IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ
MR. JUSTICE MIAN SHAKIRULLAH JAN
MR. JUSTICE JAWWAD S. KHAWAJA
MR. JUSTICE ANWAR ZAHEER JAMALI
MR. JUSTICE KHILJI ARIF HUSSAIN
MR. JUSTICE TARIQ PARVEZ
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE AMIR HANI MUSLIM

INTRA COURT APPEAL NO. 1 OF 2012
[Against the order dated 02.02.2012 passed by this Court in Criminal Original No. 06/2012]

Syed Yousaf Raza Gillani,
Prime Minister of Pakistan. … Appellant

VERSUS

Assistant Registrar,
Supreme Court of Pakistan & another. … Respondents

For the appellant: Mr. Aitzaz Ahsan, Sr. ASC
Assisted by Mr. Gohar Ali Khan, Advocate
Mr. M.S. Khattak, AOR

Respondents: Not represented.

Dates of hearing: 09th & 10th February, 2012

O R D E R

Jawwad S. Khawaja, J. This Intra-Court Appeal has been filed under Section 19(1)(iii) of the Contempt of Court Ordinance, 2003 (the "Ordinance"). The appellant, Mr. Yousaf Raza Gillani, is the Prime Minister of Pakistan. He assails an order passed by a bench comprising seven learned Judges of this Court (the "trial Bench"), on 02.02.2012, whereby it was decided that a charge be framed against the appellant for having committed contempt of the Court. Prior to the passing of the impugned order, the learned trial Bench, vide order dated 16.01.2012, issued a notice under Section 17(1) of the Ordinance to the appellant "*to show cause as to why the proceedings of contempt of Court may not be initiated against him for not complying with the direction of this Court given in paragraph 178 of the judgment in the case of Dr. Mobashir Hassan (PLD 2010 SC 265)*". The appellant did not submit a written reply to the show cause

notice. The learned trial Bench granted a preliminary hearing to the appellant in accordance with Section 17(3) of the Ordinance, and heard him in person and also through his counsel Mr. Aitzaz Ahsan, Sr. ASC. The Bench was *prima facie* satisfied and held *"that it is in the interest of justice that [it] shall proceed further in the matter"* and adjourned the case to 13.02.2012 for framing of charge. Aggrieved, the appellant filed this appeal, which was dismissed by means of a short order dated 10.02.2012 which, in relevant part reads as under:-

> *"We have concluded, for the reasons to be recorded later, that the impugned order has been passed strictly in accordance with the provisions of section 17(1) and (3) of the Ordinance 2003 following the settled principles of the criminal administration of justice, therefore, no interference is called for. Consequently, the appeal is dismissed."*

2. We now record our reasons in support of our short order. To facilitate understanding of these reasons, we have divided this opinion into three parts. The first part contains a brief narrative of events that have led to the initiation of contempt proceedings against the appellant. This narrative will provide context for the second and third parts wherein arguments advanced on behalf of the appellant have been addressed and key constitutional principles have been highlighted.

I. Brief Historical Narrative

3. The roots of this controversy lie in events which occurred in the year 2007. That year a number of Constitution Petitions were filed before this Court under Article 184(3) of the Constitution, challenging the constitutionality of the National Reconciliation Ordinance, 2007 (the "NRO"). The NRO had been issued on 05.10.2007 by the then President General Parvez Musharraf purportedly in exercise of powers under Article 89 of the Constitution. The NRO had attempted to create a mechanism that enabled selected individuals to escape the pale of accountability. Certain unconstitutional measures were then taken by General Musharraf to accord permanence to the NRO and to some other Ordinances. This Court declared these measures unconstitutional, illegal, *mala fide,* and *void ab initio.* The Parliament also discredited the NRO by choosing not to validate the same as permanent legislation or to adopt any alternative or modified legislation as a substitute for it.

