IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ
Mr. Justice Ijaz Ahmed Chaudhry
Mr. Justice Iqbal Hameedur Rahman

Constitution Petition No.33 & 34 of 2005

(Regarding sudden increase in petroleum products on 13.06.2013 due to increase in sales tax)

And Civil Misc. Application No.3821 of 2013

Engineer Iqbal Zafar Jhagra
Senator Rukhsana Zuberi

...Petitioners

Versus

Federation of Pakistan and others

...Respondents

For the petitioners:	Mr. M. Ikram Ch. ASC (in Constitution Petition No.33/05)
	Nemo (in Cons.P.34/05)
For the Federation:	Mr. Muneer A Malik, Attorney General for Pakistan Assisted by: Mr. Faisal Siddiqui, Adv.
	Mr. Dil Mohammad Alizai, DAG Raja Abdul Ghafoor, AOR
For FBR:	Dr. Rana M. Shamim, ASC Mr. Arshad Ali Chaudhry, AOR Mr. Muhammad Aaqil, Member (Legal) Mr. Raza Baqir, Member Mr. Ashfaq Tunio, Chief Sale Tax
For OGRA:	Mr. Salman Akram Raja, ASC Mr. Saeed Ahmad Khan, Chairman Mr. Abdul Basit, Law Officer Ms. Misbah Yaqoob, JED(F)
For M/o Petroleum:	Ch. Akhtar Ali, AOR

For M/o Finance: Nemo

For M/o Climate Change: Mr. Dilawar Khan, Dy. Director

For OCAC: Nemo

Dates of hearing: 19 – 21 June, 2013

J U D G M E N T

IFTIKHAR MUHAMMAD CHAUDHRY, CJ.— Engineer Iqbal Zafar Jhagra and Senator Rukhsana Zuberi filed the listed Constitution Petitions under Article 184(3) of the Constitution of the Islamic Republic of Pakistan before this Court as back as in the year 2005 with the prayer, *inter alia*, that increase in prices of petroleum products from July, 2001 may be declared as illegal, arbitrary, *mala fide*, non-transparent, deceitful and violative of various provisions of the Constitution.

2. With to view to ascertaining controversies raised in the petitioner *vide* order dated 30.03.2009 a Judicial Commission was appointed to prepare a comprehensive report in consultation with all the stakeholders including consumers.

3. Pending proceedings of the petitions, on 12.06.2013, the Federal Government presented in the National Assembly the Finance Bill 2013 (hereinafter referred to as "the Bill") containing various financial proposals for the year commencing from the first day of July 2013 and to amend and enact certain laws to give effect to the said financial proposals. The Bill, *inter alia*, proposed to increase GST from 16% to 17% on the value of taxable supplies made by a registered person in the course, or furtherance, of any taxable activity carried on by him by amending section 3 of the Sales Tax Act, 1990 [hereinafter referred to as "the Act, 1990"]. Along with the Bill a Declaration made

under the Collections of Taxes Act, 1931 (Act No. VI of 1931), [hereinafter referred to as "the Act, 1931"], was also appended, contents whereof read as under: -

> "DECLARATION UNDER THE PROVISIONAL COLLECTIONS OF TAXES ACT, 1931 (XVI OF 1931)
>
> The provisions of sub-clause (10) of clause 2, sub-clause (2), sub-clause (3), sub-clause (7), sub-clause (13) and sub-clause (14) of clause 3 and sub-clause (6), sub-clause (8)(a)(ii), sub-clause (8)(a)(iii), sub-clause (8)(a)(iv), sub-clause (8)(b) and sub-clause (9) of clause 5 of this Bill shall have effect, for the purpose of this declaration and for the purposes of the provisions of the Provisional Collection of Taxes Act, 1931 (XVI of 1931), as if they were provisions for imposition of sales tax or duties of federal excise or duties of customs. It is hereby declared accordingly in terms of section 3 of the said Act that it is expedient in the public interest that the aforesaid provisions shall have effect on the 13th June, 2013.
>
> STATEMENT OF OBJECTS AND REASONS
>
> The purpose of this Bill is to make financial provisions for the year beginning on the first day of July, 2013. Various provisions have been explained in the Notes on Clauses."

4. The Oil and Gas Regulatory Authority [hereinafter called OGRA], by means of notification No. S.R.O…(1)/2013, dated 13.06.2013 issued in exercise of the powers conferred by rule 13 of Compressed Natural Gas (Production & Marketing) Rules, 1992, in supersession of its notification No.S.R.O.02(I)/2013, dated 01.01.2013 determined and notified the maximum sale price of Compressed Natural Gas (CNG) to be charged by a licensee (CNG Station) from a consumer for vehicular or other mobile use as per Federal Government approved policy guidelines and in pursuance of the Federal Government Declaration under the Act, 1931 with immediate effect as follows: -

Sr.#	Components	Region-I @1040BTU	Region-II @ 950 BTU
		Rupees per KG	
A	Cost of Gas	33.00	30.14
B	Value Addition (Electricity cost)	7.22	7.22
C	Operating Expenses (i-iv)	5.06	5.06
i	*Human Resources Cost*	2.59	2.59
ii	*Fee & Subscription*	0.16	0.16
iii	*Repair & Maintenance (machinery)*	1.50	1.50
iv	*Oil & Lubrication*	0.81	0.81
D	Total Cost (A+B+C)	45.28	42.42
E	Margin	4.35	4.35
F	GIDC	13.25	9.18
G	GST (26% of A+F)	12.02	10.22
Maximum CNG Sale Price (D+E+F+G)		74.90	66.18
Region-I, Khyber Pakhtunkhwa, Baluchistan & Potohar Region (Rawalpindi, Islamabad & Gujarkhan) Region-II: Sindh & Punjab excluding Potohar Region			

Immediately thereafter, the dealers started charging sales tax at the increased rate and the prices of petroleum products as well as CNG were increased abruptly. From a perusal of the aforesaid notification of OGRA, it transpired that GST is being charged @ 17% as enhanced under the Bill on petroleum products, whereas on CNG 9% in addition to 17% GST chargeable under section 3 of the Act.

5. On 13.06.2013, a note was put up by the Registrar of this Court, which was registered as CMA No.3821/2013 in Constitution Petitions No.33 & 34 of 2013 *vide* order of even date and ordered to be fixed in Court along with Constitution Petitions No.33 and 34 of 2005 on 14.6.2013. Notices were also ordered to be issued to the learned Attorney General for Pakistan and the other concerned parties.

6. On 14.06.2013, the Ministry of Petroleum filed following break-up of prices of petroleum products after issuing of above Declaration: -

Comparative Ex-Depot Prices effective 13 June 2013

	MOGAS				SKO				HSD			
	1-June	13-June	Diff	%age	1-June	13-June	Diff	%age	1-June	13-June	Diff	%age
Ex-Refinery	67.98	67.98	-	0.0%	71.34	71.34	-	0.0%	76.37	76.37	-	0.0%
IFEM	3.02	3.02	-	0.0%	1.93	1.93	-	0.0%	1.64	1.64	-	0.0%
District margin	2.23	2.23	-	0.0%	1.58	1.58	-	0.0%	1.86	1.86	-	0.0%
Dealer Margin	2.78	2.78	-	0.0%	-	-	-		2.30	2.30	-	0.0%
Petroleum Levy	10.00	10.00	-	0.0%	6.00	6.00	-	0.0%	8.00	8.00	-	0.0%
Sales Tax	13.76	14.62	0.86	6.3%	12.94	13.74	0.80	6.2%	14.43	15.33	0.90	6.2%
Max.ex-depot sale price	99.77	100.63	0.86	0.9%	93.79	94.59	0.80	0.9%	104.60	105.50	0.90	0.9%

7. It is to be noted that in the above noted break-up, GST has been increased 86 paisa per litre, but no notification to charge GST at the increased rate has been issued, as it has been pointed out by the learned counsel for OGRA.

8. On the same date, the learned Attorney General placed on record the Bill and stated that by means of section 2 of the Bill, section 3 and various other provisions of the Act, 1990 have been proposed to be amended by substituting the word “sixteen” wherever it occurs with the word “seventeen”. He further stated that in view of the provisions of section 3 read with section 4 of the Act, 1931, the increased sale tax from 16% to 17% is being legitimately charged with immediate effect, inasmuch as the said provisions empower the Government so to do as per past practice. He also stated that in case the Declaration ceased to have effect, the amount already charged would be liable to be refunded in terms of section 5 of the Act, 1931, which provides a mechanism for refund of the tax in question.

9. Mr. Salman Akram Raja, learned ASC for ORGRA stated that the prices of petroleum products have been revised strictly following the Declaration made in the Bill. However, he candidly admitted that except the aforesaid Declaration, no notification regarding increase of GST from 16% to 17% *qua* other taxable activities has been issued.

10. The above facts have given rise, *inter alia*, to the following questions: -

(a) As to whether section 3 of the Act, 1931 is not derogatory to Articles 3, 4, 8, 24 and 77 of the Constitution?

(b) As to whether recovery of taxes from the consumers is permissible on the basis of the Declaration made under section 3 of the Act, 1931 before amending the relevant provisions of the Act, 1990, the Customs Act, 1969 and the Central Excise Act, 1944?

(c) As to whether section 5 of the Act, 1931 provides a proper mechanism for refund of the tax so collected from the end users?

11. Learned Attorney General and the learned counsel for OGRA argued that sections 3, 4 and 5 of the Act, 1931 being the existing law in terms of Article 268(1) of the Constitution shall continue in force. As such, in pursuance of the Declaration made in terms of the above provisions of law, the same shall have the force of law and GST at the increased rate of 17% of the value of taxable activity is being lawfully charged and consumers (individuals) or the companies or the associations of persons, etc. were liable to pay increased GST on the petroleum products including CNG. He further argued that the object of charging GST at the increased rate under section 3 of the Act, 1931 is to maintain balance of taxable supplies in

the market. He also argued that OGRA is empowered to charge sales tax @ 9% of the value, in addition to the tax chargeable under section 3 of the Act, 1990 in pursuance of rule 20(2)(c) of the Sales Tax Special Procedures Rules, 2007. However, he clarified that 26% GST is not being charged from the end users and that only 16% previously or 17% GST presently is being charged from the suppliers/consumers. Learned Attorney General further stated that the Court, instead of declaring unconstitutional any of the provisions of sections 3, 4, or 5 of the Act, 1931, may read down the same under Article 268(6) of the Constitution, if it comes to the conclusion that any of those provisions of Act, 1931 are violative of the provisions of the Constitution or negate the Fundamental Rights of the citizens. He concluded that in any case, following the principle laid down by this Court in the case of *Asad Ali v. Federation of Pakistan* (PLD 1998 SC 161), any decision made by the Court in the instant case may be applied prospectively.

