IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

PRESENT:

Mr. Justice Khalil-ur-Rehman Ramday
Mr. Justice Muhammad Nawaz Abbasi
Mr. Justice Faqir Muhammad Khokhar
Mr. Justice Mian Shakirullah Jan
Mr. Justice M. Javed Buttar
Mr. Justice Tassaduq Hussain Jillani
Mr. Justice Saiyed Saeed Ashhad
Mr. Justice Nasir-ul-Mulk
Mr. Justice Raja Fayyaz Ahmed
Mr. Justice Ch. Ijaz Ahmed
Mr. Justice Syed Jamshed Ali
Mr. Justice Hamid Ali Mirza
Mr. Justice Ghulam Rabbani

CONSTITUTION PETITION NO.21 OF 2007

Chief Justice of Pakistan,
Mr. Justice Iftikhar Muhammad Chaudhry. ...Petitioner.

VERSUS

The President of Pakistan through the
Secretary and others. ...Respondents.

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For the petitioner: Ch. Aitizaz Ahsan, Sr. ASC.
Mr. Hamid Khan, Sr. ASC.
Mr. M. S. Khattak, AOR.
Assisted by Barrister Gohar Ali Khan
& Mr. Nadeem Ahmed &
Shahid Saeed, Advocates.
(under special permission granted by this Court)

On Court's notice: Mr. Makhdoom Ali Khan,
Attorney General for Pakistan.
Raja Abdul Ghafoor, AOR.
Assisted by Mr. Khurram Hashmi &
Mr. Umair Majeed Malik, Advocates
(under special permission granted by this Court)

For respondent No.1: Syed Sharifuddin Pirzada, Sr. ASC.
Raja Muhammad Ibrahim Satti, ASC.
Assisted by Mr. Waqar Rana, Advocate
(under special permission granted by this Court)

For respondent No.2: Mr. Maqbool Ellahi Malik, Sr. ASC.
Malik Muhammad Qayyum, ASC.
Mr. Shaukat Ali Mehr, ASC.

Ch. Akhtar Ali, AOR.
Assisted by Mr. M. Ahmed Qayyum, Adv.
(under special permission granted by this Court)

For respondent No.3: Syed Zafar Abbas Naqvi, ASC.

For respondents No.4 & 5: Nemo.

For respondent No.6: Mr. Aftab Iqbal Chaudhry, A.G. Punjab.
Ch. Muhammad Hussain, Addl. A.G.
Rao Muhammad Yousaf Khan, AOR.

CONSTITUTION PETITION NO.7 OF 2007

Muhammad Shoaib Shaheen. ...Petitioner.

VERSUS

Federation of Pakistan through
Secretary Law and others. ...Respondents.

...

For the petitioner: In person.

For respondent No.1: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.8 OF 2007

Watan Party through its President. ...Petitioner.

VERSUS

President of Pakistan through Cabinet
Secretariat and others. ...Respondents.

...

For the petitioner: Barrister Zafar Ullah Khan, ASC.
Mr. G. N. Gohar, AOR.

On Court's notice: Mr. Makhdoom Ali Khan,
Attorney General for Pakistan.
Raja Abdul Ghafoor, AOR.

For the respondents: Sahibzada Ahmed Raza Kasuri, Sr.ASC.
Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.10 OF 2007

Adliya Bachao Committee through
Convener and others. ...Petitioners.

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VERSUS

Federation of Pakistan and others. ...Respondents.

...

For the petitioners: Dr. Farooq Hassan, ASC.
Mr. Abdur Rasheed Qureshi, ASC.
Malik Shakeel-ur-Rehman, ASC.

On Court's notice: Mr. Makhdoom Ali Khan,
Attorney General for Pakistan.
Raja Abdul Ghafoor, AOR.

For respondent No.1: Malik Muhammad Qayyum, ASC.
Mr. Shaukat Ali Mehr, ASC.
Mr. Abdul Sattar Chughtai, ASC.
Mr. Abdul Hameed Rana, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.11 OF 2007

Muhammad Ashraf Khan. ...Petitioner.

VERSUS

Pervez Musharraf and others. ...Respondents.

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For the petitioner: In person.

For the respondents: Not represented.

CONSTITUTION PETITION NO.12 OF 2007

M. A. Ghani Chaudhry. ...Petitioner.

VERSUS

Federation of Pakistan through
President of Pakistan. ...Respondents.

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For the petitioner: In person.

For the respondents: Not represented.

CONSTITUTION PETITION NO.15 OF 2007

Amjad Malik. ...Petitioner.

VERSUS

President of Pakistan through

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Secretary Law and another. ...Respondents.

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For the petitioner: Mr. Muhammad Akram Sheikh,Sr.ASC.
Mr. Abdul Rehman Siddiqui, ASC.
Mr. Arshad Ali Chaudhry, AOR.
Assisted by Mr. Mohsin Kamal &
Mr. Azid Nafees, Advocates.
(under special permission granted by this Court)

For respondent No.1: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.16 OF 2007

Communist Party of Pakistan through
its Chairman. ...Petitioners.

VERSUS

Federation of Pakistan through
Secretary Cabinet and another. ...Respondents.

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For the petitioner: Engineer Jamil Ahmed Malik(In person)

For respondent No.1: Malik Muhammad Qayyum, ASC with
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.18 OF 2007

Muhammad Ahsan Bhoon. ...Petitioner.

VERSUS

Federation of Pakistan through
Secretary Law. ...Respondents.

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For the petitioner: Mr. Muhammad Akram Sheikh,Sr.ASC.
Mr. Arshad Ali Chaudhry, AOR.
Assisted by Barrister Natalya Kamal &
Mr. Ahmed Ahsan, Advocates.
(under special permission granted by this Court)

For respondent No.1: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.19 OF 2007

Muhammad Rafi Siddiqui. ...Petitioner.

VERSUS

Federation of Pakistan through

.

Secretary Cabinet and another. ...Respondents.

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For the petitioner: Dr. Farooq Hassan, Sr. ASC.
Malik Shakeel-ur-Rehman, ASC.
Ch. Arshad Ali, AOR.

For the respondents: Not represented.

CONSTITUTION PETITION NO.22 OF 2007

Barrister Zafar Ullah Khan. ...Petitioner.

VERSUS

President of Pakistan through
Secretary Law Justice and Human Rights
Division and others. ...Respondents.

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For the petitioner: In person.

For respondent No.1: Malik Muhammad Qayyum, ASC.
Mr. Pervaiz Alamgir, ASC.
Mian Ehsan-ul-Haq Sajid, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.23 OF 2007

Pakistan Bar Council through its
Vice Chairman. ...Petitioner.

VERSUS

President through its Secretary
and others. ...Respondents.

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For the petitioner: Mr. Hamid Khan, Sr. ASC.
Mirza Aziz Akbar Baig, ASC.
Mr. M. S. Khattak, AOR.

For respondent No.2: Malik Muhammad Qayyum, ASC.
Mr. M. Siddique Mirza, ASC.
Mr. Khalid Mahmood Farooqi, ASC.
Mr. Shabbir Lali, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.24 OF 2007

Supreme Court Bar Association through
its President and another. ...Petitioners.

VERSUS

President of Pakistan through its

.

Secretary and others. ...Respondents.

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For the petitioner: Mr. Hamid Khan, Sr. ASC.
Mr. Rasheed A. Rizvi, ASC.
Mr. Shafqat Abbasi, ASC.
Hafiz Abdul Rehman Ansari, ASC.
Mr. M. S. Khattak, AOR.

For respondent No.2: Mr. Ahmed Raza Kasuri, Sr. ASC.
Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.25 OF 2007

Abdul Mujeeb Pirzada. ...Petitioner.

VERSUS

Federation of Pakistan through Secretary
Cabinet Division and others. ...Respondents.

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For the petitioner: Mr. Abdul Majeeb Pirzada, Sr. ASC.
Ms. Mehreen Anwar Raja, ASC.
Mr. M. S. Khattak, AOR.

For respondent No.2: Malik Muhammad Qayyum, ASC.
Ch. Naseer Ahmed, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.27 OF 2007

Dr. Tariq Hassan. ...Petitioner.

VERSUS

Federation of Pakistan through
Secretary Law and others. ...Respondents.

...

For the petitioner: Mr. Muhammad Akram Sheikh,Sr.ASC.
Mr. Arshad Ali Chaudhry, AOR
Assisted by Barrister M. Kamran Sheikh,
Mr. Rahat Kaunian, Advocate.
(under special permission granted by this Court)

For respondent No.1: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

C.M.APPEAL NO.22 OF 2007

Athar Minallah and another. ...Appellants.

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VERSUS

Registrar, Supreme Court of Pakistan. ...Respondent.

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For the appellants: Syed Mansoor Ali Shah, ASC.
Mr. Yahya Afridi, ASC.
Mr. Athar Minallah, ASC.
Mr. M. S. Khattak, AOR.

For the respondent: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

C.M.APPEAL NO.27 OF 2007

Muhammad Shoaib Shaheen. ...Appellant.

VERSUS

Federation of Pakistan through Secretary
Law and Justice Division and others. ...Respondents.

...

For the appellant: In person.

For respondent No.1: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.30 OF 2007

Chaudhry Muhammad Ashraf. ...Petitioner.

VERSUS

Federation of Pakistan through Secretary
Law and others. ...Respondents.

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For the petitioner: Mr. Arshad Ali Chaudhry, ASC/AOR.

For respondent No.2: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.31 OF 2007

Abrar Hassan, President Sindh High
Court Bar Association. ...Petitioner.

VERSUS

President of Pakistan through
its Secretary. ...Respondents.

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For the petitioner: Mr. Rasheed A. Rizvi, ASC.
Mr. Abrar Hassan, ASC.
Mr. M. S. Khattak, AOR.

For respondent No.2: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.32 OF 2007

Lahore High Court Bar Association
through its President. ...Petitioner.

VERSUS

President of Pakistan through
its Secretary. ...Respondent.

...

For the petitioner: Mr. Ahmed Awais, ASC.
Mr. M. S. Khattak, AOR.

For respondent No.2: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.33 OF 2007

Balochistan Bar Association through
its President. ...Petitioner.

VERSUS

President of Pakistan through
its Secretary. ...Respondent.

...

For the petitioner: Mr. Fakhar-ud-Din G. Ibrahim, Sr.ASC.
Mr. Tariq Mahmood, ASC.
Mr. M. S. Khattak, AOR.

For respondent No.2: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.34 OF 2007

Ch. Naseer Ahmed Bhutta. ...Petitioner.

VERSUS

Federation of Pakistan. ...Respondent.

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For the petitioner: Ch. Naseer Ahmed Bhutta, ASC.

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For the respondent: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.35 OF 2007

High Court Bar Association D.I.Khan
through its President and another. ...Petitioners.

VERSUS

President of Pakistan and others. ...Respondents.

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For the petitioner: Mr. Arshad Ali Chaudhry, ASC/AOR.

For respondent No.2: Malik Muhammad Qayyum, ASC.
Ch. Akhtar Ali, AOR.

CONSTITUTION PETITION NO.38 OF 2007

Syed Fakhar-e-Iman. ...Petitioner.

VERSUS

President of Pakistan. ...Respondent.

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For the petitioner: Syed Iftikhar Hussain Gillani, Sr. ASC.
Mr. M. S. Khattak, AOR.

For the respondent: Not represented.

CONSTITUTION PETITION NO.40 OF 2007

Al-Jehad Trust through its President. ...Petitioner.

VERSUS

Chief of Army Staff. ...Respondent.

...

For the petitioner: Mr. Habib-ul-Wahabul Khairi, ASC.

For the respondent: Not represented.

Dates of hearing: 15th to 17th, 21st to 25th, 28th to 31st May, 2007, 1st, 4th to 8th, 11th to 14th, 18th to 21st, 25th to 28th June, 2007, 2nd to 5th, 9th to 12th and 16th to 20th July, 2007.

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JUDGMENT

KHALIL-UR-REHMAN RAMDAY, J.- Friday, the 9th of March, 2007, some submitted that it was a defining moment for our people while others claimed that it was a day which would always be remembered as one of vital significance or as a turning point in the history of Pakistan. This was the day on which the two 'HEADS' i.e. the President of Pakistan being the Head of the State and who also happened to be the Army Chief and the Chief Justice of Pakistan being the Head of the Judiciary, met with each other at about 11.30 a.m.. And on account of the events that followed, this meeting would never get to be called an ordinary or a routine meeting.

2. According to the averments contained in the Constitution Original Petition No.21 of 2007 filed in this Court by the Chief Justice of Pakistan himself (hereinafter called the CJP) and as per an affidavit subsequently filed by him (CMA No.1644 of 2007 in COP No.21 of 2007), he had been "***summoned***" for the said meeting, the venue whereof had, for reasons which according to the CJP surfaced subsequently, been intentionally kept as the Army House in Rawalpindi. The CJP claimed that he, alongwith his personal staff, reached there at about 11.30 a.m.; that he was led to and was seated in a waiting/visitors' room; that after about five minutes, the President, wearing his army uniform, arrived there with his Military Secretary and the ADC; that while he (the CJP) was briefing the President about the then forth-coming SAARC Law Conference, the SAARC Chief Justices' Conference and the concluding ceremony of the Golden Jubilee celebrations of the Supreme Court, the President

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mentioned to him that he (the President) had received a complaint against him (the CJP) made by a Judge of the Peshawar High Court; that he (the CJP) replied that the said was a malicious and a baseless complaint as the matter of the said Judge had not been decided by him alone and had in fact been heard by a two Member Bench of the Court and that false allegations had been leveled against the other Member of the said Bench. The CJP further claimed that thereafter the President told him that he (the President) had received some other complaints against him (the CJP) also and then asked his (the President's) staff to call the 'other persons'.

3. The CJP added that in pursuance of this direction of the President, the 'OTHER PERSONS' also entered the room and they were, the Prime Minister of Pakistan, the Director General of the Military Intelligence, in military uniform (hereinafter called the D.G. M.I.), the Director General of the Inter-Services Intelligence, in military uniform (hereinafter referred to as the D.G. I.S.I.), the Director General of Intelligence Bureau, a retired army officer, (hereinafter called the D.G. I.B.) and the Chief of Staff of the President, namely, Lt. Gen. (R) Hamid Javaid (hereinafter called the C.O.S.). The President then started mentioning the allegations of mis-conduct against him (the CJP) which the President was reading from some notes written on small pieces of paper and which accusations had been ***"taken from the contents of a notorious letter written by Mr.Naeem Bukhari with absolutely no substance in them"***. According to the CJP, he ***"promptly denied the veracity and credibility of these allegations"***. The CJP further

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claimed that the President then added that he (the CJP) ***"had obtained a car from the Supreme Court for his family"*** and also that he (the CJP) ***"was being driven in a Mercedes, to which the deponent (the CJP) promptly replied 'here is the Prime Minister, ask him, he has sent the car himself. The P.M. did not reply to this answer even by gesture"***. As per the CJP the ***"Respondent (the President) went on to say that the deponent (the CJP) had interfered in the affairs of the Lahore High Court and had not accepted and taken heed of most of the recommendations of the Chief Justice of Lahore High Court"*** (about appointment of Judges).

4. The petitioner CJP went on to depose that ***"the Respondent (the President) insisted that the deponent (the CJP) should resign"***. He added that his refusal to oblige, ***"ignited the fury of the respondent (the President); he (the President) stood up angrily and left the room along with his M.S., C.O.S., and the Prime Minister of Pakistan, saying that others would show evidence to the deponent" (about the allegations of misconduct against the CJP)***.

5. As per the CJP, his meeting with the President lasted for about thirty minutes meaning thereby that the President and the Prime Minister would have left by about 12.15/12.30 p.m. and the CJP was then left behind in the company only of the D.G. M.I., the D.G. I.S.I. and the D.G. I.B., allegedly to be shown the evidence in support of the above-noticed accusations. The CJP alleged that no evidence, at all, was shown to him and ***"in fact, no official except D.G. I.S.I.***

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had some documents with him but he also did not show any thing to the deponent" (the CJP). He added that they only accused him of having secured a seat for his son in Bolan Medical College while he was serving as a Judge of Balochistan High Court. The CJP further alleged that the D.G. M.I. and the D.G. I.S.I. kept insisting that he should resign from his office while he continued to assert strongly that the allegations were baseless and were being leveled only for a collateral purpose and that he would not resign at any cost and would rather face the said false charges.

6. The CJP then made a rather serious allegation i.e. that after the President and the Prime Minister had left the meeting which would be around 12.15/12.30 p.m., he was kept at the said meeting place against his will; that his movements appeared to be under watch through a close circuit camera; that whenever he tried to open the door of that room to leave, he would be confronted by an officer who would not let him do so; that he had been denied access even to his personal staff; that he was to go to Lahore that evening and was not in a position even to inform his family that he was still at the Army House and that his plan to go to Lahore had been cancelled and further that it was, having been put in such a situation, that he had to request the President's staff present there to ask his (CJP's) staff to convey the said message to his family.

7. He further claimed that it was after 5 p.m. that the D.G. M.I. came into the room where he was being detained; told him that his car was outside to drive him home and that while he (the CJP) was leaving, the D.G. M.I. told him that since he (the CJP) had parted

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ways with them, therefore, he (the CJP) had been ***"restrained to work as a Judge of the Supreme Court or Chief Justice of Pakistan"***. He added that when he saw his motor car, he found that the same ***"had been stripped of both, the flag of Pakistan and the emblem flag"*** whereafter his staff officer informed him that it had been shown on the T.V. that Mr. Justice Javed Iqbal had taken oath as the Acting Chief Justice of Pakistan and then his (CJP's) driver also told him that "***he (the driver) had been instructed not to take the deponent (the CJP) to the Supreme Court while on way to residence of the deponent"*** (the CJP).

8. It was added by the CJP that while on his way home, he asked the driver to take him to the Supreme Court but an Army official ***"prevented the deponent's (the CJP) car near the Sports Complex from proceeding further"***; that Tariq Masood Yasin SP surfaced there and ***"ordered the driver to come out of the car so that he could drive the deponent's car and also asked the deponent's (the CJP's) gunman to come out of the car as well"*** whereupon he (the CJP) agreed not to go to the Supreme Court on the condition that his driver would continue to drive his car and his gun man would continue to escort him home and that it was only on the said commitment made by him (the CJP) that Tariq Masood Yasin SP allowed the car to be driven by the CJP's driver.

9. Thus reaching home at about 5.45 p.m., the CJP claimed to have been shocked to see barricades placed on the road leading to his residence; to see that the national and the emblem flag had been

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taken off his house; to see a large number of police officials and the personnel from the Intelligence Agencies in uniform and in plain clothes all over his house and also to find that the telephones installed at his residence had been disconnected and that similar was the position of the mobile phones, the T.V. cables and the DSL which had also been, either jammed or dis-connected. It was added that by 9 p.m. that evening, the vehicles in his official use had also been lifted by means of a lifter and taken away though later that evening one vehicle was brought back but without its key being handed over to anyone there.

10. Re-capitulating the incidents and the events that followed, the CJP and the learned ASC appearing for him added that he (the CJP), alongwith the members of his family including his two young daughters and a not very healthy seven years old son, were detained in his house and so kept till after March 13, 2007; that on account of the presence of a large number of officials and personnel of the police department and of other Agencies inside their house, the privacy of their home and that of their personal and private lives appeared to have become concepts that had perhaps never existed; that their domestic servants had been taken away by some Agency and were released only after 2/3 days; that no one was allowed to go out even to fetch groceries till some one from some Agency accompanied the servant going out for the purpose; that his above-mentioned infant son who was a special child had been denied even medicines and medical aid; that heavy contingents of men, in and without uniform, were deployed outside their house and no one, including the sitting and the

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retired Judges of the Supreme Court, the Editors of the leading news-papers and other media-men, the office-bearers of the All Pakistan News-papers Society, the office-bearers and others of the Bar Associations and the members of the civil society, was allowed to meet him except the ones 'SENT' by the authorities; that even his two college-going daughters were not allowed to leave the house as a result of which one of them could not take her 1st year Federal Board Examination while the other was also not being allowed to take her examination and that the shock and trauma caused to them all by this treatment especially the children, defied expression.

11. In support of his above-noticed allegations, the CJP, as has been mentioned above, filed his personal affidavit (CMA No. 1644 of 2007) in addition to which a large number of news-papers carrying the relevant news-items and photographs; transcripts of two interviews of the President i.e. one with Kamran Khan of "GEO TV" and the other with Tallat Hussain of "AAJ TV"; some "PRESS RELEASES" especially the one dated March 9, 2007 issued from the office of the Press Secretary to the President (a copy of which taken from the President's web-site is available at page 58 of COP No. 21 of 2007) and some other documents were also filed on behalf of the C.J.P..

12. To notice the reaction of the respondents to these rather serious allegations leveled by none other than the Chief Justice of Pakistan himself, I would leave this story here for the time being dividing the same into three phases i.e. the first phase which witnessed the meeting between the CJP and the President and which

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according to the CJP started at about 11.30/11.45 a.m. and lasted till around 12.15/12.30 p.m.; the second phase starting with the time when the President left the meeting place and till the CJP's departure from the Army House/the President's Camp Office and during which period the CJP had been left in the company of the Intelligence Chiefs and which according to the CJP extended from around 12.30 p.m. till after 5 p.m. and finally the phase when the CJP reached back home at about 5.45 p.m. on March 9, 2007 and lasting till the morning of March 13, 2007 when the CJP left his house for the Supreme Court building to appear before the Supreme Judicial Council (hereinafter called the S.J.C.).

13. The respondents responded to the above-noticed assertions and others by filing, inter alia, a concise statement on behalf of the President and the Federation of Pakistan (CMA 1012 of 2007); affidavits of Lt. Gen. (R) Hamid Javed, the Chief of Staff of the President, the D.G. M.I., the D.G. I.B. and the affidavits of a large number of other officials and public servants.

14. The CJP's claim of having been 'SUMMONED' for the said meeting was denied by the first two respondents i.e. the President of Pakistan and the Federation, through their concise statement (CMA 1012 of 2007) and it was submitted that it was the CJP himself who had requested for the said meeting. During his interview with Kamran Khan of 'GEO' T.V., on a question put by the said host about the said issue, the President had stated that it was at the request of the CJP himself that he had met him (the CJP) on March 9, 2007. The C.O.S. to the President, through his above-mentioned affidavit sworn

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on 7.6.2007, gave further details and the background of the meeting in question. He deposed that the 9th of March meeting was not the first meeting ever between the President and the CJP and that the CJP had had meetings with the President at least on ten earlier occasions starting with the one on 7.10.2004 and the last being on 13.2.2007 and that except two of the said meetings which had taken place in the President's House at Islamabad, the venue of all other meetings had been either the Army House or the President's Camp Office in Rawalpindi. He had added that the Federal Government had received a number of complaints against the CJP; that the Federal Government had prepared a draft Reference which had been brought to the notice of the President by the Prime Minister on 7.3.2007; that on 8.3.2007, the President's Secretariat received a summary containing an advice from the Prime Minister for making a Reference against the CJP to the Supreme Judicial Council; that the President had been further advised that while making the said Reference, the CJP be restrained from working as a Judge of the Supreme Court or as the Chief Justice of Pakistan and that in his place the most senior available Judge of the Supreme Court be appointed as the Acting Chief Justice of Pakistan. He had further deposed that on that very day i.e. on 8.3.2007, the CJP had 'REQUESTED' for an urgent meeting with the President which was finally fixed for 11.30 a.m. on March 9, 2007.

15. However, the ***'Press Release'*** issued from the office of the Press Secretary to the President on March 9, 2007 (a copy of which taken from the President's web-site, as has been mentioned above

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appears at p.58 of COP No. 21 of 2007), had a different story to tell which was as under:-

> *"..... the Chief Justice <u>WAS CALLED</u> by the President and the Prime Minister and confronted with the allegations in answer to which he could not give any satisfactory reply. Consequently, the President and the Prime Minister were constrained to refer the matter to the Supreme Judicial Council as provided in the Constitution."*
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> *(emphasis and under-lining has been supplied)*

16. The next issue raised on behalf of the CJP was about the said meeting having been arranged in the Army House at Rawalpindi instead of the President's House at Islamabad and the President meeting the Chief Justice in army uniform. This coupled with the presence, in the said meeting, of the Chiefs of the three Intelligence Agencies, was emphasized to establish an attempt on the part of the respondents to bring the CJP under pressure in order to coerce him into tendering his resignation. It was the case of the other side that General Pervez Musharraf combined two offices in him i.e. he was the President of Pakistan and that at the same time he was also the Army Chief; that the residence of the President of Pakistan was the President's House in Islamabad which was adjacent to the Supreme Court building while the residence of the Chief of the Army Staff was in Rawalpindi being about 25 kilometers away from the Presidency and was also known as the Army House and that the President was using both these houses and was, at times, performing presidential functions even out of Rawalpindi for which purpose the President's

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Camp Office stood set up in a building which was adjacent to the residential block of the Army Chief. Kamran Khan of 'GEO TV' also asked the President about him being in army uniform to meet the Chief Justice and the venue of the meeting being the Army House to which the President had replied that the meeting in question did not take place in the Army House but they had met in the President's Camp Office at Rawalpindi and it was the same place which had been used by Prime Minster Bhutto, President Zia-ul-Haq and every other President before the construction of the President's House in Islamabad. The impression that the President had put on the Army Uniform only to over-awe the Chief Justice was sought to be repelled by the President also by adding that he mostly, was, in uniform.

17. The claim of the petitioner-CJP that the Referring Authority i.e. the President, fervently persuaded him to resign from the office of the CJP making all kinds of offers in lieu thereof, was not specifically denied by the respondents as would appear from para 4-5 of section II of the concise statement filed by them and what was instead said was, that:-

> *"the petitioner obviously had an option to resign or face S.J.C. proceedings".*

Almost similar was the stance of the President himself when questioned by Kamran Khan of 'GEO TV' about this resignation business which question was answered thus:-

> *"He is a Chief Justice. He should know himself if he wants to resign or contest the case and he decided to contest the case. That is his choice."*

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The C.O.S. also spoke on the subject especially the allegation by the CJP that even the Intelligence Chiefs had extended threats to him to secure his resignation from his office. The C.O.S., through his affidavit denied the said accusation deposing that no one had threatened the CJP and no one had coerced him to write out a resignation. He, however, added that tendering resignation, in such-like situations, was always an option.

18. This brings us to the crucial ***'five hours'*** or thereabout i.e. the time when the CJP had been in the President's Camp Office in Rawalpindi starting around 11.45 a.m. and extending upto after 5 p.m. during which period the CJP claimed to have been detained at the said office against his wishes after the President had left the said meeting at about 12.30 p.m..

19. The C.O.S., through his above-mentioned affidavit gave a detailed account of the said period of time deposing that the CJP had a one on one meeting with the President which started at 11.45 a.m. and the only other person present in the said meeting was the Military Secretary to the President; that the CJP briefed the President about the SAARC Law Conference, the SAARC Chief Justices' Conference and the Golden Jubilee ceremony of the Supreme Court whereafter the CJP opened a file and shared with the President the contents of a complaint filed against him (the CJP) by a Judge of the Peshawar High Court. The C.O.S. went on to add that the matter of this complaint was not in knowledge of the President and it was the CJP himself who had raised the said issue and that prior to the said meeting, the CJP had also spoken to the Chairman of the CBR and

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the D.G. M.I. requesting them to support him (the CJP) with respect to the said complaint. The C.O.S. had further added that it was after the CJP had talked about the said complaint that the President informed the CJP that in pursuance of his (the CJP's) request, the Intelligence Agencies had carried out a discreet fact-finding probe into the media reports tarnishing his image (the CJP's) and that he (the President) had been pained to learn about the findings of the said Agencies whereafter the President drew the attention of the CJP to the main points of the Reference which he had received. The C.O.S. claimed that it was incorrect that the only material which the President had with him, had been taken from a letter of Naeem Bukhari Advocate; that the President had read the entire Reference and the material in support thereof and had jotted down some points which he had mentioned to the CJP.. The C.O.S. had further disclosed that it was on the insistence of the CJP to know the details of the Reference that the President had told him that the same could be discussed in the presence of the Intelligence Chiefs and that it was at the said stage of the meeting i.e. at about 1 p.m. that the Prime Minister, the C.O.S., the D.G. M.I., the D.G. I.S.I. and the D.G. I.B. had also joined the said meeting. He had further deposed that the President, the Prime Minister, the MS to the President and the C.O.S. himself had left the meeting at 2 p.m. while the CJP stayed back for further discussions with the Chiefs of the M.I. and the I.B. with whom he (the CJP) had cordial relations. It was further submitted by the C.O.S. that the D.G. I.B. also left the meeting at 3 p.m. leaving the

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CJP alone in the company of D.G. M.I. (for about two hours i.e. till after 5 p.m.).

20. The C.O.S. also denied that the CJP had been detained at the President's Camp Office against his wishes or having been held there ***in-communicado*** pleading that during this period a message of the CJP had been conveyed to his (the CJP's) staff officer that his (the CJP's) family be informed that his programme to go to Lahore had been cancelled. It was further emphasized by the C.O.S. that the CJP and his family were on visiting terms with the D.G. I.B. and the D.G. M.I. and they had thus cordial relations with each other and further that the atmosphere during the period that the CJP remained at the President's Camp Office, was polite and that decorum had been maintained at all times.

21. Referring to the CJP being kept in the Army House/the President's Camp Office in Rawalpindi for about five hours i.e. from around 11.30/11.45 a.m. when the CJP reached there till after 5 p.m. when the CJP finally left, Kamran Khan of 'GEO TV' asked the following question:-

> *"First of all, taking the nation into confidence, please tell the details of these five hours because this is the biggest criticism?"*

The reaction of the President to this question was as under:-

> *"Now let me give the details of the quoted five hours. First of all I asked him about why he wanted to meet me? He said that a Justice of Peshawar had written a letter making allegations*

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against him and suggesting that Chief Justice should be taken to trial in Supreme Judicial Council otherwise he (Peshawar Judge) would resign.

I said Mr.Iftikhar there is a reference against you. I had wanted to discuss with him whether it was justified or not. I told him everything and in the meanwhile also called Prime Minister because the reference was from the Prime Minister. I told him about the references one by one and wanted an explanation of judge if it was worthwhile to send it to the Supreme Judicial Council? Even though we had personal relations but I am a strong believer and I am the President of Pakistan and he is the Chief Justice of Pakistan. There is reference against him and it is an official act. We cannot be anchored; this is far above personal relations. I have responsibility to the nation. There are legal responsibilities and I am duty-bound to analyze and take some action. So, I thought this is one sided, I must ask the person concerned. And around 2.00 p.m. Prime Minister and I went to offer Juma prayers. But I gave him the file of evidences of every charge.

I had to go to Karachi because I had already got late by half an hour. Chief Justice kept sitting with the staff studying that reference and its evidence. It might have taken the rest of time. A very serious position man was being accused and I did my best to find out. I took decision on my honest conscious in

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> *national interest, legal interest and followed the legal norms and handed over to Supreme Judicial Council."*
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> *(under-lining has been supplied)*

22. The above-mentioned concise statement submitted by the first two respondents denied the allegations of the CJP about his (the CJP's) detention in his own house alongwith his family after he had reached his residence at about 5.45 p.m. on March 9, 2007; about them all being held ***in-communicado*** and about the telephone connections and the television cables etc. having been dis-connected/jammed and submitted as under:-

> *"46. The allegations that Chief Justice of Pakistan was compelled to submit his resignation by detaining him, cutting off telephone lines, television channels, removing his vehicles or through alleged manhandling are not correct and <u>have been made out of context</u>.*
>
> *13. Para 13 is denied. The petitioner was not physically detained along with his family members. The petitioner was free to meet any one and amongst others met and continues to meet a very large number of politicians. The Chief Justice House has become a hub of opposition political activities. It is denied that the telephone lines and television connections were cut off.*
>
> *14. Para 14 is denied. It is vehemently denied that any actions by the Referring Authority were taken to punish the petitioner for his refusal to*

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resign. It is denied that there was any mala fide or collateral purpose. There have never been a physical restraint or a deliberate humiliation inflicted upon the petitioner. It is denied that irked by the petitioner's refusal to resign the reference was crafted as the alternative mode of ouster.

15. Denied. It is denied that the petitioner had no access to his counsel and was denied visitors and entry and exit to and from his house. The petitioner was assisted by a panel of five lawyers on the first date of hearing before the S.J.C. on 13.3.2007."

(under-lining has been supplied)

23. Kamran Khan of '**GEO TV**' also asked the President about the detention of the Chief Justice along with his children; about the dis-connection of his telephones and about restrictions on the CJP's interaction with other people as the said were the kind of matters which had shocked not only the nation but the whole world and how and why all this had happened. The President replied as under:-

"Yes, I would like to tell that where he was living, we had a concern that there should be no media trail out of this and there is not politicization of this, plus a security aspect of that area. Other than this as far as I am concerned, I don't deal with tactics or its implementation. So if there are restrictions at that level, it is bad. But then we realized and then took action when this all came in front of me then I even got involved in the

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> *tactics of it. And I corrected the situation."*
>
> *(under-lining has been supplied)*

The said anchor-person then asked the President whether it was because of his direct intervention and orders that the restrictions placed on the movements and on the freedom of the CJP had been lifted. The President answered as under:-

> *"Frankly, yes. I got involved because I noticed that these issues were creating misconceptions and leading to confusion. Like I said I believe in freedom of speech and freedom of the media. There should be no restrictions. So I got concerned about what was happening. So I said allow him to move freely and meet anybody or say anything. And because of that I am glad that actions have been taken on the ground."*
>
> *(under-lining has been supplied)*

24. To almost the same effect was the President's stance while talking to Tallat Hussain of 'AAJ TV' on 18.5.2007 which I am not quoting ***in-extenso*** to avoid repetition and also because the said interview was mostly in Urdu language. Suffice it, however, to add that according to the President, he was alone with the CJP for about one or one and a half hours discussing with him, *inter alia*, the advice sent to him by the Prime Minster for making a Reference to the Supreme Judicial Council and that it was when the CJP had asked proof of the allegations contained in the said Reference that he (the President) had called in the Intelligence people and also the Prime Minister. Tallat Hussain also asked the President about taking away of the mobile

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phone of the CJP; stripping the official vehicle of the CJP of the national flag and about the CJP's detention in his house. The President's reaction to the same was that this was a matter of "**TACTICAL HANDLING**"; that he (the President) was not aware of taking away of the cell phone of the Chief Justice and added that it was wrong tactical handling which should not have happened.

25. The C.O.S. also talked about the CJP's above-mentioned detention in his house from the 9th to 13th of March, 2007 and deposed that the impression created by the CJP that he had been, for several days, held, ***in-communicado***, at his residence where his telephone lines had been dis-connected and the mobile phones had been jammed, was incorrect. The only evidence offered by him in support of his denial was that between 5 p.m. on March 9, 2007 and the morning of March 13, 2007 more than 350 calls had been made/received from/on the mobile phone of his (the CJP's) son including a call made by Mian Muhammad Nawaz Sharif (an ex-Prime Minister of Pakistan).

26. The contents of the affidavits filed by the D.G. M.I. and the D.G. I.B. were more or less the same as those of the C.O.S.. Therefore, the same are not being discussed for fear of repetition.

27. It may, however, be added that the C.O.S. in his affidavit also talked about certain other acts of mis-conduct allegedly committed by the CJP but since, for reasons best known to the Referring Authority, the same were not part of the accusations mentioned in the Reference, therefore, they are being ignored by me being more than irrelevant for our purposes. For the same reason, we did not permit the

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learned Sr. ASC for the petitioner-CJP to talk about them when he desired to answer the same.

28. So far, we have noticed the events and the happenings of the 9th of March, 2007 as they had allegedly taken place at the President's Camp Office and the situation thereafter, allegedly, prevailing at the residence of the CJP.. Let us now see what was happening elsewhere during the said crucial period.

29. While the CJP was still at the President's Camp Office in Rawalpindi during the said crucial 'FIVE HOURS' and when according to the CJP he was being detained there against his wishes after 12 noon and when according to the respondents he was sitting there, in the company of the Intelligence Chiefs examining the Reference and the material available in support thereof, a notification dated March 9, 2007, was issued by the Government of Pakistan in the Law, Justice and Human Rights Division mentioning therein that since the President of Pakistan had been pleased to make a Reference (called a 'DIRECTION' by Article 209(5) of the Constitution) to the S.J.C. against the CJP, therefore, the President had restrained Mr. Justice Iftikhar Muhammad Chaudhry from acting as the Chief Justice of Pakistan or even as a Judge of the Supreme Court of Pakistan. This notification was followed by another notification of the same date issued by the same Division in the Government of Pakistan stating therein that since on account of the above-mentioned restraining order, Mr. Justice Iftikhar Muhammad Chaudhry stood rendered unable to perform functions as the Chief Justice of Pakistan, therefore, the President of Pakistan was, in exercise of the powers vesting in him

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under Article 180 of the Constitution, pleased to appoint Mr. Justice Javed Iqbal, the most senior available Judge of the Supreme Court, to act as the Chief Justice of Pakistan. What may be kept in mind at this stage is that the 9th of March happened to be a Friday which was a half working day when the Secretariat and all other offices closed down at 12.30 p.m. while according to the President and his C.O.S., the President was with the CJP till around 2 p.m. whereafter he left for Friday prayers and then went away to Karachi taking off from Islamabad airport at about 3 p.m..

30. It is on record that Mr. Justice Javed Iqbal took oath of the office of the Acting Chief Justice of Pakistan at three minutes past 5 p.m.. It is also on record, having been so deposed by the CJP and not denied by the respondents or even by any one else on their behalf, that when the CJP left the President's Camp Office and came out to board his motor-car, his staff officer had informed him that Mr. Justice Javed Iqbal had been sworn in as the Acting CJP as he (the staff officer) had seen the ceremony on the television. It thus stands established that the two above-mentioned notifications had been issued; the Reference in question had been made; the CJP had consequently been restrained from performing functions as the CJP or even as the Judge of the Supreme Court and Mr. Justice Javed Iqbal had been constituted as the Acting CJP while the CJP was still at the President's Camp Office, according to the CJP, under detention and according to the respondents, sitting and examining the said Reference and the evidence in support thereof to decide whether to accept the offer made to him to tender his resignation or to contest the charges leveled

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against him. Needless to mention here that the President had left Islamabad at about 3 P.M. and would have signed the Reference in question and the order of the appointment of the Acting Chief Justice of Pakistan (hereinafter referred to as the ACJP) before leaving for Karachi.

31. After Mr. Justice Javed Iqbal had so become the Acting Chief Justice of Pakistan, the Supreme Judicial Council met the same evening i.e. on March 9, 2007 and passed the following order:-

> *"BEFORE THE SUPREME JUDICIAL COUNCIL*
> *SUPREME COURT BUILDING ISLAMABAD*
> *(PROCEEDING IN CAMERA)*
>
> ***PRESENT:***
>
> *MR. JUSTICE JAVED IQBAL, (ACJP)/CHAIRMAN*
> *MR. JUSTICE ABDUL HAMEED DOGAR, MEMBER*
> *MR. JUSTICE SARDAR MUHAMMAD RAZA KHAN, MEMBER*
> *MR. JUSTICE IFTIKHAR HUSSAIN CHAUDHRY, MEMBER*
> *MR.JUSTICE SABIHUDDIN AHMED, MEMBER*
>
> *RE:* ***REFERENCE RECEIVED FROM THE PRESIDENT OF THE ISLAMIC REPUBLIC OF PAKISTAN UNDER ARTICLE 209 OF THE CONSTITUTION AGAISNT MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CHIEF JUSTICE OF PAKISTAN***
>
> *MR. MAKHDOOM ALI KHAN, ATTORNEY GENEAL FOR PAKISTAN IN ATTENDANCE.*
>
> *DATE OF HEARING: 9 MARCH 2007*
>
> ***ORDER***
>
> *Mr. Justice (Retd.) Mansoor Ahmed, Secretary Law, Justice and Human Rights Division, Government of Pakistan, Islamabad HAS PRESENTED a Reference made by the President of the Islamic Republic of Pakistan under Article 209 of the Constitution against Mr. Justice Iftikhar Muhammad Chaudhry, Chief*

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> *Justice of Pakistan to answer the question whether the respondent is guilty of misconduct.*
>
> *2. The Supreme Judicial Council, ON RECEIPT OF THE REFERENCE, HAS MET TODAY. After examining the Reference and having gone through the record the council has taken cognizance of the Reference and decided to invite the respondent to appear before it on 13 March, 2007 at 1.30 p.m. Order accordingly.*
>
> *3. IT IS FURTHER ORDERED THAT THE RESPONDENT SHALL NOT PERFORM FUCNTIONS AS JUDGE OF THE SUPREME COURT AND/OR THE CHIEF JUSTICE OF PAKISTAN TILL THE ABOVE REFERENCE IS ANSWERED BY THE COUNCIL."*
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> *(emphasis and under-lining has been supplied)*

32. According to the CJP, as subsequently gathered by him from the media, the Supreme Judicial Council had met at 6 p.m. that evening while according to the learned Attorney General who was present in the said meeting, the same had taken place at about 6.30 p.m.. It had been argued that if the said meeting had been convened by the ACJP then His lordship could not have done so prior to taking oath of his said office which was at about 5 P.M.. It is on record, being evident from the above quoted order itself that one of the Hon'ble Members of the S.J.C. participating in the said meeting i.e. Mr.Justice Iftikhar Hussain Chaudhry was the Hon'ble Chief Justice of the Lahore High Court based in Lahore while the 5th Member of the said council i.e. Mr.Justice Sabihud Din Ahmad was the Hon'ble Chief Justice of the Sindh High Court and was based in Karachi. As per the averments contained in the CJP's COP No. 21 of 2007, the said two

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Hon'ble Members had been flown into Islamabad from Karachi and Lahore by special aeroplanes. This assertion of the petitioner CJP had been denied by the respondents as also by the C.O.S. but only to the extent that it was only the Hon'ble Chief Justice of the Sindh High Court who had been so flown into Islamabad. It may be mentioned here that just the flying time from Karachi to Islamabad was about two hours while the driving time from Lahore to Islamabad was more than four hours. The respondents did not place, on record, any copy of the order convening the S.J.C. meeting on March 9, 2007 to establish as to who, if at all, had convened the said meeting and when. Nor had any explanation been offered as to who had informed the said two Hon'ble Members of the S.J.C. at Lahore and Karachi about the said meeting and when and also the means through which Their lordships in Lahore and Karachi could have reached Islamabad within about an hour or an hour and a half of the Hon'ble Acting Chief Justice of Pakistan assuming responsibilities of the said office including the Chairmanship of the S.J.C.. I may mention here that the record of the S.J.C. was summoned by us in Court and after examining the same, it had been found that no order convening the S.J.C. meeting on 9.3.2007 had ever been passed either by the Hon.ACJP/the Chairman of the S.J.C. or even by the Registrar of this Court who also happened to be the Secretary of the said Council.

33. What also transpires from a bare perusal of the said order of the S.J.C. dated the 9th March, 2007 is:-

> *a) that the Reference in question had not been sent to the Supreme Court*

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or the S.J.C. in due course but had been brought personally by the Law Secretary of the Government of Pakistan who presented the same before the S.J.C. after the same had met;

b) that the CJP had then been "invited" to appear before the S.J.C. on 13.3.2007 at 1.30 P.M.;

c) that while so inviting the CJP to answer the said Reference, the S.J.C. had "ordered" the CJP not to perform functions as a Judge of the Supreme Court or as the Chief Justice of Pakistan;

d) that it had been so ordered by the S.J.C. inspite of the fact that the President, in the earlier part of the same day, had already passed an order restraining Mr.Justice Iftikhar Muhammad Chaudhry from performing functions as a Judge of this Court or as the Chief Justice of Pakistan;

e) that the said restraining order had been passed by the S.J.C. without any application having been filed by any one seeking any such order or even on an oral request having been made by the learned Attorney General for the purpose who happened to be present in the said meeting;

f) that the said order which stripped the head of the national judiciary of all his powers had been passed without hearing him; without any notice to him for the said purpose and was not an ad-interim order which was to enure only till the next date of hearing but was an

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> *order which was to remain in force through the entire length of the proceedings before the S.J.C. i.e. till the Reference was finally answered by it.*

34. Two orders had thus been passed, within a span of about three to four hours on March 9, 2007, commanding Mr. Justice Iftikhar Muhammad Chaudhry not to perform any act as the Chief Justice of Pakistan or even as a Judge of the Supreme Court i.e. one passed by the President of Pakistan and the other by the Supreme Judicial Council. It appears that not only that the order passed by President was not considered good enough as the S.J.C. had felt compelled to pass another order but even the one passed by the said Council was thought not to be sufficient for the purpose because yet another order was issued by the Government of Pakistan in the Law, Justice and Human Rights Division through a notification dated March 15, 2007 stating therein that the President had proceeded, in terms of Article 2(1) of the Judges (Compulsory Leave) Order of 1970 (President's Order No.27 of 1970), to order that Mr. Justice Iftikhar Muhammad Chaudhry, the already restrained and dysfunctional Chief Justice of Pakistan, shall be on 'COMPULSORY LEAVE' with effect from the 9th of March, 2007 till the submission of the report by the S.J.C. and the President's order thereon under Article 209 of the Constitution. This is, it was submitted, how the head of the Judiciary who was guaranteed security of his office and of its tenure and who was constitutionally assured of independence and freedom, was sought to be chained before his final execution.