4. While hearing the case of *Dr. Mobashir Hassan & others v. Federation of Pakistan & others* (PLD 2010 SC 265) it was noted in paragraph 177 that, amongst other things, the Attorney

General at the time, namely Malik Muhammad Qayyum initiated and exchanged communications with Swiss authorities regarding proceedings relating to laundered monies pending before Swiss Courts. A report filed in Court by the National Accountability Bureau had put the figure of such monies at US $ 60,000,000 (US Dollars sixty million only). The communication aforesaid, was itself held to be devoid of legal sanction since the Attorney General did not have the necessary authorization to initiate or engage in communications regarding this matter, with the Swiss authorities. Through these communications, he managed to withdraw Pakistan's request for mutual legal assistance and revoked its status of a civil party in the pending proceedings in Switzerland. As a consequence of this exchange, the proceedings relating to the aforesaid laundered monies were abandoned. In view of the directions given by the Court in para in 178 *ibid* "*the Federal Government and other concerned authorities [were] ordered to take immediate steps to seek revival of the said requests, claims and status"* in respect of the allegedly laundered monies lying in foreign countries including Switzerland.

5. After the judgment of this Court dated 16.12.2009 (the "NRO Judgment") passed in the case of *Dr. Mobashir Hassan supra,* the Federal Government sought review of the same through Civil Review Petition No.129 of 2010. This Review Petition was dismissed on 25.11.2011. Therefore, the NRO Judgment is final and binding, including its directives instructing the Federal Government and other concerned authorities to take immediate steps as ordered. The necessity of initiating contempt proceedings against the appellant arose for the purpose of ensuring compliance with the orders and directives of the Court. It is neither necessary nor appropriate for this appellate Bench to dilate upon the many orders and proceedings of the Court made in furtherance of this objective between the date of the NRO Judgment in December 2007 and the issuance of a show cause notice to the appellant on 16.01.2012. Such orders and proceedings can more appropriately be examined in the contempt proceedings before the learned trial Bench. This brief factual narration brings us to the second part of this opinion.

II The Appellant's Case

6. The appellant's case before us is not that the orders and directives of this Court contained in the NRO Judgment have been complied with. On the contrary, the grounds and tenor of this appeal show that the said orders/directives have still not been implemented. It has been contended

on behalf of the appellant that firstly, as Chief Executive and head of the Government, he has not committed any "wilful disobedience" of the NRO Judgment and therefore, contempt proceedings against him are not justified, secondly, that a full hearing was not afforded to the appellant by the learned trial Bench and thirdly, that the impugned order is a non-speaking order as it does not cite any reasons in support of its conclusions. On the basis of these submissions, learned counsel for the appellant argued that the impugned order is liable to be set aside.

7. We can now elaborate on these contentions and comment on their respective merits. The present appeal places great emphasis on the avowed want of *mens* rea and the absence of a 'guilty intent' on the part of the appellant. The argument is that the disobedience of the orders of the Court, if at all there was any, was not 'wilful'. This appears to be the salient feature of the present appeal. Since the contempt proceedings are pending before the learned trial Bench, we will only make tentative observations so as not to prejudice the outcome of the matter. In his appeal, the appellant acknowledges his awareness of the contents of para 178 of the NRO Judgment and the steps enumerated therein which the Government was legally obliged to undertake. These steps, which have been enumerated in paragraph 34 of this appeal, admittedly have not been taken. The appellant has asserted that despite his admitted inaction, his "*intention was not to disobey*" the orders of the Court and that there exists some "*valid justification with respect to his own conduct*". The appellant defends his inaction by contending that since he was "*required to go by the Rules of Business, 1973*", he accepted the views presented by the concerned Government functionaries and that he "*had no reason whatsoever to believe otherwise than what had been maintained in the summaries*". Such explanations, which have been put up by the appellant do not detract from, rather confirm the fact that the directives in the NRO Judgment have not, as yet, been complied with.

8. Section 17(3) of the Ordinance requires that "*[i]f, after giving the alleged contemner an opportunity of a preliminary hearing, the court is <u>prima facie</u> satisfied that the interest of justice so requires, it shall fix a date for framing a charge in open court and proceed to decide the matter…*" It is settled law "*that to formulate a 'prima facie' opinion, the Court is not required to consider all the facts in depth, rather it has to satisfy itself whether there exists an arguable case*". <u>*Justice Hasnat Ahmad Khan v. Federation of Pakistan*</u>, (PLD 2011 SC 680, para 58). Here, it may be noted that under section 3 of the Ordinance a person can be proceeded against for contempt of

Court if he disobeys or even disregards any Order of a Court, which he is legally bound to obey. In view of this statutory provision, the admitted position of the appellant, in our opinion, constitutes a sufficient basis for the *'prima facie'* satisfaction expressed by the learned trial Bench, to proceed further in the matter by framing a charge.

