

**IMPORTANT CASES DECIDED  
BY THE SUPREME COURT  
FROM APRIL 2010 - DECEMBER 2011**

## SUMMARY OF THE CASES

**MIR MUHAMMAD IDRIS AND OTHERS VERSUS FEDERATION OF PAKISTAN THROUGH SECRETARY, MINISTRTRY OF FINANCE AND OTHERS (PLD 2011 SUPREME COURT 213)**

In the instant Constitution Petition, the petitioners had challenged the validity of the reappointment of one Syed Ali Raza, respondent No 3, as President of the National Bank of Pakistan (NBP) for the fifth time. The petitioners alleged that Respondent No.3 was initially appointed as President for a period of three years w.e.f 1-7-2000. Thereafter, he was reappointed w.e.f 1-7-2003, for yet another period of three years w.e.f. 1-7-2006; and for a further period of one year w.e.f. 1-7-2009; following which he was again appointed for another year w.e.f. 1-7-2010 vide notification dated 10-4-2010. The petitioners alleged that Respondent No. 3 was holding the said lucrative post illegally and unlawfully.

The pivotal question falling for determination by the Supreme Court was whether section 11(3)(d) of the Banks (Nationalization) Act 1974, as amended by the Banks (Nationalization), (Amendment) Act, 1997, relating to the appointment of Chairman, President and members of the NBP Board, could have been amended by the Finance Act, 2007 [Money Bill] passed in terms of Articles 73 and 75 of the Constitution.

In the judgment authored by the Honourable Chief Justice of Pakistan, it was observed that as per Article 73(2) of the Constitution a Bill or amendment was to be deemed a Money Bill if it contained provisions dealing with all or any of the matters enumerated in clauses (a) to (g) of Paragraph 2 of the said Article. That the subject matter of amendment of section 11(3)(d) of the Act of 1974 was not covered by the term 'Money Bill'. Therefore, the reappointment of Chairman, the President and other members of the Board of NBP did not fall within the ambit of clauses (a) to (g) of Art 73(2). That the amendment in question could not have been introduced in clause (d) of subsection (3) of section 11 of the Act of 1974 by way of Finance Act, 2007, as it did not fulfil the requirement envisaged by Article 70 of the Constitution, i.e. of approval by two houses of parliament.

The Supreme Court relied upon the case of *Sindh High Court Bar Association versus Federation of Pakistan*(PLD 2009 SC 879), wherein it was held that the amendment in the Supreme Court (Number of Judges) Act, 1997, effected by the Finance Act, 2008, was unconstitutional and illegal. Resultantly, certain Judges of the Supreme Court were made to relinquish office. Based on the same analogy, the Supreme Court observed that if the appointments of Judges were effected on account of a similar defect in legislation, the appointment of Respondent No.3, who, too, was appointed under an unconstitutional and illegal amendment could

be protected. Therefore, the amendment made in section 11(3)(d) of the Act of 1974 by the Finance Act, 2007, was declared unconstitutional and illegal, and Respondent No.3 was directed to relinquish his office as President NBP with immediate effect.

**PETROSON CORPORATION PVT. LTD AND OTHERS VERSUS OGDC  
THROUGH MANAGING DIRECTOR  
(P L D 2011 Supreme Court 235)**

The judgment in the instant case, authored by the Honourable Mr. Justice Saqib Nisar, elaborately discussed the scope of Review and Appeal in terms of Articles 185, 188, 184 & 199 of the Constitution of Pakistan 1973 and Section 114 & O. XLVII, R. 1, of C.P.C, while dilating upon the questions as to whether a short order was an order in terms of law or not and whether the period of limitation was to be reckoned from the date of knowledge of discovery of new facts.

Certain civil appeals filed by the petitioners were dismissed by the Supreme Court on 24-9-2008 vide a short order. The petitioners applied for the copy of the short order of the appeals in 2008, which was delivered to them on 8-10-2008. Subsequently another application for obtaining the copy of short order was moved; which was prepared and delivered on 23-2-2009 and another application and delivery of a copy was made on 11-3-2009. The petitioners instituted their review petitions on 7-4-2009 on the basis of the last copy of the short order, whereupon the office objected to the petition for being time barred.

The Supreme Court, while placing reliance mainly upon precedent cases of *The State v. Asif Adil and others* (1997 SCMR 209), *Abdul Hameed Dogar v. Federation of Pakistan and others* (2010 SCMR 312) and an unreported judgment in Criminal Review Petition No.9 of 2008, observed that the short order—though not elucidating the reasons—having been signed by all the Judges and the matter finally being disposed of, for all intents and purposes was the final judgment/order of the Court. That the party intending to assail the same in appeal or review must avail its remedy within the prescribed period of limitation from the date of short order etc., rather than waiting for the detailed reasons and allowing the limitation to pass by.

The Supreme Court further observed that the petitioners were obliged to file their review petitions within the period of limitation commencing from 8-10-2008, when they first obtained the copy of the short order. That the counsel for the petitioners could give certificate in terms of Order XXVI, Rule 4, of the Supreme Court Rules, 1980, until the detailed judgment was handed over to him. Concerning the proposition that upon discovery of new facts/evidence, the period of limitation for review was to commence from the date of disclosure and attaining knowledge thereof, the Supreme Court held that the discovery of new facts/evidence, per se, did not enlarge or extend the period of limitation. Such period was not to be reckoned from the date of discovery, but at best, could constitute in appropriate

cases a "sufficient cause" for the condoning delay, subject to the application of section 5 of the Limitation Act, 1908. The Supreme Court dismissed Civil Miscellaneous Applications as well as the Review Petitions for being time barred.

**SUPREME COURT BAR ASSOCIATION THROUGH SECRETARY VERSUS FEDERATION OF PAKISTAN AND OTHERS  
(P L D 2011 Supreme Court 269)**

Various Civil Miscellaneous Applications filed by the Chief Justices of the Provincial High Courts were heard and decided by an interim order on 30-08-2010 by a seventeen-member larger Bench headed by Mr. Justice Iftikhar Muhammad Chaudhry, the Honourable Chief Justice of Pakistan. The Chief Justices of the four provinces had requested the Supreme Court to take steps in order for as many as 32 Additional Judges of the High Courts to continue performing their duties as Additional Judges till the determination of the matter sub judice before the Supreme Court in Constitutional Petition No 14/2010 challenging, *inter alia*, vires of Article 175-A pertaining to the mode of appointment of superior courts judges, inserted by 18<sup>th</sup> Amendment in the Constitution of Pakistan 1973. The Supreme Court Bar Association also filed Miscellaneous Applications praying therein for suspension of the constitutional provisions challenged in those petitions. The applicants stated that the Additional Judges of their concerned provinces had already served for a period of one year and had got the expectancy for their permanent appointment, but their cases could not be taken up as the matter was sub-judice before the Supreme Court.

The Supreme Court while referring to an earlier judgment in the case of *Wukala Mahaz v. Federation of Pakistan* (PLD 1998 SC 1263) passed an interim order observing that in order to avoid any constitutional void, and other complications, the Additional Judges of all the four High Courts could continue to perform their functions as Additional Judges subject to final determination of the matter sub judice before the Court.

**JUSTICE HASNAT AHMED KHAN AND ANOTHER versus FEDERATION OF PAKISTAN/STATE  
(P L D 2011 Supreme Court 274)**

Intra-Court appeals were filed by Justice Hasnat Ahmed Khan and Justice Syed Shabbar Raza Rizvi against the verdict of the four member Bench dated 2-02-2011 whereby the Supreme Court had directed the framing of charge in contempt of court proceedings against judges of the superior courts who had taken oath under the Provisional Constitution Order (1 of 2007) (the 'PCO') and Oath of Office(Judges) Order, 2007, in violation of the Supreme Courts Order dated 7<sup>th</sup> October 2007—whereby the judges of the superior courts were specifically restrained from doing so. These appeals were placed before a Special Bench of the Supreme Court on the request of the petitioners. The Registrar of the Supreme Court brought to the notice of the Court that one Mr. Justice Jehanzeb

Rahim of the Peshawar High Court had passed an order on 17-2-2011 in his Chambers for issuance of contempt notices to some Hon'able Judges of the Supreme Court; even though no such contempt proceedings were pending in the Peshawar High Court. However, the Chief Justice, Peshawar High Court, initially took up the matter on the administrative side and directed the office not to act upon the same. Further, on the judicial side as well, a three member Bench set aside the said order.

