2 Law Ed. 60), ruling that it was

inherent in the nature of judicial power that the Constitution is regarded as the supreme law and any law or act contrary to it or infringing its provisions is to be struck down by the Court in that the duty and function of the Court is to enforce the Constitution. The concept of judicial review did not exist in England because the supreme law in England was that the Queen-in-Parliament can do anything and that once an Act of Parliament has been passed, the Courts were to follow it. The Founding Fathers of the United States Constitution, however, deviated from it and in doing so followed the view expounded by Montesquieu in his treatise "Spirit of Law", which enumerates the concept of Separation of Powers: the judicial, the legislative and the executive powers. Montesquieu based his opinion on the practice but not the law of England, in that, in practice there was Separation of Powers in England but not in theory. Unlike the Constitution of Pakistan, the Constitution of United States does not confer any power on the Supreme Court to strike down laws but the Supreme Court of United States ruled so in the case of William Marbury v. James Medison (supra).

217. ……………………………………………………………

218. ……………………………………………………………

219. While going through the case-law of Great Britain, we came across the view expounded by Chief Justice Coke, whose writings are regarded as an important source of Common Law, to the effect that the Bench should be independent of the Crown and arbiter of the Constitution to decide all disputed questions whereas Bacon took the view that the Court is under the King but then following the Plato's theory he (Bacon) wanted the King to be a philosopher. The evolution of judicial power is co-terminus with the evolution of civilization and this is so because judicial power has to check the arbitrary exercise of powers by any organ or authority. ……..…………………………………………………………..”

Similarly in **Wattan Party** (PLD 2006 SC 697), the power of judicial review of this Court has been discussed in the following terms:-

> "47. Article 8 of the Constitution grants the power of judicial review of legislation according to which this Court is empowered to declare a law void if it is inconsistent with or in derogation to the fundamental rights. However, at the same time this Court is empowered to declare any legislation contrary to the provisions of Constitution under some of the identical provisions of the Constitution as under Article 143 of the Constitution on having noticed inconsistencies between the Federal and Provincial laws the Court is empowered to declare that which out of the two laws is in accordance with the Constitution. Besides it is an accepted principle of the Constitutional jurisprudence that a Constitution being a basic document is always treated to be higher than other statutes and whenever a document in the shape of law given by the Parliament or other competent authority is in conflict with the Constitution or is inconsistent then to that extent the same is liable to be declared un-Constitutional. This is not for the first time that a law like Ordinance 2000 has come for examination before the Court as in the past a number of laws were examined and when found against the Constitution the same were declared void and of no legal effect. Reference may be made to the case of **Syed Zafar Ali Shah v. Gen. Pervez Musharaf, Chief Executive of Pakistan** (PLD 2000 SC 869) wherein it was held that judicial power means that the superior courts can strike down a law on the touchstone of the Constitution. The nature of judicial power and its

> relation to jurisdiction are all allied concepts and the same cannot be taken away. It is inherent in the nature of judicial power that the Constitution is regarded as a supreme law and any law contrary to it or its provisions is to be struck down by the Court, as the duty and the function of the Court is to enforce the Constitution. Prior to the case of Zafar Ali Shah, this Court had examined different laws and declared that provisions of some of them were contrary to the provisions of the Constitution. Reference to the cases of **Mehram Ali** ibid, **Sh. Liaquat Hussain v. Federation of Pakistan** (PLD 1999 SC 504), **Khan Asfand Yar Wali v. Federation of Pakistan** (PLD 2001 SC 607), etc is pertinent. Keeping in view the principles defining the powers of judicial review of this Court to examine a law at the touchstone of the Constitution, we have considered the arguments put forward by learned counsel for the petitioner and have also minutely gone through the provisions/ sections of the Ordinance 2000 referred to by the learned counsel in his arguments to ascertain as to whether any of them negates the provisions of the Constitution."

87. In exercise of judicial powers, as it has been discussed in above referred judgments, while examining the vires of a statute, the powers of this Court are limited to examine the legislative competence or to such other limitations as are in the Constitution and while declaring a legislative instrument as void, it is not because the judicial powers are superior in dignity to the legislative powers but because it enforces the Constitution as a paramount law or

where the legislative instrument is in conflict with the Constitutional provisions so as to give effect to it or where the legislature fails to keep it, within its constitutional limitations. [**Fauji Foundation v. Shamimur Rehman** (PLD 1983 SC 457)**]**. There are cases wherein this Court has examined the constitutional provisions challenged therein, as well, but while remaining within its limited sphere, as noted above. Reference may be made to **Wukala Mahaz Barai Tahafaz Dastoor's case** (PLD 1998 SC 1263).

88. Similarly, in the neighbouring country as well, the constitutional provisions have been challenged from time to time. Reference in this behalf may be made to **Smt. Indira Nehru Gandhi's case** (AIR 1975 SC 2299). Brief facts of this case are that the High Court of Allahabad vide judgment dated 12th June, 1975 observed that the appellant (Smt. Indra Nehru Ghandi) held herself out as a candidate from 29th December, 1970 and was guilty of having committed corrupt practice by having obtained the assistance of Gazetted Officers in furtherance of her election prospects; the High Court further found the appellant guilty of corrupt practice committed under Section 123(7) of the Representation of the People Act, 1951, by having obtained the assistance of Yashpal Kapur a Gazetted Officer for the furtherance of her election prospects; the appellant was held to be disqualified

for a period of six years from the date of the order as provided in Section 8(a) of the 1951 Act. Subsequently, the matter was brought under challenge before the Supreme Court in appeal, during the pendency whereof the Constitution (Thirty-ninth Amendment) Act, 1975, was enacted, whereby, apart from other amendments in the Constitution, Article 329A was inserted in the Indian Constitution. Clause (4) of Article 329A, provided that no law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person as is referred to in Clause (1) to either House of Parliament and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect. Consequently, the above noted Thirty-ninth amendment in the Constitution of India was also brought under challenge

before the Supreme Court of India in above noted case. Validity of the legislative judgment, whereby the above referred amendments were made, was the moot question before the Supreme Court including the questions that whether by amending a law, action of judgment can be nullified and whether it is upon the constitutional authority to declare an order or findings to be void and of no effect or whether such declaration can only be made under either any judicial proceedings or on a proceedings before higher Court. The answer to this proposition has been replied in the following paras :-

> "189. Another aspect of part (iv) of Clause (4) relates to the question as to whether it is open to the constituent authority to declare an order and a finding of the High Court to be void and of no effect or whether such a declaration can be made only either in separate judicial proceedings or in proceedings before a higher court.
>
> 190. A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function. Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the legislature to encroach upon the judicial sphere. It has accordingly been held that a legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the legislature to declare the judgment of

the court to be void or not binding (see Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, (1970) 1 SCR 388 (at page 392) = (AIR 1970 SC 192), Janapada Sabha, Chhindwara v. The Central Provinces Syndicate Ltd. (1970) 3 SCR 745 (at page 751) = (AIR 1971 SC 57), Municipal Corporation of the City of Ahmedabad etc. v. New Shorock Spg. & Wvg. Co. Ltd. etc. (1971) 1 SCR 288 = (AIR 1970 SC 1292) and State of Tamil Nadu v. M.Rayappa Gounder (AIR 1971 SC 231).

191. The position as it prevails in the United States, where guarantee of due process of law is in operation, is given on pages 318-19 of Vol. 46 of the American Jurisprudence 2d. as under:

> "The general rule is that the legislature may not destroy, annul, set aside, vacate, reverse, modify, or impair the final judgment of a court of competent jurisdiction, so as to take away private rights which have become vested by the judgment. A statute attempting to do so has been held unconstitutional as an attempt on the part of the legislature to exercise judicial power, and as a violation of the Constitutional guarantee of due process of law. The legislature is not only prohibited from reopening cases previously decided by the courts, but is also forbidden to affect the inherent attributes of a judgment. That the statute is under the guise of an act affecting remedies does not alter the rule. It is worthy of notice, however, that there are cases in which judgments requiring acts to be done in the future may validly be affected by subsequent legislation making illegal that which the judgment found to be legal, or making legal that which the judgment found to be illegal.
>
> 10.- Judgment as to public right.
>
> With respect to legislative interference with a judgment, a distinction has been made between public and private rights under which distinction a statute may be valid even though it renders ineffective a judgment concerning a public right. Even after a public right has been established by

> the judgment of the court, it may be annulled by subsequent legislation.

192. Question arises whether the above limitation imposed upon the legislature about its competence to declare a judgment of the court to be void would also operate upon the constituent authority?

193. View has been canvassed before us that the answer to the above question should be in the negative. Although normally a declaration that the judgment of a court is void can be made either in separate proceedings or in proceedings before the higher court, there is, according to this view, no bar to the constituent authority making a declaration in the Constitutional law that such an order would be void especially when it relates to a matter of public importance like the dispute relating to the election of a person holding the office of Prime Minister. The declaration of the voidness of the High Court judgment is something which can ultimately be traced to part (i). Whether such a declaration should be made by the court or by the constituent authority is more, it is urged, a matter of the mechanics of making the declaration and would not ultimately affect the substance of the matter that the judgment is declared void. According to Article 31B, without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the

contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force. The effect of the above article, it is pointed out, is that even if a statute has been declared to be void on the ground of contravention of fundamental rights by a court of law, the moment that statute is specified by the constituent authority in the Ninth Schedule to the Constitution, it shall be deemed to have got rid of that voidness and the order of the court declaring that statute to be void is rendered to be of no effect. It is not necessary in such an event to make even the slightest change in the statute to rid it of its voidness. The stigma of voidness attaching to the statute because of contravention of fundamental rights found by the Court is deemed to be washed away as soon as the statute is specified by the constituent authority in the Ninth Schedule and the judgment of the Court in this respect is rendered to be inoperative and of no effect. In the case of Don John Douglas Liyange v. The Queen 1967 AC 259 the Judicial Committee struck down as *ultra vires* and void the provisions of the Criminal Law (Special Provisions) Act, 1962 on the ground that they involved the usurpation and infringement by the legislature of the judicial powers inconsistent with the written Constitution of Ceylon. Their Lordships, however, expressly referred on page 287 to the fact that the impugned legislation had not been passed by two-thirds majority in the manner required for an amendment of the Constitution contained in Section 29(4) of the Constitution. It was observed:

> "There was speculation during the argument as to what the position would be if Parliament sought to procure such a result by first amending

> the Constitution by a two-thirds majority. But such a situation does not arise here. In so far as any Act passed without recourse to Section 29(4) of the Constitution purports to usurp or infringe the judicial power it is *ultra vires.* "

The above observations, it is urged, show that the restriction upon the legislature in encroaching upon judicial sphere may not necessarily hold good in the case of constituent authority.

194. The above contention has been controverted by Mr. Shanti Bhushan and he submits that the limitation on the power of the legislature that it cannot declare void a judgment of the Court equally operates upon the constituent authority. It is urged that the constituent authority can only enact a law in general terms, even though it be a Constitutional law. The constituent authority may also, if it so deems proper change the law which is the basis of a decision and make such change with retrospective effect, but it cannot, according to the learned Counsel, declare void the judgment of the Court. Declaration of voidness of a judgment, it is stated, is a judicial act and cannot be taken over by the constituent authority. Although legislatures or the constituent authority can make laws including those for creation of courts, they cannot, according to the submission, exercise judicial functions by assuming the powers of a super court in the same way as the Courts cannot act as a super legislature. It is in my opinion, not necessary to dilate upon this aspect and express a final opinion upon the rival contentions, because of the view I am taking of part (iii) of Clause (4)."

89. As far as sub-Article 4 of Article 329A, providing constitutional protection to the amended law is concerned, the Court, ultimately, held as under:-

> "690. The Parliament, by Clause (4) of Article 329-A, has decided a matter of which the country's Courts were lawfully seized. Neither more nor less. It is true, as contended by the learned Attorney-General and Shri Sen, that retrospective validation is a well known legislative process which has received the recognition of this Court in tax cases, pre-emption cases, tenancy cases and a variety of other matters. In fact, such validation was resorted to by the legislature and upheld by this Court in at least four election cases, the last of them being Kanta Kathuria v. Manak Chand Surana (1970) 2 SCR 835 = (AIR 1970 SC 694). But in all of these cases, what the legislature did was to change the law retrospectively so as to remove the reason of disqualification, leaving it to the Courts to apply the amended law to the decision of the particular case. In the instant case the Parliament has withdrawn the application of all laws whatsoever to the disputed election and has taken upon itself to decide that the election is valid. Clause (5) commands the Supreme Court to dispose of the appeal and the cross-appeal in conformity with the provisions of Clause (4) of Article 329-A, that is in conformity with the "judgment" delivered by the Parliament. The "separation of powers does not mean the equal balance of powers" says Harold Laski, but the exercise by the legislature of what is purely and indubitably a judicial function is impossible to sustain in the context even of our co-operative federalism which contains no rigid

distribution of powers but which provides a system of salutary checks and balances.

90. Likewise, recently the Constitutional Court of Italy examined the constitutionality of Article 1 of law No. 124 of 23rd July 2008 [the provision ordering the suspension of criminal proceedings against the high offices of state]. Brief facts of the said case are that the above said law was promulgated in Italy to provide protection to some of the politicians including the Silvio Berlusconi, the President of the Council of Ministers. Article 1(1) of the said law provided that *"without prejudice to the cases governed by Articles 90 and 96 of the Constitution, any criminal proceedings against individuals which occupy the offices of President of the Republic, President of the Senate of the Republic, President of the Chamber of Deputies and President of the Council of Ministers, shall be suspended from the time when the office or function is taken up until the end of the term in office; the suspension shall also apply to criminal proceedings for conduct prior to taking up the office or function"*. Whereas Sub-Section 7 of the said Article provided that *"the provisions of the Article shall also apply to criminal proceedings in progress, at every stage, state or instance, at the time when the present law enters into force"*. During the course of criminal proceedings, the *Tribunale di Milano,* by referral order of 26th September, 2008 (referral order No. 397 of 2008), raised the

question with regard to the constitutionality of Article 1(1) and (7) of law No. 124 of 23rd July 2008, with reference to Articles 3, 136 and 138 of the Constitution. However, ultimately the matter came up before the Constitutional Court of Italy, when the Court concluded that the procedural suspension provided for, under the contested provision, is aimed essentially at protecting the functions of the members and Presidents of certain constitutional organs and, at the same time, creates a clear difference in treatment before the courts. Therefore, it was held that both of the prerequisites for constitutional privileges are satisfied, which means that, that matter is not susceptible to regulation through ordinary legislation. It was further held that in particular, the contested legislation confers on the holders of four high institutional offices an exceptional and innovative protected status, which cannot be inferred from the constitutional provisions on privileges and which therefore is not covered under constitutional law, therefore, it does not constitute a source of law of an appropriate level to make provision over this matter. Thus the Court, eventually, declared that Article 1 of law No. 124 of 2008 is unconstitutional due to violation of the combined provisions of Articles 3 and 138 of the Constitution, in relation to the arrangements governing

privileges contained in Articles 68, 90 and 96 of the Constitution.

91. Thus, in view of above discussion, it is held that amendment in Section 31A of the NAO, 1999 by inserting clause (aa) in it, by means of Section 6 of the NRO, 2007 is unconstitutional and void *ab initio*.

92. Section 7 of the NRO, 2007 further added Section 33F in the NAO, 1999, by means of which, following categories of the persons have benefitted:

i) The persons, against whom investigation is pending but no trial has commenced; the investigation has come to an end.

ii) The persons, against whom the trial is pending but no conviction/ acquittal has been recorded; the trial comes to an immediate end.

iii) The persons, who have been convicted but have merely filed an appeal or some proceedings, against that conviction before the High Court or the Supreme Court and whether or not such conviction/sentence has been suspended, before the promulgation of the NRO, 2007; everything stands terminated and withdrawn.

iv) The persons, who have been acquitted and against their acquittal an appeal is pending; they also stand absolved.

v) The persons, against whom, request for mutual legal assistance and civil party to proceedings, have been initiated by the Federal Government; that stand withdrawn or terminated.

vi) 'holders of public office', whose cases have been withdrawn or terminated, shall also not be liable to any action in future, as well, under the NRO, 2007, for acts having been done in good faith before the cut off date.

93. It may be noted that Section 33E of the NAO, 1999 provides that any fine or other sum due, or as determined to be due by a Court, shall be recoverable as arrears of land revenue. Apparently, Section 33F of the NAO, 1999, inserted through Section 7 of the NRO, 2007 has provided a mechanism for **withdrawal** and **termination** of **prolonged pending proceedings**, initiated prior to 12th October, 1999. For ready reference, Section 7 of the NRO, 2007 is reproduced hereinbelow:-

> "7. Insertion of new section, Ordinance, XVIII of 1999. In the said Ordinance, after section 33E, the following new section shall be inserted, namely:
>
> > "33F. Withdrawal and termination of prolonged pending proceedings initiated prior to 12th October, 1999.
> >
> > (1) Notwithstanding anything contained in this Ordinance or any other law for the time being in force, proceedings under investigation or pending in any court including a High Court and the Supreme Court of Pakistan initiated by or on a reference by the National Accountability Bureau

> inside or outside Pakistan, including proceedings continued under section 33, requests for mutual assistance and civil party to proceedings initiated by the Federal Government before the 12th day of October, 1999 against holders of public office stand withdrawn and terminated with immediate effect and such holders of public office shall also not be liable to any action in future as well under this Ordinance for acts having been done in good faith before the said date;
>
> Provided that those proceedings shall not be withdrawn and terminated which relate to cases registered in connection with the cooperative societies and other financial and investment companies or in which no appeal, revision or constitutional petition has been filed against final judgment and order of the Court or in which an appellate or revisional order or an order in constitutional petition has become final or in which voluntary return or plea bargain has been accepted by the Chairman, National Accountability Bureau under section 25 or recommendations of the Conciliation Committee have been accepted by the Governor, State bank of Pakistan under section 25A.
>
> (2) No action or claim by way of suit, prosecution, complaint or other civil or criminal proceeding shall lie against the Federal, Provincial or Local Government, the National Accountability Bureau or any of their officers and functionaries for any act or thing done or intended to be done in good faith pursuant to the withdrawal and termination of cases under sub-section (1) unless they have deliberately misused authority in violation of law."

The above provision seems to be open ended, as on account of *non obstante* clause, it directs that notwithstanding anything contained in this Ordinance or any other law for the time being in force, proceedings under investigation or pending in any Court, including a High Court and the Supreme Court of Pakistan, initiated by or on a reference by

the National Accountability Bureau, **inside or outside Pakistan**, including proceedings continued under Section 33, requests for mutual assistance and civil party to proceedings, initiated by the Federal Government, before the 12th October, 1999, **against holders of public offices, stand withdrawn and terminated with immediate effect** and such 'holders of public office' shall also not be liable to any action in future, as well, under this Ordinance, for acts having been done in good faith, before the said date. This is for the first time that in the newly inserted Section 33F of the NAO, 1999 by means of Section 7 of the NRO, 2007, the connotation 'holders of public office' has been used. The definition of the 'holders of public office' has been provided in Section 5(m) of the NAO, 1999, which reads as follows:-

> 5(m). "Holder of Public Office" means a person who :-
>
> (i) has been the President of Pakistan or the Governor of a Province.
>
> (ii) is, or has been the Prime Minister, Chairman Senate, Speaker of the National Assembly, Deputy Speaker National Assembly, Federal Minister, Minister of State, Attorney General and other Law Officer appointed under the Central Law Officers Ordinance, 1970 (VII of 1970), Advisor to the Prime Minister, Special Assistant to the Prime Minister, Federal Parliamentary Secretary, Member of Parliament, Auditor General, Political Secretary, Consultant to the Prime Minister and holds or has held a post or office with the rank or status of a Federal Minister or Minister of State;
>
> (iii) is, or has been, the Chief Minister, Speaker

Provincial Assembly, Deputy Speaker Provincial Assembly, Provincial Minister, Advisor to the Chief Minister, Special Assistant to the Chief Minister, Provincial Parliamentary Secretary, Member of the Provincial Assembly, Advocate General including Additional Advocate General and Assistant Advocate General, Political Secretary, Consultant to the Chief Minister and who holds or has held a post or office with the rank or status of a Provincial Minister;

(iv) is holding, or has held, an office or post in the service of Pakistan, or any service in connection with the affairs of the Federation, or of a Province, or of a local council constituted under any Federal or Provincial law relating to the constitution of local councils, cooperative societies or in the management of corporations, banks, financial institutions, firms, concerns, undertakings or any other institution or organization established, controlled or administered by or under the Federal Government or a Provincial Government, other than a person who is a member of any of the armed forces of Pakistan, except a person who is, or has been a member of the said forces and is holding, or has held, a post or office in any public corporation, bank, financial institution, undertaking or other organization established, controlled or administered by or under the Federal Government or a Provincial Government or, notwithstanding any thing contained in the Pakistan Army Act, 1952 (XXXIX of 1952), or any other law for the time being in force, a person who is a civilian employee of the armed forces of Pakistan;

(v) has been, the Chairman or Vice Chairman of a zila council, a municipal committee, a municipal corporation or a metropolitan corporation constituted under any Federal or Provincial law relating to local councils; and

"Explanation"- For the purpose of this sub-clause the expressions "Chairman" and "Vice Chairman" shall include "Mayor" and "Deputy Mayor" as the case may be, and the respective councilors therein.

(va) is or has been a District Nazim or Naib Nazim, Tehsil Nazim or Naib Nazim or Union Nazim or

Naib Nazim;

(vi) has served in and retired or resigned from or has been discharged or dismissed from the Armed Forces of Pakistan."

94. It may be noted that NAO, 1999 was promulgated on 16th November, 1999, after military takeover in the country, on 12th October, 1999. Although in its application the NAO, 1999 during the regime of General Pervez Musharraf has been the subject of debate, pro and con, it has not been amended by any succeeding Parliament. In fact, the promulgation of the NAO, 1999 was claimed to have been expedient and necessary to provide for effective measures for the detection, investigation, prosecution and speedy disposal of cases, involving corruption, corrupt practices, misuse or abuse of power or authority, misappropriation of property, taking of kickbacks, commissions and for matters connected and ancillary or incidental thereto. [The underlined words have been added in the preamble vide Ordinance No.CXXXIII of 2002 dated 23rd November 2002]. Similarly, an emergent need was also found for the recovery of outstanding amounts from the persons, who have committed default in the repayment of amounts to Banks, Financial Institutions, Government agencies and other agencies. Likewise, it was also felt that there was a grave and urgent

need for the recovery of State money and other assets from those persons who have misappropriated or removed such money or assets through corruption, corrupt practices and misuse of power or authority. Yet there was another important aspect of the preamble, which was inserted vide Ordinance No. XXXV of 2001 dated 10th August 2001 which speaks that there is an increased international awareness that nations should co-operate in combating corruption and seek, obtain or give mutual legal assistance in matters concerning corruption and for matters connected, ancillary or incidental thereto.

95. It may be noted that the word 'corruption' has been defined by this Court in **Syed Zafar Ali Shah's case** (PLD 2000 SC 869), in the following terms:-

> "233. 'Corruption' is generally defined as the abuse of public office for private gain. In view of the fact that scope of corruption has widened, this definition would include the abuse of all offices of trust. It has diverse meanings and far-reaching effects on society, government and the people. Of late, the culture of corruption and bribe has embedded in our society to the extent that even routine works which should be done without any approach or influence are commonly known to be done only on some such consideration. This bribe culture has plagued the society to the extent that it has become a way of life. In Anatulay VIII (1988) 2 SCC 602 where Abdul Rahman Anatulay, Chief

Minister of Maharashtra was prosecuted for, corruption Sabyasachi Mukharji, J. lamented as follows-.-

> "Values in public life and perspective of values in public life, have undergone serious changes and erosion during the last few decades. What was unheard before is common place today. A new value orientation is being undergone in our life and culture. We are at the threshold of the cross-roads of values. It is for the sovereign people of this country to settle these conflicts yet the Courts have a vital role to play in these matters."