9. Want of guilty intent and the wilfulness (or otherwise) of disobedience of Court directives and other averments in this appeal raise questions of fact that warrant a detailed enquiry based on evidence. Furthermore, by virtue of being distinct elements of the defence set up by the appellant, both elements need to be assessed on the facts and on the basis of such evidence as is adduced before the competent forum. For this purpose, the competent forum is the learned trial Bench. These factual defences have not and could not have been addressed and answered in a preliminary hearing. By not discussing and adjudicating upon such defences at this preliminary juncture, the learned trial Bench acted as per directions of law. The trial Bench may have prejudiced the outcome of the case by giving a conclusive verdict on the merits of the appellant's defences since such would have been issued without having evaluated the necessary evidence. It goes without saying that the appellant will have the right to rely on his arguments and produce evidence in support thereof, before the learned trial Bench.

10. We have already stressed that the judicial exercise of receiving evidence or considering factual pleas on the basis of such evidence, is not to be undertaken at the preliminary hearing. Learned counsel for the appellant appears to be under a misconception on this point, which may have blurred his appreciation of the nature of a preliminary hearing under Section 17(1) of the Ordinance. The case of *Justice Hasnat supra* has already established that where non-compliance of a Court directive is not disputed, the Court is, *prima facie*, justified in the satisfaction that the matter should proceed to trial. A show cause notice under Section 17 of the Ordinance can, of course, be discharged where the alleged contemnor shows that the Court order has, in fact, already been complied with. The notice may, at the discretion of the Court, also be discharged if the alleged contemnor agrees to comply with the Court order even after the issuance of a show cause notice. However, where neither of these situations exists and a factual plea is raised requiring evidence, the proper course for the Court is to frame a charge and allow the alleged contemnor to prove the pleas which he has raised in his defence, whether by way of complete exoneration from the charge or in mitigation of sentence if the charge is proved.

11. The appellant's contention that the learned trial Bench denied him a 'full hearing' is also premised on a misconceived understanding of the nature of a preliminary hearing. The appellant has been granted a reasonable opportunity to make his submissions. What comprises reasonable opportunity is a question that must depend on the facts and circumstances of each case. From what has been stated above, it is clear to us that sufficient hearing was, in fact, afforded to the appellant to justify the *prima facie* determination made by the learned trial Bench, before it issued a show cause notice to the appellant.

12. Learned counsel for the appellant has referred to case law in support of his submissions. The cited cases, however, mostly pertain to appeals against judgments/orders which had been issued after a final adjudication in judicial proceedings. The present appeal, however, has been brought against an order issued in a preliminary proceeding. The distinction between a preliminary hearing as opposed to final proceedings is well recognized. Precedent, therefore, which enunciates rules for full hearing as a pre-condition for final orders, is inapplicable to the facts of the present case.

13. A great deal of emphasis was placed by learned counsel for the appellant on the case titled *Imran Ullah v. The Crown* (1954 FC 123) and reference was made to an extract from the judgment of Cornelius, J. read superficially and taken out of context. The learned Judge had observed at page 140 that "*[the Courts] should do nothing that might have the effect of terminating an Advocate's arguments unless they have first satisfied themselves, by a direct question, that he cannot usefully add to what he has already said"*. First of all, it may be noted that the cited judgment resulted from a challenge to a final judgment rendered by a Bench of the Lahore High Court after the final hearing of a Criminal Appeal. This obvious distinguishing factor is sufficient to show that the cited precedent has no application in this case as the order impugned before us has been passed at a preliminary hearing. Secondly, it would be useful to state that discussion and adjudication of all arguments at a preliminary hearing is not to be seen as a mindless exercise or as an end in itself. There is no warrant for a mechanical insistence on such discussion/adjudication. The distinguished British jurist, Prof. H.L.A. Hart wisely comments that "*neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or 'mechanical deduction' from rules with predetermined meaning.*" In fact, the ratio of *Imran Ullah's* case *supra* reinforces our decision to dismiss this appeal. In the said case

after considering the arguments advanced, the Court decided not to set aside the judgment assailed before it. A.S.M. Akram, J. observed at page 127 that though he *"was minded to remit the case but as we have carefully listened to the elaborate arguments on the merits by either side, it would now be of no purpose to adopt that course"*. Considering that we have heard learned counsel for the appellant at great length even though the matter involves only a *prima facie* finding in a preliminary hearing, we do not find any justification for setting aside the impugned order and remitting the case to the learned trial Bench for recording its decision on each and every argument and defence advanced on behalf of the appellant, during the preliminary hearing.