In order to preserve and protect the dignity and respect of the Hon'able Judges of the Bench seized with the matter as well as the other Judges, and to ensure and preserve the system of administration of justice and honour of the judicial institution including high courts and district courts, a seven-member bench headed by Mr. Justice Iftikhar Muhammad Chaudhry, the Hon'able Chief Justice of Pakistan, vide its order dated 18-02-2011, observed that the judges whose cases were pending before a four-member bench of the Supreme Court had started making attempts to undermine the authority of the Hon'able Judges of the Court by issuing contempt notices to them. Therefore, the Supreme Court directed that all the six Judges, namely, Syed Shabbar Raza Rizvi, Hasnat Ahmed Khan, Syed Hamid Ali Shah and Syed Sajjad Hussain Shah (Lahore High Court), Justice Ms. Yasmeen Abbasy (High Court of Sindh), Justice Jehanzeb Rahim (Peshawar High Court) and Justice Sayed Zahid Hussain (Supreme Court) were not to pass any such order against the members of the Bench or the Judges of the Supreme Court; and if any such order was passed by them, the same would have no legal or binding effect upon the Supreme Court as well as on other functionaries in the country and would be deemed non-existent.

**SUO MOTU CASE NO. 24 OF 2010 AND HUMAN RIGHTS CASES NOs. 57701-P, 57719-G, 57754-P, 58152-P, 59036-S, 59060-P, 54187-P & 58118-K OF 2010 (P L D 2011 Supreme Court 277)**

An eight-member bench, headed by the Hon'able Chief Justice of Pakistan, while hearing Suo Motu and Human Rights cases regarding corruption in Hajj arrangements in 2010, took notice of the matter of re-employment of one Syed Javed Ali Bukhari, a Police Officer, as Additional Director General FIA, vide Notification dated 21-1-2011; and of some other Police officers on contract basis. The Supreme Court was informed by the then Director (Law) FIA that the appointment of the said Syed Javed Ali Bukhari was in violation of Section 3(2) read with sections 4 and 5(2) of the Federal Investigation Agency Act, 1974.

The Supreme Court observed that the said police officers were re-employed in total disregard of the provisions of Section 14 of the Civil Servants Act, 1973, as well as the instructions contained in Esta Code in Volume-I, Edition 2007, under the heading "Re-Employment" and the judgments of the superior courts. It was further observed that for establishing rule of law and constitutionalism, adherence to the relevant provisions of law in letter and spirit was necessary. Otherwise, it

would not be possible to ensure the effective running of the machinery of the police department. The Supreme Court held that such re-employments tantamount to blocking the promotion of deserving officers of the forces. The Supreme Court observed that in order to achieve good governance, the same principle should be followed and strictly applied in all other departments as well.

### **SUO MOTU CASE NO. 5 OF 2010 (PLD 2010 SC 731)**

In this case, a note was put up by the Registrar of the Supreme Court highlighting a news item appearing in 'The News' dated 28th March, 2010, for the facts disclosed therein in respect of alleged massive corruption in awarding contract of supply of LNG, which was treated as petition under Article 184(3) of the Constitution. The reporter of The News appeared in Court and stated that when he learnt about the awarding of contract for supply of LNG, he probed into the matter and discovered that before awarding the contract to a foreign firm, the Ministry of Petroleum had, in principle, decided to give the contract to Shell Gas & Power Co. and, towards that end, the minister for Petroleum was invited to Doha to witness the signing of relevant documents in due course. The ECC, due to intervention of the Ministry of Petroleum, declined to approve the name of Shell Gas & power for supply of LNG and recommended the name of GDF Suez. Therefore, according to him, the proceedings for completion of the contract were not carried out in a transparent manner.

It was alleged on behalf of the FAUJI/VITOL that they had submitted their conditions of Short Term LNG Supply and Price Negotiating Committee (PNC) and had been negotiating with them by convening a number of meetings but, surprisingly, instead of recommending their names, the Ministry of Petroleum put up a summary on 9th February, 2010, to ECC for approving Shell Gas & Power or GDF Suez for awarding the contract of Mashal. On acquiring knowledge of this fact, they agitated the matter before the Minister for Petroleum.

The Court, after a careful perusal of facts, observed that the Ministry of Petroleum and SSGCL had not followed the process for awarding contract for LNG supply for Mashal or Short Term Project seriously and with a high order of transparency as was evident from the facts and circumstances narrated above. The Court observed that there was a price slope averaging from 0.145 to 0.155, which needed to be kept in view; and that it was the duty of the Court to ensure that the Public Procurement Regulatory Authority Ordinance, 2002, read with the Public Procurement Rules, 2004, were adhered to strictly to exhibit transparency. It was universally recognized principle that such type of transactions must be made in a transparent manner for the satisfaction of the people, who are the virtual owners of the national exchequer which was being invested in these projects.

However, the Ministry of Petroleum, Government of Pakistan, through Mr.

S.M. Zafar, Senior Advocate Supreme Court, has come forward with a statement stating that "without prejudice to its stand taken in Court, the Government confirms that it shall (1) put up a summary relating to the Mashal Pakistan Project before the Economic Coordination Committee (ECC) for a fresh decision for awarding the contract for supply of LNG to 4-Gas, the Developer declared qualified by the Consultant SSGCL; (2) simultaneously put up a summary relating to the Fauji/Vitol proposal against advertisement for Expression of Interest dated July 18, 2009 for consideration and decision independently and separately from the case of Mashal; and (3) as a consequence of 1 above, the ECC decision dated February 9, 2010, to award the contract of supply to any person would not give any right to such person to make any claim in this behalf and shall be of no consequence."

In view of the said statement, the petition was disposed of with the observation that the matter be considered in a highly transparent manner, both for Mashal Pakistan and Short Term LNG Supply Projects.

**HUMAN RIGHTS CASES NOS. 4668 OF 2006, 1111 OF 2007 AND 15283-G  
OF 2010  
(P L D 2010 Supreme Court 759)**

In January 2005, the Capital Development Authority (CDA) leased out a plot of 6000 square yards in F-9 Park (Fatima Jinnah Park) to M/ s. Siza Foods (Pvt.) Ltd., a franchise holder in Pakistan of McDonald's Corporation, for setting up a fast food restaurant (McDonald's) on the western side of F-9 Park (Fatima Jinnah Park). The members of the civil society expressed grave concern in a segment of the press about the legality/desirability of the project in a public park. Barrister Saadia Abbasi, member, Senate of Pakistan also alleged that it was done in sheer violation of CDA rules and regulations, which were also violating several fundamental rights guaranteed to the citizens of the country under the Constitution in the light of the law laid down in the case of *Iqbal Haider v. Capital Development Authority* (PLD 2006 SC 394). The matters were registered as Human Rights Cases. During the hearing, it was divulged that apart from McDonald's, some other buildings, namely, Aiwan-e-Quaid and *Bowling Centre* had already been constructed in F-9 Park and were operative, whereas *Citizens Club* was being constructed. In pursuance of the Court orders, the Chairman CDA filed comments/replies on all the above projects.

Mian Allah Nawaz, Sr. ASC, learned counsel representing CDA in the matter of M/s. Siza Foods candidly conceded that no order for change in the Master Plan was available on record and that the CDA, vide publication dated 9-7-2004 did not invite any national food chain, which violated Article 18 of the Constitution. However, he insisted that as a huge amount had been spent, therefore, following the principle of equity, the violation of constitutional provisions and of law--if any--

be condoned by issuing a direction allowing the restaurant to continue functioning in the interest of the CDA. Mr. Anwar Kamal also candidly accepted the violation of Article 18 of the Constitution. However, his claim was that M/s. Siza Foods, a franchise holder of McDonald's, could hardly be held responsible for the same.

The Court observed that F-9 Park had initially been a residential sector. However, in 1968, it was converted into a Park comprising 800 acres of land, generally known as Capital Park as well as Fatima Jinnah Park. Despite insistence, the original Master Plan was not produced except the one prepared by JICA for establishing a park. On the southern side, an area was earmarked as cuisine pavilions with dense vegetation without any provision for setting up a large restaurant to be run by an international food chain. But, it did mean that such a restaurant could not be constructed, as of course, after an amendment in the Master Plan made by the CDA Board, replacing cuisine pavilions having dense vegetation with a restaurant. The CDA officials admitted that no such decision was taken by the Board. Therefore, whole exercise has been done illegally by former Chairman, CDA.

On the point of violation of the constitutional provision, the Court observed that there was no need to highlight this aspect of the case in view of the admission made by the learned counsel for the CDA as well as M/s. Siza Foods. However, it was noted that by inviting expression of interest from one international food chain alone, not only Article 18 had been violated, but at the same time the Chairman had allowed the international food chain to have a monopoly, which, under clause (c) to the proviso to Article 18 of the Constitution was available to no one else except the government. Thus, in absence of any decision by the CDA Board, the use of the restaurant by the masses is tantamount to defeating the object/purpose for which the public park had been established.