234. .... When corruption permeates in the social, political and financial transactions to such an extent that even proper and honest orders and transactions are suspected to the point of belief being a result of corruption, one is compelled to infer all is not well and corruption has gone deep in the roots. No doubt, this is an age of "corruption eruption", but during the last few years there have been large scale prosecutions of former world leaders in various countries on the charges of corruption and corrupt practices, in some cases leading to convictions, which phenomenon must not be taken lightly and the issue must be addressed adequately and effectively through transparent institutionalized processes."

96. One of the learned counsel appearing for the petitioners argued that the NRO, 2007 is the result of abuse of public office for private gain, therefore, it is like a virus which has infected the body of politics. According to him corruption vitiates like fraud, which vitiates all transactions, therefore, the NRO, 2007 stands vitiated by the effect of

abuse of public office for private gain. He further added that the NRO, 2007 is a document which is *non est*; it is like a still born, which dies in mother's wombs.

97. Thus the theme of the NAO, 1999, as it is evident from its preamble and substantive part, is to deal with the cases of corruption and corrupt practices, strictly to achieve the object spelt out in preamble. The expression "corruption and corrupt practices" has been defined in Section 9 of the NAO, 1999, as under:-

> **9. Corruption and Corrupt Practices**
>
> (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices:-
>
> (i) if he accepts or obtains from any person or offers any gratification directly or indirectly, other than legal remuneration, as a motive or reward such as is specified in section 161 of the Pakistan Penal Code (Act XLV of 1860) for doing or for-bearing to do any official act, or for showing or for-bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person; or
>
> (ii) If he accepts or obtains or offers any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or likely to be, concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with his official functions or from any person whom he knows to be interested in or related to the person so concerned; or

(iii) If he dishonestly or fraudulently misappropriates or otherwise converts for his own use, or for the use of any other person, any property entrusted to him, or under his control, or willfully allows any other person so to do; or

(iv) If he by corrupt, dishonest, or illegal means, obtains or seeks to obtain for himself, or for his spouse and/or dependents or any other person, any property, valuable thing, or pecuniary advantage; or

(v) If he or any of his dependents or benamidars owns, possesses, or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for, or maintains a standard of living beyond that which is commensurate with his source of income; or

(vi) If he misuses his authority so as to gain any benefit or favour for himself or any other person, or render or attempts to render or willfully fails to exercise his authority to prevent the grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority;

(vii) If he has issued any directive, policy, or any SRO (Statutory Regulatory Order) or any other order which grants or attempts to grant any undue concession or benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or associate or a benamidar or any other person; or

(viii) if he commits an offence of willful default; or

(ix) if he commits the offence of cheating as defined in section 415 of the Pakistan Penal Code, 1860 (Act XLV of 1860), and thereby dishonestly induces members of the public at large to deliver any property including money or valuable security to any person; or

(x) if he commits the offence of criminal breach of trust as defined in section 405 of the Pakistan Penal Code, 1860 (Act XLV of 1860) with regard to any property including money or valuable security entrusted to him by members of the public at large;

(xi) if he, in his capacity as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust as provided in section 409 of the Pakistan Penal Code, 1860 (Act XLV of 1860) in respect of property entrusted to him or over which he has dominion;

(xii) if he aids, assists, abets, attempts or acts in conspiracy with a person or a holder of public office accused of an offence as provided in clauses (i) to (xi).]; and

(b) All offences under this Order shall be non-bailable and, notwithstanding anything contained in sections 426, 491, 497, 498 and 561A or any other provision of the Code, or any other law for the time being in force no Court shall have jurisdiction to grant bail to any person accused of any offence under this Order.

(c) If after completing the investigation of an offence against a holder of public office or any other person, the Chairman NAB is satisfied that no prima facie case is made out against him and the case may be closed, the Chairman NAB shall refer the matter to a Court for approval and for the release of the accused, if in custody.]

98. This Court in the case of **Khan Asfandyar Wali v. Federation of Pakistan** (PLD 2001 SC 607), has spelt out a mechanism for the NAB and the Courts thereunder, as under:-

"266. A perusal of the Preamble of the NAB Ordinance shows that it is a composite and an extensive law and its interpretation has to be done in a manner different

from the normal interpretation placed on purely criminal statutes. This law deals with, among others, setting up of the National Accountability Bureau, which is an executive as well as administrative authority and an investigating agency; which deals with several aspects of 'corruption' etc. The NAB does not merely deal with crimes of corruption, it also deals with their investigation and settlement out of Court. Bargain out of Court is now an established method by which things are settled in several developed societies. It was necessary in cases where the criminal is a potential investor and is inter-linked with the economy of the society after he has cleared his liability. There appears to be nothing amiss insofar as it does not oust the jurisdiction of the Accountability Courts to exercise their judicial power in appropriate proceedings. Rather this is in the nature of a facility provided to the accused. There is nothing wrong with the NAB Ordinance providing for a procedure of bargaining.

267. Moreover, the scheme for exploring the possibility of settlement during investigation/inquiry stage by the Chairman NAB cannot be ignored straight away. At the outset, most of the lawyers tend to consider the question of settlement out of court. There is need to focus attention on this significant fact of the matter. The rationale behind the Ordinance is not only to punish those who were found guilty of the charges leveled under the Ordinance but also to facilitate early recovery of the ill-gotten wealth through settlement where practicable. The traditional compromise, settlement, compoundability of offence during the course of proceedings by the Courts after protracted litigation is wasteful. Viewed in this perspective, a

> power has been vested in the Chairman NAB to facilitate early settlement for recovery of dues through 'plea bargaining' where practicable. Lawyers are often interested in settling the disputes of their clients on just, fair and equitable basis. There are different approaches to settlement. Plea bargaining is not desirable in cases opposed to the principles of public policy. Chairman NAB/Governor, State Bank of Pakistan, while involved in plea bargaining negotiations, should avoid using their position and authority for exerting influence and undue pressure on parties to arrive at settlement. However, in the interest of revival of economy and recovery of outstanding dues, any type of alternate resolution like the 'plea bargaining' envisaged under section 25 of the Ordinance should be encouraged. An accused can be persuaded without pressure or threat to agree on a settlement figure subject to the provisions of the Ordinance. Establishing this procedure at the investigation/inquiry stage greatly reduces determination of such disputes by the Court. However, as the plea bargaining/ compromise is in the nature of compounding the offences, the same should be subject to approval of the Accountability Court. Accordingly, section 25 of the impugned Ordinance be suitably amended."

99. The provisions of the NAO, 1999 as well as their interpretation, as noted in the preceding paras, provide high moral authority to the functionaries, to discharge their duties for curbing corruption and corrupt practices, to achieve the object namely, conviction and effecting the recovery of national wealth, even before the trial, keeping in view the

solid mechanism provided under Section 25 of the NAO. As far as its provisions, embedded in Section 21, are concerned, it lays down procedure for international cooperation and request for mutual legal assistance. It reads as follows:-

> **21. International Cooperation - Request for mutual legal assistance:**
> The Chairman NAB or any officer authorized by the Federal Government may request a Foreign State to do any or all of the following acts in accordance with the law of such State:-
>
> (a) have evidence taken, or documents or other articles produced;
>
> (b) obtain and execute search warrants or other lawful instruments authorizing search for things relevant to investigation or proceedings in Pakistan believed to be located in that State, and if found, seize them;
>
> (c) freeze assets, by whatever processes are lawfully available in that State, to the extent to which the assets are believed on reasonable grounds to be situated in that State;
>
> (d) confiscate articles and forfeit assets to the extent to which the articles or assets, as the case may be, are believed to be located in that State;
>
> (e) transfer to Pakistan any such evidence, documents, things, articles, assets or proceeds realized from the disposal of such articles or assets;
>
> (f) transfer in custody to Pakistan a person detained in that State who consents to assist Pakistan in the relevant investigation or proceedings;
>
> (g) Notwithstanding anything contained in the Qanun-e-Shahadat Order 1984 (P.O.10 of 1984) or any other law for the time being in force all evidence, documents or any other material transferred to Pakistan by a Foreign Government shall be receivable as evidence in legal proceedings under this Ordinance; and

> (h) notwithstanding anything to the contrary contained hereinabove, the Chairman NAB may, on such terms and conditions as he deems fit, employ any person or organization, whether in Pakistan or abroad, for detecting, tracing or identifying assets acquired by an accused in connection with an office under this Ordinance, and secreted or hoarded abroad, or for recovery of and repatriation to Pakistan of such assets."

A perusal of above Section indicates that on account of international cooperation, request for mutual legal assistance means, the NAB or any officer, authorized by the Federal Government, has been empowered to make a request to a Foreign State to do any or all things mentioned therein; to freeze assets by whatever processes are lawfully available in that State, to the extent to which the assets are believed, on reasonable grounds, to be situated in that State; and to transfer to Pakistan any such evidence, documents, things, articles, assets or proceeds, realized from the disposal of such articles or assets. As far as, confiscation or realization of the national wealth, situated within the country, is concerned, there is no difficulty for the NAB to deal with it, in accordance with the procedure provided under the NAO, 1999. However, for achieving the object to save the assets outside the country, allegedly belonging to the nation, a mechanism has been provided on the basis of international cooperation.

100. It is to be noted that while making request to the Foreign States for mutual legal assistance, no request for criminal proceedings in such a State can be demanded. However, Courts of the said States may proceed independently for an action, which falls within the definition of their municipal laws, governing criminal actions. Pakistan is not the only country, which has demanded for such mutual legal assistance; there are so many other countries, on whose demand, subject to determination, the wealth of the nation was reverted back to those States. In this behalf reference may be made to the case of **Ferdinand Emmanuel Edralin Marcos,** President of the Philippines. Detailed marshaling of the facts of said case would not serve any purpose, however, the crux of the matter in the form of brief summery is as under:-

> Marcos was elected as President of Philippines in November 1965 and re-elected in 1969. On 21st September 1972 he declared Marshal Law in the country which was lifted on 7th January 1981. He was re-elected as President in 1981 and remained on this position till February 1986, when he was removed through a popular revolt in 1986.
>
> In 1986, on the basis of documents lost by him in the Presidential palace, assets worth US$ 356 millions were discovered in his name in Swiss Banks. The said assets were freezed on the request filed through Swiss Lawyers in February 1986.
>
> On 28th February 1986 the Philippine Presidential Commission on Good Government (PCGG) formed

under the Presidential Order No.1 of 1986 to recover Marcos-linked assets in the Philippines and abroad.

On 24th March 1986 the Swiss Federal Council imposed an unprecedented unilateral and exceptional freeze order on Marcos assets, after it was informed by a Swiss Bank that De Guzman, a Filipino Banker, with power of attorney from Marcos and his wife, had requested for the transfer of assets to an Australian Bank belonging to him, in anticipation of the Philippine Governmental claim. This was done without any mutual legal assistance treaty on criminal matters between Switzerland and Philippines, just on the basis of the Swiss Federal Act on International Mutual Assistance in criminal matters (Act on International Criminal Assistance, IMAC).

On 18th April 1986 the Philippines Government made informal request for continuation of freeze order but the freezing order was rescinded on 23rd April 1986, however, the assets were re-freezed on 20th July 1986, after a formal request, made by the Philippines Government through a diplomatic note, for continuation of freeze order.

In 1989 the Government of Philippines brought Court cases in the US District Courts, California and Hawaii, however, these cases were dropped when the Marcos family agreed to transfer certain assets held in US, to the Philippine government.

On 20th December 1990, Swiss Federal Court (Supreme Court) accepted that, in principle, the frozen assets should be returned to the Philippines and also ordered for transmission of Banking documents pertaining to Marcos's deposits to Philippines government, subject to some conditions.

On 17th December 1991 the PCGG filed civil case in the Filipino Court of Sadiganbayan seeking recovery of Marcos properties and assets just four days prior to the deadline of 21st December 1991.

On 28th December 1993 the government of Philippines entered into 75/25(%) sharing agreement with Marcos family through PCGG which was declared invalid by the Philippines Supreme Court on 9th December 1998.

On 10th December 1997, the Swiss Federal Court (Supreme Court) took decisive steps by issuing decision to transfer US$ 540 million (increased to US$ 658 million with interest) of Marcos, to the custody of Sadiganbayan, under the IMAC. The revised law made it, in principle, essential for the country to which the funds are to be restituted, to prove the illegal origin and the legal ownership of the funds through a legally binding judgment. However, the Republic of Philippines guaranteed that the decision about the seizure or restitution of the assets to the entitled parties would be taken in judicial proceedings, to satisfy the requirement of Article 14 of the International Covenant on Civil and Political Rights 1966 (ICCPR).

In September 2000 Filipino Anti-Corruption Court Sadiganbayan's first division, made, prima facie, decision that the entire US$ 627 million of Marcos funds, repatriated from Switzerland, were to be considered the property of Philippines.

On 15th July 2003, Philippines Supreme Court ruled that the funds transferred from Switzerland are ill-gotten and must, therefore, be handed over to the Philippine Government, confirming Swiss Federal Court's decision concerning the illegitimate origin of the funds. The money was to be used for buying the land for its distribution to poor farmers.

On 5th August 2003 Swiss and Filipino authorities expressed their satisfaction on the said decision and opined that the funds transferred from Switzerland to PNB escrow account, can now be transferred into the care of the government of Philippines, which was ultimately remitted to the Philippine treasury on 4th February 2004.

Afterwards the Federal Supreme Court of Switzerland vide partial decision dated 18th August 2006, freezed the assets of GEI Inc (owned by Marcos/associates) and set a deadline of 31st December 2006 for filing or decision of the Court of first instance about the seizer of said assets, which was provided on 28th December 2006. The beneficiaries/associates of Marcos filed appeals which were dismissed vide order dated 1st June 2007.

It may be noted that on account of above proceedings against Marcos, the money/funds belonging to Philippine Government were returned by the Swiss Courts.

101. Similarly, there is another case, from Nigerian jurisdiction, wherein the Head of the State namely **Sani Abacha,** was found involved in corruption and corrupt practices and proceedings, against him, were initiated for return of his assets from Switzerland to Nigeria and from 1999 to 2009, approximately US$ 1.2 billion, had been returned to the Federal Republic of Nigeria. Brief history of this case is also narrated hereinbelow for reference:-

> Sani Abacha began his career as second lieutenant in the Nigerian Army in 1963, rose through the ranks to the Armed Forces Ruling Council (AFRC) and eventually became head of State. He died on 8th June 1998 suddenly of a heart attack. He was listed as the world's fourth most corrupt leader in recent history by Transparency International in 2004.
>
> General Abdulsalami Abubakar's interim government had delivered a clear message that Abacha had looted huge sums, and it had to be restored. Members of the Abacha family and some of their accomplice 'voluntarily' returned approximately US$ 1 billion to the Federal Government of Nigeria, during that tenure.
>
> Obasanjo's government has implicated the deceased General Abacha and his family in wholesale looting of Nigeria's coffers. According to post-Abacha government sources, some US$ 3 billion in the shape of foreign assets have been traced, in the name of Abacha, his family members, representatives and accomplices.

> In 1999 Nigeria transmitted a request for judicial assistance to Switzerland against Sani Abacha and fourteen other persons, for blocking of their assets, channeled into Switzerland and also disclosing the relevant banking documents. The FOG blocked amount of US$ 83 million in the banks of Geneva and Zurich.
>
> In October 1999 Geneva's judiciary initiated various proceedings against family members and business friends of Abacha including Mohammed Abacha and Atiku Bagudu, on suspicion of money laundering, fraud and taking part in a criminal organisation. In furtherance whereof the accounts already blocked in the judicial assistance proceedings as well as other accounts, traced during the criminal investigation, were blocked. In the course of the proceedings, an amount of US$ 70 million was transferred to the bank of International Settlement, in the year 2000.
>
> In February 2005, the Swiss Federal Court rejected the appeal filed by the Abachas against the repatriation of the most of the funds frozen in Switzerland, totaling about US$ 468 million, approximately, however, US$ 40 million, the remaining frozen until the Abachas were given the opportunity to attempt to demonstrate that they were not of criminal origin.
>
> An additional US$ 700 million were 'voluntarily' returned or forfeited in the context of criminal proceedings initiated in Switzerland, Jersey and Liechtenstein.
>
> From September 1999 to date, approximately US$ 1.2 billion have been repatriated to the Federal Republic of Nigeria (including from Switzerland, Luxembourg, Jersey, Liechtenstein, Belgium and the UK).

102. Apart from above two cases, there is yet another case from UK jurisdiction i.e. High Court of Justice, Queen's Bench Division, in Re: **The Queen on the Application of**

Corner House Research and Campaign Against Arms Trade vs. The Director of The Serious Fraud Office and BAE Systems PLC [(2008) EWHC 714]. The brief summary of the facts is as under:-

> The BAE Systems was under a contract with Saudi Arabia for the purchase of Al-Yamamah aircrafts. In relation to this contract, several allegations of bribery had been made against the BAE. The Serious Fraud Office (SFO) had been appointed to investigate into the matter. In the course of this investigation the BAE was asked to disclose the details of payments to agents and the consultants with respect to the contract of the aircrafts.
>
> In response to this, the solicitors for BAE wrote back to SFO saying that the investigations should be halted; as the continuing investigations would seriously affect the diplomatic relations between the U.K and Saudi Arabia and also that the safety of the British Citizens would be affected. Further, also that the investigations would prevent UK from clinching the largest export contract of Al-Yamamah aircrafts. This however, did not stop the investigations from continuing.
>
> In July 2006, the SFO was about to access the Swiss Bank accounts of BAE. This caused a stir and made the Prince Bandar of Arabia to convey to the then Prime Minister of UK, that if the SFO did not stop looking at the Swiss Bank accounts of BAE, and also cease other investigation, then the contract for the aircrafts would be called off and both intelligence and diplomatic relations between the two countries would be seriously ceased.
>
> This made the government to rethink its policy, and it was agreed among the Prime Minister and other ministers that if the investigation into this continued then the relations between the two countries would be affected and a severe blow would also be dealt on UK's foreign policy objectives in the Middle East. Further, there would be a threat to the internal security of the country.

> In light of the above developments on 14 December 2006 the Director of SFO terminated all investigation proceedings as it was felt that the continued investigation posed a serious threat to the country's National and International security and would also affect the lives of their citizens. It was in this light that an NGO called Corner House Research, applied for a judicial review of the decision to terminate the investigation process.

The Court, apart from other findings, made the following observations:-

> The principle of separation of powers cannot be applied in the cases of executive's decisions affecting foreign policy. The courts can take notice of those cases where the threat involved is not simply against the country's commercial, diplomatic and security interest but also against its legal system.
>
> It is the responsibility of the court to provide protection. Threats to the administration of public justice within a country are the concern primarily of the courts, not the executive.
>
> The rule of law requires that the Director should act in a manner consistent, the well recognized standards, which the courts impose by way of judicial review. At the heart of the obligations of the courts and of the judges lies the duty to protect the rule of law
>
> The Rule of law is nothing if it fails to constrain overweening power.
>
> The courts fulfill their obligation to protect the rule of law by ensuring that a decision maker on whom statutory powers are conferred , exercises those powers independently and without surrendering them to a third party.
>
> The executive, Director and the attorney should not make any decision in submission to the threats. The courts cannot exercise jurisdiction on the foreign

> state, however, the legal relationships of the different branches of the government and the separation of power depends upon internal constitutional arrangements. They are of no concern to foreign states.
>
> A resolute refusal to any foreign threat is the only way to protect national interest. While exercising statutory power an independent prosecutor is not entitled to surrender to the threat of a third party or the foreign state.
>
> The discontinuation of the investigation has in fact caused actual damage to the national security, the integrity of criminal justice system and the rule of law.
>
> The Director has acted on erroneous interpretation of Art 5 of OECD and both the Director and the government have failed to recognize that the rule of law required the decision to discontinue to be reached as an exercise of independent judgment, in pursuance of power conferred by statute. To preserve the integrity and independence of that judgment demanded resistance to the pressure exerted by means of a specific threat. That threat was intended to prevent the Director from pursuing the course of investigation. It achieved its purpose.

On the basis of above findings, the Court ultimately came to the following conclusion:-

> "The Court has a responsibility to secure the rule of law. The Director was required to satisfy the court that all that could reasonably be done had been done to resist the threat. He has failed to do so. He submitted too readily because he, like the executive, concentrated on the effects which were feared should the threat be carried out and not on how the threat might be resisted. No one whether within this country or outside is entitled to interfere with

the course of our justice. It is the failure of govt. and the defendant to bear the essential principle in mind that justifies the intervention of this court. We shall hear further arguments as to the nature of such intervention. But we intervene in fulfillment of our responsibility to protect the independence of the Director and of our criminal justice system from threat. On 11 Dec 2006, Prime Minister said that this was the clearest case for intervention in the public interest he had seen. We agree."

103. It is further to be noted that the international cooperation, for the purpose of prevention of corruption, has been considered in the comity of the nations, as their commitment to achieving the object, under the **United Nation's Convention Against Corruption, 2005**. Relevant portion therefrom is reproduced hereinbelow for convenience:-

"The purposes of this Convention are:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

(c) To promote, integrity accountability and proper management of public affairs and public property.

Recalling the work carried out by other international and regional organizations in this field, including the activities of the African Union, the council of Europe, the Customs Cooperation Council (also known as the World Customs Organization), the European Union, the League of Arab States, the

> Organization for Economic Cooperation and Development and the Organization of American States,
>
> Taking note with appreciation of multilateral instruments to prevent and combat corruption, including inter alia, the Inter-American Convention against Corruption, adopted by the Organization of American States on 29 March 1996, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the European Union on 26 May 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organization for Economic Cooperation and Development on 212 November 1997, the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999, the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe and 4 November 1999, and the African Union Convention on Preventing and Combating Corruption, adopted by the Heads of State and Government of the African Union on 12 July, 2003.
>
> Welcoming the entry into force on 29 September, 2003 of the United Nations Convention against Transnational Organized Crime."

104. The Government of Pakistan is also signatory to the above UN Convention as it has been ratified by Pakistan on 31st August, 2007, regarding international cooperation in criminal matters in accordance with Articles 44 to 50 of the above noted UN Convention, according to which, where appropriate and consistent with their domestic legal system, the State Parties shall consider assisting each other in investigation or proceedings in civil and administrative matters, relating to corruption.

105. Learned counsel appearing for the petitioners vehemently contended that on the one hand, the Government of Pakistan is signatory to the UN General Assembly Regulation No. 58/41 of 31st October, 2003, on the international cooperation relating to corruption but at the same time, by means of adding Section 33F in the NAO, 1999 through Section 7 of the NRO, 2007, the prolonged pending proceedings, initiated prior to 12th October 1999, against 'holders of public office', inside or outside the country, and cases at the stage of investigation or pending before the High Court or Supreme Court, have been ordered to be withdrawn and terminated by means of the same legislative order; therefore, this amendment is in clear contravention to the provisions of the NAO, 1999 as well as to the above referred international treaty. This act of the legislative authority is not only unconstitutional but simultaneously against the principle of the trichotomy of powers.

106. There is no need to undertake the lengthy discussion relating to powers to withdraw cases. However, as it has been pointed out hereinabove, that according to the scheme of the NAO, 1999 Section 25 of the NAO, 1999 provides that notwithstanding anything contained in Section 15 or in any other law, for the time being in force, where a

'holder of public office' or any other person, prior to the authorization of investigation against him, voluntarily comes forward and offers to return the assets or gains, acquired or made by him in the course, or as a consequence of any offence, under this Ordinance, the Chairman NAB may accept such offer and after determination of the amount, due from such person, and its deposit with the NAB, discharge such person from all his liability in respect of the matter or transaction in issue. In this provision of law as well the word 'withdrawal' has not been used, which is akin to process of discharge or acquittal of an accused under the system of criminal administration of justice.

