IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE AMIR HANI MUSLIM

CIVIL APPEAL NOs. 800-L, 801-L & 802-L OF 2013
AND
CIVIL PETITION NOs. 1148/2013 & 1348/2013
AND
C.M.A. NOs. 278-L, 279-L, 285-L, 287-L, 288-L, 289-L, 5328 to 5332, 5378, 5463, 5464, 5492, 5493, 5515 to 5522 & 5524/2013

(On appeal from the orders dated 24.6.2013 & 9.7.2013 passed by Lahore High Court, Lahore in Writ Petition No. 7253/2013 and judgment dated 15.7.2013 passed by Islamabad High Court, Islamabad in WP No. 2939/2013)

Dossani Travels Pvt Ltd (CA 800-L/2013)

City Travels (Pvt) Ltd (CA 801-L/2013)

Super Travels Pvt Ltd (CA 802-L/2013)

Usman Air Travels through its CEO (CP 1148/2013)

M/s Golden Travel Services Pvt Ltd (CP 1348/2013)

... Appellants/Petitioners

VERSUS

M/s Travels Shop (Pvt) Ltd and others (CAs 800-L, 801-L & 802-L/2013)

Federation of Pakistan through Secretary M/o Religions Affairs and others (CPs 1148/2013 & 1348/2013)

... Respondents

For the Appellants: Mr. Afzal A. Haider, ASC
(In CAs 800-L to 802-L/2013)

For the Petitioners: Mr. Muhammad Ikram Ch, Sr. ASC
(In CPs 1148 & 1348/2013)

For the Applicants: Mr. Waseem Majid Malik, ASC
(In CMA 278-L,5492 & 5524/2013)

Mr. A.K. Dogar, Sr. ASC
(In CMA 279-L/2013)

Mr. Saeed Ullah Khan, ASC
(In CMA 285-L/2013)

Mr. Azhar Siddique, ASC
(In CMAs 287-L, 288-L, 5328 to 5331, 5463, 5464, 5493, 5521 & 5522/2013)

Mr. Muhammad Ikram Ch., Sr ASC
(In CMAs 289-L & 5477/2013)

Mr. Afzal A. Haider, ASC
(In CMA 5332/2013)

Mr. Mir Adam Khan, AOR
Mr. Nek Nawaz Khan Awan, ASC
(In CMA 5378/2013)

Qari Abdur Rasheed, ASC
(In CMAs 5515 to 5520/2013)

For FBR: Syed Arshad Hussain Shah, ASC
Mr. Mehmood A. Sheikh, AOR

For SECP: Mr. Naveed Ihsan, Departmental Representative

For CCP: Mr. Muhammad Bilal, Sr. ASC
Mr. Babar Bilal, ASC

For NADRA: Mr. Saqib Jamal, Manager Legal

On Court Call: Mr. Abdul Hayee Gillani, Additional Attorney General
Mr. Dil Muhammad Alizai, DAG
Mr. Jahanzeb Wahla, Standing Counsel.
Mr. Shahid Khan, Secretary,
Ministry of Religious Affairs.
Mr. Shahzad Ahmed, Joint Secretary, Ministry of Religious Affairs
Mr. Farid Khattak, Deputy Secretary, Ministry of Religious Affairs
Malik Saeed, Director Hajj, Lahore

For the Respondents: Mr. A.K. Dogar, Sr. ASC **(for respondent No.1)**

Mr. Azhar Siddique, ASC **(for respondent No. 4, 6, 10-12, 14, 16, 18, 20-22, 29, 30, 32-34, 58-60, 64, 66, 68, 78, 79, 85, 87, 89, 92 & 94)**

Qari Abdur Rasheed, ASC
(for respondent No. 65)

Date of Hearing: 12, 19, 26 & 27 of August, 2013

JUDGMENT

CIVIL APPEAL NOs. 800-L, 801-L & 802-L OF 2013

Through these appeals, by leave of the Court, the appellants have challenged the order dated 24.6.2013 vide which a learned Judge of the Lahore High Court vide an interim order in pending writ petitions directed that Ministry of Religious Affairs, Government of Pakistan (hereinafter to be referred to as the "MORA") should invite top 60 enrolled Hajj Group Operators (hereinafter to be referred to as the "HGO/HGOs") and 04 other HGOs which were given Hujjaj quota in the Hajj of 2012 for specifying the details of their respective packages and the price for a Haji; that the name of those companies should be displayed at the MORA (Ministry of Religious Affairs) website; that they be given seven days notice in writing as also by email for the bidding process; that the remaining quota for Hajj 2013 (which was retrieved from 19 HGOs on account of poor performance during the preceding Hajj) be allocated through a bidding process; that the candidates who would offer packages satisfying the requirements laid down in the impugned order and lowest bids should be given quota license of 50 Hujjaj each at a time. It was further directed that 20% cut on the allocation of Hujjaj quota as directed by the Kingdom of Saudi Arabia authorities (hereinafter to be referred to as the "KSA") would not apply to those HGOs who have been given quota through such bidding process.

2. The appellants' case is that they are well reputed companies owned and run by Pakistani citizens; that they are providing complete services to the pilgrims for Hajj and Umra for

many years and to the entire satisfaction of MORA; that they were granted Hajj quota in 2012 in accord with the Hajj Policy strictly on merit and in terms of the order passed by the learned High Court dated 4.10.2012 in W.P. No. 18155 of 2012; that they were allocated a quota of 48 Hujjaj the said year and they organized successful Hajj for clients in 2012; that on account of their good performance they were allocated quota for 48 Hujjaj as per the Hajj Policy of 2013; that a "Hajj Recognition Letter 2013" was also issued to them whereafter they started booking Hujjaj pilgrims who intended to perform Hajj 2013; that they gave passports, I.D. cards and other documents pursuant to which requisite number of accommodation was rented at Makkah and Madina; rent deeds were executed with Saudi citizens; that to their utter surprise, they were informed through letter No. F(1)/2013 HJO-14066 dated 27.6.2013 that the impugned order has been passed directing the petitioners in the said writ petition to participate in the auction to be conducted by MORA for purposes of allocation of quota of Hujjaj afresh; that the order passed by the learned High Court was arbitrary; against the law declared and cannot be sustained. Leave was granted by this Court vide order dated 30.7.2013 *inter alia* to consider:-

> *(i) whether the learned High Court sitting in Constitutional jurisdiction under Article 199 of the Constitution could interfere in the Policy Making Domain of the Executive?*

(ii) whether the Hajj Policy announced by Ministry of Religious Affairs was violative of any law or rules to warrant interference?

(iii) whether the Hajj Policy announced for the year 2013 was reflective of lack of transparency or malice?

(iv) whether the impugned order passed is violative of the law laid down by this Court in Al-Raham Travels and Tours (Pvt) Ltd Vs. Ministry of Religious Affairs, Hajj, Zakat and Ushr (PLD 2011 SC 1621)? And

(v) whether the petitioners could be condemned unheard?

3. Learned counsel for the appellants reiterated the submissions made at the leave granting stage.

4. Learned counsel for the respondents Mr. A.K. Dogar, Sr. ASC submitted:

(i) that the appellants had an alternate remedy of challenging the letter issued to them to participate in the bidding process vide letter dated 27.6.2013 issued by the MORA and instead of offering the bid, they challenged the order of the High Court before this Court which is not tenable in law;

(ii) that vide the impugned order the bidding process was carried out transparently and 19 persons were allocated quota;

(iii) that the so-called third party evaluation in the selection process for Hujjaj carried out by the MORA cannot be sustained as the said selection had been set aside by the High Court vide order dated 5.7.2013 (in C.M. No. 1837/2013 in W.P. No. 7253/2013), a copy of the order is at Page 376 of CMA 286-L of 2013;

(iv) that if any policy framed by the government is in conflict with any provision of law or is violative of fundamental rights, the same can be called in question before the High Court under Article 199 of the Constitution and the order passed does not reflect any jurisdictional defect to warrant interference by this Court. In support of the submissions made, he relied on AL-RAHAM Travels and Tours (Pvt.) Ltd. versus Ministry of Religious Affairs, Hajj, Zakat and Ushr (2011 SCMR 1621 at page 1642);

(v) that every citizen has been granted freedom of free business and profession under Article 18 of the Constitution and the Hajj Policy insofar as it limits the grant of quota to a class of citizens and excludes the respondent-writ petitioners is violative of Article 18(b) of the Constitution. In support of the submissions made, he relied on Arshad Mehmood versus Government of Punjab through Secretary, Transport Civil Secretariat, Lahore PLD 2005 SC 193 at 231 and 233. (Para 7 at Page 197);

(vi) that the selection process of HGOs through open auction as directed by the High Court vide the impugned order is in accord with the command of the Constitution in particular Article 18. Reference was made by learned counsel to a judgment of this Court in Shaukat Ali versus Government of Pakistan (PLD 1997 SC 342 at 346);

(vii) that the classification of HGOs in terms of the services/facilities provided to Hujjaj at Macca and Madina into blue, green and white accommodation is discriminatory and violative of Article 25 of the Constitution which has rightly been annulled by the High Court. The classification of this kind is in derogation to the tenets of Islam. Reference was made to The State v. Zulfiqar Ali Bhutto (PLD 1978 Lahore 523, 663);

(viii) that the appellants and petitioners were put on notice by MORA vide letter dated 27.6.2013 and it is not open for them to contend that they have been condemned unheard. Reliance was placed by learned counsel on AL-RAHAM Travels and Tours (Pvt.) Ltd. versus Ministry of Religious Affairs, Hajj, Zakat and Ushr (2011 SCMR 1621 and 1641, Paras 44 and 45).