14. Learned counsel for the appellant while referring to the case of *Justice Hasnat supra* contended that a full hearing and reasons were given by this Court while hearing the said case and also that the hearing before the trial Bench in the said case had continued for a period of close to four months at the stage of preliminary hearing. The dictum of Cornelius, J. in *Imran Ullah's* case *supra,* sufficiently addresses the appellants contention regarding the inadequate duration of the preliminary proceedings: The learned Judge said at page 135 of the judgment that *"it is impossible to read into the word 'hearing' anything in the nature of an obligation as to [the] pattern of an argument or the form which it is to follow, and any suggestion that observance of any kind of ritual is involved would be, in my opinion obnoxious to the true meaning."* The significant aspect of the case of *Justice Hasnat supra,* which appears to have been overlooked is that the case concerned only a question of law, not one which required any recording or consideration of evidence. The issue was whether contempt proceedings could be initiated against a serving Judge of a High Court. It is clear that this question raised a jurisdictional issue. If, as a matter of constitutional law, a contempt notice to a serving Judge in the extraordinary circumstances of the cited case, was not permitted then the notice issued to the Judge involved would have had to be discharged after the preliminary hearing and without the necessity of receiving evidence. No such question of law arises in the present case.

15. The case of *Justice Hasnat supra* also examined the scheme of the Ordinance and clearly enumerated the requirements contained therein. It was held in para 58, as reproduced above, that *"to formulate a prima facie opinion, the Court is not required to consider all the facts in depth rather it has to satisfy itself whether there exists an arguable case"*. The argument that the trial Bench ought to have determined the factual issue (arising in that case) of whether the appellant

had intimation of an order dated 3.11.2007 was repelled by the observation that *"these aspects of the case alongwith others are required to be decided on the basis of evidence which will be produced before the Bench seized with the contempt cases."*

16. The aforesaid dictum fortifies our view that the course adopted by the learned trial Bench in the present case was in line with precedent. We are, therefore, unable to agree with learned counsel that *"all pleas and defences of the [appellant] to the allegations contained in the show cause notice [had] to be thoroughly gone into, considered and decided judiciously"*.

III. The Constitutional Imperative

17. A number of constitutional imperatives, which we shall presently allude to, also justify the course followed by the learned trial Bench. We may confine this part of our reasoning by adverting to a somewhat odd question posed by the appellant. He has, in his grounds of appeal, asked the Court to "*show greater restraint and forbearance with respect to a duly elected Prime Minister.... when the very stability of the democratic system obtained by the people of Pakistan after so much sacrifice, may depend on the outcome of this case."* This averment, coming as it is from the Chief Executive of the country appears to be based, firstly on a claim to some special privilege that accords the appellant preferential treatment by sheltering him from receiving equal treatment in accordance with the law and the constitution and thereby allowing him to disregard the orders of the Court because of his office. And, secondly, it calls upon the Court to formulate its opinion, not in accordance with the mandate of law as applicable on the facts of this appeal, but in fear and anticipation of a possible outcome that may flow out of a decision, which may be arrived at by the learned trial Bench on the basis of the law and the Constitution. In other words, the appellant is urging this Court to resurrect and adopt a form of the doctrine of necessity, which in the past had blighted Constitutional rule in Pakistan. The validity of this averment, and both arguments adduced in support of it, must be examined, like other questions of public law, in the light of the Constitution.

A - Special Privilege

18. It is clear to us that the appellant's claim to a 'special privilege' on account of his executive office, which seeks for him "greater restraint" amounting to an exception from contempt proceedings, does not find any basis in our Constitution. For this, we need only refer to the

Preamble, Article 5 and Article 25, the relevant parts of which are worth examining. The Preamble, whose importance as an aid to the proper interpretation of our constitution has already been explained in *Munir Hussain Bhatti v. Federation of Pakistan* (PLD 2011 SC 407), states a number of principles upon which the Constitution has been founded and in line with which it must, therefore, be interpreted. Amongst these is mentioned the principle of "*equality, ... as enunciated by Islam*" which, it is ordained, "*shall be fully observed.*" A number of articles of the Constitution have been framed to give effect to the principle of equality enshrined thus in the preamble. Amongst these is Article 5 which states that "*obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be ...*" It should be noticed that the Constitution mentions no exemptions from the obligation it imposes. The exceptionalism therefore, which is being claimed by the appellant has no constitutional basis.

