

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 Jilani
Mr. Justice Nasir-ul-Mulk
Mr. Justice Raja Fayyaz Ahmed
Mr. Justice Ch. Ijaz Ahmed
Mr. Justice Ghulam Rabbani
Mr. Justice Sarmad Jalal Osmany
Mr. Justice Muhammad Sair Ali
Mr. Justice Mahmood Akhtar Shahid Siddiqui
Mr. Justice Jawwad S. Khawaja.

CONSTITUTION PETITION NO. 09 OF 2009

Sindh High Court Bar Association through its Secretary.

....PETITIONER

CONSTITUTION PETITION NO. 08 OF 2009

Nadeem Ahmed Advocate

....PETITIONER

VERSUS

**Federation of Pakistan through Secretary, Ministry of Law
and Justice, Islamabad and others.**

....RESPONDENTS

For the petitioner:
(Const.P.09/2009)

Mr. Hamid Khan, Sr. ASC.
Mr. Rashid A. Razvi, ASC.
Mr. M. S. Khattak, AOR
Assisted by
M/s Waqar Rana, Waheed Khalid Khan
& Haq Nawaz Talpur, Advocates.

For the petitioner:
(Const.P.08/2009)

Mr. Muhammad Akram Sheikh, Sr. ASC.
Assisted by
Barristers Ms Natalya Kamal &
Syed Shehryar, Advocates

For respondent No.1	Sardar Muhammad Latif Khan Khosa Attorney General for Pakistan. Agha Tariq Mehmood Khan, DAG Mr. Shah Khawar, DAG. Ch. Akhtar Ali, AOR.
For respondent No.2.	Mr. Muhammad Yousaf Leghari, A.G.Sindh. Raja Abdul Ghafoor, AOR.
For respondent Nos.3 & 4.	Nemo.
Respondent No.5.	Not represented.
Dates of hearing:	20 th to 24 th and 27 th to 31 st July, 2009.

JUDGEMENT

IFTIKHAR MUHAMMAD CHAUDHRY, CJ.- The above Constitutional Petitions bearing Nos. 9 of 2009 and 8 of 2009 involve common questions of facts and law and are disposed of by this single judgment.

2. In the first mentioned petition, the petitioner while referring to several provisions of Constitution and the case law, beside making other contentions, legal and factual, has stated, in para No.5, that:

“The removal of Judges of Supreme Court and High Courts on 3.11.2007 was not only violative of Article 209 of the Constitution, 1973 but was against the rule laid down by the bench of twelve (12) Judges of Supreme Court in the case of Syed Zafar Ali Shah (PLD 2000 SC 869). The subsequent validation in the case of Tika Iqbal Khan (PLD 2008 SC 178) a smaller bench of the Supreme Court is per incuriam and in any event, is not by a Supreme Court that is de jure. It is respectfully submitted, that Justice Abdul Hameed Dogar could not be treated as Constitutional head of the Supreme Court even after the decision in the case of Tika Iqbal Khan (supra) as he himself was the real beneficiary of the said Judgement and contrary to one of the cardinal principles of Natural justice, “no person should be judge in his own cause” had headed the Bench. Hence, in view of the facts and reasons stated above Justice

Iftikhar Muhammad Chaudhry is still the Chief Justice of Pakistan as per Constitution and all appointments and re-appointments made in the Supreme Court and High Courts without consultation of de jure Chief justice of Pakistan are unlawful, illegal, ultra-vires of the Constitution as well as malafide”.

3. Having made above averments, the petitioner has, inter-alia, sought a declaration to the effect that the respondents Nos. 3 and 4 namely Justice Zaffar Ahmad Khan Sherwani and Justice Abdul Rashid Kalwar are and continue to be Judges of High Court of Sindh and that they would continue as Additional Judges till 25.8.2010 and that their term of appointment has not expired as opined by Mr. Justice Abdul Hameed Dogar, as then he was called. During the course of his submissions, learned counsel appearing for him prayed further that following declarations be also granted:

- i) that the purported acts done by General Pervez Musharraf, (Rtd) between 3.11.2007 to 16.12.2007 aimed at to suspend and amend the Constitution through several instruments are unconstitutional, invalid and without any legal consequence;
- ii) that on account of his acts taken during 3.11.2007 to 15.12.2007 relating to superior judiciary, General Pervez Musharraf (Rtd) became a usurper;
- iii) all the appointments of Judges of superior judiciary on or after 3.11.2007 up till 22.3.2009 which were without consultation of de-jure Chief Justice of Pakistan are/were unconstitutional, invalid and without any legal consequence;

iv) that the two (so called) Judgments dated 23.11.2007 and 15.2.2008 on Constitutional Petitions No. 87 and 88 of 2007 filed by Tika Iqbal Muhammad and WATAN Party and the Review Petition No.7 of 2008 filed by the former are/were nullity in law, being decisions per incuriam, coram-non-judice, without any legal basis and based on mala-fide proceedings rendered by biased persons of Tribunal (then calling themselves as Judges of this Court) fraudulently, collusively and lacking in bona-fides;

4. In the other petition No. 8 of 2009 which has been filed by Nadeem Ahmad, a practicing Advocate, while criticizing the judgement delivered in case of *Tikka Iqbal Muhammad Khan versus Federation of Pakistan* (PLD 2008 SC 178), the petitioner has, inter-alia, averred as follows:

“All the persons who were not judges on 3rd November 2007 but who were brought into Supreme Court and High Courts as ‘judges’ despite the fact that the Honourable Chief Justice of Pakistan was never consulted before their appointment which meant that they were never appointed under the Constitution.”

AND

“On the night of 22 March 2009, issuance of cause lists comprising persons who have not been appointed in strict adherence to Article 177 and who are therefore complete strangers to the Supreme court, is a serious matter and it is incumbent on the Honourable Chief Justice, before proceeding with any other judicial work, to forthwith stop all these persons from hearing any cases till such time that he, along with other

validly appointed judges, are able to look into and judicially determine validity of their appointments as judges.”

5. The petitioner has, among others, sought a declaration that all those persons, both in Supreme Court and High Courts, regardless of whether they have taken oath under PCO or the Constitution, who have been appointed without ‘consultation’ of Honourable Chief Justice of Pakistan as not judges and therefore, not entitled to function as such.

6. On 22.7.2009 a notice was issued to General Pervez Musharraf (Rtd) on his available address intimating him about the proceedings in this case and 29.7.2009 as the date fixed therein before this Court. The Process Serving Officer reported on the same day that he had gone to the residential place viz: C-1, B Park Road, Chak Shahzad, Islamabad where a person identifying himself as Muhammad Hussain son of Amir and that on former's offer the latter refused to receive the notice. The factum of issuance of the afore-referred notice was widely televised through National and International T.V. channels. Also, it was widely published in National and International print media, but, on the date so fixed no one entered appearance.

7. We have heard learned counsel for petitioners and learned Attorney General for Pakistan.

8. Before dilating upon the pleas taken in the arguments by learned counsel for the parties, in our view, some of the facts/events which took place before 3rd November, 2007 touching the very basis of the issues involved in the matter are brought on record.

9. In our country, during sixty years of its independence after partition, to the misfortune of people, several times, the Constitutions framed by Legislative Bodies were desecrated. Sovereignty of people was not allowed to flourish and get deep-rooted in the polity of our country. Prior to 3rd November, 2007, the Constitutions were either abrogated or put in abeyance and the democratic system of governance was put to an end. For the first time, Constitution of 1956 was abrogated on 7th October, 1958 and Martial Law was imposed by the then President, Sikandar Mirza who dismissed the Central and Provincial Governments; dissolved the Parliament and Provincial Assemblies and abolished all Political Parties and appointed General Muhammad Ayub Khan, the then Commander in Chief as Martial Law Administrator. Sikandar Mirza was soon, within few days, replaced by the latter. On 25th March, 1969, again the then head of Army, General Agha Muhammad Yahya Khan, abrogated the Constitution of 1962 and by proclamation (PLD 1969 Central Statutes 42) Promulgated Martial Law followed by Provisional Constitution Order (Gazette of Pakistan, Extraordinary 4th April, 1969). On 5th July, 1977 once again Martial Law was imposed throughout the country by the then head of Army Chief viz. former General Muhammad Zia-ul-Haq, who, vide Proclamation of Martial Law (PLD 1969 Federal Statutes 326) dissolved the National Assembly, the Senate, the Provincial Assemblies etc. and put the Constitution of 1973 in abeyance followed by Laws (Continuance in Force) Order, 1977. When the Constitution was revived,

it was undeniably, in a mutilated form by the notorious Eighth Amendment.