12. Mr. Salman Akram Raja, learned counsel argued that under certain enactments, such as the Customs Act, Anti-Dumping Act and Sales Tax, *Majlis-e-Shoora* (Parliament)/Federal Government is empowered to levy and recover duty or tax by means of legislation or sub-legislation, therefore, the Declaration inserted in the Bill is to be considered as an Act of *Majlis-e-Shoora* (Parliament) for the purpose of effecting recovery of GST at the increased rate pending approval of amendment in section 3 of the Act, 1990 by the *Majlis-e-Shoora* (Parliament). He argued that OGRA is empowered to charge/recover from consumers GST @ 16% or 17% on CNG and except for the rules which are not happily worded, OGRA is not charging additional GST @ 9%. However, both the learned counsel conceded that under the

Constitution, the *Majlis-e-Shoora* (Parliament) is empowered to levy tax and the Executive/Federal Government is not empowered to impose tax by means of rules or SROs, and such practice, if allowed, is likely to cause havoc in the tax regime.

13. Dr. Rana M. Shamim, learned counsel for the Federal Board of Revenue [FBR] adopted the arguments of Mr. Salman Akram Raja, ASC.

14. Mr. M. Ikram Chaudhry, learned ASC stated that Constitution Petition No. 33 of 2005 was filed on behalf of Engineer Iqbal Zafar Jhagra, who is an office bearer of the present ruling political party, but as notice has been issued to him by the Court, therefore, he would confine himself to the extent of constitutional provisions. He argued that the Declaration appended with the Bill confers no authority upon the Government or the Finance Minister to increase the rate of GST from 16% to 17% because under Article 77 of the Constitution, the power to levy and impose tax vests in the *Majlis-e-Shoora* (Parliament). He maintained that the practice of levying tax, duty, etc., which is in vogue since long before passing of the Bill by the National Assembly and its enactment after assent of the President is illegal and unacceptable because in such manner no reference ever shall be made by the Executive to the *Majlis-e-Shoora* (Parliament) and such omission is not permissible under the Constitution. He stated that directions be issued for effecting recovery of the excess tax i.e. difference of 1% collected on the taxable supplies from the end users from the date of tabling of the Bill in the National Assembly and same be ordered to be refunded to the consumers, and if it be not practicable for any reason, any other appropriate order may be

passed, e.g., the money in question may be ordered to be spent for the public welfare.

15. Learned counsel for OGRA stated that the additional tax *qua* persons involved in the taxable supplies but who are not registered under the Act, 1990 and were required to pay GST @ 19% instead of 16% of the value of taxable supplies, i.e., petrol, CNG, etc., on account of which the prices had increased exorbitantly, has been withdrawn *vide* letter dated 17.06.2013, which reads as under: -

"No.PL-3(457)/2013-Pt
Government of Pakistan
Ministry of Petroleum & Natural Resources
*****

Islamabad, the 17th June, 2013

Secretary General,
Oil Companies Advisory Council,
Karachi

Subject: Pending of charging of additional 2% GST from Un-registered Petrol Pubmp Dealers/tetail out lets

I am directed to refer to subject cited above and to say that Minister for Finance has been pleased to allow all the un-registered petrol pump dealers/retail outlets to get them registered within two weeks. Till that time, additional 2% sales tax may not be received from them.

2. You are therefore requested to inform PSO and other concerned OMCs about the above decision of Ministry of Finance that they should not receive the said additional sales tax from consumer.

3. This issues with the approval of Secretary Finance.

-sd/-
(Syed Muhammad Ahsen)
Research Officer (F & P)

16. We have inquired from the learned counsel for FBR whether increase in GST is not chargeable on the essential items mentioned in the Sixth Schedule to the Act, 1990 and when his attention was drawn towards the Declaration inserted in the Bill, where

no exception in charging increased GST @ 17% on the essential items as per Sixth Schedule of the Act, 1990 is made, as a result whereof prices of essential items have also been exorbitantly increased, he candidly conceded that the Declaration in question has been issued in routine, however, after some time he produced a clarification, which, according to him, has been prepared by the Secretary Finance under instruction of the Finance Minister, contents whereof are reproduced hereinbelow: -

> "**DIRECTIVE OF THE FEDERAL FINACE MINISTER**
>
> The FBR is directed to inform the general public by all appropriate means that the essential items as per Section 13, read with the Sixth Schedule, under the Sales Tax, 1990, such as vegetables, meat, milk, eggs, red chilies, fish, drugs, pulses, fruits, poultry, ginger, turmeric, cereals and products of milling industry, ice, poultry feed, butter, sugar cane, yogurt, butter, infant milk preparations, salt, potato, onions, bread, *nan*, *chapatti*, *bun*, rusk & others, continue to remain exempted from Sales Tax and that the increase in the rate of Sales Tax from 16% to 17% under the Declaration issued under the Provisional Collections of Taxes Act, 1931, does not affect any of the items, which are exempted under the Sales Tax Act, 1990.
>
> The FBR is also directed to ensure that all Inland Revenue Officers strictly monitor that no Sales Tax is recovered on the said supplies and to take proper action against violators."

17. It is to be seen that the Finance Division has issued "Declaration" in the Bill in routine, otherwise there was no necessity to issue letter dated 17.06.2013 withdrawing GST @ 19% instead of 16% from the unregistered taxable suppliers (owners of petrol pumps) and above clarification.

18. It may be noted that the Act, 1931 was promulgated before the partition of the Subcontinent in 1947. There are few other

countries as well having corresponding provisions of law, but it appears that their constitutionality has never been examined in any of those jurisdictions including the neighbouring country India on the touchstone of the constitutional provisions, except in the case of *Abdur Rashid v. Central Board of Revenue and other* (PLD 1965 Peshawar 249). Learned Attorney General heavily relied upon this judgment and argued that the Government had been following consistent practice of appending Declaration with the Finance Bill with a *bona fide* intention, for the reason that in the aforesaid judgment this matter has been found in accordance with the Constitution.

19. After the independence, the Act, 1931 was adopted by means of Adaptation of Central Acts and Ordinances Order, 1949, and continued in force as per Article 224 of the Constitution of 1956, then by Article 225 of the Constitution of 1962 and then under Article 268 of the Constitution of 1973. The Act, 1931 was first amended *vide* the Finance Act, 1967 whereby in section 3, along with the "duty of customs or excise" the words "sales tax" were added. The said Act was then amended by the Finance Act, 1990 whereby besides certain amendments in sections 4 and 5, in section 3, along with the words "for the imposition or increase of a duty", the words 'or reduction' were added. Because in the instant proceedings, constitutionality of sections 3, 4 and 5 of the Act, 1931 is required to be examined, therefore, it would be appropriate to reproduce the said sections in their present form, which read thus: -

> 3. Power to make declarations under this Act.—Where a Bill to be introduced in the Central Legislature on behalf of Government provides for the imposition or increase or reduction of duty of customs or excise, the Central

Government may cause lo be inserted in the Bill a declaration that it is expedient in the public interest that any provision of' the Bill relating to such imposition or increase shall have immediate effect under this Act.

4. Effect of declarations under this Act, and duration thereof. — (1) Subject to the provisions of sub-section (2), a declared provision shall have the force of law with immediate effect as if enacted on the day on which the Bill is introduced.

(2) declared provision shall cease to have the force of law under the provisions of this Act—

(a) when it comes into operation as an enactment, with or without amendment, or

(b) when the federal Government in pursuance of a motion passed by the Central Legislature directs, by notification in the Official Gazette, that it shall cease to have the force of law, or

(c) if it has not already ceased to have the force of law under clause (a) or clause (b) then on the expiry of the sixtieth day on which the Bill containing it was introduced.

5. Certain refunds to be made, or demands to be raised, when declaration ceases to have effect.—(1) Where a declared provision comes into operation as an enactment in an amended form before the expiry of the sixtieth day after the day on which the Bill containing it was introduced—

(a) refunds shall be made of all duties or taxes collected which would not have been collected if the provision adopted in the enactment had been the declared provision;

(b) demands shall be raised of all duties and taxes not collected which would have been collected, if the provision adopted in the enactment had been the declared provision:

Provided that the rate at which refunds of any duty or tax may be made, or demand may be raised, under this sub-section shall not exceed the difference between the rate of such

duty or tax proposed in the declared provision and the rate of such duty or tax in force when the Bill was introduced.

(2) Where a declared provision ceases to have the force of law under clause (b) or clause (c) of sub-section (2) of section 4 —

(a) refunds shall be made of all duties or taxes which would have not been collected if the declaration in respect thereof had not been made; or
(b) demands shall be raised of all duties and taxes not collected, which would have been collected if the declaration in respect thereof had not been made."

A perusal of section 3 shows that the Federal Government may cause to be inserted in the Bill a Declaration that it is expedient in the public interest that any provision of the Bill relating to such imposition or increase or reduction would have immediate effect. In the instant case, the Finance Minister, in his budget speech, proposed to increase GST from 16% to 17% by amending section 3 of the Act, 1990, but effect was given to the proposed amendment immediately on tabling of the Bill in the National Assembly and GST on all taxable supplies and activities as proposed to be increased was levied as is evident from the break-up of the prices of petroleum products filed by the Ministry of Petroleum without issuing any notification, whereas notification dated 13.06.2013, reproduced hereinabove, in respect of consequential increase in GST on CNG was issued by OGRA.

20. It is well settled proposition that levy of tax for the purpose of Federation is not permissible except by or under the authority of Act of *Majlis-e-Shoora* (Parliament). Reference in this behalf may be made to the case of *Cyanamid Pakistan Ltd. v. Collector of Customs* (PLD 2005 SC 495), wherein it has also been held that

such legislative powers cannot be delegated to the Executive Authorities. Also see *Government of Pakistan v. Muhammad Ashraf* (PLD 1993 SC 176) and *All Pakistan Textile Mills Associations v. Province of Sindh* (2004 YLR 192).