On the point of transparency, the Court observed that in granting lease the to M/S Siza Foods, the CDA had taken no decision in this regard and the exercise of accommodating M/s. Siza Foods had been started on the basis of a chit issued under the signature of former Chairman, CDA. These observations spoke for themselves and needed no further deliberation. Therefore, it could not be held that the transaction was a transparent one. An incomplete advertisement had been given, due to which no one could have a clear idea about the future business prospects. It was also not understandable why CDA agreed to lease out  $4000 + 2000 = 6000$  square yards of a valuable piece of land for 33 years at a rent of Rs.316,250 or 5% of gross sales; the CDA had signed MoU with M/s. Siza Foods, perusal whereof indicated that a third party, namely, M/s. Lakson group was also involved, who was entitled to advertise and display its logo in the Park; such permission exclusively could not be granted by CDA in the garb of MoU between CDA and M/s. Siza Foods. Therefore,

there was no transparency, and the deal was shabby, in violation of the Constitution and the law.

The Court also emphasized that the departmental functionaries were obliged to carry out lawful orders of their superiors and if they were being pressurized to implement an illegal order, they should have put their dissenting note on record.

On the issue of NPC in the light of the provisions of MoU, it was observed that the Aiwan-e-Quaid ought to be managed and controlled on the pattern of Aiwan-e-Iqbal Authority, Lahore as envisaged by the aforesaid MoU dated 30.10.2001, signed between the Ministry of Education and the NPC. Thus, it was directed that the project should be taken over by the above mentioned Aiwan-e-Quaid Authority.

On the issue of establishment of Citizens Club, it was observed that no residential building for lodging/boarding of the members of the Citizens Club could be constructed without approval of the competent authority. The revised Master Plan of 1995, which envisaged establishment of a club, did not enjoy legal validity in absence of necessary approvals by the Federal Government. Therefore, no superstructure could be built upon it and no scheme could be prepared in pursuance thereof. However, it was directed that with the approval of the Federal Government, that instead of abandoning the project, the CDA may utilize the building and other facilities for any public welfare project, like a women's university, medical/engineering college, science, technology or IT institution, etc.

On the issue of *Megazone* (formerly named as Hot Shots), established in pursuance of an advertisement published in the press in the year 1994, it was observed that all the referred actions were contrary to the decision of the CDA Board on the relevant issue as well as the relevant rules and regulations of the CDA.

Finally, it was held that Establishment/construction of McDonald's restaurant in Fatima Jinnah Park was contrary to Article 18 of the Constitution read with CDA Ordinance, 1960; consequently, CDA was directed to cancel the lease of M/s. Siza Foods forthwith, put up the matter before the CDA Board for converting cuisine pavilion area with dense vegetation into restaurant area, and then re-auction a site for setting up a food outlet therein.

**JUSTICE HASNAT AHMED KHAN and 3 others versus REGISTRAR,  
SUPREME COURT OF PAKISTAN and others  
(P L D 2010 Supreme Court 806)**

General Pervez Musharraf, as the Chief of Army Staff, had issued Provisional Constitution Order No.1 of 2007, and in his capacity as President of Pakistan had issued the Oath of Office (Judges) Order of 2007. Before the said instruments

were issued, a seven--member Bench of this Court, headed by the Chief Justice of Pakistan, passed a restraining order in the case of Mr. Justice (Retd.) Wajih-ud-Din Ahmed, said that no Judge of the Supreme Court or the High Courts including Chief Justice(s) shall take a fresh oath under Provisional Constitution Order or any extra constitutional instrument. Some Judges of the Supreme Court and the High Courts took oath under the Oath of Office (Judges) Order of 2007 whereas the majority declined the offer. Later, the PCO along with other connected instruments were struck down as unconstitutional, illegal and consequently of no legal effect by the Supreme Court vide judgment dated 31-7-2009 in the case of *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879). Accordingly, notices for contempt of Court were issued to the Judges of Superior Courts. Subsequently, notices were discharged against those Judges who had tendered their unconditional apology whereas it was ordered that the Judges of the Supreme Court and the High Courts, who were contesting the notices or had not filed replies thereto, would be proceeded against separately. In pursuance of that direction, the proceedings for contempt of Court were initiated against the petitioners and the other Judges.

The foremost question for determination was whether the Contempt of Court Act, 1976, or the Ordinance V of 2003 was the law in force regarding contempt proceedings. The Act was replaced and repealed by the Contempt of Court Ordinance IV of 2003 issued on July 10, 2003. Upon expiry of the said Ordinance, Ordinance V of 2003 was promulgated on December 15, 2003, re-enacting the provision of expired Ordinance. Section 20 of this Ordinance also repealed the Contempt of Court Act, 1976. Another Ordinance No.1 of 2004 was promulgated on 15th July, 2004, the contents whereof were the same as the other two Ordinances and this also repealed the Contempt of Court Act, 1976.

The Court observed that the Contempt of Court Act, 1976 had been repealed effectively by all three successive Ordinances; furthermore, Article 270-AA substituted by the Constitution (17th Amendment) Act, 2003, had accorded permanence to Ordinances issued prior to December 31, 2003. Ordinance V of 2003-issued on December 15, 2003-came under its protection. The Constitution (18th Amendment) Act, 2010, again substituted Article 270-AA; and while declaring unlawful a number of instruments issued during the military rule, nevertheless, by Clause 2, accorded permanence to, inter alia, Ordinances promulgated between 12th October, 1999 and 31st December, 2003. Therefore, Ordinance V of 2003, being permanent legislation and having repealed the Contempt of Court Act, 1976, was the law regulating the proceedings of contempt of Court.

It was further observed that the Supreme Court and the High Courts derive the power to punish contemnors from Article 204 of the Constitution, and were not dependant upon sub-constitutional legislation. Clause 3 of the Article only provided that the exercise of power conferred upon the Court under the Article

may be regulated by law and, subject to law, by rules made by the Court. All the foregoing statutes from the Contempt of Court Act, 1976, onwards, had been enacted with reference to Clause 3 of Article 204.

On the issue that since notices were issued under Contempt of Court Act, 1976, in accordance with the order of a 14-Member Bench dated 13-10-2009, a five-member bench could not alter the provision of law, it was observed that indeed, the notices were issued "under Article 204 of the Constitution read with sections 3 and 4 of the Contempt of Court Act, 1976 or any other enabling provisions of the relevant law". Reference to "any other enabling provision of the relevant law" in the notices was in the alternative to the provisions of the Contempt of Court Act, 1976. Perhaps this was added as a precaution as there was still some controversy prevailing at the time as to whether or not the Contempt of Court Act, 1976, stood effectively repealed and replaced by Ordinance V of 2003. The argument that the said phrase be read as *eiusdem generis* with the Contempt of Court Act, 1976, was untenable in that the 'enabling provisions' mentioned in the phrase is followed by the words 'of the relevant law'. If it was intended to refer to the enabling provisions of the Contempt of Court Act, 1976, it would not have been qualified by the words 'the relevant law'. The relevant law meant law other than the 1976 Act, if so found relevant.

**MUAHMAD RIZWAN GILL VERSUS NADIA AZIZ AND others  
(P L D 2010 Supreme Court 828)**

Pursuant to the general elections of the 2008, Rizwan appellant got returned as the successful candidate from PP 34-Sargodha VII for a seat in the provincial assembly of Punjab. A rival candidate, namely, Ms. Nadia Aziz respondent questioned the said election essentially on the ground that Rizwan appellant did not hold a valid and a genuine B.A. degree and was thus not qualified to be a member of the Punjab Assembly in terms of section 99(cc) of the Representation of the People Act of 1976. The Election Petition was accepted through a judgment dated 28-5-2010. This brought the appellant to the Court with an appeal under section 67(3) of the Act, read with Article 225 of the Constitution.

The case of Ms. Nadia Aziz, respondent, was that Rizwan, appellant, was not a graduate; that he had never taken the B.A. examination of the University of Punjab; and that the B.A. degree which he claimed to possess was not the degree awarded to him. The stance of the appellant obviously was that it was he who had actually taken the B.A. examination in question and that the degree in question had been actually and genuinely awarded to him by the University of Punjab.

The Court placed on record a revealing incident which took place before it. One of the subjects which the appellant had allegedly offered for his B.A. examination and in which he had allegedly secured no less than 72% marks was 'I.P.S.'. While the appellant's learned counsel was making his submissions, the appellant came

to the podium and wished to be heard in person. Taking advantage of his said desire and of his presence, the Court asked him as to what it did 'I.P.S' stand for and what was the subject about? A long silence was the appellant's answer. On the Court's insistence and after a deep thought, the appellant's reply was: "HEALTH AND PHYSICAL EDUCATION". The Court expressed shocked at the answer coming from a person who claimed to have studied this subject at the B.A. level and who, as has been noticed above, had obtained 72% marks in the same. According to the Admission Form (Mark 'A') and the Detailed Marks Certificate produced on record by the appellant himself, 'I.P.S.' meant: "ISLAMIC STUDIES/ETHICS AND PAKISTAN STUDIES". This answer of the appellant, said it all.