19. In a similar vein, Article 25(1) states in the clearest terms that "*[a]ll citizens are equal before law and are entitled to equal protection of law.*" It may be noted here that, in his appeal, the Prime Minister has not relied upon the limited and functional immunity from court processes, which is offered to certain official acts under Article 248 of the Constitution. The article states: "*the Prime Minister…shall not be answerable to any court for the exercise of powers and performance of functions of [his] office[.]or for any act done or purported to be done in the exercise of those powers and performance of those functions…*" Discussion of this exception is therefore not merited here and may be left for an appropriate case. The cumulative effect of these provisions is quite powerful and hard to miss. It becomes clear that our law does not accord individual immunity to the appellant from complying with the law. Therefore, even though we have no doubt that the appellant is a duly elected Prime Minister of the country and deserves respect, this Court cannot be expected to show any restraint and forbearance on account of his position. This constitutional directive only echoes the perennial wisdom which underpins governance of the State in accordance with the mandate of the Constitution.

20. It is worth repeating here a *hadith* of the Holy Prophet (peace be upon him), which has become a part of the collective consciousness of the people of Pakistan. It expresses the spirit of equality enunciated by Islam which the Constitution refers to. A woman from a powerful Arabian tribe was found to have committed theft. The Holy Prophet (peace be upon him) was urged through some intermediaries to exercise restraint in her case because of her position in society.

The *hadith* gives a description of the Prophet's reaction to this suggestion. It was, to say the least, stern. He rejected this plea and, instead, issued a warning which all functionaries of the State would do well to pay heed to. He said:

أيها الناس إنما أهلك الذين قبلكم أنهم كانوا إذا سرق فيهم الشريف تركوه وإذا سرق فيهم الضعيف أقاموا عليه الحد

Translation: *O people, those before you were ruined because when someone of high rank among them (sharif) committed theft, they would spare him, but when a weak person from amongst them (zaeef) committed theft, they would inflict the prescribed punishment upon him*." (Sahih Bukhari). Similarly deference shown by a Qazi by rising from his seat when *Hazrat* Umar appeared before him as a defendant was strongly disapproved by *Hazrat* Umar on the ground it militated against the principle of equality under the law.

21. We need only give effect to this simple principle to repel the appellant's claim to a special privilege. In fact, the position which needs to be adopted, and which emerges from a close examination of the Constitution, is quite the opposite: the higher the constitutional office, the greater the onus of responsibility on the holder of such office. One reason for this is that a holder of Constitutional office is under this higher responsibility because he, unlike ordinary citizens, makes an oath to discharge his duties "*in accordance with the Constitution… and the law.*" The Prime Minister's oath also requires that he "*will preserve, protect and defend the Constitution.*" Therefore, more stringent legal standards apply to him as compared to others who have not taken a similar oath. In other words, the Court has greater reason to be particularly concerned about the possibility of contempt having been committed by the appellant.

22. We can now proceed to elaborate further the bases for holding this constitutional position.

B - Fiduciary Duties of Constitutional Office-bearers.

23. It has been observed by this Court that the functionaries of the State are fiduciaries of the people and ultimately responsible to the people who are also their pay masters. In a recently decided case, we have held that "*holders of public office have to remain conscious that in terms of the Constitution 'it is the will of the People of Pakistan' which has established the Constitutional Order under which they hold office. As such they are, first and foremost fiduciaries and trustees for the People of Pakistan. And, when performing the functions of their Office, they can have no interest other than the interests of the honourable People of Pakistan in whose name they hold*

office and from whose pockets they draw their salaries and perquisites". Muhammad Yasin v. Federation of Pakistan (PLD 2012 SC 132, page 163).