5. M/s Nek Nawaz Khan Awan, learned counsel for applicants (in CMA No. 5378 of 2013), Waseem Majid Malik, learned counsel for applicants (in CMA 278-L of 2013) and Saeed

Ullah Khan, learned counsel for applicants (in CMA 285-L of 2013) adopted the arguments of Mr. A.K.Dogar, Sr. ASC.

6. Mr. Azhar Siddique, ASC who was representing 29 respondents (in CMAs No. 5328 to 5333 of 2013) at the outset adopted the arguments of Mr. A.K.Dogar, Sr. ASC. In addition to this he submitted:

i) that the appellants have not approached this Court with clean hands;

ii) that they were only allowed provisional quota in terms of order dated 4.10.2012 pursuant to the order passed in Writ Petition No. 18156 of 2012;

iii) that some of the appellants went to the High Court and challenged the impugned order (W.P. No. 2939 of 2013) and they are not entitled to seek any relief by this Court;

iv) that MORA overstepped its jurisdiction in appointing chartered accountants and it is violative of the order of the High Court which has been placed on record at Page 376 in C.M. No. 286-L of 2013);

v) that the Hajj Policy insofar as it dedicates 60% of quota to government and remaining to private HGOs is bad in law and violative of Article 18 of the Constitution;

vi) that Hajj being a sacred duty in Islam, the State should have arranged for Hajj at a more inexpensive rate and the impugned order has addressed the plight

of millions who could not afford to perform Hajj on account of the expenses involved.

7. Mr. Abdul Hayee Gillani, learned Additional Attorney General for Pakistan submitted that allocation of Hajj quota to 19 companies is in accord with the Hajj Policy 2013; that there were 720 companies in all and the quota allotted to the above mentioned 19 companies was retrieved from old companies on account of their poor performance in the preceding year; that MORA registered 227 new companies in 2012 pursuant to the observation/direction made by this Court in Messrs Al-Raham Travels and Tours (Pvt) Ltd v. Ministry of Religious Affairs, Hajj, Zakat and Ushr (2011 SCMR 1621); that in 2013 it was decided by MORA not to register new companies (Hajj Policy Para 18(ii); that MORA carried out due scrutiny/evaluation of the existing HGOs in a transparent manner and the quota allotted is based after the said exercise has been carried out and in the light of a third party evaluation i.e. by chartered accountants.

8. One of the arguments raised before the learned High Court which finds specific mention in the grounds urged in the body of the writ petition (bearing No. 7253 of 2013) was that in the earlier round of litigation (Writ Petition No. 18091 of 2012), the learned High Court vide order dated 1.10.2012 had called for comments from the Competition Commission and the Commission had made elaborate recommendations but the MORA has not complied with those recommendations. Mr. Shahzad Ahmed, Joint Secretary, Ministry of Religious Affairs was specifically confronted with the above recommendations. On Court query, he submitted

that some of the recommendations of the Competition Commission have already been complied with and in formulating the next Hajj Policy, the MORA would examine those recommendations with a view to comply with those as far as possible. Those recommendations were as follows:

> ***"F. RECOMMENDATIONS***
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> *58. Keeping in view the background and the findings, MORA may consider the following two set of suggestions. These suggestions, if implemented, can address the competition and transparency issues that have been raised. The first set of suggestions assumes that the MORA continues with the quota system in place. The second set of suggestions allow for the possibility of free competition within the overall quota allocated for the HGO Scheme.*
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> *59. In case MORA wants to continue with the quota allocation policy to HGO's it is recommended as follows:*
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> *(a) Currently MORA is allocating Hajj quota only based on Hajj operations performed. Such criteria provide undue advantage to the HGOs who have performed maximum number of Hajj operations, whereas it places the new entrants and the HGOs who have performed lesser number of hajj operations at a competitive disadvantage. The allocation of quota should be decided, in addition to experience, on various qualitative variables which inter alia includes:-*
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> *(i) Past performance of Hajj or Umrah or Ziyarat Operations,*
> *(ii) Economy of financial packages offered,*
> *(iii) Quality of management and services provided, and*
> *(iv) The financial strength of the HGOs.*
>
> *Weight-age should be allocated to these variables in a manner which does not give undue consideration to experience only.*
>
> *(b) MORA shall also allocate a specific percentage of hajj quotas to the new entrants to encourage entry of new players in the market and such quota may be allocated based on the separate criteria.*

(c) MORA shall ensure that the HGOs to whom the quota is allocated, should perform the Hajj operations on their own and this fact should also be verified from their financial statement. In case, any HGO continues with such practices, MORA should consider it for blacklisting for an appropriate period.

(d) All the variables mentioned above should be evaluated by a third party, preferably a chartered accountancy firm approved by ICAP, to ensure transparency of the process.

(e) MORA should consider forming a panel, whose responsibility will be to monitor all the HGOs. All the complaints against the HGOs shall also be reviewed by that panel. The recommendations and the finding of that panel shall be taken into account when allocating the quota to the HGOs. The panel shall be completely independent to ensure transparency of the process.

60. In the event that MORA would like to consider opening up the market for competition, as has been done in some other jurisdictions, here are some suggestions it should consider.

(a) MORA could enlist/approve/license HGO's that meet the criteria as recommended in the previous paragraph and then allow them to offer services to first come basis to intending pilgrims. Such a system would allow the market, most importantly the intending pilgrims, to decide which HGO they prefer. The enlistment/license could be reviewed based on the feedback received from the market.

(b) In order to avoid multiple bookings for the same space, MORA should setup an electronic real-time system of booking spaces for the hajj. An appropriate comparison would be with the airline ticket booking system used by airlines and their agents. The intending pilgrims could be identified using their computerized identity card number.

(c) Moreover, in order to discourage fake bookings and to discourage middlemen appropriate safeguards, including meaningful penalties, time lines and ban on transferring of booking, should be implemented in the system.

61. The above recommendations are made in order to ensure that the competitiveness and transparency in the Hajj Sector is achieved by providing a level playing field to all the concerned undertakings."

9. In the written statement filed by the Secretary MORA dated 30.7.2013, it was submitted that:-

i) *That number of writ petitions are pending before different High Courts throughout Pakistan against the Ministry of Religious Affairs on different issues with regard to allocation of revised quota to private HGOs and redistribution of the quota of 19 retrieved from different HGOs for their bad performance during the Hajj-2012. W.P.No. 7253/13 titled Travel Shop Vs. FOP etc is pending in the Lahore High Court, Lahroe in which bidding process was initiated and 19 companies were qualified by the Lahore High Court, Lahore through its order dated 22.07.2013 and MORA was directed to issue quota to these qualified HGOs. The next date in the subject case has been fixed on 01.08.2013.*

ii) *That aggrieved by the proceedings of the Lahore High Court, Lahore, certain qualified HGOs challenged the proceedings and actions of MORA done in compliance with order of the Lahore High Court, Lahore in W.P. No. 7253/13 before the Peshawar High Court in W.P. No. 1771-P/13 and the Peshawar High Court was pleased to suspend the qualified list placed on the Website of MORA and the redistribution process started by the MORA as a result of 20% cut imposed by the Kingdom of Saudi Arabia. The next date in the subject case has been fixed on 06.08.2013.*

iii) *That Sindh High Court at Karachi was pleased to pass an order dated 25.07.13 in Suit No. 796/13 titled as Universal Travels Vs FOP. The order also addresses the distribution of quota amongst the HGOs after upholding the policy decision of the Federation to reallocate the revised quota in the ratio of 60:40 between the Government and Private scheme. It however, laid operational restrictions on MORA such that the process in compliance with the orders of Sindh High Court would be completed by 4th September, 2013; whereas, first flight is scheduled on 08.09.13 and leaves little to no room in organizing Hajj pilgrims both in Pakistan in KSA.*

iv) *That the order provides for MORA to seek clarification on the methodology imposed.*

v) That if orders of Sindh High Court are complied with or implemented by MORA, then the orders passed by different High Courts cannot be complied with or implemented by MORA, hence all these writ petitions necessitate the intervention of this August Court to pass an order for consolidation of all the cases pending in the different High Courts.

vi) That particularly, in the presence of the orders of Sindh High Court, timely Hajj operation cannot be ensured and, therefore, the restriction imposed in the aforesaid order may be relaxed and the said suit may also be consolidated and the record of the suit may be requisitioned for appropriate order giving a fair chance to MORA to operate smoothly for Hajj operation 2013 within the prescribed limitation of time which has already lapsed.