10. Later, there was another onslaught on the ongoing democratic system of governance. On 12th October, 1999, the then Chief of Army Staff, General Pervez Musharraf, now retired, once more, put the Constitution in abeyance and the whole of Pakistan was brought under the control of Armed Forces. The National Assembly, the Senate and the Provincial Assemblies were suspended, so also, the Chairman and Deputy Chairman of Senate, the Speaker and Deputy Speaker of the National Assembly and the Provincial Assemblies were suspended and it was declared that the Prime Minister, Federal Ministers, Parliamentary Secretaries, the Provincial Governors, the Provincial Chief Ministers and the Advisor to the Chief Ministers would cease to hold offices, followed by issuance of Provisional Constitution Order and the Oath of Office (Judges) Order 2000. General Pervez Musharraf (Rtd), self styled himself as Chief Executive and started ruling the country under the new dispensation. Later, he, unceremoniously, occupied the office of President and in the coming years revived the Constitution with Seventeenth Amendment.

11. Again, on 3rd November, 2007 the General Pervez Musharraf, (Rtd), in his capacity as Chief of Army Staff, in the garb of declaration of emergency, put the Constitution in abeyance, issued Provisional Constitution Order No.1 of 2007 followed by the Oath of Office (Judges) Order, 2007, making as many as sixty one (61) Judges of

superior judiciary including Chief Justice of Pakistan and Chief Justices of three Provinces dysfunctional for many of them either did not agree to take or were not given the oath. Of them were; from Supreme Court 13 out of 18 (17 permanent and one ad-hoc) Judges including Chief Justice of Pakistan, 18 out of 31 Judges of the Lahore High Court, 24 out of 28 Judges including Chief Justice of High Court of Sindh, 6 out of 13 Judges including Chief Justice of Peshawar High Court. It is quite saddening that all the five Judges including the Chief Justice of Balochistan High Court took oath under the Oath of Office (Judges) Order, 2007.

12. An independent and strong judiciary is a back bone of viable democratic system all over the world. The time tested experience has proved that independent and strong judiciary provides strength to the institutions running government particularly, those who roll on the wheels of democracy. Equally the independent and strong judiciary acts as an arbiter striking balance among various segments of Democratic system. It helps State organs, such, as, Legislature, Executive and the judiciary itself to function smoothly maintaining balance inter se. The constitution of Pakistan, of 1973, too, provides the judiciary guarantees enshrined in it and states that the judiciary shall be fully secured, but, unfortunately, to its great dismay, this organ of State has, all along been under the wrath of adventurers imposing their dictatorial terms obviously for their ulterior designs. The history of this country witnessed that in a set up of one government tenure of a Chief Justice of Pakistan was curtailed with ulterior motives and was restored to its original position when the designs

were stood achieved. Likewise, through various instruments, the favourites and pliant members of superior judiciary were out rightly given underserved benefits while the others were shown doors. This happened during the era of the then Martial Law Administrator General Zia-ul-Haq and following the same foot steps, General Pervez Musharraf (Rtd) did the same in the year 2000. Many judges of superior judiciary who declined to toe his line of action were unceremoniously sacked.

13. General Pervez Musharraf (Rtd) through his 1999/2000 action, declared that the national Assembly, the provincial Assemblies, Senate, Chairman and Deputy Chairman of Senate, Speaker of National Assembly and the Provincial Assemblies were suspended and the Prime Minister, Federal Ministers, Parliamentary Secretaries, the Provincial Governors and the provincial Chief Ministers and the Advisors to the Chief Ministers, to have ceased to hold offices. However, his November, 2007 action was a singular in nature, in that, the onslaught was on judiciary alone. All other institutions were in tact. The independence of judiciary was given a serious blow. In order to save the judiciary from being destroyed, for the first time in the history of this Country, a seven member bench of this Court headed by the de jure Chief Justice of Pakistan, passed an order, inter-alia, restraining the President and Prime Minister of Pakistan from undertaking any such action, which was contrary to the Independence of Judiciary. So also the Judges of this Court and that of the High Courts including Chief Justice (s) were required not to take oath under the Provincial Constitution Order or any

other extra Constitutional step and on the same day viz: 3.11.2007, the order was served on the members of superior judiciary through the respective Registrars of the Courts by way of Fax. It was also sent to all the relevant Executive functionaries.