107. So far as withdrawal of a case is concerned, that is possible only with the consent of the Court, as provided in Section 494 Cr.P.C, detailed discussion, in respect whereof has already been made in the preceding paras, while examining the vires of Section 2 of the NRO, 2007.

108. The words "termination of the proceedings, under investigation or pending in any Court, including a High Court and the Supreme Court", are not recognized under any legal instrument, including the Constitution of Pakistan, Cr.P.C. or NAO, 1999. Much discussion has already been undertaken in this behalf, while examining the

constitutionality of newly inserted clause (aa) in Section 31A of the NAO, 1999, whereby the judgments passed by the Court in absentia under the NAO, 1999, have been declared void *ab initio* by the legislative authority.

109. The President of Pakistan being an authority to issue temporary legislation can discharge his functions under Article 89 of the Constitution, subject to limitation provided therein but admittedly, no such legislation can be issued, which is against the fundamental rights or any of the provisions of the Constitution. It seems that without caring about the fundamental rights of the non-beneficiaries of the NRO, 2007, on 5th October 2007, the then President had promulgated the NRO, 2007. On our query, learned Acting Attorney General for Pakistan (Mr. Shah Khawar) has placed on record the summary regarding promulgation of the NRO, 2007, for the Prime Minster of Pakistan. A careful perusal of the same indicates that on 5th October 2007, when the summary was moved, the Cabinet in its meeting, held on the same day, had approved the draft of the NRO, 2007, in pursuance whereof, the Prime Minister was requested to advise the then President to approve and sign the NRO, 2007, as such on the same day i.e. 5th October 2007, the NRO, 2007 was promulgated. It is also interesting to note that both the

proceedings and the cases of corruption and corrupt practices, were being terminated or withdrawn in terms of Section 7 of the NRO, 2007, whereby Section 33F has been added in the NAO, 1999 regarding withdrawal and termination of prolonged pending proceedings initiated prior to 12th October 1999. The object, disclosed in the summary for the Cabinet, for issuance of the NRO, 2007 was that it was expedient to promote national reconciliation, foster mutual trust and confidence amongst 'holders of public office' and to make the election process more transparent. Ultimately, on the same day, the Ordinance was promulgated when the election of General Pervez Musharraf as the President (in uniform) was scheduled to be held on the very next day i.e. 6th October 2007. At that time, a petition filed by **Jamat-e-Islami** (PLD 2009 SC 549), was pending and during the course of hearing, vide order dated 5th October, 2007, General Pervez Musharraf was allowed to contest the election conditionally. However, remaining details with regard to issuance of the NRO, 2007 have already been published in Daily Dawn dated 5th October, 2007.

110. We are conscious of the fact that temporary legislation cannot be struck down, taking into consideration the *mala fide* or subjective consideration for the issuance of

such legislation but simultaneously this Court is empowered to examine the contents of the temporary legislation, if it is inconsistent with the fundamental rights, guaranteed by the Constitution or of any of the provisions of the Constitution has been violated. The Indian Supreme Court, when met with this situation, in the case of **State of Rajasthan's case** (AIR 1977 SC 1361), observed as under:-

> "144. But when we say this, we must make it clear that the constitutional jurisdiction of this Court is confined only to saying whether the limits on the power conferred by the Constitution have been observed or there is transgression of such limits. Here the only limit on the Power of the President under Art. 356, cl. (1) is that the President should be satisfied that a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. The satisfaction of the President is a subjective one and cannot be tested by reference to any objective tests. It is deliberately and advisedly subjective because the matter in respect to which he is to be satisfied is of such a nature that its decision must necessarily be left to the executive branch of Government. There may be a wide range of situations which may arise and their political implications and consequences may have to be evaluated in order to decide whether the situation is such that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. It is not a decision which can be based on what the Supreme Court of United States has described as "judicially

discoverable and manageable standards." It would largely be a political judgment based on assessment of diverse and varied factors, fast changing situations, potential consequences, public reaction, motivations and responses of different classes of people and their anticipated future behaviour and a host of other considerations, in the light of experience of public affairs and pragmatic management of complex and often curious adjustments that go to make up the highly sophisticated mechanism of a modern democratic government. It cannot, therefore, by its very nature be a fit subject matter for judicial determination and hence it is left to the subjective satisfaction of the Central Government which is best in a position to decide it. The Court cannot in the circumstances, go into the question of correctness or adequacy of the facts and circumstances on which the satisfaction of the Central Government is based. That would be a dangerous exercise for the Court, both because it is not a fit instrument for determining a question of this kind and also because the Court would thereby usurp the function of the Central Government and in doing so, enter the 'Political thicket', which it must avoid if it is to retain its legitimacy with the people. In fact it would not be possible for the Court to undertake this exercise, apart from total lack of jurisdiction to do so, since by reason of Art. 74 cl. (2), the question whether any and if so what advice was tendered by the Ministers to the President cannot be enquired into by the Court, and moreover, "the steps taken by the responsible Government may be founded on information and apprehensions which are not known to and cannot always be made, known to, those who seek to impugn what has been done., (Vide Ningkan v. Government of

Malaysic, 1970 AC 379). But one thing is certain that if the satisfaction is *mala fide* or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it, because in that case there would be (sic-no?) satisfaction of the President in regard to the matter which he is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power under Art. 356, cl. (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid. Of course by reason of cl. (5) of Art. 356, the satisfaction of the President is final and conclusive and cannot be assailed on any ground but this immunity from attack cannot apply where the challenge is not that the satisfaction is improper or unjustified, but that there is, no satisfaction at all. On such a case it is not the satisfaction arrived at by the President which is challenged, but the existence of the satisfaction itself.

Take, for example, a case where the President gives the reason for taking action under Art. 356, cl. (1) and says that he is doing so, because the Chief Minister of the State is below five feet in height and, therefore, in his opinion a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. Can the so called satisfaction of the President in such a case not be challenged on the ground that it is absurd or perverse or *mala fide* or based on a wholly extraneous and irrelevant ground and is, therefore, no satisfaction at all. It must of course be concerned that in most cases it would be difficult, if not impossible, to challenge the exercise of power under Art. 356, cl. (1) even on this

limited ground, because the facts and circumstances on which the satisfaction is based would not be known, but where it is possible, the existence of the satisfaction can always be challenged on the ground that it is *mala fide* or based on wholly extraneous and irrelevant grounds. This proposition derives support from the decision of the Judicial Committee of the Privy Council in King Emperor v. Banwari Lal Sarma (72 Ind App 57: (AIR 1945 PC 48) where Viscount Simon, L.C. agreed that the Governor General in declaring that emergency exists must act *bona fide* and in accordance with his statutory powers. This is the narrow minimal area in which the exercise of power under Art. 356, cl. (1) is subject to judicial review and apart from it, it cannot rest with the Court to challenge the satisfaction of the President that the situation contemplated in that clause exists."

However, subsequently, by means of 44th Amendment, Clause (4) of Article 123 of the Indian Constitution, which provided that "notwithstanding anything in this Constitution, the satisfaction of the President mentioned in clause (1) shall be final and conclusive and shall not be questioned in any Court on any ground", has been omitted. Therefore, in the case of **A.K. Roy v. Union of India** (AIR 1982 SC 710), the judgment passed in **State of Rajasthan's case** (AIR 1977 SC 1361), was considered and it was held that "the Rajasthan case is often cited as an authority for the proposition that the courts ought not to enter the "political

thicket"; it has to be borne in mind that at the time when that case was decided, Article 356 contained clause (5) which was inserted by the 38th Amendment, by which the satisfaction of the President mentioned in clause (1) was made final and conclusive and that satisfaction was not open to be questioned in any court on any ground; clause (5) has been deleted by the 44th Amendment and, therefore, any observations made in the Rajasthan case, on the basis of that clause, cannot any longer hold good; it is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction". Be that as it may, this Court, while dealing with the same proposition, in **Fauji Foundation's case** (PLD 1983 SC 457), has observed as under:-

> 206. The statement formulated by the High Court, namely: Notwithstanding the reference to Article 14 of the Constitution the above two decisions adequately support the contention of the learned counsel that no Legislature could be permitted to pass a law for the resolution of private dispute which could be decided by the Courts alone and such action amounted to infringement on the field of judiciary, is not discernible from these two decisions, nor can such a statement, as so widely stated, be enunciated in the context of the discussion that I have undertaken in this judgment.

207. The learned counsel for the respondent relied on Basanta Chandra Ghose and others v. Emperor (AIR 1944 FC 86), to impress that the Legislature cannot usurp judicial power in the guise of enacting law. In this case clause (2) of section 10 of the Restriction & Detention Ordinance (3 of 1944) was challenged on the ground that "it was an arrogation of judicial power by legislative authority," as what it achieved was direct disposal of cases by the Legislature itself. In accepting this argument Spens, C. J., held that such a provision was an exercise of judicial power and not an enactment of law as it discharged the pending proceedings which raised questions of fact which had to be determined in reference to facts, as for example the competency of the detaining authority or the colourable nature of the act or the order though purporting to be passed by an authority was not in reality the act of that authority ; and as the determination did not depend on any rule of law it was clearly a judicial act and not an enactment of law. The ratio of this case brings out the distinction between the exercise of judicial power and legislation. Essentially as was held the High Court was called upon to decide a controversy which involved the determination of facts which did not depend on any rule of law. Clearly there was, therefore, an exertion of judicial power, which within its ambit involves an inquiry and investigation of facts and then declaring and enforcing liabilities as they stand on present or past facts, and under any law which already exists, which could not be done otherwise than by the High Court which was seized of the matter. In this situation the Federal Court construed this provision as an exercise of judicial power by a legislative enactment. In Prentis v. Atlantic Coast Line Co. (53 Law Ed. 158), at p. 158,

Justice Holmes distinguished the two (legislation and judicial power) in the following words:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing condition by making a new rule, to be applied thereafter to all or some part of those subject to its power."

111. The present case is singular and on its own. We do not even have to go into whether there was any objective basis for the satisfaction required by Article 89 of Constitution, nor into the issue whether such satisfaction is to be entirely subjective. Present case can be resolved simply on the ground that the Federal Government has not even defended the NRO, 2007 and thus not even asserted that there was indeed any such satisfaction at all, subjective or objective. There should at least have been an assertion, howsoever weak it may have been, for the Court to undertake the exercise envisaged in the **State of Rajasthan's case** (AIR 1977 SC 1361). In the absence of even a simple assertion by the Government we can easily hold that there was no satisfaction at all.

112. As discussed hereinabove that firstly, the NRO, 2007 as a whole and in particular, its Sections 2, 6 & 7, are inconsistent with Article 25 of the Constitution, as it has

created unreasonable classification, having no rational nexus with the object of the NRO, 2007.

113. Besides above, the principle of equality (Musawat), as enshrined in Article 25 of the Constitution, has its origin in the Islamic teachings. Reference in this behalf may be made to **Muhammad** (PBUH) **Encyclopedia of Seerah** (Sunnah, Da'wah and Islam), 1st Edn. 1986. Vol.IV (p:147-148). Relevant portion therefrom, on the subject of "Equality" is reproduced hereinbelow for convenience:-

> **"Equality**
> Equality is an essential requisite of justice, because when there is discrimination and partiality between people, there is no justice. The Code of Allah demands absolute equality of rights between all people without any discrimination or favouritism between man and man and between man and woman on any count.
>
> The Qur'an declares. "O mankind! Behold, we have created you all out of a male and a female, and have made you into nations and tribes, so that you may know each other. Surely, the noblest of you in the Sight of Allah is the one who is most pious." (49:13)
>
> This verse clearly establishes equality of all men and women on the basis of common parentage, and as such discounts all claims of superiority or discrimination for any person or group of persons. There is no rational or logical ground for such claims, and therefore, it is unreal and unnatural to demand discrimination between man and man or between man and woman on any count.

Besides' all human beings are servants (ibid) of Allah and therefore equal.

They are all created by Allah and all are His servants alone. As such they are all equal and enjoy equal rights in all areas of life. In His service and obedience, all humans are equal and stand on the same level without any discrimination all as one race and one people before Him, no one claiming any special privileges and honours.

In Surah al-A'raf we have these words: "When your Lord drew forth from the children of Adam from their loins their descendants, and made them testify concerning themselves, saying: 'Am I not your Lord?' They said: Yes we do testify.'" (7:172). And then we find these words; "Surely, this Brotherhood of yours is single Brotherhood, and I am your Lord: therefore serve and obey Me (and no other)." (21:92 and 23:52))

This concept of equality bestows equal rights upon all members of the human race and leaves no room for any discrimination of any kind, whether by colour, creed, race or sex. If there is any discrimination anywhere, it is man made, not divinely ordained, and therefore, must be denounced, condemned and discarded.

Any such discrimination is unnatural and artificial and goes against the basic Doctrine of Tawhid. As such it will endanger the right balance and stability of human social life.

If there is any discrimination for any man or woman in Islam, it is on merit and on merit alone. Those who develop their personal relationship with Allah fear

Allah, attain degrees of piety and taqwa of Allah, and reach higher stations of excellence in the Sight of Allah.

However, even they stand equal with others in the enjoyment of rights in society, and can claim no superiority or favouritism over others so far as social rights are concerned.

This basic doctrine also demands equality of all men and women before the law and negates any kind of discrimination between them. This is the essential requirement of the Rule of Law in Islam: that all men and women are equal in the eyes of the Law and must be treated as such. Respect for human dignity, upon which the Prophet of Islam laid so much emphasis, also demands equality for all men and women in all fields of human activity. (For details see under "Basic Human Rights" in Volume III of this work)

Equality of Rights

It is implicit in the Doctrine of Tawhid and is also an essential ingredient of justice and equality that all people must enjoy equal rights without discrimination on any count in all fields and departments of life. In the enjoyment of social, political and religious rights, there must not be any discrimination between ruler and ruled, employer and employee, rich and poor and man and woman: all should enjoy these rights freely, equally and without any check or restriction. Denial of any of these rights to any member would, in fact, be a denial of the Doctrine of Tawhid.

Equal Treatment

The logical consequences of the above principle in practice demands absolutely equal treatment of all citizens, without any reservation, in all areas of life. It

> also requires: (a) equality of opportunity of education, training, employment and promotion in all services for all citizens, irrespective of their social or political status and influence; (b) equal treatment in all departments, without discrimination of any kind between rich and poor, big and small or workers and employers; (c) the right to a livelihood of every member of the Muslim state. It is the birthright of every person to have a guaranteed decent living and decent wage from the state. This calls indirectly for equitable distribution of wealth between all the members of the state on the principle of maximum circulation of the total wealth of the nation, discouraging, as far as possible, the concentration of wealth among a few people (59:7); and (d) it is also implicit in the above principle that for the political and social stability of society and state, matters of national interest must be decided through a process of consultation with the people, and all state affairs on all levels must be decided on the basis of the concept of consultation in its true sense, as envisaged by the Qura'n (42:38) and practiced by the Prophet Muhammad (PBUH)."

114. Corruption and corrupt practices, being a crime, if proved, against a 'holder of public office' takes away his qualification to contest the election because, prima facie, he has breached the trust of his electorate. Therefore, by inserting Section 33F in the NAO, 1999 by means of Section 7 of the NRO, 2007, possibility of raising objection on the qualification of a person to be elected or chosen as a member of the Parliament has been negated for limited purpose, in

view of Article 62(f) of the Constitution, a person having been convicted/sentenced by the Court under the NAO, 1999 shall stand absolved as the case has been withdrawn against him or the proceedings have been terminated, pending in any Court including the High Court and Supreme Court, in appeal or whatever the case may be. Therefore, instead of following the command of Article 5 of the Constitution, Section 7 of the NAO has contravened Article 62(f) of the Constitution. It is true that Section 62(f) of the Constitution cannot be considered self-executory but if a person involved in corruption and corrupt practices has been finally adjudged to be so, then on the basis of such final judgment, his candidature on the touchstone of Article 62(f) of the Constitution can be adjudged to the effect whether he is sagacious, righteous, non-profligate, honest or Ameen.

115. It is true that on an objection against a candidate, without any support of evidence, the provisions of Article 62 of the Constitution cannot be pressed into service, because it is a provision of Constitution which is not self executory. Reference in this behalf may be made to **Muhammad Afzal v. Muhammad Altaf Hussain** (1986 SCMR 1736).

116. However, with reference to examining the vires of Section 7 of the NRO, 2007, in pursuance of which Section

33F has been inserted in the NAO, 1999, with an approach that a 'holder of public office', as per the mandate of law, has been absolved without following the legal course from the allegations of corruption or corrupt practices, which also keeps the element of trust in its fold, and washed him from all such like sins, then how he can be considered qualified to contest the election because conviction and sentence under Section 9 of the NAO, 1999 has not been set aside legally, and whether such 'holder of public office', with a stigma upon him to be corrupt and involved in corrupt practices, can become a member of the Parliament, which is a sovereign body, representing the people of Pakistan. Article 62 (f) has been incorporated in the Constitution by means of President's Order No.14 of 1985 (The Revival of Constitution Order, 1985) and it being a part of the Constitution has to be taken into consideration by the Courts, while examining the case of a convict, involved in corruption and corrupt practices, who has attained the status of innocent person by means of a law which has washed away his conviction/ sentence by withdrawal or termination of cases or proceedings, however, subject to furnishing strong evidence for establishing the allegation mentioned in Article 62(f) of the Constitution. As it has been noted hereinabove that this provision was inserted by a dictator but it is still continuing

although five National Assemblies and Senate had been elected and completed their terms, but no effective steps, so far have been taken in this behalf.

117. Now turning towards the question under consideration in respect of insertion of Section 33F in the NAO, 1999 by means of Section 7 of the NRO, 2007, on the basis of which either the proceedings have been terminated or the cases have been withdrawn, as far as the withdrawal of proceedings under Section 494 Cr.P.C. is concerned, it has already been discussed hereinabove. while examining the implications of Section 2 of the NRO, 2007 wherein it was held that no withdrawal without the consent of the Court, seized with the case, is possible and this provision itself being discriminatory has been found in derogation to the fundamental rights enshrined in Article 25 of the Constitution and at the same time withdrawal of the criminal cases, particularly the murder cases, without hearing the heirs of victims. Likewise, while examining the vires of Section 6 of the NRO, 2007 it has been held that the legislature is not empowered to declare any judgment void *ab initio*, however, subject to following the principles, discussed hereinabove, which are lacking in the instant case.

As far as principles of withdrawal of cases under the NAO, 1999 is concerned, Section 25 of the NAO, 1999 contains that:-

> "**25.** (a) Notwithstanding anything contained in section 15 or in any other law for the time being in force, where a holder of public office or any other person, prior to the authorization of investigation against him, voluntarily comes forward and offers to return the assets or gains acquired or made by him in the course, or as the consequence, of any offence under this Ordinance, the Chairman NAB may accept such offer and after determination of the amount due from such person and its deposit with the NAB discharge such person from all his liability in respect of the matter or transaction in issue:
>
> Provided that the matter is not sub judice in any court of law.
>
> (b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB, shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused.
>
> (c) The amount deposited by the accused with the NAB shall be transferred to the Federal Government or, as the case may be, a Provincial Government or the

> concerned bank or financial institution, company, body corporate, co-operative society, statutory body, or authority concerned within one month from the date of such deposit."

Subject to exercise of above powers, a case can be withdrawn on the basis of entering into plea bargain, with all consequences. So far as, withdrawal from the prosecution under Section 31B of the NAO, 1999, is concerned, that is also subject to consent of the Court. Section 31B of the NAO, 1999 reads as follows:-

> "**31B**. **Withdrawal from Prosecution.** The Prosecutor General Accountability may, with the consent of the Court, withdraw from the prosecution of any accused Person generally or in respect of any one or more of the offences for which he is tried and upon such withdrawal:
>
> (i) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences; and
>
> (ii) if it is made after a charge has been framed, he shall be acquitted in respect of such offence or offences."

118. It is important to note that a person, who enters into plea-bargain as per the mandate of Section 25 of the NAO, 1999, would be disqualified to contest the election or to hold the public office. The language employed in Section 33F of the NAO, 1999, inserted by means of Section 7 of the NRO, 2007 does not indicate that the withdrawal had to take place, subject to any of the above provisions, either under Section

25 or under Section 31B of the NAO, 1999, with the consent of the Court.

119. So far as withdrawal from the cases inside or outside the country, as per Section 33F of the NAO, 1999, inserted through Section 7 of the NRO, 2007, is concerned, it would mean that the 'holders of public office' have been absolved from the charge of corruption and corrupt practices, therefore, by adopting such procedure, the legislative authority had transgressed its jurisdiction, because such powers are only available to the judiciary and the Constitution provides guarantee to secure the independence of the judiciary. Reference in this behalf may be made to Article 175 of the Constitution, which has been extensively interpreted in **Mehram Ali's case** (PLD 1998 SC 1445) and **Liaquat Hussain's case** (PLD 1999 SC 504).

120. A perusal of Section 33F of the NAO, 1999, inserted through Section 7 of the NRO, 2007 further reveals that while using the expressions 'withdrawal' and 'termination', it was not considered that in the cases of the offences, falling within the mischief of the NAO, 1999, charged against the 'holders of public office', no such judicial powers can be given to the legislature to withdraw or terminate the cases or proceedings. As far as, the words

'termination of prolonged pending proceedings', are concerned, these are alien to the system of criminal administration of justice, prevailing in the country under Criminal Procedure Code and the NAO, 1999.

121. In order to ascertain that as to how many persons have benefited from Section 33F of the NAO, 1999, inserted through Section 7 of the NRO, 2007, the NAB was asked to furnish the details of the same. Accordingly, after a great deal of difficulty, the list was provided by the Chairman NAB, which indicates that there are two categories of the beneficiaries i.e. 'holders of public office'; whose cases were pending **(a)** inside Pakistan and **(b)** outside Pakistan, in which US$ 60 million are involved for which a request for mutual legal assistance and civil party to proceedings, has been made by the Federal Government. As far as the category **(a)** is concerned, this Court, in exercise of its powers conferred under Article 187 read with Article 190 of the Constitution, may direct the NAB or any executive authority to supply requisite information.

122. So far as Article 190 of the Constitution is concerned, it imposes a constitutional obligation upon all the executives and judicial authorities, throughout the country to act in aid of the Supreme Court. Reference in this behalf may

be made to **Al-Jehad Trust v. Federation of Pakistan** (PLD 1997 SC 84), but in implementing the judgment, in letter and spirit, regarding the cases outside the country, the Court may feel handicapped. Therefore, it would be an obligation and the duty of the executive to ensure initiation of proceedings according to law.

123. At this juncture, it may be noted that as per the list provided by the NAB, regarding cases falling within category **(b)** in which a huge amount is involved, it was also pointed out that to get back this money, subject to determination, belonged to the people of Pakistan, an amount ranging between 660 million to 2 billion rupees was spent but despite our directions, the Chairman NAB could not furnish the exact figure. This Court asked the learned Prosecutor General to furnish the details in respect of the amount involved in the cases out side the country, in pursuance of request for mutual legal assistance and civil party to proceedings, was made by the Federal Government.

124. In reply, the learned Prosecutor General NAB furnished the following details:-

a) The Magistrate after considering the material opined that, prima facie, case has been made out and sent it to the Attorney General for

launching the proceeding and also passed the order for freezing of account.

b) The accused filed appeal against the said order, which was also dismissed being based on vague grounds.

c) Our lawyer informed that the Attorney General in Geneva had decided not to prosecute the accused further and the Court expressed its dissatisfaction over it.

d) The Magistrate in Geneva has passed an order for de-freezing of the money.