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35. Returning to the events of the 9th of March and later, it had also been alleged by the CJP, as learnt by him subsequently, that his Chamber in the Supreme Court which he had not been allowed to visit since after his above-mentioned meeting with the President, had been taken over by some officials of some 'Agencies' on that day i.e. on March 9, 2007; that his personal staff was taken into custody and had been kept by some personnel of the said 'Agencies' at some un-known place for some days; that they had been interrogated and then pressurized into making statements against him (the CJP) to extort and fabricate evidence; that his Chamber had been searched, some files had been taken away and the Chamber was then sealed and that the then Registrar of the Supreme Court i.e. Dr. Faqir Hussain who was also the Secretary of the S.J.C., had been transferred immediately by the ACJP after taking oath of his said office.

36. As has been noticed above, the order of the S.J.C. dated March 9, 2007 had asked the CJP to appear before it on March 13, 2007 to answer the Reference sent against him by the President. The CJP claims to have been harassed, humiliated and man-handled while walking down to the Supreme Court on 13.3.2007 to attend the meeting of the said Council. According to the learned Sr. ASC for the petitioner, the CJP had felt compelled to foot it to the Court because his official motor-cars had been lifted away on March 9 and the keys of the one car restored to his house, had not been left with them. The learned Sr. ASC also drew our attention to the reports of the said man-handling of the CJP and the photographs appearing in the media where he was shown to be held by his hair by a police-man.

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37. The CJP, however, reached the Supreme Court Building on 13.3.2007; participated in the proceedings of the S.J.C. and according to COP No.21 of 2007 and CMA No.1664 of 2007, objections were taken by him, *inter alia*, to the participation of three of the Hon'ble Members of the Supreme Judicial Council in the said proceedings on account of their alleged bias against the CJP as also to the holding of the S.J.C. proceedings ***"in camera"***. And it was, *inter alia*, on account of the said objections not being decided by the S.J.C. despite a lapse of over one month and the manner in which the proceedings were being taken by the said Council that the CJP had felt coerced into filing the present petition invoking the Original Jurisdiction of this Court under Article 184(3) of the Constitution.

38. At least twenty four other and similar petitions were filed in this Court, some before and some after the filing of the above-mentioned petition by the CJP himself. The petitioners in these petitions included the Pakistan Bar Council, the Supreme Court Bar Association, the Lahore High Court Bar Association, the President of the Karachi High Court Bar Association, the Peshawar High Court Bar Association at D.I.Khan, some advocates of this Court, some NGOs, some political figures of the country and some members of the civil society. All these petitions were heard together on the question of their maintainability but then in order to avoid the avoidable delays in deciding the issue, it was decided to separate the petition of the CJP, who was the person really aggrieved, from the other petitions; to decide the same first and to deal with the other petitions separately and thereafter.

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39. It may also be mentioned here that all these petitions had initially come up for hearing before a learned Bench comprising three Hon'ble Judges of this Court but as one of the learned Members of the said Bench (Sardar Muhammad Raza Khan, J.) had participated in the first meeting of the S.J.C. as one of its Members, therefore, all these matters were ordered to be placed before a Bench of which His lordship (Sardar Muhammad Raza Khan, J.) was not a Member and preferably before a still larger Bench. The matters were thereafter laid before a five Member Bench of this Court but on the request of the learned counsel for the respondents i.e. the President and the Federation of Pakistan, the same were ordered to be listed before the full Court minus, of course, the Hon'ble Judges of this Court who had been or still were the Members of the S.J.C.. Fourteen Hon'ble Judges thus assembled on 14.5.2007 to hear these matters but then one of them i.e. Falak Sher, J. recused himself on the ground that his representation claiming seniority over the petitioner CJP was still pending determination and on account thereof His lordship did not consider it appropriate to decide a matter pertaining to him (the CJP). It may also be mentioned here that in the early hours of 14.5.2007 i.e. the day on which this Bench was to commence the hearing of this petition, an Additional Registrar of this Court, namely, Syed Hammad Raza, who had suffered long spells of detention and interrogation after 9.3.2007, was murdered. And according to a public statement of his widow, this murder was, in fact, a message to the Members of this Bench.

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40. This is how and why this matter and others came to be heard and decided by this thirteen Member Bench of this Court. The actual hearing of these petitions thus started on 15.5.2007 which went on from day to day minus of course the week-ends.

41. Mr. Aitizaz Ahsan, Senior ASC led the arguments on behalf of the petitioner CJP while Malik Muhammad Qayyum, ASC representing the Federation, was the lead counsel who rendered the main assistance canvassing dismissal of this petition.

42. Syed Sharif-ud-Din Pirzada, Senior ASC assisted us on behalf of the President adopting, mainly, the submissions made by Malik Muhammad Qayyum ASC. He, however, did make a mention of the historical background of various constitutional provisions relating to the removal of Judges starting with the Government of India Act of 1935 down to the present day. Also referred to some earlier cases where Judges of Sindh and West Pakistan High Courts had been proceeded against for mis-conduct. He also dwelt upon the vires of the above-mentioned President's Order No.27 of 1970 giving us the background which had led to its promulgation. But his main emphasis was his repeated reference to the case of Tun Salleh Abbas who was the Lord President i.e. the highest Judge in Malaysia and the head of the National Judiciary. The then Prime Minister of Malaysia had started feeling un-happy and uncomfortable with some decisions which the judiciary was rendering. As a first step towards clipping its wings and subsuming the judiciary beneath the Executive, the Prime Minister decided to eliminate the highest hurdle i.e. the honest, just and independent Lord President. He, however, refused to bow to the

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Prime Minister's pressure to either resign or retire despite offers of alternative lucrative jobs and financial inducements. He was suspended and a Tribunal was set up to seal his fate. Tun Salleh's lawyers approached the Supreme Court. Five Honourable Judges decided hear to the case. The Acting Lord President who was also the head of the said Tribunal, ordered locking of the Supreme Court doors to ensure that these Judges could not meet and also directed secreting away of the seal of the Court. The said Judges managed opening of the Court doors; assembled to hear the case and then ordered the Tribunal (the equivalent of our S.J.C.) not to submit any recommendation, report or advice to the King in the matter. The Tribunal was holding its sittings in the Parliament House. This time, the doors of the Parliament House were locked to ensure that this restraint order could not be served on the Tribunal before it sent its advice to the King. The 'Honourable five' again secured un-locking of the doors, this time of the Parliament House and the restraint order was finally served on the Tribunal. Four days later, all the 'Honourable five' were suspended. The prohibition order that they had passed, was revoked. Tun Salleh Abbas, the Lord President was finally removed. The irking orders that the judiciary had earlier passed, were reversed. Three of the 'Honourable five' were eventually re-instated but the other two were removed from office.

43. I asked Mr. Pirzada, of course in a light vein, whether citing this Malaysian case was a threat or a mere advice. His captivating smile, was the answer.

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44. Mr. Makhdoom Ali Khan, the learned Attorney General, who was appearing only as the Attorney General representing none, also adopted the arguments of Malik Muhammad Qayyum, ASC but addressed additional arguments on the competence of the S.J.C. to inquire into the alleged in-capacity or the mis-conduct of the Chief Justice of Pakistan in pursuance of a Reference made by the President; the validity of the orders passed by the President and the S.J.C. restraining the CJP from working as a Judge of the Supreme Court or as the CJP; the validity of the '***in-camera***' proceedings being held by the S.J.C.; the effect of the alleged bias of some Hon'ble Members of the S.J.C. towards the CJP and finally the severability of the grounds which had weighed with the President in making the Reference in question.

45. It may also be mentioned here that more than two months after the commencement of the hearing of this petition i.e. on 16.7.2007, while Malik Muhammad Qayyum, ASC was vehemently arguing about the serious application of mind by the Referring Authority to the Reference in question before the same had been made to the S.J.C., Syed Sharif-ud-Din Pirzada, Sr. ASC representing the President of Pakistan rose and, with our permission, made the following statement:-

> *"I have instructions from the President and the Prime Minister to state that para 34 of the Reference alongwith its heading as also clause (g) of para 36 of the Reference may be considered as deleted."*

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These paragraphs related to the alleged ***'Judicial Misconduct'*** of the petitioner CJP..

46. The conduct of the Supreme Judicial Council, in these proceedings, also deserves notice. It had been arrayed as a respondent because, according to the learned counsel for the petitioner, *inter alia*, an order passed by it; the proceedings before it and the bias of some of its Hon'ble Members had also been questioned through this petition. The S.J.C. responded to the said petition by filing a Concise Statement taking, according again to the learned Sr. ASC for the petitioner, an adversarial position. The said Council submitted that the provisions of Article 211 of the Constitution barred the jurisdiction of this Court qua the proceedings before it; that this Court was not possessed of any power to entertain this petition against the S.J.C. and/or to issue any process or notice to it; that any proceedings taken in this petition regarding the proceedings pending before the said Council, any process issued to it or any order passed against the S.J.C. in pursuance of such a petition would be proceedings and orders etc. passed without jurisdiction and consequently a nullity in the eyes of the Constitution and the law and that any such petition filed before this Court under Article 184 of the Constitution ought to be dismissed forthwith without taking any further proceedings thereon. It had also been submitted that the S.J.C. had engaged/was in the process of engaging and retaining a Senior Advocate of the Supreme Court to address this Court on the constitutional impediments and prohibitions in the matter of arraying the S.J.C. as a respondent in this petition and against the issuance of any process, orders or directions to it and

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finally that the filing of this reply by the S.J.C. or the appearance of a senior counsel on its behalf before this Court for the above purpose, should not be deemed to be submission by the S.J.C. to the jurisdiction of this Court. This reply was filed by the Secretary of the S.J.C./the Acting Registrar of this Court on 24.4.2007 through an Advocate on Record.

47. On 21.5.2007, it appears that on second thoughts, a further Statement was filed in this Court by the said Secretary of the S.J.C. stating therein that the status of the Council, in the present *lis*, was non-adversarial and that the Council was entirely non-partisan. It had, however, been re-iterated that holding an inquiry under Article 209(5) of the Constitution pursuant to a Presidential Reference was a constitutional obligation of the Council; that every constitutional obligation was inviolable; that the S.J.C. being the only institution and Articles 209, 210, and 211 of the Constitution and the mode prescribed by the said provisions being the only mode of carrying out the accountability of judges of the Superior Courts, the provisions of 211 of the Constitution expressly and explicitly barred the jurisdiction of all courts, including this Court, to call in question the proceedings before the Council and its report to the President; that the proceedings before the Council were judicial in nature or were, at least, quasi-judicial and certainly not administrative and were comparable to the powers exercised by this Court under Article 186 of the Constitution; that the Council, like this Court and like the High Courts, stood vested with powers and functions which were legislative/sub-legislative, judicial and administrative and finally that it also stood blessed with powers

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under Article 210 of the Constitution which were identical to the powers enjoyed by this Court including the powers to impose punishments for its contempt.

48. Having thus enlightened us about the immense powers possessed by the S.J.C. and the paucity or the absence of the same with this Court vis-à-vis the S.J.C., its Secretary informed us that the S.J.C. did not wish to participate in the proceedings of this Court arising out of the petition in hand and that its name be struck off the array of respondents. It may be mentioned here that nothing was placed on record to indicate any order passed by the S.J.C. authorizing the said Secretary to file the said statements in this Court in reply to the petition in question filed by the C.J.P.. Nor was anything available on record, summoned and perused by us, to demonstrate as to who had instructed him to file the said reply.

49. Needless to say that having heard the learned counsel for the parties at some length; having benefited immensely from the in-valuable assistance rendered by them, and for detailed reasons to be recorded later about all the questions agitated before us, this Court, passed the following judgment on July 20, 2007:-

> *"For detailed reasons to be recorded later, the following issues arising out of this petition are decided as under:-*
>
> *(I)* ***MAINTAINABILITY OF COP NO.21 OF 2007 FILED UNDER ARTICLE 184(3) OF THE CONSTITUTION***
>
> *This petition is unanimously declared to be maintainable.*
>
> *(II)* ***VALIDITY OF THE DIRECTION (THE REFERENCE)***

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ISSUED BY THE PRESIDENT UNDER ARTICLE 209(5) OF THE CONSTITUTION.

By a majority of 10 to 3 (Faqir Muhammad Khokhar, J., M. Javed Buttar, J. and Saiyed Saeed Ashhad, J. dissenting), the said direction (the Reference) in question dated March 9, 2007, for separate reasons to be recorded by the Hon. Judges so desiring, is set aside.

(III) ***VIRES OF JUDGES (COMPULSORY LEAVE) ORDER BEING PRESIDENT'S ORDER NO.27 OF 1970 AND THE CONSEQUENT VALIDITY OF THE ORDER DATED 15.3.2007 PASSED BY THE PRESIDENT DIRECTING THAT THE CJP SHALL BE ON LEAVE***

The said President's Order No.27 of 1970 is, unanimously declared as ultra vires of the Constitution and consequently the said order of the President dated 15.3.2007 is also, unanimously declared to have been passed without lawful authority.

(IV) ***VALIDITY OF THE ORDER OF THE PRESIDENT DATED 9.3.2007 AND OF THE ORDER OF THE SAME DATE OF THE SUPREME JUDICIAL COUNCIL RESTRAINING THE CJP FROM ACTING AS A JUDGE OF THE SUPREME COURT AND/OR CHIEF JUSTICE OF PAKISTAN***

Both these orders are, unanimously, set aside as being illegal. However, since according to the minority view on the question of the validity of the direction (the Reference) in question, the said Reference had been competently filed

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by the President, therefore, this Court could pass a restraining order under Article 184(3) read with Article 187 of the Constitution.

(V) VALIDITY OF THE APPOINTMENT OF THE HON'BLE ACTING CHIEF JUSTICES OF PAKISTAN IN VIEW OF THE ANNULMENT OF THE TWO RESTRAINING ORDERS AND THE COMPULSORY LEAVE ORDER IN RESPECT OF THE CJP

The appointments in question of the Hon'ble Acting Chief Justices of Pakistan vide notification dated 9.3.2007 and the notification dated 22.3.2007 are, unanimously, declared to have been made without lawful authority. However, this in-validity shall not affect the ordinary working of the Supreme Court or the discharge of any other Constitutional and/or legal obligations by the Hon'ble Acting Chief Justices of Pakistan during the period in question and this declaration is so made by applying the de-facto doctrine.

(VI) ACCOUNTABILITY OF THE HON'BLE CHIEF JUSTICE OF PAKISTAN

It has never been anybody's case before us that the Chief Justice of Pakistan was not accountable. The same issue, therefore, does not require any adjudication.

All other legal and Constitutional issues raised before us shall be answered in due course through the detailed judgment/judgments to follow.

ORDER OF THE COURT

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> *By majority of 10 to 3 (Faqir Muhammad Khokhar, J., M. Javed Buttar, J. and Saiyed Saeed Ashhad, J. dissenting), this Constitution Original Petition No.21 of 2007 filed by Mr. Justice Iftikhar Muhammad Chaudhry, the Chief Justice of Pakistan, is allowed as a result whereof the above-mentioned direction (the Reference) of the President dated March 9, 2007 is set aside. As a further consequence thereof, the petitioner CJP shall be deemed to be holding the said office and shall always be deemed to have been so holding the same.*
>
> *The other connected petitions shall be listed before the appropriate Benches, in due course, for their disposal in accordance with law."*

50. Hereunder are the said reasons for passing the above-quoted order.

51. This petition, invoking the original jurisdiction of this Court, has been filed by the Chief Justice of Pakistan under Article 184(3) of the Constitution impugning, amongst others, the validity of the direction (generally known as a Reference) made by the President under Article 209(5) of the Constitution calling upon the S.J.C. to inquire into the allegations of misconduct committed by the CJP; the composition of the S.J.C. and its competence to inquire into the conduct of the Chief Justice of Pakistan; the validity of the order denuding the CJP of the powers conferred on him by the Constitution and the vires of the manner in which the Reference in question had been made and the manner in which the S.J.C. was proceeding with

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the same. The respondents, however, asserted that this petition was not maintainable:-

> *a) because it did not satisfy the conditions prescribed by Article 184(3) of the Constitution i.e. that it did not disclose the breach of any fundamental right and consequently there being no question of enforcement of any such right and secondly that in any case, the matter was not one of public importance;*
>
> *b) because the provisions of Article 211 of the Constitution commanded that the proceedings relating to the removal of a Superior Court Judge could not be called in question in any court and this petition questioning the said proceedings was thus hit by the said constitutional prohibition;*
>
> *c) because the President of Pakistan had been impleaded, by name, in this petition, as a respondent and the same, therefore, could not be permitted to proceed on account of the provisions of Article 248(1) of the Constitution; and finally,*
>
> *d) because the petition was pre-mature.*

52. I will first examine the objection arising out of Article 184(3) of the Constitution. The said provision reads as under:-

> *"184. (1) ……*
>
> *(2) ……*
>
> *(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a QUESTION OF PUBLIC IMPORTANCE with reference to the ENFORCEMENT OF*

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> *ANY OF THE FUNDAMENTAL RIGHTS conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article."*
>
> *(emphasis and under-lining has been supplied)*

For this petition to be competent, what would, therefore, be required to be shown would be that it disclosed a breach of a Fundamental Right; sought repair of the said breach and the consequent enforcement of the said right and further and more importantly that the matter was not one which related only to an individual's private grievance but was one of public importance. We would, therefore, have to find out whether the petition in hand met the said standards.

53. The petitioner before us is the holder of one of the top five constitutional offices in the country and alleges his illegal confinement in the President's Camp Office for about five hours; complains of his subsequent detention, alongwith his wife and children, for about four days and having been so kept, ***in-communicado***; claims a gross violation not only of the privacy of his home at the hands of some un-scrupulous aliens but also of a grave and un-speakable offence to his dignity and asserts also that all this had been done to him to maneuver his illegal removal from his office in gross violation of the Constitutional guarantees. Further alleges that his trial by a not legally composed forum comprising also of some members who had a serious bias against him and then the forum proceeding against him in a manner which could not be said to be fair, transparent, just and lawful, was offensive of the protection which the Constitution had guaranteed to him.

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54. These grievances, the details of which have been noticed in the earlier part of this judgment, might at the initial glance appear only to be individualistic in nature and personal to the petitioner. But then, he is the Chief Justice of Pakistan; the head of the national judicature and thus a symbol of justice and of the independence of the country's judiciary. The allegedly contemptible exercise in question not having been directed only against the person of the petitioner but being allegedly a device to remove the Chief Justice of Pakistan from his office in a manner not permitted by the Constitution, demonstrated that the matter in question was no longer a mere private affair of an individual by the name of Iftikhar Muhammad Chaudhry but was much more.

55. The questions which would, therefore, emerge for determination, amongst others, would be as to what were the powers available with the executive qua the judiciary; whether a power could be conceded to the executive to suspend a Judge of a Superior Court or to restrain him from performing the judicial or even administrative obligations cast on him by the Constitution; could the President send such a Judge, leave alone the Chief Justice of the country, on forced leave; was the President's Order No.27 of 1970 not offensive of the Constitutional security guaranteed to the Judges of the Superior Courts and thus *ultra-vires* of the Constitution; was the Supreme Judicial Council a forum competent to try the Chief Justice of Pakistan; was free access to justice and a trial by a valid, independent and an un-biased forum in a fair and a transparent manner not a fundamental right guaranteed to the people; was the manner in which

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the Head of the national judiciary was sought to be removed form office, a proper, a lawful and a *bona fide* act on the part of the executive or was it not an act rooted in malice and for a collateral purposes; was the whole exercise in question not an offensive encroachment upon the Constitutional pledge about the independence of judiciary thus offending against the right of the people to ask for a judiciary which could guarantee quality justice for all.

56. The critical indispensability of dispensation of justice in a society, be it between men and men or between the governors and the governed, could never be over-emphasized. The fact that it is justice and justice alone which could ensure peace in a society and its consequent strength, security and solidarity, was one of the serious lessons taught to the civilization by its history. And history, be it ancient, biblical, medieval or contemporary, also tells us that societies sans justice had never been permitted to pollute this planet for very long and had either to reform themselves paying heavy costs usually in blood or had else been wiped off the face of this earth. The French, the Russian, the Chinese and more recently, the Iranian revolution are some such lessons. It is perhaps for this very reason that doing of justice is conceivably the most repeated Quranic Command after 'SALAAT' and 'ZAKKAT'. And it is also for the same cause that '***Right of Access to Justice***' which is in-conceivable in the absence of an independent and impartial judiciary, was by now a well-established and a universally accepted human right as would be evident, *inter alia*, from Article 10 of the Universal Declaration of Human Rights and from Article 14 of the United Nations Convention on Criminal and

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Political Rights and which right was now being secured by the people in different States by making requisite provisions in their respective Constitutions.

57. The passionate desire and the consequent determination of the people of Pakistan to establish an independent judiciary to ensure justice and the resultant security, peace and prosperity for themselves, is manifested through the Objectives Resolution which is now a substantive part of our Constitution being Article 2-A thereof and Articles 4, 9, 14, 25, 175, 179 and some others stand incorporated in our Constitution towards the attainment of the same declared and sacred objective.

58. The above-mentioned Article 9 of the Constitution guarantees protection of one's life. All the judges and jurists in different ages and from different jurisdictions have been one in saying that the word "LIFE" protected and assured by various constitutions could never be understood to have been used in a limited or a restricted sense and therefore, did not mean just the vegetative and the animal life of a man or his mere existence from conception to death. This word had, in fact, to be understood in its widest and fullest context to include all such rights, amenities and facilities which were necessary and essential for the enjoyment of a free, proper, comfortable, clean and peaceful life. When confronted with concrete situations, it was held through various judgments from various countries that the right to live meant the right to live with dignity and honour and included rights such as the right to proper health-care, the right to proper food and nutrition, the right to proper clothing, the

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right to education, the right to shelter, the right to earn one's livelihood and even a right to a clean atmosphere and an un-polluted environment. And in some other cases, the nuisance created by municipal sewage, industrial affluents and the hazards caused by a magnetic field produced by high tension electricity wires, were found to be an interference with the enjoyment of one's right to life. In yet another case from Indian jurisdiction, even access to proper roads for people living in hilly areas was held to be an essential part of the right to life. In more than one cases from our own jurisdiction, it was also declared that since right to live in peace in a just and a fair environment was inherent in the right to life, therefore, the right of access to justice was a well recognized and an inviolable Fundamental Right enshrined in Article 9 of the Constitution and its denial, an infringement of the said right. As a necessary consequence, it was further held that since access to justice was in-conceivable and would be a mere farce and a mirage in the absence of an independent judiciary guaranteeing impartial, fair and a just adjudicatory mechanism, therefore, the demand for a judiciary which was free of executive influence and pressures; was not manipulatable and which was not a subservient judiciary, was also an integral part and an indispensable ingredient of the said Fundamental Right of access to justice.

59. While endorsing these views, let me also add that the courts set up by the Constitution or under its authority have been so established not just as a means of securing bread and butter for the members of the Bench or of the Bar but to provide justice to the people

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and the resultant peace in the society and it is thus they, who are the actual stake-holders and for whose benefit and welfare, the judicial system stands created. The judiciary was, therefore, an affair of the public; any offence to its independence would be an encroachment on the right of the people to access justice and finally that the security of service and of the tenure of the Judges was critical for the said independence.

60. I would, therefore, conclude and hold that access to justice was a Fundamental Right which the Constitution had guaranteed to the people; that the existence of an independent and vibrant judiciary was indispensable and crucial for the enjoyment of the said constitutional assurance and in the absence thereof, this right would be a mere illusion; that without security to the Judges of the Superior Courts vis-à-vis, *inter alia*, their service and the tenure thereof, the independence of judiciary would be a mere delusion and a chimera; that an allegedly illegal and un-constitutional interference with the tenure of office of the Head of the national judiciary would not be just an injury personal to the Chief Justice of Pakistan but would, in fact, be a serious assault on the said assured Fundamental Right of the public at large and thus of public importance. The blood-soaked, un-precedented agitation by the national Bar and by the people of Pakistan which commenced immediately after the 9th of March, 2007 and which, un-fortunately, also witnessed the loss of at least sixty innocent human lives at different occasions in different cities of the country, leaves hardly any room for proof that the matter was one of public importance.

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61. Consequently, it is declared that this petition and the twenty four connected petitions which had also been heard by us vis-à-vis their maintainability, satisfy all the conditions and requirements envisaged by Article 184(3) of the Constitution and are, therefore, competent. I may add another reason for the maintainability of such a petition in suck-like situations. It is not un-known that when disciplinary proceedings were taken even against a peon in the public service and even if such proceedings resulted in the most minor of all actions i.e. a censure, he had a right of appeal and in fact had remedies, upto this Court. But here is a public servant who is the Head of the national Judicature and who stands blessed with constitutional guarantees about his service, when he is removed from his office either for misconduct or on account of his mental or physical incapacity, he is left high and dry and without a door that he could knock at for seeking justice for a Mr. Justice. Providing a remedy to any one who had suffered a wrong was one of the basic norms of justice. Reference may be made to *REGISTRAR, SUPREME COURT OF PAKISTAN, ISLAMABAD VS. QAZI WALI MUHAMMAD (1997 SCMR 141) AND MUHAMMAD MUBEEN-US-SALAM and others VS. FEDERATION OF PAKISTAN through SECRETARY, MINISTRY OF DEFENCE and others (PLD 2006 SC 602)*. Since the law does not provide any remedy to a Superior Court Judge who is removed from office, therefore, Article 184(3) of the Constitution was the only mode, in appropriate cases of extra-ordinary nature of the kind in hand, through which such a Judge could seek redress of his grievances.

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62. And before I move on to the next aspect of the matter, I must acknowledge the wisdom and guidance that I received on this issue from the judgments delivered, *inter alia*, in the case of *GOVT. OF BALUCHISTAN VS. AZIZ ULLAH MEMON* (PLD 1993 SC 341), *MAHRAM ALI'S CASE* (PLD 1998 SC 1445), *SHAHLA ZIA'S CASE* (PLD 1994 SC 693), *MUNN VS. ILLINOINS* (1876 US 113), *FRANCIS CORGI VS. UNION TERRITORY of DELHI* (AIR 1981 SC 746), *OLGA TELLIS & others VS. BOMBAY MUNICIPAL CORPORATION (AIR 1986 SC 180) and STATE of HIMACHAL PARDESH and another VS. UMED RAM SHARMA and others* (AIR 1986 SC 847).

63. This then brings me to the next question in the context of maintainability of this petition i.e. whether this Court would have the jurisdiction to deal with the matter in question despite the ouster clause contained in Article 211 of the Constitution. Although, what is relevant for the said purpose are only the provisions of clauses (5) and (6) of Article 209 and the provisions of the said Article 211 of the Constitution but for a better understanding of the issue, it would be appropriate to notice the entire scheme envisaged by the Constitution for the removal of a Superior Court Judge who, on account of some mental or physical disability, was no longer capable of discharging his said obligations or who had mis-conducted himself and was no longer a desirable person to adorn the said high office. Articles 209, 210 and 211 are the relevant Constitutional provisions which read as under:-

> ***"209. Supreme Judicial Council.—(1)*** *There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.*

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(2) The Council shall consist of –

(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts.

Explanation.— For the purpose of this clause, the inter se seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice otherwise than as Acting Chief Justice, and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.

(3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or any other cause, then:--

(a) if such member is a Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and

(b) if such member is the Chief Justice of a High Court, the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts,

shall act as a member of the Council in his place.

(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.

(5) If, on information from any other source, the Council or the President is of the

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opinion that a Judge of the Supreme Court or of a High Court, --

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct,

the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter.

(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion:--

(a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct and

(b) that he should be removed from office,

the President may remove the Judge from office.

(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.

(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts.

***210. Power of Council to enforce attendance of person, etc.**--- (1) for the purpose of inquiring into any matter, the Council shall have the same power as the Supreme Court has to issue directions or orders for securing the attendance of any person or the discovery or production of any document; and any such direction or order shall be enforceable as if it had been issued by the Supreme Court.*

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> *(2) The provisions of Article 204 shall apply to the Council as they apply to the Supreme Court and a High Court.*
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> ***211. Bar of jurisdiction.***--- *The Proceedings before the Council, its report to the President and the removal of a Judge under clause (6) of Article 209 shall not be called in question in any Court."*

64. A perusal of the above-quoted provisions of Article 209 would reveal that clauses (1) to (4) thereof envisage the existence and the constitution of Supreme Judicial Council while the provisions of clauses (5) and (6) of the said Article 209 tell us of various steps of the exercise leading to the removal of a Superior Court Judge. I may add that as would appear from the said provisions, the action in question could now be initiated by both i.e. by the President as also by the Supreme Judicial Council itself. Since in the present case, the proceedings in question had commenced at the instance of the President, therefore, I would confine myself only to the said situation. Reverting back to the various steps mentioned above, I would summarize the same as under:-

> *(i) receipt of information by the President, from any source, about the mental or physical incapacity of a Judge or of his being guilty of mis-conduct;*
>
> *(ii) collection of material in support of the said information;*
>
> *(iii) formation of opinion by the President that such a Judge may well be incapable as above-mentioned or may have committed mis-conduct;*

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(iv) the consequent direction (generally called the Reference) by the President to the Council to inquire into the matter;

(v) holding of the requisite inquiry by the Council pursuant to the said direction;

(vi) after the inquiry is concluded, formation of opinion by the S.J.C. whether the Judge under inquiry was or was not incapable of performing his functions or was guilty of misconduct as alleged;

(vii) if the opinion of the S.J.C. is that the Judge was not incapable as above-said or was not guilty of misconduct then that would be the end of the matter but if the Council finds him incapable or guilty as afore-said, then making a report by the S.J.C. accordingly and sending of the same to the President;

(viii) the resultant removal of the Judge by the President.

65. It thus transpires that the exercise in question prescribed by Article 209 of the Constitution consists of the above-noticed eight stages or steps starting with the receipt of the relevant information by the President and ending, either with the dropping of the proceedings against the concerned Judge, or his removal by the President, as the case may be. Let us now revert to the provisions of the ouster clause i.e. Article 211 of the Constitution to find out the extent to which the Constitution seeks to protect the said exercise against judicial

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scrutiny. The said provisions have been quoted above but are being re-produced hereunder for ready reference:-

> *"211. Bar of Jurisdiction. – The PROCEEDINGS BEFORE the COUNCIL, its REPORT to the PRESIDENT and the REMOVAL OF A JUDGE under clause (6) of Article 209 SHALL NOT BE CALLED IN QUESTION in any COURT."*
>
> *(emphasis and under-lining has been supplied)*

It will thus be noticed that out of the above-mentioned eight steps in the exercise in question, what is sought to be protected are the following three matters only, namely,:-

> *i) proceedings before the Council;*
> *ii) report of the S.J.C. to the President, as a result of the said proceeding; and finally,*
> *iii) the removal of the concerned Judge.*

Meaning thereby that the Constitution makes no attempt at all to keep the remaining matters out of the purview of the Courts of law, namely,:-

> i) *receipt of information by the President, from any source, about the mental or physical disability of a Judge or about his being guilty of mis-conduct;*
> *ii) collection of material in support of the said information;*
> *iii) formation of opinion by the President about such a disability or mis-conduct of a Judge; and the consequent*

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> *iv) direction (generally called a Reference) by the President to the Council to inquire into the matter.*

66. Pleading a complete caging of the courts vis-à-vis the entire exercise in question, Malik Muhammad Qayyum, ASC submitted that the word 'PROCEEDINGS' appearing in Article 211 "covered everything from the start till the end". Explaining his submission, he went on to add that the said word would include everything starting with initiation of the proceedings i.e. receipt of information about the disability or the mis-conduct of a Judge and collection of material in support thereof and ending with the removal of such a Judge.

67. The submission loses sight of the fact that the word 'PROCEEDINGS' does not stand alone or un-qualified in the said provision but stands restricted and qualified by three other words i.e. 'BEFORE THE COUNCIL'. What we, therefore, need to find out is not what is meant by the word 'proceedings' but the meaning of the expression "PROCEEDINGS BEFORE THE COUNCIL".

68. According to the English language dictionaries, the word 'PROCEEDINGS' means the 'ACTS', the 'ACTIONS', the 'DEEDS', the 'STEPS' and the 'HAPPENINGS' while the word 'BEFORE' means 'IN FRONT OF' or 'IN THE PRESENCE OF'. And when translated into simpler language, easily comprehendible by all concerned, the expression, 'THE PROCEEDINGS BEFORE THE COUNCIL', would mean, the acts, the actions, the deeds, the steps and all the happenings taking place in front of or in the presence of the Council. Therefore, the

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said expression would cover only those matters which take place before or in front of the S.J.C. and no other. Meaning thereby that any event or business or any part of the exercise in question taking place elsewhere would not fall within the purview of the said expression e.g. receipt of relevant information by the President; collection of evidence relating thereto; formation of opinion by the President about making a Reference in the matter to the S.J.C. and the consequent direction to the said Council. Needless to add that the exercise envisaged by Article 209 is bi-foral i.e. certain things happening at the President's end and other things taking place before the S.J.C.. And if the framers of the Constitution had understood English language as the said learned ASC for the Federation is canvassing i.e. proceedings before the Council meaning "everything from the start to the end", then the founding fathers would not have wasted words to mention also the report of the Council to the President and the removal of Judge by him, in the said Article 211. Every student of law is expected to know the principle which is too well established by now that no redundancy or surplusage could ever be attributed to a draftsman much less to the one drafting the Constitution. It may be clarified that the report of the Council to the President should not be confused as a matter happening before the said Council as the report required to be sent to the President was not something taking place before the S.J.C. but only a result of whatever had transpired or had taken place before it. It may be added that if the intention of the Constitution was to grant immunity to all the acts and proceedings "from the start to the end", then there was nothing stopping the Constitution-makers from saying in Article 211 simply

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that no proceedings under Article 209 would be called in question in any court, which was not done and what had instead been done was grant of protection to some only of the proceedings envisaged by the said Article 209.

69. I must notice here some judgments cited by Malik Muhammad Qayyum, ASC in support of his submission that the word "PROCEEDINGS" was a rather wide and comprehensive term starting with the first step by which the machinery of law was put into motion and included all possible steps in the action under the law. The judgments cited were as follow:-

"(i) *JAN MUHAMMAD AND ANOTHER VS. HOME SECRETARY, GOVERNEMNT OF WEST PAKISTAN AND OTHERS*
(PLD 1968 Lahore 1455)

(ii) *THE STATE THROUGH ADVOCATE GENERAL NWFP, PESHAWAR VS. NAEEMULLAH KHAN*
(2001 SCMR 1461)

(iii) *PAKISTAN VS. AHMED SAEED KIRMANI AND OTHERS*
(PLD 1958 SC 397)

(iv) *MST. KARIM BIBI AND OTHERS VS. HUSSAIN BAKHSH AND ANOTHER*
(PLD 1984 SC 344)

(v) *WAZIR LAIQ VS. THE STATE AND OTHERS*
(PLD 1987 SC 35)

(vi) *MEMBER (S&R)/CHIEF SETTLEMENT COMMISSIONER, BOARD OF REVENUE, PUNJAB LAHORE & ANOTHER VS. SYED ASHFAQUE ALI AND OTHERS*
(PLD 2003 SC 132)"

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There is no cavil with the proposition that the word "PROCEEDINGS" is a comprehensive term and would ordinarily include every step towards the progress of a cause in a court or before a tribunal. But then we also need to remember that a narrow or a wider import could be given to the said word depending upon the nature and the scope of the enactment in which the same was used with particular reference to the language of the law in which it appeared. Reference may be made to *GANGA NAICEEN VS. SUNDARAM A.YYAR* (AIR 1956 Madras 597). Reference may also be made to *MUHAMMAD ISMAIL'S CASE* (PLD 1969 SC 241) wherein it had been declared by this Court that the purpose of construction or interpretation of statutory provisions was no doubt to ascertain the true intention of the Legislature, yet that intention had, of necessity, to be gathered from the words used by the Legislature, itself and that if the words were so clear and un-mistakable that they could not be given any meaning other than that which they carried in their ordinary grammatical sense, then the said were the meanings to be attached to the said words. As has been mentioned above, the word "PROCEEDINGS" used in Article 211 of the Constitution did not stand un-qualified in the said provision but stood restricted by express words i.e. "BEFORE THE COUNCIL" and the said word, therefore, had to be given a restricted meaning in the context of the language used in the said provision.

70. Having thus examined all aspects of this question, I would conclude and would consequently declare:-

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a) *that the expression "PROCEEDINGS BEFORE THE COUNCIL" as used in Article 211 of the Constitution would mean only those acts, actions, happenings or proceedings which actually took place in front of or in the presence of the Supreme Judicial Council and whatever happened not before the said Council, would not be covered by or included in the said expression;*

b) that what would, therefore, fall within the purview of the said Article 211 would be just the "PROCEEDINGS BEFORE THE COUNCIL" as above defined, the "REPORT OF THE COUNCIL" submitted to the President as a result of the said proceedings and finally the "REMOVAL OF A JUDGE BY THE PRESIDENT UNDER CLAUSE (6) OF ARTICLE 209" and no more;

c) that other steps or matters mentioned in Article 209 of the Constitution i.e. the collection of information or material about the mental or physical incapacity of a Judge or about any act of misconduct committed by a Judge; the receipt of such an information by the President; formation of opinion by the President about the possible mental or physical incapability of a Judge or the possibility of a Judge having mis-conducted himself and

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> *the desirability or otherwise of making a direction to the S.J.C. to inquire into the same, are not covered by the said ouster clause contained in the said Article 211 of the Constitution, and, finally,*
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> *d) that the said matters not hit by the mischief of Article 211 and mentioned above, would be subject to examination, scrutiny and judicial review like any other executive or administrative act.*

71. Having thus determined the operational area of Article 211 of the Constitution and the extent to which the immunity granted by it extended, we revert back to the petition in hand and find that the acts impugned therethrough were two-fold i.e. the actions taken on the 9th of March at the President's end including the making of the direction under clause (5) of Article 209 i.e. sending of the Reference to the S.J.C. and then some proceedings taken before the said Council. It has been declared above that, no immunity attaches to the happenings and the actions prior to the matter reaching the S.J.C. and the said actions were, therefore, subject to scrutiny by this Court like any other administrative act. However, the matter relating to the proceedings before the S.J.C. which also stood questioned before us, warrants further examination.

72. The objection to the said part of the claimed relief is the oft-repeated and the oft-examined argument about the ouster of this Court's jurisdiction vis-à-vis, amongst others, the 'PROCEEDINGS BEFORE THE COUNCIL' because Article 211 of the Constitution

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provides that the same "SHALL NOT BE CALLED IN QUESTION IN ANY COURT".

73. Essentially, because of the repeated military interventions, our Constitutional and Judicial history is brimful with ouster of jurisdiction clauses and the treatment metted out to the same by the Superior Courts. The issue has been so frequently raised and equally frequently examined that nothing new remains available to be said on the subject. It has been repeatedly and consistently declared by this Court that a mere incorporation of such a provision in the Constitution or in any other law for that matter, did not by itself preclude a court from entering the arena sought to be protected as the judicial power, being inherent in this Apex Court, it was not its privilege but in fact its obligation to examine such-like ouster clauses and then to determine the extent of the claimed immunity. This principle was thus expounded in *ZIA-UR-RAHMAN'S CASE* (PLD 1973 SC 49):-

> *"So far, therefore, as this Court is concerned it has never claimed to be above the Constitution nor to have the right to strike down any provisions of the Constitution. It has accepted the position that it is a creature of the Constitution; that it derives its powers and jurisdiction from the Constitution; and that it will even confine itself within the limits set by the Constitution which it has taken oath to protect and preserve but IT DOES CLAIM AND HAS ALWAYS CLAIMED THAT IT HAS THE RIGHT TO INTERPRET THE*

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> *CONSTITUTION and to say what a particular provision of the Constitution means or does not mean EVEN IF THAT PARTICULAR PROVISION IS A PROVISION SEEKING TO OUST THE JURISDICTION OF THIS COURT.*
>
> *This is a right which it acquires not DE HORS the Constitution but by virtue of the fact that it is a superior Court set up by the Constitution itself. It is not necessary for this purpose to invoke any divine or super-natural right but THIS JUDICIAL POWER IS INHERENT IN THE COURT ITSELF. It flows from the fact that it is a Constitutional Court and it can only be taken away by ABOLOSHING THE COURT ITSELF.*
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> *In saying this, however, I should make it clear that I am making a distinction between 'judicial power' and 'jurisdiction'.*
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> .....
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> *This power, it is said, is inherent in the judiciary by reason of the system of division of powers itself under which, as Chief Justice Marshal put it, "The legislature makes, the executive executes, and the judiciary construes the laws....."*
>
> *(emphasis and under-lining has been supplied)*

74. Before proceeding any further with this aspect of the matter, it would be of advantage to notice the background in which the said judgment in the said *ZIA-UR-RAHMAN'S CASE* was delivered.

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The judgment in *ASMA JILLANI'S CASE* (PLD 1972 SC 139) had cast rather serious and dark clouds on the legitimacy of General Yahya Khan's Martial Law Regime which continued from March, 1969 to December, 1971 and which period had also, unfortunately, witnessed the severance of the eastern wing of our country. The National Assembly of the left-over Pakistan met thereafter and rushed in to evolve an Interim Constitution in an effort to bring the country back to normalcy. And on account of the said judgment in *ASMA JILLANI'S CASE*, the Parliament also felt the need to examine all that had been done during General Yahya Khan's illegitimate rule and in order to avoid chaos and anarchy, also felt compelled to offer protection to the legislative and executive acts suffered during the said period and considered it also expedient to oust the jurisdiction of courts of law vis-à-vis the said actions. One such provision incorporated in the said Interim Constitution of 1972, for the purpose, was Article 281 thereof which read as under:-

> *"281. — (1) All Proclamations, President's Orders, Martial Law Regulations, Martial Law Orders, and all other laws made as from the twenty-fifth day of March 1969 are hereby declared notwithstanding any judgment of any Court, to have been validly made by competent authority, AND SHALL NOT BE CALLED IN QUESTION IN ANY COURT.*
>
> *(2) All orders made proceedings taken and acts done by any authority or by any person, which were made, taken or done, or PURPORTED to have been made, taken or done, on or after the twenty-fifth day of*

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> *March 1969, in exercise of the powers derived from any President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws, or in execution of any orders made or sentences passed by any authority in the exercise or PURPORTED exercise of powers as afore-said, shall be DEEMED to be and always to have been validly made, taken or done.*
>
> *(3) No suit or other legal proceedings shall lie in any Court against any authority or any person for or on account of or in respect of any order made, proceedings taken or act done, whether in the exercise or PURPORTED exercise of powers referred to in clause (2) or in the execution of or in compliance with orders made or sentences passed in exercise or PURPORTED exercise of such powers.*
>
> *(emphasis and under-lining has been supplied)*

75. And when some such acts pertaining to General Yahya's regime were questioned, the courts were confronted with the above-mentioned constitutional-validity granting provision, and it was pleaded that irrespective of the fact whether the said acts were good or bad, noble or ignoble, just or un-just, fair or un-fair and lawful or un-lawful, since the Constitution had declared them valid, therefore, the courts of law which were not above the Constitution, were bound to honour and respect the said constitutional command and could not scrutinise such acts to declare them not to be what the Constitution had said they were.

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76. This Court, through its above-mentioned leading judgment on the subject, had responded by saying that yes, no court, including this Court was above the Constitution; that all the courts, including this Court, were a creation of the Constitution and were thus subservient to it; that this Court had never claimed superiority over the Legislature or even the Executive and had always believed in tricotomy of powers where each organ of the State was expected and obliged to complement the others and not to compete with them and that this Court was also bound to respect each word of the Constitution which each Judge of this Court had taken oath to protect and defend. But added that in a State where the people had opted to be governed by a written and a federal Constitution through a system which envisaged trichotomy of sovereign powers, the JUDICIAL POWER, of necessity, got vested in the judiciary which then obliged it to act as the administrator of public will. It is, as a repository of this judicial power, that the judiciary gets burdened with the onerous, the demanding, the taxing and at times the back nay even the neck-breaking task of identifying the meanings of the provisions of the constitutional and sub-constitutional legislation i.e. interpretation of laws; with the duty of preserving the purity, the piety and the chastity of the Constitution by protecting it against any inroads, invasions and incursions and finally with the responsibility of acting as the custodian of the rights of the people and defending the same against any violations, encroachments and aggressions which included the duty of guarding the public property and the public exchequer. It needs to be clearly understood that when the judiciary invalidates a legislative measure

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or when it annuls an administrative or an executive act, it did not do so because the judicial power was in any way superior in degree or dignity to the legislative or the executive power but because it stood commanded by the people, through the Constitution framed by them, to preserve it and for the purpose, to enforce compliance thereof.