It is, therefore, most respectfully prayed that all the cases pending before the different High Courts throughout Pakistan be combined and consolidated for passing an appropriate order such that the Hajj October, 2013 is organized timely and smoothly in the public interest.

Dated: 30.07.2013

Sd/-
Shahid Khan
Secretary
M/o Religious Affairs
Government of Pakistan
Islamabad.

10. Yet another report was submitted about the arrangements made by the MORA on 19.8.2013 in connection with Hajj 2013 wherein it was averred as follows:-

"The Ministry of Religious Affairs readjusted share of Government and Private Hajj Scheme in the ratio of 60:40 of reduced quota in June-2013, consequent upon reduction of 20% Hajj quota by Saudi Government across the board. Accordingly revised quota of enrolled HGOs was notified which was challenged by few HGOs in the High Court of Sindh, Karachi. The Honorable High Court of Sindh in its order dated 25.07.2013 & 29.7.2013 in Suit No. 796/2013 & 895/2013

respectively, upheld the decision of the Government regarding adjustment of Hajj quota in the ratio of 60:40% between Government and Private Hajj Scheme. However, honorable High Court issued directions vide above referred orders for receipt of applications and their uploading on the website within a specific time frame. The petitioners in Sindh High Court Suit No. referred to above also filed CMA in the Honorable Supreme Court, Lahore Registry, Lahore which was fixed on 12.8.2013 and there after on 19.8.2013.

The Ministry of Religious Affairs fixed last date of Ramadan as cutoff date for receipt of applications from the enrolled HGOs in accordance with revised quota allocation. A meeting of petitioners companies in the Sindh High Court, thereafter, was convened in the Ministry on 14.8.2013 which was also attended by their representative body i.e. Hajj Organizer Association of Pakistan (HOAP). After marathon deliberations a consensus agreement was reached and documented where in petitioners companies were allocated additional quota of 527 on pro rata basis with the understanding that petitioners companies would withdraw all pending litigation against Ministry. Copy of the agreement is attached for kind perusal. Further in the light of this agreement the Ministry has revised quota allocation to enrolled HGOs including 19 new companies which were allocated quota in accordance with the provision of Hajj Policy-2013 and as per directions of the Honorable Supreme Court interim orders dated 30.7.2013. The final list of 734 companies has been uploaded on the website of respondent Ministry on 17.8.2013.

Sd/-
On behalf of the respondent Ministry
Farid Islam Khattak
Deputy Secretary
Ministry of Religious Affairs
Government of Pakistan
Islamabad."

11. We have given careful consideration to the facts and circumstances of these cases as also to the submissions made by learned counsel for the parties.

12. The stance of MORA before the High Court and this Court has been that there was mismanagement during Hajj 2010 which was taken note of by this Court in (Corruption in Hajj Arrangements in 2010 PLD 2011 SC 963); that in the light of the directions/observations given by this Court, structural changes were incorporated in the Hajj Policy 2011 and the process for further improvement of Hajj Policy continued up to framing of the current Hajj Policy, 2013. The salient features of the Hajj Policy appear to be as follows:-

i) The applications were received on first cum first serve basis;

ii) MORA offered three categories of accommodation and the expense was worked out accordingly;

iii) The share of Government and Private Schemes was fixed initially as 50:50 i.e. 18605 for each scheme. However on account of reduction of Hajj quota by the Saudi Government, the share of Government and Private Scheme was readjusted to 60:40;

iv) The Cabinet approved the scheme on 20.2.2013 and recognition letters were accordingly issued;

v) HGOs were selected and quota was allocated from amongst the companies already registered with MORA. Their past performance and evaluation report by Chartered Accountants were taken into account during selection; and

vi) The quota retrieved from 19 companies on account of their poor performance in Hajj 2012 was allotted to

registered 19 HGOs under the Hajj Policy after due scrutiny of their credentials by the Chartered Accountants.

13. The respondent-writ petitioners had sought judicial review of Hajj Policy by invoking Article 199 of the Constitution, *inter alia* on the ground that the said policy was violative of the Fundamental Rights enshrined in Articles 18 and 25 of the Constitution.

14. We judges are mere mortals but the functions we perform have divine attributes. By the nature of our calling, we dispense justice under the law and provide relief. However, "justice" in its generic sense is a relative concept and unless regulated by law, the dispensation, notwithstanding the noble intent would be rather subjective. While exercising powers under Article 199(1) of the Constitution, Courts should always keep in view the following three parameters of their jurisdiction:-

(i) A High Court is the apex court in the province or in the case of Islamabad, of the capital territory, but they are the creatures of the Constitution and they have only that jurisdiction which has been conferred by the Constitution or under any law for the time being in force. Article 175(2) specifically mandates, "*no court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.*"

(ii) The power of the High Court under Article 199 is "subject to the Constitution" and it can make any of the following orders, "if it is satisfied that no other adequate remedy is available,"

(i) "directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, a Province or a local authority, to refrain from doing anything he is not permitted by law to do, or to do anything he is required by law to do; or

(ii) declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect; or

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

(i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

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

(c) on the application of any aggrieved person, make an order giving such directions to any person or authority, including any Government exercising any power or performing any function in, or in relation to, any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II." (Fundamental Rights as interpreted by the Supreme Court of Pakistan).

(iii) The ambit and scope of the power of High Court under Article 199 of the Constitution is not as wide, as of the Supreme Court under Article 187 of the Constitution to pass any order or issue any direction or decrees for doing "complete justice".

15. In the cases in hand, the learned High Court had *inter alia* to address the basic question whether the relief claimed was a Fundamental Right and whether the Hajj Policy was violative of the said right. A reference to those provisions/Fundamental Rights violation of which was alleged would be in order:-

> ***18.*** *Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:*
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> *(a) the regulation of any trade or profession by a licensing system; or*
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> *(b) the regulation of trade, commerce or industry in the interest of free competition therein; or*
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> *(c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons."*
>
> **25.** (1) All citizens are equal before law and are entitled to equal protection of law.
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> (2) There shall be no discrimination on the basis of sex.
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> (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children."

16. A bare perusal of Article 18 would show that the right of freedom of trade, business or profession is not an absolute right rather it is qualified by the expression, "*subject to such qualifications, if any, as may be prescribed by law"* and there are three exceptions which stipulate: (a) the regulation of any trade or profession by a licensing system; (b) the regulation of trade, commerce or industry in the interest of free competition therein; and (c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons". These qualifications empower the government to lay down a policy and the Hajj Policy has been framed in terms of the power of the government stipulated in the foregoing exceptions. In Messrs Raham Travels and Tours (Pvt) Ltd v. Ministry of Religious Affaris, Hajj, Zakat and Ushr (2011 SCMR 1621), this Court had repelled

such a contention with reference to Hajj Policy by relying on a judgment of the Indian Supreme Court in AIR 1963 SC 385 and a judgment of this Court in Farooq Ahmed Khan Leghari versus Federation of Pakistan (PLD 1999 SC 57).

17. The Constitution of a country is an organic whole and the import of a certain provision has to be construed in the context of the overall scheme of the Constitution. By qualifying the right to business and trade, the Constitution makers wanted to create a balance between the societal needs and the rights of an individual. In Pakistan Muslim League (N) through Khawaja Muhammad Asif M.N.A. and others v. Federation of Pakistan through Ministry of Interior and others (PLD 2007 SC 642), this Court had occasion to dilate upon this "balance" and observed as follows:-

> *"28. The Fundamental Rights can neither be treated lightly nor interpreted in a casual or cursory manner but while "interpreting Fundamental rights guaranteed by the Constitution, a cardinal principle has always to be borne in mind that these guarantees to individuals are subject to the overriding necessity or interest of community. A balance has to be struck between these rights of individuals and the interests of the community. If in serving the interests of the community, an individual or number of individuals have to be put to some inconvenience and loss by placing restrictions on some of their rights guaranteed by the Constitution, the restrictions can never be considered to be unreasonable."*

18. In Information Systems Associates Limited through (CEO) v. Federation of Pakistan through Secretary Information Technology and Telecommunication Division Ministry of Information Technology and another (2012 CLC 958), a Division Bench of the High Court of Sindh commented on the ambit and import of Article 18 of the Constitution and held as under:-