24. The implications of a fiduciary relationship are well-defined in our jurisprudence. Amongst other things, it implies that constitutional functionaries, being fiduciaries, must scrupulously and with complete loyalty, ensure compliance with the will of the people of Pakistan who have, via the Constitution, placed them in office. And since this will finds expression in the form of the Constitution, which is stated to be its 'embodiment', the functionaries of the state must ensure adherence to the Constitution and the law. This principle acquires added poignancy when the possibility exists that the State, starved of hard foreign currency and a grossly adverse balance of payments may benefit from pursuing the course ordered in the NRO Judgement. This jurisprudential background allows us to fully appreciate why Article 190 of the Constitution requires that "*all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court"*. In this context it will become evident that the Government and the Court share the common objective to serve the people strictly in accordance with their will, as expressed in the Constitutional Order established by them. This is also the essence of our Constitutional and democratic dispensation that is based on the rule of law. We may at this point add that there is no conflict in the respective roles assigned to the Executive and the Judicature and nor is there any room for institutional or individual egos to create one. All that is required is the humility to recognize that these institutions and their functionaries are in the service of a common master, the people.

25. To further understand the nature of the above referred role and the fiduciary relationship between the people of Pakistan and bearers of state offices, it is useful to refer to a speech made by Prime Minister Liaqat Ali Khan, in 1949, on the floor of the Constituent Assembly. He said: "*…the people have been recognized as the recipients of all authority and it is in them that the power to wield it has been vested.*" Mr. Sirish Chandra Chatapadhaya, another member of the Constituent Assembly echoed the same opinion but with even greater humility when he said that "*the citizens of our country are our masters. We are their servants."* It is these sentiments which have informed our Constitution and must also inform the official acts of State organs and their functionaries.

26. These statements of the founding fathers of Pakistan are, in fact, modern articulations of what is actually a timeless and prophetic principle of governance, encapsulated in the well-known saying: "سيد القوم خادمهم." (*The leader of a people is their servant*). Our constitution manifests the embodiment of this very principle when it obliges the highest executive functionary to carry out the commandments expressed by the people in the form of the constitution and the law. Deviations by fiduciaries from these commandments must remain of the gravest concern to citizens and courts alike.

27. Justice Louis Brandeis, writing in the American context, succinctly explained another important reason why government officials, no matter how high, must be subjected to the same rules of conduct as ordinary citizens. He said: "*Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example... If the government becomes a lawbreaker… it invites every man to become a law unto himself; it invites anarchy."* {*Olmstead v. United States*, 277 U.S. 438 (1928),} quoted recently by Khosa, J. in *Crl. M.A 486 of 2010 in Criminal Appeal No. 22 of 2002 etc*, on 10.01.2012 Similar expression can be found in the sage advice of Sheikh Saadi who said:

به پنج بیضہ کہ سلطان ستم روا دارد
زنند لشکر یانش ہزار مرغ بہ سیخ
(گلستان سعدی)

Translation: *If the ruler plunders but five eggs, his minions will plunder a thousand roosters.*

28. In a government of laws, the government is expected to play the role of an exemplar for promoting the rule of law. The case of *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879) drew attention to the same issue by holding the unconstitutional acts of a military dictator invalid. More than two and a half years down, it is worth posing the same question to all State functionaries and to all thinking people posed in the said case: *'has the absence of the rule of law within the upper echelons and formal structures of the State generated, in a significant way, the lawlessness which so permeates our society today?'* Then and today, the causal connection strongly suggests itself. This is all the more reason why courts must not (as a matter of constitutional principle) exercise any special restraint in matters such as the present one.

29. Since there is now a *prima facie* case to be made that the obligation to obey the directions of this Court may have been violated by the highest constitutional functionary of the executive branch of government, legal scrutiny is clearly warranted. Therefore, the learned trial Bench has only done the needful by letting matters proceed to the stage of framing of charge.

C - Consequentialism or the rule of law?