Having thus examined all aspects of the matter, it was held that no exception could be taken to the conclusions reached by the learned Election Tribunal and to the impugned judgment.

Additionally, the Election Commission was directed to initiate action against all such persons who were accused of commission of corrupt practices; of committing forgery and of using, as genuine, documents which they knew, or at least, had reason to believe to be forged. The learned Sessions Judges to whom these trials would then be entrusted, were also directed to conclude the same without any delay, within a period of three months.

**SYED AIZAD HUSSAIN AND OTHERS VERSUS MOTOR REGISTRATION AUTHORITY AND OTHERS  
(P L D 2010 Supreme Court 983)**

By virtue of section 6 of Act I of 2008, in the Province of Punjab, a tax titled "Tax on Imported Luxury Motor Cars" was levied on two categories of motor cars specified in the schedule provided therein. The petitioners being owners, occupants or keepers of imported motor cars falling within the ambit of such taxing provision of Act I of 2008, and many others in like position, aggrieved by it, challenged the legality of such levy in their respective writ petitions before the Lahore High Court, mainly on the ground that under Articles 70(a) and 142(a) of the Constitution of the Islamic Republic of Pakistan, read with entries No.43 and 49 of the Federal Legislative List provided in IV Schedule thereof, the impugned tax could only be levied by an Act of the parliament and thus provincial legislature has no competence in this behalf. As such, recovery of such tax is unjustified, discriminatory in nature and amounts to double taxation, which is prohibited in law.

The Court observed that a combined reading of Article 142(a), (b) and (c) of the Constitution together with the Federal Legislative List and Concurrent Legislative List provided in Part-I and II of the Fourth Schedule, in terms of Article 70(4), with particular reference to its various items, show that looking to its nature the

impugned tax levied under section 6 of the Act I of 2008, to the exclusion of Article 142(a) and, by dint of Article 142(c), falls within the competence of provincial legislature to levy one time tax of such nature. Thus, no exception could be taken to such valid piece of legislation. Learned counsel when confronted with this factual and legal position, revealing constitutional validity of impugned levy of tax by the provincial legislature, had no plausible reply to rebut the position. While dealing with the issue of Constitutional validity of a piece of legislation, the Courts must not lose sight of one important principle of interpretation of statute that a law should be saved rather than destroyed, and for this purpose the Courts, as far as possible, should lean in favour of upholding the Constitutionality of a legislation. The submission of the learned counsel about the levy of impugned tax, only in the Province of Punjab from the angle of discrimination, is equally devoid of force as no valid legislation made by any Provincial Legislative body can be struck down on this account as such legislative bodies, for enactment of Provincial laws, have independent powers, leaving no room for comparison on the yardstick of discrimination. Similarly, submissions of the learned counsel as regards nature of levy being fee and not tax or being wrongly labelled as "luxury", have no foot hold as mere assertion of the petitioners in this regard, without looking at the ground realities and actual impact of such legislation, is of no consequence.

As regards the retrospective applicability of such taxing provision of law with effect, it was held that the submission of the learned counsel as to the harshness of the nature of levy due to its retrospective applicability, also had no force.

#### **NAZAR HUSSAIN AND ANOTHER VERSUS THE STATE (P L D 2010 SUPREME COURT 1021)**

While hearing Criminal Petition, a number of questions with regard to powers of the President under Article 45 of the Constitution to grant pardon and reprieve, and the policy framed by the Government of Pakistan to grant remissions under the law came up for consideration. The Court framed following issues:

- (i) whether under Article 45 of the Constitution of Islamic Republic of Pakistan, the President enjoys unfettered powers to grant remissions in respect of offences and no clog stipulated in a piece of subordinate legislation can abridge this power of the President as held by this Court in *Abdul Malik and others v. The State and Others* (PLD 2006 Supreme Court 365);
- (ii) whether the policy formulated by the Government of Pakistan, Ministry of Interior, dated August, 2009, is in consonance with the judgment delivered by the larger bench of this Court in the case of *Shah Hussain v. The State* (PLD 2009 Supreme Court 460);

- (iii) whether the Prison Rules, as enumerated, are subservient to Article 45; and in case of any conflict between Prison Rules and the above-referred judgments as well as special remissions under Article 45 of the Constitution, what would be the legal position of the said Rules; and
- (iv) whether any classification would be permissible in view of the nature of accusation in case special remission is granted by the President of Pakistan, in view of the provisions as enumerated in Article 25 of the Constitution.

The Court has observed that the head of the State is vested with similar powers in almost all Constitutions of the World as provided in Article 45 of the Constitution of Islamic Republic of Pakistan. The issues of the extent of Presidential power under such a provision, the manner of its exercise and whether it is immune from challenge in a Court has been a subject of debate both within the country and in jurisdictions across the frontier. Every country recognizes and has, therefore, provided for this power to be exercised as an act of grace in proper cases. It is by now well-recognized that "Without such a power of clemency to be exercised by some department or functionary of government, a country would be most imperfect and deficient in its political morality and in that attribute of deity whose judgments are always tempered with mercy."

It has also been observed that if a sentence is commuted, it has the effect of substituting the sentence imposed by the court with that of the President or the federal government or the provincial government as the case may be. It does not, however, wash off the guilt or alter the judgment. If the commutation order has been passed during the pendency of the appeal of the convict, the court can still decide about the guilt or innocence of the accused. In *Abdul Malik's* case (PLD 2006 SC 365), while affirming the view already taken in *Bhai Khan's* case, this Court held that being a constitutional dispensation, this cannot be fettered by any legislative Act or instrument. Although it was held that the powers of the President in terms of Article 45 of the Constitution are unqualified, yet there was no comment on the manner in which the President has to exercise the power i.e. whether on the advice of the Prime Minister or in exercise of his discretionary powers under the Constitution. The powers/actions of the President under Article 45 of the Constitution are part of his "functions" and are to be exercised in accordance with the advice of the Cabinet or the Prime Minister. Sub-Article (2) of Article 48 of the Constitution relates to the discretionary powers of President in which he is empowered to act, but there is no reference to the discretion of the President in Article 45 of the Constitution. Thus in the exercise of the powers under the latter provision, he has to act on the advice of the Prime Minister or the Cabinet. The exercise of the power under this provision, therefore, would not fall within the ambit of

Article 48(2) of the Constitution. However, it needs to be emphasized that all public power which includes the Constitutional power is a public trust and has to be exercised bona fide, for public good and welfare.

The power granted to the President of Pakistan under Article 45 of the Constitution is unfettered by any subordinate legislation. This being a constitutional dispensation, the remissions, reprieve or pardon granted under it shall prevail in the event of a conflict between the rules and an order passed under Article 45. This is in line with this Courts judgment in *Abdul Malik's case* which stands reiterated by this Court in *Shah Hussain's case* (PLD 2009 SC 460).

The Court in *Shah Hussain* partly endorsed the policy and the classification made therein in so far as it was backed by law by observing, "However the same (remissions) shall not be available to the convicts of offences under the National Accountability Bureau Ordinance, 1999, Anti-Terrorism Act, 1997, the offence of Karo Kari, etc., where the law itself prohibits that." In terms of the policy framed by the Ministry of Interior, Government of Pakistan, certain parameters/guidelines have been laid down for the grant of remissions under Article 45 of the Constitution. A class of convicts/prisoners have been excluded who are accused of "heinous offences" in the paragraph of "remissions" in the policy letter reproduced in paragraph 24 above. The expression "heinous offences" has further been elaborated in the succeeding para i.e. that such remission would be available to those prisoners convicted for life imprisonment except those convicted for murder, espionage, anti-State activities, sectarianism, zina, robbery, dacoity, kidnapping/ abduction, and terrorist acts. The same are based on reasonable differentia and it is neither individual specific nor arbitrary. The policy of remissions under consideration is neither arbitrary or discriminatory and is rather based on an intelligible differentia which is permissible and is therefore, not violating Article 25 of the Constitution and the law laid down by this Court.

It has been a consistent view of this Court that classification is permissible provided the same is backed by law, rules or is based on reasonable differentia. For the exercise of authority under Article 45 of the Constitution, classification of convicts on the basis of accusation is permissible as the President may, inter alia, like to grant remissions to those who are not accused of heinous offences and may refuse it to those accused of serious or terrorism related offences. In the remission policy under consideration, a class of convicts involved in "heinous crimes" have been excluded from the benefit of remissions. As explained, most of these exclusions are backed by law, rule or an intelligible differentia. The classification is reasonable and applies equally to convicts/prisoners similarly placed. This differentia is not hit by the *equality clause* of the Constitution.