> *21. From the plain reading of the above Article, it consists of two parts. The first, which confers upon a citizen a right to choose his profession and business, etc. and is objected towards enabling the citizen to explore and adopt the best for his future and the means of his living and earning; and the best for his expression and recognition of his skill and the ability. However, this right is not absolute and unqualified, rather the Article itself permits the State through proper legal means to impose certain qualification for the exercise of the right, without possessing which, it cannot be so exercised. Such qualification may also be prescribed for a person who intends to conduct a particular business or trade, which may involve some special skill and the expertise. The second part of the Article, permits only such profession or the business, etc. which is "lawful". Meaning thereby that any unlawful profession, etc. shall not be protected under this Article. The expression "lawful" appearing in the Article has been used in contradistinction to the word "unlawful".*

19. The reliance of learned counsel for the respondents Mr. A.K. Dogar, ASC on a judgment of this Court in Arshad Mehmood v. Government of Punjab (PLD 2005 SC 193) would not be tenable as in the said judgment, a monopoly was created in favour of one bus operator and all the rest bus operators were knocked out of business by insertion of section 69-A in the Provincial Motor Vehicles Ordinance, 1965 by Punjab Motor Vehicles (Amendment) Ordinance, 1999. While declaring the said provision of law to be *ultra vires* of the Constitution, the Court held as follows:-

> *"It may be noted that appellants and the respondents both are similarly placed being owners of stage carriages and prior to the grant of franchise to the private respondents, appellants were in possession of valid route permits for plying their stage carriages on the specified routes but their route permits stood cancelled due to grant of franchise to the respondents in view of the provisions of section 69-A of the Ordinance.*
>
> *It means that section 69-A of the Ordinance has created a classification between franchise holders and appellants-transporters. Such classification is not permissible under Article 25 of the Constitution, because the*

> *differentia between both the classes must have rational nexus to the object, sought to be achieved by such classification. As such we are of the opinion that section 69-A of the Ordinance is also violative of Article 25 of the Constitution."*

20. It was also argued on behalf of the respondents that the Hajj Policy 2013 was violative of the law laid down by this Court in Messrs Al-Raham Travels and Tours (Pvt) Ltd v. Ministry of Religious Affaris, Hajj, Zakat and Ushr (2011 SCMR 1621). In the said case, the petitioners had challenged the judgment of the learned Division Bench of the Lahore High Court whereby the policy direction given in Hajj Policy 2011 limiting the selection of HGOs of Hajj 2011 to the persons rendering services during last Hajj 2010 or preceding years was declared illegal, without lawful authority and of no legal effect. The said judgment of the learned Division Bench (dated 6.6.2011) was set aside by this Court by holding that:

> *"We may observe that every year such litigation is brought to the Court, however, we expect that in future the Government of Pakistan will announce the Hajj Policy well in time and process the applications submitted by the Tour Operators, pending before the Ministry within a reasonable period of time, after providing proper opportunity, if need be, keeping in view of the guidelines given by the host country."*

21. Thus even in the said judgment, interference by the High Court under Article 199 of the Constitution in the Hajj Policy framed by the government was not sustained.

22. In the case in hand, the Hajj Policy was framed by the MORA (Ministry of Religious Affairs) which was duly approved by the Cabinet. The ratio of Government and Private Hajj Scheme was readjusted from 50:50 to 60:40 on account of the 20% decrease in

the Hajj quota by the Saudi Government. The quotas were allocated to registered companies on the basis of their performance in the preceding Hajj and evaluation by the Chartered Accountants.

23. The appellants, it is not denied, were duly registered HGOs. They were also given quota for the preceding year (2012) and had carried out the task without any complaint whatsoever. After due scrutiny they were allotted quota which was retrieved from 19 HGOs as those were not given quota for the current year on account of their poor performance during the preceding year. It is not denied that the appellants had started booking Hujjaj pilgrims who intended to perform Hajj 2013 and had even arranged their accommodation by executing rent deeds with Saudi citizens. It was at that stage that the respondent-writ petitioners challenged the Hajj Policy, *inter alia*, on the ground that the same was discriminatory and based on mala fide. However, neither in the entire body of the constitution petition filed before the learned High Court nor in the arguments addressed before this Court, any specific incidence of mala fide was pointed out; there was no allegation that appellants were given quota on account of any connection with some individual of political influence or any official in the MORA; or that any individual in the said Ministry had allotted the quota for personal gain. *Mala fide* is a question of fact and has to be specific and not vague in absence of which an order passed or policy framed by the competent authority cannot be annulled on this ground alone. In Dr. Akhtar Hassan Khan v.

Federation of Pakistan (2012 SCMR 455), dilating on *mala fide* as a ground for judicial review, this Court at page 486 held as follows:-

> *"The allegations of mala fides and of the impugned exercise being collusive are questions of fact requiring factual inquiry. It is by now a well established principle of judicial review of administrative action that in absence of some un-rebuttable material on record qua mala fides, the Court would not annul the order of Executive Authority which otherwise does not reflect any illegality or jurisdictional defect. In Federation of Pakistan v. Saeed Ahmed Khan (PLD 1974 SC 151), this Court was called upon to dilate upon the mala fides as a ground for exercise of power of judicial review of administrative action and the Court observed as follows:--*
>
> > *"Mala fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of mala fides. As has been pointed out by this Court in the case of the Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14), mala fides must be pleaded with particularity, and once one kind of mala fides is alleged, no one should be allowed to adduce proof of any other kind of mala fides nor should any enquiry be launched upon merely on the basis of vague and indefinite allegations, nor should the person alleging mala fides be allowed a roving enquiry into the files of the Government for the purposes of fishing out some kind of a case.*
> >
> > *"Mala fides" literally means "in bad faith". Action taken in bad faith is usually action taken maliciously in fact, that is to say, in which the person taking the action does so out of personal motives either to hurt the person against whom the action is taken or to benefit oneself."*

24. We are conscious that the impugned order of the learned High Court is an interim order and ordinarily this Court does not interfere at that stage. However, this Court granted leave

to appeal because the learned High Court, we may observe with respect, with the noble object of making the Hajj cheaper by directing allocation of quota through bidding process, not only modified/substituted the Cabinet's decision with its own but also practically decided the writ petitions. The Court directed the MORA that the quota retrieved from 19 HGOs who had not performed well in terms of the scrutiny carried out by the MORA should be allocated through bidding process. This order was passed even without hearing the appellants who had already been allotted Hujjaj quota for Hajj 2013; had booked the intending Hujjaj and even had arranged for their accommodation in KSA. The order also partly disturbed the Hajj arrangements. This set a precedent and other HGOs also started filing petitions. Writ petitions were filed in Sindh, Peshawar and Islamabad High Courts. The arrangements made by MORA and private HGOs for Hajj which is a time bound operation were adversely affected. This required a prompt intervention and adjudication at the Supreme Court level so that divergent opinions of various High Courts may not further disturb the Hajj arrangements. Pursuant to direction of this Court, Secretary MORA, Mr. Shahid Khan appeared on 30.7.2013, the day the leave granting order was passed, and explained through concise written statement as to how the MORA was facing difficulty in giving effect to the Hajj Policy 2013 on account of various interim orders passed by the learned High Court of Sindh, Peshawar High Court and the Lahore High Court, Lahore. According to him, "*as per the Hajj Policy, 2013 revised on account of 20% cut by the Saudi Government, the Ministry has to allocate the*

quota in the ratio of 60:40 between the Government and private sector; that a major part of the quota available has already been allocated; that the HGOs who were granted licenses have already made elaborate arrangements for Hujjaj and that the first flight for Hujjaj is scheduled for 8.9.2013; that if the Ministry is to comply with the various interim orders passed by the High Court of Sindh or Peshawar High Court and Lahore High Court it would not be possible for it to organize the Hajj Policy in terms of its settled schedule." The quota available to Government of Pakistan for Hujjaj is regulated by the government of KSA (Kingdom of Saudi Arabia) and within the given quota, it fixes a certain ratio between the government sponsored category and the private scheme. It is not denied that the HGOs were allocated quota after scrutiny which *inter alia* includes evaluation carried out by registered firms of Chartered Accountants. The allocation of Hajj quota through bidding process was neither suggested by the MORA at any stage nor there is anything on record that it was ever suggested by the Hajj Organizers Association of Pakistan (HOAP) which is a representative body of the HGOs. Besides the task of allocating such quotas and making arrangements for Hajj fell within the policy making domain of MORA and in absence of any illegality, arbitrariness or established mala fides, it was not open for the learned High Court to annul the policy framed by the competent authority.

25. There is yet another aspect. The HGOs are not driven by charitable considerations. It is the profit motive which creates the interest. Through bidding process, the lowest bidder who is

awarded the Haj quota, would not bear the Haj expenses of Hujjaj from his pocket. To ensure his profit, he will rent cheapest possible accommodation and other services and thereby compromise with the quality to the utter inconvenience and discomfort of Hujjaj. There is no effective mechanism whereby Hajis would be able to voice their grievance. Most of them would have suffered the agony and discomfort in a stoic manner as if this too was part of the spiritual exercise ordained by Allah Almighty.