In respect of item (c) above, the learned Prosecutor General NAB admitted that in the proceedings, reference was made to a letter sent by the then Attorney General for Pakistan (Malik Muhammad Qayyum). Whereas, Malik Muhammad Qayyum, the then Attorney General for Pakistan, who appeared on Court's call, informed the Court that he had sent a letter to the Attorney General of Geneva, mentioning therein the relevant provisions of the NRO, 2007, regarding withdrawal of cases. Similarly, learned Acting Attorney General for Pakistan (Mr. Shah Khawar) appeared and stated that the request for mutual legal assistance and civil party to proceedings, was made by the Federal Government through the Attorney General, therefore, he would apprise the Court of the position of cases etc. According to him, so far as the

amount lying in the Swiss Banks was concerned, 25 other individuals had also filed claims against it; however, a request was made by the former Attorney General for Pakistan (Malik Muhammad Qayyum) for withdrawal of money but as per his knowledge that request was not acceded to by the Attorney General Office of Switzerland as well as by the concerned Magistrate because their version was that they would deal with the case in accordance with their local laws. However, on 15th December 2009, the then Attorney General for Pakistan (Malik Muhammad Qayyum) again appeared on Court's call; he read Section 7 of the NRO, 2007 with reference to withdrawal of cases and informed the Court that Constitution Petition No. 265 of 2008 (Asif Ali Zardari v. Government of Pakistan) was filed before the High Court of Sindh, whereby directions were sought for the Federation and the NAB, both, that they should withdraw all the cases pending in Pakistan and specifically proceedings in Geneva and in London and all others under the provisions of the NRO, 2007; the NAB authorities appeared before the Sindh High Court and made a statement that they would make efforts to withdraw the proceedings from all the Courts in and outside Pakistan; the Court, vide order dated 4th March 2008, directed to do the needful within a period of two weeks; he further stated that in pursuance of said order and

also under the instructions of the then President, he issued a letter dated 9th March 2008 to the Attorney General of Geneva regarding withdrawal of proceedings. Copy of said letter has also been placed on record, which is reproduced hereinbelow in extenso:-

> "Re: P/11105/1997 and CP 289/97, Republic of Pakistan Vs/ Asif Ali Zardari and Jens Schlegelmich
>
> Dear Mr. Attorney General,
>
> We write you further to our meeting of 7 April 2008.
>
> We hereby confirm that the Republic of Pakistan having not suffered any damage withdraws in capacity of civil party not only against Mr. Asif Ali Zardari but also against Mr. Jens Schlegelmich and any other third party concerned by these proceedings. This withdrawal is effective for the above captioned proceedings as well as for any other proceedings possibly initiated in Switzerland (national or further to international judicial assistance). The Republic of Pakistan thus confirms entirely the withdrawal of its request of judicial assistance and its complements, object of the proceedings CP/289/97.
>
> Request for mutual assistance made by the then government, which already stand withdrawn, was politically motivated. Contract was awarded to pre-shipment inspection companies in good faith in discharge of official functions by the State functionaries in accordance with rules.
>
> The Republic of Pakistan further confirms having withdrawn itself as a damaged party and apologizes for the inconvenience caused to the Swiss authorities.
>
> Your sincerely,
> Sd/-
> Malik Muhammad Qayyum
> Attorney General for Pakistan."

125. Despite our repeated queries that how request for withdrawal of mutual assistance and civil party to

proceedings, initiated by the Federal Government, were withdrawn, no satisfactory answer was given to us. We have noticed that the Chairman NAB, who should have assisted the Court diligently, was reluctant to do so for one or the other reason. Therefore, having left with no option, the Federal Secretary, Law & Justice Division, Government of Pakistan was called upon to appear and place on record copies of the file, pertaining to the Swiss cases. His statement was as follows:-

> "a letter was addressed to Law Ministry by Mr. Farooq H. Naik, ASC (on behalf of Mohtarma Benazir Bhutto and Asif Ali Zardari), requesting therein that since this NRO, 2007 has been promulgated, as such all cases should be dropped, emphasizing upon the cases in Geneva Court; that application was processed and in routine placed before the then Minister Law (Zahid Hamid), who opposed the request and wrote a detailed note that it is not within their ambit so kindly contact the foreign office. After that file does not show anything".

126. Likewise, Mr. Salman Faruqui, Secretary General to the President also appeared on Court's call and informed that no such file existed in his office or at President's Camp Office, Rawalpindi.

127. As far as issuing a letter to Attorney General of Geneva dated 7th April 2008 by Malik Muhammad Qayyum

(the then Attorney General) is concerned, it seems that he had done so in his personal capacity, against the Rules of Business, 1973. In this behalf it may be noted that under Rule 14 of the Rules of Business, 1973, he was required to consult the Law, Justice and Human Rights Division on all legal questions, arising out of any case. Had he consulted the Law, Justice & Human Rights Division, he would have been advised not to send any letter in this regard because the Ministry of Law & Justice had already declined such request as was pointed out by the Secretary Law & Justice Division, whose statement has been referred to hereinabove.

128. It is also important to note that under sub-Rule (2) of Rule 14 of the Rules of Business, 1973, no Division shall consult the Attorney General except through the Law, Justice & Human Rights Division and in accordance with the procedure laid down by that Division. Beside it, stand taken by Malik Muhammad Qayyum that he was asked by the then President of Pakistan to do so, does not seem to be correct because under Rule 5(11-A) of the Rules of Business, 1973, verbal orders given by a functionary of the Government should, as a matter of routine, be reduced to writing and submitted to the issuing authority; if time permits, the confirmation shall invariably be taken before initiating

action; however, in an exigency, where action is required to be taken immediately or it is not possible to obtain written confirmation of the orders before initiating actions, functionary to whom the verbal orders are given shall take the action so required and at the first available opportunity, obtain the requisite confirmation while submitting to the issuing authority a report of the action taken by him. The statement of Mr. Salman Faruqui, Secretary General to the President, reflects that no such file exists. Since Malik Muhammad Qayyum, the then Attorney General for Pakistan has done so in violation of the Rules of Business, 1973, therefore, he is liable to account for his such action.

129. Section 21 of the NAO, 1999 is a comprehensive provision of law, which spells out the nature of the request to a Foreign State for mutual legal assistance including; freezing of assets to the extent to which the assets are believed on reasonable ground to be situated in that State; confiscate articles and forfeit assets to the extent to which the articles or assets, as the case may be, are believed to be located in that State; transfer to Pakistan any such evidence, documents, things, articles, assets or proceeds realized from the disposal of such articles or assets, etc. We believe that to curb the culture of corruption and corrupt practices globally it has

become necessary to enact such law on the basis of which the objects noted hereinabove could be achieved.

130. Learned counsel appearing for the petitioners impressed upon the arguments that on the one hand in pursuance of the NRO, 2007, the cases against the 'holders of public office' either have been withdrawn or terminated, who should have been found guilty for the corruption or corrupt practices (under Section 9 of the NAO, 1999) and sentenced to imprisonment as well as fine, and on the other hand, the 'holders of public office' who have been convicted and sentenced, and against their convictions, appeals pending either before the High Court or the Supreme Court, have been withdrawn. Similarly against those 'holders of public office', who were acquitted but against their acquittal proceedings were pending before the superior Courts, have also been illegally provided clean-chit by withdrawal or termination of the proceedings, contrary to constitution and the law, knowing well that this country is signatory to the UN Convention Against Corruption. A perusal of UN Convention Against Corruption indicates that the state had responsibility to develop and implement or maintain effective, coordinated anti-corruption policies; to take measures to prevent money laundering; to take measures for

freezing, seizure and confiscation of proceeds of crime, derived from offences established in accordance with the Convention, or the property the value of which corresponds to that of such proceeds, property, equipment or other instrumentalities used in or destined for use in offences established in accordance with the Convention, etc.; State parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption; as well as affording to one another the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to the offences covered by the Convention; prevention and detection of transfers of proceeds of crime. On the other hand, the promulgation of the NRO, 2007, instead of preventing corruption and corrupt practices, has encouraged the same. We have no option but to agree with the contention of the learned counsel for the petitioners, as the same is based on legal and logical premise.

131. We have already pointed out in the preceding paras of this judgment that under the provisions of NAO, 1999, there is a separate scheme for the withdrawal of cases. However, Article 45 of the Constitution confers power upon the President of Pakistan to the effect that the President shall

have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any Court, tribunal or other authority. The cases under Section 33F of the NAO, 1999, inserted through Section 7 of the NRO, 2007, are also not covered under Article 45 of the Constitution and in this behalf no other law has been referred to by any of the learned counsel appearing for the parties. There is no cavil with the proposition that the criminal Courts, including the Trial, Appellate and Revisional, are empowered to acquit, set aside the conviction/ sentence or quash the proceedings, but without adhering to this provision, the legislative authority, in its wisdom, has withdrawn or terminated the cases or proceedings, purportedly, in exercise of power, not vested in it. Consequently, all the 'holders of public office' have not been dealt with in accordance with law, principle of which has been enshrined in Article 4 of the Constitution.

132. At this juncture, it may occur in one's mind that what are the judicial powers. This question has not been discussed in **Mehram Ali's case** (PLD 1998 SC 1445) or in **Liaquat Hussain's case** (PLD 1999 SC 504). However, one of the learned counsel has placed on record a judgment in the case of **Brandy v. Human Rights & Equal Opportunity**

Commission (183 CLR 245) from the Australian jurisdiction passed by High Court of Australia, which is the Apex Court of the country. Relevant portion therefrom is reproduced hereinbelow for ready reference:-

> "9. Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not (66 See Reg. v. Davison [1954] HCA 46; (1954) 90 CLR 353 at 368). These difficulties were recognized by the Court in Precision Data Holdings Ltd. v. Wills (67 [1991] HCA 58; (1991) 173 CLR 167 at 188-189):
>
> > "The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential to the exercise of the power are not by themselves conclusive of it. Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power."
>
> One is tempted to say that, in the end, judicial power is the power exercised by courts and can only be defined by reference to what courts do and the way in which they do it, rather than by recourse to any other

classification of functions. But that would be to place reliance upon the elements of history and policy which, whilst they are legitimate considerations, cannot be conclusive.

10. It is traditional to start with the definition advanced by Griffith CJ in Huddart, Parker and Co. Proprietary Ltd. v. Moorehead (68 [1909] HCA 36; (1909) 8 CLR 330 at 357) in which he spoke of the concept of judicial power in terms of the binding and authoritative decision of controversies between subjects or between subjects and the Crown made by a tribunal which is called upon to take action. However, it is not every binding and authoritative decision made in the determination of a dispute which constitutes the exercise of judicial power. A legislative or administrative decision may answer that description. Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion. Thus Kitto J in Reg. v. Gallagher; Ex parte Aberdare Collieries (69 (1963) 37 ALJR 40 at 43) said that judicial power consists of the "giving of decisions in the nature of adjudications upon disputes as to rights or obligations arising from the operation of the law upon past events or conduct". But again, as was pointed out in Re Cram; Ex parte Newcastle Wallsend Coal Co. Pty. Ltd. (70 [1987] HCA 29;(1987) 163 CLR 140 at 149) , the exercise of non-judicial functions, for example, arbitral powers, may also involve the determination of existing rights and

obligations if only as the basis for prescribing future rights and obligations."

133. It is a principle of law that binding judgment, either of acquittal or conviction, can only be withdrawn by the Courts of law, therefore, the question for determination would be as to which forum is a 'Court' and which is not. Answer to this proposition has been given in **Rehman Khan v. Asadullah Khan** (PLD 1983 Quetta 52). In this very judgment the word 'Court' has been defined, after a considerable discussion, and it has been held that "hence, the Courts are only such organs of the State which follow legally prescribed scientific methodology as to procedure and evidence, in arriving at just and fair conclusions. As far as the definition of 'Court' is concerned, the Hon'ble late Mr. Justice Zakaullah Lodhi (the then Acting CJ) concluded that "the Courts are only such organs of State which administer justice under guidance of procedural laws as to conduct of proceedings as well as evidence; since such methodology helps the Court in administering justice, in accordance with law, therefore, all other bodies which have a free hand in the matter of deciding disputes are not Courts".

134. Applying the above test on the provisions of Section 33F of the NAO, 1999, inserted through Section 7 of the NRO, 2007, relating to withdrawal or termination of cases

or proceedings, inescapable conclusion would be that the legislative authority of the President had acted contrary to judicial norms by allowing withdrawal and termination of cases and proceedings. However, as noted hereinabove, that on the basis of judicial interaction by the Court of law, having jurisdiction, appropriate orders can be passed.

135. Essentially withdrawal or termination of cases or proceedings in the manner as it has been done by means of contents of Section 33F of the NAO, 1999, inserted through Section 7 of the NRO, 2007, does not fall within the definition of 'pardon', 'amnesty' or 'commutation of sentence'. As per the **Corpus Juris Secundum,** Vol.67, 'pardon' and 'amnesty' has been defined as follows:-

> "**Pardon**.- a pardon is an executive act of grace which exempts and individual from the punishment the law inflicts for a crime, he has committed. It is full or partial accordingly as it absolves the recipient of all or only a portion of the legal consequences of his crime; and it is conditional or absolute accordingly as it does or does not make its operation or continued operation, depend on a condition precedent or subsequent."
>
> "**Amnesty**.- Amnesty is an exercise of the sovereign power by which immunity to prosecution is granted by wiping out the offence supposed to have been committed by a group or class of persons prior to their being brought to trial."
>
> **Who May Exercise Authority.-** Under constitutional provisions, the granting of pardons is within the

> province of the executive department of the State or nation, as the case may be.
>
> ……….…………………………………………………………..
>
> **Legislature**. As a general rule, the legislature cannot exercise the pardoning power where the constitution of the State does not confer such power on the legislature, but lodges it else where."

The expressions 'pardon' and 'amnesty' have been defined in **Black's Law Dictionary**, 7th Edn. (1999), as under:-

> "**Pardon.**- The act or an instance of officially nullifying punishment or other legal consequences of a crime; a pardon is usu. granted by the chief executive of a government [the President has the sole power to issue pardons for federal offences, while State Governors have the power to issue pardons for State crimes]."
>
> **"Amnesty.**- A pardon extended by the Government to a group or class of persons, usu. for the political offences; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted; unlike an ordinary pardon, amnesty is usu. addressed to crimes against State sovereignty – that is, to political offences with respect to which forgiveness is deemed more expedient for the public welfare then prosecution and punishment. Amnesty is usu. general, addressed to classes or even communities."

Admittedly, neither the 'holders of public office' have been pardoned nor amnesty has been given to them and similarly, their sentences have also not been commuted. Therefore, on the basis of such legislative document i.e. the NRO, 2007,

which has no legal sanctity behind it, the benefit drawn by the 'holders of public office' is not sustainable.

136. Article 5 of the Constitution in unambiguous terms provides that loyalty to the State is the basic duty of every citizen; and obedience to the Constitution and the law is the inviolable obligation of every citizen, wherever he may be and of every other person for the time being within Pakistan. Therefore, while promulgating the NRO, 2007, the President has to conform to the norms and response to the voice of the Constitution, as per the mandate of Article 5 of the Constitution and any action on his part which negates the dictates of the Constitution including the fundamental rights shall be tantamount to promulgating a law which is neither acceptable by the nation or internationally, being not in line with the dictates of the Constitution. Therefore, the President who is under oath to protect the Constitution in all circumstances is not competent to promulgate an Ordinance in the name of national reconciliation, which is not permissible under any of the legislative lists i.e. Federal or Concurrent, as per Fourth Schedule of the Constitution, perusal whereof abundantly makes it clear that no law in the nature of the NRO, 2007 can be promulgated which instead of eliminating exploitation etc. amongst the citizens, as per

Article 3 of the Constitution, tends to perpetuate corruption and corrupt practices as discussed above. There is no need to cite any judgment in this behalf except making reference to the case of **Ch. Zahur Ilahi v. Zulfikar Ali Bhutto** (PLD 1975 SC 383) to emphasize that it is the duty of every one to obey the Constitution.

137. It is the prerogative of the Parliament or Provincial Assembly to promulgate laws according to their respective spheres allocated to them, inter alia, taking into consideration the provisions of Article 227 of the Constitution, relating to promulgation of law according to Islamic provisions. Sub-Article (1) of Article 227 has two parts; according to its first part all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah. As per its plain reading, it refers to the laws which were existing when the Constitution of Pakistan, 1973 was enforced i.e. on 14th August 1973. As per its second part, which commands that no law shall be enacted which is repugnant to such injunctions. Clause (2) of Article 227 of the Constitution provides that effect shall be given to the provisions of clause (1) only in the manner provided in Part-IX of the Constitution, thus it leads to a reference to Article 228, which provides for composition of Council of Islamic Ideology, to

which a reference may be made by the Parliament, the President or the Governors of the Provinces on a question whether a proposed law is or is not repugnant to the injunctions of Islam, in terms of Article 229 of the Constitution. On receipt of such question so referred under Article 229 of the Constitution, the Council has to inform within 15 days, from the receipt of the reference, to the House, the Assembly, the President or the Governor, as the case may be, of the period within which the Council expects to be able to furnish that advice. Article 230 of the Constitution further provides that where a House, a Provincial Assembly, the President or the Governor, as the case may be, considers that, in the public interest, the making of the proposed law, in relation to which the question arose, should not be postponed until the advice of the Islamic Council is furnished, the law may be made before the advice is furnished; but at the same time it is also provided that, where a law is referred for advice to the Islamic Council and the Council advises that the law is repugnant to the Injunctions of Islam, the House or, as the case may be, the Provincial Assembly, the President or the Governor shall reconsider the law so made. This is how the scheme of Part IX of the Constitution, relating to Islamic provisions, works.

138. As it has been discussed hereinabove, by making reference to a book tilted as "**Muhammad (PBUH) Encyclopedia of Seerah**", that principle of equality in Islam is an essential requisite of justice because when there is discrimination and partiality between the people, there is no justice. A code of Allah demands absolute equality of rights between the people without any discrimination or favouritism between man and man, and man and woman, on any count. Therefore, without any fear of doubt, it can be held that Article 25 of the Constitution, namely, all citizens are equal before the law and are entitled to equal protection of law and there shall be no discrimination on the basis of sex alone, has its origin in Quranic injunctions. Once it has been held that any law is void, insofar as, it is inconsistent with or in derogation of fundamental rights, therefore, it would also be against the injunctions of Islam and no such law shall be enacted which is repugnant to such Injunctions.

139. Thus for the foregoing reasons, we are of the opinion that the NRO, 2007 has been promulgated not in consonance with Injunctions of Islam in terms of Article 227(1) of the Constitution. We may add a word of caution since there is a tendency among some litigants to invoke such precepts of Islam as do not have universal acceptance even

among the jurists and schools of Islamic Sharia, or who will invoke, on vague and unspecific grounds, recourse to the morality and conscience of the Constitution or to international conventions. These cannot be invoked as a matter of course, and certainly not to strike down formal legislation or executive action which is otherwise found to be within the scope of the Constitution and the law. The Constitution remains supreme and the primary reason for striking down the NRO, 2007 has been its being *ultra vires* the express and stated provisions of the Constitution. The observations relating to the application of Article 227 and to the morality and conscience of the Constitution are only further supportive observations that can be construed as a reconfirmation of the essential and inherent invalidity in the light of the other express provisions contained in the Constitution. The Primary touchstones remain the other provisions of the Constitution specified in the judgment.

140. This Court in more than one cases including the **Azizullah Memon's case** (PLD 1993 SC 341), **I.A. Sherwani's case** (1991 SCMR 1041) and **Liaquat Hussain's case** (PLD 1999 SC 504) has held that different laws can be enacted for different sexes and age groups, but in the present case the basic question is as to the vires of the NRO, 2007 on the

ground of being violative of Article 25 of the Constitution as it has provided protection to a certain class of persons against the crimes committed during a certain period.

141. It may be noted that newly inserted Section 33F of the NAO, 1999, under Section 7 of the NRO, 2007, has not only made classification between the general public and the 'holders of public office' but also amongst the 'holders of public office' on account of time period, as well, on the basis of which, benefit to a particular class i.e. the persons against whom the proceedings were initiated prior to 12th October 1999, has been extended on the criteria that prolonged proceeding are pending against them. At this juncture, it may be noted that prior to the NAO, 1999, Ehtesab Act, 1997 was in field, which was repealed on the promulgation of the NAO, 1999, as a result whereof, the proceedings initiated under the said Act, were protected by means of Section 33 of the NAO, 1999, which provides that any and all proceedings pending before the Court under the Ehtesab Act, 1997 shall stand transferred to a Court, as soon as it is constituted under this Ordinance, within the same Province, and it shall not be necessary to recall any witness or again to record any evidence, that may have been recorded. As far as Ehtesab Act is concerned, it was enacted on 31st May 1997 and was made effective w.e.f. 6th November 1990, so through the

NRO, 2007 benefit of withdrawal or termination of the cases or proceedings has been extended to persons whose cases are covered between the period from 6th November 1990 and 12th October 1999. Interestingly, neither the benefit of the NRO, 2007 has been extended to the 'holders of public office', against whom cases were registered prior to 6th November 1990 nor to those 'holders of public office' against whom cases have been registered after 12th October 1999, although the cases were registered against such persons, even before and after these cutoff dates. Thus for this reason as well, all the 'holders of public office' against whom cases have been initiated before 6th November 1990 and after 12th October 1999 are also entitled for equal protection of law because they are similarly placed. Therefore, on the basis of intelligible differentia, no distinction can be drawn between both the groups, as such the above sub-classification within the class of 'holders of public office' is not based on an intelligible differentia, having no rational nexus to the object, sought to be achieved by the relevant classification under the NRO, 2007 as such, it, being a discriminatory law, deserves to be declared void *ab initio* [**I.A. Sherwani's case** (1991 SCMR 1041)].

142. It is also contended with vehemence by the petitioner's counsel, particularly Mr. Abdul Hafeez Pirzda

and Mr. A.K. Dogar, learned Advocates that the NRO, 2007 was promulgated against the morality and the conscience of the Constitution. To elaborate their argument, they relied upon **R.S. Jhamandas' case** (PLD 1966 SC 229), **Benazir Bhutto's case** (PLD 1988 SC 416) and **D.S. Nakara's case** (AIR 1983 SC 130).

143. It is a universally accepted principle that Constitution of the country, may be written or otherwise, represents the voice of the people. The Constitution being a supreme law of the country provides for guarantee of peace, welfare and amity of the people, subject to their rights and obligations, against all forms of exploitation, socio-economic justice and principles of good governance, transformed in the principles of policy, to make the document as a living instrument, sufficient to cater for the present and future requirements of a nation. An instrument like the Constitution of 1973, to achieve the objects spelt out in the preamble, has the support of 176 million people, meaning thereby that this instrument has on its back moral strength of the nation, therefore, it would be their earnest desire and wish that everyone must show loyalty to the State and obedience to the Constitution and the law, as it has been envisaged under Article 5 of the Constitution. This object can be achieved if the moral or ethical values, the desires of the nation, have

been transformed into a legally enforceable formulation. In instant case the Parliamentarians i.e. the representatives of the people of Pakistan, by their high moral conduct have already demonstrated, by not allowing the NRO, 2007 to become the Act of the Parliament, as manifested from the proceedings of the National Assembly, referred to hereinabove, as well as by the act of the Federal and Provincial Governments of not defending and supporting it. As it has been discussed earlier that will of the people of Pakistan was not included in the promulgation of the NRO, 2007 because despite availability of the National Assembly the same was not placed before it as the then legislative authority, being holder of highest office under the Constitution, is presumed to know that it is a legislation which is being promulgated against the conscience of the Parliamentarians representing the people of Pakistan and inconsistent with the constitutional provisions discussed hereinabove, including Article 63(1)(h) of the Constitution, which provides for disqualification of a person from being elected or chosen as, and from being, a member of the Parliament, if he has been convicted by a Court of competent jurisdiction on a charge of corrupt practices, moral turpitude or misuse of power or authority under any law for the time being in force. The Constitution has its own conscience being

a living document, therefore, any law which negates any of the constitutional provisions shall be considered to be inconsistent with it. In **R.S. Jhamandas's case** (PLD 1966 SC 229), this Court being conferred with the powers of judicial review in the orders passed by Land Commissioner under para 27 (1) of the West Pakistan Land Reforms Regulation, 1959 overruled the objection and observed that "*what is hit is something which in the terms of the present Constitution, may well be described as the constitutional conscience of Pakistan*". This judgment supports the arguments that any law which is not promulgated in accordance with the Constitution would be considered against its conscience. As far as the question of morality is concerned, it has already been discussed hereinabove. However, note of it was also taken by this Court in **Benazir Bhutto's case** (PLD 1988 SC 416) while examining the implications of Article 17(1) of the Constitution. An elector, while exercising his right of franchise, confers/places trust upon the representative, being chosen by him. If such representative betrays his trust by involving himself into corruption or the offence of moral turpitude, he disqualifies himself to continue as a member of the Parliament, according to the guidelines provided in Article 63(1)(h) of the Constitution. It is also to be noted that plain reading of Article 63(1)(h) of the Constitution reveals

that it introduces two types of situation; one disclosing disqualification qua a candidate to become a member of the Parliament and; second disqualification qua the elected member of the Parliament.