77. It is for these reasons that whenever the judiciary gets confronted with any jurisdiction-curtailing provisions intended to immunize any legislative or administrative act against judicial scrutiny, the courts treat such provisions as a departure from the generally prescribed path; views it strictly as an exceptional deviation from the prescribed rule and moves in to discover the precise legislative intent to show respect to the legislative measure while carefully balancing it against the sanctity of the Constitution and the rights of the public.

78. As has been noticed above, it was pleaded that since the Constitution had declared all acts, done or suffered during the said un-constitutional rule of General Yahya Khan, as valid, therefore, no occasion or reason existed which could justify examination of the said acts by any court of law. The response of this Court to the said plea was that the Constitution was a sacred document and the Legislature consisted of people who were noble and were gentlemen, therefore, by enacting the said clause (2), such a Legislature could never have intended to perpetrate or perpetuate injustice, inequity or lawlessness. And this Court thought that attributing such an intention to such a pious document and to such honourable and civilized members of the Parliament, would be an insult to them. And that in any case, this

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Court which was the protector of the purity of the Constitution, could not allow pollution of the said supreme law by imputing such an intention to it. Therefore, in discharge of its above-quoted obligation as the repository of judicial power, this Court examined the said provisions of Article 281 and declared that yes, validity would be attributed to all the acts mentioned therein minus the ones which had been done for extraneous or collateral purposes i.e. were *mala fide* or acts which were *coram non judice* or the ones taken or done without jurisdiction. (*ZIA-UR-RAHMAN'S CASE ibid*).

79. The concerned quarters, despite the above-noticed declaration of this Court in *ZIA-UR-RAHMAN'S case*, appeared to be adamant in providing protection even to acts which were illegitimate, un-fair and un-lawful and sought to strengthen the said clause (2) of Article 281 by plugging the holes which the said quarters thought, had led to the above-mentioned judgment. Consequently, the said provisions of clause (2) of Article 281 of the 1972 Constitution were amended through President's Order No.3 of 1973 being the Constitution 6th Amendment Order, 1973. The said provisions, in its so amended form, read as under:-

> *"(2) All orders made, proceedings taken and acts done by any authority, or by any person, which were made, taken or done, or purported to have been made, taken or done, on or after the twenty-fifth day of March 1969, in exercise of the powers derived from any President's Order, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws, or in execution*

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> *of any orders made or sentences passed by any authority in the exercise or purported exercise of powers as aforesaid, shall be deemed NOTWITHSTANDING ANY JUDGMENT OF ANY COURT to be and always to have been validly made, taken or done AND SHALL NOT BE CALLED IN QUESTION IN ANY COURT."*
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> *(emphasis and under-lining has been supplied and the said is the portion added through the above-mentioned amendment)*

The said amendment, it would be noticed, added a non-obstente clause to annul the effect of *ASMA JILLANI'S CASE ibid* and of *ZIA-UR-RAHMAN'S CASE* and added also an ouster clause to the said provisions. This clause (2) of Article 281 of the Interim Constitution, as amended by the above-mentioned President's Order No.3 of 1973, subsequently became clause (2) of Article 269 of the permanent Constitution of 1973.

80. A large number of writ petitions were filed in the High Court by some public servants who had been removed from service during the period in question. The Government pleaded ouster of jurisdiction on the strength of the above-noticed further fortified ouster clause of Article 281 of the 1972 Constitution as adopted by the provisions of clause (2) of Article 269 of the 1973 Constitution. On the matter reaching this Court, it was declared, once again, through *SAEED AHMED KHAN'S CASE* (PLD 1974 SC 151) that no amount of strengthening of the ouster clause could keep the acts taken without jurisdiction or taken *mala fide* or the ones which were *coram non judice*, beyond the scrutiny of the courts of law.

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81. In July, 1977 another Martial Law was imposed in the country which was lifted in December, 1985 only after the Parliament had offered validity, *inter alia*, to the actions taken during the eight years of martial law regime by adding Article 270-A to the Constitution through the 8th Amendment. The said provisions were fabricated to act as a further bung or spigot to fill the gaps in the earlier above-mentioned ouster clauses and read as under:-

> *"**270A.**— (1) .....*
> *(2) All orders made, proceedings taken and acts done by any authority or by any person, which were made, taken or done, or purported to have been made, taken or done, between the fifth day of July, 1977, and the date on which this Article comes into force, in exercise of the powers derived from any Proclamation, President's Orders, Ordinances, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws, or in execution of or in compliance with any order made or sentence passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, NOTWITHSTANDING ANY JUDGMENT OF ANY COURT, BE DEEMED TO BE AND ALWAYS TO HAVE BEEN VALIDLY MADE, TAKEN OR DONE AND SHALL NOT BE CALLED IN QUESTION IN ANY COURT ON ANY GROUND WHATSOEVER.*
> *(3) .....*
> *(4) NO SUIT, PROSECUTION OR OTHER LEGAL PROCEEDINGS SHALL LIE IN ANY COURT AGAINST ANY AUTHORITY OR ANY PERSON, for or on*

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> *account of or in respect of any order made, proceedings taken or act done whether in the exercise or purported exercise of the powers referred to in clause (2) or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers.*
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> *(5) For the purposes of clauses (1), (2) and (4), all orders made, proceedings taken, acts done or purporting to be made, taken or done by any authority or person SHALL BE DEEMED TO HAVE BEEN MADE, TAKEN OR DONE IN GOOD FAITH AND FOR THE PURPOSE INTENDED TO BE SERVED THEREBY."*
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> *(emphasis and under-lining has been supplied)*

82. As has been mentioned above, to meet *ZIA-UR-RAHMAN'S CASE*, the following words were added to clause (2) of Article 281 of the 1972 Constitution which then became clause (2) of Article 269 of the 1973 Constitution i.e.:-

> *"NOTWITHSTANDING ANY JUDGMENT OF ANY COURT ..... AND SHALL NOT BE CALLED IN QUESTION IN ANY COURT".*

And the above-mentioned judgment in *SAEED AHMAD KHAN'S CASE*, had prompted addition of the following words in clause (5) of Article 270-A of the 1973 Constitution to further firm up the immunity clause:-

> *'ON ANY GROUND WHATSOEVER'.*

83. The so strengthened ouster clause of Article 270-A of the Constitution also came up for examination in *MALIK GHULAM*

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MUSTAFA KHAR'S CASE (PLD 1989 SC 26) and this Court persisted with its determination to preserve the sanctity of the Constitution and not to permit its pollution by attributing to it an un-desirable intention of protecting despicable, disgraceful and inglorious acts founded in bad faith, malice, injustice and illegalities. This Court, consequently, stood firm with its declaration that no amount of immunity would ever be sufficient to protect acts which had been taken *mala fide* or which had been taken without jurisdiction or which were *coram non judice*.

84. I consider it un-necessary to burden this judgment with any more cases on the subject, suffice it however to say that the said matter had been coming up for consideration in various other subsequent cases also but the above-noticed principle enunciated by this Court holds the field till date. Reference be made to:-

> "*PIR SABIR SHAH'S CASE*
> ***(PLD 1994 SC 738)***
>
> *SARDAR FAROOQ AHMAD KHAN LEGHARI'S CASE*
> ***(PLD 1999 SC 57)***"

Some other cases which have also been of assistance in the matter are:-

> "*ZAFAR-UL-AHSAN'S CASE*
> ***(PLD 1960 SC 113)***
>
> *ABDUL RAUF'S CASE*
> ***(PLD 1965 SC 671)***
>
> *JAMEEL ASGHARI'S CASE*
> ***(PLD 1965 SC 698)***
>
> *JAMAL SHAH'S CASE*
> ***(PLD 1966 SC 1)***"

85. Having heard the learned counsel for the parties and having looked at all possible aspects of the matter, we re-iterate the above-noticed principle enunciated by this Court that while this Court

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respects the ouster clauses wherever they occur in the Constitution or in any other law, it is on account of the same respect that this Court would interpret such-like clauses as not extending immunity to acts which were *coram non judice* or which were taken *mala fide* or the ones which had been done without jurisdiction. And we hold accordingly.

86. It will thus be seen that this Court had never felt precluded from examining the validity of acts even where the Constitution itself had declared such acts to be valid notwithstanding any judgment of even the highest court of the country and where the Constitution had barred the courts from examining the said acts on any ground whatsoever. We now revert again to the provisions of the ouster clause being pleaded in the present case i.e. Article 211 of the Constitution and find that the said immunity clause was much mildly worded as compared to the above-noticed provisions of Article 281(2) of the 1972 Constitution and those of Article 269 and 270-A of the 1973 Constitution and had said only and that also rather meekly that, *inter alia*, the proceedings before the Council "SHALL NOT BE CALLED IN QUESTION IN ANY COURT". Respectfully following the above-mentioned enunciation of law by this Court, we hold that while we honour this ouster clause, we declare, that the immunity sought to be extended by the same shall not be available to acts which were taken without jurisdiction or were *coram non judice* or the ones which were *mala fide*.

87. A further, though a half-hearted, attempt was made to claim immunity for the proceedings of the Supreme Judicial Council on the ground that the said Council was a Constitutional Court; that the

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said Council comprised of senior Members of the Superior Judiciary; that no other constitutional court could interfere with the proceedings of the said Court i.e. the S.J.C. nor could a court assume jurisdiction in respect of a matter which fell within the exclusive domain of the said Council and finally, in the alternative, that the comity of Judges also desired exercise of the highest of restraint in the matter of interference with the proceedings of the said Council.

88. Why I said that the said was a half-hearted attempt was, because Syed Sharifuddin Pirzada, the learned Sr. ASC appearing for the President and the learned Attorney General for Pakistan, never canvassed that the status of the Supreme Judicial Council was that of a Court. Mr. Pirzada had, in fact, with reference to *MR. JUSTICE SHEIKH SHAUKAT ALI'S CASE* (PLD 1971 SC 585) maintained to the contrary submitting that the Supreme Judicial Council was only a domestic forum. Similar was the stance of the learned Attorney General and so was the initial plea of Malik Muhammad Qayyum, the learned ASC appearing for the Federation who had categorically declared that the Supreme Judicial Council was "not a Court and was only a constitutional body though its status was much higher than that of an ordinary tribunal". Malik Muhammad Qayyum, ASC had even placed reliance, to support his said submission, on *TOFAZZAL HOSSAIN AND OTHERS VS. THE PROVINCE OF EAST PAKISTAN AND OTHERS* (PLD 1961 Dacca 389) and on *KHAN ASFAND YAR WALI'S CASE* (PLD 2001 SC 609) wherein this Court had refused to recognise the Supreme Judicial Council as a Court and had, in fact, declared the same to be a "UNIQUE INSTITUTION".

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89. It was, however, only Nawabzada Ahmed Raza Qasuri, who was one of the many learned Advocates appearing for the respondents, who had canvassed, to the surprise even of his own colleagues on the respondents' side that the Supreme Judicial Council was a Court of law. When asked about the authority on the strength of which the learned ASC claimed that the Supreme Judicial Council was a court, his reply was that the said Council stood placed in Part VII of the Constitution which was titled as "THE JUDICATURE" and that the said was the same part of the Constitution which had also created this Court; the High Courts and even the Federal Shariat Court.

90. After the address of Nawabzada Ahmed Raza Qasuri, ASC, Malik Muhammad Qayyum, ASC appeared also to have had second thoughts in the matter and returned to us with the following submission which is being reproduced in his own exact words:-

> *"S.J.C. has some attributes of a court. It appears in the Chapter of Judicature. S.J.C. is a Constitutional Court but not a court as understood in common parlance. Every court is a tribunal but those tribunals which are not in the ordinary hierarchy of the judicial system of the State can not be called courts".*

91. As has been mentioned above, Syed Sharifuddin Pirzada and Mr. Makhdoom Ali Khan were emphatic that the Supreme Judicial Council was not a court. Malik Muhammad Qayyum, ASC for the respondents, as would appear from the different positions taken by

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him, was wavering and oscillating about the issue and was not even sure himself what stance to take. This left us only with Nawabzada Ahmed Raza Qasuri, ASC who had categorically claimed a Constitutional Court status for the Supreme Judicial Council only because Article 209 creating the said Council fell in the Part named as the 'JUDICATURE'.

92. The submission that the S.J.C. was a court only because it fell in the same 'PART' of the Constitution which talked of Courts, was fallacious. The Constitution comprises of 'XII PARTS'. These 'PARTS' are then divided into 'CHAPTERS'. Part VII of the Constitution deals with 'THE JUDICATURE'. This part is then divided into five Chapters i.e. Chapter 1, 2, 3, 3-A and 4. Chapter 1 is titled as 'THE COURTS' and consists only of one Article i.e. Article 175. Chapter 2 talks of 'The Supreme Court of Pakistan'. Chapter 3 relates to 'The High Courts'. Chapter 3-A, added by President's Order No.1 of 1980 envisages the establishment of the Federal Shariat Court while Chapter 4 in which Chapter fall Articles 209 to 211 relating to the Supreme Judicial Council, is titled as 'GENERAL PROVISIONS RELATING TO THE JUDICATURE'.

93. Canvassing the above-noticed status for the S.J.C. appears to emanate from a misconception about the meanings of the word 'JUDICATURE' and from a not proper reading of the said relevant part of the Constitution. The word 'JUDICATURE' as used in the title of PART VII of the Constitution does not mean a court but means a 'SYSTEM OF COURTS'. Needless to add that courts of law are living organisms which do not operate in a vacuum. Therefore, whenever a

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court is established, it also requires the setting up of the requisite infra-structure to make it workable. Judicature, therefore, comprises of a court or courts together with a set of the requisite, the indispensable, the inter-connected and the inter-related parts which are established to make the courts workable and thus forming a complete, though a complex, whole. It is then this system consisting of different parts which is called the Judicature and not just the courts or just the judges presiding over the said courts. To put it more simply, the parts which are essential for the operation of the Courts e.g. the registry and the ministerial staff of the courts, would also form part of the Judicature but such officers and staff, though part of the judicature, could never be called the court nor could they ever be called the judges or the judicial officers. One obvious example could be found in Article 208 of the Constitution which envisages appointment of officers and servants of Courts but despite finding their mention in the JUDICATURE PART of the Constitution, it would be perverse even to visualize that such offices, officers or servants were courts. Therefore, the submission that the Supreme Judicial Council was a Court only because Article 209 creating the said Council fell in PART VII of the Constitution, was misplaced.

94. There is yet another aspect of the matter which deserves attention. The Supreme Judicial Council was created by Article 209 of the Constitution as enacted in the year 1973 and found a place in the Part relating to the Judicature. The said Part starts with Article 175 which is the only Article falling in Chapter 1 of the said Part VII and is titled as 'THE COURTS' i.e. the provisions identifying the fora

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which were to have the status of courts. The relevant clause is clause (1) of the said Article 175 which reads as under:-

> *"175. (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and such other courts as may be established by law."*

Thus what is being told to us by the Constitution is that of all the fora, the bodies and the institutions it had created, it had conferred the status of courts only on the Supreme Court of Pakistan; on a High Court in each Province and on such other courts as may be established by law and on none else. And it had been so said by the founding fathers knowing fully well that it had also created a forum comprising of some of the most senior members of the superior judiciary known as the Supreme Judicial Council. What is, therefore, obvious is that even the Constitution itself refuses to recognize the said Council as a court.

95. I may add, for the purposes of record only that, as is evident from the above-quoted Article 175(1), the Constitution, as initially enacted in the year 1973, identified only two courts being created by it i.e. the Supreme Court and the High Courts. Seven years later, however, through the Constitution (Amendment) Order being President's Order No.1 of 1980, Chapter 3-A was added to Part VII of the Constitution and thus the Constitution created another court i.e. the Federal Shariat Court. Therefore, the Constitution as it stands today recognizes only three of the institutions created by it, as Courts and all other fora etc. created by it including the S.J.C. could be anything but courts. And I may also add that the Constitution does

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allow creation of courts through subordinate legislation but needless to say that S.J.C. was not one such body created by a statutory law.

96. The conclusion is thus inevitable that the Supreme Judicial Council is a forum created by the Constitution but the Constitution itself has refused to grant it the status of a court.

97. Although, having discovered the verdict of the Constitution itself about the status of the S.J.C., it may no longer be necessary to say anything more on the subject but it may be of some help to mention the further insight provided to us by the Constitution vis-à-vis the said issue. The proceedings which take place before the S.J.C. have been described, by Article 209 of the Constitution, as an inquiry and not a trial. It is too well known by now that an inquiry is only a fact-finding and not a right-determining exercise and further that the courts ordinarily hold trials and finally pronounce upon the rights of the parties if the proceedings were of a civil nature or declare the guilt or innocence of the accused persons if the proceedings were of a criminal or a quasi-criminal nature. The courts of law deliver judgments and pass orders which are final, enforceable and executable and do not submit reports. But according to clause (6) of the above-mentioned Article 209, what is produced by the S.J.C. as a result of the proceedings taken by it is only a report which is to be submitted/sent to the President. Although the opinion of the S.J.C. about the fitness of a Judge receives quietus but it has no power to make a final pronouncement which could PROPRIO VIGORE be binding on and create rights and obligations between the parties and consequently could not order removal of a Judge from office who is

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found un-fit by it to hold the said office. In fact, as declared by this Court in the case of *KHAN ASFAND YAR WALI* (PLD 2001 SC 607) and in the case of *MALIK ASAD* (PLD 1998 SC 161), the findings of the S.J.C. and its report to the President were only "recommendatory in nature". It may be added that if the intention of the framers of the Constitution was to have the inquiry in question conducted by a court then it would be absurd to expect the Constitution to first create a Council and then to expect us to stretch all limits and confer the status of a court on the said Council for the said purpose when the same object could have been achieved by assigning the said task to an already existing court like it had been done through Article 169 of the 1956 Constitution which had cast this obligation on the Supreme Court itself with respect to the High Court Judges.

98. Having thus examined the relevant legal and constitutional provisions and also having surveyed the case law, I am of the opinion that the true status of the Supreme Judicial Council is the one suggested by Syed Sharif-ud-Din Pirzada, the learned Sr. ASC appearing for the President of Pakistan while placing reliance on *MR. JUSTICE SHAUKAT ALI'S CASE* (PLD 1971 SC 585 at 602) wherein the said status had been determined as under:-

> *"Moreover, an inquiry into the conduct of a Judge is neither a criminal indictment nor even a quasi-criminal proceedings, but it is, in our opinion, mainly an ADMINISTRATIVE PROCEEDINGS conducted by a DOMESTIC FORUM to examine the professional fitness of a Judge. The subject-matter of these proceedings is*

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> *neither civil rights and duties nor criminal liabilities. It is simply the conduct of a Judge which is to be properly reviewed in the interest of the purity and honour of the judiciary. The FORUM consists of judges of superior courts who also belong to the same profession. To be tried by one's peers is a protection because they understand one's difficulties, problems and the situation in which one was. DOCTORS, ARCHITECTS, ACCOUNTANTS AND LAWYERS aim at having and have THEIR DOMESTIC TRIBUNALS, that is to say, the tribunals which judge their conduct are manned by their own peers."*
>
> *(emphasis and under-lining has been supplied)*

99. Since nothing could be offered by Sahibzada Ahmed Raza Qasuri, ASC or even by Malik Muhammad Qayyum, ASC to come to any conclusion different from the one reached through *MR. JUSTICE SHAUKAT ALI'S CASE*, therefore, I agree with Syed Sharif-ud-Din Pirzada, Sr. ASC appearing for the President of Pakistan, with Mr. Makhdoom Ali Khan, the learned Attorney General for Pakistan and Mr. Aitizaz Ahsan, Sr. ASC for the petitioner and hold that while the Supreme Judicial Council may have some attributes and trappings of a court of law but it was neither intended by the Constitution to be a court nor could any such status be conferred on it in view of the relevant constitutional provisions. It is, at best, a fact-finding domestic forum set up by the Constitution to look into the affairs of the Judges of the Superior Judiciary. I may, however, add that the said Council is entitled to the highest of respect because at least three of its members

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are the most senior Judges of the country. And before parting with this aspect of the matter, it may also be added that only because some holder of some public office or some forum stood blessed with the power to award punishment for contempt, was never by itself, sufficient to constitute such a person or a forum, as a court. Of the umpteen number of examples available in our corpus juris, I shall quote just one. The Federal Ombudsman (the Wafaqi Mohtisib) created under the Establishment of the Office of Wafaqi Mohtisib (Ombudsman) Order No.1 of 1983, has power to punish its contemnors vide Article 16 of the said Order but nobody has ever said that the Ombudsman was a court only because it could impose punishment for its contempt.

100. A reference to clause (5) of Article 199 of the Constitution would also be of assistance in the matter. The said provision reads as under:-

> *"(5) In this Article, unless the context otherwise requires, — 'Person' includes any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and ANY COURT or TRIBUNAL, other than the SUPREME COURT, a HIGH COURT or a court or tribunal established under a law relating to the Armed Forces of Pakistan;..... ....."*
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> *(emphasis and under-lining has been supplied)*

Needless to mention that the power to issue writs emanates from Article 199 of the Constitution which authorises the High Courts to issue writs and Article 184(3) thereof, in turn, permits this Court to

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make orders of the nature mentioned in the said Article 199. A perusal of the above-quoted clause (5) reveals that while the said Article allowed issuance of writs, *inter alia,* to all courts and tribunals of all kinds, it kept certain courts and tribunals outside the said purview and commanded that no writ could issue to the Supreme Court of Pakistan, to a High Court and to a court or a tribunal established under any law relating to the Armed Forces. The significant omission of the Supreme Judicial Council from this protected arena is more than revealing in the matter of determining the vulnerability of the said Council to writ jurisdiction.

101. As has been mentioned above, the principle of maintaining comity among the Judges of the Superior Courts was also canvassed to screen the proceedings before the S.J.C. from scrutiny by this Court. A passing reference to this principle was made by this Court in *MIAN JAMAL SHAH'S CASE* (PLD 1966 SC 1 at 38). But then it was subsequently clarified that the said principle could never be stretched to deprive people of what was due to them. What emerges from the provisions of clause (5) of Article 199 of the Constitution as also from some precedent cases is that writs should not issue from one High Court to another High Court or from one Bench of a High Court to another Bench of the same High Court because that could seriously undermine and prejudice the smooth and harmonious working of the Superior Courts. But this should never be understood to mean that no writ could ever issue to a Judge in his personal capacity or where a Judge was working as a *PERSONA DESIGNATA*. Two passages from a judgment of this Court delivered in *ABRAR HASSAN'S CASE* (PLD

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1976 SC 315 at 342 and 350) which contain the views of Salah-ud-Din J. and Muhammad Gul J. (as their lordships then were), respectively, could offer the requisite guidance and are reproduced below:-

> ***per Salah-ud-Din J.***
>
> *" The propriety of maintaining comity amongst the members of the superior judiciary is not a rule of law, and certainly can not outweigh the imperative necessity of correctly interpreting the Constitution. It must be left to the good sense of the gentlemen who are members of the Superior Courts to behave in a manner which their high offices require."*
>
> ***per Muhammad Gul J.***
>
> *" .....it would not be right to lay down that to preserve the high degree of comity in the Superior Judiciary, the plain meanings of Art. 199(i)(ii) of the Constitution should be curtailed or abridged. Maintenance of comity among the Superior Judiciary is at the highest, a rule of propriety and not a rule of law and therefore can not erode a constitutional provision....."*

102. Having thus looked into the question of jurisdiction of this Court vis-à-vis the Supreme Judicial Council, I would conclude as under:-

> *a) that the Supreme Judicial Council which comprises of the Chief Justice of Pakistan (except when the reference be against him) and two most senior Honourable Judges of this*

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Court and two most senior Honourable Chief Justices of the High Courts, is a forum entitled to the highest of respect;

b) that the said Council, however, can not be conceded the status of a court;

c) that the ouster clause of Article 211 of the Constitution would not protect acts which were mala fide or coram non judice or were acts taken without jurisdiction;

d) that in situations of extra-ordinary nature, the S.J.C. would be amenable to the jurisdiction of this Court under Article 184 of the Constitution; and

e) that the principle of comity among Judges of the Superior Courts is only a rule of propriety and could never be considered an impediment in the way of providing justice to an aggrieved person.

103. Another objection raised to the maintainability of this petition was that General Pervez Musharraf, the President of Pakistan, had been impleaded in the said petition as one of the respondents which was offensive of the provisions of Article 248(1) of the Constitution. The said provision reads as under:-

"248. (1) The President, a Governor, the Prime Minister, a Federal Minister, a Minister of State, the Chief Minister and a Provincial Minister shall not be answerable to any court for the exercise of powers

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> *and performance of functions of their respective offices or for any act done or purported to be done in the exercise of those powers and performance of those functions:*
>
> *Provided that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Federation or a Province."*

104. Such an immunity clause had been examined by the Privy Council in *H.B. GILLS CASE* (AIR 1948 Privy Council 148) and the re-action of the Privy Council to such-like protective provisions was as under:-

> *"Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A Public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus, a Judge neither acts nor purports to act as a Judge in receiving a bribe, though the judgment which he delivers may be such an act: nor does a Government medical officer acts or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the*

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> *examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office."*

105. In our jurisdiction the pleaded Article 248 came up for interpretation in *CH. ZAHUR ILAHI'S CASE* (PLD 1975 SC 383). The scope and the operational area of the said provision was so stated by this Court:-

> *".....the immunity provisions must, in accordance with the accepted principles of interpretation, be construed strictly and unless persons claiming the immunity come strictly within the terms of the provisions granting the immunity, the immunity can not be extended. The immunity is in the nature of an exception to the general rule that no one is above the law."*

The matter was further explained thus:-

> *"Hence, since neither the Constitution nor any law can possibly authorise him to commit a criminal act or do anything which is contrary to law, the immunity can not extend to illegal or un-constitutional acts."*

This Court, when confronted again with the protection provisions of Article 248 in *AMAN ULLAH KHAN'S CASE* (PLD 1990 SC 1092) re-iterated that the said provisions were required to be strictly construed and added that:-

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> *"56. If mala fide of fact was pleaded by a party then it had to decide for itself whether on the material with it, the Minister has to be impleaded in spite of the protecting provisions of the Constitution; because if his act does not fall within the purview of the provision so interpreted, then he can be impleaded as a party and all the objections to such impleadment dealt with in the proceedings. In the absence of the party, no finding with regard to mala fide of fact (as distinguished from mala fide of law) can be recorded, should be recorded and should have been recorded. Recourse to the principles of natural justice to overcome the prohibition contained in Article 248 of the Constitution is not permissible."*

It was further declared that:-

> *"Protection under Article 248 of the Constitution is not available to the designated functionaries if their actions suffer from mala fide of fact .... where the allegation against the protected functionaries is one of mala fide of fact, they have to be personally impleaded as a party to the proceedings;"*

106. The views of Naseem Hassan Shah J. in the same case are also enlightening for the resolution of the issue in question. The same read as under:-

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> *"Now the immunity to a Minister extends only to 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. A Minister can be said to be acting in exercise of the powers and functions of his office, if his acts are such which not only lie within the scope of the powers and functions conferred on him by law but are performed bona fide and for carrying into effect the intention and purposes of the statute under which he is acting. If on the other hand his acts are performed with mala fide intent or for a colourable purpose, such acts will not be deemed to have been performed in the lawful exercise of the powers and functions vested in him and will not, therefore, be covered by the immunity. Accordingly, where it transpires that a Minister has acted illegally and abused his discretion and the illegality committed was not in the bona fide exercise of his powers and functions but on account of mala fides the immunity contained in Article 248(1) would not extend to protect such an act."*

To the similar effect were the views expressed by this Court in *NAWABZADA MUHAMMAD UMAR KHAN'S CASE* (1992 SCMR 2450) which were as under:-

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> *"Secondly, where allegations of mala fide of fact are involved or alleged, it is necessary that the parties against whom such mala fide of fact is alleged must be impleaded as a party so that it has occasion to meet the allegation. This is notwithstanding the constitutional protection enjoyed by such functionaries under Article 248 of the Constitution vide Amanullah Khan and others v. the Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others (PLD 1990 SC 1092)."*

107. As would appear from the averments made in this petition, some of which have even been noticed in the earlier part of this judgment, the mainstay of the case of the petitioner CJP is that the entire exercise in question had been commenced for collateral purposes and suffered from *mala fides* which was sought to be established, *inter alia*, through the CJP being summoned by the President to the Army House/President's Camp Office; detention of the CJP at the said office for about five hours; the attempts made to secure the resignation of the CJP under duress and through coercion; the alleged illegal detention of the lady wife and the children of the CJP in their house and the alleged un-constitutional removal of the CJP from his office and the appointment of Acting Chief Justice of Pakistan. Since such serious allegations of *mala fide* had been levelled against the person of the President by no less a person than the Chief Justice of Pakistan, no exception could be taken to the impleadment of the President as a

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respondent in this petition which impleadment was in fact imperative in view of the above-mentioned precedent cases.

108. This brings me to the next question, namely, the validity of the orders restraining the petitioner Chief Justice from acting as the Chief Justice of Pakistan and even as a Judge of the Supreme Court and the consequent question of the validity of the appointment of an Acting Chief Justice for the country.

109. Three orders had been passed for the purpose in a rather quick succession. Two of them had in fact been passed on the same day i.e. on the 9th March, 2007 —— one by the President of Pakistan and the other having been passed the same night by the Supreme Judicial Council. The third order for the same purpose had been passed, once again, by the President of Pakistan but on the 15th March, 2007. I propose to deal with all the said three orders separately.

110. As has been mentioned above, the first order in the series had been passed by the President on the 9th March, 2007 which reads as under: -

"GOVERNMENT OF PAKISTAN
LAW, JUSTICE AND HUMAN RIGHTS
DIVISION

Islamabad, the 9th
March, 2007

NOTIFICATION

No.F.1(2)/2005.A.II – the President of the Islamic Republic of Pakistan does hereby restrain Mr. Justice Iftikhar Muhammad Chaudhry to act as chief Justice of Pakistan and a Judge of the Supreme

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> *Court, as he is unable to perform the functions of his office due to facts narrated in a reference having been made against him to the Supreme Judicial Council under Article 209 of the Constitution of the Islamic republic of Pakistan.*
>
> *Mr. Justice (Retd)*
> *(Mansoor Ahmed)*
> *Secretary"*

111. What is strikingly noticeable from a perusal of the above quoted order is FIRSTLY, that it makes no mention of the authority under the Constitution or under any other law for that matter under which the said order had been passed by the President. SECONDLY, that the only reason being offered for restraining the Chief Justice of Pakistan from acting as the Chief Justice of Pakistan or as a Judge of the Supreme Court was that he was unable to perform the functions of his said office due to facts narrated in a reference which had been made against him under article 209 of the Constitution.

112. Malik Muhammad Qayyum, the learned ASC for the Federation defending the said order, admitted that there was no specific provision in the Constitution or in any other law which authorised "SUSPENSION" of the Chief Justice of Pakistan or to restrain him from acting as such or even as a Judge of the Supreme Court but added that power to suspend a Judge was incidental and ancillary to and implicit in the power of "REMOVAL" which the President had under Article 209(6) of the Constitution and further that the authority which had the power to "REMOVE" another also had the power to "SUSPEND" him, pending the proceedings against such a person. Reliance was placed by him on:-

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(i) *MESSRS EAST-END EXPORTS, KARACHI VS. THE CHIEF CONTROLLER OF IMPORTS AND EXPORTS, RAWALPINDI AND THE ASSISTANT CONTROLLER OF IMPORTS AND EXPORTS, KARACHI.*
(PLD 1965 SC 605 at 613)

(ii) *MOHAMMAD GHOUS VS. THE STATE OF ANDHRA.*
(AIR 1957 SC 246 at 249)

(iii) *STATE OF ORISSA AND OTHERS VS. SHIVA PARASHAD DAS.*
(AIR 1985 SC 701 at 702)

(iv) *MIAN MUHAMMAD HAYAT VS. PROVINCE OF WEST PAKISTAN.*
(PLD 1964 SC 321)

113. Mr. Aitizaz Ahsan, the learned Senior ASC for the petitioner-CJP responded by submitting that in the absence of any specific provision authorizing the President to "SUSPEND" the Chief Justice of Pakistan i.e., the head of the Judiciary in the country, it was fallacious to canvass that the Executive or even the President had any "INHERENT", ancillary or incidental power to restrain any Judge, leave alone the Chief Justice of Pakistan, from performing the functions assigned to him by the Constitution itself; that even a temporary restraint placed on any Judge in the matter of exercising his judicial power amounted to his "REMOVAL" from office; that such an action was offensive of the guarantees provided to a Judge, *inter alia*, by Clause (7) of Article 209 of the Constitution; that any interdiction with the working of a Judge was violative of the security of tenure of a Judge and the same militated against the independence of judiciary and that even if it be presumed, though only for the sake of arguments, that power to remove included in it the power to

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suspend, even then the President would have no authority to restrain a Judge from discharging his constitutional and legal obligations because the power of removal vesting in the President was conditional upon a verdict of guilt by the Supreme Judicial Council and till such time that the S.J.C. gave such a finding against the Judge, the President would not get possessed of any power to remove a Judge and would consequently get clothed with no power to exercise any alleged, incidental, implied or ancillary power to suspend him or to restrain him from acting as one. The learned counsel placed reliance on a number of judgments which shall be mentioned and examined in the succeeding paragraphs.

114. The first question which would crop up in the matter would be whether restraining a Judge from exercising his judicial power and from discharging the obligations cast on him by the Constitution, would amount to his removal. A judgment of this Court which would clinch the said issue is the case of *AL-JEHAD TRUST* (PLD 1996 SC 324). The Court examined the provisions of Article 203-C of the Constitution which provided, *inter alia*, that a Chief Justice or a Judge of a High Court could be appointed as a Judge of the Federal Shariat Court without his consent for a period not exceeding two years and declared that the said part of the said Article 203-C of the Constitution offended against the security of tenure guaranteed to a Judge by Clause (7) of Article 209 of the Constitution and that appointment of a Chief Justice or a Judge of a High Court as a Judge or even as the Chief Justice of the Federal Shariat Court, even

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temporarily, amounted to his "REMOVAL" from office. The relevant part of the said judgment reads as under: -

> *"Clause 7 whereof guarantees the tenure of a Judge of the Supreme Court and of a High Court by providing that a Judge of the Supreme Court or a High Court shall not be removed from office except by the said Article. ..... The above fresh appointment in fact IMPLIEDLY INVOLVES REMOVAL FROM OFFICE of a Chief Justice or a Judge of a High Court, as the case may be, FOR THE PERIOD FOR WHICH HE IS APPOINTED IN THE FSC."*
>
> *(emphasis and under-lining has been supplied)*

It is thus clear that even a temporary interference with the office of the Chief Justice or of a Judge, even when he had not been suspended but in fact appointed to another judicial office, amounted to his "REMOVAL FROM OFFICE".

115. It may be of some advantage here to make a mention of three earlier cases in the judicial history of Pakistan where References were made for removal of an Honourable Judge of the Chief Court of Sindh and two Honourable Judges of the Lahore High Court. I am making a mention of these three cases only because these were the ones where the Honourable Judges had contested the charges levelled against them and were consequently tried. The first case in point of time was that of Honourable Justice Hasan Ali Agha of the Chief Court of Sindh against whom a Reference was made in the year 1951. The Governor General of Pakistan while making the said Reference never thought that he had any inherent, incidental or ancillary

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powers and did not suspend the said Honourable Judge while making the Reference nor did the Executive pass any other order restraining him from acting as such. This clearly indicated that the Executive then, never claimed that it stood blessed with any powers to interfere with the exercise of judicial powers by a Judge. It may, however, be added that in this case the then Honourable Chief Justice Sir Abdul Rashid proposed to the said Honourable Judge under inquiry to proceed on leave and the said Honourable Judge volunteered to remain on leave during the pendency of the proceedings against him. It may also be of interest to mention here that this was the only Reference in our judicial history which had been made against an Honourable Judge during the civilian/constitutional rule and the Honourable Justice Hasan Ali Agha earned exoneration of the charges leveled against him.

116. The two other cases where References had been made against the Honourable Judges of the Lahore High Court pertained to the Martial Law days when the Constitution stood abrogated. First of the said two cases was of Honourable Mr. Justice *IKHLAQ HUSSAIN* (PLD 1960 SC 226) of the Lahore High Court. In his case also while making a Reference even the Chief Martial Law Administrator, inspite of the fact that the Constitution stood abrogated, had no illusions that he had any inherent powers to restrain a Judge of a superior court from discharging his obligations and resorted to making a legislation for sending the Honourable Judge on leave. The law enacted by him for the purpose was President's Order (Post Proclamation) No. 4 of 1958 through which a new Clause (2) was

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added to Article 6 of the Laws (Continuance in Force) Order of 1958 which provided as under:-

> *"(2) The President, IN CONSULTATION WITH THE CHIEF JUSTICE OF PAKISTAN, may suspend a Judge whose conduct he has referred to the Supreme Court for report and any Judge so suspended shall be entitled during suspension to half pay, and if reported not to have been guilty of misbehavior, to treat the whole period of his suspension, as actual service as a Judge and to receive the balance of his full pay for that period."*
>
> *(emphasis and under-lining has been supplied)*

The case of the said Honourable Judge had been referred to the Supreme Court and not to the Supreme Judicial Council because under Article 169 of the 1956 Constitution which stood abrogated but which was being followed, as far as possible, on account of the Chief Martial Law Administrator's Proclamation, a Judge of a High Court was removable only if the Supreme Court, on a Reference being made to it by the President, reported that the Judge deserved to be removed from his office. It may be noticed, as has been mentioned above, that no inherent powers had been claimed by the Executive/the President to suspend a Judge during the pendency of the proceedings against him for misconduct and it would also transpire from the said P.O.No.4 of 1958 that even the Chief Martial Law Administrator did not allocate any such power unto himself and opted to exercise such a power only in consultation with the head of the national judiciary i.e., the Chief Justice of Pakistan.

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117. The third case was that of Honourable Mr. Justice *SHEIKH SHAUKAT ALI* (PLD 1971 SC 585) of the Lahore High Court where again a Reference had been made during the Martial Law regime of General Yahya Khan when the Constitution of 1962 stood abrogated. Even General Yahya Khan, as the President and the Chief Marshal Law Administrator of the country never claimed any divine rights in the matter of suspending a superior Court Judge or in the matter of restraining him from exercising his judicial powers and enacted a law for the purpose. The said legislation was President's Order No. 27 of 1970 being the Judges (Compulsory Leave) Order of 1970. Article 2(1) of the said Order which is relevant for our purpose, prescribed as under: -

> ***"Power to require a judge to proceed on leave****-(1) If, at any time, the Supreme Judicial Council is inquiring into the capacity or conduct of a Judge of the Supreme Court or of a High Court the President may, notwithstanding anything contained in the Provisional Constitutional Order or in any other law for the time being enforce, by order in writing, require such a Judge to proceed on leave from such date and for such period as may be specified in the Order."*

It may also be mentioned here that the Reference against Honourable Mr. Justice Shaukat Ali had been received by the Supreme Judicial Council on 20.06.1970 and the above P.O.No. 27 of the 1970 had been promulgated during the pendency of the proceedings in pursuance of the said Reference. The last paragraph of the report of the Supreme

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Judicial Council gives us some indication about the reasons which could have led to the enactment of the said President's Order. The said last paragraph of the said report was as under:-

> *"Before we part with this report we would like to place on record that although the respondent behaved in a most objectionable manner throughout, we have not allowed this act to influence our decision. This proceeding has been an extremely unpleasant and taxing experience for the Council. The respondent forgot that he was appearing before five of the most experienced Judges in the country, and from the very beginning, either by design or from force of habit, took up an arrogant and insolent attitude. At one stage he even insulted the Council in its face when the Council with great reluctance had to issue a notice for his committal for contempt. It was only through the timely intervention of Mr. Anwar, his counsel that a very ugly situation was avoided, for, otherwise the council would not have hesitated to punish the respondent suitably. He also did not hesitate to falsely and maliciously malign the Council before other Authorities and even attempted at one stage to intimidate the council by threats. Finally, he staged a walk-out even after the evidence was closed. Even so, the Council did not deny Mr. Manzoor Qadir the opportunity to address the Council on the respondent's behalf. Indeed, the Council has throughout, as admitted by Mr. Manzoor*

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> *Qadir himself, not only shown the maximum amount of consideration but even treated the tantrums of the respondent with the indulgence they did not deserve."*

It may also be of historical interest to add here that during the course of the said Reference another President's Order bearing No. 20 of 1970 was also promulgated on 20.10.1970. Article 3 thereof equipped the Supreme Judicial Council with the power to award punishment for its contempt. The *vires* of the above mentioned P.O.No. 27 of 1970 which is in issue before us will be separately discussed in the later parts of this judgment vis-à-vis the present constitutional framework.

118. The purpose of making a reference to the above mentioned three cases was only to emphasize that whether it was during the constitutional and the democratic rule or whether it was during the days when Martial Law stood clamped in the country and the Constitution stood abrogated, the Executive, including the Head of the State never asserted any inherent powers to suspend Judges or to send them on forced leave or even to restrain them from acting as such Judges. Even during the Martial Law regimes when no constitutional security existed for the Judges guaranteeing them their tenure in office, the Presidents/the Chief Martial Law Administrators made specific legislative provisions for such a purpose and did not ever claim any divine or inherent or ancillary and not even any incidental or implicit powers to suspend Judges or to restrain them from discharging their judicial functions.

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119. Leave alone the Judges of the superior courts whose term of office stands guaranteed by Article 209 of the Constitution which is an indispensable ingredient of the independence of judiciary, such an inherent or ancillary or implicit powers, as canvassed by Malik Muhammad Qayyum, ASC had never been asserted even with respect to the civil servants who did not enjoy any constitutional protection vis-à-vis their respective offices. Even a peon could not be suspended or sent on forced leave in the exercise of any such assumed inherent powers and even in their case, laws had to be enacted for the purpose. Reference may be made to the provisions of Section 4 of Removal from Service (Special Powers) Ordinance No. XVII of 2000 which provides as under: -

> *"4-Suspension- A person against whom action is proposed to be taken under sub-section(1) of section 3 MAY BE PLACED UNDER SUSPENSION with immediate effect if, in the opinion of the competent authority, suspension is necessary or expedient.....*
>
> *Provided that the competent authority may, in an appropriate case for reasons to be recorded in writing, instead of placing such person under suspension, REQUIRE HIM TO PROCEED ON LEAVE as may be admissible to him from such date as may be specified by the competent authority."*
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> *(emphasis and under-lining has been supplied)*

To the same effect are the provisions of the Balochistan Province Removal from Service (Special Powers) Ordinance No. 3 of 2000; of the North West Frontier Province Removal from Service (Special

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Powers) Ordinance No. 5 of 2000; of Removal from Service (Special Powers) Sindh Ordinance No. 9 of 2000 and of the Punjab Ordinance. Similar provisions earlier stood prescribed through the Government Servants (Efficiency and Discipline) Rules of 1973 framed under the Civil Servants Act of 1973 and the similar rules framed by various provinces.

120. Some further cases from our own Court may also be cited to determine whether the President has any inherent or implied powers in our constitutional framework. The case, first in line, that I feel tempted to refer to is *FAZLUL QAUDER CHOWDHRY'S CASE* (PLD 1963 SC 486). This was a case where appointments of Cabinet Ministers were alleged to have been made in breach of the constitutional provisions. A rather interesting argument had been advanced in defence of the said action of the President. The said argument was that since the Constitution of 1962 had been enacted, not by the people or the Parliament but by President Field Martial Muhammad Ayub Khan himself and since he was the creator and the giver of the Constitution and since the appointments in question had also been made by him, therefore, due consideration should be given to the said fact while interpreting the relevant provisions of the said Constitution. The response of this Court to the said submission was as under:-

> *"It is no doubt true that the Constitution was enacted by the President as stated in the Preamble, in exercise of the Mandate given to him by the people of Pakistan. But once the Constitution had been enacted, he*

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> *became under Article 226(1) read with Article 227(1) the first President of Pakistan under the Constitution, and, after he had taken the oath of office under the Constitution to act faithfully in accordance with the Constitution and to preserve, protect and defend the Constitution, his powers became circumscribed by the provisions of the Constitution and he could do no more than what he Constitution empowered him to do.*
> .....
> ..... *Thus the written Constitution is the source from what all government power emanates and it defines its scope and ambit so that each functionary should act within his respective sphere.* *NO POWER CAN, THEREFORE, BE CLAIMED BY ANY FUNCTIONARY WHICH IS NOT TO BE FOUND WITHIN THE FOUR CORNERS OF THE CONSTITUTION NOR CAN ANYONE TRANSGRESS THE LIMITS THEREIN SPECIFIED.*"
>
> *(emphasis and under-lining has been supplied)*

Talking about the President's inherent powers, this Court declared in *MIAN MUHAMMAD NAWAZ SHARIF'S CASE* (PLD 1993 SC 473) that:-

> "*Unfortunately,* *THIS BELIEF THAT HE ENJOYS SOME INHERENT OR IMPLIED POWERS BESIDES THOSE SPECIFICALLY CONFERRED ON HIM* ..... *IS A MISTAKEN ONE* .....*In view of the express provisions of our written Constitution dealing with fullness, the powers and*

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> *duties..... THERE IS NO ROOM OF ANY RESIDUAL OR ENABLING POWERS INHERENT IN ANY AUTHORITY."*
>
> *(emphasis and under-lining has been supplied)*

121. Reference to a case from American jurisdiction where the President of the U.S. is supposed to be a rather powerful office, it was observed by the U.S. Supreme Court in *YOUNGSTOWN SHEET'S CASE* (343 US 579) which was a case where during the Korean war of 1951 the President had issued orders to take over the steel mills to avoid their closure on account of a labour dispute, that:-

> *"It is clear that if the President had authority to issue the order he did, IT MUST BE FOUND IN SOME PROVISION OF THE CONSTITUTION."*
>
> *(emphasis and under-lining has been supplied)*

Meaning thereby that even the President of the United States had no power or authority which was not specifically conferred upon him by the Constitution or some law.