26. One of the seminal principles of the Constitution of Islamic Republic of Pakistan is the concept of trichotomy of powers between the Legislature, Executive and the Judiciary. This principle underpins the rationale that framing of a government policy is to be undertaken by the Executive which is in a better position to decide on account of its mandate, experience, wisdom and sagacity which are acquired through diverse skills. The Legislature which represents the people enacts the law and the law so enacted acquires legitimacy. The judiciary on the other hand, is entrusted with the task of interpreting the law and to play the role of an arbiter in cases of disputes between the individuals *inter se* and between individual and the State. We may remind ourselves that judiciary neither has sword nor purse. The legitimacy and respect of its judgments is dependent on peoples' confidence in its strict adherence to the Constitution, its integrity, impartiality and independence. In changing times and judicialization of political issues, a certain degree of judicial activism by fearless and impartial judiciary is also essential for maintaining its integrity and people's trust. In most of the modern democracies, judiciaries

have been called upon to provide wider meanings to various provisions of the Constitution so as to meet the challenges of modern times and to fill the gap between the law and the requirements of substantive justice. Every institution has to play its role in enforcing the Constitution and the law. It is a multi-disciplinary exercise. However, implementation of rule of law is the primary function of judiciary. This role is multi-dimensional and the most challenging facet of this role is to keep various institutions and the judiciary itself within the limits of their respective powers laid down in the Constitution and the law. The legitimacy of its judgments does not arise from the beauty of the language or the use of populist rhetoric. Rather it radiates from the dynamism reflected in interpreting the Constitution and in particular its Fundamental Rights provisions, in judicial restraint displayed in deference to the principle of trichotomy of powers, and in an impersonal and impartial application of law.

27. In contemporary age, there has been a significant growth in the judicial review of administrative actions and the grounds on which the Courts interfere have been expanded. This expansion, however, *"has taken place in the shadow of competing concerns of 'vigilance' and 'restraint' .....and it is faithfulness to these dual concerns of vigilance and restraint which produces the unique supervisory jurisdiction which is the hallmark of judicial review."*[1]. If the Courts fail to maintain this delicate balance, none

[1] See generally Fordham, Judicial Review Handbook (2nd ed., 1997) pp.148-177. See also Fordham, 'Surveying the grounds: Key themes in judicial intervention' in Leyland and Woods (eds.), Administrative Law Facing the Future (1997) p.195.

else but people's confidence in the judiciary would be the worst victim. As aptly observed by Radford:

> *"One of the principal aims of a system of judicial review must be to maintain a high level of public confidence in the administrative decision making process and this must also be borne in mind in assessing the level of judicial intervention which is desirable. It can be argued that the courts' desire to achieve a fair and just result in an individual case must be tempered with a commitment not to interfere unduly with the achievement of policy objectives. However, public confidence in the administrative system may also be undermined if blatantly unfair or illegal decision are permitted to go unchecked."*[2]

28. A comparative analysis of the constitutional law from various jurisdictions would indicate that the Courts have deferred to the decisions of the administrative bodies and those entrusted with the policy making functions of the Executive if there was no violation of law. In his seminal book "Judicial Review of Administrative Action: A Comparative Analysis", Hilary Delany gives a brief survey of the precedent case law of the Canadian Supreme Court reflective of this deference. He writes:

> *"The judiciary in this jurisdiction have also increasingly been developing a doctrine of curial deference, although they have not examined the rationale behind it to the same extent as their Canadian counterparts. There were signs of a movement in this direction in decisions such as O'Keeffe v. An Board Pleanala*[3] *where Finlay C.J. stated that planning questions have been firmly placed within the jurisdiction of planning authorities and An Board Pleanala which are expected to have special*

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[2] As Radford has commented in "Mitigating the democratic deficit? Judicial review and ministerial accountability' in Leyland and Woods (eds.), Administrative Law Facing the Future (1997) at p.57 'it is altogether appropriate that the judiciary should be alert to the dangers of straying into areas of policy, but their caution also serves, despite its far-reaching impact, to highlight significant limitations on the legitimate scope of judicial review.'

[3] [1993] 1 IR 39, 71-72. See also O'Reilly v. O'Sullivan High Court (Laffoy J.) 25 July 1996; Ni Eili v. Environmental Protection Agency High Court (Lavan J.) 2 February 1998.

> *skill, competence and experience in such matters. Similarly, in ACT Shipping (PTE) Ltd v. Minister for the Marine*[4] *Barr J. stressed that the court should be loathe to interfere with intra vires administrative decisions, 'particularly where the decision maker is acting within his own area of professional expertise.'*

29. A similar deference has been shown by this Court in several cases. In Watan Party v. Federation of Pakistan (PLD 2013 SC 167), a public interest petition was filed wherein a direction was sought to the Federal Government regarding the Thal Coal Reserves Development Project and the argument raised was that the government policy with regard to the said project was neither pragmatic nor bona fide. This Court while dismissing the petition observed as under:-

> *"7. We are afraid that at the instance of petitioners, in order to expedite the progress of the Project, we cannot assume the functions of policy making or determining the priorities of various development projects in the country, which are the exclusive domain and functions of the Federal and Provincial Government, as the case may be, who have their own ministries, departments, commissions and consultants, etc. for policy making, determining the priorities of various development projects and its implementation. It is pertinent to mention here that under the scheme of the Constitution having its structure based on trichotomy of power amongst its different organs i.e. legislature, executive and judiciary, each of its organ has to work and exercise its authority strictly within its mandate, without encroaching upon or usurping the jurisdiction/functions of any other organ of the State.*
> *8. From the bare reading of the Constitution, particularly, Articles 29 and 38 of Chapter 2, Part-II, relating to principles of policy, it is evident that policies are to be made by the respective Federal and Provincial Governments and all decisions regarding their implementation are also to be taken by them on the basis of determined priorities of different projects and availability of financial*

[4] [1995] 3 IR 406, 431. See also the *dicta* of O'Flaherty J. in Faulkner v. Minister for Industry and Commerce [1997] ELR 107 that '[w]e do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis.'

> *resources at their disposal. Obviously, this exercise cannot be ordinarily interfered with by this Court by invoking its jurisdiction under Article 184(3) of the Constitution, unless shown to be mala fide or in violation of the fundamental rights guaranteed under the Constitution to every citizen of this Country, thereby affecting the interest of public at large."* (Emphasis is supplied)

30. In Dr. Akhtar Hassan Khan v. Federation of Pakistan (2012 SCMR 455), the privatization of the HBL was challenged inter alia on the ground that the same lacked transparency; that it was being done on the advice of the International Monetary Fund and it was not economically a sound move on the part of the government. This Court dismissed the petition and held as follows:-

> *"Though its policies sometimes may be open to criticism but that is for the concerned economists in the government or academics to examine and opine but once the Competent Authority in the government has taken a decision backed by law, it would not be in consonance with the well established norms of judicial review to interfere in policy making domain of the executive authority."*

31. Again in Dr. Akhtar Hassan Khan *supra*, this Court at page 484 reiterated the parameters of judicial review as follows:

> *23. In Tata Cellular v. Union of India (36(1994) 6 SCC 651), the Court while dilating on the parameters of judicial review in matters of awarding of contract by the Government candidly laid down as follows:--*
>
> *"77. The duty of the court is to confine itself to the question of legality. Its concern should be:*
>
> *(1) whether a decision-making authority exceeded its powers?*
>
> *(2) committed an error of law,*
>
> *(3) committed a breach of the rules of natural justice,*
>
> *(4) reached a decision which no reasonable tribunal would have reached or,*
>
> *(5) abused its powers.*
>
> *Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which*

> *those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:--*
>
> *(i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.*
>
> *(ii) Irrationality, namely, Wednesbury unreasonableness.*
>
> *(iii) Procedural impropriety.*
>
> *The above are only the broad grounds but it does not rule out addition of further grounds in course of time."*

32. In Imtiaz Rasheed Qureshi v. Federation of Pakistan through Secretary, Ministry of Power, Islamabad and 4 others (2009 CLC 1391), the load shedding was challenged before the Lahore High Court on the ground that it was discriminatory and violative of Article 25 of the Constitution. The Court while dismissing the petition held that:-