**BANK OF PUNJAB AND OTHERS VERSUS HARIS STEEL INDUSTRIES (PVT.) LTD AND OTHERS  
(P L D 2010 Supreme Court 1109)**

The background of the case was that M/s. Haris Steel Industries, Haider Steel Industries and Prime Steel Industries availed various credit facilities amounting to Rs.720 millions, Rs.325 millions and Rs.1000 millions respectively during the period 2005-2008 from the Bank of Punjab against mortgaged property belonging to different persons. During the month of May, 2007, in a routine audit, it was revealed that 23 accounts pertained to fake account holders and were not adequately secured and credit facilities had been advanced and finances disbursed by the branch managers in visible haste. The matter was taken up by the NAB authorities. A number of Writ Petitions were also filed by the accused against the NAB. Later on, all the Writ Petitions were ordered to be transferred from Lahore High Court, Lahore, to Islamabad High Court, Islamabad. The Bank of Punjab filed Constitutional Petition under Article 186-A read with Article 187 of the Constitution with the prayer that Writ Petitions pending before Islamabad High Court be heard by this Court.

When this Court took cognizance of the matter, it transpired that billions of rupees of public money had been doled out by the Bank of Punjab to a group of persons in fake names or in the names of persons who did not exist or in the names of businesses and factories which were sham; these huge loans and advances had been made by the said Bank either without any securities or where securities had been taken, the same comprised properties which were non-existent or were highly over-valued. It was not just these billions belonging to around a million depositors which were at stake but what was under serious threat was the very existence of the Bank of Punjab which was a project of the Government of Punjab. Therefore, finding itself constitutionally obligated to defend the constitutionally guaranteed public rights and realising the severity of the threat and the magnitude of the damage, the matter was taken up almost fortnightly. As a result of the orders passed by the Court, valuable movable and immovable assets and properties of the accused persons were traced and identified not only in Pakistan but also in Malaysia and U.A.E. and on account of requests made by the NAB and others to these foreign governments for Mutual Legal Assistance, most of the said properties were attached and frozen and the persons owning these properties had even executed General Powers of Attorney in favour of the NAB/The Bank of Punjab, which are now at their disposal. An amount of rupees 1518.602 million was paid back. Around 125 immovable properties were placed by the accused persons at the disposal of the Bank of Punjab. Jewellery and expensive watches worth about 101 million rupees also stood placed by the accused at the disposal of the said Bank and around thirty vehicles were also handed over by the accused persons to the said Bank.

With regard to the jurisdiction of Court, it was observed that not only a colossal amount of money/property belonging to at least one million depositors, i.e. a large section of the public, but the very existence of the Bank of Punjab was at stake; thus not only the right of the Court but in fact its onerous obligation was to intervene to defend the said assault on the said fundamental right to life and to property of the public.

It was held that the provisions of section 6(c) of the National Accountability Ordinance of 1999 [NAO] permit a Deputy Chairman to act as the Chairman NAB only when the Chairman is available but is temporarily absent or is temporarily unable to perform functions of his office e.g. on account of illness etc. and that the said provisions did not allow a Deputy Chairman to act as the Chairman when the said office was vacant as in the present case.

With regard to the allegation that Mr. Irfan Qadir, Advocate, as the learned Prosecutor-General Accountability had once earlier been appointed as the Prosecutor-General Accountability, therefore, under section 8 of NAO, there was a legal bar on his re-appointment to the same office, it was held that the said appointment was not legally tenable.

#### **MIAN NAJIBUDDIN OWAISI VERSUS AAMIR YAR AND OTHERS (P L D 2011 Supreme Court 1)**

In the case of *Muhammad Rizwan Gill v. Nadia Aziz* (PLD 2010 SC 828), decided on 14.06.2010, the Election Commission of Pakistan was directed to initiate action against all such persons who were accused of commission of corrupt practices, committing forgery and using, as genuine, documents which they knew or at least had reason to believe to be forged. Whereas, in the case titled *Mian Najeeb-ud-Din Owaisi v. Amir Yar* (2011 SCMR 180) observations were made that the matter was required to be dealt with by Chief Election Commissioner in accordance with provision of section 78 of the Representation of the People Act, 1976, and to proceed against Respondent No.1 for corrupt practices.

In the backdrop of the above observations directing different authorities i.e. the Election Commission of Pakistan and the Chief Election Commissioner, the Election Commission had experienced difficulty in lodging criminal proceedings against the person who was guilty of corrupt practices in respect of his educational qualifications etc. as had been defined under section 78(3)(d) of the Act, 1976. As such, a CMA was filed whereby clarification was sought as to whether the Chief Election Commissioner, individually and independently could proceed to get the aforesaid judgments of this Court implemented in light of the above mentioned constitutional and legal provisions.

Considering the provisions of section 94 and 95 of the Act, it was observed that section 95 provided that the Commission or the Commissioner (Chief Election Commissioner) can lodge the complaint in respect of such other offences. Thus, there was no bar in lodging the complaint either by the Commission or by the Commissioner and by an individual in respect of offences made cognizable under section 82 of the Act. Therefore, it was clarified that the Chief Election Commissioner (the Commissioner) or the Commission were both competent to lodge the complaint notwithstanding the observation made in the judgments passed by the Court.

**SECRETARY, MINISTRY OF LAW, PARLIAMENTARY AFFAIRS AND HUMAN RIGHTS, GOVERNMENT OF PUNJAB AND OTHERS VERSUS MUHAMMAD ASHRAF KHAN AND OTHERS  
(P L D 2011 SUPREME COURT 7)**

A practicing lawyer filed a writ petition before the Lahore High Court, challenging the appointment of persons as Additional Advocates-General, Punjab and Assistant Advocates-General, Punjab, on the ground that their appointments were made in violation of the Law Department Manual (1938) as amended by Notification No. 8-19/93 dated 19.10.1993, which provided that the Governor may, in consultation with the Lahore High Court, Lahore, appoint an Additional Advocate-General or an Assistant Advocate General; and Article 140 of the Constitution of Islamic Republic of Pakistan, 1973, which provided that the Governor of each Province shall appoint a person qualified to be appointed as a Judge of the High Court, to be the Advocate-General of the Province. The learned High Court allowed the writ petition. Being dissatisfied, the Government of the Punjab through Secretary Law, Parliamentary Affairs and Human Rights, filed Civil Petition for Leave to Appeal before the Supreme Court which was converted into appeal.

The Court observed that since Article 140 of the Constitution itself does not envisage consultation by the Governor with the Chief Justice/High Court in the matter of appointment of Advocate-General, the learned High Court wrongly read the same into the said Article, and the appointment of Additional Advocate-General and Assistant Advocate General being governed by the rules made by the Governor, the requirement of consultation could not be read into the rules so made unless it was explicitly provided therein. The Government of the Punjab, by making an amendment in the Law Department Manual (1938), vide notification 19.10.1993, provided such a consultation, but subsequently vide notification dated 03.11.1994 had done away with it, which position was not altered later.

It was, thus, held that a person appointed as Advocate General has to be one who is qualified for appointment as a Judge of the High Court, but that does

not mean that he also does not suffer from the disqualifications or disabilities envisaged in respect of the office of a judge. It is clear that such a person cannot be deemed to be under the same disability as has been placed by the Constitution on a judge of the High Court in other respects.

**HUMAN RIGHTS CASE NO. 1356-P of 2009  
(P L D 2011 Supreme Court 17)**

Mst. Bibi Fatima, a lady who belonged to Tajikistan had contracted marriage with one Abdullah (Abdul Rehman). Out of their wedlock Bibi Mariam was born. Marriage was dissolved and her husband along with two other persons removed from her custody the minor Bibi Mariam on gunpoint. Efforts made by her for effecting recovery of the minor could not succeed though petitioner approached the Prime Minister of Pakistan and other authorities. Application so submitted to the Prime Minister was also endorsed to the Court which was treated as a Human Rights Case. It transpired that no legal proceedings were initiated by law-enforcing agencies as she left Pakistan for Tajikistan and when she came back and started pursuing her application. Accordingly a criminal case under section 365/34, P.P.C. vide F.I.R. No.35 of 2008 was registered against Abdullah and others.

Necessary directions were issued to the Secretary Interior and Secretary Foreign Affairs to submit report. Efforts were made by the police administration and F.I.A. to cause the arrest of Abdullah and to recover Bibi Mariam. Resultantly, the authorities succeeded in arresting Abdullah from Iran wherfrom he was extradited to Pakistan but Bibi Mariam could not be traced. However, ultimately, police and F.I.A. accelerated their efforts and succeeded in effecting the recovery of Bibi Mariam and bringing her back to Pakistan. The custody of the minor was handed over to the petitioner in Court on 08.10.2010 and the matter was disposed of.