21. There cannot be two opinions that the Declaration dated 13.06.2013 inserted in the Bill unless passed by the *Majlis-e-Shoora* (Parliament) was an executive act of the Government and not a legislative act of the *Majlis-e-Shoora* (Parliament), therefore, imposition or increase as well as reduction of the sales tax with immediate effect in pursuance of the Declaration made under section 3 of the Act, 1931 was against salutary principle envisaged by Article 77 of the Constitution, which lays down that no tax shall be levied for the purpose of the Federation except by or under the authority of Act of *Majlis-e-Shoora* (Parliament).

22. Mr. Salman Akram Raja, learned counsel for OGRA purported to canvass that taxing power of the Parliament can be delegated to the Government/Executive and the delegatee of such power may then decide at what rate tax is to be imposed or what exemption or reduction, if any, is to be granted. It seems that to save the provision of section 3 of the Act, 1931 he stated that as the Bill has already been tabled before the *Majlis-e-Shoora* (Parliament), therefore, it would be deemed that pending discussion on the Bill, the Parliament has empowered the Government/Executive to impose increase in GST with immediate effect in the public interest. He further argued that under section 18(2) of the Customs Act, 1969, section 3(2)(b) of the Sales Act, 1990 and section 67 of the Anti Dumping Ordinance, 2000 such powers have been delegated, therefore, the

Declaration inserted in the Bill may be considered an instrument, on the basis of which the Parliament has authorized the Government to impose increase GST from 16% to 17% with immediate effect. In this behalf, he has relied upon the case of *Zaibtun Textile Mills v. Central Board of Revenue* (PLD 1983 SC 358). In this case, the owners of Zaibtun Textile Mills were aggrieved by the levy and the demand of the duty on the production capacity of the plants and machinery of their factories by the Central Board of Revenue under section 3(4) of the Central Excises and Salt Act of 1944. When the matter reached this Court, leave to appeal was granted to examine following questions: -

(i) In absence of any guiding principles in the Act it was unconstitutional on the part of the Legislature to delegate its legislative function to the Central Board of Revenue and to empower the Board to determine the production capacity of a Textile Mill.

(ii) Even assuming the validity of the impugned provisions of section 3(4), of the Act, the question was whether the requirements of law as prescribed therein were fulfilled and in particular, whether the rules were not notified by the Central Board of Revenue as required thereunder, which according to the appellants were not in fact notified by the Central Government.

(iii) The law contemplated that the guiding principles upon the basis of which the production capacity was required to be fixed should have come into existence prior to the actual fixation of the production capacity and not simultaneously as was done in the present case.

(iv) The Awan Committee was unauthorisedly constituted as an ad hoc body and it would not, therefore, be legally charged with the duty of examining and determining the production capacity of Cotton Textile Mills.

Having considered the arguments of the parties, the Court returned the following findings on the above questions: -

> "21. From the aforesaid analysis of the judgments it would appear that it is too late in the day to maintain that the Legislature cannot delegate authority to subordinate or outside authorities for carrying the laws enacted by it into effect and operation, in view of the long history of legislative practice committing the rule-making powers having the force of law, to such subordinate functionaries or agencies. As held in *Hodge v. Regina* by the Privy Council as early as 1883, such power of delegation is inherent and ancillary to legislation. It is also futile to seek and apply the constitutional theories underlying the doctrine of impermissible delegation of legislative power as applied under the American system as these theories were irrelevant in our system (as obtaining under the 1962 Constitution). It is now well established as observed by Hamoodur Rahman, J. (as he then was) in *Province of East Pakistan v. Sirajul Hag Patwari* that the powers of the Legislatures in the Indo-Pak sub-continent have always been as plenary as those of the British Parliament. Mr. A. K. Brohi in his argument also did not put his contention as high as to canvass a total absence of power to delegate any part of the legislative function in connection with a particular statute to outside authorities by the Legislature. But his submission was, as mentioned hereinbefore, that the impugned provisions were invalid inasmuch as the Legislature had effaced itself and abdicated its essential legislative function in favour of a subordinate authority i.e. Central Board of Revenue who has been given power to levy and collect the duty in question in all its dimensions, leaving it unfettered discretion to formulate its own policy and standards according to which the tax was to be levied.
>
> "22. The question raised in this argument essentially concerns the question of the constitutional limits to

legislative power. In other words the question is as to what extent and on what principles delegation of legislative power to outside authorities is permissible under the Constitution. The Constitution does not expressly lay down and prescribe the limits within which such delegation would be permissible. Nor is there any provision in the Constitution which may define what constitutes the essential legislative function, which may then be kept as a norm to strike down the legislation by which such essential legislative power is entrusted to other agencies. The question whether in a given case the Legislature has incompetently delegated its power has to be determined by the Courts in the exercise of their judicial power under the Constitution. The cases reviewed in this judgment bear testimony to the fact that the Courts in the various jurisdictions have not been able to evolve a consensus on a fixed rule or test to determine this question. Indeed they illustrate the difficulty with which the objection regarding impermissible delegation of administrative power has been applied in individual cases. No uniform test has been laid down in these cases to determine this objection. In *Hodge v. Regina* a case from the year 1853 the wide test that where the Legislature retains the power to destroy the agency it has created and set up another or take back the matter directly into its own hands, was applied to resolve this controversy and was reiterated as recently as 1967 in the case of *Cobb & Co. Ltd. v. Kropp*. This view holds that until the Legislature constitutes another legislative power or separate legislative body armed with general legislative authority, it cannot be said that the Legislature has effaced itself. On the other hand in the case of Sobho Gyanchandani the Federal Court of Pakistan held as ultra vires a piece of legislation empowering the executive government to give a fresh lease of life to a temporary enactment passed by the Legislature, on the ground that such power created a parallel Legislature. This objection

was found inapplicable in the case of East & West Steamship Co. on the ground that it would not be possible for the Legislature in view of the subject-matter of legislation to lay down the details how the outside authority was to act in varying situations, which necessitated the conferring of unfettered discretion to exercise subordinate legislative power. In the case of *District Magistrate, Lahore v. Raza Kazim*, this Court upheld the validity of a legislation which laid down no criterion for the guidance of rule-making authority or even define the general policy from which guidance could be sought. The objection of excessive delegation was avoided on the ground of plenary powers enjoyed by the Legislature in the matter of legislation. Once again the impossibility of providing for every detail and machinery to carry into effect the object sought to be achieved by the Legislature was regarded as sufficient ground to uphold the validity of the enactment. In this case a view similar to that held in *Hodge v. Regina* was taken that the Legislature retains its legislative powers intact to do away with the agency under the enactment. The case of Muhammad Ismail & Co. is perhaps the only case in Pakistan, which attempted to lay down a general rule for determining the question of impermissible delegation, as it was observed that only “essential legislative power” is incapable of being delegated. In this case also reference was made to the laying down of the policy of the legislation in the enactment for the guidance of the rule-making authorities. In the last case referred to, viz., *Province of East Pakistan v. Sirajul Haq Patwarl* also no uniform test could be laid down by the learned Judges delivering their separate opinions but the validity of the impugned enactment was held not open to objection of impermissible delegation, although it did not in itself lay down any policy or guidelines for the executive authorities to carry into effect the object of the legislation. In this case

I would particularly point out what Hamoodur Rahman, J., held to be in his opinion constitutionally permissible, namely, that the provision for details in a statute, particularly when details are by their very nature incapable of being ascertained by the Legislature itself, can well be left to be worked out by another agency in whom the Legislature places confidence. In the final analysis this being a question of the *vires* of the assertion of a constitutional power, has to be decided with reference to limitations placed by the Constitution on the scope of the power of the Legislature, either expressly or impliedly by necessary intendment. The framers of the 1962 Constitution did not adopt the distribution of powers as found in the Constitution of the United States with all the implications of that doctrine, but an overall consideration of the provisions of the 1962 Constitution relating to the setting up of the various organs of State does suggest that they contemplate a scheme for distribution of function of the Government into the three well-known departments, each being separately charged with the duty and being constituted a repository for the respective power in the relevant field of governmental functions of the State. Viewed in this context what the Constitution committed to the Legislature as its primary obligation to be discharged by it with exercise of powers conferred on it, cannot be entrusted by the legislature to another organ of the State or to a body of its own creation. That would negate the very basic arrangement adopted by the Constitution and in its place create a mode of the discharge of legislative function, in a manner not envisaged therein or contrary to the instrument which constituted it. A reflection of this proposition will be found in the following observations of S. A. Rehman, J. (as he then was) in the judgment of this Court in *Fazlul Quadar Chowdhary v. Shah Nawaz* [PLD 1966 SC 105]: “The constitution contains a scheme for the distribution of powers between various organs and

> authorities of the State, and to the superior judiciary is allotted the very responsible though delicate duty of containing all the authorities within their jurisdiction, by investing the former with powers to intervene whenever any person exceeds his lawful authority".

The learned counsel for OGRA also relied upon the judgment in *Muhammad Ashraf's case* (supra), wherein the respondents had imported large consignments of Soya bean oil into Pakistan after obtaining import licences for the purpose at a time when there was no customs duty leviable on the commodities in question, however, subsequent to the opening of the Letters of Credit by the respective respondents and shipment of imported goods by the foreign suppliers, by means of notification dated 07.04.1986, issued under section 18(2) of the Customs Act, 1969, the earlier notification dated 01.07.1985 was amended so as to add a new Heading, namely, 15.07-A inserted in the table according to which a duty @ Rs.3000 per ton was imposed on Soya bean oil. Subsequently, by another notification No.SRO396(1)/86 dated 17.04.1986, the rate of regulatory duty on Soya bean oil was reduced to Rs.2350/- per ton. Being aggrieved by the imposition of regulatory duty after firm commitments were made by the respondents for the import of goods by means of contract for the sale of goods with foreign suppliers and opening of Letters of Credit, respondents therein filed respective Constitution Petitions challenging the levy of regulatory duty by means of aforesaid notifications dated 07.04.1986 and 17.04.1986, firstly on the ground that the Soya bean oil was an item free from levy on the duty on the aforesaid date and, therefore, subsequent imposition and collection of duty on the goods affecting the vested rights of the respondents was

illegal. Secondly, it was urged that imposition of duty, in such circumstances, rendered the imported consignments wholly uneconomical, if not wholly onerous, and as the respondents were exposed to very substantial monetary loss, the imposition was *mala fide* and unconstitutional. In the backdrop of above facts of the precedent case, the learned counsel for OGRA has relied upon following para of the judgment: -

> "However, the question whether the ratio of Al-Samrez Enterprise would be attracted in the case of regulatory duty under section 18(2) of the Act is a separate matter. The case of A]-Samrez Enterprise dealt with the question of the effect of withdrawal of an exemption notification under section 19 of the Act. As discussed in Civil Appeal No.915-K of 1990 and others in Al-Samrez Enterprise the concept of exemption as applied to taxation, which presupposes a liability and constitutes grant of immunity from the liability created by the charging section, was the essential principle on which the decision proceeded. So far as the power of the Government to impose a regulatory duty is concerned, the case falls within the domain of delegated legislation, whereby duty or tax is imposed under the law as authorised by Article 77 of the Constitution, under the authority of the Act of Parliament. Therefore, on no principle or rule of law, it can be urged that merely because at one time no regulatory duty was imposed and was in force, when the contract was entered into, any embargo is thereby created upon the delegatee of the legislature to impose the tax at any time irrespective of any transaction entered into on the basis when no such tax was in force. We have not been shown any authority for the proposition that abstention of the Government or non-exercise of delegated authority to impose the tax at a given time under delegated authority gives a vested right to any one to be exempted from the

payment of such tax *ipso facto* subsequently when such tax is imposed."