144. It may be noted that Section 33F(1) in the NAO, 1999, inserted through Section 7 of the NRO, 2007, giving it overriding effect, by using *non abstante* clause, has allowed the prolonged pending proceedings to be withdrawn with immediate effect. In **Black's Law Dictionary**, 7th Edn. (1999) word 'proceeding' has been defined as follows:-

> "**(1)** the regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment. **(2)** any procedural means for seeking redress from a tribunal or agency. **(3)** an act or step that is part of a larger action. **(4)** the business conducted by a Court or other official body; a hearing. ...."

As per the above definition, the cases or proceedings have been withdrawn or terminated contrary to law, as it has been discussed hereinabove, initiated before 12th October 1999, including pending trial proceedings, conviction/acquittal appeals, etc., inasmuch as the transfer of pending proceedings under Section 33 of the NAO, 1999 have also been withdrawn or terminated. The manner in which Section 33F of the NAO, 1999, has been couched, suggests that the

'holders of public office' involved in any proceedings, not only under the NAO, 1999 but also in the cases under other laws i.e. Pakistan Penal Code, Anti-Terrorism Act, etc. have been withdrawn or terminated, considering the 'holders of public office' as a distinct class from the accused/convicts against whom similar proceedings are pending in any Court, with immediate effect. How the Constitution, as per its conscience coupled with morality, can allow this Court to maintain a law which is against all the norms of justice. As explained above, two things have become very significant; one is category of cases, initiated on a reference by the NAB inside or outside Pakistan and; second is that of the cases under any other law, for the time being in force covering all nature of crimes, heinous or minor. It may be noted that a 'holder of public office' when enters into Parliament, he enjoys moral authority as he has been elected by the constituents, enjoying their trust. But a 'holder of public office' whose case falls under disqualification prescribed in Article 63(1)(h) of the Constitution, which includes conviction by a Court of competent jurisdiction, on the charge of corrupt practices under Section 9 of the NAO, 1999, identifies persons, who are said to have committed the crime falling under this category. Second charge which falls under the definition of disqualification under Article 63(1)(h) of the

Constitution is in respect of moral turpitude. The expression 'moral turpitude' has not been defined under the Constitution, however, in **Black's Law Dictionary**, 6th Ed. its definition as under:-

> "The act of baseness, vileness or the depravity in private hand social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man. Act or behaviour that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offences as distinguished from others. The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory *mala prohibita*."

Similarly, in **Webster Dictionary,** the term 'moral turpitude' has been defined as "an act or behaviour that gravely violates moral sentiment or accepted moral standards of community." In **Law Lexicon** by P. Remnatha Aiyar Vol.III, 3rd Ed. (2005), the term 'moral turpitude has been defined as under:-

> "Anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness of depravity in private and social duties which a man owes to his fellowmen, or to society in general, contrary to accepted and customary rule of right and duty between man and man. ………………..

> Everything done contrary to justice, honesty, modesty, or good morals is done with turpitude, so that embezzlement involves moral turpitude."

Likewise, in **Corpus Juris Secundum**, Vol.1, 8th Ed. the term 'moral turpitude' has been defined as under:-

> " 'moral turpitude' is not a new term, but, rather, it is a term which is old in the law, and which has been used in the law for centuries. It is a term which has been the subject of many decisions and which has been much defined by Courts. ……………."

145. Third category relates to the cases of misuse of power or authority under any law for the time being in force. This category also squarely falls within the definition of corruption and corrupt practices as defined in Section 9 of the NAO, 1999.

146. Thus question arises, whether a law which instead of eliminating, has encouraged the offence of corruption and moral turpitude, can at all not be enacted in exercise of powers under Article 89 of the Constitution; whether promulgation of such a law would not be against the morality and the conscience of the Constitution; whether the constituents, in exercise of their right of franchise, have not made out a case to strike down such a law, which is not only contrary to the constitutional provisions, discussed

hereinabove, but also calls upon this Court to strike down such law as they believe that on account of their high moral and ethical codes, it has become their enforceable legal formulations **[D.S. Nakara's case** (AIR 1983 SC 130)**]**; and lastly whether it is not against the conscience of the Constitution which prohibits enactment and promulgation of any law inconsistent with its provisions. Answer to all above questions is in affirmative and could not be else.

147. It is mentioned in Section 33F of the NAO, 1999 inserted by means of Section 7 of the NRO, 2007 that 'holders of public office' shall also not be liable for any action in future as well for acts having been done in good faith before the said date. This immunity from future actions has also been provided contrary to the Constitution and the law. There are two provisions in the Constitution i.e. Article 12, according to which protection to a person against retrospective punishment has been made permissible; and Article 13, which protects a person against double punishment and self-incrimination. Thus, operation of Section 33F of the NAO, 1999, inserted through Section 7 of the NRO, 2007 seems to be in contravention to the mandate of Section 31B of the NAO, 1999, which provides mechanism for withdrawal from the prosecution of any accused person in the manner prescribed therein, but as far as the protection

against double punishment is concerned, it would only be available to a person who has already been punished but criminal proceeding right from the date of commencement up to final judgment has been withdrawn or terminated, making such a person as innocent, as he was before initiation of such proceedings at investigation stage. So far as Article 13 of the Constitution is concerned, no case can be made out under this Article of the Constitution against double punishment or self incrimination. It seems that the 'holders of public office' have been saved from future action for the crimes committed by them as well as the crimes charged against them on the basis of reference filed by the NAB including corruption and corrupt practices. Neither the Constitution nor any other law permits the legislative authority i.e. the President to promulgate a law, which fails to stand the test of Articles 12 and 13 of the Constitution.

148. By promulgation of the NRO, 2007, the 'holders of public office' have been saved from being charged of certain acts committed by them in good faith. Essentially, Section 33F of the NAO, 1999, inserted through Section 7 of the NRO, 2007, in generality, is dealing with the persons, facing criminal charges under any provision of law or the crime defined under the NAO, 1999. As far as the last

mentioned law is concerned, under it no exception has been created for the crimes committed under good faith except under some of the provisions of PPC, whereby protection has been given for committing an act in good faith. Section 52 of PPC defines the expression 'good faith' as 'nothing is said to be done or believed in 'good faith', which is done or believed without due care and attention'. In **Black's Law Dictionary**, 7th Edn. (1999), the expression 'good faith' has been defined as 'a state of mind consisting in **(1)** honesty in belief or purpose, **(2)** faithfulness to one's duty or obligation, **(3)** observance of reasonable commercial standards of fair dealing in a given trade or business or **(4)** absence of intent to defraud or to seek unconscionable advantage – also termed bona fide". In **Industrial Development Bank of Pakistan v. Saadi Asamatullah** (1999 SCMR 2874), the expression 'good faith' has been defined as 'an act is said to be done in good faith when it is done with due care and attention'. Similarly in **Fazal Ullah Siddiqui v. State** (2006 SCMR 1334), it has been held that 'nothing done without due care and caution can be accepted as having been done in good faith'.

149. It may also be noted that a public servant performing duty on behalf of State has been provided immunity in different statutes with reference to the nature of the crime etc. This expression has been used in Section 36 of

the NAO, 1999, which provides that no suit, prosecution, or any other proceedings shall lie against the Federal Government, Provincial Government, Chairman NAB, or any other member of the NAB or any person exercising any power or performing any function under this Ordinance or the Rules made under it for any act or thing, which has been done in good faith or intended to be done under this Ordinance or the rules thereof. As far as the persons against whom proceedings or investigation are pending before the Court of law including a High Court or Supreme Court, cannot be said to have committed the crime, in good faith, either heinous or minor in nature, as well as relating to corruption or corrupt practices, inside and outside the country. The legislature while enacting a law has to adopt certain measures before extending immunity to the functionaries of the State but at least we can say that an accused or convict cannot enjoy protection for offences, noted hereinabove, or for his deeds, in the garb of good faith.

150. Another important aspect of Section 7 of the NRO, 2007 is that while inserting Section 33F in the NAO, 1999, a mechanism has also been provided for 'withdrawal and termination of prolonged pending proceedings, initiated prior to 12th October, 1999'. One of the so-called reasons, prevailed upon the legislative authority to promulgate such

provision on account of 'prolonged pending proceedings initiated prior to 12th October 1999'. It may be noted that in the preamble of the NRO, 2007, besides other things, the prolonged pending proceedings was never the consideration. It does not seem to be that on account of prolonged pending proceedings, initiated prior to 12th October 1999, the cases have been withdrawn as according to it, necessity to promulgate the NRO, 2007 is "to promote national reconciliation, foster mutual trust and confidence amongst 'holders of public office' and to remove the vestiges of political vendetta and victimization, to make the election process more transparent and to amend certain laws for that purpose and for matters connected therewith and ancillary thereto". Assuming that the conditions so mentioned therein for terminating the cases being prolonged pending proceedings is acceptable, then why the cases which have been finalized, resulting in the conviction or acquittal and proceedings in respect thereof were pending, have been withdrawn. Therefore, instead of withdrawing or terminating the proceedings, mechanism should have been followed for the disposal of cases by increasing manpower of investigating agencies and the number of Courts etc. In **Liaquat Hussain's case** (PLD 1999 SC 504), somehow identical objection was raised on the creation of Military

Courts and this Court while disposing of the matter, provided a mechanism to monitor the proceedings with a view to ensure expeditious disposal of cases pending in Courts. Relevant para therefrom has already been reproduced hereinabove. In addition to it, prolonged pending proceedings, in no way, can constitute a ground for the withdrawal or termination of the proceedings, in view of discussion made hereinabove elaborately. More so, Article 37 of the Constitution casts a duty upon the State to ensure inexpensive and expeditious justice, therefore, the Government by invoking this provision can increase the number of Courts and paralegal staff to ensure expeditious disposal of the cases of persons charged for various offences.

151. This Court while interpreting different provisions of the Constitution has an authority to make an observation with an object that the State must realize its duty. As in the case in hand, the Court is empowered to pass appropriate orders, as it deemed fit under Article 187 of the Constitution as well as keeping in view the earlier precedents providing for monitoring of the cases pending in the Courts and the increase in number of Courts. As far as the supervision of the High Court is concerned, it has already been discussed hereinabove and for comprehending powers of this Court under Article 187 of the Constitution, reference can be made

to **Sabir Shah's case** (PLD 1995 SC 66). In this case, Chief Justice Sajjad Ali Shah (as he then was) while discussing the powers of this Court, observed as under:-

> "22. In support of the proposition that this Court has more than ample powers to do complete justice, as contemplated under Article 187 of the Constitution, reference can be made to Order XXIII Rule 6 of the Supreme Court Rules, 1980, which also provides that nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. This rule is consistent with the spirit and amplitude of the jurisdiction and power as conferred upon it by the Constitution."

Likewise, Justice Saleem Akhtar (as he then was) observed as under:-

> "10. The Supreme Court is the apex Court. It is the highest and the ultimate Court under the Constitution. In my view the inherent and plenary power of this Court which is vested in it by virtue of being the ultimate Court, it has the power to do complete justice without in any manner infringing or violating any provision of law. While doing complete justice this Court would not cross the frontiers of the Constitution and law. The term "complete justice" is not capable of definition with exactitude. It is a term covering variety of cases and reliefs which this Court can mould and grant depending upon the facts and circumstances of the case. While doing complete justice formalities and technicalities should not fetter its power. It can grant ancillary relief, mould the

relief within its jurisdiction depending on the facts and circumstances of the case, take additional evidence and in appropriate cases even subsequent events may be taken into consideration. Ronald Rotunda in his book "Treatise on Constitutional Case Substance" (Second-Edition), Volume 2 at page 90 has stated that "The Supreme Court is an essence of a continual Constitutional convention". The jurisdiction and the power conferred on the Supreme Court does empower it to do complete justice by looking to the facts, circumstances and the law governing a particular case. Article 187 does not confer any jurisdiction. It recognises inherent power of an apex Court to do complete justice and issue orders and directions to achieve that end. Inherent justification is vested in the High Court and subordinate Courts while dealing with civil and criminal cases by virtue of provisions of law. The inherent jurisdiction of this Court to do complete justice cannot be curtailed by law as it may adversely affect the independence of judiciary and the fundamental right of person to have free access to the Court for achieving complete justice. This enunciation may evoke a controversy that as Article 175(2) restricts Article 187 it will create conflict between the two. There is no conflict and both the Articles can be read together. The conflict in the provisions of the Constitution should not be assumed and if apparently there seems to be any, it has to be interpreted in a harmonious manner by which both the provisions may co-exist. One provision of the Constitution cannot be struck down being in conflict with the other provision of the Constitution. They have to live together, exist together anti operate together. Therefore, while

> interpreting jurisdiction and power of the superior Courts one should look to the fundamental rights conferred and the duty cast upon them under the Constitution. A provision like Article 187 cannot be read in isolation but has to be interpreted and read harmoniously with other provisions of the Constitution. In my humble view this Court while hearing appeal under a statute has the jurisdiction and power to decide the question of vires of the statute under which the appeal has arisen and can even invoke Article 184(3) in appropriate cases."

152. It is worth to mention here that by means of Section 33F of the NAO, 1999, inserted through Section 7 of the NRO, 2007, cases or proceedings have been withdrawn or terminated, without spelling out the reasons, namely, as to whether an accused himself is responsible for causing the prolonged delay or the prosecution or the Courts have failed to decide the case expeditiously. After the promulgation of National Judicial Policy, 2009 by the National Judicial Policy Making Committee, despite strict monitoring of the proceedings of the Court, we have observed that the Courts and the Investigating Agencies are taking all necessary steps to dispose of the cases expeditiously according to law but it is a hard fact that accused, for one or other reasons, known to them, attempt to protract the proceedings.

153. By means of Section 3 of the NRO, 2007, amendment has been made in Section 39 of the Representation of the People Act, which reads as under:-

> "**3. Amendment of section 39, Act LXXXV of 1976.** (1) In the Representation of the People Act, 1976 (LXXXV of 1976), in section 39, after sub-section (6), the following new sub-section (7) shall be added, namely:-
>
> "(7) After consolidation of results the Returning Officer shall give to such contesting candidates and their election agents as are present during the consolidation proceedings, a copy of the result of the count notified to the Commission immediately against proper receipt and shall also post a copy thereof to the other candidates and election agents."

Intention enshrined in above said Section cannot be doubted but it seems that this provision is cosmetic in its nature, comparing to Sections 2, 6 and 7 of the NRO, 2007. However, the benefit of the same cannot be drawn immediately by a candidate, who is always interested to get the certified copy of the result and such arrangement is already available in Section 38 of the Representation of the People Act, 1976, which provides that the Presiding Officer shall give a certified copy of the statement of count and the ballot paper account to such of the candidates, their election agents or polling agents as may be present and obtain a receipt for such copy because as far as the consolidation of a result is concerned, it takes place subsequent to polling day, as per

the schedule fixed by the Election Commission. If at all, the intention of the legislature was to ensure transparent election free from rigging of any kind, then emphasis should have been for the strict compliance of Section 38 (11) of the Representation of the People Act, 1976, which reads as under:-

> "**38. Proceedings at the close of poll** .-
> ……………………………………………………
> …………………………………………………....
> (11) The Presiding Officer shall give a certified copy of the statement of the count and the ballot paper account to such of the candidates, their, election agents or polling agents as may be present.
> ……………………………………………………
> …………………………………………………...."

154. Mr. Shaiq Usmani, learned Amicus curiae started his arguments by saying that he would draw the canvas before the Court, which is necessary to be seen, that what possible arguments could be raised in defence of the NRO, 2007 by the other side. He argued that in criminal justice system, there are two systems of justice; one is retributory and the other is restorative; first one entails prosecution and punishment, just very simple, whereas restorative does not believe in prosecution or punishment rather it tries to resolve the issues through accountability. According to him if, presumably, it was an act of amnesty by means of the NRO, 2007, then the question arises whether it was legitimate and if so, could it justify the derogation from the fundamental

rights. He added that amnesty is manifestation of restorative justice and is resorted to, with a view to end the internal conflict on the basis of negotiation with the leaders, who committed the crimes, either political or the other. He stated that there are two further types of amnesties; one is compromised by the two parties for their mutual interest; and other is accountable amnesty where there is open admission of guilt, because victims do not, necessarily, always want punishment, but certainly want the admission of guilt. According to his version, the only legitimate amnesty is the one which is accountable, so in the case in hand, the amnesty, if it could be called as amnesty, is not a legitimate one, hence not permissible; therefore, on this ground, too, it falls. He further stated that the NRO, 2007 is violative of Article 25 of the Constitution on the ground of discrimination because on the face of it, it is discriminatory; therefore, looking at the **I.A. Sherwani's case** (1991 SCMR 1041) there was a definite classification of people. He argued that the NRO, 2007 is violative of the salient features of the Constitution and principle of trichotomy of powers, as it is the domain of the judiciary to see whether a criminal case should be withdrawn or not, inasmuch as there is encroachment upon the domain of judiciary, which is certainly violative of the principle of trichotomy of powers,

as such it is void. He strenuously argued that corruption is nothing but theft of public money; when the National Assembly cannot make a law to condone theft, how can the President issue an Ordinance to condone theft. While referring to Section 21 of the NAO, 1999, he argued that Attorney General has no power at all to withdraw the cases; therefore, anything done by the then Attorney General, is of no consequences.

155. The above arguments of the learned Amicus Curiae have been considered and need no further deliberations being comprehensive in their form, in view of above discussion on different aspects of the case noted in the forgoing paras.

156. Mian Allah Nawaz, another learned Amicus Curiae submitted his formulations on the NRO, 2007 by saying that man is a complex, complicated in it; there is no definition of man; even the Allah Almighty has said that the creation, which is being sent to this globe, is flawed, and is a blend of two great positive and negative reservoirs of instincts; one instinct is goodness, the good, the tranquility, peace; and the other is greed, lust, bloodshed etc.; so the man is beautiful combination of both. He quoted the saying of **Jeremy Bentham**, a great philosopher, that '*if you keep twenty*

wolfs at one place and twenty men at the same place, it would be difficult to manage the men'. According to him another philosopher has rightly said that '*law is necessity of the man*' because he can't discipline himself; he can't undertake his own examination; man is such a creature that he needs three instincts, i.e. instinct of preservation, instinct of peace and the instinct of law, which compel him to travel on the path of law. He added that laws are those minimum requirements, patterns, modes; which if recognized, each man will be saved from the warring, lust and greed; and this is beginning of the law. According to him law is not necessarily be a divine law, it may be a temporal law and it may be a secular law but whatever it is, the main thing is that it is for the peace, tranquility and goodness. He stated that any law, which violates the 'intrinsic value of the law' or 'intrinsic value of behaviour', is not a good law, and it has to be struck down otherwise it would create simple anarchy, lust, greed and would lead to monumentally horrendous things. He argued that if the basic fundamental philosophy of law was not kept in view, neither the Constitution nor the law or the problem facing the nation could be understood and no solution could be found. In this behalf he referred to Surah Al-Baqarah from the Holy Quran. According to him the morality of law has

two aspects to be assumed as *sine qua non*; one is internal voice of a human being and the other is external voice i.e. conduct of a human being; these two can be called as a soul, conscience, discipline, etc. of human being; as the same are contemporaneous not simultaneous; naturally embodied in the human being, who is to be tested on these touchstones.

157. With regard to NRO, 2007, he stated that the NRO, 2007 is not only a bad law but it's a dirty law, a kleptocratic law, which converts the very form of the Government. While explaining the word 'kleptocracy', he stated that it is a classical manifestation of evolution of gradual supremacy of satanic forces. He further stated that there is not a single provision in the Constitution, validating the NRO, 2007 or giving a conscience to it under any statute, because our Constitution is based upon morality of Muslims. According to him the NRO, 2007, from the beginning to end, after preamble, is a master piece of savagery, therefore, from the commencement to finish, irrespective of certain cosmetic provisions, it is a so bad law that it must be struck down, as a piece of paper, which never deserved to be put on the statute book.

158. The above arguments of the learned amicus curiae are self-explanatory; therefore, there is no need to further dilate upon them.

159. Mr. M. Sardar Khan, learned amicus curiae, made his submissions to the effect that the NRO, 2007 is not only discriminatory and inconsistent with fundamental rights, enshrined in Article 25 of the Constitution but also in conflict with other Articles of the Constitution such as Articles 62, 63 and 175, therefore, it is not a valid law rather it is a bad law. According to him Article 5 of the Constitution postulates that it is inviolable obligation of every citizen to obey the Constitution and the law, whereas, Article 8 (2) prohibits the State from making any law which takes away or abridges fundamental rights conferred by the Constitution; therefore, if a law does so, then it shall be void, as such, the NRO, 2007, so promulgated, seems to be an intentional violation and disobedience of the Constitutional provision, contained in Article 8 of the Constitution. He further contended that Article 2A of the Constitution requires that the authority of Allah Almighty, conferred upon the chosen representatives of the people of Pakistan, is to be exercised by them in accordance with the Constitution and within the limits

prescribed by Allah Almighty. According to him various provisions of the NRO, 2007 i.e. 2, 3, 4, 6 & 7, are not valid provisions as they are void for various reasons, including, being against the Injunction of Islam, violative of the mandate of Article 175 of the Constitution, and repulsive to the provisions of Article 62 & 63 of the Constitution. He argued that the object of this law, for all intents and purposes, does not seem to be 'reconciliation' but it paves the way and facilitates to those, charged with corruption and corrupt practices, plundering of national wealth and fraud, to come back, seize and occupy echelons of power again; its aim seems to be to legalize corruption and the crimes committed by those in power, in the past. He further argued that Courts have been deprived, by virtue of this law, from their judicial functions by conferring powers to the administrative authority. He contended that the NRO, 2007, besides being discriminatory, has also been applied discriminately.

160. With regard to Article 247 of the Constitution, learned counsel contended that this Court has always favoured application of fundamental rights to ensure that there should not be any discrimination amongst citizens and the State shall not make any law which takes away or

abridges the rights so conferred. In this behalf he relied upon the case of **Government of NWFP v. Muhammad Irshad** (PLD 1995 SC 281), wherein Regulation No. I of 1975 dated 26th July 1975, known as Provincially Administered Tribunal Areas Criminal Laws (Special Provisions) Regulation, 1975 was declared void, being inconsistent with the fundamental rights guaranteed under Article 25 of the Constitution. On the arguments that under Article 8(1) of the Constitution, examination of Regulation, framed by the President or the Governor in exercise of powers under sub-Articles (4) and (5) of Article 247 of the Constitution, is not included in the expression 'any law', this Court maintained the judgment of the High Court, in the following terms:-

> "20. It seems difficult to subscribe to the view canvassed by Mr. Samadani that the expression `any law' as used in Article 8(1) does not encompass a Regulation made under Article 247(4) or that the term `State' as occurring in Article 7 does not include the President and the Governor. Article 8(1), ibid, reads as follows:
>
> > "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 word `any' is ordinarily used to enlarge the amplitude of the term to which it is attached and there seems to be no reason why the expression `any law' as occurring in Article 8(1) be so narrowly construed as to

exclude from its purview a Regulation which possessed the efficacy of law in a part of Pakistan, particularly when its effect has been extended to all customs and usages which have the force of law. Article 7 falls in Part II of the Constitution which bears the rubric Fundamental Rights and Principles of Policy. The said Article reads as follows:

> "7. Definition of the State.- In this Part, unless the context otherwise requires, `the State' means the Federal Government, Majlis-e-Shoora (Parliament), a Provincial Government, a Provincial Assembly, and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess."