However, the Court observed that it was not the first case of its nature where the Court had exercised jurisdiction under Article 184(3) of the Constitution because in some other cases as well identical complaints were received where minor children had been forcibly removed from Pakistan to outside of the country. The Courts do hear a variety of cases where violation of fundamental rights of the citizens are noticed and efforts are made to grant them relief. However, the more painful cases in this regard belong to the category where police authorities show their inability to extradite the minors from outside the country on some occasions for some strong reasons in exceptional cases. But ordinarily, the lower Courts enjoying equal jurisdiction for enforcing the orders i.e. to make direction for bringing back the minors from outside the country either under section 491 Cr.P.C. or under Article 199 of the Constitution. If the matter is brought before the learned Sessions Judges or the High Courts respectively, despite exercising jurisdiction, no results are

achieved for no other reason except that the law enforcing agencies abstain from involving themselves fully with the commitment in effecting recovery of the minors. Police authorities which are primarily responsible for enforcing the law for some reason seem to be reluctant to do so whereas the F.I.A. does take interest and also succeeds in obtaining object only in the cases where directions are made by the Superior Courts. Otherwise, at the stage when the matter is under investigation before the police, they also fail to show much interest in such cases. In Pakistan, the Courts and all the institutions have to work under the provisions of law and the Constitution and no sooner a case is registered, law enforcing agencies are required to take full interest and involve all the concerned authorities for the purpose of concluding the investigation of the case in just and proper manner. The Honourable Court reiterated that it had an earnest desire and hope that law-enforcing agencies with full zeal and commitment shall make efforts to extend relief to the aggrieved persons at the preliminary stage of the happening of an incident, in stead of waiting for direction of the Court of law to put the machinery into motion. Human Right case stood disposed of accordingly.

**H.R. CASES NOS. 16360 OF 2009, 1859-S & 14292-P OF 2010  
(P L D 2011 Supreme Court 37)**

Proceedings were initiated on an anonymous application seeking remedy for Lady Health Workers and lady Health Supervisors. Initially, a report was called from the Secretary, Ministry of Health, Islamabad. Being dissatisfied with the report, Secretary Health was, inter alia, asked to submit as to why minimum wages of Rs.7000.00 PM are not being paid to LHWs. The report submitted in response of the said order was found incomplete. In the meanwhile two more applications, on the same subject, were submitted by other staff members which were registered as Human Rights Cases and were ordered to be clubbed together. Notices were issued to Secretary Health, Government of Pakistan, for appearance before the Court.

The Court observed that the terms and conditions of service of LHWs/LHSs, *prima facie*, indicated that they were practically required to adhere to full time engagements to discharge their duties subject to certain other conditions including non-payment of TA/DA and availing maternity and non-maternity leave etc. Additionally, they had to establish Health Houses at their own residences, in respect of which the expenses of utility bills etc. were to be borne by them, for which no reimbursement was permissible.

It was further observed that in a welfare state like ours, it is duty of the government to ensure that discriminatory policies are not applied as far as its employees are concerned, on both those enjoying permanent status or working on contractual basis. The contract, though executed mutually, in

pursuance whereof LHWs, LHSs, accountants and drivers have agreed to accept the lesser amount of wages as compared to the minimum one fixed under the provision of law. However, one of the contracting parties, i.e. the government, is not supposed to deprive them from their legitimate rights qua the nature of duties being performed by them. Any agreement, which is against the public policy is not enforceable.

The Court, as an interim measure, directed that employees should get minimum wages of Rs.7,000 per month which must be paid to them regularly according to the Rules and Regulations in the matter. Respondent-Government was directed to work out their actual salary to bring them at par with the employees of the Health Department according to the prevailing rates of scales and wages in the country. On the next date of hearing, the learned Attorney General appeared and stated that necessary steps had been taken to implement the order. He further explained that the wages/stipends of LHWs and RHSs, Accounts Supervisors and drivers, in view of the above decision by the Planning Commission, had been determined and an amount of one billion rupees had been released in that behalf.

**PAKISTAN TELECOMMUNICATION COMPANY LTD. THROUGH  
CHAIRMAN VERSUS IQBAL NASIR AND OTHERS  
(P L D 2011 SUPREME COURT 132)**

PTCL had introduced a scheme for its employees known as "Voluntary Separation Scheme", whereby, apart from other benefits which an employee was entitled to get, he was also entitled to receive early retirement benefits provided he had rendered a minimum of 20 years of service. Some of the employees, who applied for the benefit of VSS, were denied the same on the ground that they did not possess the requisite qualifying length of service, whereas, others were terminated from service. They approached the concerned High Court through Constitution/Writ Petitions against the termination of their service, and/or denial of the benefit of the voluntary separation scheme introduced by the appellant. The High Courts allowed the Petitions and directed the PTCL to extend the benefit of VSS to the said employees as well; and the termination orders made by the PTCL or by the Foundation were declared void.

PTCL approached the Supreme Court by means of civil petitions wherein leave was granted to consider, inter alia, the contentions that writ in the matter could not be issued to the PTCL as it was not performing functions in connection with the affairs of the Government; and even if it was assumed to be performing such functions, still the subject matter of the impugned judgment was not connected with the affairs of the Government, and further whether the rules framed by the PTCL were statutory or not.

It was argued that the appellant PTCL was not a person performing functions in connection with the affairs of the Federation within the meaning of Article 199(5)

of the Constitution and the matters dealing with the officers and servants of PTCL, which vested in the EIP, were not functions in connection with the affairs of the Federation.

The court observed that in Muhammad Zahid's case, it was held that the employees of the erstwhile T&T Department transferred to the Corporation [PTC] under the relevant provisions of the Act of 1991 and later/on succeeded by the PTCL, discharging their functions and duties in the International Gateway Exchange as Operators were inducted permanently or regularized subsequently under the rules necessarily related to one of the affairs of the Federation within the purview of provisions of Article 199 of the Constitution. Hence, similar duties and functions in the International Gateway Exchange being discharged by the private respondents as Operators could not be distinguished to say that the same did not relate to the affairs of the Federation though conferred upon the Corporation [PTC], and finally upon PTCL; that PTCL fell within the connotations of the word 'person' as defined in clause (5) of the Article 199 of the Constitution; accordingly, the grievance of the private respondents was amenable to the writ jurisdiction of the High Court. However, it was observed that the status of the private respondents, be that of a 'worker' or a 'civil servant' or a 'contact employee' had no nexus to the maintainability of the writ petition on the ground of discrimination meted out to them.

It was further observed that the learned counsel for the respondents, though they placed on record a copy of the Pakistan Telecommunication Corporation Service Regulations, 1996, framed under section 20 of the Act of 1991, failed to show whether the said Regulations were duly notified in the official Gazette. However, even if such Regulations were duly made, they were not holding the field after the repeal of the Act of 1991 under which the said Regulations were made. Further, as per Regulation 1.02 thereof, the said Regulations would not apply to a person employed on contract or on work-charged basis or who is paid from contingencies; they would be governed by the principle of 'Master and Servant'. Applying the principles of law, the Court held that in the absence of statutory rules, writ petitions filed by the employees of the PTCL were not maintainable. Resultantly, the appeals filed by PTCL were allowed and the judgments/orders impugned therein were set aside while the appeals filed by the employees were dismissed.

**Criminal Original Petitions Nos. 93 to 98, 100 to 104 of 2009 and 2, 3 & 4 of 2011 and Criminal Miscellaneous Applications Nos. 178, 311, 225, 179, 619, 168, 282, 283, 169, 148, 226, of 2010, 1 and 2 of 2011 and C.M.As. Nos. 4234, 4224, 4255, 4288 to 4290, 4292, 4281, 4486, 4504 of 2009 and 1258 of 2010, 9, 10, 12 of 2011, 4487 of 2009, 35 of 2011, and 1104, 1105 and 1174 of 2010 in C.M.A. No. 2745 fo 2009 in C.R.P. No. NIL of 2009 in Constitutional Petition No. 9 of 2009, decided on February 12, 2011  
(P L D 2011 Supreme Court 197)**

On 03.11.2007, the then Chief of Army Staff (General Pervez Musharraf), violating the Constitution, issued Proclamation of Emergency followed by the Provisional Constitution Order, 2007, and Oath of Office (Judges) Order, 2007. On the same day 7-members Bench of the Court issued order, inter alia, restraining the Judges of the Supreme Court or the High Courts to make oath under PCO or any other extra-Constitutional instrument. However, 5 out of the 18 Judges of Supreme Court and many Judges of the High Courts made oath under the PCO.

In the case of Sindh High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 879), the PCO was declared unconstitutional and it was observed that the Judges who made oath under the PCO had violated the aforesaid order dated 03.11.2007 and had all rendered themselves liable for consequences under the Constitution. Some of the Judges filed petitions seeking review of the aforesaid judgment dated 31.07.2007. Office objections were raised in respect of the said review petitions which led to the filing of a number of miscellaneous applications which were dismissed vide order dated 13.10.2009. Pending decision on the aforesaid applications and pursuant to orders dated 05.10.2009 and 09.10.2009 notices were issued to them, to explain as to why proceedings should not be initiated against them for committing contempt of this Court. Seventy-two persons either submitted their respective replies to the said notices or tendered unconditional apologies. Some of them also resigned from office; whereas, ten Judges contested the notices issued to them.