122. It is, therefore, not possible for me to accept that in the constitutional, the legal and the legislative framework of our country, as noticed above, which did not recognize any inherent, ancillary or incidental powers with the competent authority to suspend or to restrain from working even a civil servant of the lowest grade who had no constitutional security of office, the Chief Justice of the country whose tenure in office stood guaranteed by the Constitution, could be suspended from office or could be restrained from exercising the judicial powers appertaining to his office, in exercise of some

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alleged inherent, ancillary, implied or implicit powers vesting in the President.

123. In the matter of the issue under examination, I am avoiding reference to the cases from foreign jurisdictions which were cited before us essentially because the Constitutional Scheme vis-à-vis the matter in question of each country differs from the other and any reference to or reliance upon the cases decided by the courts of other countries could be misleading. I may, however, refer here to one or two cases where the constitutional framework was similar to ours. One of the said cases was of *EVAN REES AND OTHERS VS. RICHARD ALFRED CRANE* (1994 (2) WLR 476). This was a case where the proceedings for removal of a Judge of the High Court of Trinidad and Tobago were commenced under Section 137 of the Constitution of the Republic of Trinidad and Tobago. After receiving complaints against the said Judge, the Chief Justice of the High Court, through an administrative arrangement which he was entitled to do, decided not to include the said Judge on the roster of Judges dealing with the cases, from October, 1990 to January, 1991 term. This decision of the Chief Justice was placed before the Judicial and Legal Service Commission which affirmed the said decision of the Chief Justice. The Privy Council held that the act of the Chief Justice, in not listing cases before the said Judge for hearing, in fact amounted to suspension of the said Judge which the Chief Justice or even the Commission had no power to do and was thus a gross breach of the right of a Judge to perform his functions. And this is what the

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Privy Council had to say with respect to the temporary deprivation of a Judge of his judicial powers:-

> *"The exercise of these powers, however, must be seen against the specific provisions of the constitution relating to the suspension of a Judge's activities or the termination of his appointment. It is clear that section 137 of the Constitution provides a procedure and an exclusive procedure for such suspension and termination and, if judicial independence is to mean anything, a Judge cannot be suspended ..... by others or in other ways. The issue in the present case is thus whether what Bernard C.J. did was merely within his competence as an administrative arrangement or whether it amounted to a purported suspension.*
>
> *Their Lordships agree with majority in the Court of Appeal that what happened here went beyond mere administrative arrangement. Despite the fact that the respondent continued to receive his salary and theoretically (as has been argued) could have exercised some power, e.g. to grant an injunction if approached directly to do so, THE RESPONDENT WAS EFFECTIVELY BARRED FROM EXERCISING HIS FUNCTIONS AS A JUDGE SITTING IN COURT. He was left out of the October to January roster and there was no indication that he would thereafter sit again. IT WAS IN EFFECT AN INDEFINITE SUSPENSION. This in their Lordships' view was outwith the powers of Bernard C.J.. Such action not retrospectively corrected by the subsequent*

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> *order of the President. The suspension was wrongful as long as it lasted and the majority of the Court of Appeal were entitled and right to quash Bernard C.J.'s decision.*
>
> *As the appellants accept, the commission had no power or function in relation to the suspension or removal of a judge other than the powers laid down in the constitution. Whether in this case they purported to confirm Bernard C.J.'s decision or whether they purported to suspend the judge themselves, they had no power to do so and their decision should, as the majority in the Court of Appeal considered, be set aside."*
>
> *(emphasis and under-lining has been supplied)*

It may be added here that the Privy Council in this even found that the wronged Judge was even entitled to payment of damages for the breach of his rights at the hands of the Chief Justice and the above said Commission and ordered accordingly.

124. And while I am on the subject I may also make a reference to a case from the Indian Jurisdiction. This is the case of *SUB-COMMITTEE OF JUDICIAL ACCOUNTABILITY VS. UNION OF INDIA AND OTHERS* (AIR 1992 SC 320). The part of the judgment relevant for our purposes, is as under: -

> *"THE RELIEF OF A DIRECTION TO RESTRAIN THE JUDGE FROM DISCHARGING JUDICIAL FUNCTIONS CANNOT BE GRANTED. It is the entire Constitutional Scheme including the provisions relating to the process of a removal of a Judge which are to be taken into account for the purpose of considering*

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> *this aspect. It is difficult to accept that there can be any right in any one running parallel with the Constitutional Scheme for this purpose contained in clauses (4) and (5) of Article 124 read with Article .....No authority can do what the Constitution by necessary implication forbids ..... THE INDICATION, THEREFORE, IS THAT INTERIM DIRECTION OF THIS KIND DURING THE STAGE OF INQUIRY INTO THE ALLEGED MISBEHAVIOR OR INCAPACITY IS NOT CONTEMPLATED, IT BEING ALIEN TO OUR CONSTITUTIONAL SCHEME*.

125. As has been mentioned above, Malik Muhammad Qayyum, the learned ASC for the Federation had argued, *inter alia*, that the President had some inherent and implied powers and further that the power to remove included the power to suspend. The learned counsel had also placed reliance on certain judgments from different jurisdictions which judgments I propose to examine individually.

126. He had placed reliance on *MIAN MUHAMMAD HAYAT'S CASE* (PLD 1964 SC 321). The said appellant was an Executive Engineer in the Irrigation Department of the then Government of West Pakistan. The question in this case was that although under the relevant Efficiency and Discipline Rules, the competent authority had the power to suspend a Government servant, but what was the stage of the proceedings at which such a

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power could be exercised. The judgment in question was based on the premise that:-

> *".....It was not intended by the new Rules that merely by virtue of being a Government servant, a person should have a vested right to hold an office and to perform the functions of that office, but in respect of the holding of office, the pleasure of the executive authority was still to be paramount....."*

This judgment, to say the least, had no bearing on a case of the Chief Justice of Pakistan whose security of office and security of tenure in the said office, stood guaranteed by the Constitution and who, did not hold office at the pleasure of the executive authority.

127. The next case cited by the learned counsel was, *MESSRS EAST - END EXPORTS, KARACHI'S CASE* (PLD 1965 SC 605). This was a case where the Export Registration Certificate of the appellant had been suspended. I am appalled, though not surprised, that the learned ASC was treating the suspension of the Chief Justice of Pakistan with strongest of constitutional guarantees, at par with the suspension of an exporter's certificate of Registration. The cited judgment deserves no further comment.

128. *MOTI RAM'S CASE* (AIR 1964 SC 600) was again a case of Government servants and could not be cited as an authority or even as a precedent for the holder of a constitutional office with constitutionally guaranteed security of tenure. The said case, however, did involve interpretation of the word "*REMOVAL*" but the

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said word had been interpreted as it appeared only in the given context of the relevant legal and constitutional framework. This, as has been mentioned above, was a case of Government employees. Article 311 of the Indian Constitution offered protection to their service by commanding that no civil servant could be dismissed or removed from service until a reasonable opportunity had been granted to him to show cause against the proposed action. It was in this background that a more than liberal construction had been given to the word "*DISMISSAL*" and to the word "*REMOVAL*" to protect the interests of the civil servants against their suspension without hearing them and not to throw them out of their offices. *THE STATE OF ORRISA'S CASE* (AIR 1985 SC 701) was again a case of a Government servant who had been suspended from service and was of no relevance to us.

129. The judgment cited by the learned ASC from U.S. Supreme Court i.e. *BORNAP VS. UNITED STATES* (252 U.S. 512) was a case of an Architect who was an employee of the office of Public Buildings and Grounds. It is true that in the said case it had been declared by the U.S. Supreme Court that power to remove was an incident of power to appoint but what was missed by the learned counsel were the all important words "*IN THE ABSENCE OF STATUTORY PROVISIONS TO THE CONTRARY*". The learned counsel had then placed reliance on *GRINER VS. THOMAS* (104 SW 1058). As I have mentioned above, I was purposely avoiding reference to cases from American or English Jurisdiction because the legal framework in the said two countries and some others was

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significantly different from our Constitutional Scheme. For example Section 98(6) of the Constitution of Belize specifically provides for suspension of Judges under trial. The Constitutional Reforms Act, 2005 of the United Kingdom specifically empowers the Lord Chief Justice to take recourse to "*MINOR MEASURES*" including suspension of a Judge under certain circumstances (Section 108). The Act of 1980 of the United States of America as also the Constitutions and Statutes of various States in the U.S.A. e.g. California, Idaho, Connecticut, Texas and some others, also authorise the Judicial Councils to resort to "*MINOR MEASURES*" including the power to request the Judges under trial to seek retirement and withdrawal of cases from them during the pendency of the proceedings. Similar provisions also exist in some other countries like Canada and Germany. Needless to add that such-like laws and measures existing in such States had been found to fall within the Constitutional Schemes of the said countries.

130. The situation in our country was, however, absolutely different. Articles 209, 210 and 211, falling in Chapter-4 of Part-VII of our Constitution, was a complete code in itself. The said Article 209 established a forum i.e., the Supreme Judicial Council for the purpose and laid down a complete procedure starting with the initiation of proceedings against a Judge and ending either with his exoneration of the charges or his removal from office. The said Article 210 confers certain powers on the said Council regarding securing of attendance of the persons required by it for the purpose or for the discovery and production of any documents. Clause (2) of

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Article 210 confers powers on the S.J.C. to award punishment for its contempt while Article 211 offers protection to some of the proceedings and actions envisaged by the said Article 209. In the United States of America, however, a power exists authorizing suspension of Judges despite which it had been clearly declared in *GRAHAM VS. CANNON* (574 P.2d 305) that in the absence of any authority in the Constitution or in a statute, a Judge could not be suspended from office pending the resolution of charges against him.

131. Malik Muhammad Qayyum, ASC had also placed reliance on the case of *McALLISTER Vs. UNITED STATES* (141 U.S. 174). This was a case decided by the U.S. Supreme Court in the year 1891 where a District Judge appointed for the District of Alaska had been suspended from office in the year 1885 by:-

> *"…….. virtue of the authority conferred upon the President of the United States by Section-176(8) of the Revised Statutes of the United States."*

With the above-noticed state of law existing in the U.S., the matter of suspension of a District Judge being a precedent for the suspension of the Chief Justice of Pakistan in our constitutional framework which did not envisage any such power, hardly needs any comment.

132. Having thus surveyed the Constitutional Scheme of our country vis-à-vis the removal of Judges of Supreme Court or of any of the High Courts, the conclusion is irresistible that our Constitution does not allow any restraint on the exercise of judicial powers by a Judge or any restraint on him to act as a Judge during the pendency

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of the proceedings envisaged by Article 209 of the Constitution nor has our Constitution authorised any sub-ordinate legislation for the said purpose. It may be added that even a temporary dis-ability cast on a Judge in the matter of discharging his constitutional and official obligations as such amounted to "REMOVAL" from office and was not permitted by our Constitution.

133. Before I part with the examination of the said first Order passed by the President on March 9, 2007 restraining the petitioner-CJP from acting as the Chief Justice of Pakistan or as a Judge of the Supreme Court, it may be mentioned that, as would appear from the said impugned order reproduced above, the reason for putting the said restraint on the petitioner-CJP was that he was "UNABLE TO PERFORM THE FUNCTIONS OF HIS OFFICE DUE TO FACTS NARRATED IN A REFERENCE HAVING BEEN MADE AGAINST HIM". The cause for the said restraint was in-ability to perform functions of his office and the cause of the said in-ability to perform his functions was stated to be a Reference made against him. I have gone through the said Reference and have not been able to decipher any reason which could have caused any dis-ability for the CJP to continue to perform his functions. As would be discussed in some detail in the later parts of this judgment, the Acting Chief Justice of Pakistan had taken oath of office at 5 P.M.. The said taking of oath by the ACJP would have been preceded by issuance of a notification appointing Mr. Justice Javed Iqbal as the Acting Chief Justice of Pakistan which notification would have been issued only after the above-quoted notification restraining the petitioner-CJP from acting

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as the Chief Justice of Pakistan had been issued. As has been noticed above, the said restraining notification was the consequence, according to the said notification itself, of a Reference having been made against him. But we know from the record that the said Reference had been made when it was presented before the Supreme Judicial Council when it had met at about 6:30/7:00 p.m.. It is thus evident that the said restraining order of March 9, 2007 issued by the President was only a device to eliminate the petitioner-CJP from the scene to make way for the appointment of an Acting Chief Justice of Pakistan.

134. Having thus examined all the Constitutional, the legal and the factual aspects of the matter, I find and I hold that the Constitution conferred no power on anyone, including the President, to suspend a Judge of a Superior Court leave alone the Chief Justice of Pakistan or to restrain him from acting as such; that the President could exercise only those powers which stood specifically conferred on him by the Constitution and that he was not possessed of any inherent, incidental, implicit or ancillary powers in the matter in question. It is consequently declared that the order in question of the President passed by him on March 9, 2007, was an order passed without jurisdiction; was offensive of the constitutional provisions guaranteeing security of office of the Chief Justice of Pakistan, its tenure and of the independence of judiciary and was thus ultra-vires of the Constitution. It is also declared that in view of the facts and circumstances noticed above, the said impugned order was an order passed for a collateral purpose i.e. elimination of the petitioner from

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the judicial scene and could not be sustained as a bonafide exercise of power. It may be added that securing of an order from the Supreme Judicial Council, in a rush, the same evening to the same effect demonstrates that even the President was conscious of the fact that his said order was not valid and was not sustainable in law.

135. Consequently, the said impugned order in question is set aside as being un-constitutional, illegal, malafides and of no legal effect.

136. The next "*RESTRAINT ORDER*" in line was the one passed by the Supreme Judicial Council in its meeting held in the evening of the same fateful day of March 9, 2007 at about 6:30/7:00 p.m.. The said order reads as under:-

> *"BEFORE THE SUPREME JUDICIAL COUNCIL*
> *SUPREME COURT BUILDING, ISLAMABAD*
> *(PROCEEDINGS IN CAMERA)*
>
> ***PRESENT:***
>
> *MR. JUSTICE JAVED IQBAL, (ACJP)/CHAIRMAN*
> *MR. JUSTICE ABDUL HAMEED DOGAR, MEMBER*
> *MR. JUSTICE SARDAR MUHAMMAD RAZA KHAN, MEMBER*
> *MR. JUSTICE IFTIKHAR HUSSAIN CHAUDHRY, MEMBER*
> *MR. JUSTICE SABIHUDDIN AHMED, MEMBER*
>
> ***RE: REFERENCE RECEIVED FROM THE PRESIDENT OF THE ISLAMIC REPUBLIC OF PAKISTAN UNDER ARTICLE 209 OF THE CONSTITUTION AGAINST MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CHIEF JSUTICE OF PAKISTAN***
>
> *MR. MAKHDOOM ALI KHAN, ATTORNEY GENERAL FOR PAKISTAN IN ATTENDANCE.*
>
> *DATE OF HEARING: 9 MARCH 2007*
>
> ***ORDER***
>
> *Mr. Justice (Retd.) Mansoor Ahmed, Secretary, Law, Justice & Human Rights*

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Division, Government of Pakistan, Islamabad *HAS PRESENTED A REFERENCE MADE BY THE PRESIDENT OF THE ISLAMIC REPUBLIC OF PAKISTAN* *under Article 209 of the Constitution against Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice of Pakistan to answer the question whether the respondent is guilty of misconduct.*

2. The Supreme Judicial Council, on receipt of the Reference, has met today. After examining the Reference and having gone through the Council has taken cognizance of the Reference and decided to invite the respondent of appear before it on 13 March 2007 at 1.30 p.m. Order accordingly.

3. It is further ordered that the respondent shall not perform functions as Judge of the Supreme Court and/or the Chief Justice of Pakistan till the above Reference is answered by the Council.

-Sd-
Chairman

-Sd-
Member

-Sd-
Member

-Sd-
Member

-Sd-
Member"

(emphasis and under-lining has been supplied)

137. A bare perusal of the above-quoted impugned order of the S.J.C., as has been noticed even above, reveals as under:-

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i) that the impugned Reference made by the President had not reached the office of the Supreme Court/the Supreme Judicial Council in due course nor had the same been received by the S.J.C. at any time prior to the Honourable Members of the said Council getting together and starting the said meeting but had been brought by the Law Secretary, by hand, who had then presented the same before the Council after it had actually met at about 6:30 p.m., as disclosed by the learned Attorney General;

ii) that it thus means and establishes that the Council had not met after any Reference had been received by it but the said Reference had been presented after it had met;

iii) that this being so, it is not understandable how the Hon. Members of the S.J.C. came to know that the Law Secretary, armed with some Reference against the Chief Justice of Pakistan, was on his way to the Council wherefor all its Honourable Members should be in their places to receive him to entertain the said Reference;

iv) that besides the Hon'ble Members of the S.J.C., the only other person present in the meeting was Mr. Makhdoom Ali Khan, the learned Attorney General for Pakistan;

v) that the order is conspicuously silent as to why and how the learned

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Attorney General was present in the said meeting; who informed him of the same and on whose call or command was he there and for whom;

vi) that Hon'ble Mr. Justice Javed Iqbal, the Acting Chief Justice of Pakistan presided over the said meeting as its Chairman while the other four Hon'ble Members were, Mr. Justice Abdul Hameed Dogar, an Hon'ble Judge of the Supreme Court, Mr. Justice Sardar Muhammad Raza Khan, another Hon'ble Judge of the Supreme Court, Mr. Justice Iftikhar Hussain Chaudhry, the Hon'ble Chief Justice of the Lahore High Court and Mr. Justice Sabihuddin Ahmed, the Hon'ble Chief Justice of the Sindh High Court;

vii) that it was after the said Reference had been presented in the said meeting that the S.J.C. proceeded immediately to examine the same and to take cognizance of it after having gone through it;

viii) that having taken cognizance of the said Reference on March 9, 2007 which happened to be a Friday, the S.J.C. provided only one working day to the petitioner-CJP and invited him to appear before it on Tuesday, the 13th March, 2007;

ix) that despite an order having already been passed by the President restraining the petitioner-CJP from acting as the Chief Justice of Pakistan

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> *or even as a Judge of the Supreme Court, the S.J.C. also proceeded to issue a similar direction ordering that the "respondent" i.e. the petitioner-CJP shall not perform functions as a Judge of the Supreme Court or as the Chief Justice of Pakistan till the Reference was answered by the Council;*
>
> *x) that it is also evident from the above-quoted order that this restraining order had been passed by the S.J.C. without any application having been made by anyone for the purpose or without even an oral prayer having been made by anyone seeking such an order and further that no mention had been made therein of the provisions or the powers under which the said order had been passed; and finally,*
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> *xi) that the said restraining order had been passed without notice to the CJP; was not an interim order; was not subject to notice and was an order which was to enure through-out the proceedings before the Council till the Reference was answered by it.*

138. Barrister Aitizaz Ahsan mounted a rather aggressive assault questioning how the said meeting in question of the S.J.C. had been convened; who was the one who had convened the same and what was the compulsion which had compelled the said Council to meet not only after the normal office hours but in the darkness of the night. The learned Sr. ASC also highlighted the fact that at least two Hon'ble Members of the Council, namely, Mr. Justice Sabihuddin Ahmed and

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Mr. Justice Iftikhar Hussain Chaudhry were based in Karachi and Lahore, respectively, and seriously wondered as to who was the one who had informed them of the meeting and how did they reach Islamabad from the said two cities in the blink of an eye.

139 All the learned counsel appearing for the respondents including Syed Sharifuddin Pirzada, Sr. ASC and Malik Muhammad Qayyum, ASC maintained a mysterious silence and opted not to say even a single word to answer these questions. Mr. Makhdoom Ali Khan, the learned Attorney General for Pakistan, when asked during the course of the proceedings on 16.7.2007, confirmed that the said meeting in question had taken place at about 6:30 p.m.. He made a further statement which is being reproduced hereunder in his own words:-

> *"I am not aware of how this first meeting of S.J.C. was convened. Who convened it and how it was convened. I can only say that the Council did meet. It did pass an order directing that the Chief Justice of Pakistan shall not perform functions of his said office and not even of a Judge of the Supreme Court and that you may read this restraint order as subject to notice."*

The said silence of the learned counsel for the respondents and the above-quoted statement of the learned Attorney General, only further confounded the conundrum highlighted by the learned Sr. ASC for the petitioner.

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140 I think it would be desirable if I did not leave the said riddle un-resolved and in fact made an effort to find an answer to the same.

141. It is a fact admitted on all sides that Mr. Justice Javed Iqbal had taken oath as the Hon'ble Acting Chief Justice of Pakistan at about 5 P.M. on March 9, 2007. It was also a fact not unknown and confirmed before us by the learned Attorney General that the meeting in question of the S.J.C. had taken place at about 6:30 p.m. which, according to the learned Sr. ASC for the petitioner, was held in the darkness of the night.

142. It is only the Chief Justice of Pakistan/the Acting Chief Justice of Pakistan who could have convened the said meeting being the Chairman of the S.J.C.. Between Mr. Justice Javed Iqbal taking over as the Acting C.J.P. and the holding of the meeting, there was a gap only of about 1½ hours. It could be presumed that the two Hon'ble Judges of the Supreme Court who were the Members of the S.J.C. could have been available in Islamabad and could have reached the venue of the meeting even at a short notice. But as has been noticed above, one of the Hon'ble Members of the said Council was based in Karachi while the other Hon'ble Member was based in Lahore. It had been alleged by the petitioner-CJP through his affidavit that as per the Press reports, the said Hon'ble Members from Karachi and Lahore had been flown into Islamabad in special aeroplanes. General (R.) Hamid Javed, through his counter affidavit, however, deposed that it was only the Hon'ble Chief Justice of the Sindh High Court who had been brought to Islamabad in a special aircraft. One could take judicial

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notice of the fact that the flying time from Karachi to Islamabad even by the fastest of aircrafts, excluding the fighter jets of the Air Force, was about two hours. It would have taken the Hon'ble Member at least half an hour to drive from his residence to Karachi Airport and another half an hour to drive from Islamabad Airport to the Supreme Court. This makes it a travelling time of at least three hours. Needless to add that His lordship would have consumed some time in making preparations to undertake a visit to Islamabad. It could, therefore, be safely presumed that it would have taken the Hon'ble Member of the S.J.C. from Karachi, at least four hours to reach Islamabad, after being informed of the requirement of his presence in Islamabad. This then clearly indicates that the said Hon'ble Member would have been informed, at the latest by about 2 P.M. on Friday, the 9th March, 2007 that he was required to be available in Islamabad. As has been noticed above, the Hon'ble Acting CJP had taken oath only at about 5 P.M. which was about the earliest time when he would have come to know about the making of the Reference in question by the President. Then, who was it who had asked the Hon'ble Chief Justice of Sindh High Court at about 2 P.M. to reach Islamabad to attend the meeting of the S.J.C. that evening, remains as enigma. And what further mystifies the already nebulous scenario and further confounds the confusion is our knowledge that the Supreme Court of Pakistan is not privileged enough to have an aeroplane in its transport pool; that similar was the position of the Supreme Judicial Council and that the situation obtaining in the Sindh High Court was no different. Whose aeroplane was it then which had been rushed into Karachi to fetch the said Hon.

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Member to Islamabad and under whose command had it been so done, defies an answer and the flying machine which had been used to secure the said object, remains a U.F.O. (an Un-identified Flying Object).

143. Like-wise, one could also take judicial notice of the fact that if the Hon'ble Chief Justice of the Lahore High Court had not been brought to Islamabad in a special aeroplane then he would have driven down to Islamabad and the driving time from Lahore to Islamabad was about 4/4½ hours which means that even the said Hon'ble Member would have been informed of the meeting in question around 2 P.M., if not earlier. It had been noticed in the initial parts of this judgment that it was the claim of the President that the petitioner-CJP had not been detained at the Army House/President's Camp Office at Rawalpindi after he (the President) had left the meeting and that it was the petitioner-CJP himself who had opted to stay back to be informed of the allegations against him and of the material available in support of the said allegations so that he could make a choice whether he (the petitioner-CJP) would volunteer to tender his resignation or would opt to face the charges against him and further that it was for this reason that the petitioner-CJP had allegedly remained at the President's Camp Office till 5 P.M.. The question is that if this claim of the President was correct then the obvious reasonable inference would be that the making of a Reference would have been deferred till the CJP had made his pick. This aspect of the matter would be dealt in some detail in the succeeding parts of this judgment, suffice is, however, to say for the present that how the two Hon'ble Members from Karachi and Lahore had been asked to reach Islamabad and who

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was the one who had so asked or invited them, was not explained at all either through the concise statement filed by the respondents or through the large number of affidavits filed in support of the respondents' case or even by the learned counsel including the learned Attorney General appearing before us. This then remains an un-resolved conundrum which had prompted the learned Sr. ASC for the petitioner to submit, with respect, that the said meeting in question of the S.J.C. of 9^{h} March was an extension of the executive conspiracy hatched in the Presidency to remove the petitioner-CJP form his office in a manner not permitted by the Constitution. The learned counsel had added that the manner in which the S.J.C. had met, cast deep shadows of impropriety over the actions and the proceedings taken by the said Council.

144. I deem it my obligation to bring on record that, during the course of the hearing of this matter, we had summoned and perused the record of the S.J.C. to find out as to who was the one who had convened the meeting in question of the S.J.C. on the 9th March but could not find any order on the record regarding the summoning of the said meeting which established that the same had been convened by some un-known, hidden and invisible individual and not by the known, the designated and the authorised authority i.e. the Chief Justice of Pakistan or in his, constitutionally recognized absence, the Acting Chief Justice.

145. The learned counsel for the petitioner-CJP next argued that on March 9, 2007, the President had made a Reference against the petitioner-C.J.P.. And, allegedly, while making this Reference he had

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restrained the petitioner from discharging any functions as the Chief Justice of Pakistan or even as a Judge of the Supreme Court and that in his place even an Acting Chief Justice of Pakistan had been appointed who had taken oath of his office the same evening. His question was that if the haste displayed in holding the meeting in question of the S.J.C. the same night, was not un-due and un-holy, then what were the compelling circumstances which had forced the S.J.C. to meet in such a rush? Once again there was a confusing hush on the respondents' side and only silence of the respondents appeared to be the answer to this question.

146. I went through the above-mentioned two earlier cases where References had been filed against two Judges of the then West Pakistan High Court and found that in the case of *MR. JUSTICE IKHLAQ HUSSAIN* (PLD 1960 SC (Pak) 26), the Reference had been received on 24.11.1958 and the hearing of the said Reference did not commence for more than two months i.e. till 27.1.1959 which proceedings continued for about six months while the report in the matter was submitted to the President on 11.8.1959. In the case of *MR. JUSTICE SHEIKH SHAUKAT ALI* (PLD 1971 SC 585), the Reference had been received by the Supreme Judicial Council on 20.6.1970 and the hearing of the matter started only after about four months i.e. on 10.10.1970 which continued for almost eight months and was concluded on 19.6.1970. We have failed to discover the irresistible, the pressing and the un-avoidable reasons which could have driven the Supreme Judicial Council to meet and to commence the proceedings in

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such a haste. Needless to say that the learned counsel for the respondents could again offer no assistance to us in the matter.

147. The next issue is the crucial question of the validity of the order in question passed by the S.J.C. in its said meeting on March 9, 2007 ordering the petitioner-CJP not to perform any functions as a Judge of the Supreme Court and/or as the Chief Justice of Pakistan.

148. As has been noticed above, the said order had been passed without any request having been made by the Referring Authority i.e. the President or for that matter any other concerned or relevant quarter. In fact the Referring Authority was not even represented before the S.J.C. in the said meeting as the Law Secretary had entered appearance only to present the Reference while the learned Attorney General was just "IN ATTENDANCE". What had then prompted the Supreme Judicial Council to pass such a fateful order directing the holder of the highest judicial office in the country who also happened to be the head of the national judiciary, not to perform functions of his said office or even of a Judge of the Supreme Court, is known to none. It was an order passed without notice to the petitioner-CJP; was not just an interim order which was subject to notice but was a final and an absolute order which was to continue till as long as the proceedings before the S.J.C. lasted. Such, then being the manner in which such an un-precedented order had been passed, the same could not be sustained as a valid exercise of judicial or even the quasi-judicial powers. It was also strikingly noticeable from the said order that no reasons whatsoever had been offered for passing such a harsh order against the holder of such a high constitutional office. It is also strange

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that such an extra-ordinary and un-usual order was being passed by such a high forum and not even the slightest mention had been made of any provision enabling and authorizing the said Council to pass the same. It has already been held above that the Supreme Judicial Council was not a court and that it was only a domestic tribunal with rather limited jurisdiction to hold only an inquiry and that also on a Reference made by the President. It was merely a recommendatory body and was thus possessed only of those powers which stood specifically conferred on it by the Constitution which Constitution never blessed this body with any powers to restrain the CJP or even a Judge from discharging his functions. The said Council, not being a court, did not enjoy any inherent powers like the Supreme Court did being the Apex Court of the country or the powers that it possessed on the strength of Article 187 of the Constitution authorizing it to issue such directions, orders or decrees as may be necessary for doing complete justice. It did not even have the kind of powers which the High Courts possessed under section 561-A of the Code of Criminal Procedure or under section 151 of the Code of Civil Procedure. The only submission made by Malik Muhammad Qayyum, ASC in defence of the said order was that since the Supreme Judicial Council had the power to remove a Judge, therefore, the said power included the authority to suspend a Judge. The said submission proceeds on a factually incorrect foundation. It is fallacious to presume that the Supreme Judicial Council had any power to remove a Judge. As has been mentioned above, the said Council was only a Recommendatory Body which could only submit its report to the President about its findings vis-à-vis the

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incapacity or the misconduct of a Judge and no more. Since it had no power to remove a Judge, therefore, the assumption that it could have any power to restrain a Judge from performing his functions, was grossly mis-placed. It has been mentioned above, that the promulgation of the President's Order No.4 of 1958 and of President's Order No.27 of 1970 on two similar earlier occasions was also a fairly credible evidence of the fact that no such powers existed with the forum inquiring into the conduct or the capacity of a Judge and that was why necessity had been felt to make some legislative provision whereby a Judge under trial could be restrained from exercising his constitutional and judicial powers. It is, therefore, clear to me that the Supreme Judicial Council was not possessed of any power to order a Judge, leave alone the Chief Justice of Pakistan, not to perform functions of his office.

149. Having thus examined this aspect of the matter, I find that in view of the enigmatic manner in which the meeting in question of the Supreme Judicial Council was convened and held; the un-due haste exhibited by the S.J.C. in the matter; the un-precedented time at which the said Council had met with no explanation for the same; the un-fathomable and the perplexing mode in which the presence and availability of the two Hon'ble Members of the Council from Karachi and Lahore had been secured; the issuance of the impugned order without any prayer, written or even oral; the absence of any reasons leading to the passing of the said order; the non-mentioning and in fact the non-existence of any powers enabling the S.J.C. to pass such an order, it could not be said that the order in question was a valid and a

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bona fide exercise of powers. The order in question dated March 9, 2007 passed by the Supreme Judicial Council can, therefore, not be sustained and is set aside being illegal, without jurisdiction and of no legal effect.

150. Despite the above-mentioned order of March 9, 2007 passed by the President restraining the petitioner-CJP from acting as the Chief Justice of Pakistan and as a Judge of the Supreme Court of Pakistan and despite a similar above-mentioned second order secured from the Supreme Judicial Council the same evening, it appears that being conscious of the infirmities of both the said orders, the President passed yet another order to oust the petitioner-CJP from his office. The said order was passed on the 15th March, 2007 and is reproduced hereunder for ready reference:-

> *"GOVERNMENT OF PAKISTAN*
> *LAW, JUSTICE AND HUMAN RIGHTS DIVISION*
> ...
> *Islamabad, the 15TH March, 2007.*
>
> *ORDER*
>
> *No.F.1(2)/2005-A.II.- Consequent upon initiation of proceedings of the Supreme Judicial Council against Mr. Justice Iftikhar Muhammad Chaudhry, the President, in terms of Article 2(1) of the Judges (Compulsory Leave) Order, 1970 (P.No.No.27 of 1970), is pleased to order that Mr. Justice Iftikhar Muhammad Chaudhry, Chief Justice and Judge of the Supreme Court of Pakistan shall be on compulsory leave with effect from the 9th March, 2007, till submission of the report by the Supreme Judicial Council and the President's order thereon, in terms of Article 209 of the Constitution of the Islamic Republic of Pakistan.*
>
> *Justice (Retd)*
> *(Mansoor Ahmed)*
> *Secretary"*

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As would appear from the said order, the same was passed by the President in exercise of his acclaimed powers under Article 2(1) of the Judges (Compulsory Leave) Order, 1970 being the President's Order No.27 of 1970. Needless to repeat that through the said order the petitioner-CJP was, retrospectively, sent on compulsory leave with effect from the 9th March, 2007.

151. Mr. Aitizaz Ahsan, the learned Sr. ASC for the petitioner submitted, *inter alia*, that the said President's Order No.27 of 1970 was case-specific which had been produced and promulgated only to cater for the above-mentioned case of ***MR. JUSTICE SHAIKH SHAUKAT ALI*** and could not be pressed into service for other cases; that the said Order which was destructive of the security of office and of tenure guaranteed by Article 209(7) of the Constitution to the Judges of the Superior Courts was liable to be declared *ultra vires* of the Constitution and that in any case the purported exercise of powers by the President under the said Order was an act in bad faith which was liable to be struck down.

152. Malik Muhammad Qayyum, the learned ASC for the Federation responded by submitting, *inter alia*, that clause (1) of Article 270 of the Constitution authorised the Parliament to validate certain laws made during General Yahya Khan's un-constitutional Martial Law Regime i.e. between 25.3.1969 and 20.12.1971. He added that in pursuance of the said power, the Parliament had passed the Validation of Laws Act No.LXIII of 1975 and had validated certain laws which included the said Judges (Compulsory Leave) Order, being P.O. No.27 of 1970 in question. Relying upon clause (2) of the said

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Article 270, the learned counsel further pleaded that the validation granted to the said President's Order stood protected against judicial review on any ground whatsoever. The said provisions of clause (1) and clause (2) of the said Article 270 read as under:-

> *"**270.** — (1) Majlis-e-Shoora (Parliament) may by law made in the manner prescribed for legislation for a matter in Part I of the Federal Legislative List validate all Proclamations, President's Orders, Martial Law Regulations, Martial Law Orders and other laws made between the twenty-fifth day of March, one thousand nine hundred and sixty-nine, and the nineteenth day of December, one thousand nine hundred and seventy-one (both days inclusive).*
>
> *(2) Notwithstanding a judgment of any court, a law made by Majlis-e-Shoora (Parliament) under clause (1) shall not be questioned in any court on any ground, whatsoever."*

The provisions of section 2 of the above-mentioned Act No.LXIII of 1975 read as under:-

> *"2. Validation of Laws.—The laws mentioned in the Schedule are hereby declared to have been validly made by competent authority."*

153. A reading of the above-quoted provisions of section 2 of the Act of 1975 demonstrate that what has been granted to P.O.No.27 of 1970 was only a procedural validation and not a substantive validation because the said provisions only declared that the said P.O.No.27 was

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a law which would be deemed to have been validly made by the competent authority. It is thus obvious that no immunity stands offered to the contents of the said President's Order which could thus always be subjected to scrutiny by the courts of law. The effect of the ouster clause of Article 270 of the Constitution which has been pleaded as immunity against judicial scrutiny of the contents and provisions of the said President's Order has been discussed and examined in detail in the earlier parts of this judgment while examining the ouster clause of Article 211 of the Constitution and it stands declared that no amount of blanket wrapping of any administrative acts or legislative measures could ever render such-like acts and measures as an absolute protected arena and they were always subject to review by the competent courts. The said principle enunciated above is re-iterated with respect to the ouster clause of the said Article 270. I would, therefore, proceed to test the provisions of P.O.No.27 of 1970 in question to find out whether the same were intra-vires of the Constitution.

154. It has been found by me *supra* that right of access to justice was a fundamental right guaranteed by the Constitution. Such a guarantee to the people would be illusory without an independent judiciary [*MALIK ASAD ALI'S CASE* (PLD 1998 SC 161)]. This is why it has been held by this Court that independence of judiciary which was an integral part of the Objectives Resolution (Article 2A of the Constitution) was a basic and salient feature of our Constitution [*MAHMOOD KHAN ACHAKZAI'S CASE* (PLD 1997 SC 426)]. The indispensability of independence of judiciary was further highlighted

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in *ZAFAR ALI SHAH'S CASE* (PLD 2000 SC 869) by declaring that the Parliament was not free even to amend the Constitution in a manner which could under-mine the independence of judiciary. *MEHRAM ALI'S CASE* (PLD 1998 SC 1445) re-asserted that the security of tenure of Judges was a *sine qua non* for independence of judiciary and *LIAQAT HUSSAIN'S CASE* (PLD 1999 SC 504) re-iterated the same principle in the following words:-

> *"that the independence of judiciary is inextricably linked and connected with.....the security of their tenure and other terms and conditions."*

155. This all important ingredient of independence of judiciary which was a corner stone of our Constitution stood reflected through Article 179 and Article 209(7) of the Constitution. This Court prescribed through *ASFAND YAR WALI'S CASE* (PLD 2001 SC 607) that:-

> *"Any legislative instrument which undermines independence of judiciary ..... may be regarded as repugnant to the spirit of the Constitution. The Superior Courts have the power to declare such legislative instruments as un-enforceable."*

156. Some other principles laid down by this Court and others which could also provide a useful guidelines to discover the constitutional vires of P.O. 27 of 1970 in question are, that the legislative measures, including constitutional provisions, which were enacted by a Martial Law Administrator and had flowed out of the

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barrel of a gun during a military regime when the Constitution stood abrogated, even though subsequently saved, were not entitled to the respect which was due to a piece of legislation promulgated during a constitutional rule (Al-Jehad Trust Case, Supra); that even a constitutional provision which envisaged, not sending a Judge on compulsory leave but only his compulsory though temporary transfer and that also not to some non-judicial post or even to an ordinary Court but to another constitutional Court, amounted to his removal from office and was thus ultra-vires of the Constitution (Al-Jehad Trust Case, Supra) and that permitting a Judge to continue in office but not assigning cases to him for hearing was a serious breach of the rights constitutionally guaranteed to a Judge (Case of Evan Rees, Supra). Needless to say that the said President's Order No.27 of 1970 was a law enacted and promulgated by a military dictator during a military regime when the Constitution of 1962 stood abrogated. While I am on the subject, I am also tempted to make a mention of *MOHTARMA BENAZIR BHUTTO'S CASE* (PLD 1998 SC 388). This was a case where the National Assembly of Pakistan was dissolved by the President on 5.11.1996 in exercise of his powers under Article 58(2)(b) of the Constitution. As a consequence thereof the Government of Mohtarma Benazir Bhutto also got dismissed. The said action of the President was questioned before this Court and was sustained. One of the grounds which had weighed with the President in passing the said order and which had also prevailed with this Court in affirming the said order was that the government had moved a Bill in the Parliament which envisaged sending a Judge of the Supreme Court or

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of a High Court on forced leave on a charge of misconduct. Such are then the implications involved in measures which visualize sending of Judges of the Superior Courts on compulsory leave.

157. What emerges from the above-noticed principles discovered and declared by this Court is that independence of judiciary was a basic and a salient feature of our constitution; that security of office and of its tenure was a *sine qua non* for the independence of judiciary; that Article 179 and 209(7) of the Constitution guaranteed the said security of office and security of tenure to the Judges; that any step or measure which envisaged even for a short and a brief intervention with the tenure and office of a Judge amounted to his removal and was thus an un-constitutional interference with the said Constitutional guarantees and finally that any legislative instrument which sapped or eroded the independence of judiciary could not be sustained. In view of the said principles, the conclusion was irresistible that a legislative instrument which contemplated interference with a Judge's security of office and its tenure by sending him on compulsory leave was *ultra vires* of the Constitution. It is consequently declared that Judges (Compulsory Leave) Order being President's Order No.27 of 1970 which gave unbridled powers to the executive to require a Judge to proceed on leave only because a reference had been made by the President calling upon the Supreme Judicial Council to enquire into the capacity or the conduct of such a Judge, was *ultra vires* of the Constitution. This being so, the order in question of the President dated March 15, 2007 commanding the Chief Justice of Pakistan to be on compulsory leave from 9th March, 2007 till submission of the report

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of the S.J.C. and the President's order thereon, is set aside as being illegal and of no legal effect.

158. The finding that the President's order of March 9, 2007 restraining the Chief Justice of Pakistan from acting as such was illegal and of no legal effect, meant that the office of the Chief Justice of Pakistan had not become vacant on the said date nor could the Chief Justice of Pakistan, for the said reason, be said to be absent and unable to perform the functions of his office. Therefore, no room existed for the appointment of an Acting Chief Justice of Pakistan under Article 180 of the Constitution. The said conclusion gets further emphasized on account of my further finding that even the order passed by the Supreme Judicial Council on the same day i.e. on March 9, 2009 and even the order dated 15 March, 2007 passed by the President asking the petitioner-CJP to proceed on compulsory leave, were also illegal and of no legal effect. It is resultantly held and declared that the appointment of my learned brother Mr. Justice Javed Iqbal as the Acting Chief Justice of Pakistan on 9.3.2007 was un-constitutional and of no legal effect and similar was the position of the appointment of my learned brother Rana Bhagwandas, J. who was like-wise appointed as the Acting Chief Justice of Pakistan on his return from leave abroad.

159. Mr. Aitizaz Ahsan, the learned Sr. ASC next argued, which according to him was the final nail, that the entire exercise in question had been commenced not for the purposes for which Article 209 found placed in the Constitution i.e. purging the judiciary of a mis-conducting or an in-capacitated judge but that the whole drill had been

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orchestrated to rid certain, named high-ups in the Executive, of an irksome Head of the national judiciary who had shown his commitment to ensure that the judiciary, faithfully and fearlessly, discharged the constitutional and the legal obligations for which the people had, through the Constitution framed by them, established the same. The learned counsel made reference to various judgments delivered personally by the petitioner-CJP or by other members of the judiciary under his leadership, which had generated concern and alarm amongst those for whom the concept of Rule of Law did not exist. He added that from the judgments and the conduct of the petitioner, it had become evident to all concerned that the petitioner was not prepared to subsume the Judiciary beneath the Executive and that the impugned Reference was an un-wise reaction of those un-nerved and panicky individuals.

160. To strengthen his submission that the object of making the said Reference was not to remove a compromising Judge but to eliminate the one who was un-compromising, the learned counsel referred us to:-

> *i) the summoning of the Chief Justice to the Army House;*
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> *ii) the respondent-President receiving the Chief Justice in Army uniform;*
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> *iii) the presence of the Chiefs of the Military and the Civil Intelligence Agencies in the said meeting, two out of whom were serving Army Generals in uniform and the third being a retired senior Army Officer;*

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iv) the conspicuous absence, from this meeting, of the persons really relevant and connected with law and judiciary i.e. the Senior Advisor on law; the Law Minister; the Attorney General and the Law Secretary and instead, as has been mentioned above, the meaningful presence of the Generals in uniform and of the Chiefs of the Intelligence Agencies;

v) the demand of resignation from the Chief Justice under threat and coercion;

vi) the detention and confinement of the Chief Justice at the Army house for about five hours after he had refused to oblige the President with his resignation;

vii) the un-holy haste and the manner in which a Reference was then put in place;

viii) the non-application of mind to the Reference which was written large on its face and which was a further proof of the indecent haste in which the whole exercise had been carried out;

ix) the legally invalid manner in which the President restrained the Chief Justice from being the Chief Justice or even a Judge;

x) the constitutionally un-acceptable manner in which an Acting Chief Justice had been appointed;

xi) the mysterious manner in which a meeting of the S.J.C. had been maneuvered in the dark hours of the 9th of March;

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xii) the invisible hands which had convened the said meeting of the S.J.C. and which had also arranged the availability of the Hon. Members of the S.J.C. in Islamabad;

xiii) the un-precedented manner in which the S.J.C. had passed a further prohibiting order commanding the Chief Justice of Pakistan not to be what the Constitution had said he was;

xiv) the in-humane and the shocking act of putting the Chief Justice of the country and not just him but even his lady-wife, his young daughters, his sons including a 'SPECIAL CHILD' and his domestic servants, under house-arrest;

xv) the arrest; the whisking away and then the illegal detention of the personal staff of the C.J.P.;

xvi) the disconnecting and jamming of all his telephone connections and other communication devices and rendering him IN COMMUNICADO; and finally as if all this was not enough,

xvii) the physical man-handling of the Chief Justice of Pakistan at the hands of the Police constables when he was on his way to the Supreme Court building on March 13, to appear before the S.J.C..