> *"9. As regard the plea of load-shedding is concerned, suffice it to say that when questioned, learned counsel for the petitioner has admitted that the country is facing with acute energy crises. This is also a publicly known fact. It is also generally known to the whole nation that no new power generation has been established in the country for the last many years and particularly, during the previous regime; the present Government has acquired the legacy of this calamity and seemingly has been endeavouring to coup with the crises by coordinating the supply and demand through the process of load management, awaiting the installation of new generation projects, and till then obviously if the demand is high and the supply inadequate, that has to be done by bridging up the gap and load sharing. To plan and regulate the load management, which is dependent on so many factors and is a constantly fluctuating phenomenon as mentioned, that the job can be accomplished only by the relevant authorities; it is to be decided by such authorities, as to which sector, organization, institution, establishment, area (geographical or industrial, agricultural or otherwise), should be subjected to what quantum of and the schedule of load-shedding. And when the above process is not shown to be irrational, unreasonable or tainted with dishonesty of purpose, such action cannot be questioned on the touchstone of Article 25 of the Constitution of Islamic Republic of Pakistan. I have examined chart/graphs, which*

> *have been placed on the record and find that both the decisions including the daylight saving and the load management are not arbitrary or whimsical in any manner, rather those have been done under the compelling circumstances of acute energy shortage.*
>
> *10. Besides, the issue of load-shedding has a political fallout and repercussions; the present is a political Government and if the load-shedding is being conducted for an extraneous, irrational or, arbitrary reasons or a bad policy, it shall vex the public-at-large and no political Government can afford to face the anger of the public now or when it goes for the next election. "*
>
> *11. As regard the question of discriminating, from the data provided by the respondents' side on the record, I am convinced of the plea raised, rather it is only the essential institutions, organizations and the offices, to which the electricity is being, continuously supplied and this cannot be termed discriminatory."*

33. The question of limits of judicial review in dealing with the policy making domain of the Executive has also been a moot point before the Indian Supreme Court. In M.P. Oil Extraction and Anr. v. State of M.P. and Ors (1997 7 SCC 592), the renewal of allotment of 10,000 MT of sal seeds in favour of M/s M.P. Glychem Industries was challenged in writ petition which was dismissed by a Division Bench of the Madhya Pradesh. This judgment was challenged before the Indian Supreme Court inter alia on the grounds that renewal was arbitrary; that needs of other industrial units operating in the State had not been kept in view and that the State government had given sal seeds to the respondents without inviting any tenders and excluding the appellants. In dismissing the appeal and upholding the High Court's judgment, the Court observed as follows:-

> *"After giving our careful consideration to the facts and circumstances of the case and to the submissions made by the learned Counsel for the parties, it appears to us that the industrial policy of 1979 which was subsequently revised*

> *from time to time cannot be held arbitrary and based on no reason whatsoever but founded on mere ipse dixit of the State Government of M.P. The executive authority of the State must be held to be within its competence to frame policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes in conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain term, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the statute or the Constitution of India. The supremacy of each of three organs of the State i.e. legislature, executive and judiciary in their respective field of operation needs to be emphasized. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in out stepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective field."* (Emphasis is supplied).

34. In Premium Granites and another v. State of Tamil Nadu and others (1994 1 SCR 579), the High Court had cancelled the leases granted to Premium Granites in terms of Rule 39 of the Tamil Nadu Minor Mineral Concession Rules, 1959. Annulling the judgment of the High Court, the Indian Supreme Court held that the Government had the power under the Rules to grant the lease and the exercise of discretion not being arbitrary or reflective of mala fides, the High Court could not have interfered in the order.

35. While commenting on the parameters of judicial review of an administrative action in constitutional jurisdiction, the Indian Supreme Court in Narmada Bachao Andolan v. Union of India and others (AIR 2000 SC 3751), held:

> *"228. While protecting the rights of the people from being violated in any manner utmost care has to be taken that the Court does not transgress its jurisdiction. There is in our Constitutional frame-work a fairly clear demarcation of powers. The Court has come down heavily whenever the executive has sought to impinge upon the Court's jurisdiction.*
>
> *229. At the same time, in exercise of its enormous power the Court should not be called upon or undertake governmental duties or functions. The Courts cannot run the Government nor the administration indulge in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under the Constitution casts on it a great obligation as the sentinel to defend the values of the Constitution and rights of Indians. The courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court will not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words the Court itself is not above the law."*

36. The jurisdictional limits of the powers of the High Court under Article 199 of the Constitution, however, do not apply to the Supreme Court in terms of Article 187 of the Constitution. This Court on account of general institutional dysfunction and to render "complete justice" has expanded the scope of judicial review in exercise of its powers under Articles 184(3) and 187 of the Constitution. But while doing so, it has also been conscious of the principle of separation of powers in terms of which the functions of various organs of the State have been delineated in the Constitution. It intervenes to ensure enforcement of Fundamental

Rights, to address the menace of corruption when laws are blatantly violated and to fill the gap in law with a view to render "complete justice". The object has also been to ensure that State institutions perform their functions with integrity in accord with law and the oath of their calling.

37. The Supreme Court in Pakistan initiated suo moto proceedings in exercise of its jurisdiction under Article 184(3) read with Article 187 on questions of *"public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II"*. Some of the issues taken up were complete breakdown of law & order (Karachi & Balochistan), cases of bonded labour, missing persons, kite flying, unprecedented load shedding, multi billion scam in EOBI, irregularities and illegalities in PIA, OGRA case, murder of five women in Kohistan Division, corruption in Pakistan Steel Mills, NICL scam, Riko Diq case, etc. The Court's style and opinions rendered became subject of public debate. A great majority of people may not understand the intricate provisions of the Constitution, their import and the transformative role they have. However, the Court in its opinions with an object to enforce those provisions created in the public a better understanding of the Constitution and how it affects their lives. The Court in these cases exhorted the State institutions to perform their functions strictly in accordance with the Constitution and the law. In Watan Party v. Federation of Pakistan (PLD 2011 SC 997), this Court speaking through the Hon'ble Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhry, while commenting on Court's role observed as under:-

> *"The lesson to be learnt from this is simple. Initiation of Suo Motu proceedings by the Court sent one straight and simple message to an administration working under political pressures: "Take no political pressure from any quarter whatsoever". This was an unstated message, but it was loud and clear. The administration remained, and remains, under the political Government of the Province of Sindh but the administrators immediately understood that they would not be called upon to obey any illegal orders nor to discriminate between adversaries. They would be fair and impartial and the results have been dramatic so far. A depoliticized administration suddenly came to life in fighting crimes, criminals and Mafias, political and otherwise. That is what the intervention of the Court achieved.'*

38. In the Sindh High Court Bar Association through Secretary and another v. Federation of Pakistan through Secretary Ministry of Law and Justice (PLD 2009 SC 879), this Court held as follows:-

> *".....It is so also because of the other provisions of the Constitution, the rules of this Court and the principles and Rules comprising the Constitutional set up of Pakistan. For instance, "according to Article 187 (1) this Court sometimes has to satisfy the dictates of "Complete Justice". What goes with it, is the subject or ample authority as well as of future application in given cases. When this power is exercised the Court will have the necessary additional power to "issue such directions, orders or decrees as may be necessary." Besides the binding effect of the judgment/order of this Court on all other "Courts" when it "decides" a question of law or it is based upon or enunciates a principle of law under Article 189; another provision Art. 190, gives a similar command to all executive and judicial "authorities" throughout Pakistan": This is, so as to act "in aid of Supreme Court". When Art. 199(1) (c) is read together with Articles, 187, 189 and 190, as stated above, it becomes clear that in a fit case of enforcement of Fundamental Rights, the Supreme Court has jurisdiction, power and competence to pass all proper/ necessary orders as the facts justify."*

39. In Corruption in Hajj Arrangements in 2010 (PLD 2011 SC 963), while taking notice of massive corruption and the

resultant agony to the Hajis, the Court nevertheless did not interfere with the Hajj Policy and reiterated its resolve to guard the principle of trichotomy of powers. It held:

> *"This Court acknowledges and respects the mandate given by the sovereign authority i.e. the 'electorate to the democratically, elected government on 18th February, 2008 and would continue to jealously guard the principle of trichotomy of powers enshrined in the Constitution, which is the essence of the rule of law."*

40. In the Hajj Policy *supra*, the Court took note of the widening horizons of the judicial review by the Apex Court in public interest litigation in India and held:-

> *"By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled. Indisputably, if the action or decision is perverse or is such that no reasonable body of persons, properly informed; could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with the same. [Commissioner of Income Tax v. Mahindra (AIR 1984 SC 1182)]. The exercise of constitutional powers by the High Court and the Supreme Court is categorized as power of judicial review. Every executive or administrative action of the State or other statutory or public bodies is open to judicial scrutiny and the High Court or the Supreme Court can, in exercise of the power of judicial review under the Constitution, quash the executive action or decision which is contrary to law or is violative of Fundamental Rights guaranteed by the Constitution. With the expanding horizon of Articles dealing with Fundamental Rights, every executive action of the Government or other public bodies, if arbitrary, unreasonable or contrary to law, is now amenable to the writ jurisdiction of the Superior Courts and can be validly scrutinized on the touchstone of the Constitutional mandates. [Common Cause, A Regd. Society v. Union of India (AIR 1999 SC 2979)]. In the case of Union Carbide Corporation v. Union of India [AIR 1992 SC 248 = 1991 SCR (1) Supl. 251], the*