The Court after observing that the Constitution and law does not prohibit proceedings under Article 204 of the Constitution against the respondents even though they may be Judges of the Supreme Court and the High Courts, held that they were not immune from proceedings under Article 204 and the Contempt of Court Ordinance V of 2003, for committing contempt of this Court; that propriety required that proceedings should be taken against the respondents and they be put to trial in accordance with the aforesaid law; that there was sufficient material available to justify charging the respondents for committing contempt of the Supreme Court on account of their disobedience of the order dated 03.11.2007 passed by a seven member Bench.

**Human Rights Cases No. 57701-P, 57719-G, 57754-P, 58152-P, 59036-S, 59060-P, 54187-P and 58118-K of 2010 and S.M.C No. 24 of 2010 (P L D 2011 Supreme Court 205)**

There were complaints that no proper facilities were provided to the pilgrims of Hajj 2010 and they had to face great problems due to mismanagement and corruption of officials of Ministry of Hajj. Some of the persons from the general public, who had gone to perform Hajj as well as parliamentarians approached the Court for appropriate action and investigation into the matter. The applications were registered as human rights cases and the matter was fixed in Court. The Court directed for refund of money to the pilgrims who were not provided residential accommodation. In pursuance of the order of the Court the amount of SR 700 (in Pakistani rupees) to each pilgrim was paid.

On account of unsatisfactory performance by the Director-General (FIA), who was appointed on contract basis, he was asked to exercise the option either to disassociate himself with the investigation of the case or that the Court would pass an order in that regard. Meanwhile, he himself submitted an application and requested the Government to allow him to disassociate himself whereafter the orders have been issued, but the notification and the order, both are not in accord with section 3(2) read with sections 4 and 5(2) of the Federal Investigation Agency Act, 1974.

The Court has observed that it felt no doubt in expressing that the above notification had either been issued intentionally or by a person who had no knowledge of the law at all. A regular officer of the police had only just been made Incharge of the Investigation and his performance would be supervised in terms of section 4 of the Act of 1974 by a person, who after attaining the age of superannuation had been appointed on contract basis. In terms of the definition of section 2(1)(6)(ii) of the Civil Servants Act, 1973, a person who is employed on contract does not even fall within the definition of a civil servant. Thus, his authority to command and maintain discipline can well be imagined from the fact that if a person himself was not a Civil Servant, he was considered only bound by the terms and conditions of his contract and not by the statutory law. This was because if any condition laid down in the contract was violative of statutory law, he would only be subject to action under the said contract. The Court was fully conscious of its duty, which had to be discharged under the Constitution and when it was attempted to hush up the corruption cases, such as the one under consideration, the Court could pass an appropriate order as it had already directed, and it could also not be oblivious of its function to ensure that in departments like the police and FIA, people, who deserved to be promoted on the basis of efficiency or performance etc. were appointed and not on contract basis. Therefore, it was

directed that the learned Attorney General should take up the matter with the Government and point out that as the Director-General, FIA, had disassociated himself from the investigation, the person who had been appointed as Incharge of the Investigation should be made a Member of the Agency and he should continue with the investigation of the case in accordance with the law, without being influenced from any quarter or high up whosoever found involved in the matter.

### **THE STATE VERSUS ABDUL KHALIQ (PLD 2011 SC 554)**

Leave to Appeal was granted by Supreme Court, *inter alia*, to consider the effect of delay in lodging the FIR; whether sole testimony of the victim in rape case was sufficient for the purpose of conviction; whether the marks of injuries on the body of the victim were superfluous to secure conviction.

The Court observed that the scope of interference in appeal against acquittal was most narrow and limited, because in an acquittal the presumption of innocence was significantly added to the cardinal rule of criminal jurisprudence, that an accused shall be presumed to be innocent until proved guilty; in other words, the presumption of innocence was doubled.

It was held that violating the sanctity and chastity of a woman was a sordid, despicable and squalid act, which was considered abhorrent in any civilized society. Any language failed short of vocabulary to condemn such heinous act and cases of the kind were to be strictly construed and dealt with. However, at the same time, under criminal jurisprudence for the safe administration of criminal justice, the courts were required to follow certain settled principles; such as the innocence of the accused was to be presumed, till he was proved guilty; "sifting the grain out of the chaff"; the defence might take a number of pleas and even if all were shown to be false, yet it was the duty of the prosecution to prove its case to the hilt; "better that ten guilty persons escape than that one innocent suffer". At the same time, the courts should keep in view that in such a class of cases, usually independent ocular evidence is not available; therefore due weight should be attributed to the statement of the victim buttressed by medical evidence, and that strong attending circumstances, sufficed to warrant the conviction.

It was further held that the rule of believing of sole testimony would not apply to each and every case of rape, as a matter of routine and course, because it was not the command of any law/statute, that, in deviation of the general principles of jurisprudence, the accused was to be put to the test of strict liability and should be asked to prove his innocence because the prosecutor's version under all circumstances should be taken as correct. The sole testimony view should be applied with due care and caution in the cases where there was backdrop of

grudge, rift and tiff between the parties, as had emerged in the case. A possibility could not be ruled out that the complainant side was trapped.

It was further held that in cases pertaining to gang rape it was understandable that the victim or her family was/were hesitant to report the matter and in certain cases delay of even up to a month had not been considered fatal to the prosecution. It was not an absolute or universal rule and the delay in each case had to be explained in a plausible manner and should be assessed by the Court on its own merits. In the case of an unmarried virgin victim of a young age, whose future might get stigmatized, if such a disclosure was made, if some time was taken by the family to ponder over the matter that situation could not be held at par with a grownup lady, who was a divorcee for the last many years. The element of delaying the matter to avoid "Badnami" might also be not relevant in such case because the incident according to the prosecution's own stance was known to a large number of people and there was no point in keeping it a secret from everyone.

#### **SUO MOTU CASE NO.13 OF 2009: (PLD 2011 SC 619)**

In December, 2008, the Capital Development Authority (CDA) entered into a Joint Venture Agreement (JVA) with Messrs. Multi Professional Cooperative Housing Society (MPCHS) for development of 54 acres of land located in the northern strip of Sector E-11, Islamabad. A news report appeared, stating that prime land belonging to the CDA had allegedly been given to MPCHS through an underhand deal. The press clipping was registered as a Human Rights Case and fixed in Court.

The Court observed that the right to life includes right to livelihood, right to acquire, hold, and dispose of property, and right to acquire suitable accommodation, which could not hang on to fancies of individuals in authority, and included all those aspects of life which go to make a man's life meaningful, complete and worth living. Fundamental rights could be snatched away or waived off pursuant to any agreement.

It was further observed that in matters in which Government bodies exercise their contractual powers, the principle of judicial review could be denied. However, in such matters, judicial review was intended to prevent arbitrariness or favouritism and it must be exercised in the larger public interest. The basic test was to see whether there was any infirmity in the decision making process. Interference with the decision making process was warranted where it was vitiated on account of arbitrariness, illegality, irrationality and procedural impropriety or where it was actuated by mala fides. Government bodies were invested with powers to dispense and regulate special services by means of leases, licences, contracts, quotas, etc., where they were expected to act fairly, justly and in a transparent manner and such powers could be exercised in an arbitrary or irrational manner.

Transparency lied at the heart of every transaction entered into by, or on behalf of, a public body. To ensure transparency and fairness in contracts, inviting of open bids was a prerequisite.

The Court held that no rule could be made which was inconsistent with the parent statute, whereas, no regulation could be made inconsistent with the parent statute or the rules made thereunder and the provisions of those rules or regulations, as the case might be, to the extent of their inconsistency with the parent statute or the rules would be inoperative. Capital Development Authority could not have extended the scope of section 12 of the Capital Development Authority Ordinance (XXIII of 1960) by framing Islamabad Capital Territory (Zoning) Regulations, 1992, and allowed preparation of schemes by the private organizations even with prior approval of the Federal Government. Such was something not envisaged by the Ordinance and something, not permitted by the statute and could not be allowed to be done by subordinate legislation.

Lastly, it was declared that the clause (iv) of regulation 4(1)A of the Regulation was inconsistent with sections 12 and 13 read with sections 2(a) and (j); and consequently, the JVA entered with MPCHS was rendered inoperative and ineffective qua CDA.

#### **FEDERATION OF PAKISTAN VERSUS DR. MUBASHIR HASSAN (PLD 2011 SC 674)**

Mr. Kamal Azfar, Senior Advocate Supreme Court stated that though it was always a privilege to appear and assist the apex Court, but in the instant case, the Federation of Pakistan had taken away the brief from him, and had instructed Dr. Khalid Ranjha to appear and argue the case. It was pointed out to him by the Court that in his letter dated October 30, 2010, after having tendered resignation from the post of Advisor to the Prime Minister against which he was appointed a day or so before the hearing of the petition fixed on 13th October, 2010, he had stated that he was available to argue the case.