It will be noticed that the definition of the `State' as given in this Article is fairly wide; on its plain reading it would appear to encompass all authorities which perform executive and legislative functions in any part of the country. So far as the Areas are concerned, the President and the Governor while exercising their powers under Article 247 stand in the position of the Federal and the Provincial Governments. There is therefore no reason why they should be excluded from the definition of the `State' so far as the Areas are concerned. In fact, to hold otherwise, would tend to deprive a sizeable part of the Pakistan citizenry of the Fundamental Rights enshrined in the Constitution which could never have been the intention of the Constitution-makers."

161. Learned counsel, while heavily relying upon the above judgment, stated that this Court has not shown any flexibility, while interpreting constitutional provisions, dealing with the case pertaining to Tribal Area, where the

President and the Government have dominating authority to issue regulation, then as to why not the NRO, 2007 be declared *ultra vires* to the Constitution, void *ab initio* and of no consequences for the reason discussed hereinabove.

162. We are in agreement with the above arguments of the learned counsel.

163. Raja Muhammad Ibrahim Satti, learned counsel appearing in Civil Appeal No. 1094 of 2009, however, supported the NRO, 2007 for the following reasons :-

i) On 12th October 2007, while admitting the Constitution Petition, challenging the NRO, 2007, its operation was not suspended, therefore, presumably it was a good law.

ii) On 27th February 2008, order dated 12th October 2007 was modified without declaring the NRO, 2007 *ultra vires* the Constitution, as such presumably the NRO, 2007 is a valid law.

iii) The President, in exercise of powers under Article 89 of the Constitution, on having been satisfied that the circumstances prevailed for issuing the NRO, 2007, exercises his authority with immediate effect and it is no body's case that the NRO, 2007 has been issued by the President in exercise of powers, beyond the scope of the

Constitution, therefore, it being a valid law deserves to continue.

iv) The NRO, 2007 along with other Ordinances was not declared *ultra vires* the Constitution at the time of examination of the validity of Proclamation of Emergency of 2007 and Provisional Constitution Order, 2007 by this Court in **Sindh High Court Bar Association's case** (PLD 2009 SC 879), as by extending its constitutional life, it was sent to the Parliament for examination and making it an Act of the Parliament, therefore, it may be presumed that this Court having ample powers, refused to exercise the same for declaring the NRO, 2007 *ultra vires* the Constitution.

v) Appellant is entitled for the same relief, which has been extended to the beneficiaries, between the period from 5th October 2007 to 1st February 2008, so that he is not discriminated.

164. As far as the reference of the learned counsel for the appellant to order dated 12th October 2007 is concerned, on this date notice was issued to the respondents and while examining the request of the counsel for the petitioners for suspending the operation of the NRO, 2007, it was observed that "*ordinarily the provisions of a law cannot be suspended because this Court can only suspend a particular order, judgment*

or action, etc.; however, we are inclined to observe in unambiguous terms that any benefit drawn or intended to be drawn by any of the public office holder shall be subject to the decision of the listed petitions and the beneficiary would not be entitled to claim any protection of the concluded action under Sections 6 and 7 of the impugned Ordinance, under any principle of law, if this Court conclude that the impugned Ordinance and particularly its these provisions are ultra vires the Constitution. Therefore, the argument of the learned counsel is of no help to him.

165. Next crucial date pointed out by the learned counsel is 27th February 2008, when order dated 12th October 2007 was modified, which does not mean that the law has been validated. In addition to it, it may be stated that the appellant Fazal Dad Jat was not a party in those proceedings, therefore, this argument has no substance.

166. So far as the argument of the learned counsel regarding referring of the NRO, 2007 along with other Ordinances to the National Assembly in the case of **Sindh High Court Bar Association's case** (PLD 2009 SC 879), is concerned, reasons in this behalf have already been explicitly explained therein and discussion in this regard had already taken place hereinabove, whereby, it has been held that this

Court believes in trichotomy of powers, therefore, instead of examining the constitutionality of such Ordinances, including the NRO, 2007, for the detailed reasons, mentioned in the judgment, the Ordinances along with the NRO, 2007 were sent to the National Assembly for examination. It is an admitted fact that the National Assembly had not made the NRO, 2007 as an Act of the Parliament, although it was tabled before it; therefore, the argument of the learned counsel that its constitutionality being inapt is not acceptable.

167. As far as the question of extending relief under the NRO, 2007 to the appellant and the convicts, who have filed applications being Human Right Case Nos. 14328-P to 14331-P & 15082-P of 2009, is concerned, it is to be observed that it depends upon the final verdict about the constitutionality of the NRO, 2007.

168. Now turning towards the arguments of the learned counsel about the Ordinance issuing powers of the President, there is no denial to it, but subject to discussion made hereinabove on this subject.

169. It may be noted that the President has an authority under Article 89 of the Constitution to promulgate an Ordinance, but cannot issue temporary legislation, which

the Parliament is not empowered to do. A thorough perusal of the Federal and the Concurrent Lists persuades us to hold that the President was not empowered to issue the NRO, 2007 as the subjects covered by its Section 2, 6 and 7 fall beyond the scope of these lists. As far as its manifestations is concerned, it has already been done by the Parliament before whom the NRO, 2007 was placed, but the same was withdrawn subsequently under Rule 139 of the Rules of Procedure and Conduct of Business in the National Assembly, 2007, as impliedly the National Assembly refrained itself from making it as an Act of Parliament. Inasmuch as, the actions taken from the date of its inception till the expiry of its constitutional life of 120 days under Article 89 of the Constitution from 5th October 2007 to 1st February 2008, benefits derived by some of the person have not been protected, and the Government (either Federal or Provincial) has also not insisted to allow retention of the benefits derived out of it to the accused persons during the said period. More so, none of the beneficiaries, who have drawn benefit during the said stipulated period from 5th October 2007 to 31st July 2009, when vide judgment dated 31st July 2009, all the Ordinances were declared to have been

shorn of permanency, have not come forward to protect their benefits, although hearing of these petitions has been widely publicized in print and electronic media. Thus in view of theory of *ultra vires*, explained in **Cooley's Constitutional Limitations**, reference of which has been made by Chief Justice Cornelius (as then he was) in **Fazlul Quader Chowdhry v. Muhammad Abdul Haque** (PLD 1963 SC 486), wherein it has been observed that "for the constitution of the State is higher in authority than any law, direction, or order made by anybody or any officer assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation is made; in any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity", we are of the opinion that the NRO, 2007 is void *ab initio*, therefore, the parties who have derived benefit shall not be entitled for the same from 5th October 2007 and all the cases withdrawn under Section 2, 6 & 7 of the NRO, 2007 shall stand revived immediately. The Courts seized with the matters shall proceed to decide the same, considering that the NRO, 2007 was never promulgated.

170. It is also to be noted that while examining the vires of a statute the Court is free to examine the same on the touchstone of different constitutional provisions as it has been held in **Muhammad Mubeen-us-Salam v. Federation of Pakistan** (PLD 2006 SC 602):

> "52. In this behalf it may be noted that this Court, in exercise of constitutional Jurisdiction conferred upon it under various provisions of the Constitution, including Articles 184, 185, 186, 187(1) and 212(3), enjoys enormous power of judicial review. Besides, it is well-settled by this time that being the apex Court, it has also been vested with inherent Powers to regulate its own authority of judicial review, inasmuch as, that in Zafar Ali Shah v. Pervaiz Musharraf, Chief Executive of Pakistan (PLD 2000 SC 869), it has been held by the full Court that "so long as the superior Courts exist, they shall continue to exercise powers and functions within the domain of their jurisdiction and shall also continue to exercise power of judicial review in respect of any law or provision of law which comes for examination before the superior Courts. " Argument by one of the learned counsel that in the absence of violation of any of the fundamental rights, guaranteed by the Constitution, section 2-A of the STA, 1973 can be struck down only if in derogation of Article 8 of the Constitution and there is no other specific provision in the Constitution, authorizing this Court to exercise powers in this behalf is untenable on the face of it. A reference to the case of Mr. Fazlul Qader Chowdhry (ibid) would indicate that "superior Courts have inherent duty, together with the appurtenant power,

to ascertain and enforce the provisions of the Constitution in any case coming before them." In the case of A.M. Khan Leghari v. Government of Pakistan (PLD 1967 Lahore 227), it has been emphasized that " ----------in cases of conflict between the supreme law of the Constitution and an enactment it is the duty of the superior Courts as its protectors and defenders to declare the enactment in question as invalid to the extent of its repugnancy with the constitutional provision in the absence of any bar either express or implied." Similarly, in Messrs Electric Lamp Manufacturers of Pakistan Ltd. v. The Government of Pakistan (1989 PTD 42), it has been held that "the Parliament in England is sovereign in the real sense and it is not subject to any constraints as in England there is no written Constitution, whereas in Pakistan the Parliament is subject to constraints contemplated by the Constitution in accordance with the procedure provided therein, but so long as it is not amended the Parliament has to act within its four corners; so a statute or any of its provisions can be struck down on the ground of being *ultra vires* of the Constitution." Likewise, in the case of Fauji Foundation v. Shamimur Rehman (PLD 1983 SC 457), it is held that "-----------when a Court, which is a creature of the Constitution itself, examines the vires of an Act, its powers are limited to examine the legislative competence or such other limitations as are in the Constitution; and while declaring a legislative instrument as void, "it is not because the judicial power is superior in degree or dignity to the legislative power" but because it enforces the Constitution as a paramount law either where a

legislative instrument is in conflict with the constitutional provision so as to give effect to it or where the Legislature fails to keep within its constitutional limits." In the case of Liaqat Hussain v. Federation of Pakistan (PLD 1999 SC 504), the conclusion was that "Court cannot strike down a statute on the ground of mala fides, but the same can be struck down on the ground that it is violative of a constitutional provision. In Collector of Customs and others v. Sheikh Spinning Mills (1999 SCMR 1402), this Court struck down the imposition of pre-shipment inspection service charge under the Customs Act, 1969 as unconstitutional, which of course was not based on any fundamental rights. Relevant para reads as under:--

> "Considering the case from all angles, although the Federal Legislature is competent to legislate for the imposition of fees within the meaning of Entry 54, in the Federal Legislative List, Fourth Schedule to the Constitution, but again as already discussed hereinbefore, one has to see what is the nature of the legislation and whether the same could have been legislated within the ambit of the powers of the Federal Legislature. No doubt, legislation can be made to impose fee in respect of any of the matters in the Federal Legislative List, but definitely not for pre-inspection, the benefit of which has to go to the companies appointed to carry out the inspection and not to the payees of the fees. The imposition of such fee is not in lieu of services to be rendered for the benefit of its payees
> --------------------------

For the foregoing reasons, we are of the view that the imposition of service charge as imposed under section 18-B of the Act towards the pre-shipment inspection is *ultra vires* of the powers of the Federal Legislature."

> 53. Likewise, in the case of Zaman Cement Company (Pvt.) Ltd. v. Central Board of Revenue and others (2002 SCMR 312) this Court observed that "the function of the judiciary is not to question the wisdom of Legislature in making a particular law nor it can refuse to enforce it even if the result of it be to nullify its own decisions provided the law is competently made; its vires can only be challenged being violative of any of the provisions of the Constitution and not on the ground that it nullifies the judgment of the superior Courts." In this judgment the use of expression `any, has widened the jurisdiction of the Court and extended it to the extent of the violation of any of the provisions of the Constitution including fundamental rights. Similarly in Ghulam Mustafa Ansari v. Government of Punjab (2004 SCMR 1903) it was held that "ordinarily it is not for us to question the wisdom of the Legislature merely on the ground that a provision of law may work some inconvenience or hardship in the case of some persons, unless it be violative of a constitutional provision including the fundamental rights"."

171. We have examined the respective contentions of the learned counsel for the parties as well as the vires of the NRO, 2007 on the touchstone of various Articles of the Constitution, and have come to the conclusion that the NRO, 2007 as a whole, particularly its Sections 2, 6 and 7, is declared void *ab initio* being *ultra vires* and violative of Articles 4, 8, 12, 13, 25, 62(f), 63(1)(h), 63(1)(p), 89, 175, 227 of

the Constitution, therefore, it shall be deemed *non est* from the day of its promulgation i.e. 5th October 2007 as a consequence whereof all steps taken, actions suffered, and all orders passed by whatever authority, any orders passed by the Courts of law including the orders of discharge and acquittals recorded in favour of accused persons, are also declared never to have existed in the eyes of law and resultantly of no legal effect.

172. Resultantly, all cases in which the accused persons were either discharged or acquitted under Section 2 of the NRO, 2007 or where proceedings pending against the holders of public office had got terminated in view of Section 7 thereof, a list of which cases has been furnished to this Court and any other such cases/proceedings which may not have been brought to the notice of this Court, shall stand revived and relegated to the status of pre-5th of October, 2007 position.

173. All the concerned Courts including the Trial, the Appellate and the Revisional Courts are ordered to summon the persons accused in such cases and then to proceed in the respective matters in accordance with law from the stage

from where such proceedings had been brought to an end in pursuance of the above provisions of the NRO, 2007.

174. The Federal Government, all the Provincial Governments and all relevant and competent authorities including the Prosecutor General of NAB, the Special Prosecutors in various Accountability Courts, the Prosecutors General in the four Provinces and other officers or officials involved in the prosecution of criminal offenders are directed to offer every possible assistance required by the competent Courts in the said connection.

175. Similarly all cases which were under investigation or pending enquiries and which had either been withdrawn or where the investigations or enquiries had been terminated on account of the NRO, 2007 shall also stand revived and the relevant and competent authorities shall proceed in the said matters in accordance with law.

176. It may be clarified that any judgment, conviction or sentence recorded under Section 31-A of the NAO, 1999 shall hold the field subject to law and since the NRO, 2007 stands declared as void *ab initio*, therefore, any benefit derived by any person in pursuance of Section 6 thereof is

also declared never to have legally accrued to any such person and consequently of no legal effect.

177. Since in view of the provisions of Article 100(3) of the Constitution, the Attorney General for Pakistan could not have suffered any act not assigned to him by the Federal Government or not authorized by the said Government and since no order or authority had been shown to us under which the then learned Attorney General namely Malik Muhammad Qayyum had been authorized to address communications to various authorities/courts in foreign countries including Switzerland, therefore, such communications addressed by him withdrawing the requests for mutual legal assistance or abandoning the status of a civil party in such proceedings abroad or which had culminated in the termination of proceedings before the competent fora in Switzerland or other countries or in abandonment of the claim of the Government of Pakistan to huge amounts of allegedly laundered moneys, are declared to be unauthorized, unconstitutional and illegal acts of the said Malik Muhammad Qayyum.

178. Since the NRO, 2007 stands declared void *ab*

initio, therefore, any actions taken or suffered under the said law are also *non est* in law and since the communications addressed by Malik Muhammad Qayyum to various foreign fora/ authorities/courts withdrawing the requests earlier made by the Government of Pakistan for mutual legal assistance; surrendering the status of civil party; abandoning the claims to the allegedly laundered moneys lying in foreign countries including Switzerland, have also been declared by us to be unauthorized and illegal communications and consequently of no legal effect, therefore, it is declared that the initial requests for mutual legal assistance; securing the status of civil party and the claims lodged to the allegedly laundered moneys lying in foreign countries including Switzerland are declared never to have been withdrawn. Therefore the Federal Government and other concerned authorities are ordered to take immediate steps to seek revival of the said requests, claims and status.

179. In view of the above noticed conduct of Malik Muhammad Qayyum, the then learned Attorney General for Pakistan in addressing unauthorized communications which had resulted in unlawful abandonment of claims of the Government of Pakistan, inter alia, to huge amounts of the

allegedly laundered moneys lying in foreign countries including Switzerland, the Federal Government and all other competent authorities are directed to proceed against the said Malik Muhammad Qayyum in accordance with law in the said connection.

180. We place on record our displeasure about the conduct and lack of proper and honest assistance and cooperation on the part of the Chairman of the NAB, the Prosecutor General of the NAB and of the Additional Prosecutor General of the NAB, namely, Mr. Abdul Baseer Qureshi in this case. Consequently, it is not possible for us to trust them with proper and diligent pursuit of the cases falling within their respective spheres of operation. It is therefore, suggested that the Federal Government may make fresh appointments against the said posts of persons possessing high degree of competence and impeccable integrity in terms of Section 6 of the NAO, 1999 as also in terms of the observations of this Court made in **Khan Asfandyar Wali's case** (PLD 2001 SC 607). However, till such fresh appointments are so made, the present incumbents may continue to discharge their obligations strictly in accordance

with law. They shall, however, transmit periodical reports of the actions taken by them to the Monitoring Cell of this Court which is being established through the succeeding parts of this judgment.

181. A Monitoring Cell shall be established in the Supreme Court of Pakistan comprising of the Chief Justice of Pakistan or a Judge of the Supreme Court to be nominated by him to monitor the progress and the proceedings in respect of Court cases (explanation added in detailed reasons) in the above noticed and other cases under the NAO, 1999. Likewise similar Monitoring Cells shall be set up in the High Courts of all the Provinces comprising the Chief Justice of the respective Province or Judges of the concerned High Courts to be nominated by them to monitor the progress and the proceedings in respect of Court cases (explanation added in detailed reasons) in which the accused persons had been acquitted or discharged under Section 2 of the NRO, 2007.

182. The Secretary of the Law Division, Government of Pakistan, is directed to take immediate steps to increase the number of Accountability Courts to ensure expeditious disposal of cases.

183. Hereinabove are the reasons of our short order dated 16th December 2009.

Chief Justice.

Judge (1) **Judge (2)** **Judge (3)**
I agree, by separate note

Judge (4) **Judge (5)** **Judge (6)**

Judge (7) **Judge (8)** **Judge (10)**
I agree, however I add my own note

Judge (11) **Judge (12)** **Judge (13)**
I agree and have also added my separate note

Judge (14) **Judge (15)** **Judge (16)**

Judge (17)

Islamabad
16.12.2009
Irshad /*

APPROVED FOR REPORTING.

CH. IJAZ AHMED, J. I have had the benefit and privilege of going through the judgment recorded by Mr. Justice Iftikhar Muhammad Chaudhry, Hon'ble Chief Justice of Pakistan and generally agree therewith. In view of the importance of the matter, I deem it prudent to add few words in support thereto. The facts and contentions have already been narrated in detail by the Hon'ble Chief Justice of Pakistan, therefore, reiteration thereof are not required.

2. Legislative history/past events are relevant for interpreting constitutional provisions on the principle of historical modalities. The Muslims had ruled sub continent for a considerable period. During the period of the Muslim rule, sub continent was rich in all spheres of life. It is interesting to note that rate of literacy was very high above 90 percent as highlighted by Frishta while writing history of the sub continent. Even otherwise sub continent was known as the richest part of the world. The western countries also had belief that sub continent was rich qua all types of resources such as minerals, wheat, rice etc as the land of the sub continent was very fertile as compared to other parts of the world. Sub continent was almost surrounded by mountains and large open area due to which according to the western countries this area is known as "Soonay ke Chiria". The kingdom of Britain and France had entered in sub continent for the purpose of business.

3. After death of Aurangzeb the system of justice, established by the Muslims, was totally dis-regarded and Muslims were fighting with each other for securing power. This was the time when the East India Company had taken benefit of its experience and ultimately had become rulers of the sub continent. It is pertinent to mention that Lord

Macaulay had made speech at the floor of the British Parliament on 2nd February, 1835 which is to the following effect:-

> *"I have traveled across the length and breadth of India and I have not seen one person who is a beggar, who is a thief. Such wealth I have seen in this country, such high moral values, people of such caliber, that I do not think we would ever conquer this country, unless we break the very backbone of this nation, which is her spiritual and cultural heritage, and, therefore, I propose that we replace her old and ancient education system, her culture, for if the Indians think that all that is foreign and English is good and greater than their own, they will lose their self-esteem, their native self-culture and they will become what we want them, a truly dominated nation".*

(a) **HISTORY OF CONCEPT OF EQUALITY BEFORE LAW.**

4. Holy Quran says; "if Ye Judge between mankind, that Ye Judge justly". The Holy Prophet (PBUH) proclaimed; "people are all equal as the teeth of a comb".

5. The concept was introduced by Islam and further highlighted, implemented and explained by the Holy Prophet (PBUH). See *Pakistan Petroleum Workers Union's case (1991 CLC 13).* The relevant observations are as follows:-

> "This Article guarantees to all citizens of Pakistan equality before law and equal protection of law. These rights guaranteed by the Constitution are now universally applied and practised in all the civilized world. It finds recognition in Universal Declaration of Human Rights and the Covenant on Human Rights, 1950. An examination of Constitutions of

various countries will show that the written Constitutions have invariably used the expression "equality before law" but "equal protection of law" has not so commonly been used. According to the jurists term "equal protection of law" finds it origin in the 14th Amendment of the American Constitution. In my humble view the concept of both terms "equality before law" and "equal protection of law" is not of so recent origin in jurisprudence as described by various authors and jurists. From a comparative study of the legal history and jurisprudence we find that the concept of equality before law and principles of "equal protection of the law" were for the first time given and firmly practised by the Holy Prophet (be peace on him). Therefore, it can be traced as far back as 1400 years, i.e. much before the Magna Carta, 14th Amendment of American Constitution, Declaration of Human Rights and the theory of Rule of Law as enunciated by the Western Jurists. The Last Sermon of the Holy Prophet (be peace on him) is a landmark in the history of mankind which recognizes the inalienable Rights of a man conferred by Islam which are now known as Fundamental Rights. The following extracts from the farewell Sermon can be reproduced for reference:-

"……..O Ye people, Allah says: O people We created you from one male and one female and made you into tribes and nations, so as to be known to one another. Verily in the sight of Allah, the most honoured amongst you is the one who is most God-fearing. There is no superiority for an Arab over a non-Arab and for a non-Arab over an Arab, nor for the white over the black nor for the black over the while except in God-consciousness."

"All mankind is the progeny of Adam and Adam was fashioned out of clay.

Behold! Every claim of privilege whether that of blood or property, is under my heels except that of the custody of the Ka'ba and supplying of water to the pilgrims………….."

"Behold! All practices of the days of ignorance are now under my feet. The blood revenges of the days of ignorance are remitted……..All interest and usurious dues accruing from the times of ignorance stand wiped out……."

"O people, verily your blood, your property and your honour are sacred and inviolable until you appear before your Lord, as the sacred inviolability of this day of yours, this month of yours and this very town (of yours). Verily you will soon

> meet your Lord and you will be held answerable for your actions."

6. The extract from last Sermon of the Holy Prophet (PBUH) is landmark in the history of man kind which is reproduced hereunder:-

> "12. The concept of equality amongst the mankind was introduced for the first time by Islam. The Holy Prophet (peace be upon him) preached and practised equality throughout the life and sermon delivered on the occasion of last Haj performed by the Holy Prophet (peace be upon him) is the first landmark in the history of mankind. It was clear for all times to come that there is no difference amongst the individuals on the basis of race, colour and territory. The relevant portion reads as under: --
>
> 16. The Holy Prophet (peace be upon him) said in his address at the Hajjat-ul-Wida, the last Haj, performed by him, that ....O! people, hear me, your Lord is one and your father is one. No Arab has any superiority over a non-Arab, nor any non-Arab over an Arab nor any white man over a black man, nor a black man over a white man save in respect of piety and fear of Allah'."