14. The action of General Pervez Musharraf (Rtd) was, undeniably, taken to prevent the 11 member Bench of this Court which was hearing the Petition No. 73 of 2007 filed by Mr. Justice (Rtd) Wajihuddin Ahmad and others in which the qualification of the General was in question, and perhaps, he was not expecting a favourable decision. The reasons shall, in that behalf be found in the detailed judgement. Be that as it may, Justice Abdul Hameed Dogar, as then he was called, alongwith four other Judges of this Court took oath in pursuance of unconstitutional Provisional Constitution Order and the Oath of Office (Judges) Order, 2007 and by that he also violated the order of seven member Bench of this Court which was headed by de jure Chief Justice of Pakistan. Mr. Justice Abdul Hameed Dogar took the oath of Chief Justice of Pakistan, although, the office was not vacant. Some of High Courts Judges too took oath likewise violating the constitution and the order of seven member Bench, legally and lawfully passed. Besides, many other Judges in this Court and in the High Courts were appointed and they took oath in violation of constitutional provisions and the order of seven member Bench of this Court.

15. Subsequently, in order to dilute the effect of afore-referred 7 member Bench order, Mr. Justice Abdul Hameed Dogar, the CJP, as then

was called, constituted a Bench of 8 Judges including those appointed afresh in pursuance of Provisional Constitution Order and took up CMA bearing No.2874 of 2007 in Constitution Petition No.73 of 2007 and by their order dated 6.11.2007 illegally and unlawfully, without the mandate of the Constitution, declared the order dated 3.11.2007 to be illegal and without jurisdiction. Later, a 10 member Bench was also constituted which was headed by Mr. Justice Abdul Hameed Dogar, Chief Justice of Pakistan, as then he was called. This Bench again illegally and unlawfully took up and dismissed the petition No.73 and Original Criminal Petition No.51 of 2007 filed by Justice (Rtd) Wajihuddin Ahmad calling in question the eligibility of General Pervez Musharraf to contest election to the office of President although, it already stood dismissed for want of instruction. Further details in this behalf shall be given in the detailed judgment.

16. Also subsequently, an other 7 member bench headed by Mr. Justice Abdul Hameed Dogar, Chief Justice of Pakistan, as then he was called, took up hearing the case of Tikka Iqbal Muhammad Khan and WATAN Party and decided the same on the principle of ‘ Salus Populi Supreme Lex’ and granted that relief which was even not prayed by the petitioner. This judgement is/was, ex-facie, per incuriam, corum-non-judice illegal and unlawful. Later, a time barred Review Petition was filed by Tikka Iqbal Khan which was heard by 13 member Bench and was dismissed, palpably to give impression that a larger Bench decided the

matter to dilute the effect of a previous judgment handed down in case of Syed Zafar Ali Shah (PLD 2000 SC 869).

17. It may be noted that the chosen representative of the time, too, did not extend validation to the unconstitutional acts taken upto 3rd November, 2007 as is universally known. It is, however, quite heartening that, for the first time, in the history of our beloved country, the chosen representative of people, who took their offices as a result of election taking place on 18th February, 2008 have, commendably, stayed their hands off and have not sanctified the unconstitutional acts, such as, the Declaration of Emergency, the Provisional Constitution Order No.1, the Oath of Office (Judges), Order, 2007, the Constitution (Amendment) Order, 2007 (President's Order No.5 of 2007), the Constitution (Second Amendment) Order of 2007 (President's Order No.6 of 2007) and many other instruments made and declared by General Pervez Musharraf (Rtd). In this, their restraint not extending validity to all these unconstitutional and illegal instruments and other steps taken by retired General are laudable. Evidently, this was done by the present representatives of people believing firmly that the prosperity of the country lies in the strong and independent democratic system which can alone flourish and survive with democratic steps to be taken in the better interest of people always apt and keen to choose them in such a viable system of governance. We are sanguine that the current democratic dispensation comprising of the President, the Prime Minister, Ministers and the

Parliament shall continue to uphold the Constitution, its institutions and sacred values.