161. In seeking quashment of the impugned Reference, the entire emphasis of the learned counsel was on the above-noticed facts establishing, according to him, that the whole exercise had been

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motivated by collateral motives; was rooted in malice; had been taken for ulterior purposes which were extraneous to and in fact an abuse of the Constitution; was consequently malafides and resultantly deserved to be set aside.

162. It was surprising, though understandable, that the learned counsel for the respondents who had pleaded the respondents' cause for weeks, had remained speechless about this all-important question of malafides and left the same un-rebutted and un-controverted. However, realising that reaching just conclusions and then dispensing justice was, in the final analysis, an obligation cast on the court irrespective of the quality or the quantum of assistance rendered by the learned counsel for the parties, we proceeded, of our own, to check the veracity of the submissions made by the learned counsel for the petitioner in the light of the available record.

163. The first relevant question which would have some bearing on the issue and warranted determination was whether the petitioner-CJP had been summoned to the Army House as alleged by him or whether he had been granted audience on his own request? What is available on record is as under:-

> *i)the CJP alleged that he had been summoned;*
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> *ii) according to the Concise Statement filed on behalf of the President and the Federation on April 23, 2007, it had been denied that the petitioner had been called by the President and it had instead been urged that it was on the request of the CJP*

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himself that the meeting in question had been fixed for March 9, 2007 at 11:30 a.m.;

iii) similar was the stance taken by General (R.) Hamid Javed, the C.O.S. to the President through an affidavit filed by him on June 7, 2007 i.e. about three months after the said meeting;

iv) the C.O.S. had further deposed that the Prime Minister had brought the draft of the Reference in question on March 7 and had discussed it with the President and had added that it was the next day i.e. on the 8th of March that a Summary had been received from the Prime Minister advising the President to make the Reference in question and further that it was on the same day that the CJP had also rung up the Military Secretary to the President seeking an appointment with the President — some coincidence;

v) the C.O.S. had also disclosed through the same affidavit, as noticed above, that when the meeting in question started, the CJP first briefed the President for about twenty minutes on the SAARC Law Conference, the SAARC Chief Justices Conference and the Golden Jubilee Ceremony of the Supreme Court and then opened a file and shared, with the President, the contents of a complaint filed against him (the CJP) by Mr. Justice Jehanzeb Rahim of the Peshawar High Court which matter consumed another twenty minutes and it was after the CJP had concluded all that he had to say that

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the President told him (the CJP) about the advice that he had received from the Prime Minister for making a Reference against him (the CJP) which means that prior to this point in time, the CJP knew nothing about this Reference business;

vi) the stance of the President himself, as it surfaced through his interviews with Kamran Khan of 'GEO' T.V., and with Tallat Hussain of 'AAJ' T.V., was that it was not he who had summoned the CJP for the fateful meeting and that this meeting had been arranged at the request and at the instance of the CJP himself;

vii) through the same two interviews, the President had also said something rather revealing and which was that the Reference that he had received contained rather serious allegations against the Chief Justice; that this was only one side of the story and that the Chief Justice was a very important man and, therefore, he thought it was his duty to hear the other side of the story also (the CJP's version), before he took any final decision in the matter.

164. What then emerges from the above-noticed depositions of the C.O.S. is that during his meeting with the President, the CJP had talked only about the SAARC conferences etc. and about a complaint emanating from a Peshawar High Court Judge; that it was the President himself who had disclosed to the CJP that he (the President) had received a summary from the Prime Minister advising him to make a Reference against him (the CJP) which means that the CJP,

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till that time, had no clue about the said Reference which then rules out the possibility of the CJP trying to seek audience with the President to request him or to plead to him or to persuade him to come to his aid and to have this Reference business dropped. Then what was it for which the CJP would have wanted to meet the President so urgently and in fact immediately? According to the C.O.S., it was the CJP who had rung up the Military Secretary to the President on the 8th March asking him to meet the President. There was nothing stopping the all-resourceful respondents to produce the record of the telephone Department to prove the making or the receipt of such a call, which had obviously not been done and offering no explanation for not so doing.

165. As against this, it was the President's own assertion, through his above-mentioned interviews to the two private T.V. Channels that he deemed it his duty to hear the other side of the story also before taking any final step against a rather important man, namely, the C.J.P.. There is thus every reasonable possibility that the President may have asked the CJP to come over so that he (the President) could discharge his said moral obligation.

166. These are, however, only the inferences though rather obvious, which a reasonable man could draw from the above-noticed admitted available facts but what really clinches the issue is the '*PRESS RELEASE*' dated March 9, 2007, issued by the Press Secretary to the President. A copy of the relevant part of the said un-controverted and un-denied Press Release down-loaded from the

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President's website which is available at page 58 of this petition is reproduced hereunder for ready reference:-

> *"Under Article 209 of the Constitution of Islamic Republic of Pakistan, the President on the advice of the Prime Minister has sent a Reference to the Supreme Judicial Council against the Chief Justice of Pakistan after receiving numerous complaints and serious allegations for misconduct, misuse of authority and actions prejudicial to the dignity of office of the Chief Justice of Pakistan.*
>
> *Earlier, the Chief Justice WAS CALLED BY THE PRESIDENT AND THE PRIME MINISTER AND CONFRONTED WITH THE ALLEGATIONS IN ANSWER TO WHICH HE COULD NOT GIVE ANY SATISFACTORY REPLY. Consequently, the President and the Prime Minister were constrained to refer the matter to the Supreme Judicial Council as provided in the Constitution.*
>
> *Mr. Justice Javed Iqbal, the next senior most available Judge of the Supreme Court has been appointed as Acting Chief Justice, as required under the Constitution."*
>
> *(emphasis and under-lining has been supplied)*

167. This being so, we have no option but to hold that it was the Chief Justice of Pakistan who had been called for the meeting in question on March 9, 2007 and we are pained to declare that the above-noticed claims to the contrary, were not true.

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168. The President is holding two offices. He is the President of Pakistan and is also the Chief of Army Staff. The official residence and the Secretariat of the President is in the complex known as the Aiwan-e-Sadar (the Presidency) which is adjacent to the Supreme Court building in Islamabad. The official residence of the Chief of Army Staff is in Rawalpindi which is about 25 K.Ms. away from Islamabad and is called the Army House. It was disclosed by the respondents that General Pervez Musharraf also maintained an office/a secretariat in Rawalpindi which was housed in the compound of the Army House or adjacent to it and was designated as the President's Camp Office. The President obviously has a choice either to spend a night at the Aiwan-e-Sadar or in the Army House and then to work either out of the Presidency or out of the President's Camp Office, as the case may be. Like-wise, he also has a discretion either to be wearing the Army uniform or to be in civilian clothes depending upon his pleasure or the dictates of the occasion, like, when talking to Tallat Hussain during his above-mentioned interview with 'AAJ' T.V., the President had said that he was wearing a lounge suit and perhaps what he meant to convey was that his said engagement had so required. One could also take judicial notice of the fact that while addressing political public rallies, one had seen the President even wearing 'SHALWAR QAMEEZ' (shirt and local trousers) and even caps and turbans depending upon the area in which he was addressing such a rally.

169. On March 9, the President was to meet the Chief Justice at 11:30 a.m.. He was then to offer 'JUMA' (Friday) prayers whereafter he was to fly off to Karachi on a brief private visit to have a look at his

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under-construction house as disclosed by him through his above-mentioned interview. We declare that it will be highly un-reasonable to hold the President answerable for the kind of clothes he wears at a particular occasion or for a particular engagement but would only say that despite such a public roar about the President being in his Army uniform during his fateful meeting with the CJP and about the meeting taking place in the Army House or in the same complex and despite the President being conscious of the said public outrage, as admitted by him through his said interviews, nobody had deemed it desirable to take this Court into confidence about any special engagement or occasion which could have prompted the President to meet the Chief Justice in his Army uniform or to meet him in the Army House complex and we will leave this question at that.

170. It is available on record, as noticed above, that the Prime Minister had brought the matter of Reference against the CJP, to the notice of the President on the 7th March and the President had then received the formal advice of the P.M. in the matter on the 8th i.e. a day before the meeting of the 9th. It is also on record that the President desired to hear the other side of the story from the CJP and also wanted to confront him with the allegations levelled against him (the CJP). Needless to say that the meeting of the 9th involved purely constitutional and legal issues relating to the Chief Justice of Pakistan in particular and the Judiciary in general. If at all the President required any assistance or aides for the said purpose, then the obvious and the only reasonable choice would have been those who were connected with these matters i.e. the Senior Advisor of the Federation

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on Law who was an eminent and a renowned jurist; the Law Minister, the Attorney General and the Law Secretary. But conspicuously enough, none of them participated in the said meeting nor was anyone of them even asked to remain present and available even in the periphery. And the ones who were present there, besides the Prime Minister, were the Director General of the Inter-Services Intelligence, who was a serving General and was in Army uniform; the Director General of the Military Intelligence, who was also a serving General and was also in Army uniform; the Director General of the Intelligence Bureau, a retired Brigadier of the Army; the Chief of Staff of the President, a retired General of the Army and of course the Military Secretary to the President, also a serving General, in Army uniform.

171. It was the case of the petitioner-CJP that the selection of the Army House as the venue of the meeting; the choice of the President to be in Army uniform for the said meeting; the awesome presence of the Heads of the Intelligence Agencies in the said meeting and some of them also being in Army uniform, was a considered design to create a fearful environment for him (the CJP) conducive to his surrendering into resigning from his office.

172. It may be mentioned here that the CJP had specifically alleged that during the course of this meeting, he had been pressurized and asked to resign and it was on his refusal to oblige, that whatever followed, had been orchestrated. This specific and un-ambiguous assertion of the CJP had never been specifically denied by any one of the respondents and what had been said about this

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accusation was that in such-like situations, resignation was always an option.

173. An attempt had been made to explain and justify the presence of the Chiefs of the Intelligence Agencies in the meeting in question by saying that they were the ones who had collected all the material against the CJP supporting the allegations levelled against him and were there to show the said evidence to the CJP and further that it was the CJP himself who had requested the D.G. M.I. to be present in the said meeting to offer support to him (the CJP) vis-à-vis the letter written by the Peshawar Judge. The latter explanation does not sound believable — *FIRSTLY,* because the host and the fixer of the said meeting was a person no less than the President himself and it was not un-known that choice about the invitees to such-like meetings would rest with the President and the CJP could not have dictated the list of such invitees and *SECONDLY*, because the CJP allegedly required the said DG's support in the matter of the said Peshawar Judge but interestingly enough, even according to the affidavit of the C.O.S., this DG was not present when the CJP had talked to the President about the said matter in the '*FIRST TWENTY MINUTES*' of the meeting starting at 11:45 a.m. and he had appeared at the scene only at 1300 hours (at 1 P.M.). The President left the meeting at 1400 hours leaving the CJP to 'DISCUSS' the material in question with the Intelligence Chiefs. At 1500 hours, the other two Chiefs also left, leaving the CJP in the care of the D.G. M.I. alone for the next two hours i.e. till 1700 hours when the CJP finally left the Army House stripped of all his honours, powers and even his office. What support

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was the said D.G. rendering to the CJP in this solitude and for what purpose, is not understandable.

174. Even if someone wished otherwise, it shall have to be believed that a person holding the highest judicial office in the country knew how to read and then to understand what he had read unless the reading material was in Greek which it is nobody's case that it was. Supposing the CJP had been confronted with the allegations levelled against him and when so confronted, he would have obviously known whether the same were false or true and either way he did not need to see the supporting material to find out whether he was or was not guilty of those accusations. And then how come, the President had presumed that when confronted with the said allegations, the CJP would deny their veracity; would opt not to resign and that he would then want to see the material in question and that he (the President) should, therefore, ensure the availability of the three Chiefs, before hand.

175. Looked at from whatever angle, none of these explanations sound believable and it, therefore, could not be said that the petitioner-CJP's claim under examination was un-founded and we hold accordingly.

176. The next serious allegation levelled by the petitioner-CJP and graver than the others so far examined was, his illegal confinement in the Army House till around 5 p.m. of that eventful day.

177. In this connection what is admitted on all sides is:-

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i) that the CJP had reached the Army House/the President's Camp Office at about 11:30 a.m.;

ii) that his meeting with the President started at about 11:40 / 11:45 a.m.;

iii) that the CJP was in the Army House/the President's Camp Office till after 5 p.m.;

iv)that it was while the CJP was still at the said Army House that an Acting Chief Justice was appointed who then took oath of his office at 5:03 p.m.; and

v) that when the CJP left the said meeting place, he stood denuded of his office, of all his prerogatives and privileges and even his official motor-car stood stripped of the national and the Supreme Court flags.

178. The meeting in question, then admittedly, started at about 11:45 a.m.. According to the CJP, it lasted for about half an hour when the President walked out alongwith his Military Secretary, his Chief of Staff and the Prime Minister after the CJP had refused to oblige him with his resignation and had thus "*IGNITED THE FURY OF THE RESPONDENT*". This, according to the CJP would be around 12:15 or 12:30 p.m. and was happening at the Army House/the President's Camp Office in Rawalpindi which was about 25 K.Ms. away from Islamabad where the Prime Minister's office, the Law Ministry and the Supreme Court were located and the driving time between these twin cities would not be less than half an hour. We would also have to notice that after the President had signed the summary sent by the P.M. regarding making of the Reference in question; restraining the CJP from performing functions of his said

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office and regarding the appointment of an Acting CJP, some formal orders would have had to be passed by his secretariat and even if the P.M. was available with the President, the file would still have to come to the P.M's. office in Islamabad where his Secretary or some other officer would record another formal order and from where the file would have had to travel to the Ministry of Law where the same, passing through the Law Minister etc. would reach the concerned officials who would then prepare the above-mentioned letters and notifications regarding the making of the said Reference; regarding the rendering of the CJP 'DYSFUNCTIONAL' and regarding the appointment of Mr. Justice Javed Iqbal as the Acting C.J.P.. Thereafter Mr. Justice Javed Iqbal who was to take oath as the A.C.J.P.; Mr. Justice Abdul Hameed Dogar who was to administer the said oath; the others concerned and the media would also have to be notified as the oath-taking ceremony had been fully covered by the electronic and the print media and then all of them reaching the Supreme Court building, would again have consumed time. And we also know that the oath-taking ceremony took place at 5:03 p.m. as covered and telecast by all the T.V. channels.

179. As against this assertion of the CJP that the meeting in question had ended at about 12:30 p.m. whereafter he had been kept in illegal detention till around 5 p.m., the claim of the respondents, as noticed above, was that from around 11:45 a.m. till around 1 p.m., the President and the CJP had a one on one meeting with only the President's M.S. present there; that at about 1 p.m., the Prime Minister, the C.O.S. and the three Intelligence Chiefs were also called

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in; that at about 2 p.m., the President, the P.M. and the C.O.S. left the meeting to offer 'JUMA' (Friday) prayers whereafter the President left for Karachi leaving the CJP in the company of the three Intelligence Chiefs and that at about 3 p.m., the D.G. I.S.I. and the D.G. I.B. also left and the CJP then remained in the care of the D.G. Military Intelligence till after 5 p.m. when he left the Army House/the President's Camp Office. And this is how the respondents had justified the C.J.P's. alleged voluntary and un-compelled stay at the said meeting place in pursuance of his desire to pursue the material available in support of the allegations forming part of the Reference in question controverting the C.J.P's. contention of illegal confinement till after 5 p.m..

180. Some intriguing questions crop up from the respondents' said explanation. *FIRSTLY,* that it was the CJP who had expressed his desire to see the allegedly voluminous material collected against him; *SECONDLY,* that the CJP had never been coerced into tendering resignation but always had the option to do so and *THIRDLY,* that it took the CJP a fairly long time to complete the said reading i.e. till after 5 p.m.. If the CJP had the choice either to resign his office or to face proceedings before the S.J.C. and if the CJP wanted to evaluate the worth of the collected material to make his pick, then it would be reasonably expected that the person competent to take the final decision, would wait for the person in the dock to exercise his option before any final decisive step was taken by him. The CJP, allegedly, finished reading the said material at 5 p.m. but by that time, we know

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that his fate already stood sealed as the Acting C.J.P. was sworn in at 5:03 p.m..

181. It is on record as the respondents' constantly repeated claim that the President left the meeting at about 2 p.m. (though according to the CJP, It was at 12:30 p.m.); offered 'JUMA' prayers and then left for Karachi which was by or before 3 p.m.. It was nobody's contention that the President had singed the summary in question while in the air or on reaching Karachi which is a clear proof of the fact that the President would have singed the said summary before leaving for Karachi i.e. before 3 p.m..

182. Even if the respondents' claim on the said issue was accepted as true, it means that the die stood finally cast, at the latest, by or before 3 p.m. and if this be so then what was the CJP doing there sitting in a room of the Army House/the President's Camp Office from 3 p.m. to 5 p.m.? The respondents wants us to believe that the material in question was so entertaining; so amusing and so absorbing and the CJP got so engrossed reading it that he sacrificed his 'JUMA' prayers; opted to remain caged till he had read through the whole of it and did not even bother to care that in the meantime someone else was usurping his office.

183. While we are on the subject, we may add that during the course of hearing of this petition, an application bearing Civil Misc. Application No.2073 of 2007 was filed on June 28, 2007 i.e. more than 2½ months after the filing of the Reference in question in the S.J.C. and about 1½ months after we had started hearing this petition which application sought to place before us the above-mentioned

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'*MATERIAL*' which was allegedly available with the President in support of the accusations against the C.J.P. and which had then been allegedly filed in the S.J.C. to prove the alleged misconduct committed by him. An order, unanimously passed by us on the said application on July 2, 2007 which gives an insight and an indication of the kind and the wroth of the said '*MATERIAL*', is reproduced here-under:-

> "*Malik Muhammad Qayyum, ASC for the Federation, when questioned initially, on an objection raised by the other side about CMA No.2073 of 2007, submitted that this entire record filed through the said CMA had been placed before this Court as the same was the material which was available to the Referring Authority at the time of the formation of the opinion to send the reference against the HCJP to the Supreme Judicial Council and that it was to meet the objection of the petitioner regarding the said reference having been sent without any application of mind and without any material being available before the said authority that the same had been done. When confronted with the documents e.g. AN AFFIDAVIT APPEARING AT PAGE 340 OF CMA NO.2073 OF 2007 WHICH WAS AN AFFIDAVIT SWORN BY CH. MUSHTAQ AHMED KHAN, SR. ASC AND WHICH HAD BEEN ATTESTED AND SWORN AT LAHORE ON 16.4.2007, Malik Muhammad Qayyum, ASC submitted that these were the copies of the documents placed before the Supreme Judicial Council and that he had nothing more in defence of*

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the said document being or not being before the Referring Authority at the relevant time. After some further arguments, the learned ASC when confronted with the documents appearing at pages 164, 165 and 166 in which NAKED ABUSES HAD BEEN HURLED ON THIS COURT AND THE HON'BLE JUDGES OF THIS COURT and which were neither the clippings of the press nor a document signed by anyone and even the source of which documents was not known and likewise when confronted with two documents described as "SECRET" appearing at pages 75 and 80 of the said CMA No.2073 of 2007, the learned ASC submitted that he did not know the source of these documents nor had he even seen the said documents earlier. These documents, to say the least, appear to be intended to scandalize and malign certain Hon'ble Judges of this Court who are not even a party to this petition. When asked to disclose the source of these documents and others and when asked to produce the author of these documents, Malik Muhammad Qayyum, ASC for the Federation prayed for permission to withdraw CMA No.2073 of 2007. He added again that he was not the one who had supplied these documents to the learned AOR who had filed the same NOR HAD HE EVEN SEEN THEM PRIOR TO BEING CONFRONTED WITH THEM, IN COURT, THIS MORNING.

2. WE, THEREAFTER, ASKED SYED SHARIFUDDIN PIRZADA, THE

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LEARNED SR. ASC FOR THE PRESIDENT OF PAKISTAN about this CMA No.2073 of 2007 whereupon he submitted that HE DID NOT OWN THE SAID APPLICATION NOR DID HE HAVE ANY KNOWLEDGE OF THE FILING OF THE SAME. SIMILAR WAS THE STANCE TAKEN BY THE LEARNED ATTORNEY GENERAL FOR PAKISTAN when questioned about the same.

3. At this stage, the learned ASC for the petitioner-Chief Justice also drew our attention to the photographs appearing, inter alia, at pages 67, 68, 69, 70, 71, 72, 73 and 74 of the said CMA No.2073 of 2007 and submitted that this was A BLATANT AND DISGRACEFUL DISPLAY OF INTERFERENCE WITH THE PRIVACY OF HOMES AND MORE SO WHEN THE HOME WAS THAT OF THE HON'BLE CHIEF JUSTICE OF THE COUNTRY. He added that the respondents who had filed these photographs and relied upon by them be called upon to disclose the person who had taken the said photographs and who may then be summoned for appropriate action in accordance with law.

4. On notice from us and under our call, Ch. Akhtar Ali, AOR who had filed CMA No.2073 of 2007 alongwith the documents appended therewith and had supported the same with his own affidavit sworn on 28th day of June, 2007, submits that all the documents appended with this application had been prepared in the Ministry of Law; that an Additional Secretary from the Law Ministry

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accompanied by the Private Secretary of the Law Secretary and some Civil Judge posted in the Law Ministry had brought all these documents to him; that the Law Secretary had spoken to him at least seven or eight times on the subject and IT WAS THE LAW SECRETARY WHO HAD INSTRUCTED HIM TO FILE THIS APPLICATION AND THE DOCUMENTS IN QUESTION. He adds that MALIK MUHAMMAD QAYYUM, ASC HAD ALSO SPOKEN TO HIM ON THE SUBJECT AND HAD TOLD HIM TO COMPLY WITH THE INSTRUCTIONS OF THE LAW SECRETARY in the matter. He further submits that he had not seen or read the said documents filed with the said CMA as he was not left with any time or opportunity to do so because MALIK MUHAMMAD QAYYUM, ASC HAD TOLD HIM THAT HE WOULD NOT BE ABLE TO ARGUE THE CASE ANY FURTHER UNLESS THESE DOCUMENTS WERE AVAILABLE ON RECORD TODAY.

5. Having considered all aspects of the matter; having gone through the documents in question appended with CMA No.2073 of 2007 and having heard CH. AKHTAR ALI, AOR who had filed the said application on behalf of the Federation of Pakistan, we are, prima facie, of the view that since the said documents emanated from not only un-identified and irresponsible sources; were designed to scandalize this Court and to malign some of the Hon'ble Judges of this Court, therefore, we direct that a COMPLIANT BE FILED

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AGAINST HIM WITH THE PAKISTAN BAR COUNCIL UNDER SECTION 41 OF THE BAR COUNCILS ACT. In the MEANTIME, ON ACCOUNT OF whatever has been noticed above, the said learned AOR is, at least prima facie, guilty of misconduct or a conduct unbecoming of an advocate with regard to a matter concerning this Court and HIS LICENSE TO PRACTICE IS SUSPENDED. This is being done in pursuance of the powers vesting in this Court under section 54 of the Legal Practitioners and Bar Councils Act of 1973 and Rule 30 of Order IV of the Supreme Court Rules of 1980. A notice is also issued to him to SHOW CAUSE WHY HE SHOULD NOT BE REMOVED FROM PRACTICING AS AN ADVOCATE IN THIS COURT as envisaged by the said Order IV, Rule 30 of the Supreme Court Rules. A further notice is issued to him to show cause why he SHOULD NOT BE PUNISHED FOR HAVING SCANDALIZED THIS COURT AND FOR HAVING MALIGNED SOME OF THE HON'BLE JUDGES THEREOF.

6. A separate file shall be prepared with respect to the said notice and shall be set down for hearing in due course.

7. Malik Muhammad Qayyum, ASC for the Federation, on our command to him to secure appearance of the authors of the above- mentioned documents appearing at pages 65, 75 and 80 described as "SECRET", submits that during the tea-break he had discussed the matter with the Law Secretary who had told him that all

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these documents had been prepared in the Law Ministry. About the photographs of the house of the Hon'ble Chief Justice which had been appended with this application, Malik Muhammad Qayyum, ASC submits that the Law Secretary had undertaken to find out about the person who had taken these photographs and would inform this Court about it tomorrow.

8. In view of the statement made by Ch. Akhtar Ali, AOR that it was the Law Secretary who had commanded him to file the documents in question in this Court and also in view of the statement made by Malik Muhammad Qayyum, ASC for the Federation that some of the documents above-mentioned had been owned by the Law Secretary to have been prepared in the Law Ministry, A NOTICE IS ALSO ISSUED TO THE LAW SECRETARY TO SHOW CAUSE WHY PROCEEDINGS SHOULD NOT BE TAKEN AGAINST HIM IN THE MATTER IN ACCORDANCE WITH LAW.

9. During the course of hearing of this matter before us for about two months, it had been repeatedly pointed out by the learned Sr. ASC for the petitioner-Chief Justice of Pakistan that the intelligence agencies were swarming this Court and were persistently spying upon the Hon'ble Judges of this Court and the Hon'ble Judges of the High Courts in the country and were prying into their private matters. In view of the pendency of these proceedings of a very serious and delicate nature, we had been ignoring the said

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aspect of the matter. However, after going through the documents filed with the CMA in question, we now feel compelled having been left with no option but to command that no un-authorized person including the officials of the intelligence agencies of whichever department of the State, shall enter the office of this Court or of the High Courts in the country; that no one shall seek access to any record of this Court including the High Courts nor shall any official of the said Courts, if so requested, supply any document or information or even show or make available any document or record of any court of law to such officials or un-authorized persons. The Registrar of this Court is ordered to ensure compliance of this order and like-wise the Registrars of the respective High Courts shall ensure compliance thereof within their respective courts. It is further ordered that the concerned Registrar shall be personally responsible and liable for any deviation or non-compliance of this order. Needless to add that the learned advocates of the respective courts shall have access to the judicial records in accordance with law and that this order shall not be deemed as a prohibition to supply certified copies of the documents which are liable to be supplied, in accordance with law.

10. The Director General of the Intelligence Bureau is ordered to have an inspection of the premises of this Court as also the premises of the residences of the Hon'ble Judges of this Court, carried out regarding the availability of any bugging

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instruments or devices therein and shall then submit a personal affidavit about the non-existence thereof. We shall expect this exercise to be completed within one week whereafter the Director General of the Intelligence Bureau of Pakistan shall file the said affidavit so as to be available before this Court on 9.7.2007.

11. MALIK MUHAMMAD QAYYUM, ASC FOR THE FEDERATION, AT THIS STAGE, TENDERS UN-CONDITIONAL APOLOGIES ON HIS BEHALF AND PRAYS FOR PERMISSION TO WITHDRAW CMA NO.2073 OF 2007.

12. In view of the REMORSE EXPRESSED BY MALIK MUHAMMAD QAYYUM, ASC, THIS CMA NO.2073 OF 2007 IS DISMISSED AS WITHDRAWN BUT SUBJECT TO PAYMENT OF RS.1,00,000/- BY THE FEDERATION AS COSTS FOR HAVING FILED A VEXATIOUS AND SCANDALOUS APPLICATION. This amount of Rs.1,00,000/- shall be sent for the benefit of the flood victims of Balochistan and a receipt evidencing the same shall be filed with the Registrar of this Court within ONE WEEK.

13. Copies of this order shall be sent to the Registrars of all the High Courts in the country. A copy thereof shall also be sent to the Director General of the Intelligence Bureau for compliance.

(emphasis and under-lining has been supplied)

184. I do not consider it necessary to devote any further time and space to this material; its merit, value and worthiness and

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whether it was or how much of it was available with the President on March 9, 2007 which could have kept the CJP busy for hours, reading it.

185. A news-item appeared in the daily "Nation" on March 11, 2007 i.e. two days after the making of the Reference in question. A copy of the said un-controverted news-item is available at page 51 of this petition filed by the C.J.P.. It carries a report about the S.M.Ss. (mobile phone messages) which were being secretly and stealthily sent by a young daughter of the C.J.P. to some close friend narrating whatever was happening to them and in their house on March 9. I propose to re-produce the said news-item, in full, in the succeeding parts of this judgment in a different context, suffice it to say for the present purpose that according to one of these messages, some 'ACTIVITY' had already started in their house (the residence of the CJP) by 3 p.m. on the said fateful day of March 9.

186. What emerges from the above discussion, could be summarised as under:-

> *i) that the presence of the Hon. Chief Justices of Lahore and Karachi High Courts in the meeting of the S.J.C. held at about 6:30 p.m. on March 9, as held above, established that it would have been around mid-day on the said day that the said Hon. Chief Justices in Lahore and Karachi would have been asked to reach Islamabad for the meeting in the evening meaning thereby that the final decision to file the Reference*

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would have been made by then i.e. by mid-day on March 9, 2007;

ii) that the said final decision having been taken around mid-day is being also confirmed by the President's departure for Karachi around that time;

iii) that the said fact is being further confirmed through the above-mentioned S.M.S. sent by the C.J.P's daughter to one of her friends as revealed by the daily 'Nation' and according to which some 'ACTIVITY' had already started at the C.J.P's residence by 3 p.m.;

iv) that the same is being corroborated also by the fact that according to the respondents themselves, the President had deputed all the three Intelligence Chiefs to 'SHOW' the 'MATERIAL' to the CJP and at least two of them had left the venue at about 3 p.m. leaving the 'SHOWING' part to the Director General of the Military Intelligence;

v) that, the nature and worth of the said material being as noticed above, there was hardly anything which the CJP would have desired to dig out from the said material and which would have taken him hours to extricate and un-earth; and finally and more importantly,

vi) that while the CJP was sitting

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> *in the Army House/the President's Camp Office, the entire governmental machinery was astir, hurriedly rushing through steps to dethrone him and to strip him of what legally, morally and constitutionally, belonged to him.*

187. With these facts and circumstances being available on record, when we juxtapose the two versions i.e. the claim of the CJP that after the President had left the meeting at about 12:30 p.m., he had been kept there in captivity till his denudation had been fully accomplished through installation of Mr. Justice Javed Iqbal as the Acting Chief Justice of Pakistan at 5.03 p.m. and the contrary assertion of the respondents that the CJP was sitting in the Army House of his own pleasure and free will enjoying and appreciating the 'MATERIAL' collected against him and had opted to leave the place after 5 p.m. only after he stood stripped of his office, the conclusion is inevitable that it was the CJP's version which was more plausible and consequently believable and that the claim to the contrary was implausible and un-believable and we hold accordingly.

188. Another question which had been vehemently agitated before us was of the indecent haste in which the Reference in question had been put together after the CJP's alleged refusal to resign and the resultant non-application of mind thereto.

189. The facts relevant for the purpose to which our attention was drawn and which gawk at the one watching the same are:-

> *"i) at page 13 of the Reference, after*

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para 31 of the same what finds written is:-

"Para 32 – deleted"

and the space where the said para 32 existed, lies vacant and blank indicating that the Referring Authority did not even have time to have such an important document, emanating from the Head of the State and being sent to a high constitutional forum, re-typed after the said amendment had been considered necessary;

ii) and then, it was on 16.7.2007 i.e. after more than four months of the filing of the Reference; after more than two months of hearing of this petition and only four days before the completion of the said hearing and the announcement of the judgment that Syed Sharif-ud-Din Pirzada, the learned Sr. ASC appearing for the President made the following statement,

> *"I have instructions from the President and the Prime Minister to state that para 34 of the Reference appearing at page 14 thereof alongwith its heading and clause (g) of part III of para 36 of the said Reference may be considered as deleted."*

iii) we feel compelled to refer, once again, to the supporting 'MATERIAL' which was sought to be placed before us on 2.7.2007; which was examined by us through our above-quoted order of the said date and turned out to be only a source of embarrassment, awkwardness

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> *and mortification for all concerned and which the learned Sr. ASC for the President had refused to own; which the learned Attorney General for Pakistan had declined to acknowledge and for which Malik Muhammad Qayyum, the learned ASC for the Federation had only apologies to offer.*

190. One would ordinarily expect that a document emanating from the Head of the Executive affirmed by the Head of the State and moreso when it accused, none other than the Head of the Judiciary of misconduct, would be the result and the product of some serious deliberations involving an earnest thought – process reflecting a high degree of care, caution and sobriety but we are pained to say that the Reference in question displayed haste, rush, thoughtlessness and even impetuosity which was un-fortunately bordering on to recklessness.

191. Another serious allegation levelled by the petitioner-CJP was that after his release from his above-noticed captivity in the Army House/the President's Camp Office, he was caged in his house in Islamabad. It was submitted by Mr. Aitizaz Ahsan, of course with some vehemence, that after the CJP had incurred the ire of the President by refusing to oblige him with his (CJP's) resignation, it was decided to punish him which could also operate as a measure of coercion expecting the CJP to succumb to it and to surrender his office.

192. The CJP's claim about the treatment meted out to him, to his lady-wife and children; to the members of his personal staff and

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even to his domestic servants has been noticed, in some detail, in the opening parts of this judgment. It may, however, be recapitulated that it was the case of the CJP that before he left the Army House/the President's Camp Office, he had been stripped of all vestiges of his office; that on his way home, he had been intercepted by an Army official and a Superintendent of Police who had forced him not to go to the Supreme Court; that when he was nearing his house at about 5:45 p.m., he saw barricades and piquets erected on the road leading to his residence; that on reaching his house, he saw that the national and the emblem flag flying there had been pulled down and he was shocked, though not surprised, that battalions of policemen and men of the 'AGENCIES' were swarming inside and outside his house; that his lady-wife, his two young daughters and two young sons stood huddled into one bedroom while the rest of the house had been taken over by the said men; that all his telephone lines and television cables had been disconnected and the mobile telephones and other devices had been jammed; that his domestic servants were whisked away by some 'AGENCY' officials and were allowed to return home only after 2/3 days; that till March 13, his daughters were not allowed to go to their school and college; that his seven years old son who suffered from physical handicaps and required constant medical attention, was deprived of the said facilities and that on March 13, when he had decided to walk down to the Supreme Court building to appear before the S.J.C. as his cars had been lifted away, he was man-handled by police officials who even caught him from his hair and tried to bundle him into a vehicle which he refused to board on account of his security

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and safety concerns. He had added that on getting exposed to the world outside on the said March 13, he came to know that some members of his personal staff, including an Additional Registrar of the Supreme Court, namely, Hammad Raza who was on officer belonging to the District Management Group and was on deputation with the Supreme Court working also as a Personal Staff Officer of the CJP, had also been taken away by the men of the 'AGENCIES'; detained at some un-known place; interrogated and pressurized to give evidence against the C.J.P.. It may be mentioned here that this Hammad Raza who was the only child of his parents and was the father of three small children including a few months' old son, was murdered in the early hours of the 14th of May, 2007 i.e. the day on which this Bench was to commence the hearing of this petition and according to his young widow, this was in fact a message for the Judges comprising this Bench.

193. It could be of assistance to notice here some of the news-items, appearing in the national and the international print media, about the said detention of the CJP and about the said manner of conduct and behaviour towards him and towards the ones near and dear to him. The said news-items which form part of this petition and had remained un-controverted on record, are re-produced hereunder. I propose to start with the above-mentioned report appearing in the daily 'Nation' of March 11, 2007 which is based on S.M.Ss. (mobile telephone messages) secretly sent by a daughter of the CJP to some close friend who then narrated the same to the reporter of this news-item. And these messages say it all:-

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I. ***<u>THE NATION – Sunday, March 11, 2007</u>***

"SMSs REVEAL THE ORDEAL OF TEENAGER, KIDS

ISLAMABAD – "A lot of armed people are inside the house and we are restricted to one room," said a text message sent by the frightened daughter of Chief Justice Iftikhar Muhammad Chaudhry to one of her friend on Friday evening.

The message was part of a sole communication link established secretly by the teenage daughter of the Chief Justice with one of her very close friend and a class fellow. This was the only link the whole family of seven had with the outer world.

The link could not be severed by the armed persons, who had taken over the house of the Chief Justice, cordoned off the entire neighbourhood and blocked all the landline and cell phone connection, as the Chief Justice's daughter had managed to keep the cell phone hidden inside the room.

"We are restricted to one room," another message sent at 8:00 pm on Friday night by her said. The teenager stayed in that room along with her parents, two other sisters and two brothers. The youngest of the brother, who is six year old, was totally freaked out because of the chaos that was unfolding around them.

Earlier, at around 3:00 pm she called her friend and told her to direct other friends not to call or SMS her. She didn't give any details and told her friend that she well tell her the details later.

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Later at 6:00 in the evening she called her friend again from a landline and told her, "My father has been told to leave the office and is now under house arrest." And the phone disconnected abruptly.

The friend of Chief Justice's daughter was not sure whether the phone was snatched from her hand, she disconnected herself or the line dropped for technical reasons. The friend kept calling her back but all the phones were busy.

It was also learnt that a control room has been formed inside the house from where all the phones are being operated. "Either the phones don't respond or somebody else picks up the phone," the sources said. "The house is swarming with agency people," the sources said.

By Saturday evening the family was allowed to move around the house, it was learnt.

It was learnt that on Friday the search was carried out for all the phones and the family was told to give in all their mobile phones. However, CJ's daughter managed to hide her mobile phone from the intelligence agencies. But had not called her friend due to the fear of it being found out. She, rather, had been SMSing.

Although the house is crowded with the agency people but there is not a single female police officer to deal with the four females of the family. The family follows traditional values and the women of the

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house cover their head.

"There are all strange armed men around the house," another message said. All the servants including the cook and the personal driver were taken away. Another message said the milkman was also turned away."

II. DAILY TIME – Sunday, March 11, 2007

"LAWYERS NOT ALLOWED IN CJP's HOUSE

ISLAMABAD: A delegation of lawyers and journalists was not allowed to meet suspended Supreme Court Chief Justice Iftikhar Muhammad Chaudhry on Saturday. As the delegation reached the highly guarded residence of Mr. Chaudhry at Judges Enclave, the authorities responsible for the security at the judge's house refused to open the gate and let the delegation in. The lawyers from the Pakistan Bar Council and Supreme Court Bar Association said they Believed that "Mr. Chaudhry has been put under house arrest and is being forced to resign". The delegation stayed about two hours to meet him, but to no avail. An SC judge was also denied entry."

III. DAWN – March 11, 2007

"CJ HELD INCOMMUNICADO; LAWYERS SLAM 'ARREST'

ISLAMABAD. March 10: Chief Justice Iftikhar Mohammad Chaudhry remained incommunicado on Saturday for the second consecutive day and a heavy police contingent was posted to guard his residence.

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The Pakistan Bar Council described the action as a case of 'illegal house arrest', Yes, he is in illegal detention," Ali Ahmed Kurd, vice-chairman of the PBC, told reporters outside the official residence of the Chief Justice.

"There is no other way to describe the situation as no one is being allowed to meet him," he said after police officials stopped him and other lawyers from going inside the Chief Justice's residence.

The views expressed by Munir A. Malik, the President of the Supreme Court Bar Association, were equally strong as he described it an attempt to pressure the chief justice into resigning.

Nestled in the Margalla hills, the judges' colony in Islamabad remained the focus of intense activity throughout the day as several leaders and members of lawyers' associations gathered outside Justice Iftikhar's residence.

A battery of newspaper reporters and television teams also accompanied them, trying to get a glimpse of the 'suspended' chief justice, who has not been seen in public since his fateful meeting with President Gen Pervez Musharraf in Rawalpindi on Friday.

After the meeting at the President's camp office in Rawalpindi, Justice Iftikhar Mohammad Chaudhry tried to return to the Supreme Court on Friday evening, but was stopped by police officials. They then escorted him to his official residence.

Although there has been no official order of

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'arrest' or 'detention', the gate of his house has remained in control of the police.

Security was further stepped up on Saturday with the deployment of more policemen and officials in plain clothes in the vicinity of Justice Iftikhar Chaudhry's house.

Police were under instructions not to let anyone into the building. The officials posted there were polite but firm in their stand that the chief justice's residence was out of bounds for lawyers and journalists. They did not say anything about judges, but a Supreme Court Judge, Justice Raja Fayyaz Ahmed, was not allowed to enter the premises.

A good number of lawyers stayed around after security officials informed them that permission was being sought from the higher authorities to allow them to go inside. But after waiting 'for over an hour', the Vice Chairman of the Pakistan Bar Council, Ali Ahmed Kurd, and the President of SCBA, Munir Malik, decided to leave the place to hold a joint meeting in the Supreme Court building.

The meeting adopted yet another resolution accusing the authorities of trying to obtain Justice Iftikhar Chaudhry's resignation by force.

By removing the national as well as the Supreme Court flags from the official residence of the chief justice, they said, the government was sending him a signal that he was no more the chief justice. They regretted that the chief justice was not allowed to move freely and was not allowed

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to meet even his counsel.

All bar councils and bar associations have decided to observe a 'black day' on March 13 – the day the Supreme Judicial Council takes up the presidential reference. Black flags will fly atop all premises housing bar associations.

While demanding proceedings before the SJC to be held in the open court with full access to all lawyers and journalists, they offered legal assistance to the chief justice and resolved to defend him at the SJC on March 13.

No complaint has ever been converted into a reference even though 27 complaints against sitting judges – one of them against a sitting chief justice of a high court – is pending before the SCJ, chairman of the PBC executive committee, Qazi Anwar, alleged."

IV. ***<u>THE NEWS – Saturday, March 10, 2007</u>***

"POLICE POSTED AT CJ RESIDENCE

ISLAMABAD: A heavy contingent of police has been deployed around the residence of former Chief Justice Iftikhar Muhammad Chaudhry, B-5 Judges Colony in Islamabad, after being made ineffective on Friday. No one is being allowed to meet him."

V. ***<u>THE NEWS – Tuesday, March 13, 2007</u>***

"APNS-CPNE TEAM BARRED FROM MEETING SUSPENDED CJ

ISLAMABAD: A delegation comprising media tycoons and newspapers editors Monday was refused permission to visit the "non-functional" Chief Justice of Pakistan, Iftikhar Mohammad Chaudhry.

The office bearers of All Pakistan

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Newspapers Society (APNS) were stopped near the Ministers' Enclave where the police had barricaded the road leading to the Judges Colony.

Mir Shakil-ur-Rehman, APNS President and other office bearers wanted to meet the 'non-functional' Chief Justice of Pakistan in the wake of the current crisis.

Magistrate Syed Hussain Bihadar, who intercepted the delegation, claimed that the CJ had not been 'arrested' and that the police guards had been deployed for his security.

He added that 'non-functional' CJ was taking rest in his house.

He also asked for a list of the delegates that would be sent to Iftikhar Chaudhry for approval.

"We are neither his relatives nor friends. We are representing the fourth pillar of the state," Hameed Haroon, a senior office bearer of the APNS told the magistrate when he showed reluctance to let them go anywhere near the residence of Iftikhar Chaudhry.

Talking to journalists Haroon said the APNS executive committee had decided to see the 'non-functional' CJ. "But we have been told that the Chief Justice did not want to meet us and that he was taking rest," he further said.

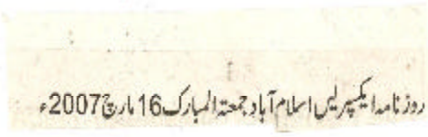
Haroon said they had decided to go back instead of breaking the law.

Arif Nizami, Imtinan Shahid, Mujeeb-ur-Rehman Shami, Qazi Asad Abid, Anwar Farooqi, Mumtaz Tahir, Mehtab Khan, Arshad Zuberi, Najam-ud-Din Sheikh, Jamil

.

Athar, Altaf Qureshi, Pir Sufaid Shah and other members of APNS/CPNE were also present on the occasion."

VI.


روزنامہ ایکسپریس اسلام آباد جمعۃ المبارک 16 مارچ 2007ء


چیف جسٹس کے گھریلو ملازمین کو روزانہ تھانہ بلا کر تفتیش جاری

لاہور (لیڈی رپورٹر) غیر فعال چیف جسٹس افتخار محمد چوہدری کے ملازمین پولیس اور خفیہ اداروں کے تفتیشی افسروں کے غیر مناسب رویے کے (باقی صفحہ 5 نمبر 26)

26 بقیہ نمبر

ہاتھوں پریشانی سے دوچار ہو گئے ہیں۔ پولیس اہلکار سپریم جوڈیشل کونسل میں ریفرنس کی سماعت کے روز ڈیوٹی پر موجود ٹیلی فون آپریٹر کو زبردستی اٹھا کر لے گئے اور ٹیلی فون آپریٹر کے پاس موجود ٹیلی فون انٹرکس اور دیگر ساز و سامان بھی ساتھ لے گئے۔ چیف جسٹس کے کل خانسامے کے ساتھ غیر ہفتہ ملازمین جن میں ان کے باورچی اور ویٹرز سمیت دیگر ملازمین شامل ہیں۔ پولیس انہیں روزانہ تحقیق کیلئے پولیس سٹیشن لے جا رہی ہے۔ ملازمین نے پولیس کے غیر مناسب طریقہ تفتیش کی شکایت کی ہے اور چھ روز گزرنے کے باوجود ابھی بھی یہ سلسلہ مسلسل جاری ہے۔

VII.