Court while taking up the issues of healthcare and compensation to the victims, supervised the distribution of the money among the victims of Bhopal gas tragedy and monitored the hospitals set up to treat the victims. In Vishaka v. State of Rajasthan [AIR 1997 SC 3011] = [(1997) 6 SCC 241], the Court laid down guidelines to make the workplace safer for women making a grievance redressal mechanism in all private and public offices mandatory. In the case of Vineet Narain v. Union of India (AIR 1998 SC 889), commonly known as Hawala case, the Supreme Court of India had taken over the charge of CBI to ensure transparent investigation into corruption and corrupt practices under its own supervision. In the case of Zahira Habibullah Sheikh v. State of Gujarat [(2006) 3 SCC 374], the Court reopened several cases and set up a special investigation team where the police deliberately botched up the probe to help perpetrators of the post Godhra mob violence against Muslims in 2002, including overseas investigations into the Sohrabuddin fake encounter case of 2005 whereby several senior police officers and key politicians were put in the dock. In the Case of Rubabbuddin Sheikh v. State of Gujarat [(2010) 2 SCC 200] petitioner wrote a letter to the Chief Justice of India complaining about the killing of his brother in a fake encounter and disappearance of his sister-in-law at the hands of the Anti-Terrorist Squad (ATS) Police (Gujarat) and Rajasthan Special Task Force (STF). Taking notice of this letter, the Court forwarded it to the Director General of Police, Gujarat to take further action. The CID (Crime) conducted an enquiry and the statements of a number of witnesses, including the petitioner, were recorded. The learned Attorney General for - India submitted that in view of the serious nature of the offence in which some highly placed police officials of the State of Gujarat were alleged to be involved, orders may be immediately passed directing the CBI to take charge of the investigation and report to this Court. The CBI Authorities were directed to investigate all aspects of the case relating to the killing of the deceased including the alleged possibility of a larger conspiracy.' The report of the CBI Authorities was directed to be filed in the Court when the Court would pass further necessary orders in accordance with the said report, if necessary. Ultimately, it was held that accusations were directed against the local police personnel in which high police officials of the State were involved. Therefore, it was directed that if investigation was allowed to be carried out by the local police authorities, all concerned including the

relatives of the deceased may feel that investigation was not proper and in the circumstances it would be fit and proper that the petitioner and the relatives of the deceased should be assured that an independent agency should look into the matter and that would lend the final outcome of the investigation credibility. In the case of Center for Pil v. Union of India [Appeal arising out of SLP (C) No. 24873 of 2010 decided on 16-12-2010], the Court ordered probe into a mega crore scam against the sitting Telecom Minister. In the case of Center for Pil v. Union of India [Writ Petition (C) No. 348 of 2010, decided on 3-3-2011], the Court quashed the illegal appointment of P J Thomas as Central Vigilance Commissioner because of a charge-sheet pending against him in Kerala. The Court also laid down guidelines for future appointments to this post. In the case of Radhy Shyarn v. State of UP (Civil Appeal No.3261 of 2011, decided on 15-4-2011), the Supreme Court quashed Government's notification to acquire land for the planned industrial development in District Gautam Budh Nagar through Greater Noida Industrial Development Authority, which appeared to be a device to grab the land of the poor farmers. In the case of Nandini Sundar v. State of Chattisgarh [Writ Petition (Civil) No. 250 of 2007 decided on 5-7-2011], the Court disbanded and disarmed Special Police Officers involved in anti-Naxal operations in many states. Thus, the Supreme Court of India has been monitoring public distribution system, treatment at hospitals and conservation of forests for more than two decades. It also set up a judicial commission to examine the public distribution system and directed the Government to provide more facilities in the poorer districts."

41. While seized of petitions under Article 199 of the Constitution, the High Courts at times are faced with prayers to pass order and provide relief for "doing complete justice". But such powers in constitutional jurisdiction are vested in the Supreme Court under Article 187 of the Constitution. These powers are distinct both in scope and the manner of their exercise. The Apex Courts in most of the democratic countries enjoy such powers. The powers of this Court to pass any order or give any direction "for

doing complete justice" are similar to those which the Supreme Court of India enjoys under Article 142 of the Constitution of India and such powers cannot be exercised by the High Courts in India in exercise of their constitutional jurisdiction. For a better understanding of the comparative constitutional law emerging under these provisions, a reference to these Articles would be in order which are as under:-

Constitution of Pakistan	**Constitution of India**
187.(1) [Subject to clause (2) of Article 175, the] Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document. **(2)** Any such direction, order or decree shall be enforceable throughout Pakistan and shall, where it is to be executed in a Province, or a territory or an area not forming part of a Province but within the jurisdiction of the High Court of the Province, be executed as if it had been issued by the High Court of that Province. **(3)** If a question arises as to which High Court shall give effect to a direction, order or decree of the Supreme Court, the decision of the Supreme Court on the question shall be final.	**142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.----(1)** The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may be order prescribe. **(2)** Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

42. In both the above quoted provisions, the paramount consideration and the constitutional intent is common i.e. "for

doing complete justice". These powers being inherent are complementary to those which are specifically conferred on the Court by the Constitutions of these two countries. These powers remain undefined so that the Court can cater to any situation and could even mould the relief. (D.D.A. v. Skipper Construction AIR 1996 SC 2005). For instance, if an individual acquires property by defrauding people, the Supreme Court can restore the possession. [(1996) 4 SCC 622]. However, this power should not be misconstrued to mean to pass any order which is against the letter of law or against specific constitutional provisions. The rationale appears to be that in situations which cannot be resolved by existing provisions of law and warrant an intervention by the Court, it may pass an order to ensure "complete justice". This can also be used where the Court finds a gap in legislation and a solution is required till the Legislature acts and covers the field. [Vineet Narain v. Union of India (1998)1 SCC 226]. *"The phrase "complete justice" in Art. 142(1) is the word of width couched with elasticity to meet myriad situations created by human ingenuity or cause or result of operation of statute law or law declared under Arts. 32, 136 and 141 ---Ashok Kumar Gupta v. State of U.P. (1997)5 SCC 201; see R.C. Patuck v. Fatima (1997)5 SCC 334: AIR 1997 SC 2320."* (Case Book on Indian Constitutional Law by Durga Das Basu).

43. The very fact that this power is conferred on the Apex Court alone has to be used sparingly and with an element of judicial restraint [Chandra Kant Patil v. State (1998)3 SCC 38] so as not to contravene any other constitutional provision or statute.

44. In S.A.M. Wahidi v. Federation of Pakistan through Secretary Finance and another (1999 SCMR 1904), this Court granted "special additional pension" where it found that a pensioner was being discriminated against and observed, "*It may be stated here that this Court, in terms of clause (1) of Article 187 of the Constitution is competent to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it.*"

45. The constitution makers conferred powers "*to issue such directions, orders, or decrees as may be necessary for doing complete justice*" (Article 187) only to the Supreme Court and not to the High Courts. This constitutional intent is significant and has to be kept in view by the learned High Courts. In Hitachi Limited and another v. Rupali Polyester and others (1998 SCMR 1618), the Court highlighted this distinction between the powers of the High Court and the Supreme Court with reference to Articles 175 and 187 of the Constitution. It was observed that the power to render "complete justice" vests with the Supreme Court alone, whereas the High Court is a creature of the Constitution and can only exercise that power which is vested in it under the law:-

> *"The principles of common law or equity and good conscience cannot confer jurisdiction on the Courts in Pakistan which has not been vested in them by law. In this regard reference may be made to clause (2) of Article 175 of the Constitution of Pakistan, which provides that no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law. The High Courts derive their jurisdiction under the Constitution and the statutes. In view of the above Constitutional provision and the case-law the principles of English common law or equity or good conscience cannot be pressed into service in Pakistan as*

> *having statutory force. But a Court may adopt a procedure, which is not prohibited by any law if the dictates of justice so demand.*
> *We may observe that under Article 187(1) of the Constitution of Pakistan this Court has been empowered to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document. It may be pointed out that the above provision is an enabling provision, which can be invoked in aid in a matter which is competently filed before this Court. While granting a relief the Court can dispense with the technicalities and may mould the relief according to the requirement, if the dictates of justice so demand. In this behalf reference may be made to the case of Zulfiquar Ali Babu v. Government of Punjab (PLD 1997 SC 11).”* (Emphasis is supplied).

46. In Mehr Zulfiqar Ali Babu and others v. Government of the Punjab and others (PLD 1997 SC 11), this Court observed that for passing an order under Article 187 of the Constitution, no independent proceeding before the Court is required and once the Court is seized of a *lis* competently, it can pass orders, decrees for doing “complete justice”.