18. From above, the conclusions drawn are that:

- i) The General Pervez Musharraf (Rtd) in the garb of Emergency Plus and the Provisional Constitution Order made amendments in the Constitution by self-acquired the powers which all are unconstitutional, unauthorized, without any legal basis, hence, without any legal consequences;
- ii) Mr. Justice Abdul Hameed Dogar, took oath as CJP in violation of the order dated 3.11.2007 passed by a 7 member Bench headed by de-jure Chief Justice of Pakistan and in pursuance of unconstitutional instruments introduced by General Pervez Musharraf (Rtd), additionally knowing well that the office of Chief Justice of Pakistan was not lying vacant;
- iii) Also, the Judges who were either retired or were not holding any judicial office, beside those in High Courts took fresh oath on their appointment on and after 3.11.2007 till 15.12.2007 in Supreme Court where the full strength of Judges alongwith an Ad-hoc Judge appointed under the Constitution were already working and thus there was no vacancy. Similarly, many Judges took oath in Provincial High Courts. All of them did so in violation of order dated 3.11.2007 passed by 7 member Bench headed by de-jure Chief Justice of Pakistan. Four incumbent Judges already

functioning in the Supreme Court took fresh oath under the influence of and in pursuance of unconstitutional steps of General Pervez Musharraf (Rtd);

- iv) The Petition No.73 of 2007 filed by Mr. Justice (Rtd) Wajihuddin Ahmad challenging the eligibility of General Pervez Musharraf (Rtd) to contest for the office of President in uniform was dismissed purportedly on merits although the record maintained in the Supreme Court revealed otherwise;
- iv) The decisions in the cases of Tikka Iqbal Muhammad Khan granting validity to the actions of General Pervez Musharraf (Rtd) were per incuriam, corum-non-judice, without any legal basis hence, of no legal consequences;
- vi) The amendments in the Supreme Court (Number of Judges) Act, (XXXIII, 1997) 1997 by way of Finance Act, 2008 raising the strength of Judges in Supreme Court from 17 (1+ 16) to 30 (1+29) seemingly aimed at providing allocation of funds for increasing the strength of Judges is unconstitutional because the strengths of Judges of Supreme Court is be increased by Parliament as defined in Article 50 to be read with Article 260 of the Constitution which defines the acts of Parliaments;
- vii) Surprisingly, in the past the Courts of the time used to extend favours empowering the adventurers to amend the Constitution in actual effect were to achieve their

overt and covert agenda but this time, such powers were acquired by the General Pervez Musharraf (Rtd) himself through the PCO and brought a host of unconstitutional amendments for his own benefits; and

- viii) The present representative of people firmly believe in strong and independent judiciary and the democratic system which is evident that the deposed Judges of Supreme Court, High Courts and the de-jure Chief Justice of Pakistan were restored with effect from 3rd of November, 2007 implied that the present representatives of people denied the validity of the actions of General Pervez Musharraf (Rtd) taken from 3.11.2007 to 15.12.2007 during which the Constitution remained suspended.

19. Considering the above, in the light of submissions of learned counsel for the parties and on examination of the material brought before us and for the detailed reasons to be recorded, we dispose the above petitions as follows.

20. The judgment purported to have been delivered in Constitutional Petitions bearing No: 87 and 88 of 2007 in the case titled as TIKA IQBAL MUHAMMAD KHAN VS. GENERAL PERVEZ MUSHARRAF AND OTHERS (PLD 2008 SC 25 and PLD 2008 SC 178) and the judgment dated 15.2.2008, purported to have been passed in C.R.P.No.7 of 2008 titled as TIKA IQBAL MUHAMMAD KHAN VS. GENERAL PERVEZ MUSHARRAF AND OTHERS and any other judgment/judgments passed on the strength of the said two judgments are hereby declared to be void *ab initio*.

21. The Proclamation of Emergency issued by General Pervez Musharraf as the Chief of Army Staff (as he then was) on November 3, 2007; the Provisional Constitution Order No.1 of 2007 issued by him on the same date in his said capacity; the Oath of Office (Judges) Order of 2007 issued by him also on the same date though as the President of Pakistan but in exercise of powers under the aforesaid Proclamation of Emergency and the Provisional Constitution Order No.1 of 2007; The Provisional Constitution (Amendment) Order, 2007 issued by him likewise on 15.11.2007; the Constitution (Amendment) Order, 2007 being President's Order No.5 of 2007 issued on November 20, 2007; the Constitution (Second Amendment) Order, 2007 being the President's Order No.6 of 2007 issued on 14th December, 2007; the Islamabad High Court (Establishment) Order 2007 dated 14th December 2007 being the President's Order No.7 of 2007; the High Court Judges (Pensionary Benefits) Order, 2007 being Presidents Order No.8 of 2007; the Supreme Court Judges (Pensionary Benefits) Order, 2007 being President's Order No.9 of 2007 dated 14th December, 2007 are hereby declared to be unconstitutional, *ultra-vires* of the Constitution and consequently being illegal and of no legal e.