TH E NATION – Wednesday, March 14, 2007

"EX-CJ DETENTION: HRW

ISLAMABAD – The Pakistani government must end the arbitrary detention of the 'non-functional' Chief Justice of the Supreme Court and cease the police crackdown on lawyers staging peaceful protests, Human Rights Watch said in a Press release issued from its New York office.

On March 9, Pakistan's President General Pervez Musharraf summoned Chief Justice Iftikhar Muhammad Chaudhry to his office and effectively dismissed him for

alleged 'misuse of office'."

The government subsequently declared the Chief Justice to be "non-functional" and has held him incommunicado at his official residence. It appears Justice Chaudhry has refused to resign.

Human Rights Watch said the government's dismissal and detention of the Chief Justice contravened provisions for the removal of Judges under Pakistan's Constitution and severely undermined judicial independence in the country.

Human Rights Watch called for Justice Chaudhry's immediate release from illegal detention.

"By Brazenly and unlawfully dismissing, detaining and humiliating the Chief Justice of the Supreme Court, President Musharraf has created constitutional crisis at the judiciary's expense," said Ali Dayan Hassan, South Asia researcher for Human Rights Watch. "Musharraf has undermined judicial independence before and nothing could make that more clear than his arrest of the Chief Justice", he added."

VIII. <u>DAILY TIMES – Thursday, March 15, 2007</u>

"ACTION AGAINST CJP WAS TAKEN TO SAVE GOVT: RASHID

ISLAMABAD: The government took action against Supreme Court Chief Justice Iftikhar Muhammad Chaudhry to quash efforts aimed at paralyzing it (the government), Railways Minister Sheikh

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Rashid Ahmed said on Wednesday.....

Rashid said he was against the confinement of Mr. Chaudhry and his family. "I think it is unfair to stop his kids from going to school, and other such actions do not do any good to government."

IX. DAILY TIMES – Tuesday, March 13, 2007

"CJP DISMISSED TO EASE MUSHARRAF'S RE-ELECTION'

WASHINGTON: The Christian Science Monitor on Monday described last week's removal of Pakistan's chief justice, Iftikhar Muhammad Chaudhry, as a calculated move by President General Pervez Musharraf's to cling to power in the forthcoming general elections. The American daily said it was likely that Gen Musharraf had dismissed Chaudhry after having increasingly come to view him as a "potential obstacle to the legality" of his re-election bid. The paper quoted a Karachi-based social scientist, S. Akbar Zaidi, as Saying that the Chief Justice's dismissal represented part of Gen Musharraf's larger plan to "take control of all institutions and dominate whatever political process is left". Moreover, the Monitor noted that the effective silencing of Chaudhry was set to jeopardize the holding of free and fair general elections, scheduled to be held between September and November of this year. And this, the paper said, underlined the period of crisis currently facing Gen Musharraf. With elections on the horizon and well aware that his political base had been eroded, the

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president turned to heavy-handed tactics to secure his electoral victory at the polls. The paper also went to note that years of military rule and increasing isolation had frayed Gen Musharraf's "shroud of legitimacy", adding that his "Pro-Western economic and political policies have undercut his political base and popular support". Indeed, as Karachi-based political analyst Kaiser Bengali puts it: "Unlike Ayub Khan and Zia-ul-Haq, who created a large domestic constituency, Musharraf has never been able to create a constituency. His survival has been dependent on external support." Thus the administration removed the chief justice, a move that "unleashed a frenzy from the press and a revolt from lawyers" across Pakistan, because Chaudhry had, during his tenure, which began in 2005, done what Islamabad had least wanted. In short, the paper stressed, the chief justice had dared to air the government's dirty laundry, while issuing judgments seeking rectification. "Last year he blocked a government bid to sell the majority of the state-owned Pakistan Steel Mills to a private consortium, a blow that proved a rare and embarrassing check on administration." In addition, Chaudhry demanded that the government produce missing persons that were allegedly picked up by the country's intelligence services. Indeed, as the paper recalled, when results were not produced fast enough, the chief justice "chastised a government lawyer and expressed disappointment with the administration's efforts". The Monitor also

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quoted Pakistan People's Party (PPP) spokesman Farhatullah Babar as saying that Chaudhry's mistake was in showing more independence that the government had anticipated, adding that the regime was likely suspicious that the chief justice would not toe its line."

X. ***<u>THE NEWS – Sunday, March 25, 2007</u>***

"DID CJ FACE PRE-EMPTIVE ACTION?

ISLAMABAD: The reference against Chief Justice Iftikhar Muhammad Chaudhry was motivated by fears among presidential quarters about likely hostile rulings during the election year when vital issues like General Pervez Musharraf's re-election from the present assemblies and his continuation in military uniform are going to be raised.

A few federal ministers and senior officials this correspondent talked to for the background information say Justice Chaudhry has been saying in off the cuff remarks that he would strictly go by the Constitution when key issues come up in the Supreme Court.

"This rang alarm bells among presidential circles, which schemed to rein in the chief justice before he could inflict the damage and before it was too late to salvage the situation," one of them remarked to The News.

Another said that although Justice Chaudhry had not come out with any harsh verdict against the president on any issue relating to him agitated in the apex court, he continued to speak rather abrasively, but rightly so, about the bureaucracy especially

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police.

"Justice Chaudhry's style of proceeding judicially gave a fillip to apprehensions that he may embark upon a path that may spawn difficulties for Musharraf, sooner than later," a top official said.

Most ministers and well-placed officials agree with the general perception that the reference doesn't contain anything solid that justified the strike."

194. During the course of his above-mentioned interview with Kamran Khan of 'GEO' T.V., the President appeared to be fully cognizant of the illegal detention of the CJP, of his family members and of his domestic servants; the manner in which they were all being treated and their complete isolation from the out-side world. When questioned about the same, this is what the President had to say:-

".....Yes I would like to tell that where he was living, we had a concern that there is no media trail out of it and there is no politicization of this plus a security aspect of that area. Other than this, as far as I am concerned I don't deal with tactics or its implementation. So if there are restrictions at that level, it is bad. But then we realized and then took action when all this came in front of me and I even got involved in tactics of it and then I corrected the situation.....

..... Like I said I believe in freedom of speech and freedom of media. There should be no restrictions. So I got concerned about what was happening. So I said ALLOW HIM TO MOVE FREELY and meet anybody and

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> *say anything. And because of that I am glad actions have been taken on ground."*
>
> *(This reproduced para has been taken from the transcript of the said interview appended with this petition)*

195. The facts, the circumstances and the admissions above-noticed, speak, fairly loud and clear, about the matter in issue i.e. the detention and the treatment of the CJP; of the members of his family; of his domestic servants and of the members of his personal staff and I, therefore, do not consider it necessary to formally state the inevitable conclusions sprouting therefrom.

196. Summarising the facts and circumstances leading to and attending the impugned exercise in question, it may be stated:-

> *a) that it was the CJP who had been SUMMONED to the Army House/the President's Camp Office for the 9th of March meeting where the President met him (the CJP) in his Army uniform;*
>
> *b) that instead of the persons really concerned with the matter, like the Law Minister and the Attorney General etc., the ones present in the meeting were only the Chiefs of the Intelligence Agencies and Generals in uniform;*
>
> *c) that the CJP was asked to abdicate his office which he declined to do;*
>
> *d) that the impugned Reference was then hurriedly put in place asking the concerned officials in the Presidency, the P.M's. Secretariat and the Law Ministry to remain available despite the said day being a Friday and thus a half working day and while all these matters were being organized and finalized, the CJP was kept in captivity*

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and "IN – COMMUNICADO" at the Army House /the President's Camp Office till his ouster was accomplished through making him dysfunctional and appointing an Acting Chief Justice of Pakistan;

e) that some imperceptible hands then hastily engineered a meeting of the Supreme Judicial Council the same evening, even using some un-identifiable flying object to transport at least one Hon. Member thereof to ensure his participation in the said meeting;

f) that the S.J.C. then passed a further order, without there being a request or a prayer for the purpose, and even without being empowered so to do and restrained the CJP from performing his functions as the CJP or even as a Judge;

g) that to ensure that these designs were fully consummated, without any resistance, the CJP was put under house-arrest and was rendered IN COMMUNICADO; and

h) that in the rush to achieve the given target, no heed at all was paid by the S.J.C. to the objections raised by the CJP about the alleged bias of at least three out of the five Hon. Members of the S.J.C. and to his earnest and persistent demand that the proceedings of the S.J.C. be not held IN-CAMERA and that he be allowed an open and a public trial.

197. Is this then how our Constitution guarantees the security and the tenure of office for a Member of the Superior Judiciary and the resultant independence of Judiciary to protect and defend the rights of the people? And is this the manner envisaged by the

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Constitution to secure riddance from an allegedly misconducting Judge?

198. We are of the opinion that such a mode employed to oust a Judge was an insult inflicted on the Constitution; was an offensive abuse of the same for a collateral purpose; was clearly *malafide* and could not be sustained in law or permitted to be continued. The impugned Reference is, therefore, quashed.

199. These are then the detailed reasons which had led us to the conclusions that we announced through our judgment delivered on July 20, 2007.

200. We may add here that since we have set aside the Reference in question, therefore, the question of the alleged bias of some Hon. Members of the S.J.C. towards the CJP and its resultant implications and the question of the validity of the '*IN-CAMERA*' proceedings of the S.J.C. as against an open and a public trial as requested by the CJP, had become redundant and we are, therefore, not venturing to look for an answer to the said issues. Like-wise, the question whether the provisions of Article 209 visualized proceedings even against the Chief Justice of Pakistan, was also being left un-answered as the learned Sr. ASC for the petitioner-CJP had submitted at the very outset that he had instructions not to canvass any such immunity for his client.

201. Before we part with this judgment, we wish to bring on record that we were pained to notice a news-item available at page 83 of this petition which reported a statement made in New York on March 12, 2007 by a rather responsible person who had been the

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Prime Minister of Pakistan and was still the Head of the ruling political party. The relevant portion of the said news-item reads as under:-

> *"**SUSPENSION OF CJ INTERNAL MATTER BETWEEN ARMY, JUDICIARY: SHUJAAT***
>
> *NEW YORK, March 12:* .....
> .....
> .....
>
> *While responding to a question regarding Chief Justice, he said that it is an internal matter between Army and Judiciary."*

202. This, in our opinion, was a naive attempt to create a wedge between two important and indispensable arms of the State and to put them on a war-path. What was in question before us was an act of the President and it was just an accident or a coincidence that the said President also happened to be the Chief of Army Staff. The matter had obviously nothing to do with the Army as an institution. Needless to add that the Army was an invaluable organ and instrument of the State and was as precious to us all as any other institution of our home-land. We, therefore, take this opportunity to express our disapproval and displeasure about the said statement.

203. And before I put my pen down, I wish to offer a personal explanation which I owe in connection with this judgment. As is known, the short judgment in the matter was announced on July 20, 2007 and these reasons in support of the said judgment are being recorded after almost 2½ years. This rather extra-ordinary delay which was on account of equally extra-ordinary circumstances,

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warrants clarification and elucidation.

204. The said judgment of the 20th of July had been signed by all the thirteen Honourable Members of the Bench and, even in the absence of the supporting reasons, was a valid judgment as declared by this Court in the case of *STATE VS. ASIF ADIL AND OTHERS* (1997 SCMR 209). The Court summer vacations commenced from July 23, 2007 and some of us, including myself, went out for a really required and well-deserved vacation. On my return, I and some of my learned brothers on this Bench, found ourselves on a Bench constituted to hear another equally taxing petition filed by Mr. Justice (Retd.) Wajih-ud-Din Ahmed who was a candidate in the Presidential election of the country scheduled for October 6, 2007 and who had questioned the eligibility of General Pervez Musharraf, the sitting President, to contest the said election. The hearing continued for a fairly long period of time and when the said matter had almost reached the final stages, Martial Law (called the Emergency) was imposed in the country by General Pervez Musharraf on November 3, 2007 in his capacity as the Chief of Army Staff. Thirteen out of a total of seventeen Judges of this Court, including the Chief Justice and myself, were removed from office and some of us, including the Chief Justice and myself were put under house arrest which detention continued till March, 2008. Thereafter, I was of course a free man but being a 'REMOVED' Judge, had no access to the Supreme Court and consequently the entire record of this case, including all the notes etc., were out of my reach.

205. I, alongwith the Chief Justice of Pakistan and some other

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learned brothers, got restored to office in March, 2009 and it is thereafter that I got down to collecting the lost, the forgotten and the scattered threads and this is what I have been able to produce now.

206. But in the meantime, some of us of this Bench had superannuated which includes three Hon. Members of the ten Members forming the Majority view in this case. In the *AL-JEHAD TRUST case (supra)*, two Hon. Judges who had signed the short judgment, had retired before the detailed reasons were recorded yet they signed the said reasons. Following the said precedent, I am offering these reasons even to the superannuated Honourable Judges, namely, Mr. Justice Muhammad Nawaz Abbasi, Mr. Justice Syed Jamshed Ali and Mr. Justice Hamid Ali Mirza, leaving it to them to decide whether they would or would not like to be party to these detailed reasons.

207. I would not have fully discharged my obligations vis-à-vis this matter before us if I did not record our appreciation of the conduct and the contribution made by the learned counsel for the parties in the said connection. The hearing of this case had unfortunately commenced in a rather charged atmosphere chocked with emotions, anger and anguish. Before us, stood pitched against each other, the President of Pakistan who also happened to be the Chief of Army Staff on one hand and the Chief Justice of Pakistan on the other. A very highly placed gentleman who had been the Prime Minister of the country and who was the head of the ruling political party, had, regretfully, tried to paint this matter as a battle between the army and the judiciary. Two days before this Bench was to commence

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hearing of this case, the most populous city of the country had witnessed an un-precedented blood bath in connection with this very issue in which, *inter-alia,* tens of innocent lives had been lost. In the early hours of the very day on which this Bench was to assemble to start hearing of these petitions, an Additional Registrar of this Court who had also been serving as the Staff Officer of the petitioner-CJP, was killed in his house in cold blood. The angry protesting processionists were being baton-charged and shelled on almost daily basis. In fact on one of the processions taken out by the District Bar Association of Sahiwal, the police had even sprayed burning oil and quite a few lawyers had, as a result, got rather badly burnt. While this case was nearing its conclusion, in fact three days before we announced the short judgment, there was a bomb explosion in a meeting of the Islamabad Bar in which some lost their lives while some others lost their limbs.

208. This was then the kind of atmosphere obtaining outside the Court. Despite this, the learned counsel on both the sides kept their cool and demonstrated admirable patience, tolerance and restraint inside the Court room throughout the proceedings which had gone on for ten long weeks. We greatly admire each and every learned counsel assisting us in these cases for the high degree of mannerism and dignity displayed by them as true and honourable officers of this Court and thank them all for the same.

209. We must also acknowledge the invaluable assistance rendered in these matters by Barrister Aitizaz Ahsan, Sr. ASC and his young colleagues pleading the cause of the petitioner-CJP which

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assistance, needless to say, was of great benefit to us in reaching a just conclusion. We also place on record our deep appreciation of the immense contribution made by Malik Muhammad Qayyum, ASC who was though, technically, representing only the Federation but who had then carried the main brunt of defending the cause of all the respondents in rather trying circumstances. We also express our gratitude to Syed Sharif-ud-Din Pirzada, Sr. ASC assisting us on behalf of the President for his continued presence and the patience with which he witnessed the entire proceedings and for his occasional discourse on the history of the law relating to removal of Judges and of course for his repeated 'ADVICE' to us with reference to the Malaysian experience. We also thank Mr. Makhdoom Ali Khan, the learned Attorney General for Pakistan who appeared to be feeling handicapped in offering us any real assistance commensurate with his competence, learning and knowledge as the main players on the respondents' side were being represented by privately engaged counsel yet the forthright manner in which he assisted us deserves praise and gratitude.

(Khalil-ur-Rehman Ramday, J.)

(Mian Shakirullah Jan, J.) **(Tassaduq Hussain Jillani, J.)**

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handicapped in offering us any real assistance commensurate with his competence, learning and knowledge as the main players on the respondents' side were being represented by privately engaged counsel yet the forthright manner in which he assisted us deserves praise and gratitude.

(Khalil-ur-Rehman Ramday, J.)

(Mian Shakirullah Jan, J.) **(Tassaduq Hussain Jillani, J.)**

(Nasir-ul-Mulk, J.) **(Raja Fayyaz Ahmed, J.)**

(Ch. Ijaz Ahmed, J.) **(Ghulam Rabbani, J.)**

I agree but I may add a note of my own.

(Muhammad Nawaz Abbasi, J.) **(Syed Jamshed Ali, J.)**

I agree with the reason and also add my separate note.

(Hamid Ali Mirza, J.)

Islamabad, the
November 3, 2009.
APPROVED FOR REPORTING.
Waqas Naseer

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CH. IJAZ AHMED, J. I have had the benefit and privilege of going through the judgment recorded by my learned brother Mr. Justice Khalil-ur-Rehman Ramday and generally agree therewith. In view of the importance of the case, I deem it prudent to add few words in support thereto. The events immediately preceding the institution of constitutional petitions have been narrated in detail by my learned brother, therefore, reiteration thereof are not required.

The facts and Circumstances giving rise to this petition have deep roots in the political history of Pakistan. The facts do not start with the occurrences of 9th March, 2007 but with the existence of Pakistan on the map of world on 14-8-1947 under the Indian Independence Act, 1947. Pakistan was to be governed by the provisions of the Government of India Act, 1935 as adopted by the Pakistan Provisional Constitution Order, 1947 until a Constitution was framed by the competent body which also formulated the function of the Federal legislature. The competent body i.e. Constituent Assembly failed to frame Constitution even after the lapse of seven years and was guilty of acting as if it was permanent Legislature. The then Governor-General Mr. Ghulam Muhammad dismissed the Constituent Assembly on 24-10-1954 on the reason that it had become unrepresentative character. Molvi Tameez-ud-Din Khan being aggrieved, by the aforesaid action of the Governor-General filed a petition under section 223-A of the Government of India Act, 1935 before the Chief Court of Sindh with the prayer of issuance of writs of *mandamus* and *quo warranto*. The Federation of Pakistan raised preliminary objection on the ground that Section 223-A under which the issuance of writ was prayed was not enacted properly for want of assent of the Governor-General. The Chief Court Sindh rejected the preliminary objection of the

Federation of Pakistan on the ground that the Assembly functioned as Constituent Assembly and not a Federal legislature, therefore, assent was not given and writ petition was accepted. The Federation of Pakistan being aggrieved field appeal before the Federal Court. The Federal Court reversed the findings of the Chief Court and held that Constituent Assembly while enacting Section 223-A exercised power under Section 8 (1) within the meaning of section 6(1) of the Indian Independence Act and was Legislature of the dominion and as such legislation under section 6(3) of the Act requires assent of the Governor-General which was lacking. See *Federation of Pakistan and others v. Moulvi Tamiz-ud-Din* (PLD 1955 FC 240).

The aforesaid decision of the Federal Court had far reaching consequences as number of enactments which were promulgated by the Constituent Assembly since 1950 and had not received the assent of the Governor-General became ineffective. Due to this reason Governor-General promulgated Emergency Powers Ordinance, 1955 to validate these enactments which had been enacted since 1950. The validity of the Ordinance came under consideration in *Yousaf Patel's case* (PLD 1955 SC 38) before Federal Court. The Federal Court held that validation amount to legislation and the Constituent Assembly alone was competent to legislate on Constitutional matters and by its dissolution, the powers held by it could not be transferred to the Governor-General. The Governor-General could only either accord or refuse his assent to the enactments passed by the Constituent Assembly. Ordinance was thus found to be invalid. The aforesaid decision had effect of creating a serious Constitutional chaos in the country as there was no competent Legislature to validate the

laws. The Governor-General filed a Reference before the Federal Court under section 213 of the Government of India Act, 1935 seeking opinion of Federal Court to overcome the crises (PLD 1955 FC 435).

Mr. Muhammad Munir, the then Chief Justice expressed his opinion in the following terms:-

> "The powers and responsibilities of the Head of the State in preserving the State and Society during an extraordinary emergency and preventing from disruption the Constitution and government of the country are analogous to the powers which an Army Commander had during Martial Law."

He also referred to the following opinion of Lord Mansfield in *George Stration and others* {(1979) 21 Howells State trial 1045}.

> " .....The only question for you to consider is this: Whether there was that necessity for the preservation of the society and the habitants of the place as authorized private men .... to take possession of the government; and to take possession of the Government to be sure it was necessary to do it immediately, "to amount to a justification, there must appear imminent danger to the Government and individuals; the mischief must be extreme, and such as would not admit a possibility of waiting for a legal remedy. That the safety of the Government must well-warrant the experiment. ... The necessity will not justify going further than necessity obliges; for though compulsion takes away the criminality of the acts, which would otherwise be treason, yet it will not justify a man in acting farther than such necessity obliges him or continuing to act after the compulsion is removed."

The Chief Justice then expressed his own opinion:

> " .... subject to the conditions of absoluteness, extremeness and imminence, an act which would

otherwise be illegal becomes legal if it is done bona fide under the stress of necessity ..... (it) affirms Chitty's statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful that which otherwise is not lawful. Since the address (of Mansfield) expressly refers to the right to private person to act in necessity, in the case of Head of the State justification to act must a fortiori be clear and more imperative."

The Chief Justice further observed:-

"…. The disaster that started the Governor-General in the face, consequent on the illegal manner in which the Constituent Assembly exercised its legislative authority, is apparent from the results described in the Reference as having followed from this Court's decision in Mr. Tameez-ud-Din Khan's case and the subsequent case of Yousaf Patel. The Governor-General must, therefore, be held to have cited in order to avert an impending disaster and to prevent the State and society from dissolution. His proclamation of 16th April, 1955, declaring that the laws mentioned in the schedule to the emergency Powers Ordinance, 1955 shall be retrospectively enforceable is accordingly valid during the interim period, i.e. until the validity of these laws is decided upon by the new constituent Assembly."

In view of the opinion of the Federal Court, Constituent Assembly was installed under the Constitutional Assembly Order, 1955. It passed the validity of laws Bills which was duly assented by the Governor-General; thereafter the Constituent Assembly of Pakistan finally passed the Constitutional bill. The first Constitution of Pakistan came into force on 23-3-1956. Mr. Ghulam Muhammad resigned from the office of the Governor General, and Major General Skindar Mirza had succeeded to office of the Governor-General of Pakistan w.e.f. 7.10.1955 and became President of Republic of Pakistan. He abrogated Constitution of 1956 and dissolved the Legislative Assemblies and also dismissed the Federal and Provincial governments and also abolished the political parties. He also proclaimed Martial Law

> throughout the country and appointed General Muhammad Ayub as Chief Martial Law Administrator. The proclamation contained inter alia following reasons for imposing proclamation . ... "the Constitution ... is so full of dangerous compromises that Pakistan will disintegrate internally if the inherent malice is not removed. To rectify this, the country must be firstly brought to sanity by a peaceful revolution. Then it is my intention ... to devise a Constitution more suitable to the genuis of Muslim People ... "

The aforesaid action came under discussion before the Supreme Court in *State v. Dosso and three others* (PLD 1958 SC 533). The Supreme Court examined the question of validity of Martial Law and laid down the following principle:-

> " ..... for the purposes of the doctrine here a change is, in law, a revolution if it annuls the Constitution and the annulment is effective ... if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to confirm to the new regime, then the revolution itself becomes a law creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change ... if what I had already stated is correct then the revolution having been successful it satisfies the test of efficacy and becomes a basic law creating fact. On that assumption the Laws (Continuance in force) Order, however, transitory or imperfect it may be, is a new legal order and it is in accordance with that order that the validity of the law and the correctness of judicial decisions has to

> be determined ... Under the new legal order any law may at any time be changed by the President... there being no restriction on the President's law making powers."

It is pertinent to mention here that the Field Martial Muhammad Ayub Khan, replaced Maj. General Sakindar Mirza and gave new Constitution to the Country on 8-6-1962. He remained in power as President of Pakistan upto 25-3-1969. The country fell in major crises and Field Martial Muhammad Ayub Khan had to tender his resignation and handed over the control of the country to General Muhammad Yahya Khan, who also abrogated the Constitution and became Chief Martial Law Administrator. He assumed the office of President and continued to act as President until 20th December, 1971, when Mr. Zulfiqar Ali Bhuttoo, took over as President and Chief Martial Law Administrator. The principle laid down by the Supreme Court in Dosso's case supra was re-examined by the Supreme Court in *Asma Jillani's case* (PLD 1972 SC 139) and laid down following principle:-

> " ..... The assumption of power by Agha Muhammad Yahya Khan as Chief Martial Law Administrator and later as President of Pakistan was an act of usurpation, and was illegal and unconstitutional. All the legislative and administrative measures taken by this unauthorized and unconstitutional regime can not be upheld on the basis of legitimacy, but such laws and measures which are protected by the doctrine of necessity, that is to say, which were made for the welfare of the nation and for the ordinary orderly administration of the country, can be deemed to be valid .... Martial Law Regulation No. 78 of 1971 under which the two detainees were held is an

> illegal regulation which can not enjoy the protection of the rule of necessity."

After holding that Martial Law regime of Yahya Khan was utterly illegal, relying on the Attorney General of the *Public v. Mutafa Ibrahim and others* (1964 Cyprus Law Reports 195) and dissenting opinion of the Lord Pearce in *Madzimbamuto v. Lardner Burke* {(1968) 3 AER 561} Hamood-ur-Rehman, *C.J.* expressed the view that:-

> " .. .I too am of the opinion that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the view that it is a doctrine for validating the illegal acts of usurpers.
> .... I would call this a principle of condemnation and not legitimization ... I would condone all transactions which are passed and closed for no useful purposes can be served by opening them, all acts and legislation legislative matters which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal orders; all acts which tend to advance or promote the good of the people; and all acts required to be done for the ordinary orderly running of the State and all such measures as would establish or lead to the establishment of, in our case, the objectives mentioned in the Objectives Resolution."

Subsequently, Zulfiqar Ali Bhutto, became Prime Minister of the country who remained in the office till July, 1977. Then General Muhammad Zia-ul-Haq, Chief of Army Staff took over control of the country on 5-7-1977 and also issued proclamation whereby the whole of Pakistan was brought under Martial Law. The

Constitution of Pakistan was held in abeyance. The Prime Minister including his Cabinet, Speaker, Deputy Speaker and Chief Ministers were ceased to hold office. The President of Pakistan was allowed to remain in the office. General Muhammad Zia-ul-Haq also issued Laws (Continuance in Force) Order, 1977 to give effect to the proclamation in which he had taken the control of the country. Begum Nusrat Bhutto, being aggrieved of the imposition of Martial Law challenged the same under Article 184(3) of the Constitution before Supreme Court. The Supreme Court held that the effectiveness of regime provides its own legality and rather took the view that the enactment of the legal order is only condition of validity and not the validity itself. The Supreme Court summarized the legal position in following terms in *Begum Nusrat Bhutto's case* (PLD 1977 SC 657):-

> 1. That the 1973 Constitution still remains the supreme law of the land, subject to the condition that certain parts thereof have been held in abeyance on the account of the State necessity.
> 2. That the President of Pakistan and the superior Courts continue to function under the Constitution. The mere fact that the Judges of the superior Courts have taken all new oath after the proclamation of Martial Law, does not in any manner derogate from this position as the Courts had been originally established under the 1973 Constitution, and have continued in their functions in spite of the proclamation of Martial law;
>
> 3. That the Chief Martial Law Administrator, having validity assume power by means of an extra-Constitutional step, in the interest of the State and for the welfare of the people is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognized by judicial authorities as falling within the scope of the law of

necessity, namely:-

a). all acts of legislative measures which are in accordance with or could have been made under the 1973 Constitution, including the power to mend it;

b). all acts which tend to advance or promote the good of the people;

c). all acts required to be done for the ordinary orderly running of the State; and

d). all such measures as would establish or lead to the establishment of the declared objectives of the proclamation of Martial Law, namely restoration of law and order, and normalcy in the country, the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution;

4. That these acts, or any of them, may be performed or carry out by means of Presidential Orders, Ordinances, Martial Law Regulations, or as the occasion may require; and

5. That the superior courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding any thing to the contrary contained in any Martial Law Regulation or Order, Presidential Order or ordinance;

General Muhammad Zia-ul-Haq Chief Martial Law Administrator promulgated Provisional Constitution Order on 24-3 -1981. The same was self-contained document and certain Articles of 1973 Constitution were made part thereof. The country was governed in accordance with the provisions of this Order until 30th December, 1985 when Martial Law was lifted. The revival of the constitution of

1973 order, 1985 was promulgated. It was first the amendment in the Constitution. Second Amendment Order 1985 and then substituted by the Constitution (8th Amendment) Act, 1985. It came into force on 30-12-1985 when proclamation on 5-7-1977 was revoked. Article 270-A was added in the Constitution through 8th Amendment which was challenged before the Supreme Court in case of *Ghulam Mustafa Khar* (PLD 1989 SC.26). The Supreme Court has laid down principle that Superior Courts have powers of judicial review qua the actions taken by the Martial Law regime if the actions are malafide, without lawful authority or coram non judice.

From this onward political system came under turmoil, Article 58 (2) (b) was added in the original Constitution of 1973 through 8th Amendment. The President of Pakistan and Governors of provinces under Article 58 (2) (b) dissolved the National and Provincial Assemblies respectively. The actions of President and Governors were challenged before the Supreme Court in *Haji Saif Ullah's case* (PLD 1989 SC 166), the action of President was declared void, without lawful authority but the Assemblies were not restored. Thereafter, President and Governor again dissolved the Assemblies, the action was again challenged before the Supreme Court in *Kh. Ahmed Tariq Rahim's case* (PLD 1992 SC 646) and the same was declared valid. The President of Pakistan and Governors again dissolved National and Provincial Assemblies yet another time in the year 1993 which was challenged before the Supreme Court and action of President was declared invalid and assemblies were restored in *Mian Muhammad Nawaz Sharif's* case (PLD 1993 SC 473).

It is pertinent to mention here that after restoration of Assemblies, Mian Nawaz Sharif remained in power for one

month only and he himself advised the President of Pakistan to dissolve the National Assembly and Provincial Assemblies on the advice of Governors. The general elections were held and Mohtrama Benazir Bhutto became Prime Minister of Pakistan. The President and Governors again exercised their powers under Article 58 (2) (b) of the Constitution and dissolved the Assemblies which were challenged in Mahmood Khan Achakzai's case (PLD 1997 SC 426) and Mohtrama Benazir Bhutto's case (PLD 1998 SC 338) and the action was declared valid by the Supreme Court. The General Election was held and Mian Nawaz Sharif was elected as Prime Minister. The present Chief Executive dissolved the National Assemblies and provincial Assemblies and imposed P.C.O in the country on 12-10-1999. This action was challenged before Supreme Court and the same was finally decided and action of Chief Executive was declared valid in Syed Zafar Ali Shah's case (PLD 2000 SC 869).

Wasim Sajjad and others filed review petitions before Supreme Court under Article 188 of the Constitution in which they sought review of judgment, dated 12-5-2000 rendered by the Supreme Court in Syed Zafar Ali Shah's case. The Supreme Court reconsidered the aforesaid case in all prospects and upheld its earlier view and dismissed the review petition. See Wasim Sajjad's case (PLD 2001 SC 233).

Elections were held in terms of the law laid down by this Court in Zafar Ali Shah's case supra. 17th amendment was passed by the newly elected assembly whereby President General Pervaiz Musharraf was allowed to remain as President of Pakistan and also the Chief of Army Staff till 31st December 2004.

General Pervaiz Musharraf secured the position of Chief Executive through referendum in terms of Article 48(6) of the

Constitution which was challenged by Qazi Hussain Ahmed, Amir Jamat-e-Islami before this Court reported as PLD 2002 SC 853 which was dismissed by this Court. Legal Framework Order, 2002, was issued which was challenged before this Court on the ground of being illegal, unconstitutional and in violation of the dictum laid down by this Court in Zafar Ali Shah's case (PLD 2000 SC 869) wherein it has been held by this Court that no amendment shall be made in the salient features of the Constitution i.e. independence of Judiciary, federalism, parliamentary form of government blended with Islamic provisions. The said order was challenged by Watan Party before this Court reported as PLD 2003 SC 74 which was dismissed solely on the ground that Watan Party has no locus standi to file the petition before this Court. Pakistan Lawyers Forum has also challenged the grafting of the Legal Framework order in the body of Constitution and the Constitutional 17th Amendment Act, 2003, the vote of confidence and notification of General Pervaiz Musharraf as Chief of Army Staff and President of Pakistan on the ground that those legislations are subversive of the Constitution and in violation of law laid down by this Court in Wukla Mahaz's case (PLD 1998 SC 1236) and Zafar Ali Shah's case (PLD 2000 SC 869) which was also dismissed. See PLD 2005 SC 719.

Keeping in view the above stated political history and historical background of the creation of the country beginning with the struggle started by late Sultan Haider Ali of Mysor and his noble brave and courageous son late Tipu Sultan Shaheed who gave his precious life including life of his two beloved sons for freedom, and the goal of freedom ultimately achieved under dynamic leadership of Quaid-e-Azam Muhammad Ali Jinnah,

who was motivated by the spirit of great national poet Dr. Allama Muhammad Iqbal; and sacrifices made by millions of Muslims of this continent, we must remember that freedom requires eternal vigilance and independent judges.

The time has come to put the nation on a right path and this can be done by following the character of the Founder of Pakistan so as to strengthen the country and to remove all excessive and colourable exercise of power in each and every sphere of government. It is better to learn and follow the principles of Quaid-e-Azam and his associates to resolve the present controversy. Firstly, let me quote that once late Mian Mushtaq Gormani met Lord Wavel who during discussion made following remarks about the Founder of Pakistan which are very relevant for the purpose of building national character:

> "He (Founder of Pakistan) is not only honest but he is also intellectually honest."

The role of Founder of Pakistan as member of Legislative Assembly is a model for our present political leaders to be followed.

On 14th March, 1919 Founder of Pakistan participated in the proceedings of Legislative Council qua bill relating to Criminal Law (Emergency Powers) Bill. The relevant paras are reproduced here under:-

(On March 14th 1919 part II of the Bill was taken up for consideration. Mr. VJ.Patel moved for its deletion. Sir Verney Lovett, Mr. PJ.Fagan and Sir James Douboulay opposed the motion. Mr. M.A. Jinnah in his speech strongly opposed this part of the Bill).

The Honourable Mr. M.AJinnah:--

"My Lord, this part of the Bill is, as I said on the very first occassion, to me abhorrent and shocking, and on that occassion, my Lord, I stated my reasons for it. I would not really have spoken

in the Council on this motion of the Honourable Mr. Patel more than by merely saying that I am strongly opposed to this part of the Bill, and I would have done that, my Lord, for this reason, that I really feel that I can not even trust myself to discuss this Part lest I give vent to my feelings and my opinion, which I honestly say to this Council I can not possibly express in words, namely, my repugnance for this Part of the Bill. But it is the first time that the Government side have tried to meet the real point in this bill, and that point having been made, I venture to make a few observations. The Honourable Sir Verney Lovett quoted me, but only portion of my reasons for opposing this Part II.

Therefore, as he has quoted me, he does not quite correctly represent my position on the grounds of my position. But I will meet his point. And the point which he endeavoured to make was that there is a real danger, and that being so, are we, as Government, not entitled to enact this measure into law? Now, my Lord, that is the sole question which the Council has got to decide. If I may quote an authority and I am quoting Blackstone who has been quoted by Lord Shah (I am not quoting this as a judgment, but merely as a quotation from Blackstone and for convenience sake, I am quoting it from his judgment). This is what he says.

Blackstone is quite clear upon the parties of the Constitution. He searchingly treats the case of both of liberty and life as tests both and equally of one and the same principle - the very principle which is under scrutiny in the present case. To deprive a man of life by violence or to confiscate his estate without accusation or trial would be so gross and notorious an act of deposition as must at one convey the alarm of tyranny throughout the whole kingdom, but confinement of the person, by secretly hurrying him to jail

where his sufferings are unknown or forgotten, is a less public and less striking and, therefore, a more dangerous engine of arbitrary government."

The Honourable Mr. M.AJinnah:-

"My Lord, I will only quote the words of very great authority before I say anything more. In a very famous case, which is known as Deaniel' s case, one of the greatest jurists and lawyers laid down three prepositions:-

The first preposition is that no man can be imprisoned upon the will and pleasure of any, but a bondman or a villain. The second preposition. If a freeman of England might be imprisoned at the will and pleasure of king, or by his commandant, he were in worse case even than a villain.

The third preposition. A freeman imprisoned without cause is civilly dead."

"My Lord, the provision of Part II of this Bill will bring about the result. First, the selection of the victim will be left to the plenary discretion of the bureaucracy, secondly, my Lord, it means the negation of public safety and defence, and thirdly, my Lord, I say that it is poison to the Commonwealth.

My Lord, to quote the words of Lord Shaw in that famous judgment to which I have referred, this is what he says:-

In the exercise of power that the Government have the plainest teachings of history and the dictates of justice demand that, on the one hand, government power, and on the other hand, individual rights, these two shall face each other as party and party

.... the fundamental principles of justice have been uprooted and

the Constitutional rights of the people have been violated at a time when there is no real danger to the State by an over fretful and incompetent bureaucracy which is neither responsible to the people nor to touch with real public opinion and their sole plea is that the powers when they are assumed will not be abused.

"I therefore, as a protest against the passing of the Bill and the manner in which it was passed tender my resignation as a member of the Imperial Legislative Council for I feel, that under the prevailing conditions I can be of no use to my people in the Council nor consistently with one's self respect is cooperation possible with a Government that shows such utter disregard for the opinion of the representatives of the people in the Council Chamber, and for the feelings and sentiments of the people outside.

"In my opinion, a Government that passes or sanction such a law in times of peace forfeit its claim to be called a civilized government and I still hope that the Secretary of the State for India, Mr. Moutagu, will advise His Majesty to signify his disallowance to this Black Act."

The last document signed by Founder of Pakistan as per book "Baba-a-Qaom Quaid-e-Azam" by Prof. Hamid Ullah Shah Hashmi is also very pertinent for reference and the relevant portion is as follows:-

"پاکستان کی ترقی کے امکانات پر یوں روشنی ڈالی۔ "خدا نے پاکستان کو ہر چیز دے رکھی ہے۔ معدنیات اور زراعت کے وسیع وسائل، اقتصادیات کی ترقی کے روشن امکانات ملک کو صنعتی بنانے کے ذرائع، غرضیکہ ہر چیز پاکستان میں موجود ہے۔ قدرت کی فیاضی نے اس ملک کو مالا مال کر رکھا ہے۔ لیکن ضرورت محنت، خلوص اور دیانتداری کی ہے۔ میری قوم میں یہ اوصاف پیدا ہو جائیں تو یہ دنیا کی بہت بڑی قوم بن سکتی ہے۔ ہمیں مشکلات اور مصائب سے گھبرانا نہیں چاہیے۔ خدا ہمیشہ ان قوموں کو آزمائش میں ڈالتا ہے جنہیں وہ زمین کی خلافت سونپنا چاہتا ہے"۔

The last sentence which was uttered by Founder of Pakistatn is as follows.

"رات کو نو بجے سے بیقراری بڑھ گئی۔ چند منٹ بعد دل ڈوبنے لگا اور سانس رک رک کر آنے لگی۔ عالمِ بے ہوشی میں آپ کی زبان سے یہ الفاظ نکلے۔ "اللہ..... پاکستان"

The bureaucrats who got a chance to see the Founder of Pakistan and worked with him like Mushtaq Ahmed Wajid, the relevant passage from his book (Hangamon ki duniya) reproduced as under:-

" ریلوے ڈائننگ کار کا ٹھیکہ دینا تھا۔ ٹینڈر طلب کیے گئے۔ ایک صاحب کی سفارش منسٹر صاحب نے خود ٹیلیفون سے کی۔ اتفاق سے یہی سب سے موزوں تھے۔ لیکن میں نے ان کو ٹھیکہ نہ ملنے دیا اور لکھ دیا کہ اگر قائدے کے مطابق کوئی سفارش کرائے یا کسی کی رائے پر اثر ڈالنے کی کوشش کرے تو اس کو ٹھیکہ نہیں مل سکتا۔ اس میں شک نہیں کہ یہ شخص سب سے زیادہ موزوں ہے لیکن اس نے وزیر مواصلات سے سفارش کرائی ہے۔ اس لئے اس کے نام پر غور بھی نہیں کیا جا سکتا۔ کمیٹی کے دوسرے ممبران نے مجھ سے اتفاق کیا۔ وزیر صاحب بہت ناراض ہوئے اور مجھ سے ترجیہہ طلب کی گئی۔ میں نے اپنا نوٹ بھجوا دیا۔ مجبوراً خاموش ہو گئے۔ ابھی انگریزی عہد کی یاد تازہ تھی۔ قاعدوں اور قانون کا نام ابھی باقی تھا۔ یہ تو بعد کی بات ہے کہ رشوت اور سفارش کے بغیر کام کرنے والا احمق سمجھا جائے اور قانون کی پاسداری قابلِ سزا سمجھی جائے"۔

Similarly Mr. Qudrat Ullah Shahab in his lifetime has shown great courage to put on right path Filed Martial late Muhammad Ayub Khan as is evident from his book "Shahab Nama," he did not accept the direction of his superior against his conscious as is evident from chapter 10 and 14 of the aforesaid book.

The organ of Judiciary has faced difficulties on account of its own weaknesses as pointed out by late Mr. Qudrat Ullah Shahab in his book "Shahab Nama," under the heading "Governor General Ghulam Muhammad. ", The relevant observation is as follows.

"جس زمانے میں یہ ریفرنس فیڈرل کورٹ کے زیرغور تھی میں نے دیکھا کہ میرا ڈپٹی سیکرٹری فرخ امین ہر دوسرے تیسرے روز مجھے بتائے بغیر لاہور آ جا رہا ہے۔ایک روز میں نے اسے ڈانٹا کہ میری اجازت کے بغیر وہ اتنی بار کیوں لاہور آتا جاتا ہے۔اس نے صاف گوئی سے کام لے کر مجھے بتایا کہ وہ گورنر جنرل کا کوئی خفیہ پیغام کوڈ ورڈ(Code Word) کی صورت میں چیف جسٹس منیر کے پاس لے جاتا ہے اور وہاں سے اسی طرح کوڈ الفاظ میں چیف جسٹس کا پیغام گورنر جنرل کو لا کر دیتا ہے۔فرخ امین نے مزید یہ بتایا کہ غلام محمد صاحب کا تاکیدی حکم تھا کہ وہ یہ بات کسی کو ہرگز نہ بتائے۔ مجھے معلوم نہیں کہ گورنر جنرل اور فیڈرل چیف جسٹس کے مابین اس خفیہ پیغام رسانی کی کیا نوعیت تھی اور نہ ہی یہ وثوق سے کہا جا سکتا ہے کہ اس باہمی خفیہ رسانی نے فیڈرل کورٹ کے فیصلے پر کوئی اثر ڈالا بھی تھا یا نہیں؟ البتہ اس میں کوئی شبہ نہیں کہ ایسے موقع پر مملکت کے سربراہ اور عدلیہ کے سربراہ کا آپس میں خفیہ رابطے قائم کرنا دونوں کو زیب نہ دیتا ہے"۔

RULES OF INTERPRETATION OF CONSTITUTION.

Before proceeding further, it is pertinent to recapitulate the principles of interpretation Mr. S.M.Zafar in his book "Understanding Statutes" has elaborated rules of interpretation of the Constitution as laid down by the superior Courts in Pakistan and else where:

1). Legislative history is relevant for interpreting Constitutional provisions (Historical Modality)

2). While interpreting the Constitution the Court is entitled to apply well recognized principles of Islamic Common Law (Ethical Modality).

3) Any interpretation which seeks to comply with or advance principle of policy enumerated in the Constitution should be adopted as against an interpretation which goes against such principles (Structural and Ethical Modality).

4). In case of a Federal Constitution the powers of Government established thereunder are enumerated i.e. that the Government can exercise only the powers granted to it and any other exercise of power could be invalidated as colorable exercise of legislative power (Structural Modality). But the Legislative List is not to be interpreted in any narrow pedantic sense and should be construed in broader manner (PLD 1995 SC 66 at 179,193; PLD 1960 SC 623).

5). What can not be done directly cannot be done indirectly applies more rigorously to the Constitutional provision. So, it was held in "*Cumming v. Missoori*" 71 US (4 Wall) 277, 325 (1867) that "constitution deals with substance not shadows" (Structural Modality). Also see *Nawaz Sharifs case* (PLD 1993 SC473).

6). The principle that the enumeration of certain specified things in a provision will exclude all things not so included, would not apply to Constitutional provision (PLD 1995 SC 66, PLD 1969 SC 623; CORPUS Juris Secundum vol. 17, pp. 86 and 89).