Following principles are highlighted from the above judgments: -

(1) The legislature can delegate authority to subordinate or outside authorities for carrying the laws enacted by it into effect or operation, in view of the long history of legislative practice committing the rule-making powers having the force of law to such subordinate functionaries or agencies;

(2) Such power of delegation is inherent and ancillary to the legislation;

(3) The Constitution does not expressly lay and prescribe the limits within which such delegation is permissible nor is there any provision in the Constitution, which says that the essential legislative functions are to be kept as a norm to strike down a legislative bill, as such essential legislative power is entrusted to other agencies;

(4) The question whether the Legislature in a given case has incompetently delegated its powers is to be determined by the Courts in exercise of the power of judicial review under the Constitution;

(5) Abstention of the Government and non-exercise of delegated authority to impose the tax at any time under the delegated authority does not give a vested right to anyone to be exempted from the payment of such tax *ipso facto*, when such tax is imposed;

(6) The power of granting exemption can be conferred on the executive authority and the Federal Government in view of its powers under section 18(2) of the Customs Act, 1969 and levy the regulatory duty without any limitation or restriction as it may deem fit on such power as may be specified in the notification;

(7) The power of grant of exemption of customs duty on a particular article and the power of withdrawal of such exemption is always available to the Government under the law, therefore, it is not open to the Courts to go

beyond the notification issued by the Government. Grant of power shall arbitrarily be exercised unless it is stated that grant of exemption on specific duty shall be subject to existence of certain conditions; and

(8) The Government, if it is empowered to issue a notification for grant of exemption on custom duty, is also empowered to withdraw such exemption wholly or partially.

23. On the insistence of learned counsel to treat the Declaration as delegation by the Legislature, we, on having gone through all the judgments relied upon by him, have applied the principles deduced therefrom to the question of delegation of powers one by one, keeping in view the provisions of section 3(2)(b) of the Act, 1990 and section 18(2) of the Customs Act, 1969. It would be appropriate to reproduce sub-sections (1) & (2) of section 3 of the Act, 1990, which read thus: -

> "3. Scope of tax.— (1) Subject to the provisions of this Act, there shall be charged, levied and paid a tax known as sales tax at the rate of sixteen per cent of the value of –
>
> (a) taxable supplies made by a registered person in the course or furtherance of any taxable activity carried on by him; and
> (b) goods imported into Pakistan.
>
> (2) Notwithstanding the provisions of sub-section (1) –
>
> (a) taxable supplies specified in the Third Schedule shall be charged to tax at the rate of sixteen per cent of the retail price which along with the amount of sales tax shall be legibly, prominently and indelibly printed or embossed by the manufacturer on each article, packet, container, package, cover or label, as the case may be:
>
> Provided that the Federal Government, may, by notification in the official Gazette, exclude any taxable supply from the said Schedule or include any taxable supply therein; and

> (b) the Federal Government may, subject to such conditions and restrictions, as it may impose by notification in the official Gazette, declare that in respect of any goods or class of goods imported into or produced or any taxable supplies made by a registered person or a class of registered persons, the tax shall be charged, collected and paid in such manner and at such higher or lower rate or rates as may be specified in the said notification."

We are not inclined to agree with the learned counsel because in the instant case, except tabling the Bill in the National Assembly, no legislation on the issue has so far taken place. The question of delegation of power or its coming into effect or operation will arise only after the Bill is passed by the Parliament and converted into an Act on receiving assent of the President, i.e., on successful completion of the constitutional process, and the arguments being raised by the learned counsel may perhaps be relevant thereafter. However, as it has been noted hereinabove, the learned counsel himself was of the opinion that delegation of power to the executive/government in the matter of imposing tax will create havoc in the tax regime. Thus, it is sufficient to conclude that no such delegation can be considered to have been conferred upon the government in terms of section 3 of the Act, 1931, allowing it to insert Declaration for the purpose of imposing/increasing or reducing GST with immediate effect.

24. It is also to be borne in mind that in a Parliamentary system of Government, the scheme of the Constitution is based upon the theory of separation of powers enunciated by the French political philosopher Montesquieu under which powers of the State are distributed among the three organs of the State, namely, Legislature, Executive and the Judiciary. Under Article 7 of the Constitution, 1973, two institutions named earlier find mention, whereas the Judiciary has

not been included therein with a view to establishing a system of checks and balances. Similarly, John Locke, in his work "Treatise on Civil Government" has emphasized that "the legislative cannot transfer power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said "We will submit, and be governed by laws made by such men, and in such forms", nobody else can say other men shall make laws for them, nor can they be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them."

25. This Court in a number of cases has held that the principle of trichotomy of powers is one of the fundamental values of the Constitution of Pakistan. In the case of *Dr. Mubashir Hassan v. Federation of Pakistan* (PLD 2010 SC 265) this Court held as under: -

> "7. It is to be noted that this Court vide judgment dated 31st July 2009, in the case of *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879), declared the Proclamation of Emergency, 2007, Provisional Constitutional Order, 2007, Oath of Office (Judges) Order, 2007, Provisional Constitution (Amendment) Order, 2007 and the Constitution (Amendment) Order, 2007, to be unconstitutional, illegal and *void ab initio*. Consequently all the Ordinances (including the NRO, 2007) were shorn of the permanency, which was provided under Article 270AAA of the Constitution, as validated in *Tikka Iqbal Muhammad Khan v. General Pervez Musharraf* (PLD 2008 SC 178). But the Court, while adhering to the doctrine of constitutional trichotomy, referred the NRO, 2007 along with other Ordinances, to the Parliament for consideration to make

them Act of the Parliament, or the Provincial Assemblies, as the case may be, with retrospective effect. The relevant paras from the said judgment are reproduced hereinbelow for ready reference: -

> "186. Proclamation of Emergency and PCO No. 1 of 2007 having been declared unconstitutional and void ab initio and the validity purportedly conferred on all such Ordinances by means of Article 270AAA and by the judgment in Tikka Iqbal Muhammad Khan's case also having been shorn, such Ordinances would cease to be permanent laws with the result that the life of such Ordinances would be limited to the period specified in Articles 89 and 128 of the Constitution, viz., four months and three months respectively from the date of their promulgation. Under Article 89 of the Constitution, an Ordinance issued by the President, if not so laid before the National Assembly, or both Houses of Parliament, stands repealed on expiration of four months from its promulgation. Similarly, under Article 128 of the Constitution, an Ordinance issued by the Governor, if not so laid before the concerned Provincial Assembly, stands repealed on expiration of three months from its promulgation.
>
> 187. It may be noted that such Ordinances were continued in force throughout under a wrong notion that they had become permanent laws. Thus, the fact remains that on the touchstone of the provisions of Articles 89 and 128 read with Article 264 of the Constitution and section 6 of the General Clauses Act, 1897, only such rights, privileges, obligations, or liabilities would lawfully be protected as were acquired, accrued or incurred under the said Ordinances during the period of four months or three months, as the case may be, from their promulgation, whether before or after 3rd November, 2007, and not thereafter, until such Ordinances were enacted as Acts by the Parliament or the concerned Provincial Assembly with retrospective effect.
>
> 188. In the light of the above, the question of validation of such Ordinances would be required to be decided by the Parliament or the concerned Provincial Assemblies. However, the period of four months and three months mentioned respectively in Articles 89 and 128 of the Constitution would be deemed to commence from the date of short order passed in this case on 31st July, 2009 and steps may be taken to lay such Ordinances before the

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

26. Learned counsel for OGRA also argued that delegation of Parliament's power of taxation to Government/Executive is permissible in view of legislative requirement provided in Article 77 of the Constitution, as according to said provision, tax can be levied by or under the authority of Act of *Majlis-e-Shoora* (Parliament). In support of his argument, he has cited judgments in *Ittefaq Foundry v. Federation of Pakistan* (PLD 1990 Lahore 121) and *All Pakistan Textile Mills Association's case* (supra).

27. In *Ittefaq Foundry's case* (*supra*), petition under Article 199 of the Constitution was filed before the High Court seeking a declaration to the effect that the notification dated 10.07.1989 issued under section 7 of Sales Tax Act, 1951; the letter of C.E.&S.T., Circle 11, Lahore, dated 05.07.1989 (intimating revised rates of central excise duty and sales tax on billets/ingots); and the oral order on which the above said letter was based as well as the relevant provisions of Finance Act, 1989 were without lawful authority and hence of no legal effect. It was further prayed that the petitioner be permitted to sell the products already produced before the introduction

of impugned tax without additional burden of the **new impose** and the further production on such terms as the Court would deem fit to impose. The learned High Court allowed the petition and held that the levy, charging and collecting the excise duty and the sales tax at the rates intimated *vide* letter dated 05.07.1989, were illegal and without lawful authority and the notifications seeking amendment/extending the operative period of the aforesaid notification were illegal and without lawful authority. Thus, the Federal Government was required to reconsider within two months the question of grant of exemption of excise duty and sales tax on billets in the light of the observations made therein. However, while dealing with the exemptions which are allowed under the relevant provisions of law, given by the *Majlis-e-Shoora* (Parliament) under Article 77 or by the Provincial Assembly under Article 127, a mechanism has to be laid down to **exercise** burden of taxation on individuals in view of the principle of reasonability.