The Court held that no one else on his behalf could be allowed to argue the case at that stage, as in terms of Order XXVI Rule 6 of the Supreme Court Rules, 1980, no unavoidable circumstances existed for exercising such power. In the cases of Muhammad Younas v. The State (PLD 2005 SC 93), Mukhtar Ahmad versus The State (PLD 2003 SC 126), Feroze Din v. Mehr Sardar Muhammad (2002 SCMR 1993), Haji Malik Amanullah v. Khyber Khan (2008 SCMR 1723) as well as order dated April 11, 2011, passed in Civil Review Petition No. 46 of 2011 in Constitution Petition No. 10 of 2011 etc., the Court had discouraged substitution of counsel except in unavoidable circumstances. Therefore, permission to substitute counsel at that stage, subject to law, could not be granted.

**MAULANA ABDUL HAQ BALOCH VERSUS GOVERNMENT OF  
BALOCHISTAN  
(PLD 2011 SC 835)**

The subject-matter of the case was the right to exploration and lease of copper/gold mines etc., in the area of Reko Diq, District Chaghai at Dalbandin in Balochistan Province of Pakistan. In a civil petition, the jurisdiction of the Supreme Court under Article 185(3) was invoked; whereas, constitution petitions were filed under Article 184(3), seeking transparency and merit in the award of the mining lease.

Facts, as briefly mentioned by the Court, were that for the purpose of conducting exploration and development of mineral deposits of gold and copper in the agreed Exploration Area, in District Chaghai, Balochistan Development Authority (BDA), on the approval of the Government of Balochistan (GOB), entered into CHAGHAI HILLS EXPLORATION JOINT VENTURE AGREEMENT dated July 29, 1993 (CHEJVA) with BHP MINERALS INTERNATIONAL EXPLORATION INC (BHP)—a foreign company. BDA was to provide administrative support, necessary consents, approvals, NOCs, security clearances etc., etc., and relaxation of certain Rules of the Balochistan Mining Concession Rules, 1970. BHP was to undertake the work and the entire cost of the exploration and infrastructure etc. thereof. The respective Percentage Interests were 25% for BDA and 75% for BHP. The Joint Venture was granted ten Prospecting Licenses (P.Ls) in 1996 for an area of 1000 Sq. Km. BHP carried out reconnaissance and detailed work up to 1999 in the areas and reported large deposits of Copper, Gold etc. at Reko-Diq. The Joint Venture thereafter surrendered 8-P.L's and retained Two P.Ls of Reko-Diq. After the new National Mineral Policy and the enactment of Balochistan Mineral Rules, 2002, a consolidated Exploration License No.EL-5 was granted to the Joint Venture for a defined area of Reko-Diq in 2002 for three years. On two renewals thereof, EL-5 was to remain valid upto February 18, 2011. During the extended period of EL-5, ADDENDUM No.1 to the CHEJVA was signed between BDA/GOB and BHP, whereby inter alia, Government of Balochistan became Joint Venture partner in CHEJVA with BDA as its Agent. The addendum also permitted transfer or assignment of a party's interests in CHEJWA wholly or partly. Whereon through intermediary corporate instrumentalities, share interest of BHP in CHEJWA was routed and re-routed via Mincor Resources N.L/Tethyan Copper Company Ltd., of Australia (TCC) per the OPTION AGREEMENT/ALLIANCE AGREEMENT. And finally under the NOVATION AGREEMENT OF 2006 JVA was novated to substitute TCC for BHP as a full party with Deed of Waiver and Consent of GOB for such transfer. BHP was thus replaced by TCC in the Joint Venture which became TCC-BDA/GOB' GHAGHAI HILLS JOINT VENTURE. The respective Percentage Interests were restated for GOB (25%) and ICC (75%). Antofagasta of Chile and Barrick Gold Corporation of Canada, stated to be amongst the largest companies prospecting for gold and copper in the world, then stepped in and jointly purchased TCC's

entire 75% Percentage Interest in the Joint Venture. Antofagasta and Barrick Gold on thus acquiring TCC, carried out the drilling and exploration programme at EL-5 area of Reko-Diq at a claimed expense of millions of US \$, with no financial cost burden on GOB/BDA.

During the pendency of the case, a major development took place. Exploration work including drilling was completed by TCC within the stipulated period. Substantial discoveries of gold and copper, etc., were made. The license period expired on February 18, 2011. TCC submitted to GOB Feasibility Study Report which was under examination of GOB. After the said discovery by TCC, the litigation attracted general focus and also publicity. Various petitioners also filed their respective petitions alleging absence of, fairness, transparency, and merit in the grant of licence(s) to BHP/TCC and also alleged possible risks to the vital interests of Balochistan and Pakistan in the grant of mining lease to TCC. The TCC formally applied to the Government of Balochistan within the visualized period for the grant of the mining lease under 2002 Rules which purportedly recognized the licensee's entitlement to apply for a mining lease on success of the licensee in the exploration.

In view of the above, and on hearing the learned counsel for the parties at length, the Court inquired from the learned counsel for the petitioners, the respondents, the interveners, GOB/BDA and the learned Attorney General for Pakistan as to whether the restraining order dated 03.02.2011 be vacated. All of them responded affirmatively. The Court accepting the consensus of all the learned counsel, recalled the restraining order dated 03.02.2011 and directed the competent authority in the Government of Balochistan to proceed expeditiously to decide TCC's application for the grant of mining lease transparently and fairly in accordance with the law and the rules, without being influenced in any manner whatsoever by the pendency of the proceedings or by the orders therein passed by the Court.

#### **MARVI MEMON VERSUS FEDERATION OF PAKISTAN (PLD 2011 SC 854)**

In the month of July/August, 2010, due to unprecedeted flood devastation, the citizens of Pakistan suffered huge losses against their lives and properties. Floods had commenced from the province of Khyber Pakhtunkhwa and flowed up to Arabian Sea at Thatta. The Supreme Court vide order dated 15.12.2010, constituted a Commission. After hearing all the parties and on the basis of oral and documentary evidence, related information in public domain and its interaction with the affectees, the Commission submitted a report, supported by hundreds of documents.

The Court, referring to the encroachments, in the chapter of recommendations, observed that it contained statement of facts because illegal encroachments had

been allowed to go unchecked by the concerned authorities due to negligence, corruption and poor management resulting in massive losses to life and property. It further added that thousands of acres of "Kachha" lands had illegally been encroached upon by local influential persons or had been leased out on meagre charges resulting in erection of private bunds. Construction of house and other built-up properties had been allowed along with river banks and canals, etc. Similarly, there had been a surge of encroachments on acquired land in pond area of barrages which had aggravated the flood hazards. The natural flow of water had been blocked as a result of enormous encroachments in most waterways due to unplanned and illegal constructions. The findings of the Commission needed no further proof, therefore, the concerned Provincial Governments through their Chief Secretaries, should immediately remove the same; and even if need be, adopt coercive measures through the law enforcing agencies. Otherwise, responsibility of any loss to life and property of the victim would rest upon their shoulders with all its consequences.

It was also observed how a poor farmer could have the courage to challenge the encroachers or violators of the Constitution and the law in our society in a feudal system like that in Balochistan and Sindh. However, judicial notice of the same could conveniently be taken. Inasmuch as such like members of community had no awareness about their rights and obligations; therefore, it became the duty of the Court to enforce their fundamental rights considering the same to be of public importance. Otherwise, powerful and influential persons, with collaboration of the executive, would continue to deny them such rights without realizing that it is the liability of the State towards every citizen. Similarly, obedience to the Constitution and law was the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan. Denial of fundamental rights to the downtrodden classes had become common phenomenon. Therefore, the officers representing the respective governments were bound to fulfil their commitments under the Constitution by protecting the fundamental right of such like persons as it had been held in *Syed Masroor Ahsan v. Ardeshir Cowasjee* (PLD 1998 SC 823), *Sardar Farooq Ahmed Leghari v. Federation of Pakistan* (PLD 1999 SC 57).

Ultimately, the following directions were issued:

- (i) The Federal and Provincial Governments through Secretary Cabinet and Secretary Interior Division as well as Chief Secretaries of all the Provinces are hereby directed to implement the findings and recommendations of the report in letter and spirit;
- (ii) The report so prepared by the Commission shall be supplied, both soft and hard copies, to all concerned immediately;

- (iii) The Secretary Information of Federal and Provincial Governments are hereby directed to ensure publications of the findings and recommendations of the Commission and the instant order widely in print media as well as in electronic media in all the provinces and Islamabad Capital Territory in national and local languages.
- (iv) The compliance report for our perusal in Chambers shall be sent fortnightly by the Chief Secretaries.