7. The source of insertion of Article 25 is on the basis of the aforesaid history highlighted hereinabove. Similarly our constitution also ensures dignity of every individual as is evident from atticle 14 of the constitution. See:-

i) Francis Corolie Mullin's case (AIR 1981 SC 746)
ii) A.K. Roys' case (AIR 1982 SC 710)
iii) Bandhu Mukti Moracha's case (1984 SC 802)
iv) Bachan Singh's case (AIR 1982 SC 1235)
v) Weereja Chaudhry's case (AIR 1984 SC 1099)
vi) Suo Motu Constitutional Petition: (1994 SCMR 1028)

8. It is a settled maxim that the very concept of fundamental right is that it being a right guaranteed by the Constitution cannot be taken away by the law. See Jibendra Kshore's case (PLD 1957 SC 9).

9. It is settled principle of law that where a statute is ex facie discriminatory but is also capable of being administered in a discriminatory manner and it appears that it has actually being administered to the detriments of a particular class in particular, unjust and oppressive manner then it has been void ab initio since its inception. See Waris Mehi's case (PLD 1957 SC (Pak) 157), Benazir's case (PLD 1988 SC 416) and I.A. Sherwani's case (1991 SCMR 1041) and Azizullah Memon's case (PLD 1993 SC 341 at 358). In Azizullah Memon's case vires of the criminal law ordinance were attacked on the ground that they were in conflict with fundamental rights guaranteeing equality before law, equal protection of law etc. Saleem Akhtar, J (as then he was) had discussed all previous precedents rendered by superior courts. The relevant observation is as follows:-

> "(i) that equal protection of law does not envisage that every citizen is to be treated alike in all circumstances, but it contemplates that persons similarly situated or similarly placed are to be treated alike;
>
> (ii) that reasonable classification is permissible but it must be founded on reasonable distinction or reasonable basis;
>
> (iii) that different laws can validly be enacted for different sexes, persons in different age groups, persons having different financial standings, and persons accused of heinous crimes;
>
> (iv) that no standard of universal application to test reasonableness of a classification can be laid down as what may be reasonable classification in a particular set of circumstances, may be unreasonable in the other set of circumstances;
>
> (v) that a law applying to one person or one class of persons may be constitutionally valid if there is sufficient basis or reason for it, but a classification which is arbitrary and is not founded on any rational basis is no classification as to warrant its exclusion from the mischief of Article 25;
>
> (vi) that equal protection of law means that all persons equally placed be treated alike both in privileges conferred and liabilities imposed;
>
> (vii) that in order to make a classification reasonable, it should be based -----

(a) on an intelligible differentia which distinguishes persons or things that are grouped together from those who have been left out;

(b) that the differentia must have rational nexus to the object sought to be achieved by such classification."

(b) **CONCEPT OF ISLAM AS UNDERSTOOD BY DEWAN**

"This judgment cannot be completed without having a glimpse of Islamic Legal System. Mr. Vijay Kumar Dewan in his Book Prosecuting System in India (Practice and Procedure) discussed the legal system of Islam in the following terms:--

"As like the Hindu law the concept of Muslim Law also held that the king derived his authority from Qura'n and the ruler was subordinate to law the main source of Islamic law of Muslim Law i.e. Shar in Qura'n and Sunnah or Hadis. The Prophet was considered to be the best interpreter of Qur'an. On all matters on which Qura'n was silent Sunnah or Hadis was regarded as authority. Because of divergent views taken on various provisions of Qura'n by eminent Muslim Jurists, four well defined braches or schools of Muslim law came to be recognized by different sections of the Muslims. Out of the four the Hanafi School founded by Abu Hanifa (699-767 A.D.) was the most popular in India, few in India however, followed the Shafi School founded by Muhammad Ibn Idris Ash-Shafi (767-820 A.D.). The other two i.e. the Maliki School founded by Malik Ibn Annas (713-797 A.D.) and the Hanbali School based on the teachings of Ahmad Ibn Hanbal (780-855 A.D.) were not popular in India."

The author further classified criminal offences under the Islamic Penal law as follows:-

(i) Offences against God.

(ii) Offences against the State, and

(iii) Crimes against private individuals.

10. The same author discussed the Islamic Justice in the following terms:--

"… The works of judiciary however, worked systematically in view of considerable importance attached by Akbar and his

successors and Akbar had definite zeal to administer justice impartially and he had once remarked. If I were guilty of an unjust act I would rise in judgment against myself. What shall I say then of my sons, my kindred and others. (In this regard reference may be made to the book History and Culture, Vol. 7, pages 547 to 552, Aini Akbari Vol. III p.434; Akbarnama, Vol.III and Storia do mogar, Vol. I, p. 167) Akbar used to devote some time every morning for judicial works at the Jharoka Darshan and Thursday was exclusively kept for judicial work, wherein the top officers such as Chief Qazi, Mufties and other law dignitaries and Kotwal of the town used to participate. He used to decide cases after hearing and ascertaining the law from the jurists. Abdul Fazal the Chronicile Writer of Akbar's Court has given an account of the Royal Court –

'He (Akbar) opens the gates of justice and holds an open Court. In the investigation in to the cases of the oppressed, he placed no reliance on testimony or on the oaths, which are resources of the crafty, but draws his conclusions from the contradictions in the narratives, the physiognomy, and sublime resources and noble conjectures. Truth takes her place in this centre. In this work he spends not less than one and half pahars (i.e. about five hours)'.

Jahangir followed the ideals of his father. He also in addition to deciding cases every morning had set apart Tuesday exclusively for judicial work. Shahjahan also upheld the maxim of his father that justice must be enforced. Aurangzeb was also very keen in administrating impartial justice except in cases which concerned the interest of prestige of Islam the arrangement of transacting judicial business personally by the sovereign was not disturbed even when the Emperor happened to be on tours on when he was engaged in a military expedition. The Emperor decided both civil and criminal cases and his Court was not only the highest Court of appeal, but also sometimes a Court of first instance. Sometimes the Emperor used to appoint a commission of inquiry and issue instructions to decide cases on the basis of facts revealed in the investigation on the spot. Usually the cases deserving capital punishment were decided by the King himself. Such cases even if tried by Governors or other authorities, were forwarded to the capital for the Kings'

final order. The standing instructions were that no one was to be executed until the Emperor had given his orders for the third time."

Keeping in view the historical background of the creation of the country beginning with the struggle started by late Sultan Haider Ali of Maysor and his noble, brave and courageous son Tipu Sultan Shaheed who gave his precious life including life of his two beloved sons who fought for freedom, and ultimately achieved the goal of freedom under dynamic leadership of Quaid-e-Azam Muhammad Ali Jinnah, who was motivated by the spirit of great national poet Dr. Allama Muhammad Iqbal; and sacrifices made by millions of Muslims of this sub-continent, we must remember that this freedom was formally recognized by the imperial power by passing the Independence Act, 1947 which gave birth to our esteemed country.

Before coming to final conclusion, let me quote that once late Mian Muhammad Mushtaq Gormani met Lord Wavel who during discussion made some remarks about the founder of Pakistan which are very relevant to reproduce here for the purpose of building national character. Lord Wavel said:--

"He(Founder of Pakistan) is not only honest but he is intellectually honest."

11. Once the rulers of Muslims had deviated from the said principle of providing justice to the people then Great Britain who had entered initially through East India Company for the purpose of commercial business, had got the opportunity to get the benefit of said situation and had been able to take over the power and continued till 1947. Muslims had launched freedom movement in 1857 but could not succeed due to their internal contradictions and on account of non cooperation of the Hindu community with the Muslims.

12. Subsequently, British established its rule in the sub-continent with active support and connivance of Hindus and few Muslim phonies. Bal Gangadhar Tilak, first popular independence fighter after war of Independence of 1857 was convicted and sentenced by the trial Court where Founder of Pakistan appeared as his counsel. Interestingly, Bal Gangadhar Tilak again

engaged Quaid-e-Azam at the appellate stage in the High Court where Quaid-e-Azam for the first time distinguished between the offence against the state and the offence against public functionaries on ground of which appeal was accepted. See Bal Gangadhar Tilak V. Emperor (AIR 1916 Bombay 9). This episode of Muslim counsel of a Hindu convict gave birth to a little lived assumption that both the nation can together toil hard for self rule.

The founder of Pakistan did not want division of the sub continent but on account of behaviour of the Hindu community, he had demanded a separate homeland on the basis of two nations theory. See Benazir Bhutto's case (PLD 1988 SC 416).

13. It is settled maxim that nations can achieve goal under dynamic leadership and the nations who had a vision to see ahead as is evident from the speech of Lord Macaulay on the floor of the house and also from the character of the founder of Pakistan alongwith his vision.

14. The founder of Pakistan was nominated as member of legislative assembly and participated in the proceedings of Legislative Council qua bill relating to Criminal Law (Emergency Powers) Bill on 14th March, 1919 but according to his conscience he did not support government and tendered his resignation from the membership of council as a protest against passing of the Bill and the manner in which it was passed.

(c) **AFTER CREATION OF COUNTRY.**

15. The constituent assembly had promulgated objective resolution in 1949. Ultimately it was incorporated in preamble of the constitution of Islamic Republic of Pakistan and thereafter it was made substantive part of the constitution by adding article 2-A. It is evident from the history of human being that leader/nation would only progress on the basis of its good character. Once an individual leader or nation had deviated from this then destruction is the result. The best example in the recent history of human society is of China when this nation with its birth two years after Pakistan, has attained a position

of super power (an economic joint and a permanent member of the security council).

16. The word "Ameen" difined in the following books which is to the following effect:

1 The Concise Encyclopedia of Islam at page 41:

"***al-Amin***. *A name of the Prophet, given to him by the Quraysh before the revelation of Islam, meaning the 'Trustworthy One'. The word is used as a title for an organization official in a position of trust, such as the treasurer of a charitable organization, a guild, and so forth".*

2. Urdu Daera-e-Maharafil Islamia at page 279-80

اَمین: دیکھیے آمین۔

اَمِین: (عربی، جمع: اُمَنَاء) قابلِ اعتماد، یعنی ایسا شخص جس پر انسان بھروسا کر سکے۔ اسی بنا پر الف لام تعریفی کے ساتھ "الامین" جوانی کے دور میں نبی کریم ﷺ کا لقب قرار پا گیا تھا۔ اسم کی حیثیت سے امین کا مفہوم ہے: "وہ جسے بطور امانت کوئی چیز سپرد کی جائے"، نگران، ناظم، مثلاً امین الاوحی: "وہ جسے وحی سونپی گئی"، یعنی حضرت جبریلؑ۔ یہ لفظ اکثر القاب میں بھی استعمال ہوتا رہا ہے، مثلاً امین الدولہ (ابن التلمیذ وغیرہ کا خطاب)، امین الدین (قب یاقوت)، امین الملک، امین السلطنۃ۔

ان عام اور غیر معین معانی کے علاوہ اسلامی اداروں کی تاریخ میں لفظ امین زیادہ اصطلاحی معنی میں بھی استعمال کیا جاتا رہا ہے، مثلاً امین کی اصطلاح مختلف قابل اعتماد عہدے رکھنے والوں کے لیے استعمال کی جاتی ہے، خصوصاً ایسے عہدے دار جن کے وظائف میں اقتصادی یا مالی نوعیت کی ذمے داریاں شامل ہوں۔ قانونی کتابوں میں امین اس شخص کو کہتے ہیں جو کسی کا قانونی نمائندہ ہو۔ بنو عباس کے ابتدائی ادوار میں "امین الحکم" اس سرکاری اہل کار کو کہتے تھے جو نابالغ یتامی کی املاک کے انتظام کا ذمہ دار ہوتا تھا۔ (Tyan: Organisation judiciaire، 384:1) وسیع تر مفہوم میں اس لفظ کا اطلاق خزانہ داروں، راہ داری (customs) کے عاملوں اور جاگروں کے منتظمین وغیرہ پر ہوتا تھا (دیکھیے ابن مماتی: قوانین الدواوین (طبع عطیۃ Atiya)، باب 3، مصر اور المغرب کے بارے میں دیکھیے Levi-Provencal: Hist.de Espagne Musulmane 3: 40 تا 52 Le Tourneau: Fes avant le Protectorate، بمدد اشاریہ، بالخصوص ص 299 حاشیہ 3 وغیرہ۔------

امین: عربی میں آمین (رکبان)، آلِ عثمان کے عہدِ حکومت میں ایک انتظامی عہدے دار کا نام ہے، جس کے عہدے یا فریضے کو امانت کہتے تھے۔ عثمانلی سرکاری اصطلاح میں امین سے مراد کوئی ایسا تنخواہ دار ملازم حکومت ہوتا تھا، جسے بذریعہ "برات" خود سلطان کی طرف سے یا اس کے نام پر مقرر کیا جائے اور جس کے ذمے کسی محکمے، مخصوص کام یا ذریعہ آمد کی نگرانی و انتظام ہو۔ اس طرح ذخائر، بہم رسانی، ٹکسالوں، کانوں، محکمہ راہداری وغیرہ کے مختلف قسم کے امین ہوا کرتے تھے اور ان کے علاوہ "تحریر" (رکبان) کے، جن کا کام صوبوں میں زمینوں کے رجسٹر تیار کرنا اور پیداوار، آبادی، جاگیروں کی تقسیم وغیرہ کو ضبط کرنا تھا (دیکھیے مادّہ دفتر خاقانی اور تیمار)"۔ پروفیسر اینالجق کے الفاظ میں: "امانتِ تحریر کے لیے بہت علم و تجربہ درکار ہوتا تھا۔ یہ بڑی ذمے داری کا کام تھا اور ساتھ ہی اس میں بدعنوانیوں کی بھی بہت گنجائش تھی۔ عموماً صاحب رسوخ امرا اور قضاۃ اس عہدے پر مامور ہوتے تھے"۔ جب امین کے ذمے آمدنی کی تحصیل ہو تو اسے موصولہ رقم میں سے خود کچھ لینے کا حق نہیں تھا، بلکہ رقم خزانہ سرکار میں داخل کرنا پڑتی تھی۔ بعض اوقات اصطلاح امین ایسے نمائندوں اور گماشتوں کے لیے بھی استعمال ہوتی ہے جنہیں سلطان کے علاوہ کوئی اور صاحب اختیار شخص مقرر کرے، مثلاً کوئی قاضی یا کوئی محصل خراج (tax-farmer)۔ بعض اوقات امین اپنے اختیارات سے ناجائز فائدہ اٹھاتے ہوئے خود محصل بن جاتا تھا۔

3. The Encyclopaedia of Islam (New Edition) Vol.1 at 436-37

"**Amin,** 'safe', 'secure'; in this and the more frequent from amin (rarely ammin, rejected by grammarians) it is used like amen and (Syriac) amin with Jews and Christians as a confirmation or corroboration of prayers, in the meaning 'answer Thou' or 'so be it' see examples in al-Mubarrad, al Kamil, 577 note 6; Ibn al-Diazari, al-Nashr, ii, Cairo 1345, 442 f., 447. Its efficacy is enhanced at especially pious prayers, e.g. those said at the Ka'ba or those said for the welfare of other Muslims, when also the angels are said to say amin. Especially it is said after sura i, without being part of the sura. According to a hadith the prophet learned it from Gabriel when he ended that sura, and Bilal asked the prophet not to forestall him with it. At the salat the imam says it loudly or, according to others, faintly after the fatiha, and the congregation repeats it. It is called God's seal (taba or khatam) on the believers, because it prevents, evil.

"**Amin"** (Ar. Pl. umana), 'trustworthy, in whom one can place ones's trust', whence al-Amin, with the article, as an epithet of Muhammad in his youth. As a noun, it means 'he to whom something is entrusted, oversear, administrator': e.g. Amin al Wahy, 'he who is entrusted with the revelation', i.e. the angle Gabriel. The word also frequently occurs in titles, e.g. amin al-Dawla (e.g. Ibn al-Tilmidh others), Amin al Din (e.g. Yakut), Amin al-Mulk, Amin al-Saltana".

"MORALITY".

Words and Phrases, Permanent Edition Volume 27A:

"Morality" The words "morality" and "character" may have the same meaning when standing alone, but when used together the word "moral" defines the kind of character required by the rule, that attorney must be of good moral character. When so sued, the word "moral"

> is in contradistinction, to the word "immoral". Warkentin v. Klein-watcher, 27 P.2nd 160, 166 Okl. 218."
>
> **"Morality"** The word "morality" is not used in any narrow sense, but in a general sense, such as the law of conscience, the aggregate of those rules and principles of ethics which relate to upright behavior and right conduct of elected representatives and prescribe the standards to which their action and in particular those who are Muslims, who are guided by the Holy Qur'an and Sunnah should conform, in their dealings with each other or with institutions or the State". M. Saifullah Khan Vs. M. Afzal. :PLD1982 Lah.77.

(d) **CONSTITUTION BE READ AS AN ORGANIC WHOLE**

17. The body of human being consists of 99 elements with proportionate qua each body of human being. Once the imbalance in the said elements occur then the body as a whole would be disturbed and affected. The body of human being otherwise consists of two parts. Body alongwith the elements and "Rooh- spirit". All of us have an experience that once the rooh/spirit is missing from the body then body would become dead automatically that is why the body of human being is a compound of aforesaid elements and spirit. The scheme of the Constitution of Pakistan is based on rights and obligations wherein chapter 1 contains fundamental rights and principles of policy in chapter 2. According to my understanding every chapter and every article has its own significance but chapter 1 & 2 had a unique significance. Once these two chapters be held in abeyance as part of the Constitution or to do the things in violation of these two chapters by any organ of the state then according to me constitution would be dead organ that is why

chapter 1 and 2 be called as flowers and beauty of the Constitution. The preamble of the Constitution has its own significance which shows the will of the people to frame the constitution and passed their lives within the four corners and that is why it is settled principle of law that preamble is the key to understand the constitution. This is the first door to open the book which prescribes its values, comments, obligations, rights and commitments. There is no doubt that no provision of the Constitution or law be struck down in case it is framed in violation of preamble of the Constitution but at the same time it is very important that while framing the law or taking the action every organ/authority must keep in its mind the preamble of the constitution which is the command of the forefathers and the nation emerged from the document of Objectives Resolution passed by the Constituent Assembly in 1949. Our Constitution is based on trichotomy consisting of following basic pillars of the State:-

a) Legislature to frame laws.

b) Executive to implement laws.

c) The Judiciary to interpret the laws

18. This is a very beautiful scheme and defined areas of each and every organ to keep the balance. Once this balance is disturbed then the document is dead. Article 7 of the Constitution prescribes all elements and pillars of the State for the purpose of imposing cess and tax, legislature and executive. The legislature had specifically not mentioned the judiciary in article 7 as the judiciary is duty bound to maintain the balance between all the organs, therefore, judiciary is mentioned in part VII under the heading of “Judicature” vide Article 175. It is settled proposition of law that other two organs i.e. legislature

and executive have no authority whatsoever to usurp or to take role of the judiciary as it is in violation of the salient features of the constitution which cannot be changed by any canon of justice as laid down by this Court in various pronouncements. Se Zyed Zafar Ali Shah's case (PLD 2000 SC 869), Mehmood Khan Achakzai's case (PLD 1997 SC 426) and Farooq Ahmed Khan Leghari's case (PLD 1999 SC 57). It is pertinent to mention here that Supreme Court of India had taken this view which is before us that basic features of the Constitution could not be changed but unfortunately we could not take that stand earlier except the aforesaid judgments that is why the country since creation on 14-8-1947 till to date most of the time there was no democratic government around for about 37 years. Now it is high time that each and every organ must resolve to save the nation and country to remain within their spheres and discharge their duties in accordance with law. Article 4 of our Constitution compels every body to act in accordance with law whereas article 5 of the Constitution cast duty upon each and every organ/person to obey the command of the Constitution. Similarly Articles 189 and 190 of the constitution has prescribed duty to every organ to implement judgments of the courts.

19. It is pertinent to mention here that 3rd organ is also duty bound to remain within its sphere in terms of article 4 of the Constitution. The provisions of the impugned ordinance are directly in conflict with the aforesaid provisions of the Constitution. In fact through the impugned ordinance, the salient features of the constitution were changed in violation of the aforesaid judgments and command of the various provisions of the Constitution.

(e) **POWER OF PRESIDENT TO PROMULGATE ORDINANCE.**

20. It is pertinent to mention here that President had power to frame ordinance under Article 89(1) subject to certain conditions which are as follows:-

b) National Assembly is not in session.
c) President if satisfies that circumstances exist which render it necessary to take immediate action make and promulgate the ordinance as the circumstances may require.

21. The President had the same power as of the National Assembly to frame the laws, that is why principle of check and balance was incorporated in article 89 sub article 2 that life of the ordinance would be four months and the parliament had power even to pass resolution disapproving the said ordinance by the assembly that it would automatically stand repealed after expiry of four months from its promulgation or before the expiration in case of resolution of its dis-approval is passed. The president had also power to withdraw the ordinance at any time. The President had to promulgate the ordinance at the advice of the cabinet. This fact brings the case in the area that it was the satisfaction of the Parliament under Article 89(1) as is evident from the summaries produced before the Court by Acting Attorney General for Pakistan. It was merely mentioned as a 'draft ordinance' and nothing else. The preamble of the ordinance also does not reveal that any satisfaction was made before promulgating of the ordinance. It is settled law that when a thing is to be done in a particular manner, it must be done in that manner and not otherwise. The said Ordinance was promulgated even in violation of Article 89. The scheme of the Constitution as mentioned above in our Constitution is based on trichotomy but in case we read the constitution as a whole then it

automatically emerges that there is 4th pillar i.e. people of Pakistan for whose benefit every law be framed who are the real sovereign because the people of Pakistan had chosen the representatives of National Assembly and provincial assemblies and Senate. The Ordinance has not been framed for the welfare of the people of Pakistan. It had been framed by the then President of Pakistan for his benefit and benefit of the other privileged class. It is very difficult for me to imagine that any written or unwritten constitution can allow framing law against the welfare of people of the country. Similarly the President had a power to pardon by virtue of Article 45 of the Constitution but had no right whatsoever to give clean chit or to withdraw the case of the complainant whose near relations were murdered. The whole ordinance and preamble to Section 7 is in violation of various provisions of the constitution mentioned hereinabove.

(f) **PRINCIPLE OF CHECK & BALANCE.**

Hazrat Abu Bakr Siddique (RA), First Caliph of Islam in his first address had said that in case he violated any injunction of Islam, then people should guide him to be on right path. And there rose a Bedouin sitting in the audience who remarked that in case he violated the principles of Islam, then they would نیزے کی نوک پر set him on right path (Nazay ki nook par)

The second Caliph Hazrat Umar Farooq (RA) had a shirt (Choga) on his body. He was asked to explain regarding the cloth of that shirt because the cloth of shirt according to his share ~~~ was much less than the body of Caliph. The Caliph replied that he had used the share of his son for

making his own shirt. This is the type of accountability which we have to follow to save the nation to put on a right path.

(g) **IMPUGNED ORDINANCE VIS-AVIS FUNDAMENTAL RIGHTS.**

22. The word corruption has been defined as it has diverse meanings and far reaching effects on society, government and people. In other words it has always been used in a sense which is completely opposite to honesty, orderly and actions performed according to law. 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 one else.

23. The word corruption is well known to our nation as National Assembly and Provincial Assemblies were dissolved by the President and Governors under Article 58(2)(b) and article 112 of the constitution respectively as these articles were part of the constitution which were introduced through 8th amendment. See:-

i) Khalid Malik's case (PLD 1991 Karachi 1)
ii) Khawaja Ahmed Tariq Rahim'ds caxse (PLD 1990 Lah. 505)
iii) Khawaja Ahmed Tariq Rahim's case (PLD 1991 Lah. 78)
iv) Khawaja ahmed Tariq Rahim's case (PLD 1992 SC 646)
v) Aftab Ahmed Khan sherpao Case (PLD 1992 SC 723)
vi) Mian Muhammad Nawaz Sharif's case (PLD 1993 SC 473)
vii) Benazir Bhutto's case (PLD 1998 SC 388)

24. Our Constitution clearly envisages 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 as a sacred trust. See Shahid Nabi Malik's case (PLD 1997 SC 32).