28. In *All Pakistan Textile Mills Association's case* (supra) the Government of Sindh, *vide* notification dated 29.11.1990 in the purported exercise of powers under section 62(2) of the Sindh Local Government Ordinance, 1979, pursuant to the directions of the Provincial Government contained in the Government of Sindh Local Government Public Health Engineering and Rural Development Department Notification dated 17.07.1990, de-linked conservancy rates from net annual rental of properties and linked it with water charges. Resultantly, the rates of conservancy charges were increased exorbitantly. The owners of different textile mills as well as owners of commercial properties challenged the said increase before the High

Court, *inter alia*, on the ground that conferment of unhindered executive powers to levy a tax under the Sindh Local Government Ordinance, 1979 would amount to excessive delegation of legislative powers and would have to be struck down on that ground alone. Learned High Court, having taken into consideration a number of judgments of this Court, including case of *Zaibtun Textile Mills Ltd*. (*supra*) held that the doctrine of delegation has not to apply to the colonial Legislatures established under the Acts of the British Parliament prior to the Independence and this view still holds the field after the Independence in this country under the Constitutions adopted in Pakistan, as it has been held that the powers of the Legislature under the written Constitutions to make laws within the allotted spheres are in the nature of plenary and sovereign powers.

29. In the light of the law laid down in the aforesaid judgments, it is clear that the *Majlis-e-Shoora* (Parliament) /Legislature alone and not the Government/Executive is empowered to levy tax. As far as delegation of such powers to the Government/Executive is concerned, the same is for the purpose of implementation of such laws, which is to be done by framing rules, or issuing notifications or guidelines, depending upon case to case, as we have come across some of the cases noted hereinabove. But in no case, authority to levy tax for the Federation is to be delegated to the Government/Executive. Therefore, arguments so raised by learned counsel have no force and the same are repelled hereby.

30. Now is the stage, where we are required to examine the constitutionality of the Act, 1931. As it has been noted hereinabove, this Act amongst other laws, as an existing law, has remained in force

continuously from the date of its inception. As mentioned earlier, the Act, 1931 was adopted *vide* Adaptation of Central Acts and Ordinances Order, 1949 and was continued subsequently under Article 224 of the Constitution of Islamic Republic of Pakistan, 1956, Article 225 of the Constitution of 1962 and then under Article 268 of the Constitution of 1973. Thus, it has quite a long life during the course whereof its validity was adjudged first in *Abdul Rashid's case* (*supra*) and was also considered in the cases of *M/s Chhotabhai v. Union of India* (AIR 1962 SC 1006), *M/s R.H. Ghani v. Assistant Collector of Customs* (1991 SCMR 90), *Fateh Textile Mills v. Pakistan* (1992 CLC 2300) and *Gul Ahmed Textile Mills v. Collector of Customs* (1990 MLD 126), but its constitutionality was not examined.

31. Article 209 of Kenya; Article 152 of Uganda; and Article 265 of the Constitution of India, which deal with imposition of taxes for the National/Central Government by or under the authority of the Parliament, are *pari materia* with Article 77 of the Constitution of Pakistan. The aforesaid provisions are reproduced hereinbelow:

> PAKISTAN
>
> 77. No tax shall be levied for the purpose of the Federation except by or under the authority of Act of Parliament.
>
> KENYA
>
> 209. (1) Only the national government may impose—
> (a) income tax;
> (b) value-added tax;
> (c) customs duties and other duties on import and export goods; and
> (d) excise tax.
>
> (2) An Act of Parliament may authorise the national government to impose any other tax or duty, except a tax specified in clause (3)(a) or (b).
>
> (3) A county may impose—

(a) property rates;
(b) entertainment taxes; and
(c) any other tax that it is authorised to impose by an Act of Parliament.

(4) The national and county governments may impose charges for the services they provide.

(5) The taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour.

210. (1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.
(2) If legislation permits the waiver of any tax or licensing fee —
(a) a public record of each waiver shall be maintained together with the reason for the waiver; and
(b) each waiver, and the reason for it, shall be reported to the Auditor-General.
(3) No law may exclude or authorise the exclusion of a State officer from payment of tax by reason of —

(a) the office held by that State officer; or
(b) the nature of the work of the State officer.

UGANDA

152. Taxation
(1) No tax shall be imposed except under the authority of an Act of Parliament.

(2) Where a law enacted under clause (1) of this article confers powers on any person or authority to waive or vary a tax imposed by that law, that person or authority shall report to Parliament periodically in the exercise of those powers, as shall be determined by law.

(3) Parliament shall make laws to establish tax tribunals for the purposes of settling tax disputes.

INDIA

265. Taxes not to be imposed save by authority of law.- No tax shall be levied or collected except by authority of law.

It may be seen that section 2 of the Provisional Collection of Taxes and

Duties Act, 1959 of Kenya; section 1 of Provisional Collection of Taxes

Act, 1968 of the United Kingdom; and section 1 of the Taxes and Duties (Provisional Collection) Act, 1963 of Uganda, which deal with collection of taxes, are *pari materia* with section 3 of the Act, 1931. Said provisions too are reproduced hereinbelow: -

KENYA

2. Provisional collection orders – If a Bill is published in the Gazette whereby, if such Bill were passed into law, any tax or duty, or any rate, allowance or administrative or general provision in respect thereof, would be imposed, created, altered or removed, the Minister may, subject to this Act and notwithstanding the provisions of any other written law relating to taxes and duties, make an order that all or any specified provisions of the Bill relating to taxes or duties shall have effect as if the Bill were passed into law.

UNITED KINGDOM

1. (1) This section applies only to income tax, purchase tax and duties of customs and excise.
(2) Subject to that, and to the provisions of subsections (4) to (8) below, where the House of Commons passes a resolution which -

(a) provides for the renewal of a further period of any tax in force or imposed during the previous financial year (whether at the same or a different rate, and whether with or without modifications) or for the variation or abolition of any existing tax, and

(b) contains a declaration that it is expedient in the public interest that the resolution should have statutory effect under the provisions of this Act, the resolution shall, for the period specified in the next following subsection, have statutory effect as if contained in an Act of Parliament and, where the resolution provides for the renewal of a tax, all enactments which were in force with reference to that tax as last imposed by Act of Parliament shall during that period have full force and effect with respect to the tax as renewed by the resolution:

In this section references to the renewal of a tax include references to its reimposition, and references to the abolition of a tax include references to its repeal.

UGANDA

> 1. Provisional collection orders. Whenever the Government approves the introduction into Parliament of a bill by which if the bill were passed into law— any tax or duty or rate of tax or duty, or any allowance relating to the tax or duty, would be imposed or created; or any tax or duty or any such rate or allowance would be altered or removed, the Minister may, subject to this Act, by statutory instrument order that there shall be charged, levied and collected the tax or duty which would become payable if the bill were passed into law and came into operation in place of the tax or duty which would otherwise be payable or, as the case may be, that there shall cease to be charged, levied and collected any tax or duty which would cease to be payable if the bill were passed into law and came into operation.

32. A perusal of section 2 of the Provisional Collection of Taxes and Duties Act of Kenya shows that any tax or duty, or any rate, allowance or administrative or general provision in respect thereof, would be imposed, created, altered or removed if the bill were passed into law. Similarly, under the Provisional Collection of the Taxes Act, 1968 of the United Kingdom, the renewal of a further period of any tax in force or imposed during the previous financial year (whether at the same or a different rate, and whether with or without modifications) or for the variation or abolition of any existing tax and a declaration that it is expedient in the public interest that the resolution should have statutory effect are subject to the passing of the resolution by the House of Commons. Likewise, under section 1 of the Taxes and Duties (Provisional Collection) Act, 1963 of Uganda, any tax or duty or rate of tax or duty, or any allowance relating to the tax or duty, would be imposed or created; or any tax or duty or any such rate or allowance would be altered or removed if the Bill were passed into law. From the above, it is clear that the practice of provisional immediate collection of tax pending passing of the Bill by the concerned legislative body is prevailing since long, but the same is conditional either on the passing

of an Act of Parliament, or at least a resolution passed to that effect by a House of Representatives.

33. Mr. Salman Akram Raja, learned counsel for OGRA has placed on record a judgment from the Supreme Court of New South Wales *in re*: *Ex parte Wallace & Co*. of the year 1892. As per the facts of this case, after a resolution having been passed by the House of Commons, tax was imposed on certain goods, which up to 01.12.1891 had been admitted into the Colony duty free. The goods in question arrived in Sydney during December, 1891, at which time no Act of Parliament imposing any duties upon goods of the kind had come into force. The Customs Regulations Act (42 Vic. No.19, s. 47) provided that within a certain time after arrival of the goods, entry thereof would be made and "the bill of entry of any goods, when signed by the Collector or proper officer shall be transmitted to the proper officer and be his warrant for the delivery of the goods therein mentioned." The applicants duly made entry of the goods and applied to the Collector of Customs to sign the entries, in order that they might get possession of the goods. The Collector refused to sign the entries till certain customs duties were paid. The applicants thereupon obtained a rule *nisi* for a mandamus to compel the Collector to sign the bills of entry upon the grounds: -

(1) That the said goods were, at the time of the refusal of the said James Power (being the proper officer for such purpose) to sign the said entries or bills of entry, free goods, and not chargeable with any duty under the provisions of the Customs Regulation Act then in force; and

(2) That upon the applicants having complied with the provisions of the said Act with reference to the said goods

> and the entries in regard thereto, the said James Power was bound to sign the said entries or bills of entry as the warrants for the delivery of the said goods to the applicants.