Thus, the maxim "*expressiounuis est exclusio altterins*" cannot be used to restrict the plenary power of the Legislature or to control an express provision of the Constitution. (We have a caveat to the use of the words "Plenary power of the Legislature" in this context, as used by his Lordship in PLD 1995 SC 66 at 179.

7). Court while construing a Constitutional provision, can press into service an established Constitutional convention in order to understand the import and working of the same (PLD 1996 SC 324 at 439,441,442 and 478).

8) The Courts can not supply casus omissus, meaning thereby Court is not competent to fill up omission on part of Legislature.

(Imam Baksh v. Government of Balochistan PLD 1993 Quetta 24. Muhammad Ayyub v. Abdul Khaliq 1990 MLD 1293, Messrs Chitagong Jute Co. v. Province of East Pakistan and others PLD 1966 Dacca 117, Rehmat Ullah Khan and others v. The State PLD 1965 Pesh. 162 and Excise and Taxation Officer v. Barmashell Storage Co. and others 1993 SCMR 338 and Khizar Hayat and others v. Commissioner, Sargodha PLD 1965 Lah. 349).

9) Special provision in a statute excludes the application of general provision.
(Ch. Pervaiz Elahi v. The Province of Punjab and others PLD 1993 Lah. 595 and Zia-ur-Rehman's case PLD 1973 SC 49.)

10) If the language of the enacting part of the statute does not contain the provisions which should occur in it, then Court can not derive those provisions by implication in the statute. (Governor-General of Council v. Municipal Corporation, Madras PLD 1948 PC 211).

11) It is not within the domain of the Court to depart from the plain meaning of the expression used in the statute. In arriving to this conclusion, we are fortified by the following judgments:- Rehmat Khan's case 1993 CLC 412 and Imam Baksh's case PLD 1993 Quetta 24.

12) That while examining the vires of the provisions of the statute the Court should make efforts to uphold them as valid. (Karachi Buildings Control Authorities's case PLD 1993 SC 210).

13) The pith and substance of the enactment should be considered to find out its true nature and character.
(United Province's case AIR 1941 FC 16 and Shamim-ur-Rehman's case PLD 1983 SC 457).

14) Intention of Legislature is primarily gathered from language used by Legislature in the contents of statute. Glaxo Laboratories Ltd.'s case (1992 PLD 549).

15) Prior legislation may in case of ambiguity materially assist in ascertaining intention of the Legislature. (State Bhar v. S.K. Roy AIR 1966 SC 1995).

16) The word "ejusdem generic" means of same kind or nature (Municipal Corporation's case AIR 1942 Rangoon 70). The ejusdem generic doctrine means that where general words immediately follow or closely associated with specific words their meaning must be limited by reference to the preceding word (PLD 1989 SC 128).

17) Court has only jurisdiction to interpret the law and has no lawful authority to take the role of Legislature as our Constitution is based on trichotomy. (Zia-ur-Rehman's case PLD 1973 SC 49
Mian Nawaz Sharifs case PLD 1993 SC 743
Fauji Foundation case PLD 1983 SC 457 at P. 606 to 628 Para 167 to 204).

18) Constitution is a living document and, therefore, must be interpreted as dynamic and progressive keeping in view the ground realities.

19) Constitution must be read as an organic whole (PLD 1973 SC 473 Mian Nawaz Sharif's case PLD 1995 SC 595) Hakim Ali's case (PLD 1957 SC 219)

20) Definition Clause has its impact while interpreting other provisions of law.

The preliminary objection regarding bar of jurisdiction contained in Article 211 of the Constitution of Islamic Republic of Pakistan, 1973 is misconceived and does not attract here. The procedure for removal of a judge of the Supreme Court or of a High Court as envisaged in Article 209 of the Constitution prescribes three stages: (i) Pre-reference proceedings; (ii) Proceedings before the Supreme Judicial Council; and (iii) Post-reference proceedings. Article 209(5) relates to pre-reference proceedings, and Article 209(1),(2),(3),(4) deals with proceedings before the Supreme Judicial Council whereas Article 209(6) is about post-reference proceedings. As per provision of Article 211 of the Constitution, following proceedings can not be called in question in any court:

i. the proceedings before the Supreme Judicial Council;
ii. report of the Supreme Judicial Council; and
iii. removal of a judge.

The pre-reference proceedings have been kept clearly outside the limits of bar of jurisdiction as contemplated in Article 211 of the Constitution and petition to this extent under Article 184(3) of the Constitution is competent. Before sending the reference to the Supreme Judicial Council or direction to the Supreme Judicial

Council by the President of Pakistan, some steps are required to be taken by the constitutional authorities. According to rules of business of the Government of Pakistan read with provisions of the Constitution, the Secretary of the Law, Justice and Human Rights Division, is to prepare summary about the conduct of the .Judge enabling the Prime Minister to advise the President of Pakistan under Article 41 (1) for giving direction to the Supreme Judicial Council to probe into the matter in terms of Article 209 of the Constitution. The President of Pakistan has to form his independent opinion before sending the reference/direction to the Supreme Judicial Council as is evident from Article 209(5) of the Constitution.

CONSTITUTIONAL AUTHOIUTIES ARE B0UND TO ACT IN ACCORDANCE WITH LAW IN TERMS OF ARTICLE 4 AND OBEY THE COMMAND OF THE CONSTITUTION IN TERMS OF ARTICIJE 5 (2) OF THE CONSTITUTION.

The petitioner has inherent right to be treated in accordance with law by virtue of Article 4 of the Constitution and access to justice is his basic fundamental right by virtue of Article 9 of the Constitution. The Referring Authority has no lawful authority to send the reference against the petitioner before the Supreme Judicial Council in violation of Article 25 of the Constitution.

It is also a settled principle of law that the rule requiring reasons to be given in support of orders is, like principle of audi alteram partem, a basic principle of natural justice which must confirm every quasi judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law as observed in Union Indian's case (AIR 1974 SC 87). It is also settled principle of law that State functionaries are expected to act fairly and justly, in manner which should not give to anyone any cause of complaint on account of discriminatory treatment or other wise as per principle laid down in "Shaukat Ali and others v. Government of Pakistan and others." (PLD 1997 SC 342). It

is pertinent to mention here that the aforesaid principle of law is founded on the premises that the public functionaries deriving authority from or under law, are under obligation to act justly, fairly, equitably, reasonably without any element of bias or discrimination.

It is settled principle of law that law is not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principle laid down from time to time by the Superior Courts as per law laid down in Manzoor Elahi's case (PLD 1975 SC 66). Law always gives guidance to only law abiding citizens. In fact, awareness has been given to the world 1400 years ago by Almighty Allah in the Holy book Quran. Almighty Allah in Sura Rehman warned the human beings not to disturb balance in any sphere of life, otherwise destruction is must. The aforesaid command is embodied in Article 5(2) of the Constitution that every body is bound to obey the command of the Constitution. The public functionaries are also duty bound to act in accordance with law in view of Article 4 read with Article 189, 190 and 201 of Constitution.

Laws are made not to make them merely on the statute book which are framed to act upon them. It is not only the duty of the Courts to provide justice to the people of Pakistan but it is the duty of every organ and functionary to provide justice by discharging his/its duties in accordance with law without fear, favour and nepotism.

It is constitutional duty of the President to form independent opinion as he is not merely post office. In the present case contents of reference clearly show that it was sent to the SJC without application of mind which is violative of mandate of Constitution. None of the constitutional authority has formed opinion in terms of Article 209 (5) of the Constitution. It is a settled law that all constitutional authorities are to perform their duties

within the law, efficaciously and judiciously and where they act without jurisdiction, with malafide or in violation of any law, their actions are certainly amenable to the constitutional jurisdiction of this court. This principle of law is well known that it does not need any help or support from any other source. It is a settled law that if the power has been exercised on a non-consideration or non application of mind to relevant factors the exercise of power will be regarded as manifestly erroneous. Traditionally, the government of a country is divided into three components; executive, legislative and judiciary. The courts have been shifting more and more powers from the administrative to the quasi-judicial category so as to give some what better protection to the individual. Even the term quasi-judicial is now going out of vogue. Its place is now being taken by the term adjudicative or adjudicatory. In the ultimate analysis, the courts are the judge of whether an action of the administration is ultra vires. The courts normally interpret the constitution and the statute broadly and liberally, as they realize that a literal interpretation will sound the death knell of administrative law and make powers of the administration absolute and arbitrary. The courts realize that arbitrary power negates democracy and discrimination. The object of the principle of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. The principle of natural justice has undergone a great deal of change in recent years. See *Mrs. Anisa Rehman's* case (1994 SCMR 2232). In the past it was held that it included following two rules.

(i) No one shall be a judge in his own cause.

ii) No decision shall be given against a reasonable hearing.

With the passage of time, a third rule has also been developed that public functionaries/constitutional authorities must keep in mind that action/order must be taken in good faith, without bias and not arbitrary or unreasonably. See Utility Stores Corporation Ltd's case (PLD 1987 SC 447).

The constitutional authority/administrative authority concerned should act fairly, impartially and reasonably. Prof. H.W.R.Wade has also expressed the view that natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. Lord Denning has laid down the following principle while deciding Breen's case (1971) All ER 1148:-

> *"The giving of reasons is one of fundamantals of good administration".*

See Wade Administrative Law 548 (VI ed). (1965) All ER 81 R Vs. Deputy Industrial Inquiries Commissioner, (1984) 3 All ER 201 Mohan vs New Zealand Ltd.). Shaukat Ali and others v. Government of Pakistan PLD 1997 SC 342; Raipur Development Authority's case AIR 1990 SC 1426; Institute of Chartered Accountants of India's case AIR 1987 SC 71; Harnagar Sugar Mills' case AIR 1961 SC 1669; M.P. Industries' case AIR 1966 SC 671; Mukarji's case AIR 1990 SC 1984; Collector of Monghyr's case AIR 1975 SC 2226. Requirement of recording reasons would be necessary due to following reasons.

(i) Guarantee consideration by the authority.
(ii) Introduce clarity in the decisions.
(iii) Minimise chances of arbitrariness in decision making.

See *24-A* General Clauses Act, added in General Clauses Act, is declaratory in nature. According to this provision of law, public functionaries have to pass the orders after proper application of mind

Section 24 A was interpreted by this Court and laid down a principal that public functionaries must follow principle known as reasonably, justly and fairly in the advancement of the enactment and more heavy duty is cast upon the constitutional authority to form opinion after independent application of mind in view of Article 4 & 5 of the Constitution. See M/s Airport Support Services's case (1998 SCMR 2268), Aslam Warraich's case (1991 SCMR 2330), Muhammad Tariq

Pirzada's case (1999 SCMR 2744, 1999 SCMR 2189 and Nusrat Imtiaz's case, NLR 2000 civil 54)

It will not be out of place to mention here that if a citizen which includes a person performing function in connection with the affairs of the State does not obey the Constitutional commands, then he is not performing his obligation imposed by the Constitution. In case, restraint order/ forced leave order and letter of respondent No.3 be put in juxta-position then it is crystal clear that respondent No 2 has passed the order which is not in consonance with Constitution as law laid down by this Court in Zahid Akthar's case" (PLD 1995 SC 530), meaning thereby respondent No 2 has passed the order under inf1uence/ direction of private respondents, which action is not sustainable in the eye of law, as per principle laid down by the Superior Courts in the following judgments:-

"Ghulam Mohy-ud-Din's case" (PLD 1964 SC 829), "Syed Fayyaz Hussain Qadri's case" (PLD 1972 Lahore 316), "Aman ullah Khan's case "(PLD 1990 SC 1092) and Sacm Labour Union's case (1946) 2 AII ER 201).

Besides pre-reference proceeding, the other proceedings protected under Article 211 can also be challenged and called in question before this Court by invoking Article 184(3) if the same suffer from the element of malafide, coram non judice and without lawful authority. Hence, bar of Article 211 of the Constitution is not absolute and does not eclipse the jurisdiction conferred upon this court by virtue of Article 184(3) of the Constitution. It is settled principle of law that the provisions of the bar of jurisdiction must be constructed strictly. Courts are always inclined to extend their jurisdiction instead of curtailment.

Ghulam Mustafa Khar's case (PLD 1989 SC 26)
Zia-ur-Rehman's case (PLD 1973 SC 49)
Saeed Ahmed Khan's case (PLD 1974 SC 151)

This court has followed the aforesaid view in subsequent judgments also.

(PLD 1981 SC 23) *Yamin's case*
(1991 SC Monthly Review 1041) *I. A. Sheirwani's case*
(PLD 1994 SC 738) *Pir Sabir Ali Shah's case*
(PLD 2000 SC 869) *Zafar Ali Shah's case*
(PLD 2001 SC 233) *Wasim Sajjad's case*
(PLD 2001 SC 607) *Khan Asfandyar Wali's case*

All the actions were taken in haste, in case all facts mentioned in the petition be put in juxta position. Direction was given to the Supreme Judicial Council on 9.3.2007 and the Supreme Judicial Council on the same date (9-3-2007) restrained the petitioner to perform his judicial functions. This power is not conferred upon the Supreme Judicial Council as the Supreme Judicial Council has no authority whatsoever to remove the petitioner from the post of Chief Justice of Pakistan. Supreme Judicial Council has only the power to send its report after completing the judicial enquiry/ trial as observed by the Supreme Judicial Council in late Mr Justice Sh. Shaukat Ali's case (PLD 1971 SC 585). The Supreme Judicial council has no power to pass final order and, therefore, no power to pass interim order. Hence, order of the Supreme Judicial Council dated 9-3-2007 is without lawful authority.

In view of the above discussion, the first preliminary objection qua bar of jurisdiction under Article 211 of the Constitution has no force on the touch stone that to form opinion under Article 209 of the Constitution by the President/PM/Cabinet is an executive order. This is the order of constitutional authority. The status of which is of executive nature which can be brought under judicial review as per law laid down by this court in Haji Saifullah Khan's case (PLD 1989 SC 166) and also:

(i) Zia ur Rehman's case (PLD 1973 SC 49)
(ii) Saeed Ahmad Khan's case (PLD 1974 SC 151)
(iii) Malik Ghulam Mustafa Khar's case (PLD 1989SC 26).
(iv) Pir Sabir Shah's case (PLD 1994 SC 738).

(v) Sardar Farooq Ahmad Leghari's case (PLD 1999 SC 57)
(vi) Syed Zafar Ali Shah's case (PLD 2000 SC 869).
(vii) Mian Manzoor Ahmad Wattoo's case (PLD 1997 Lah. 38).
(viii) Mian Nawaz Sharifs case (PLD 1993 SC 473).
(ix) Raja Ram Pal's case (2007 Vol. 3 SCC 184).
(x) Kilbourn's case (103 U.S. 168).
(xi) Mehmood Khan Achakzai's case (PLD 1997 SC 426).
(xii) Wukla Mahaz's case (PLD 1998 SC 1263)
(xiii) Pakistan Lawyers Forum's case (PLD 2005 SC 719)
(xiv) Iqbal Haider's case (1998 SCMR 1949)

The maintainability of the petition moved under Article 184 of the Constitution has been objected on the ground that no question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter I of Part II of the Constitution is involved. This objection has no merit and substance. Fundamental rights qua access to justice, non-deprivation of life, livelihood and liberty, inviolability or dignity of man, privacy of home, equal protection of law become of paramount importance when their enforcement is claimed by the head of third organ of state i.e. judiciary as it entails independence of judiciary, free and fair trial from independent judges, dispensation of justice and sustenance of the country. The petitioner has raised question of public importance with reference to enforcement of fundamental rights and, therefore, the petition under Article 184 of the Constitution is competent.

The courts are able to play a creative and dynamic role in shaping and moulding constitutional and administrative law mainly on the following reasons:

(i) The courts are the ultimate interpreter of constitution and law; they finally decide what the provisions of a constitution or statute actually mean.

(ii) The theory of constitution/law is that administration can exercise such power only as are allowed to it by the Constitution/law, any action of the administration which is not supported by law is ultra vires and invalid.

(iii) By and large the courts interpret the constitution and the statutes broadly and liberally, as they realize that a literal interpretation will cause the death of constitution/law and make powers of the administration absolute and arbitrary.

The Courts realize that arbitrary power negates democracy and breads discrimination. The impugned order is directly in conflict with Articles *2A*, 4, 5(2), 9, 14, 23 to 25. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. Power is always coupled with duty. For determining nature of power one has to look at the nature of the power conferred upon the person or persons, the frame work of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. It is inevitable that the organ of the state under our constitution is regulated and controlled by the rule of constitution/law. The concept of rule of law would lose its validity if the instrumentalities of the state are not charged with the duty of discharging their functions in a fair and just manner. To prevent the abuse of power and despotism, courts are gradually evolving the principles to be observed while exercising such powers. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.

The aforesaid principle had been implemented by Hazrat Umer Bin Khitab (R.A) while hearing the case of surety (Hazrat Abu Zar Ghafari, R.A.).

The relevant portion is under:-

(Book Sunahray Faislay, Page 55)

"یہ بھی سچ ہے کہ حضرت ابوذر غفاریؓ امیر المومنین حضرت عمر بن خطابؓ کے دل میں بستے تھے لیکن یہاں مسئلہ شریعت کا تھا۔ یہ دستور الٰہی کا معاملہ تھا۔ یہ قوانین الٰہی کا مسئلہ تھا۔ جن سے انکار نہیں کیا جا سکتا اور نہ انہیں لوگوں کے مراتب کے اعتبار سے تقسیم کیا جا سکتا ہے۔ کہیں شریعی قوانین کا چہرہ مسخ نہ ہو جائے نیز بحروف وحالات سے تجاوز کر کے حد نافذ نہیں کی جا سکتی اور نہ ایک آدمی کی جگہ دوسرے کا خون کیا جا سکتا ہے۔

Mr. Muhammad Halim, C.J. traced the history of Article 184(3) in Benazir's case (PLD 1988 SC 416) and held that its plain language showed that it was open ended and that the Article did not say as to who shall have the right to move the Supreme Court or by what proceedings Supreme Court may be moved or whether it was confined to enforcement of fundamental rights of an individual or extended to enforcement of a right of a group or class of persons. Having so held, his Lordship posed the question whether the notion of "aggrieved person" was implicit in Article 184(3) and answered it thus:---

> "The inquiry into law and life can not in my view, be confined to the narrow limits of the rule of law in the context of constitutionalism which makes a greater demand on judicial functions. therefore, while construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usage of interpretation, but regard should be had to the object and the purpose for which this Article is enacted, that is this interpretive approach must receive inspiration from the triad of provision which saturate and invigorate the entire Constitution namely, the Objectives Resolutions (Article *2A)* the Fundamental Rights and the directive principles of State Policy".

Right of access to impartial and independent courts/tribunals is a fundamental right of every citizen as the rights granted under Articles 9 and *25* of the Constitution.

It is the inherent right of every citizen of this country to have an independent judiciary for resolution of their disputes, therefore, it is the fundamental right of 16 crores of people of Pakistan as the issue involved relating to independence, structural and functioning of the judiciary, therefore, it is a case of public importance.

THE ONLY FORUM TO INQUIRE INTO THE CONDUCT OF JUDGES OF SUPERIOR COURTS INCLUDING THE CHIEF JUSTICE OF PAKISTAN IN TERMS OF ARTICLE 209 (5) OF THE CONSTITUTION IS THE SJC.

The Judges of the superior courts have to work and conduct themselves under the code of conduct prescribed for them which is fairly comprehensive document and covers both public and private conduct of judges. The SJC is a unique institution which consists of the senior most Judges of judicial hierarchy. The judges of the Supreme Courts including the Chief Justice of Pakistan are not immune from accountability as is evident from oath wherein it is specifically mentioned:

> "That I will abide by the code of conduct issued by the SJC"

The same has been elucidated in Khan Asfandyar Wali's case (PLD 2001 SC 607 at 946) and Syed Zafar Ali Shah (PLD 2000 SC 869). Every Constitutional Authority including Judges and superior Courts under the provision of Constitution has to face the process of removal or impeachment in case the Constitutional Authority is not performing its duty in accordance with provision of Constitution and law. Even the President of Pakistan, Prime Minister, Chairman Senate, Speaker National Assembly are not immune from the removal or impeachment. It is settled principle of law that Constitution must be read as an organic whole as law laid down by this Court in Mian Nawaz Sharif's case (PLD 1973 SC 473). The Chief Justice of Pakistan is also not immune from the process of removal and, therefore, contention of the Counsel of petitioner that Referring Authority has no authority to send the case of Chief Justice of Pakistan to Supreme Judicial Council has no force. In case, it is accepted then it creates abnormality in the Constitution qua the removal of the Chief Justice of Pakistan. Chief Justice of Pakistan is also a Judge of Supreme Court in terms of Article 260 of the Constitution. The judge of a superior court cannot be removed from his office except in terms of Article

209 of the Constitution. The aforesaid provision is a safety valve against the removal of a judge from his office before expiry of his tenure. The judiciary is a third organ of the state, with power, inter alia, to decide important constitutional cases. The aforesaid safety valve has been prescribed so as to maintain independence of a judge for deciding cases impartially and without being influenced by the Government. Its other purpose is to check the power of the government.

The Supreme Judicial Council has been constituted to protect judges of the superior courts and its purpose and function is to submit report after inquiry to the President qua removal of a Judge of superior court. The Supreme Judicial Council consists of Chief Justice of Pakistan, two next senior most judges of the Supreme Court and two most senior Chief' Justices of High Courts. It is pertinent to mention here that words 'Chief Justice of Pakistan' and' Judge' of the Supreme Court are defined in Article 260 (1) which is to the following effect:

> "**260, Definition.---(l)** In the Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say, -------
> "Chief Justice", in relation to the Supreme Court or a High Court includes the Judge for the time being acting as Chief Justice of the Court:----"Judge" in relation to the Supreme Court or a High Court includes the Chief Justice of the Court and also includes:-
> (a) in relation to the Supreme Court, a person who is acting as Judge of the Court; and
> (b) in relation to the High Court, a person who is an Additional Judge of the Court;"

Article 209(1) shows existence of Supreme Judicial Council of Pakistan. Sub Article 209(2) shows the composition of the Supreme Judicial Council which consists of Chief Justice of Pakistan and two next most senior Judges of the Supreme Court and two senior most Chief Justices of High Courts which clearly reveals that Chief Justice of Pakistan is one of the members of the

Supreme Judicial Council whereas Article 209 (3) clearly envisages that council has power to inquire into the capacity of conduct of a judge including Chief Justice. While interpreting Sub Article (3) with regard to substitution of the member stated in Sub- Article (2) of the said Article is not relevant. Sub Article (4) read with aforesaid sub clauses of Articles 209 clearly shows that in case of difference of opinion amongst its members the opinion of the majority shall prevail. Chief Justice of Pakistan has been mentioned in clause 2 as a member of council and not as persona designate. Article 209(7) specifically prescribes procedure that each judge of the Supreme Court shall not be removed from office except as provided by this Article whereas Sub-Article (8) of Article 209 has power to issue code of conduct to be observed by the Judges of the Supreme Court read with oath of office of Chief Justice wherein Chief Justice of Pakistan is bound to abide by code of conduct issued by the Supreme Judicial Council. The security of tenure of office has been granted to the Chief Justice of Pakistan until he attains the age of 65 years or be resigns or is removed from the office. This is a protection to the Chief Justice in terms of Article 209 (7) of the Constitution otherwise executive will remove him or transfer him at its pleasure, therefore, accountability of the Chief Justice is permissible under Article 209 of the Constitution on the well know principle that Constitution is to be read as organic whole.

According to Article 260 judge also includes Chief Justice of Pakistan. Constitution must be read as an organic whole, therefore, Articles 176, 177 (l) (2), 178, 180, 205 5^{lh} Schedule, Article 207 and Article 209 must be read as a whole. The competent body at the time of framing the constitution has specifically used the word judge and Chief Justice wherever it is necessary otherwise judge also includes the Chief Justice in terms of Article 260. The word 'includes' has been used to enlarge or widen the meaning of phrase in question i.e. 'Judge includes Chief Justice'.

The phrase “the context otherwise requires” mentioned in Article 260 means that generally definition of a word must be read in other provisions of the Constitution / statutes unless the context does not permit. See:

M. Jamal Com.'s case (PTCL 1989 FC 217 at 229)

Sadhi Saran Shukla's case (1994) 2 SCC 434 at 445)

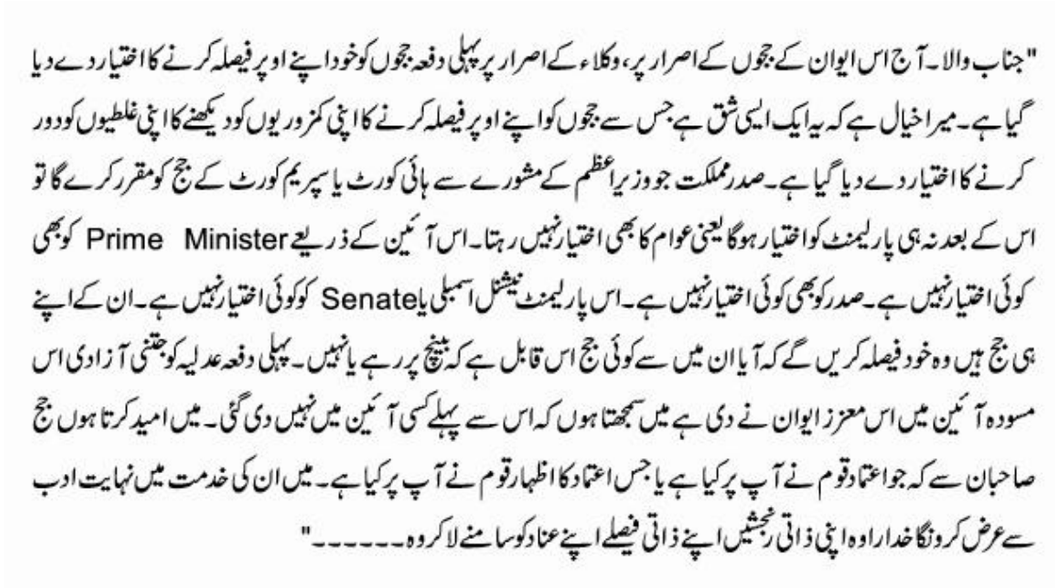
Understanding Statutes a book by Mr. S.M. Zafar (page 89-90)

Words are defined in a statutes so as to indicate intention of legislature and to make such law clear. The object of incorporating a definition clause or section in a statute is generally to declare what certain words or expression used in that statute shall mean, and that the definition clause is not meant to be the operative clause of the statute. A definition clause is a declaratory provision and governs all cases coming within its ambit (K.V. Muttu's case AIR 1997 SC 628 at 631) and Punjab Cooperative Bank's case (PLD 1964 SC 616).

It is settled principle of law that if a term stands defined in the Act, the said term is to be given the same meaning where ever it is needed in the Act, unless a contrary intention is expressed. At times definition is inserted to widen the scope of the words defined. The definition clause in statute is like a dictionary and if a word is to be interpreted which is already defined in the statute it is inevitable to refer to the meaning assigned to it in the definition clause.

When legislature define the language it uses, its definition is binding upon the Court and this is so even though the definition does not coincide with ordinary meaning of the words used. It is not for the Court to ignore the statutory definition and proceed to try and extract the true meaning of the expression independently of it. In view of the judgment the term Chief Justice is synonymous with Acting Chief Justice.

It is one of the mode to find out the intention of the legislature by examining the debates in the Assembly while framing of particular Article of the Constitution. The above intention of the legislature can be confirmed from the following portions of the debate regarding Article 209:



"جناب والا۔ آج اس ایوان کے ججوں کے اصرار پر، وکلاء کے اصرار پر پہلی دفعہ ججوں کو خود اپنے اوپر فیصلہ کرنے کا اختیار دے دیا گیا ہے۔ میرا خیال ہے کہ یہ ایک ایسی شق ہے جس سے ججوں کو اپنے اوپر فیصلہ کرنے کا اپنی کمزوریوں کو دیکھنے کا اپنی غلطیوں کو دور کرنے کا اختیار دے دیا گیا ہے۔ صدر مملکت جو وزیراعظم کے مشورے سے ہائی کورٹ یا سپریم کورٹ کے جج کو مقرر کرے گا تو اس کے بعد نہ ہی پارلیمنٹ کو اختیار ہوگا یعنی عوام کا بھی اختیار نہیں رہتا۔ اس آئین کے ذریعے Prime Minister کو بھی کوئی اختیار نہیں ہے۔ صدر کو بھی کوئی اختیار نہیں ہے۔ اس پارلیمنٹ نیشنل اسمبلی یا Senate کو کوئی اختیار نہیں ہے۔ ان کے اپنے ہی جج ہیں وہ خود فیصلہ کریں گے کہ آیا ان میں سے کوئی جج اس قابل ہے کہ بینچ پر رہے یا نہیں۔ پہلی دفعہ عدلیہ کو جتنی آزادی اس مسودہ آئین میں اس معزز ایوان نے دی ہے میں سمجھتا ہوں کہ اس سے پہلے کسی آئین میں نہیں دی گئی۔ میں امید کرتا ہوں جج صاحبان سے کہ جو اعتماد قوم نے آپ پر کیا ہے یا جس اعتماد کا اظہار قوم نے آپ پر کیا ہے۔ میں ان کی خدمت میں نہایت ادب سے عرض کرونگا خدارا وہ اپنی ذاتی رنجشیں اپنے ذاتی فیصلے اپنے عناد کو سامنے لا کر وہ۔۔۔۔۔۔"

Convention to appoint the senior most judge of the Supreme Court as the Chief Justice of Pakistan is well recognized convention and deviation thereof by the appointing authority is treated as violation of the constitution in terms of Article 177 of the Constitution. See Malik Asad Ali' s case (PLD 1998 SC 161 at 281,290 and 295). Chief Justice is senior most judge of the Supreme Court of Pakistan that is why the next two senior most judges are mentioned in Article 209 (2) (b) of the Constitution. The word next clearly envisages that Chief Justice of Pakistan is also senior most judge in case clauses (a) and (b) of Article 209 are read together as Chief Justice of Pakistan is also a judge of the Supreme Court of Pakistan.

Article 209 (3) clearly envisages members of the council. As per clause (a) of Article 209 (2) read with sub clause (3) Chief Justice is one of the member of the SJC and the same is evident from sub-Article (4) of Article 209 of the Constitution. To hold that Chief Justice is an integral part/irreplaceable of the SJC, or a council

without him will not be properly constituted, will lead to unhealthy consequences and then it will become the Chief Justice's right to decline to sit in the council when a reference is filed against any other judge on any ground whatsoever. It will amount to conferring upon a veto power on the Chief Justice and, therefore, no proceedings can be initiated against any judge of the superior court if the Chief Justice does not want to proceed against him. This is not in consonance with the intention of the framers of the Constitution and this interpretation will render Article 209 of the constitution as redundant. This court cannot declare any provision of the constitution redundant. Similarly, Article 179 of the Constitution becomes redundant if the contention of the counsel of the petitioner is accepted. This could then imply as if there is no retirement age of the Chief Justice which is not in consonance with the mandate of the Constitution read with other Articles specially Article 205 alongwith 5th schedule. The only forum to proceed against any Judge of the Supreme Court including the Chief Justice is SJC. The Chief Justice is replaceable in the same manner as in case the chief Justice is absent or unable to act due to illness or any other cause as prescribed in Article 209 (3) and is substituted by the next senior most Judge in view of aforesaid words used in Article 209 (3) of the Constitution.

It is the duty of the superior courts to have recourse to the whole constitution in order to ascertain the true intent and meaning of any particular provision of the constitution. See Hakim Khan's case (PLD 1992 SC 595 at 616). Constitution has to be construed like any other document by reading it as a whole and giving to every part thereof meaning consistent with the other provisions of the constitution keeping in view the principle of interpretation to harmonize all the provisions. See Saeed Ahmad Khan's case (PLD 1974 SC 151 at 165),

Reference by the President of Pakistan (PLD 1957 SC (Pak) 219) and Shahid Nabi Malik's case (PLD 1997 SC 32 at 49). See Syed Muhammad Alam's case (PLD 1970 Lah. 6). The case of Malik Asad Ali reported as PLD 1998 SC 161 has no relevance to the case in hand as therein the question of qualification regarding the appointment of the Chief Justice was involved and the same was outside the scope of Article 209 of the Constitution. Therefore, ratio of the Malik Asad Ali's case is not attracted in this case. Aforesaid proposition of law is also supported by various judgments: See *Justice Ghulam Haider Lakhoo's case* (PLD 2000 SC 179). *Syed Zafar Ali Shah's case* (PLD 2000 SC 869) and *Khan Asfandaryar Wali's case* (PLD 2001 SC 607).

Article 209 (2A) does not envisage that Chief Justice of Pakistan must in all circumstances be the member of the Supreme Judicial council. Article 209 if read as whole then the situation is very clear. The Chief Justice of Pakistan is merely a member of the Supreme Judicial Council and therefore, on account of his absence or inability due to his illness or any other cause next senior-most judge of the Supreme Court shall take his place under Article 209(2)-(A). There is no difference between the oath of the Chief Justice of Pakistan and Judge of the Supreme Court. The Chief Justice of Pakistan as per oath is bound to obey the command of the code of conduct which has been issued by the Supreme Judicial Council in terms of Article 209(8) of the Constitution. The Supreme Judicial Council is the only forum to initiate proceedings against the Chief Justice of Pakistan in terms of Article 209 of the Constitution on the well known principle of interpretation of doctrine of harmonious construction. See:

l)Muhammad Ijaz ul Haq's case (2006 SCMR 989 at 994D)

2)Nasimu1 Haq Malik's case (1996 SCMR 1264 at 1268B)

3)Union of India's case (AIR 1992 SC 96 at 101, para 14)

A judge of the Supreme Court including the Chief Justice of Pakistan can be removed by resorting to the procedure prescribed in Article 209 of the Constitution and recourse to other procedure would be unconstitutional and illegal. If a reference is against Chief Justice of Pakistan, then a judge immediately next to the Chief Justice of Pakistan shall act in the capacity prescribed in Article 209(2) (a) of the Constitution on the following reasons:

(i) In case the Chief Justice has become mentally incapable to perform its function, then Acting Chief Justice has to be appointed in terms of Article 180, who shall automatically be substituted as Chief Justice in Article 209 (1) (a) read with Article 260.

(ii) In case reference is filed against any Judge of superior court, the Chief Justice of Pakistan fails to proceed against him on account of any reason, then in such situation, Acting Chief Justice shall be appointed in terms of Article 180 who shall replace him automatically in Article 209 (1) (a) read with Article 260.

(iii) In case reference has been filed against the Chief Justice who decides not to sit in proceedings of the SIC, then Acting Chief Justice shall be appointed as mentioned above.

(iv) In case Chief Justice of Pakistan decides to sit in the proceedings and does not call the meeting of the SJC, then next senior member of the SJC shall place the matter before the full court meeting or before the full court for passing an appropriate order. In case full court would restrain him to perform function as Chief Justice of Pakistan or to sit in the meeting in the SJC, then Acting Chief Justice shall be appointed under Article 180. See Malik Asad Ali's case (PLD 1998 SC 161). Principle

of exception is only applicable in the case Chief Justice of Pakistan is not replaceable.

This Court has observed in AI-Jehad's case (PLD 1996 SC 324) vide para 85 page 407 that composition of the Supreme Judicial Council becomes non functional in the absence of Chief Justice is not law declared by the Judges of the Bench but it is the opinion of one of the learned Judge, who, with due respect, did not appreciate explanation of Article 209(2)(c) correctly which does not relate to Chief Justice of Pakistan but to the Chief Justices of the High Courts, therefore, judgment of this Court in AI-J ehad Trust's case supra is judgment per incurrium. (See Justice Ghulam Haider Lakho's case (PLD 2000 SC 179). In case the Chief Justice is not tried by a domestic tribunal then it would be clear cut violation of Article 25 of the Constitution, that is why no separate forum for removal of Chief Justice is prescribed under the Constitution and in case interpretation of the petitioner is accepted then Chief Justice of Pakistan is not accountable which is neither the intention of the legislature nor is borne out from the constitution. See a passage from a book under the heading 'Insaf may Musawwat' at page 226 wherein Abi (R.A) filed suit against Hazrat Umar (R.A) (Caliph) in the Court of Zaid Bin Haris (R.A). When the Caliph appeared before Qazi (Zaid Bin Baris (R.A), he showed respect to him and requested the Caliph to sit along with him. The complainant/ plaintiff Abi (R.A) according to custom wanted to take oath. The Qazi directed him to waive his right regarding oath. Caliph did not like it and removed the Qazi from his office on account of aforesaid two mistakes committed by him.

The matter of removal of the Chief Justice shall be heard by the full bench in terms of the law laid down in Malik Asad Ali's case (PLD 1998 SC 161) has no consonance with the mandatory provisions of the constitution as the constitution does not permit such course. If that be

so the President has to file a petition under Article 184 (3) of the Constitution before Supreme Court or under Article 199 of the Constitution before the High Court concerned which is not in consonance with the mandate of the constitution. In case the contention of the petitioner is accepted by this court, then this court has to suggest opinion with regard to removal of the Chief Justice of Pakistan. The court is empowered to harmonize conflicting provisions of the Constitution. The court in exercise of its inherent judicial power can even read words in the Constitution in order to give effect to the manifest intention of the legislature. See Al-jahad Trust's case (PLD 1996 SC 324 at 538), Muhammad Ismail's case (PLD 1969 SC 241 at 248), (AIR 1975 Dehli 66) and (AIR 1982 SC 149).

Proceedings before the SJC relates to inquiring against a judge or the petitioner by peers and is not a trial. The SJC is the only body to proceed against the petitioner/CJP with regard to his misconduct and incapacity in terms of Article 209 (5) of the Constitution. See the following text books and the judgments:

46 American Jurisprudence 2d, 142 para 18-19
48A Corpus Juris Secundum 614-615 para 46
Meera Bux's case (2005) UKPC 12=(2005)4
LRC 281 at 298 H,
Justice Shaukat Ali's case (PLD 1971 SC
585).

Opinion must be an honest opinion based on tangible material capable of sustaining such opinion and not an ex parte opinion or colorful exercise of statutory power. See *Kh. Muhammad Sharifs case* (PLD 1988 Lah. 725) and *Store Rolling Mills' case* PLD 1974 Note 129 at p. 189 = Kar. 1974 PTD 200)

The formation of opinion by the President must have been based on cogent reasons and not arbitrarily. See Haji Saifullah Khan's case (PLD 1989 SC 166 at 189 to 190) and Union of India's case (GT 2006

(!) SC 457). Under Article 209 the President is required to form Opinion on the basis of credible, reliable and admissible in evidence material having nexus with the code of conduct.

President has not sent reference with direction to the Council after forming his independent opinion in terms of Article 209 of Constitution as is evident from part (c) 'malafides and collateral purpose and para 49 page 6 of the petition No. 21/2007 filed by the petitioner and reply of the respondent which are reproduced hereunder.

> 49. Is it not therefore to be questioned, whether the Referring Authority, when forming his 'opinion' as required by Article 209, met the objective tests of opinion-formulation that has been laid down by this Court?

Reply by the Respondent No.1 and 2 in concise statement regarding aforesaid 49 is reproduced hereunc1er:-

> 47 -51: It is denied that any actions taken against the petitioner are malafide, discriminatory, disproportionate and/or illegal. There is no malice which would vitiate the proceedings of the reference and the process thereunder. The referring authority acted as per the provisions of the Constitution.

According to Article 209(5) read with Article 48(1) it is a Constitutional duty of the President to form his own independent opinion before sending reference to the Supreme Judicial Council or to send the reference back to the Prime Minister for reconsideration. It is no doubt that advice of the Prime Minister is binding upon the President but as mentioned above it is a Constitutional duty of the President either to send the same back for reconsideration to the Prime Minster or send the same to the Supreme Judicial Council after forming his independent opinion by applying his independent mind. If Article 209 (5) is read with Article 90, 91 and 99, even then firstly it is the duty of Prime Minister / Cabinet to form opinion before sending the advice to

the President of Pakistan for direction to the Supreme Judicial Council to inquire into conduct of the Judge of superior Court for his removal. The President is not a post office to send the same to the Supreme Judicial Council in view of provision of Article 48(1) and Article 48 (4). See Judicial Review of Public Actions by Justice ® Fazal Karim.

Article 209(5) of the Constitution cast two fold duties on the President: firstly, to form opinion, on information from any source, that a judge of the Supreme Court or of a High Court is incapable of properly performing the duties due to physical or mental incapability or guilty of misconduct; and, secondly, to send a reference to the Supreme Judicial Council with a direction to inquire into the matter. Precisely, this is a pre-reference stage of the proceedings regarding removal of a judge of Supreme Court or High Court. The perusal of record shows that neither the President nor the Prime Minister under the mandatory provisions of the constitution has deliberated upon the matter and formed opinion by applying their independent mind. Hence, non-application of mind and non- formation of opinion is fatal and render the subsequent proceedings void.

VALIDITY OF THE DIRECTION (THE REFERENCE) ISSUED BY THE PRESIDENT UNDER ARTICLE 209 (5) OF THE CONSTITUTION.

Sub Article (5) of Article 209 casts duty upon the President of Pakistan to form his opinion after receiving information qua the judges of the superior courts with regard to physical or mental incapacity to perform duties of his office or has been guilty of misconduct. The President of Pakistan bas to form his opinion after application of mind reasonably, objectively with cogent reasons based on relevant material in good faith after application of mind.

It is a condition precedent that President must form in the first instance his opinion and then to take action. This view was also affirmed by this Court in Mian Muhammad Nawaz Sharif's case (PLD 1993 SC 473). It is duty and obligation of the President to form

opinion objectively and thereafter to take action in terms of the judgment of this Court mentioned above. It is an independent act which does not fall within the parameters of the proceedings before the Supreme Judicial Council. The plain reading of the reference clearly shows that it was sent by the Constitutional Authorities (Prime Minister and President) to the Supreme Judicial Council without application of mind. This Court has the jurisdiction to examine whether the opinion was formed honestly or not. Opinion formed by the President under Article 209(5) is justiciable and this court has jurisdiction under the power of judicial review to look into the matter alongwith material on the basis of which the President/ Prime Minister formed his opinion (Muhammad Nawaz Sharif's case (PLD 1993 SC 473) and Ch. Pervaiz Elahi's case (PLD 1993 Lahore 595).

The additional documents filed by respondents through CM No. *2073/2007* (which was dismissed vide order dated 2.7.2007) show that the direction / reference was sent without application of mind and in violation of mandatory constitutional provisions. Thc operative part of the order is reproduced hereunder:-

> "When confronted with the documents e.g. an affidavit appearing at page 340 of CMA No. 2073 of 2007 which was an affidavit sworn by Ch. Mushtaq Ahmed Khan, Sr. ASC and which had been attested and sworn at Lahore on 16.4.2007, Malik Muhammad Qayyum, ASC submitted that these were the copies of the documents placed before the SJC and that he had nothing more in defence of the said document being or not being before the Referring Authority at the relevant time. After some further arguments, the learned ASC when confronted with the documents appearing at pages 164, 165 and 166 in which naked abuses had been hurled on this Court and the Hon'ble Judges of this Court and which were neither the

clipping of the press nor a document signed by anyone and even the source of which document was not known and likewise when confronted with two documents described as 'SECRET' appearing at pages 75 and 80 of the said CMA 2073 of 2007, the learned ASC submitted that he did not know the source of these documents nor had he even seen the said documents earlier. These documents, to say the least, appear to be intended to scandalize and malign certain Hon'b1e Judges of this court who are not even a party to this petition. When asked to disclose the source of these documents and others and when asked to produce the author of these documents, Malik Muhammad Qayyum, ASC for the Federation prayed for permission to withdraw CMA 2073 of 2007. He added again that he was not the one who had supplied these documents to the learned AOR who had filed the same nor had he even seen them prior to being confronted with them, in Court, this morning.

We, thereafter, asked Syed Sharifuddin Pirzada, the learned Sr. ASC for the President of Pakistan about this CMA No. 2073 of 2007 whereupon he declined to own the said application nor did he had any knowledge of the filing of the same. Similar was the stance taken by the learned Attorney General for Pakistan when questioned about the same.

At this stage, the learned ASC for the petitioner-Chief Justice also drew our attention to the photographs appearing, inter alia, at pages 67, 68, 69, 70,71,72, 73 and 74 of the said CMA No. 2073/2007 and submitted that this was a blatant and disgraceful display of interference with the privacy of homes and more so when

> the home was that of the Hon'ble Chief Justice of the country. He added that the respondents who had filed these photographs and relied upon by them be called upon to disclose the person who had taken the said photographs and who may then be summoned for appropriate action in accordance with law".....
>
> "In view of the remorse expressed by Malik Muhammad Qayyum, ASC, this CMA No. 2073/2007 is dismissed as withdrawn but subject to payment of Rs. 1,00,000/- by the Federation as costs for having filed a vexatious and scandalous application. This amount of Rs. 1,00,000/- shall be sent for the benefit of the flood victims of Balochistan and a receipt evidencing the same shall be filed with the Registrar of this Court within ONE WEEK".