22. As a consequence thereof:-

- i) the Chief Justice of Pakistan; the Judges of the Supreme Court of Pakistan; any Chief Justice of any of the High Courts and the Judges of the High Courts who were declared to have ceased to hold their respective offices in pursuance of the afore-

mentioned alleged judgments or any other such judgment and on account of the instruments mentioned in para 21 above, shall be deemed never to have ceased to be such Judges, irrespective of any notification issued regarding their reappointment or restoration;

ii) it is declared that the office of the Chief Justice of Pakistan never fell vacant on November 3, 2007 and as a consequence thereof it is further declared that the appointment of Mr. Justice Abdul Hameed Dogar as the Chief Justice of Pakistan was un-constitutional; void *ab initio* and of no legal effect;

Provided that subject to whatever is contained hereinafter, the said un-constitutional appointment of Mr. Justice Abdul Hameed Dogar as the Chief Justice of Pakistan shall not affect the validity of any administrative or financial acts performed by him or of any oath made before him in the ordinary course of the affairs of the said office;

iii) since Mr. Justice Abdul Hameed Dogar was never a constitutional Chief Justice of Pakistan, therefore, all appointments of Judges of the Supreme Court of Pakistan, of the Chief Justices of the High Courts and of the Judges of the

High Courts made, in consultation with him, during the period that he, unconstitutionally, held the said office from 3.11.2007 to 22.3.2009 (both days inclusive) are hereby declared to be unconstitutional, void *ab initio* and of no legal effect and such appointees shall cease to hold office forthwith;

Provided that the Judges so unconstitutionally appointed to the Supreme Court while holding the offices as Judges of any of the High Courts shall revert back as Judges of the respective High Courts subject to their age of superannuation and likewise, the Judges of the High Courts, who were District and Sessions Judges before their said un-constitutional elevation to the High Courts shall revert back as District and Sessions Judge subject to limitation of superannuation;

iv) the Judges of the Supreme Court of Pakistan, if any, the Chief Justices of the High Court, if any, and the Judges of any of the High Courts, if any, who stood appointed to the said offices prior to 3.11.2007 but who made oath or took oath of their respective offices in dis-obedience to the order passed by a Seven Member Bench of the Supreme Court of Pakistan on 3.11.2007 in C.M.A.No.2869 of 2007 in

Constitution Petition No.73 of 2007, shall be proceeded against under Article 209 of the Constitution. The Secretary of the Law Division of the Government of Pakistan shall take steps in the matter accordingly;

Provided that nothing hereinabove shall affect those Judges who though had been appointed as Judges/Chief Justices of any of the High Courts between 3.11.2007 to 22.3.2009 but had subsequently been appointed afresh to other offices in consultation with or with the approval of or with the consent of the Constitutional Chief Justice of Pakistan;

v) any judgments delivered or orders made or any decrees passed by any Bench of the Supreme Court or of any of the High Courts which comprised of or which included the afore-described Judges whose appointments had been declared void *ab initio*, are protected on the principle laid down in MALIK ASAD ALI'S CASE (PLD 1998 SC 161);

vi) since the Constitution (Amendment) Order, 2007 being the President's Order No.5 of 2007 and the Islamabad High Court (Establishment) Order being President's Order No.7 of 2007 establishing Islamabad High Court for the Federal Capital Territory, have been declared to be un-constitutional and of no legal effect, therefore, the said Islamabad

High Court shall cease to exist forthwith. All judicial matters pending before the said High Court before the passing of this order shall revert/stand transferred to the courts which had jurisdiction in the said matters before the promulgation of afore-mentioned President's Order No.5 of 2007 and President's Order No.7 of 2007 promulgated on 14th December, 2007. The Judges of the said Court shall, as a consequence thereof, cease to be Judges except such Judges or the Chief Justice of the said court, who prior to their appointments in the said Islamabad High Court, were Judges of some other High Court who shall revert to the court of which they were originally the Judges, subject to their age of superannuation. The officers and employees of the said Court shall also cease to hold their respective appointments and shall become part of the Federal Government Surplus Pool for their further appointments. However, if any such officer or employee was an officer or an employee of some other court or department or office, such officers or employees shall revert to their respective courts, departments or offices to which they belonged before joining the service in the Islamabad High court, subject again to their age of superannuation;

we would like to mention here that establishment of a High Court or a Federal Court for the Federal Capital Territory might be a desirable act but it is unfortunate that such a step was taken in an un-constitutional and a highly objectionable manner. We may, therefore, add that notwithstanding what has been declared and ordered above, the relevant and competent authorities may take steps to establish such a court in accordance with the Constitution/the law.