47. In Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly, NWFP and another (PLD 1995 SC 66), the Court adverted to the parameters of its jurisdiction under Article 187 and the question whether Article 175(2) restricts the power of the Supreme Court given under Article 187 of the Constitution and held that:-

> *“10. .....The term "complete justice" is not capable of definition with exactitude. It is a term covering variety of cases and reliefs which this Court can mould and grant depending upon the facts and circumstances of the case. While doing complete justice formalities and technicalities should not fetter its power. It can grant ancillary relief,*

mould the relief within its jurisdiction depending on the facts and circumstances of the case, take additional evidence and in appropriate cases even subsequent events may be taken into consideration. Ronald Rotunda in his book "Treatise on Constitutional Case Substance" (Second-Edition), Volume 2 at page 90 has stated that "The Supreme Court is an essence of a continual Constitutional convention". The jurisdiction and the power conferred on the Supreme Court does empower it to do complete justice by looking to the facts, circumstances and the law governing a particular case.. Article 187 does not confer any jurisdiction. It recognizes inherent power of an apex Court to do complete justice and issue orders 'and directions to achieve that end. Inherent justification is vested in the High Court and subordinate Courts while dealing with civil - and criminal cases by virtue of provisions of law. The inherent jurisdiction of this Court to do complete justice cannot be curtailed by law as it may adversely affect the independence of judiciary and the fundamental right of person to have free access to the Court for achieving complete justice. This enunciation may evoke a controversy that as Article 175(2) restricts Article 187 it will create conflict between the two. There is no conflict and both the Articles can be read together. The conflict in the provisions of the Constitution should not be assumed and if apparently there seems to be any, it has to be interpreted in a harmonious manner by which both the provisions may co-exist. One provision of the Constitution cannot be struck down being in conflict with the other provision of the Constitution. They have to live together, exist together anti operate together. Therefore, while interpreting jurisdiction and power of the superior Courts one should look to the fundamental rights conferred and the duty cast upon them under the Constitution. A provision like Article 187 cannot be read in isolation but has to be interpreted and read harmoniously with other provisions of the Constitution. In my humble view this Court while hearing appeal under a statute has the jurisdiction and power to decide the question of vires of the statute under which the appeal has arisen X and can even invoke Article 184(3) in appropriate cases."

48. In Sheikh Rashid Ahmad v. the State (PLD 1996 SC 168), reiterating the mandate of this provision, the Court held as under:-

> *"This Court is competent and has power to issue such directions orders or decrees as may be necessary for doing complete justice in any case of matter pending before it as contemplated under Article 187 of the Constitution and under Article 191, this Court has power to make rules regulating its practice and procedure and in consequence of which the Supreme. Court Rules, 1980 have been framed; of which Order XXXIII relates to inherent powers of the Court and Rule 6 thereof further envisages that nothing in these Rules shall be deemed to limit or otherwise effect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to E prevent abuse of the process of the Court."*

49. In Sandeep Subhash Parate v. State of Maharashtra & Ors. (AIR 2006 SC 3102), the Indian Supreme Court was seized of a case in which admission to Bachelor of Engineering course on the basis of Koshti Halba caste was granted by the High Court vide an interim order. During the currency of litigation, the student completed the studies and appeared in the examination. In the meanwhile, the question as to whether Koshti Halba caste came under the category of Scheduled Tribe was authoritatively decided by the Supreme Court in the case Maharashtra v. Milind (2000 AIR SCW 4303) holding that Koshti Halbas were not members of the Scheduled Tribe. The Court invoking its powers to do "complete justice" under Article 142 of the Constitution directed that the student be allowed to obtain degree subject to payment of Rs. 100,000/- in favour of the State of Maharashtra so as to recompense the State to some extent the amount spent on him for

imparting education as a reserved category candidate in view of the fact that there was lack of mala fides on the part of the appellant. The Court observed as under:-

> *"The Court, while exercising its discretionary jurisdiction and to do complete justice between the parties in terms of Article 142, must consider all relevant aspect of the matter, including the decisions of the Court. The doctrine of proportionality emerging from the recent trend of decisions in preference to the doctrine of Wednesbury unreasonableness is also a factor which weighs with the Court."*

50. The foregoing analysis of the comparative constitutional law from Pakistan and India would show that while the Supreme Courts in India and Pakistan have the power to issue any direction or pass a decree "for doing complete justice", the High Courts cannot pass any order in derogation to Article 199 of the Constitution or any law for the time being in force because "the principles of common law or equity and good conscience cannot confer jurisdiction on the Courts in Pakistan which has not been vested in them by law." (*Hitachi Limited* ***supra****).*

51. Before we part with the judgment, we may add that the performance of Hajj is a sacred duty for Muslims. But the quota allocated to Government of Pakistan by the Saudi Government is limited and within that limited quota, it allocates a certain portion to private HGOs. Since several hundred HGOs apply for allocation of quota from the Private Hajj Scheme share as worked out by the MORA, all applicant HGOs cannot be accommodated and the dismay of those who are left out is understandable. We are conscious that the MORA has to take several steps to ensure that travel, accommodation and other arrangements are made to the

satisfaction of Hujjaj. It requires a couple of weeks to complete the exercise. However since Hajj operation is a time bound exercise, arrangements have to be made within that limited time. It is therefore, imperative that the Hajj Policy be framed well in time in such a manner which is fair, just, inspires confidence and evokes minimum criticism. It is also imperative that the Hajj Policy for the next year should be announced at the earliest after the conclusion of Hajj. In these circumstances, we are persuaded to direct as under:-

(i) The Hajj Policy should be framed, announced and placed on the website of MORA preferably within six weeks of the arrival of last flight of Hajis from KSA under intimation to the Registrar of this Court. This of course would be subject to any policy decision of the Saudi Government regarding allocation of Hajj quota for Pakistan;

(ii) The Hajj Policy should be framed by a Committee headed by the Secretary, Ministry of Religious Affairs (MORA); a nominee of the Competition Commission of Pakistan; a nominee of the Secretary, Ministry of Foreign Affairs, Government of Pakistan; a nominee of the Secretary Ministry of Law and Justice Division & Parliamentary Affairs; and a nominee of the Attorney General for Pakistan;

(iii) The credentials of each applicant/HGO should be examined and decision taken on merit;

(iv) While framing the Hajj Policy, the MORA should be guided, *inter alia*, by the recommendations made by the Competition Commission of Pakistan to which reference has been made in Para 8 above; and

(v) The MORA should constantly monitor the working and performance of each HGO during Hajj and this assessment should form basis for further improvements in Hajj Policy for next year's Hajj.

52. For what has been discussed and observed above, we allow these petitions and set aside the impugned order. These are the reasons for our short order dated 27.8.2013 which is reproduced hereinbelow:-

> For reasons to be recorded later in the detailed judgment, Civil Appeal Nos. 800-L to 802-L/2013 are allowed, Civil Petition Nos. 1148 & 1348 of 2013 are converted into appeals and allowed and C.M.A. Nos. 278-L, 279-L/2013, 285-L/2013, 289-L/2013, 5328 to 5333/2013, 5378/2013, 5463/2013, 5464/2013 & 5477/2013 are disposed of and we hold and declare as under:-
>
> (i) that the order of the learned High Court dated 24.6.2013 passed in Writ Petition No. 7253/2013 is violative of the principle of trichotomy of powers, which is one of the foundational principles of the Constitution of Islamic Republic of Pakistan;
>
> (ii) that it is not the function of the High Court exercising jurisdiction under Article 199 of the Constitution to interfere in the Policy Making Domain of the Executive;
>
> (iii) that the learned High Court in the exercise of its Constitutional jurisdiction directed selection of Hajj Group Organizers

through bidding process and thereby substituted the criterion laid down in the Hajj Policy framed by the Ministry of Religious Affairs without hearing the appellants / Hajj Group Organizers and others who had already been allocated quota and had made arrangements for intending Hujjaj, which is not tenable in law;

(iv) that the High Court can under Article 199 of the Constitution annul an order or a Policy framed by the Executive, if it is violative of the Constitution, law or is product of *mala fides*. However, nothing has been placed before this Court to indicate that the Hajj Policy challenged before this Court seriously suffered from any of these infirmities; and

(v) that Ministry of Religious Affairs shall continue to regulate the operation of Hajj i.e. enrollment, registration and allocation of quota every year in the light of a fair and transparent policy and the guidelines to be laid down by this Court in the detailed judgment.

53. Copies of this judgment shall be sent to the Registrars of the Lahore High Court, High Court of Sindh, Peshawar High Court, Balochistan High Court and Islamabad High Court for placing the same before the Hon'ble Chief Justices of the respective High Courts with particular reference to the pending petitions on Hajj Policy. A copy of this judgment shall also be sent to Secretary, Ministry of Religious Affairs for information and necessary compliance.

JUDGE

JUDGE

Islamabad, the
27th of August, 2013
Approved For Reporting
Khurram Anees