The application was contested mainly on the ground of passing of resolution by the House of Commons. The Court declined to issue the writ returning, *inter alia*, the following findings: -

> "We are not for one moment saying that upon the mere will of the Executive new taxes are to be imposed. Here, as in England, a resolution of the Legislative Assembly—the House of Commons of the Colony, the keepers of the public purse—must precede the action of the Executive. This application for a mandamus is made after the resolution of the Assembly had been passed, and is with reference to action taken by the Executive after and in virtue of that resolution. It is right that there should be time given for the full and free discussion of important measures of this character, affecting the public interest in the highest degree, and if it were to be held that an application of this kind could succeed, the very object of such a resolution would be defeated, and the hands of the Executive in a most important matter of public interest would be paralyzed. Both Houses of parliament would be asked to pass a bill without any discussion, and blindly and in the dark to commit themselves to the proposals of the Government, or else the object of imposing this new kind of taxation would be absolutely useless. Well, our *Constitution Act* is not so rigid and inexpensive that the varying circumstances in the development of our political system are not to have some effect upon it. This is well pointed out, not with regard to the system of taxation, but with regard to the question of libel, in the case of *Wason v. Walter,* wherein *Stockdale* v. *Eansard* was cited as shewing that the House of Commons had no legislative power in itself. In that case *Sir Alexander Cockburn*, C.J., after citing at length what *Stockdale* v. *Hansard* was, said in delivering the judgment of the Court: "From the doctrines involved in this defence, namely, that the House of Commons could by their order authorize the violation of private rights, and, by declaring the power thus exercised to be matter of privilege, preclude a Court of law from inquiring into the existence of the privilege----doctrines which would have placed the rights and liberties of the subject at the mercy of a single branch of the Legislature — Lord *Denman* and his colleagues in a series of masterly judgments, which will secure to the Judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of

> the law and the rights which it is the purpose of the law to uphold. To the decision of the Court in that memorable case we gave our unhesitating and unqualified adhesion. But the decision in that case has no application to the present. The position that an order of the House of Commons cannot render lawful that which is contrary to law, still less that a resolution of the House of Commons can oust the jurisdiction of a Court of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is not whether the Act complained of being unlawful at law, is rendered lawful by the order of the House or protected by the asserting of its privilege, but whether it is independently of such order or assertion of privilege, in itself privileged and lawful." At a later part of the same judgment, Sir *Alexander Cockburn* says, "Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interest of the generation to which it is immediately applied." I adapt that language to this case, and I say we are not to go back to the time of Charles II., or to a time even anterior to that. We have to look at the things which have grown up with the growth of the Constitution, and we have to consider now that has been the established practice. It has been made abundantly clear that before the date of the passing of our *Constitution Act* in 1856 it had for a long series of years been the uniform practice under the Constitution of England to do what the applicants now complain of; and, although the written law of our Constitution is silent with reference to matters of this sort, still it is well known that it is moulded on the lines of the English Constitution, and in matters not expressly referred to we follow the precedent of the English Constitution. Therefore, if it be an exception to the matter engrafted upon our written Constitution, the broad reason why it should be accepted is that the advantage to the community is so great that the occasional inconvenience of the individuals arising from it must yield to the general good. For these reasons, I have no difficulty in concurring with the Chief Justice and Mr. Justice *Windeyer* in thinking that in the circumstances of this case we should not be justified in granting a mandamus which would violate a well-recognised constitutional principle and might have very mischievous consequence."

This judgment is based on the resolution of House of Commons, not by an individual person representing the Government/Executive as it had

happened in the present case. One of the most important observations made in this judgment was “we are not for one moment saying that upon the mere will of the Executive new taxes are to be imposed”. (Emphasis provided). Needless to observe that in this judgment too, the longstanding practice of immediate collection of taxes after passing of resolution by the House of Commons pending passing of the tax bill has been maintained with certain important observations to ensure that the tax is to be levied by the legislature but the distinction is apparent vis-à-vis the instant case, in that, the Government or the Executive being one of the organs of the State following the doctrine of trichotomy of powers was not allowed to effect immediate collection of tax. Similar was/is the practice in other countries, reference of which has been made hereinabove.

34. It is noteworthy that except in the judgment passed by the Peshawar High Court in the case of *Abdur Rashid* (*supra*) the constitutionality of any of such law, as stated earlier, never came up for examination before the Superior Courts in exercise of power of the judicial review available to them under the Constitution. As the Act, 1931 had never been challenged for a very long time, a question may be posed would it be appropriate to decide its constitutionality. Answer to this proposition lies in the case of *Attorney General of Commonwealth of Australia v. Queen* (PLD 1957 Privy Council 115), wherein the provision of sections 29(1)(b) & (c) and 29-A of the Conciliation and Arbitration Act, 1904-1952 were challenged being *ultra vires* and invalid. The Privy Council, on having examined these provisions vis-à-vis facts of the case placed before it, observed that “whatever the reasons may be, just as there was a patent invalidity in

the original Act which for a number of years went unchallenged, so for a greater number of years and invalidity, which to their Lordships as to the majority of the High Court has been convincingly demonstrated, has been disregarded. Such clear conviction must find expression in the appropriate judgment." This principle has been reiterated by the Sindh High Court in the case of *All Pakistan Newspaper Society v. Federation of Pakistan* (PLD 2012 Karachi 1).

35. Coming to the case of *Abdul Rashid* (*supra*) wherein the learned High Court declared the Act, 1931 as *intra vires* the Constitution, it may be seen that constitutionality of the Act was challenged mainly on the following two grounds, namely –

(1) The Provisional Collection of the Taxes Act, 1931 was *ultra vires* as this Act was not passed by Central Legislature of Pakistan; and

(2) Under sections 3 and 4 of the Act, no duty is recoverable from the day of presentation of the Finance Bill, until the Bill has been passed into Act, and that too from the new Financial year, *viz*., the 1st of July, 1964.

Learned High Court after hearing the learned Attorney General held as under: -

> "24. The words "subject to Constitution" used in Article 225 of the Constitution of Pakistan, which is equivalent to Article 372 of the Indian Constitution, have been explained in the Madras case referred to above. By parity of reasoning, in the absence of a provision in the Constitution that the collection of tax from the date when the Finance Bill was introduced in the National Assembly, is illegal, under the present Constitution, the law, which previously existed in regard to it, will continue to be valid even after the Constitution.

> "25. In further support of this contention, the learned Attorney-General relied on Art. 237 of the Constitution, which provides that :-
>
> > "Notwithstanding anything in this Constitution all taxes and fees levied under any law in force immediately before the commencing day shall continue to be levied until they are varied or abolished by an Act of the appropriate Legislature."
>
> "26. This Article is a complete answer to both the objections raised by the learned counsel for the petitioner. Accordingly, notwithstanding Article 48 of the Constitution, the duty on tobacco stalks at the rate of 6 paisas per pound was levied and was enforced immediately before the commencing day, and this duty was authorised to be continued to be levied until it was varied or abolished by an Act of the appropriate Legislature. In the instant case, this duty was raised to 50 paisas per pound in the Finance Act of 1963, which was passed by the Central Legislature of Pakistan."

With profound respect, we are not inclined to agree with the view taken by the learned Peshawar High Court in the aforesaid case on question No. 2 noted hereinabove because the learned High Court found itself satisfied in holding on parity of reasoning that in absence of the provisions of the Constitution that collection of tax from the date when the Finance Bill was introduced in the National Assembly was illegal, under the present Constitution, the law, which previously existed in regard to it to be valid even after the Constitution. Reference of Article 237 of the Constitution of 1962 was also made as the question before the Court was that Inspector, Central Excise, Peshawar had issued a notice demanding from the petitioner payment of the excise duty on tobacco stalk @ 60 paisa per pound in possession

of the petitioner on 30.06.1964 after the Finance Bill 1964 was introduced in the Central Assembly of Pakistan wherein the proposal of levy of this duty was made, and under the same Bill, it was made 'declared provision' for giving effect to this duty from the date when the Finance Bill was presented under the authority of the Act, 1931. Admittedly, the Finance Bill had raised the demand for the recovery of excise duty in view of the declaration, according to which notwithstanding the Constitution, all taxes and fees levied under any law in force immediately before the commencing day shall continue to be levied until they are varied or abolished by an Act of the appropriate Legislature. In that case, question of recovery of increased excise duty was involved which the Government/Executive had included in the Bill presented before the Assembly, as such, section 3 was pressed into service by making a declaration to the effect imposition of increase of the duty with immediate effect. Had there been no question of increase, there would be no necessity to issue the declaration, therefore, opinion so formed by the learned Division Bench of the Peshawar High Court requires to be re-examined in the instant case. However, before proceedings further, it may be noted that under Article 48 of the Constitution of 1962, no tax was liable to be levied for the purpose of Central Government except by or under the authority of an Act of Central Legislature. Thus, it is held that levy of tax also includes increase or reduction in it, which is possible only by or under the authority of an Act of Central Legislature. Under Article 77 of the Constitution of 1973, in consonance with same expression, the words used in Article 48 of the Constitution of 1962 have been employed. However, as far as the Indian Constitution is concerned,

there is a distinction to the effect that taxes are not to be imposed save by the authority of law. On a critical examination of the word "Declaration" which has been used in section 3 of the Act, 1931, we are persuaded to determine its status. In this behalf, efforts were made to lay hand upon a statute wherein the word 'Declaration' had been used and the same had received judicial interpretation. In this behalf, we have noticed that in section 3 of the UP Town Area Act (UP No.II) of 1914, the word 'Declaration' has been used and the same has been interpreted by the Indian Supreme Court in the case of *Tulsipur Sugar Co. Ltd. v. The Notified Area Committee* (AIR 1980 SC 882) as under: -

> "The second limb of the argument in support of the above contention is that the declaration made under section 3 of the Act being in the nature of subordinate legislation, it was the duty of the State Government to follow the same procedure which was applicable to the promulgation of rules under section 39 of the Act. Our attention was drawn in this connection to sub-section (3) of section 39 of the Act which provided that the power to make rules under the said section was subject to the condition of the rules being made after previous publication. We are of the view that it is not possible to equate a declaration to be made under section 3 of the Act with rules made under section 39. Sub-section (3) of section 39 of the Act does not in terms apply to a declaration to be made under section of the Act. The contention that the declaration to be made under section 3 of the Act is in the nature of the subordinate legislation is also not tenable."