vii) the Ordinances promulgated by the President or a Governor of a Province before 3.11.2007 which were given permanence by the Provisional Constitution Order No.1 of 2007 as also the Ordinances issued by the President or a Governor between 3.11.2007 and 15.12.2008 (both days inclusive) which were also, like-wise given permanence through the same instrument and which legislative measures alongwith the said Provisional Constitution Order had been validated by the aforementioned judgment delivered in TIKA IQBAL MUHAMAD KHAN'S CASE, stand shorn of their purported permanence on account of our afore-mentioned declarations. Since on account of the said

judgment in TIKA IQBAL MUHAMMAD KHAN'S CASE purporting to be a judgment of this Court, the presumption that the said Ordinances were valid laws not requiring approval of the Parliament or the respective Provincial Assemblies in terms of Article 89 or 128 of the Constitution and since it is today that this Court has attributed invalidity to the said legislative instruments, therefore, the period of 120 days and 90 days mentioned respectively in the said Article 89 and the said Article 128 of the Constitution, would be deemed to commence to run from today and steps may be taken to place the said Ordinances before the Parliament or the respective Provincial Assemblies in accordance with law;

viii) since the Constitution, through its Article 176, authorises only the Parliament to determine the number of Judges of the Supreme Court of Pakistan and since the Parliament had so done through the Supreme Court (Number of Judges) Act XXXIII of 1997, therefore, the increase in the strength of the Judges through the Finance Act of 2008 which Act was not passed by the Parliament but was passed only by the National Assembly would be deemed to be valid only for financial purposes and not for the purposes of Article 176 of the Constitution. It is

resultantly declared that the number of Judges of the Supreme Court for purposes of the said Article 176 shall continue to remain sixteen.

ix) in the Code of Conduct prescribed for the Judges of the Superior Courts in terms of Article 209(8) of the Constitution, a new clause shall be added commanding that no such Judge shall, hereinafter, offer any support in whatever manner to any un-constitutional functionary who acquires power otherwise than through the modes envisaged by the Constitution and that any violation of the said clause would be deemed to be misconduct in terms of the said Article 209 of the Constitution;

x) in view of our findings above regarding Mr. Justice Abdul Hameed Dogar not being a constitutional and a valid consultee, the notification dated 26.8.2008 and the notification dated 15.9.2008 extending the term of office of Mr. Justice Abdur Rashid Kalwar and of Mr. Justice Zafar Kalwar Khan Sherwani as Additional Judges of the High Court of Sindh are declared to be un-constitutional and of no legal effect.

xi) that the court acknowledges and respects the mandate given by the sovereign authority i.e. electorate to the democratically elected Government on 18th

February, 2008 and would continue to jealously guard the principle of tricotomy of powers enshrined in the Constitution, which is the essence of the rule of law. Any declaration made in this judgment shall not in any manner affect the General Elections held and the Government formed as a result thereof i.e. the President, the Prime Minister, the Parliament, the Provincial Governments, anything done by these institutions in the discharge of their functions. These acts are fully protected in terms of the age old of principle of *Salus Populi Est Suprema Lex* reflected in PLD 1972 SC 139.

xii) Before parting with the judgment, we would like to reiterate that to defend, protect and uphold the Constitution is the sacred function of the Supreme Court. The Constitution in its preamble, inter alia, mandates that there shall be democratic governance in the country, “wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed; wherein the independence of judiciary shall be fully secured.” While rendering this judgment, these abiding values have weighed with us. We are sanguine that the current democratic dispensation comprising of the President, Prime Minister and the

Parliament shall equally uphold these values and the mandate of their oaths.

23. A copy of this judgment shall be sent to the Secretary Law and Parliamentary Affairs, Government of Pakistan, for compliance.

CHIEF JUSTICE

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JUDGE

Islamabad,
July 31, 2009.

APPROVED FOR REPORTING