30. We must now address the concern of learned counsel for the appellant that "*the very stability of the democratic system ... may depend on the outcome of this case.*" In part, the concern is fully justified. Given that the instant case concerns concepts like the supremacy of the Constitution and the primacy of the rule of law, the outcome of this case is indeed important. However, the Court has in previous cases already repelled arguments based on notions of consequentialism. In the NRO case, it was held: *"…the Court cannot and should not base its decisions on expediency or on consideration of the consequences which may follow as a result of enforcing the Constitution"*. As a court of law, we cannot base our judgments on the anticipated consequences of our decisions; else we will be reverting to the malignant doctrine of necessity which has already been buried because of the valiant struggle of the people of Pakistan. At page 481 of the NRO Judgment, it was observed thus "*political stability and the rule of law will flow as a natural consequence of giving sanctity and respect to the Constitution, both in letter and in spirit. The Court can only strengthen the rule of law by upholding the Constitution, which is, in fact, the supreme law.*

31. It is the strict adherence to this principle, which has fostered the revival of democracy in Pakistan, and upon which its survival still depends. If the appellant apprehends instability as a consequence of this case, such apprehension can easily be allayed by ensuring that the Constitution is adhered to. It is precisely this exercise which is being undertaken by the learned trial Bench. The appellant may also draw comfort from the fact that institutions and systems provided in the Constitution ensure political stability. What happens to an individual can be of little consequence as long as State institutions continue functioning in accordance with the Constitution. The anachronistic notion of "*après moi, le déluge*" has no room in a Constitutional order based on institutions rather than individuals.

D. Constitutionalism and the law of Contempt.

32. It appears from the submissions of learned counsel for the appellant that he may have overlooked some significant aspects of the nature of the broader scheme within which each state organ and its respective office bearers are to operate. It cannot be disputed that all state organs and the holders of high public office derive their legitimacy from the Constitution.

33. The Prime Minister's mandate is circumscribed by Art 90 of the Constitution, which permits him to exercise, in conjunction with various other constitutional functionaries, *"the executive authority of the Federation"*. This exercise of authority is however, *"[s]ubject to the Constitution"* as expressly stated in the proviso to Art 90 (1). In the same light, Judges are required to make an oath to the effect that they will discharge their duties *"in accordance with the Constitution…and the law"*. In fact, this part of the oath is common to the oath of every single functionary for whom the Third Schedule prescribes an oath; one of these oaths which puts the point most clearly requires that such functionary will "*uphold the Constitution of the Islamic Republic of Pakistan which embodies the will of the people*." (Oath of Members of the Armed Forces, Third Schedule, Constitution)

34. It is thus clear that our Constitutional Order is founded on the fundamental instruction that each organ must give effect to and act in accordance with the Constitution. Insofar as an act of any one of the organs of the state travels beyond the limits laid down in the Constitution, the said organ can be said to have strayed from representing "*the will of the people of Pakistan*." Conversely, in so far as all organs of the State remain within the limits prescribed by the Constitution, they have a legitimate claim to being enforcers and exponents of the will of the people. Our Constitution conceives of an Order wherein the various organs of State are co-equals, each manifesting the will of the people and giving effect to such through adjudication, executive action or legislation. It is important that the primacy of the Constitution over the Government as also over the judicature be fully understood.

35. As noted above, the Constitution expressly states that *"all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court."* Therefore, all members of the executive, for example, are constitutionally obliged to implement the decisions of the Supreme Court. The severity of its violation is fully recognized by the Constitution in Article 204. The Ordinance which has been promulgated pursuant to the said Article expressly includes within the ambit of contempt of Court anyone who *"disobeys or disregards any order, direction or process of a Court which he is legally bound to obey…"*. The people have expressly intended the broad reach of these provisions precisely to avoid the usurpation of the Constitution and to maintain the balance envisioned by the Constitutional Order. Courts invoke these sections only because such are the express instructions of the Constitution. The instant case, wherein this Court has taken

cognizance *prima facie,* of contempt by the appellant, is no different. The Court, by doing so has only fulfilled its mandate to uphold the Constitution.

36. We have set out above the constitutional position because we found it necessary to dispel the appellant's claim to a special privilege as a matter of law, and also, to reiterate that a fear of anticipated consequences must not influence our decision. We have also consciously avoided any comment on the specific pleas raised by the appellant in his defence. It will be for the learned trial Bench to receive evidence and thereafter to decide on the merits of such pleas. It is for this reason we have deliberately refrained from commenting on the documents placed on the file of this appeal including the summary dated 22.9.2010 (which was repeatedly referred to, by learned counsel) prepared by the Minister for Law, Justice and Parliamentary Affairs, because consideration of such documents lies within the domain of the learned trial Bench.

37. These are our reasons for the short order dated 10.2.2012.

Chief Justice

Judge Judge Judge

Judge Judge Judge

Judge

APPROVED FOR REPORTING.