Thus, status of the declaration made under section 3 of the Act, 1931 cannot be of a sub-legislation *qua* the Finance Act, which ultimately is to be passed in pursuance of the Finance Bill by the *Majlis-e-Shoora*

(Parliament) under Article 77 imposing increase in the levy of the sales tax, which essentially shall create burden upon the consumers, to whom ultimately the sales tax shall pass on. It is to be borne in mind that it is the duty of the State to protect the life and property of the citizens under Articles 3, 9 and 24 of the Constitution. Essentially for protection of their Fundamental Rights, they cannot be subjected to exploitation in terms of section 3 of the Act, 1931 for the purpose of subjecting them to pay GST on the taxable supplies in furtherance of any taxable activity. Article 9 of the Constitution has been interpreted by this Court in number of cases wherein the scope of guaranteeing the Fundamental Rights enshrined in the said Article has been widened to ensure guarantee of life of the citizens. Reference may be made to the case of *Bank of Punjab v. Haris Steel Industries* (PLD 2010 SC 1109). Relevant paras are reproduced hereinbelow: -

> "20. With respect to the legality of assumption of office of Acting Chairman by the Deputy Chairman of N.A.B., it was submitted by Mr. Irfan Qadir, the learned Prosecutor-General, that the same was valid in view of the provisions of section 19 of the General Clauses Act, 1897 and in defence of his own appointment as the learned Prosecutor General, his only submission was that his was a fresh appointment and not an extension of his earlier tenure and that section 8 of the N.A.B. Ordinance of 1999 created no bar on a fresh appointment of a person as the Prosecutor-General who had already exhausted one term of three years in that office. Reliance in this connection had been placed on the Black's Law Dictionary and on the cases of Malik Shaukat Ali Dogar and 12 others *v. Ghulam Qasim Khan Khakwani and others* (PLD 1994 SC 281) and *Pir Sabir Shah v. Federation of Pakistan and others* (PLD 1994 SC 738).

> .....
>
> 25. A perusal of the above quoted provision would demonstrate that this Court was possessed of powers to make any order of the. nature mentioned in Article-199 of the Constitution, if, in the opinion of this Court, a question of public importance relating to the enforcement of any of the Fundamental Rights was involved in the matter, As has been mentioned in the preceding parts of this order, what was at stake was not only a colossal amount of money/property belonging to at least one million depositors i.e. a large section of the public but what was reportedly at stake was also the very existence of the Bank of Punjab which could have sunk on account of the mega fraud in question and with which would have drowned not only the said one million depositors but even others dealing with the said Bank". And what had been sought from this Court was the protection and defence of the said public property. It was thus not only the right of this Court but in fact its, onerous obligation to intervene to defend the said assault on the said fundamental right to life and to property of the said public."

Thus, in light of the above discussion, any provision of an enactment, which is against the provisions of Article 77 of the Constitution and infringes the Fundamental Rights of the citizens enshrined in Articles 9 and 24 of the Constitution by depriving them of their life or property without any proper legislation, is also tantamount to violation of Article 3 of the Constitution and the same cannot be considered to be a legislative or a sub-legislative instrument for the purpose of imposing or increasing GST pending passing of the Bill by the *Majlis-e-Shoora* (Parliament), which has already been tabled before it. As such, section 3 being contrary to Articles 3, 9, 24 and 77 of the Constitution is declared to be unconstitutional and void.

36. It may also be seen that the Government/Executive subsequent to tabling of the Bill in the *Majlis-e-Shoora* (Parliament) itself realized that charging of additional 2% GST from unregistered petrol pumps/dealers/retail outlets was an error in the Declaration, suspended the same and allowed them to get themselves registered within two weeks and in this behalf letter dated 17.06.2013 was issued, contents of which have already been reproduced hereinabove. We appreciate the conduct of the Government/Executive in suspending the imposition of additional 2% GST not for the reason stated in the letter, but in view of the above discussion that no additional GST is leviable save by or under the authority of Act of the *Majlis-e-Shoora* (Parliament) under Article 77 of the Constitution. We feel that this understanding had been developed because of increase of the prices of essential items as well, exemption of which has been granted under section 13(1) and the Sixth Schedule of the Act, 1990, and ultimately the consumers have to bear the financial burden of additional GST, may be at the rate of 17% of the value or additional GST @ 2%.

37. Learned Attorney General for Pakistan, however, stated that the Government/Executive to balance the market do adopt such measures to avoid unjust enrichment. Reference has been made by him upon the judgment in the case of *Mafatlal Industries Ltd. v. Union of India* [1997 (5) SCC 536], which has been relied upon by this Court in the case of *Facto Belarus Tractors Ltd. v. Government of Pakistan* (PLD 2005 SC 605) but we have pointed out to him that end user/consumer is not likely to be enriched what to talk unjust enrichment as the petrol or CNG is a consumable item and in fact the dealers shall also not become economically well off as the benefit of

increase in GST is to be passed on to the Government/State. Contrary to it, after recovery of increased GST with immediate effect in pursuance of the Declaration inserted in the Bill, market will become imbalanced as the traders/retailers dealing with essential items, which are exempted from GST under the Sixth Schedule read with section 13(1) of the Act, 1990 will increase the prices of essential items exorbitantly.

38. When we pointed out the above position to the learned Attorney General for Pakistan, the learned counsel for the FBR presented a clarification, which has been reproduced hereinabove, according to him wide publicity is being given for information of the consumers that items mentioned therein are exempted from GST but in the meanwhile the Media has been consistently reporting that in the garb of the Declaration, the Government/Executive has proposed to increase GST by 1% on amendment of the relevant provisions of the Act, 1990, but had given immediate effect to its recovery with the result that the prices of essential items have increased up to 15% or more. On this, we inquired from the learned counsel for the FBR as to why the prices are not being checked through Sales Tax Inspectors, he stated that instructions in this behalf have already been issued to all concerned. We are sorry to observe that despite issuance of clarification and the withdrawal of additional 2% GST, the prices of the essential items along with others have not increased by 1% only, but the same have been increased exorbitantly and are not likely to come to the level prevailing before the speech of Finance Minister. In this manner, the Fundamental Rights of the citizens enshrined in Articles 9 and 24 of the Constitution have been seriously violated, for which the

Government/Executive is required to take necessary measures/actions under sections 6 and 7 of the Price Control and Profiteering and Hoarding Act, 1977 to keep the prices consistent as per the Sixth Schedule read with section 13(1) of the Act, 1990.

39. Now turning towards the provisions of section 4 of the Act, 1931, enforceability of which depends upon the Declaration inserted by the Government in the Bill and as per sub-section (1) *ibid* the Declaration has been given the force of law with immediate effect, suffice it to observe that the Declaration in terms of section 3 does not have the status of legislation or even sub-legislation, therefore, for all intents and purposes, it does not have the force of law for the purpose of effecting the increased levy of GST, as it has been proposed in the Bill. As far as the word "law" is concerned, though the same has been used in various Articles of the Constitution, such as Articles 4, 8, etc., but has not been defined in the Constitution of 1973 separately.

40. It is to be noted that in Article 8 of the Constitution, in contradistinction to Article 4, the words "any custom or usage having the force of law" have been used, but it is settled that to give effect to a custom, usage or practice, evidence of such custom, usage or practice is to be laid, therefore, we have to confine ourselves to the extent of meaning of the word 'law' for the purpose of section 4 of the Act, 1931 as elucidated in the case of *Federation of Pakistan v. United Sugar Mills Ltd.,* (PLD 1977 SC 397) as well as *Gokula Education Foundation v. The State Of Karnataka* (AIR 1977 Kant 213). In the latter mentioned case, the word 'law' has been interpreted as under: -

> "6. The word 'law' has a particular meaning in legal parlance. The most standard definition of 'law' has been given by Salmond thus: -

> "Law is the body that principally recognised and applied by the State in the Administration of Justice. In other words, the law consists of the rules recognised and acted on by Courts of Justice."

It is clear therefrom, that it is only that rule which is capable of being enforced by the Court of law are recognised as 'law' and that which are incapable of being enforced by the Court of law, cannot be regarded as 'law'. Likewise, the answer to the question whether any rule of conduct has the force of law or not, must be found from the act whether it is enforced by the Courts of law. Another characteristic of 'law' is, it is rule of general conduct while administrative instructions relate to particular person. The other characteristics have been illustrated by the Supreme Court in *Sukhdev Singh v. Bhagatram*, thus:

> "The characteristic of law is the manner and procedure adopted in many forms of subordinate legislation. The authority making rules and regulation must specify the source of the rule and regulation making authority. To illustrate, rules are always framed in exercise of the specific power conferred by the statute to make rule. Similarly, regulations are framed in exercise of specific power conferred by the statute to make regulations. The essence of law is that it is made by the law makers in exercise of specific authority .....
>
> This again means that when a power, exercised by an official or by a Governmental organ, is challenged, legal authority therefore derived from existing law must be shown, and that no valid law can exist save that which is recognised as such by the Courts."

It is further to be noted that under Article 13(3) of the Indian Constitution the term "law" includes any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. For the sake of convenience, the same is reproduced hereinbelow: -

> "13. Laws inconsistent with or in derogation of the fundamental rights. - (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.
>
> (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.
>
> (3) In this article, unless the context otherwise requires-
>
> (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;
>
> (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
>
> (4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

Article 265 of the Constitution of India requires that no tax shall be levied or collected except by the authority of law. The Indian Supreme Court while interpreting the expression "authority of law" in the case of *Salonah Tea Company Ltd v. Superintendent of Taxes, Nowgoing* (AIR 1990 SC 772) = [1988 (33) ELT 249 (S.C)] held that in a society governed by rule of law, taxes should be paid by citizens as soon as they are due in accordance with law. Equally as a corollary of the said statement of law, it follows that taxes collected without the authority of law should be refunded because no state has the right to receive or to retain taxes or monies realized from citizens without the authority

of law. Under Article 70 of the Constitution of Pakistan, the procedure has been laid down for introduction and passing of legislative bills. According to it, the Bill after having been passed by both the Houses of Parliament is to be assented by the President, whereafter it would become a law enforceable at the courts of law. In the instant case, the Declaration, which we have already dilated upon, cannot be deemed to be a legislation or even sub-legislation for the purpose of section 4(1) of the Act, 1931 having force of law. Therefore, the Declaration being contrary to the provision of Article 70 of the Constitution, GST cannot be recovered at the increased rate pending the passing of the Bill by the *Majlis-e-Shoora* (Parliament) otherwise it would be tantamount to violation of Articles 9 and 24 and such recovery shall be deemed to be exploitation within the ambit of Article 3 of the Constitution. It may be noted that a law, which has not been enacted following the procedure prescribed in Article 70 of the Constitution, but merely on the basis of colonial legacy, and which impinges upon the Fundamental Rights of the citizens enshrined in the Constitution is not sustainable. As far as section 5 of the Act, 1931 is concerned, though it has already been amended as indicated hereinabove, but the mechanism mentioned therein is not workable and the recovery of GST on the basis of the provisions of sections 3 and 4 of the Act, 1931 in view of the ambiguity and absurdity of the language employed in section 5 cannot be enforced as ultimately if it is found that the GST has been recovered illegally, the same is required to be refunded in line with the law laid down in *Salonah Tea's case* (*supra*). This Court, as it has been pointed out hereinabove, in a number of judgments, has exercised power of judicial review and examined the constitutionality of different statutes.