25. The word corruption is also defined by this Court in Mian Muhammad Nawaz Sharif's case (PLD 1993 SC 473 at 837-838) which is to the following effect:-

> *"The word 'corruption' has not been defined by any law, but it has diverse meaning and far-reaching effects on society, Government and the people. It covers a wide field and can apply to any co lour of influence, to any office, any institution, any forum or public. A person working corruptly acts inconsistent with the official duty, the rights of others and the law governing it with intention to obtain an improbable advantage for himself or someone else. Dealing with corruption in Khalid Malik's case I had observed as follows:-*
>
> *"This bribe culture has plagued the society to this extent that it has become a way of life. In Anatulay VIII (1988) 2 SCC 602 where Abdul Rehman Antulay, Chief Minister of Maharashtra was prosecuted for corruption Sabyasachi Mukharji, J. laments as follows:--*
>
> *"Values in public life and perspective of values in public live, 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 threshold of the cross-roads of values. It is, for the sovereign people of this country to settle these conflicts yet the courts have a vital role to play in these matters.*
>
> *The degeneration in all walks of life emanates, from corruption of power and corruption of liberty. Corruption breeds corruption. 'Corruption of liberty' leads to liberty of corruption'."*
>
> ………………………………………………………………………………
> …………………………

Corruption and bribery adversely affect the social, moral and political life of the nation. In society rampant with corruption peoples lose faith in the integrity of public administration. In India in 1964 Committee on the Prevention of Corruption known as Sanathanam Committee observed as follows:--

"It was represented to us corruption has increased to such an extent that people have started losing faith in the integrity of public administration. We had heard from all sides that corruption, in recent years, spread even to those levels of administration from which it was conspicuously absent in the past. We wish we could 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 they very fact that such impressions are there causes damage to social fabric.'

The Committee also observed that there is a popular belief of corruption among all classes and strata which 'testifies not merely to the fact of corruption but its spread'. Such belief has a social impact causing' damage to social fabric.'

The anti-corruption and penal laws have remained ineffective due to their inherent defect in adequately meeting the fast multitudinous growth of corruption and bribery. Corruption in high places has remained unearthed leading to a popular belief that immunity is attached to them. To combat corruption the whole process and procedure will have to be made effective and institutionalized."

26. In other words written constitution of county is a document which defines the regular form or system of the government, containing the rules that directly or indirectly affect distribution or

exercise of the sovereign power of the state and it is thus mainly concerned with creation of three organs of State and the distribution of authority of the government among them and the definition of their mutual relation. We must remember that a constitution is not just a document but a living frame work for the government of the people and its successful working depends upon the democratic spirit underlying it being respected in letter and spirit. Whenever the spirit of the Constitution was violated, the result was chaos and this fact finds support from following extracts of Shahabnama by Qudrat Ullah Shahab:

شہاب نامہ۔ (قدرت اللہ شہاب)

باب: سکندر مرزا کا عروج و زوال۔

22 ستمبر 1958ء کو دن کے ایک بجے جب صدر اسکندر مرزا اپنے دفتر سے اٹھے تو حسبِ معمول میرے کمرے کی کھڑکی کے پاس آ کر نہ رُکے بلکہ مجھے باہر برآمدے میں اپنے پاس بلا بھیجا۔ ان کے ہاتھ میں پاکستان کے آئین کی ایک جلد تھی۔ انہوں نے اس کتاب کی طرف اشارہ کر کے مجھ سے پوچھا۔ "تم نے اس Trash کو پڑھا ہے؟"------

باب: جنرل ایوب خان کی اٹھان۔

اس نئے دور میں کام شروع کرتے ہی میرے دل میں یہ بات کھٹکی کہ مارشل لاء نافذ ہونے کے بعد اب تک جتنے سرکاری اعلانات قوانین اور ریگولیشن جاری ہوئے ہیں۔ ان میں صرف حکومتِ پاکستان کا حوالہ دیا ہے، حکومتِ اسلامی جمہوریہ پاکستان کا کہیں ذکر نہیں آیا {President's Order (Post Proclamation) No. 1 of 1958. Laws (Continuance in Force), Order, 1958, 10th October, 1958.}۔ پہلے تو میں نے پوچھا کہ شاید ڈرافٹنگ میں غلطی سے ایک آدھ بار یہ فروگذاشت ہوگئی ہوگی۔ لیکن جب ذرا تفصیل سے جائزہ لیا تو معلوم ہوا کہ جس تواتر سے یہ فروگزاشت دہرائی جا رہی ہے، وہ سہواً کم اور التزاماً زیادہ محسوس ہوتی ہے۔ اس پر میں نے ایک مختصر سے نوٹ میں صدر ایوب کی خدمت میں تجویز پیش کی کہ اگر وہ اجازت دیں تو وزارتِ قانون اور مارشل لاء ہیڈ کوارٹر کی توجہ اس صورتِ حال کی طرف دلائی جائے اور ان کی ہدایت دی جائے کہ جاری شدہ تمام اعلانات اور قوانین کی تصحیح کی جائے اور آئندہ کے لئے اس غلطی کو نہ دُہرایا جائے------

صدر میرے پاس نوٹ کا پرچہ ہاتھ میں لئے میرے کمرے میں آئے۔ وہ غیر معمولی طور پر سنجیدہ تھے آتے ہی انہوں نے میرا نوٹ میرے حوالے کیا اور کہا "تمہیں غلط فہمی ہوئی ہے۔ ڈرافٹنگ میں کسی نے کوئی غلطی نہیں کی۔ بلکہ ہم نے سوچ سمجھ کر یہی طے کیا ہے کہ اسلامک ری پبلک آف پاکستان سے اسلامک کا لفظ نکال یا جائے۔" "یہ فیصلہ ہو چکا ہے یا ابھی کرنا ہے؟" میں نے پوچھا۔

صدر ایوب نے کسی قدر غصے سے مجھے گھورا اور سخت لہجے میں کہا۔ "ہاں، ہاں فیصلہ ہو گیا ہے۔ کل صبح پہلی چیز مجھے ڈرافٹ ملنا چاہیے۔ اس میں دیر نہ ہو۔"------

چند روز بعد میں کچھ فائلیں لے کر صدر ایوب کے پاس بیٹھا ہوا تھا۔ وہ اپنی ڈاک دیکھ رہے تھے ایک خط پڑھ کر بولے۔ کچھ لوگ مجھے خط لکھتے ہیں، کچھ لوگ ملنے بھی آتے ہیں اور کہتے ہیں کہ دنیا بدل گئی ہے۔ اب ماڈرن ازم اور اسلام اکٹھے نہیں چل سکتے۔ میں ان سے کہتا ہوں "Pakistan has no Escape from Islam"------

27. The raison d'etre of any constitution is to constitute a country and it is the document which contemplates the grundnorms of State and its laws. Aim of all jurisprudence is "public good" or "Welfare of the people". No Law can be wholesome and no state can be a welfare State unless the امر بالمعروف ونہی عن المنکر principles of *amr bil maruf wan hi anil munkar* is strictly adhered to. God Almighty has created mankind and He loves those who love its creation and strives for its welfare. Our forefathers were conscious of this principle and, therefore, the objective resolution was passed. The preamble, containing objective resolution, of the Constitution of Islamic Republic of Pakistan, 1973 cast a sacred duty on the chosen representative of the people and, that is, to exercise powers and authority to run the State in such manner which promotes: (i) principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam; (ii) Muslim to order their lives in the individual and collective spheres in accordance with the teaching and requirements of Islam as set out in the Holy Quran and Sunnah; (iii) protection of minorities and backward and depressed classes; (iv) autonomy of the units of Federation; (v) Fundamental Rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, believe, faith, worship and association, subject to law and public morality; (vi) independence of judiciary; (vii) integrity of the territories of the Federation, its independence and all its rights, including its sovereign rights on land, sea and air, in fact the above said are the grundnorms and limitations of each organ of the State.

28. Validity of any law can be tested by its result or fruit. If a law evokes healthy feelings/atmosphere, then it is valid otherwise it is void. An illegal morsel gives birth to evils. Similarly any legislation which hurts the

welfare of the people should not be allowed to stand among the people. In this regard, I may quote the following couplet from Molana Roumi's Masnevy:-

علم و حکمت زاید از لقمہ حلال
عشق و رقت آید از لقمہ حلال
چون زلقمہ تو حسد بینی و دام
جہل و غفلت زاید آزاں دان حرام
لقمہ تخمست و برش اندیشہا
لقمہ بحر و گوہرش اندیشہا

29. From the legal morsel which born knowledge, love and tenderness. If you see that jealousy, deception, ignorance, negligence is born from a morsel, know that it was unlawful. The morsel is a seed and thoughts are its fruit. The morsel is the seed and thoughts are its pearls.

30. In view of above perspective if we allow to hide/swallow corruption and corrupt practices, then obviously it would not be conducive for the people of Pakistan and for the welfare of the State. The people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the world and make their full contribution towards international peace and progress and happiness of humanity if grundnorms stated in preamble are strictly followed. In this view of the matter, the national Reconcilliation Ordinance, 2007 being an illegal morsel is declared a legislation viod abi-nitio.

31. However, taking advantage of brevity, I simply hold that the National Reconciliation Ordinance, 2007 is not valid and in this regard, I endorse the view of our celebrated poet Sagar Siddiqui, which he expressed in this following poetic couplet:-

جس عہد میں لُٹ جائے فقیروں کی کمائی
اُس عہد کے سلطان سے کچھ بھول ہوئی ہے

32. For the purpose of maintaining balance between each and every organ of the State, I conclude the note and suggest all organs to obey the command of the Constitution from core of their hearts which is possible on working as per saying of Wasif Ali Wasif (Philosophical Islamic Writer) and Moulana Roomi respectively which are to the following effect:

جمع نہ کریں، منع نہ کریں، طمع نہ کریں۔
(واصف علی واصف)

چندان همی کن یاد حق
کز خود فراموشت شود
(خدا کو اتنا یاد کرو کہ خود کو بھول جاؤ)
(مولانا روم)

(Justice Ch. Ijaz Ahmed)

JAWWAD S. KHAWAJA, J.- I have gone through the detailed reasons recorded by Hon'ble the Chief Justice, for the short order announced on 16.12.2009. These reasons exhaustively examine the arguments advanced before us by learned counsel for the parties and by the *amicii curiae* who ably assisted us in these matters. While agreeing with the reasoning of Hon'ble the Chief Justice, I would like to add this note to emphasize aspects of the case which I consider to be of special relevance when examined in the context of the constitutional history of Pakistan.

2. At the very outset it must be said, without sounding extravagant, that the past three years in the history of Pakistan have been momentous, and can be accorded the same historical significance as the events of 1947 when the country was created and those of 1971 when it was dismembered. It is with this sense of the nation's past that we find ourselves called upon to understand and play the role envisaged for the Supreme Court by the Constitution. The Court has endeavoured to uphold the Constitution and has stood up to unconstitutional forces bent upon undermining it. It is in this backdrop that these petitions have been heard and decided.

3. It is to be noted that though there was no significant opposition to these petitions and even though the Federal Government did not defend the NRO, the important constitutional issues raised through these petitions were thrashed out to ensure that there is adherence to the provisions and norms of the Constitution, not only for the sake of deciding these cases but also to lay down precedent for the institutions of the State and its functionaries in terms of Article 189 of the Constitution.

4. I would also like to add that there can be no possible objection to the avowed objectives of the NRO as set out in its preamble, *viz.* promotion of national reconciliation and removal of the vestiges of political vendetta and victimization. These objectives, however, must be achieved through means which are permitted by the Constitution. The Court while exercising the judicial function entrusted to it by the Constitution is constrained by the

Constitution and must, therefore, perform its duty of resolving matters coming before it, in accordance with the dictates of the Constitution and the laws made thereunder. If the Court veers from this course charted for it and attempts to become the arbiter of what is good or bad for the people, it will inevitably enter the minefield of doctrines such as the 'law' of necessity or *salus populi suprema lex*, with the same disastrous consequences which are a matter of historical record. This Court has, in its judgment in the case of the Sindh High Court Bar Association Vs. Federation of Pakistan (PLD 2009 SC 879) emphatically held that it will not deviate from strict adherence to the law and the Constitution. Decisions as to what is good or bad for the people must be left to the elected representatives of the people, subject only to the limits imposed by the Constitution.

5. It has now been firmly and unequivocally settled that the Court cannot and should not base its decisions on expediency or on consideration of the consequences which may follow as a result of enforcing the Constitution. It is for this reason that while deciding the case of Sindh High Court Bar Association Vs. Federation of Pakistan (PLD 2009 SC 879), the Court assiduously avoided validating any of the unconstitutional acts of General Musharraf including his attempt to clothe 37 Ordinances (NRO included) with permanence in violation of the Constitution. It was, in accordance with the scheme of the Constitution and its democratic character that the right of the legislature to enact these Ordinances with retrospective effect was recognized and upheld. It is a matter of record, as noted in the reasons recorded by Hon'ble the Chief Justice, that the elected representatives of the people chose not to resurrect the NRO or to give cover to any acts thereunder through retrospective legislation.

6. In the foregoing context it will be evident that while the Court is obliged to eschew expediency and any other extraneous considerations such as the fall- out and consequences of its judgments, the executive and legislative limbs of the State do not suffer from similar constraints. As such the

consequences of executive and legislative decisions are a legitimate concern of these organs of the State. Legislators and functionaries performing executive functions may resort to expediency, compromise and accommodation in achieving political and policy objectives considered appropriate in their judgment. As long as such decisions conform to and are not violative of the Constitution, the executive and the legislature are only accountable to the electorate and not to Courts. This is the democratic principle enshrined in the Constitution.

7. One reason for giving the above background is to examine and comment on the applications (CMA Nos. 4875 and 4898 of 2009) submitted by Mr. Kamal Azfar, Sr. ASC on behalf of the Federal Government. The relevant contents of these applications have been duly noted in the main judgment. Of particular concern to me are the following excerpts from these applications:-

> *"Pak today is poised at the cross roads. One road leads to a truly federal democratic welfare state with the balance of power between an independent judiciary, a duly elected Govt. representing the will of the people and a determined executive which is fighting the war against terrorism and poverty. The second road leads to destabilization of the rule of law. The people of Pakistan await your verdict."*

8. There is, implicit in the above words, a plea to the Court to once again revert to the disastrous and rejected route of expediency and to tailor the outcome of these petitions by looking at the consequences which will follow, rather than the requirements of the Constitution. I would like to state most emphatically that the path of expediency and subjective notions of 'State necessity' are dead and buried. I find it quite extraordinary that a democratically elected Federal Government should be imploring the Court to act in a manner otherwise than in accordance with law. It was emphasized to Mr. Kamal Azfar while considering the aforesaid applications in Court, and it now needs to be reiterated in the strongest terms that this Court will not take into account extraneous considerations while exercising its judicial powers and

also that adherence to the Constitution can never lead to "*destabilization of the rule of law.*" On the contrary, any breach of Constitutional norms is likely to destabilize the rule of law.

9. The onus, therefore, of stabilizing the rule of law falls on and must be assumed by the executive organ of the State which also commands a majority in the legislature. This is the requirement of the Parliamentary democratic dispensation ordained by our Constitution. Political stability and the rule of law will flow as a natural consequence of giving sanctity and respect to the Constitution, both in letter and in spirit. The Court can only strengthen the rule of law by upholding the Constitution, which is, in fact, the supreme law. The executive and legislative limbs of the State are also constitutionally obliged to apply the powers and resources at their command, in enforcing the Constitution and the rule of law without discrimination or undue favour to any person or class.

10. Almost a millennium before 'good governance' and 'rule of law' became fashionable buzz-words in political discourse, the importance of good governance and the rule of law and their direct co-relation with political stability was recognized by enlightened rulers. In the S*iyasatnama* written by Nizam-ul-Mulk Toosi the incident is narrated where the Governor of Hamas (in present day Syria) wrote to the Caliph seeking funds to rebuild the protective wall to defend the State against its enemies, that is, to ensure the stability of the government. The reply he received is instructive. He was told to build the walls of justice i.e. the rule of law and this would ensure peace, stability and freedom from the fear of enemies.

11. This brings me to the decisions recorded in the short order of 16.12.2009 and the detailed reasons for the same. The NRO has been declared unconstitutional and void *ab initio.* It has thus met the fate it richly deserved as a black law created and prolonged by the corrupt and malevolent hands of a military dictator. The fact that the incumbent democratic government chose not to defend such a vile law bodes well for constitutionalism and the rule of law.

There is, of course, the matter of persons who may be innocent of any wrong-doing but were victimized due to political vendetta. For such persons this judgment ought to be seen as a boon. Instead of living in the shadow of a malignant cloud for the rest of their lives, their reputations sullied by the foul intervention of a scheming mind, these persons are enabled through this judgment to clear their good name of any taint with which they of necessity, stood branded on account of the NRO. This indeed would be the most potent rejoinder to those who maliciously may have initiated false cases to harm their reputations for ulterior political considerations. As the sage Sheikh Saadi said centuries ago, in these ageless words:-

آن را که حساب پاک است
از محاسبه چه باک است
(سعدی)

12. It should also be mentioned that by striking down the NRO the Court does not foreclose the possibility or impinge on the prerogative of the legislature to enact a non-discriminatory law which can pass constitutional muster and is motivated by a desire to bring about a true and inclusive reconciliation which is genuinely national in its outreach and attempts to bring within its fold disparate groups harbouring valid grievances against oppressive and vindictive use of State machinery in the past. Even those who may have committed wrongs in the past and were not wronged against, are not beyond being redeemed through a compassionate law which heals the fissures in the nation's divided polity. These are, however, matters which fall squarely within the legislative and executive domains, should these organs of the State wish to act.

13. The concept of *tauba* and sincere repentance coupled with restitution of any ill-gotten gains and the expression of genuine remorse

for past excesses provide an age-old matrix for fostering reconciliation. It has been applied successfully in ancient as well as modern societies, the most recent example being that of South Africa where a Truth and Reconciliation Commission has been able to bring about a genuine national reconciliation between staunch opponents divided among other things, by race and embittered by decades of apartheid. An example of national reconciliation also appears in our own nation's history. This has been commented upon in the main judgment. It would, as noted above, be for the executive and the legislature to consider the potential and the possibilities of what can be achieved by way of reconciliation, as opposed to perpetuation of the venom and mutual recriminations which continuously divide the nation at the cost of its well-being. This Court, however, can only abide by the rule of law and in order to do so it must limit itself to the adjudication of controversies in accordance with the Constitution and with laws made consistently therewith.

Judge

SARDAR MUHAMMAD RAZA, J.- I had the privilege of going through the detailed judgment rendered by Hon'ble the Chief Justice. I have no doubt about the conclusion that National Reconciliation Ordinance 2007 is violative of all those articles of the Constitution referred to in the judgment and is void *ab initio*.

2. Once the NRO 2007 is *non est,* the obvious legal consequence thereof would be that all cases affected thereby shall revive from the stage where each was interrupted at. As it is a matter of National importance, it has to be taken care of. For this purpose this Court has devised a mode of monitoring and also the creation of a monitoring cell. This, but for the terminology used, is not unusual. I would prefer the mode adopted by the Court in normal course of action.

3. Many a time, in the given circumstances of a particular hearing before this Court, various instructions are issued to the executive authorities as well as judicial fora to act in a particular manner for just and expeditious disposal of matters pending before them. Such orders are issued only during hearing of a cause arising out of a matter already pending before lower fora at the stage of trial, revision or appeal etcetera.

4. Suo Moto or direct action is not taken by the Supreme Court about matters at trial stage because most of such Courts are under the direct supervisory and administrative control of the High Courts. Unless a matter is challenged before it in its Revisional, Appellate or Constitutional jurisdiction, even the High Court does not interfere with the matters pending at investigation or trial stage. The reason is quite obvious and logical that by so doing the lower forums are most likely to be influenced thereby, one way or the other. This effect is likely to enhance when originating from the apex Court.

5. I am, therefore, of the view that this Court should monitor the cases related to the *non est* NRO 2007 in usual manner that it normally adheres to. The normal course is that orders are passed and directions issued to the lower forum in a matter pending before such forum, during hearing under appellate, review or constitutional jurisdiction of this Court. After having passed such orders or directions for proper, just and smooth disposal of cases, this Court retreats into an aura of judicial unconcern, without being over indulgent.

6. Whenever any such order passed by this Court is violated, the party aggrieved resorts to the Court for redressal of its grievances or for rectification of the violation done. The Court takes, rather, serious notice of it and comes to the rescue of the party, aggrieved through such non compliance.

7. Similar should be the normal course about pending cases under National Accountability Ordinance. This Court is to monitor such cases and pass appropriate orders only when, in each particular case, the violation of this judgment, is brought to the notice of this Court by any aggrieved party; be the prosecution or the defence. It is only after such violation being brought to the notice of this Court, that the Honourable Chief Justice may mark the same to any bench of this Court, including the Bench consisting of the monitoring Judge.

8. So far as the idea of suo moto monitoring during the stage of investigation or trial is concerned, it has never been adhered to by this Court, in its dignity, grace and judicial unconcern. We, therefore, should monitor every wrong but on the application of the aggrieved party. There are millions of cases pending in the trial Courts of the Country but the High Courts or Supreme Court do not monitor those cases through a particular

cell unless the wrong done is brought to the notice of the Court. NAB cases should not be made an exception.

9. I really appreciate, rather envy the apt choice of verse-selection by my Honourable brother Mr. Justice Ch. Ijaz Ahmed. It depicts a phenomenon of universal wisdom; that, in a country where the wealth of a poor man is looted, its Ruler has verily gone astray and has faltered. The literary or poetic expression of the verse is marvelous. Its philosophical aspect is superb. But, at the same time, I remained at loss to comprehend as to which "*Sultan*" he really referred to.

10. Does he refer to the *Sultan* during whose regime, the loot and plunder had occurred with reference to the dates specified in the National Accountability Ordinance? Does he refer to the *"Sultan"* during whose regime not only the loot and plunder occurred but the earlier plunders got exonerated through National Reconciliation Ordinance 2007? Does he refer to the *"Sultan"*, who according to our own verdict, was also the beneficiary of such void law?

11. All these queries make me skeptical about many rulers but *prima dona* thereof, according to our judgment, is the maker of the National Reconciliation Ordinance, 2007. He was the equal beneficiary of the Ordinance as observed by us that, it was a deal between two individuals and not a reconciliation at the National level. Such deal, in other words, is tantamount to grave violation of the Constitution.

12. We have much dilated upon but the adventures of one set of beneficiaries whose cases, after revival, are supposed to be pending before the relevant forums. Any observation by this Court about such pending cases shall not affect or influence the trial Courts; but what about the beneficiary about whose action, we

have given absolute and conclusive decision, that it was void *ab initio.*

13. What about the beneficiary who clearly confessed through the Ordinance that many Accountability cases were politically motivated, politically indicted, and politically prolonged, obviously as a sword of Damocles. If politically motivated, why were those indicted. If genuine, why were those dishonestly prolonged and no verdict was obtained against the accused involved.

14. All this, is aimed at bringing home that all beneficiaries are to be dealt with accordingly, equally and without discrimination. The maker of the Ordinance should also be brought to accountability for perpetuating corruption and for violating the Constitution. No doubt, such beneficiary is not a party to the present petitions but so are the other beneficiaries, taken care of in our judgment. Moreover, this Court has, on many occasions, given verdict against persons not party to the proceedings. All beneficiaries of National Reconciliation Ordinance, of the first or the second part, are to be dealt with equally, equitably and without discrimination. If one is proceeded against, the other must also be.

15. At the end, I must appreciate the legal assistance rendered by all the learned counsel that appeared to assist this Court, especially, the expressively eloquent and materially potent discourse of Mr. Salman Akram Raja, the budding Advocate of the Supreme Court.

(Sardar Muhammad Raza)
Judge