Reference in this behalf may be made to the case of *Baz Muhammad Kakar v. Federation of Pakistan* (PLD 2012 SC 923). Primarily, such authority is derived by the Court, *inter alia*, from the provision of Article 8, which empowers this Court to declare any law or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by Chapter 1 of Part II of the Constitution, to the extent of such inconsistency, void.

41. Learned Attorney General for Pakistan on having argued the case at some length advanced two propositions, firstly, that it would be appropriate to read down the provisions of sections 3, 4 and 5 in exercise of the jurisdiction conferred by Article 268(6) of the Constitution, according to which, any court, tribunal or authority required or empowered to enforce an existing law shall, notwithstanding that no adaptations have been made in such law by an Order made under clause (3) or clause (4), construe the law with all such adaptations as are necessary to bring it into accord with the provisions of the Constitution. We ourselves are of the opinion that while examining constitutionality of a statute, a Court must exercise restraint and efforts should be made to save the statute instead of destroying it. Reference may be made to *Baz Muhammad Kakar's case*, but on having concluded hereinabove that sections 3 and 4 being *ultra vires* the Constitution and in derogation to Articles 9, 24 and 77 of the Constitution, it is not possible to allow such a law to remain on the statute book. Similarly, section 5 of the Act, 1931 on account of its absurdity and ambiguity, even if it is allowed to remain on the statute book, it would be of no use and purpose for the Government or the executive, therefore, while holding section 3 and 4 to be *ultra vires*

the Constitution, section 5 too is held to be redundant and the same would also serve no purpose if it is allowed to continue on the statute book. Reference in this behalf too is placed on *Baz Muhammad Kakar's case*.

42. Secondly, learned Attorney General stated that the judgment may be allowed to have prospective effect in line with the dictum laid down in *Malik Asad Ali's case* (*supra*). There is no cavil with this proposition, but the difference between the reported judgment and the instant case is that here we have declared provisions of section 3 and 4 *ultra vires* the Constitution, as well as derogatory to Article 77, therefore, it is not possible to allow it to continue in force. The said provisions also being against the Fundamental Rights guaranteed under the Constitution have to be declared void under Article 8 of the Constitution. However, the Legislature is not precluded from promulgating a law directly keeping in view relevant provisions of the Constitution i.e., Article 77 as well as Fundamental Rights of the citizens discussed hereinabove.

43. We are conscious of the fact that subject to generating funds, the Government machinery for the welfare of the citizens cannot run smoothly, therefore, despite having declared certain provisions of Act, 1931 *ultra vires* the Constitution, we have not issued direction for immediate refund of 1% GST which has been charged from the end users, but have allowed the Parliament to examine this aspect of the case subject to all just exceptions. However, if the levy of the GST is applied with retrospective effect, the amount of GST so charged shall be handed over to the Government otherwise proper orders shall be passed.

44. We have noticed that by means of the Bill, GST was proposed to be increased from 16% to 17% by amending section 3 of the Act, 1990 from 13.06.2013 on the value of taxable supplies made in course or furtherance of any taxable activity, but the notification issued by OGRA clearly indicates that GST is being charged on CNG on the increased rate of 26%, contents of the notification have already been reproduced hereinabove, and the increased recovery is being made under the provision of rule 20(2)(c) of the Sales Tax Act (Special Procedure) Rules, 2007, which too has been reproduced hereinabove. This recovery is absolutely contrary to section 3 as it has been sought to be amended in the Bill. Therefore, GST at the increased cannot be recovered unless so provided under the statute.

45. Mr. Salman Akram Raja, learned ASC, however, emphasized that in *Zaibtun Textile Mills' case* (*supra*), authority can be delegated to the Government for the purpose of effecting recovery of 9% additional GST. We are not in agreement with the learned ASC because we have taken into consideration the *ratio decidendi* and the principles laid down in the above referred judgments including *All Pakistan Textile Mills Associations' case* in respect of delegation of powers and in all the other case principle has been laid down that levy of tax has to be made by the Legislature but its enforcement in some of the case can be left at the disposal of Government/Executive because in any case the legislation has neither effaced itself nor has abdicated its authority to effect the recovery of tax or granting exemption or concession subject to following the principle of reasonableness and guidelines discussed in the case, which he has relied upon.

46. Learned Attorney General for Pakistan stated that this provision of law is not happily worded and recovery of 9% additional GST on CNG is in accordance with law.

We, thus, declare that the Federal Government has no lawful authority to impose or recover GST on CNG @ 26% and @ 17% on the value of taxable supplies made in the course or furtherance of any taxable activities with effect from 13.06.2013 until passing of the Finance Bill. The excess amount equal to 1%, i.e., 17% - 16%, of GST recovered on the petroleum products/CNG or any other taxable supplies w.e.f. 13.06.2013 onward is thus refundable to the consumers and the concerned authorities are directed to deposit it with the Registrar of this Court subject to passing of the Bill by or under the authority of *Majlis-e-Shoora* (Parliament). The observations following the procedure of its refund have already been made hereinabove. Similarly, the Government has also been directed to deposit 9% out of 26% of GST charged on CNG as per notification dated 13.06.2013 in the same manner. In respect of recovery of additional 9%, statement shall also be filed on behalf of the Government showing the amount of GST so recovered from the consumers under proviso to rule 20(2)(c) of the aforesaid Rules of 2007 on the value of CNG in addition to 16% GST imposed under section 3 of the Act, 1990 as this amount is also to be refunded to the consumers, for which appropriate order shall be passed subsequently.

47. As far as rules are concerned, those are to be framed under sections 51 and 71 of the OGRA Ordinance. A perusal of the said provisions indicates that rules cannot be framed for the purpose of levying additional GST. GST is to be levied on the taxable supplies in

furtherance of section 3 of the Act, 1990 and not by any rules or instrument which has conferred right upon them to impose the tax, therefore, the aforesaid rule, being contrary to the Act, is hereby declared *non est* and also violative of the provision of section 4 of the Act, 1990.

48. Above are the reasons for the short order of even date, which is reproduced hereinbelow: -

(i) The Government is not authorized to impose or increase Sales Tax from 16% to 17% on the value of taxable supplies, i.e. by inserting in the Finance Bill (Money Bill) 2013-14 a declaration under section 3 of the Provisional Collection of Taxes Act, 1931 [hereinafter referred to as 'the Act, 1931'] as such declaration neither has the status of legislation nor sub-legislation, therefore, it has no force of law.

AND

Immediate recovery of Sales Tax from 16% to 17% on the value of taxable supplies w.e.f. 13.06.2013 is unconstitutional being contrary to Articles 3, 9, 24 and 77 of the Constitution;

(ii) Under proviso to rule 20(2)(c) of the Sales Tax Special Procedures Rules, 2007, 9% in addition to the Sales Tax prescribed under section 3 of the Sales Tax Act, 1990 imposed or recovered from the consumers on CNG is unconstitutional and contrary to Articles 3, 9, 24 and 77 of the Constitution as well as section 3 of the Sales Tax Act;

(iii) Section 4 of the Act, 1931 as a whole is declared unconstitutional being contrary to Article 70 of the Constitution, which lays down the procedure for legislation;

(iv) Section 5 of the Act, 1931 does not lay down parameters for the purpose of refund of the recovered taxes to the

consumers, as such, in absence of any workable mechanism, it is not enforceable in its present form;

(v) As a consequence of above declaration, the Federal Government has no lawful authority to levy, impose and recover Sales Tax @ 17% from 13.06.2013 on the value of taxable supplies made in course or furtherance of any taxable activity until passing of the Finance Bill (Money Bill) 2013-14, which has already been tabled before the Majlis-e-Shoora;

(vi) The excess amount equal to 1% (17%-16%) of the Sales Tax recovered on the petroleum products/CNG or any other taxable supplies w.e.f. 13.06.2013 onwards, thus is refundable to consumers and concerned authorities accordingly are directed to deposit it with the Registrar of this Court subject to passing of the Finance Bill (Money Bill) 2013-14 by or under the authority of the Majlis-e-Shoora;

If the Sales Tax is imposed by the Majlis-e-Shoora to be recovered with retrospective effect, same shall be paid to the Government, otherwise appropriate orders will be passed for its disbursement;

(vii) The Government is also directed to deposit 9% out of 26% of the Sale Tax on CNG as per notification dated 13.06.2013 in the same manner as it has been noted above;

(viii) A statement shall also be filed by the Government showing the amount of Sales Tax recovered @ 9% under proviso to rule 20(2)(c) of the aforesaid rules 2007 on value of the CNG from the consumers in addition to declared Sales Tax of 16% imposed under section 3 of the Act, 1990 as this amount is also to be refunded to the consumers, for which appropriate order shall be passed subsequently;

(ix) As prices of essential commodities mentioned in the Sixth Schedule to the Act, 1990 have exorbitantly increased according to the media reports, therefore, Federal Government and the Provincial Governments are directed to take action under sections 6 and 7 of the Price Control and Profiteering and Hoarding Act, 1977 to keep the prices consistent as per the Sixth Schedule under section 13(1) of the Act, 1990 (Essential Commodities);

(x) Pending passing of the Finance Bill (Money Bill) 2013-14, Sales Tax shall be recovered from consumers on the taxable supplies including petroleum products and CNG at the rate prescribed under section 3 of the Sales Tax Act; and

(xi) The OGRA shall issue revised notification fixing prices of CNG as per above observations forthwith recovering Sales Tax @16% Sales Tax on taxable supplies till passing of Finance Bill (Money Bill) 2013-14 by the Majlis-e-Shoora.

The titled Civil Miscellaneous Application is disposed of in the above terms.

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad, the
21st June, 2013
APPROVED FOR REPORTING