It is pertinent to mention here that para 32 and para 34 under the heading 'Judicial Conduct' para 36 under the heading "entitlement" (iii) (a) (g) were deleted on the statement of the counsel for the respondents before this Court on 16.7.2007. According to the respondents, the Prime Minister had sent the reference to the President on 8.3.2007 with the advice to file before the S.J.C. The President of Pakistan/Referring Authority had filed reference before the SJC on 9.3.207. In case all these facts are put in juxta position, then it is crystal clear that none of the constitutional authorities had applied mind at the time of sending the reference to the S.J.C. The deletion of aforesaid paragraphs on 16.7.2007 can not have retrospective effect that these paragraphs were deleted and were not before the constitutional authorities at the time of' forming opinion in terms of Article 209 (5) of the Constitution coupled with the fact that aforesaid paragraphs which were deleted on the request of the learned counsel for the respondents clearly bring the case of the petitioner in the area of discrimination as the referring authority had not filed any

reference against other judges of the superior courts whose names are mentioned in the aforesaid paragraphs. This fact also depicts that the formation of opinion by the constitutional authorities at the time of sending reference to the SJC was without application of mind.

Non-fulfillment of a condition precedent while exercising jurisdiction render all the proceedings null and void. See *The Rangoon Development Trust's case* (AIR 1932 Rangoon 123) and *Mansab Ali's case* (PLD 1971 SC 124).

The aforesaid processes must be transparent to avoid arbitrariness and therefore, matter must be placed before the cabinet for discussion for the purpose of rendering advice to the President for filing reference against the judge of the superior courts in terms of Article 209(5) read with Article 48 of the Constitution. It is basic and fundamental requirement of independence of judiciary that the process for removal of a judge should be more difficult and stringent than the process of appointment. This court has laid down principle in Al-Jahad Trust's case (PLD 1996 SC 324) that the process of appointment should be effective, meaningful, purposive and conscious oriented leaving no room for complaint or arbitrariness or unfair play. This principle is applicable with greater force in the matter or removal of Judges of superior courts. The intention and scheme of the constitution reveal that the mater of such nature must be rooted from the cabinet as evident from Rule 16 of Rules of Business, 1973. Although it does not relate to administrative policies but keeping in view the importance of the issue in question the matter for filing a reference against the Chief Justice of Pakistan must be rooted through Cabinet and President has to file reference on the advice of the cabinet and after receiving evidence. The President may send back the matter to the Prime

Minister or Cabinet in terms of Article 48 (1) or Article 48 (4) of the Constitution for reconsideration. This is one way of interpreting the essence of the constitution.

The Referring Authority has not sent reference to the Supreme Judicial Council till 2.00 p.m. on 9.3.2007. The same was handed over to the petitioner for his examination to exercise his option either to resign as Chief Justice of Pakistan or to face trial in consequence thereto in case he denies to resign. The reference was filed in haste within three hours from 2.00 pm to 5.00 p.m. on 9-3-2007. The file had to be sent back to the concerned Division in terms of Rule 15-A of Rules of Business read with Schedule V B items No.31 and 35. Thereafter, the same was to be returned to the referring authority through proper channel. 'This process cannot be completed within three hours, therefore, action of the respondent is without lawful authority exercising power in haste is termed as malafide as the power has to be exercised with due care and caution after application of mind.

Wattan Party's case (PL.D 2006 SC 697 at 759-60), Union of India's case (AIR 1994 SC 1918 at 1944 and 1988), Mian Manzoor Wattoo's case (1997 Lah. 39 at 83), Saeed Ahmad Khan's case (PLD 1974 SC 151 at 170-171) and Khalid Malik's case (PLD 1991 Kar. 1 at 127-128). Article 209 (5) is at par with Article 58 (2) (b) in case both be read together.

Under Article 209 (5) of the Constitution the President has to send the reference to the SJC alter forming his opinion for removal of Judge of the superior court whereas the President has to dissolve National Assembly after forming his opinion in his discretion under Article 58 (2) (b). On both occasion the President has to form opinion objectively and the same is justiciable under the well known principle of judicial review. See Haji Saifullah Khan's case (PLD 1989 SC 166) and Mian Nawaz Sharifs case (PLD 1993 SC 473). In case of dissolution of assembly, the members of the assembly go to the real sovereign i.e. the people of Pakistan (wherein an appeal to the electorate is

necessary). In case of Judge of the Superior Court the matter is sent to the SJC for its removal. It is a very serious and sensitive matter, therefore, it cast a heavy burden on the constitutional authority to form opinion before sending the reference to the SJC. This is the reason that the legislature has provided safety valve before initiating proceedings against any of the Judge of Superior Court.

The word 'information' mentioned in Article 209(5) which is first information from any source must be strong type of information and must be based on sound and authentic material. The President before forming his opinion shall send reference to the Supreme Judicial Council to probe into the matter qua its authenticity of genuineness or not, thereafter the Supreme Judicial Council shall send the matter to the President so that the President shall send the reference to the Supreme Judicial Council for removal of any Judge under Article 209(5) of the Constitution, meaning thereby the President shall direct the Supreme Judicial Council to look into the mater qua information received by him. This procedure was not adopted, therefore, action of the President is not in consonance with the provisions of the Constitution.

Executive cannot claim inherent constitutional power unless and until it is expressly provided under the Constitution. The courts have inherent judicial powers on the basis of the various provisions or the Constitution and law such as Article 187, Section 561-A Cr.P.C. and Section 151 CPC. President/Prime Minister or Supreme Judicial Council have no inherent or constitutional power to restrain the petitioner to perform his function as Chief Justice of Pakistan/Judge of the Supreme Court. See George Mcerabux's case (2005 UK (PC) page 12), Union of India's case (AIR 1992 SC 320 at 357 in para 61, 331 para 5,331 para 7, 356 to 357 paras 59,60,61 and 62 and 359 para 66).

The inherent power of the Constitutional Authorities i.e. President or

Prime Minister is alien to our Constitution as there is no express provision authorizing them to invoke the same. See Charles Sawyer's case (343 US 579 at pages 582, 584, 586, 588, 632,634,644,646,649,654), and Mian Nawaz Sharifs case (PLD 1993 SC 473 at 566) & Sh. Liaquat I·Iussain's case (PLD 1999 SC 504 at 563 para 14).

Reference was flied against the petitioner on the basis of the reports collected by the intelligence branches. Such type of evidence is not permissible in the eyes of law. Referring authority has admitted this fact that reference was filed on the basis of the material collected by the intelligence branches as evident from the interview of the referring authority conducted by Talat Hussain on "Live with Talat Hussain" telecast by AAJ T.V. on 18-5-2007. This fact was also borne out from the contents of the affidavit of Chief of Staff to the President of Pakistan vide paras 14,15,22 and 34 in C.M.A.No.1683/2007 at pages 7 to 21).

Article 209 (5) of the Constitution cast following duties upon the President or the Prime Minister:

(i) *President is bound by the advice of Prime Minister for the purpose of sending reference to the SJC in terms of Article* 48 (1) *of the Constitution.*

(ii) *President has to from his own independent opinion in terms of Article 209* (5) *of the Constitution.*

(iii) *Prime Minister has to apply his own independent mind while giving advice to the President to file reference against the Judge of the superior court in terms of Article 48 (1) of the Constitution. Similarly, President is also to apply his own independent mind while forming his opinion in terms of Article 209(5) q/the Constitution.*

(iv) *Prime Minister while sending his advice to the President for filing the reference against any judge of the superior court and further advice him that President has to form his own independent opinion under Article 209* (5) *of the Constitution.*

Any action of the President relating to the judiciary without advice of the Prime Minister/Cabinet is without lawful authority.

Action of the constitutional authorities to form opinion in terms of Article 209(5) was not legal and was without application of mind. The mandate of Article 209(5) clearly shows that the President has to form opinion qua guilt of misconduct of the petitioner in terms of Article 209(5)(b) and thereafter the President must have sent reference to the Supreme Judicial Council for the purpose of inquiring into the matter with regard to the allegations of misconduct. Opinion mentioned in Article 209(5) is on higher pedestal as compared to the word opinion mentioned in article 58(2)(b). Constitutional authorities has to form opinion keeping in view the principle of reasonable, good faith and mandate of Article 209 (5) (b).

President has restrained the petitioner to perform his judicial functions as Chief Justice of Pakistan or as Judge of this Court vide order dated 9-3-2007 under inherent power as evident from para 5 of the reference. President has no constitutional and inherent power to pass such type of restraining order. See Mian Muhammad Nawaz Sharif's case (PLD 1993 SC 473). President of Pakistan has not passed restraining order dated 9-3-2007 under constitutional inherent power as urged by the respondents. President has passed order dated 9-3-2007 in exercise of his incidental power as the President of Pakistan has final power to remove the Judge/Chief Justice under Article 209(6), therefore, he has incidental power to restrain him. This argument of the respondents has no force as at the time of sending the reference to the Supreme Judicial Council the President has no power whatsoever to remove the petitioner/Chief Justice of Pakistan as is evident from Article 209(5) of the Constitution. He has only authority at that time to send the reference to the Supreme Judicial Council for the purpose of enquiring into the matter qua allegations mentioned in the reference in terms of Article

209(5)(b) regarding his mis-conduct or incapacity or mental or physical. Therefore, the President has no power whatsoever to remove the Judge/Chief Justice of Pakistan unless and until he receives positive report from the Supreme Judicial Council. Therefore, impugned order dated 9-3-2007 is not sustainable under the eyes of law. The President has yet no power to remove the Chief Justice of Pakistan unless and until Supreme Judicial Council sends report of guilt to the President. After receiving the report the President has power to suspend him or to remove him. After sending the reference by the referring authority to the Supreme Judicial Council, referring authority has become functus officio till he receives report from Supreme Judicial Council. Second restraining order passed by the Supreme Judicial Council is also without lawful authority on the ground that Supreme Judicial Council is only recommendatory body. Supreme Judicial Council has no power to pass the final order of the removal of the petitioner, therefore, Supreme Judicial Council has also no power to pass interim order. Supreme Judicial Council has passed interim order against the petitioner without notice.

Respondent No. 1 has not passed the order after applying its conscious mind. Simply to endorse the office note, does not mean the application of mind. In fact it tantamounts to countersigning the office note without applying independent mind, therefore, same is not sustainable in the eye of law, in view of law laid down by this Court in Ghulam Mohy-ud-Din's case (PLD 1964 SC 829).

The test, in determining whether an action or a decision complained of is reasonable or unreasonable is, therefore, whether an ordinary, prudent and reasonable person would have taken such an action or made such a decision.

The rule relating to unreasonableness was considered in the case of

Associated Provincial Picture Houses Limited V. Wednesbury Corporation (1947) 2 A.E.R 680) and was subsequently affirmed in the case of Council of Civil Service Unions. It was there held that an administrative action is subject to control by judicial review on the grounds of illegality, irrationality and procedural impropriety. As to "irrationality" Lord Diplock explained:

The ordinary, prudent and reasonable person is, thus, expected to apply his mind to the question before him which means that he must take into consideration relevant facts and circumstances and arrive at a decision which is in consonance with logic, reason and expected moral standards.

The meaning of the word "just" was considered by Rustom S.Sidhwa, J. in the case of *Muhammad Iqbal Khokhar's case* (PLD 1991 SC 35) where he observed:

" *... the word 'just' denotes that which is right and proper, that which can be justified in law ..... the word 'just' would mean that which is legal and proper under the said Act or the rules or that which imports the exercise of good judgment or discriminatory appraisal within the bounds of reason and which negatives the presence of any arbitrary, unreasonable or capricious determination, or anything which causes injury to a person*."

While the first part of the above observation appears to equate 'just' with conformity to law, in the second part, it has been equated with presence of reason or absence of unreasonableness or arbitrariness. It would follow that which is unreasonable or arbitrary or capricious would necessarily be unjust. The impugned reference/direction in the present case is not in consonance with this dictum as elaborated above.

Mere contents of para 32 shows level of application of mind that reference was filed even without reading the same by the respondent No.1 and Prime Minister of Pakistan. The same was not even read by

the concerned Secretary. Para 34 under the heading judicial conduct also shows non application of mind by the constitutional authorities as is evident from the contents of para 34 wherein the number of case and other members of the bench were not mentioned. The petitioner has not decided the case singly. The case was decided by the bench, therefore, this fact alone shows non application of mind. The contents of para 34 do not reveal particulars of case, the wrong doing is not wrong by one person. The reference is filed without application of mind in haste meaning thereby not in accordance with manner prescribed under the constitution. The malafide IS floating on the surface of the record as absurdity is visible by mere reading the reference.

It is command of the constitution that it is the duty and obligation of the State to provide justice to people of Pakistan by appointing independent Judges as I have taken note in my book "Separation and Independence of Judiciary" and also in following three articles read at different occasions:

1. 'Judicial Independence' (PLJ 2007 Magazine 162)
2. 'Independence of judiciary' (PLJ 2007 Magazine 195)
3. 'Methods of Educating Newly Appointed Judges, (PLJ 2005 Journal 1)

I believe that country cannot be run smoothly without appointing independent Judges and by changing the method of appointing judges of superior Courts as I have highlighted this fact in aforesaid Articles.

Since the creation of Pakistan, only four references were sent by President of Pakistan against four judges of superior Courts. It is no doubt that referring authority has shown great courage to send the reference against the Chief Justice. But the same is not sent in terms of Article 209 of Constitution read with Article 25 of the Constitution. I firmly believe that by following a principle of equiponderance, every institution/constitutional authority or public functionaries must bound down themselves to perform their functions and duties within the parameters prescribed by the mandate of the Constitution and law

laid down by the superior courts. This is the only and only way to put the nation on the right path and to face the challenges of the modern world and competing the developed counties with courage on the well known principle that national interest is supreme qua the individual interest, therefore, they will perform their function in their own sphere. This principle is based on universal law. No nation can survive in violation of the said principle.

VALIDITY OF THE ORDER OF THE SJC DATED 9.3.2007.

The Notification No. Fl(2)/2005.A.lI dated 9th March, 2007 whereby Mr. Justice Iftikhar Muhammad Chaudhry was restrained by the President to act as Chief Justice of Pakistan and Judge of the Supreme Court as he was unable to perform the functions of his office due to the facts narrated in a reference sent to the Supreme Judicial Council is patently illegal as it has no backing of Constitution or any law conferring power on the President to pass such type of restraint order. Consequently, subsequent Notification No. F.529(2)/2007.Secy whereby the President under Article 180 appointed Mr. Justice Javed Iqbal as Acting Chief Justice is also void as at that time "neither the Chief Justice of Pakistan was unable to perform functions of his office nor the office of Chief Justice of Pakistan was vacant. Resultantly, the composition of Supreme Judicial Council with Mr. Justice Javed lqbal as Acting Chief Justice of Pakistan, and its proceedings till 15th March, 2007 are illegal/unconstitutional and, therefore, order dated 9.3.2007 restrained Mr. Justice Iftikhar Muhammad Chaudhry to act as Chief Justice of Pakistan and a Judge of Supreme Court by the Supreme Judicial Council is coram non judice and without lawful authority.

Order of the Supreme Judicial Council dated 9-3-2007 wherein the Supreme Judicial council had taken cognizance of the reference and decided to invite the respondent (Chief Justice of Pakistan) to appear before it on 13-3-2007 at 1-30 p.m. and also Chief Justice was directed not to perform functions as a Judge of the Supreme Court or Chief Justice till reference is answered by the counsel.

He was detained with his family members including his child of 7 years from the 9lh March, 2007 till now. This order is also without lawful authority. It is exparte order where in total relief has been granted without notice to the petitioner. Even otherwise SJC has no power to pass final order, therefore, SJC has no power to pass interim order.

The direction was given to the Supreme Judicial Council on 9-3-2007 and the Supreme Judicial Council on the same date (9-3-2007) restrained the petitioner to perform his judicial functions.

Mere filing of reference is not sufficient to restrain the petitioner from performing his function as Chief Justice of Pakistan or Judge of this court. First restraint order passed by the respondent No. 1 was not passed on advice of the Prime Minister as evident from para (v) of the reference. President was only advised to have recoursed constitutional and inheritant power, therefore, restraining order passed by the respondent is without lawful authority. Article 209 (5) read with Article 209 (3) show that filing of reference merely imposes very limited incapacity of a judge to participate in the proceedings of the SJC if he is a member of the SJC, he will not sit in the proceedings of the SJC. The President cannot invoke Article 209 (3) on the well known "doctrine of Independence of Judiciary". Article 209 (7) of the Constitution wherein a Judge of the superior court shall not

be removed from office except as provided by this Article. The word 'except' which means after completing all the procedure prescribed under Article 209 (5) of the Constitution.

Therefore, restraining the petitioner by the President and SJC tentamounts to removal of the petitioner from his office which is not in consonance with the mandatory provision of Article 209.

Mere not issuing the roster of a Judge or not assigning any work to a Judge by the Chief Justice during pendency of reference against him is also not valid and sustainable. See Rees's case (1994) Vol. 2 (PC) WLR 476,477, 479,481,482,484,489,490,493,494.

It is a settled law that mere restraining a judge to perform his judicial function tantamounts to dismissal and also interference in the independence of judiciary. Article 209(7), 209(3) and Article 209(5) expressly envisage that no authority has any power whatsoever to restrain the petitioner to perform his functions as a Judge of this Court only on account of filing of reference against the petitioner. He is only debarred to sit in the meeting of the Supreme Judicial Council as member of Supreme Judicial Council in terms of Article 209(3) of the Constitution.

The petitioner was restrained to perform his function as a Judge of this Court was violative of the mandatory provision of the Constitution, therefore, the same is not sustainable in the eyes of law. See Mian Muhammad Nawaz Sharif's case

(PLD 1993 SC 473 at 618).

VALIDITY OF APPOINTMENT OF ACTING CHIEF JUSTICE.

Para V of the reference which is reproduced hereunder:-

> *"That the Prime Minister was further pleased to advise the President that besides making the reference to the council the President may simultaneously, in exercise of his constitutional and inherent powers under the Constitution of Pakistan and all other powers enabling him in that behalf,' direct that as a reference would be pending against the learned judge before the Council it would be neither in the public interest nor in consonance with the norms of judicial propriety that he continues to perform the functions of his office as a judge of the Supreme Court or as the Chief Justice of Pakistan., This would be in consonance with past practice as well. For these reasons, till such time that the reference has been disposed off by the Council and final orders in the matter have been passed, the most senior of the other judges of the Supreme Court shall act as the Acting Chief Justice. The President has been pleased to pass orders accordingly"*

There was no positive advice to restrain the petitioner from performing function as Chief Justice or Judge of this Court. Meeting was convened by the Chairman of the council/Acting Chief Justice on 9.3.2007 which was held at 7:00 p.m. as stated on court query by the Attorney General for Pakistan Mr. Makhdoom Ali.

When first part of the notification is not inconsonance with the mandatory provisions of the Constitution, then the consequential/super structure based on the first part of the notification shall fall on the ground automatically. Office of Chief Justice was not vacant in accordance with law, therefore, appointment of Acting Chief Justice is not valid, which renders appointment of Acting Chief Justice as without lawful authority. Acting Chief Justice is not properly appointed, therefore, he has no authority to convene the meeting or to preside over the meeting of the SJC as evident from Article 180 of the Constitution read with other provisions of Constitution.

VALIDITY OF ORDER DATED 15.3.2007.

Order dated 15-3-2007 restraining the petitioner is not in consonance with Article 2(1) of the President's Order 27 of 1970 wherein it is specifically mentioned that Supreme Judicial Council is inquiring into the incapacity or conduct of Judge of the Supreme Court or of High Court. There was no inquiry pending before the Supreme Judicial Council on 9-3-2007 as the office of the Chief Justice was not vacant as mentioned above. Judge of the superior court cannot be sent on forced leave without filing reference, convening of the meting of the Supreme Judicial Council and Supreme Judicial Council having taken cognizance of the matter. Provisions of order No. 27 of 1970 can only be invoked if the meeting of the Supreme Judicial Council has been convened which was not convened in accordance with law by any properly constituted Supreme Judicial Council. Even otherwise P.O. 27/1990 is not a valid piece of law. Validation of Laws Act, 1975 (Act No. LXIII

> of 1975) is applicable only to procedural validation and not substantive validation. Section 2 of the Act clearly shows that validation order granted only to the extent that the President's order No. 27 of 1970 was promulgated by competent authority and not beyond that. The vires of the President's order can be examined on the touchstone of the provisions of the Constitution and fundamental rights. President's order No. 27 of 1970 was promulgated in pursuance of the Proclamation of 25^{1h} day of March, 1969 read with Article 8 of the Provisional Constitutional Order by Chief Martial Law Administrator General Muhammad Yahya Khan which was declared as usurper in Asma Jillani' s case by this Court (PLD 1972 SC 139), therefore, P.O. 27/1970 is not valid piece of law and validation was only to the extent of procedural provisions i.e. regarding competency of the legislative authority who had framed the P.O. 27/1970. See Wattan Party's case (PLD 2006 SC 697 at 727).

Mere reading the provisions of P.O. 27/1970 with the provisions of the constitution clearly shows that it is not a valid piece of legislation as the same is in derogation of the mandatory provisions of the constitution and clearly hit the independent character of the organ of judiciary. P.O. 27/1970 is ultra-vires of Article 209 of the Constitution. In case provisions of both Article 209 and provisions of Order 27/1970 be read together then both are conflicting with each other. See Al-jahad Trust's case (PLD 1996 SC 324 at 515). The Judge continue to remain in ajob but his depreviation to perform judicial work is considered as removal because it affects his terms and conditions. It directly hits the independence of judiciary, and, therefore, the same is ultra vires. See Mehmood Achakzai's case (PLD

1997 SC 526). See Al-Jehad Trust's case (PLD 1996 SC 324) and Mohtarma Benazir's case (PLD 1998 SC 388 at 677-679 (para 35), at 500 (para 996 and at 499 (para 94). Order dated 15.3.2007 has been given retrospective effect w.e.f 9.3.2007 by the executive authority, therefore, same is not sustainable in the eyes of law. See Village Development Organization's case (2005 SCMR 492) and Safdar Ali's case (2004 SCMR 1031 at 1033). Instrument in question (P.O.27/l970) was promulgated by the Chief Martial Law Administrator which meddled with the independence of the 3rd organ of state i.e. judiciary, therefore, same is not sustainable in the eyes of law. See Asfandyar Wali's case (PLD 2001 SC 607 at 809).

Notification No. F.l (2)/2005-A.II., dated 15.3.2007 issued by the President in exercise of power conferred upon him by virtue of Article 2(1) of the Judges (Compulsory Leave) Order, 1970, (President's Order 27 of 1970) validated by the Validation of Laws Act, 1975(Act No. LXlIl of 1975) whereby Mr. Justice Iftikhar Muhammad Chaudhry was sent on leave w.e.f. 9th March, 2007 is void to the effect of retrospectively but it shall take effect from 15th March, 2007 as no executive order can be passed with retrospective effect.

The Judges (Compulsory Leave) Order, 1970 (President's Order 27 of 1970), validated under the Validation of Laws Act, 1975 is violative of the provisions of the Constitution and fundamental rights and, therefore, the same is hereby stuck down.

B I A S.

It is a settled law that judges of the superior courts are keepers of their conscious. Even in the case in hand our two learned brothers have refused to hear the case. The operative part of the said orders are reproduced hereunder:-

"**Order dated 24.4.2007**.

Sardar Muhammad Raza, J- All the petitions have already been directed to be clubbed together. The same be done.

2. Substantial points involved in all these petitions are identical, in that, the competency of reference as such, the competency of reference being against the Hon'ble Chief Justice of Pakistan, the Constitution of the Supreme Judicial Council, allegations of bias against some of the Hon'ble members of the Council and the order dated 9.3.2007 of the Council whereby the Hon'ble Chief Justice was directed not to perform functions as Judge/Chief Justice of Pakistan till the reference is answered.

3. The last mentioned order dated 9.3.2007 (page 44 of C.P. No. 2l/2007), being the most important and directly challenged, is closely linked with other points which either flow therefrom or are anciliary thereto. One of us (Mr.Justice Sardar Muhammad Raza Khan) is a signatory to the above order, having remained associated with the Council during its first three sessions. Principles of law, justice and propriety demand that the petitions in hand be not heard by him. These be fixed before a bench of which (Mr.Justice Sardar Muhammad Raza) is not a member.

4. Although the learned counsel on either side very graciously had no objection to the hearing of the case by one of us (Mr. Justice Sardar Muhammad Raza Khan) yet the order dated 9.3.2007 in question is of such a vital importance that it would not be in the interest of justice for him to sit on judgment over it. The learned counsel for the parties also requested for the constitution of larger bench/full court for the hearing of these cases. For all matters in hand, the cases be placed before the Hon'ble Acting Chief Justice of Pakistan for orders, deemed appropriate by him.

CMAs 22 & 27/2007

As the objections of the Registrar pertain to the merits of the case, like few others, these are to be heard alongwith the main cases. Notice also be issued to the respondents."

"**Order dated 14.5.2007**.

Falak Sher, J:- On account of seniority issue, being the senior most serving Judge in the country viz. Iftikhar Muhammad Chaudhry, Rana Bhagwandas, Javed Iqbal, Abdul Hameed Dogar, Sardar Muhammad Raza Khan, Muhammad Nawaz Abbasi and Faqir Muhammad Khokar, JJ being junior to me by 4 to 9 years approximately, it would be inappropriate for me to hear these petitions concerning Justice Iftikhar Muhammad Chaudhry's controversy lest there be even a remotest possibility of entertaining a notional element of bias at the back of the latter's mind.

2. At this juncture, learned senior counsel for the parties at the rostrum appreciating my views stated in all earnestness that this is not their demand and rather would request me to continue hearing these petitions as a member of this Bench.

3. However, despite of this laudable expression of confidence by the learned counsel, 1 am of the opinion that in keeping with the practice of this court for adherence to the Rule of Law, it would not be in the fitness of things for me to sit on this Bench.

ORDER OF THE COURT.

"In view of the reservations expressed by one of us (Falak Sher, J), all these matters are adjourned to be re-listed before a Bench to be reconstituted by the HACJ".

Best examples qua keeper of conscious of a Judge/Qazi have been set-up by Muslims Rulers from which one is reproduced hereunder:-

BOOK SUNAHARY FAISALAY, Page 108, 109

"عباسی خلیفہ مہدی کے زمانے میں عاقبہ بن یزید بغداد میں بحیثیت قاضی مقرر تھے۔ ایک دن ظہر کے وقت اچانک قاضی صاحب خلیفہ مہدی کی خدمت میں پہنچ گئے اور اندر آنے کی اجازب طلب کی۔ خلیفہ کی اجازت سے گھر کے اندر داخل ہوئے اور سلام کے بعد عرض کیا: خلیفتہ المسلمین! وہ صندوق منگوائیں جس میں منصب قضا پر بحالی کے سلسلے میں میرا معاہدہ ہے کیونکہ اب میں اس منصب سے مستعفی ہونا چاہتا ہوں۔ آپ سے گزارش ہے کہ آپ میرا استعفیٰ منظور کرلیں۔

قاضی عاقبہ بن یزید کی گفتگو سے خلیفہ مہدی کو گمان ہوا کہ شاید حکومت کے کسی ذمہ دار نے قاضی کے فیصلے کو نظر انداز کر دیا ہے۔ چنانچہ پوچھ بیٹھا: کیا کسی نے آپ کا فیصلہ ماننے سے انکار کر دیا ہے جو آپ منصب قضا سے مستعفی ہونا چاہتے ہیں۔

قاضی: اس قسم کی کوئی بات نہیں۔

خلیفہ: پھر آپ منصب قضا سے کیوں سبکدوش ہونا چاہتے ہیں؟

قاضی صاحب کہنے لگے: امیر المومنین! بات دراصل یہ ہے کہ ایک ماہ قبل دو آدمیوں نے میرے پاس مقدمہ دائر کیا تھا۔ مقدمے کی نوعیت بڑی ہی پیچدہ تھی۔ ہر دو فریق کے پاس واضح ثبوت اور شہادت موجود تھی۔ فیصلہ سنانے میں دیر لگ سکتی تھی کیونکہ دونوں فریقوں کے دلائل پر غور وفکر اور نتیجے تک پہنچنے میں خاصا وقت درکار تھا۔ چنانچہ میں نے مقدمہ سننے کے بعد اس امید میں فریقین کو واپس بھیج دیا کہ وہ باہم مصالحت کرلیں گے اور یوں ان کا مقدمہ حل ہو جائے گا۔ اس مدت میں دونوں فریقوں میں سے ایک ایک کو کسی طرح معلوم ہو گیا کہ مجھے پکی ہوئی تازہ کھجوریں زیادہ مرغوب ہیں۔ چنانچہ اس نے بہت ہی عمدہ کھجوریں اکٹھی کیں اور میرے دربان کو بھاری رقم رشوت دے کر کھجوریں مجھ تک پہنچانے کو کہا۔ میں نے اتنی عمدہ کھجوریں کبھی نہیں دیکھی تھیں۔ لیکن جب دربان نے کھجور کا طبق میری خدمت میں حاضر کیا تو میں نے اسے ڈانٹ ڈپٹ کر طبق واپس کروادیا۔ دوسرے دن جب دونوں فریق عدالت میں حاضر ہوئے تو وہ دونوں میری نگاہ میں یکساں نظر نہیں آ رہے تھے۔

امیر المومنین! ہدیہ قبول نہ کرنے کے باوجود میری یہ حالت ہو گئی (کہ عدم مساوات کا تیر میری نگاہ میں چبھ گیا) پھر اگر میں نے ہدیہ قبول کرلیا ہوتا تو کیا ہوتا؟ (لامحالہ مجھے ناحق فیصلہ کرنا پڑتا!!)

It is settled convention and principle of law that a judge of superior court is a judge of conscience and he himself has to decide about his competency to hear a case.

ORDER OF THE COURT DATED 7.5.2007.

"*The learned counsel from both the sides addressed lengthy arguments on the issue of placing the matter before the Full Court and also cited a large number of judgments. In view of the admitted fact that the present cases involve unprecedented important constitutional*

and legal issues, let the matter be placed before the Full Court except, for the obvious reasons, the Hon'ble Judges who are members of the Supreme Judicial Council and the Hon. Sardar Muhammad Raza Khan, J. who has already expressed his inability to hear this case. The necessary orders, in this regard, may be solicited from the Hon'ble Acting Chief Justice of Pakistan. Further proceedings before the Supreme Judicial Council will, however, remain stayed till the hearing of the cases by the Full Court and the applications for interim relief shall be placed before the Full Court".

It is pertinent to note that the petitioner is at serial No.3 in Warrant of Precedence for Pakistan as evident from the order of precedence.

Mere eye glance on the Precedence as well as admitted position clearly show that petitioner is at serial No.3. He is above the Chairman Senate, Ministers, Chief Ministers, Governors. So far as the protocol and other privileges are concerned, there is marked difference between the petitioner and the other constitutional authorities who are below him in the order of precedence. If the order of precedence and the protocol and privileges of the petitioner and others are put in a juxta position, then it is crystal clear that protocol and other privileges afforded to the petitioner as compared to several constitutional authorities is much below to the order of precedence. This, then is not in consonance with the mandate of the constitution. There is no doubt about it that judiciary is a third organ of the state but the treatment with this organ is not proper as compared to the other organs which tentamounts to reduce the image, dignity and independence of this organ. It is admitted fact that our constitution is based on trichotomy. The principle of trichotomy will achieve the goal only and only when

every organ is given due respect and place in the system. The treatment with the 3rd organ is step-motherly. In the scheme of the trichotomy and specially Article 4 and 5 (2) of the Constitution compel each and every organ of the state to discharge their liabilities, obligations and duties in accordance with law. Article 25 relates to equality clause which provides mechanism to provide facility to each and every organ equally. The history of this country portrays the fact that this organ is not treated equally and in fact it is always treated otherwise, therefore, same is not in consonance with the law laid down by this court in I.A. Shearwani' s case (1991 SCMR 1041). The relevant constitutional authorities and bodies are advised to see the status, privileges, salaries of the judges of the superior courts and subordinate courts before independence under the provisions of the Govt. of India Act, 1935. It is no doubt that before partition in un-divided Punjab, late Khizar Hayat Tiwana was the biggest land owner as his state of Kalra was the biggest in un-divided Punjab. He was the sole owner of that state. His annual income was 30 thousands whereas the annual salary of the Sessions Judge, Sargodha was 36 thousands. This fact is duly depicted in gazette. This aspect should be considered by the constitutional authorities and other functionaries to remove anomaly between the status and privileges of the petitioner and other constitutional authorities so that the principle of check and balance may progress in its true sense.

The status of Qazi/Judge is at a very higher pedestal in Islam as is evident from the portions of following text books:-

1. **ISLAMIC LAW AND CONSTITUTION BY S. ABUL A'LA MAUDUDI.**

> "The scope of the Judiciary (which in the terminology of Islamic Jurisprudence is called

Qada) also becomes well prescribed by the acceptance of the *de jure* sovereignty of God Almighty. When Islam established its state in accordance with its eternal principles, the Prophet himself was the first judge of that state, and he performed that function in strict accordance with the Law of God. Those who succeeded him, had no alternative but to base their decisions on the law of God as transmitted to them through the Prophet. (Page 224).

"The *Qadis* were also directly appointed by them. But the Caliphs could not ordinarily terminate their services nor influence their decisions, so much so that if in their personal capacity or in their capacity as the executive head, anybody brought a suit against the Caliphs, they had to appear and plead their cases before the *Qadis* like any commoner. (Page 226).

"It is the independence and impartiality of the judiciary which ensures the internal peace of a country and the tranquility of its people. No amount of rights and privileges written in the Constitution can give the people any satisfaction if the courts, owing to the interference of the people in power are not free to administer unfettered justice. (Page 319).

2. **ADAB UL QAZI COMPILED BY MEHMOOD AHMED GHAZI.**

آدابُ القاضی

محمود احمد غازی

نظامِ قضاء کی اہمیت:

قضاء ایک نہایت باعزت منصب ہے۔ اسکا احترام اور تعظیم کرنا فرض ہے۔ دین میں اس کام کی جو اہمیت اور مقام و مرتبہ ہے۔ اس سے واقفیت حاصل کرنی چاہیے۔ یاد رکھنا چاہیے کہ اس کام کے لیے رسول اور انبیاء بھیجے گئے۔ جب تک نظامِ قضاء صحیح طور پر قائم رہے گا اس وقت تک زمین و آسمان بھی قائم رہیں گے۔(Page 384)

"اہمیت و فضیلت کے اعتبار سے قضاء کا مرتبہ ثبوت کے فوراً بعد ہے۔ اس لئے کہ اللہ تعالیٰ نے مخلوقات کو پیدا کیا ہے۔ ان کو شریعتوں پر عمل کرنے کا پابند کیا اور ان کے درمیان اپنے پیغمبروں اور رسولوں کو قاضی بنا کر بھیجا تا کہ ان کے درمیان فیصلے کریں"

(Page 386)

3. URDU DAEERA MAHAARAF-E-ISLAMIA, UNDER DANISH GAH PUNJAB, LAHORE.

اردو دائرہ معارفِ اسلامیہ:

"عدالت کا حاکم سلطنت عثمانیہ کے نظام عدلیہ کے اعلیٰ ترین عہدوں میں سے ایک تھا۔ اس عہدے پر جو لوگ فائز ہوتے تھے ان کا منصب رئیس العلماء یعنی شیخ الاسلام کے بعد سب سے بلند سمجھا جاتا تھا۔ ان کا لقب صدر (رتبہ صدر الصدور) ہوتا ہے اور مکتوبہ عرائض میں انہیں سماحت لو یعنی "فیض مآب" کے لقب سے خطاب کیا جاتا ہے"

(Vol-16/I, Page 46)

4. REPORT; ISLAMI NIZAM-E-ADAL اسلامی نظامِ عدل
ISLAMI NAZARIATI COUNCIL DATED 5TH MAY, 2000.

قاضی کا مقام:

اسلامی نظامِ عدل میں عدالت (جج) کا مقام انتہائی اہمیت اور عظمت کا حامل ہے۔ قرآنِ حکیم میں آنحضرت ﷺ کی زبان مبارک سے کہلوایا جا رہا ہے۔

("میں تمہارے درمیان عدل کرنے پر مامور کیا گیا ہوں") (سورہ شوریٰ۔15)

In view of what has been discussed above, I agree with the judgment rendered by my learned brother Mr. Justice Khalil-ur-Rehman Ramday.

(**Justice Ch. Ijaz Ahmed**)

Constitution Petition No. 21/2007 etc.

Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry
V/S
The President of Pakistan through the Secretary and others

Muhammad Nawaz Abbasi J: Having gone through the main judgment authored by my learned brother Mr. Justice Khalil-ur-Rehman Ramday, and the facts and circumstances of the case in the background highlighted therein and also the manner in which Reference under Article 209 of the Constitution was sent by the President against Mr. Justice Iftikhar Muhammad Chaudhary, Chief Justice of Pakistan. I without taking any exception to the reasons given in support thereof add my note as under: -

The essential questions involved in the matter requiring consideration are:

Firstly, whether a direct petition challenging the validity of Presidential reference under Article 209 of the Constitution against a judge of the superior court is maintainable before the Supreme Court under Article 184(3) of the Constitution;

Secondly, as to whether Supreme Judicial Council has exclusive jurisdiction to consider all question of law and fact including interpretation of Article 209 of the Constitution and Supreme Court of Pakistan due to bar contained in Article 211 of the Constitution is not competent to interfere and adjudicate the question relating to the validity of the reference and;

Thirdly, whether the President's reference under Article 209 of the Constitution against the Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhary, petitioner herein was sent to Supreme Judicial Council in performance of constitutional duty in good faith and the validity of which cannot be questioned before the Supreme Court of Pakistan on any ground including mala fide.

The answer to the above questions is to be given in the light of relevant provisions of the Constitution. The first question relates to the original jurisdiction

of the Supreme Court of Pakistan under Article 184 of the Constitution which provides as under: -

> "(1) Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between any two or more Governments.
>
> (2) In the exercise of the jurisdiction conferred on it be clause (1), the Supreme Court shall pronounce declaratory judgments only.
>
> (3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I Part II is involved, have the power to make an order of the nature mentioned in the said Article."

Article 184 of the Constitution governs original and exclusive jurisdiction in respective of the controversies between two or more provinces and between the provinces and federation. The grant of exclusive jurisdiction to the Supreme Court necessarily denies jurisdiction of such cases to any other court.

In determining the question of original jurisdiction under Article 184(3), Supreme Court looks at two factors, (a) the seriousness of the matter which is of public importance and (b) the sufficiency of alternate forum for enforcement of a fundamental right.

The concept of the original jurisdiction of the Supreme Court of Pakistan seems to be based on the provision of Section 204 of Government of India Act 1935, Article 156 of the Constitution of Islamic Republic of Pakistan, 1956, Article 57 of the Constitution of Islamic Republic of Pakistan, 1962 and parallel Article 131 in the Indian Constitution. The above provisions for the sake of convenience may be reproduced hereunder.

Article 156 of the Constitution of Islamic Republic of Pakistan, 1956 was to be read as under: -

> "(1) Subject to the provisions of the Constitution, the Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute between –

(a) the Federal Government and the Government of one or both Provinces; or

(b) the Federal Government and the Government of a Province on the one side, and the Government of the other Province on the other; or

(c) the Governments of the Provinces,

if and in so far as the dispute involves-

(i) any question, whether of law or fact, on which the existence or extent of a legal right depends; or

(ii) any question as to the interpretation of the Constitution.

(2) The Supreme Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment."

This Article more or less, was based on section 204 of Government of India Act 1935 which was to the following effect: -

"204. *Original Jurisdiction Federal Court*: (1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other Court, have an original jurisdiction in any dispute between any of the following parties, that is to say, the Federation, any of the Provinces if and in so far as the dispute involves any question (whether of law or fact on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising under agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment."

Article 57 of the Constitution of Islamic Republic of Pakistan 1962 and Article 131 in the Indian Constitution are almost similar in respect of the original jurisdiction of the Supreme Court of Pakistan and India. These Articles provided as under: -

"Article 57 the Constitution of Islamic Republic of Pakistan 1962:

(1) The Supreme Court shall, to the exclusion of every other Court, have original jurisdiction in any dispute between one of the Governments and one or both of the other Governments.

(2) In the exercise of the Jurisdiction conferred on it by this Article, the Supreme Court shall pronounce declaratory judgments only.

(3) In this Article, "the Government" means the Central Government and the Provincial Governments."

"Article 131 in the Indian Constitution: Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute-

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and or more other States on the other; or

(c) between two or more states.

If and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends:

Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, *sanad* or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute."

The comparative study of the above provision would show that original jurisdiction of the Supreme Court under Article 184(3) of the Constitution was introduced for the first time in the Constitution of Pakistan 1973.

Sub Article (1) of Article 184 of Constitution provides that Supreme Court has the exclusive Jurisdiction to adjudicate upon a dispute on a question of law or fact between Federal Government and the Provincial Government or inter see the Provincial Governments and under sub Article (2) the Supreme Court pronounce only a declaratory judgment. Whereas under sub Article (3) the Supreme Court is empowered to make an order of the nature mentioned in Article 199 of the Constitution in a case in which a question relating to the enforcement of any of the fundamental rights conferred by Chapter I of Part II of the Constitution of Pakistan is involved. The historical and comparative study of the provisions relating to original jurisdiction of the Supreme Court of Pakistan would show that there is a

distinction between the original jurisdiction and exclusive jurisdiction. The Court is said to have exclusive jurisdiction when it has the power and authority to hear and adjudicate upon the matter with exclusion of any other court tribunal or authority whereas original jurisdiction may not necessarily exclude the jurisdiction of other Courts or a tribunal or an authority as is provided in sub Article (3) of Article 184 of the constitution.

The plain reading of Article 184(3) would sufficiently indicate that it is an open ended Article and Supreme Court under this sub Article in a case in which the question relating to the enforcement of fundamental rights of any individual or of a group or of a class of persons is involved may take cognizance and interfere to adjudicate the matter. Reference may be made to the cases of Manzoor Ilahi vs Federation of Pakistan PLD 1975 SC 66 and Miss Benazir Bhutto vs Federation of Pakistan PLD 1988 SC 416. In this special jurisdiction under Article 184(3) of the Constitution the Supreme Court can take cognizance of any matter involving the question of public importance with reference to the enforcement of fundamental rights and if in the petition before it an infraction of any of Fundamental right is shown, may pass an appropriate order with the liberal interpretation of provision of Article 184(3) of Constitution to carve and assert in the matter referred therein. The essential element for exercise of jurisdiction by the Supreme Court under Article 184(3) of the Constitution is that it must involve a question of public importance with reference to the enforcement of fundamental right and if the matter relating to the enforcement of fundamental right, is not of public importance the court may refuse to entertain the petition and exercise the jurisdiction.

In the present case, in which the constitutionality and validity of the President's reference under Article 209 of the Constitution against the Chief Justice of Pakistan (petitioner) has been questioned, both these elements are traceable on the record. This is correct that in the normal circumstances a

reference under Article 209 of the Constitution against a judge of superior courts, may not be subject to the judicial scrutiny, by any court including the Supreme Court of Pakistan due to bar contained in Article 211 of the Constitution but if the reference under Article 209 of the Constitution is made by the President for the motive and purpose beyond the spirit of Article 209 and is not in good faith, the same may not have the immunity from judicial review of the superior courts and the Supreme Court of Pakistan may on the ground of mala fide examine the question relating to the validity of reference in its original jurisdiction under Article 184(3) of the Constitution.

The detail examination of the facts and circumstances in the background leading to the filing of the reference would evidently show that the President for the personal interest and malice sent the reference against the Chief Justice of Pakistan to the Supreme Judicial Council hurriedly in an extraordinary manner with pre determination to remove Mr. Justice Iftikhar Muhammad Chaudhary from the office of the Chief Justice of Pakistan. The manner in which reference was sent to Supreme Judicial Council and the order restraining the Chief Justice of Pakistan from discharging his function was passed by the President, the appointment of acting Chief Justice of Pakistan with the arrangement of calling the meeting of Supreme Judicial Council on the same day was a strong evidence of malice without any other proof. This is noticeable that pending inquiry into the allegations made in reference, Supreme Judicial Council also in its first meeting passed a restrained order against the Chief Justice of Pakistan. The action of the President and his team to compel Chief Justice of Pakistan to tender resignation by detaining him in the President's Camp Office at Rawalpindi was unprecedented, which was naked infringement of the right of liberty of Chief Justice of Pakistan and thus the manner in which the Chief Justice of Pakistan was dealt was shocking to a common man which was a matter of great public importance relating to the enforcement of fundamental rights of not only of Chief Justice of Pakistan but also

of public at large. Consequently the Supreme Court would have no hesitation to entertain the petition under Article 184(3) of the Constitution for examination of the matter in exercise of power of judicial review pending inquiry in the reference before the Supreme Judicial Council. The action of the President and the manner in which the power was exercised under Article 209 of the Constitution was an evident proof of the mala fide, personal interest, and bias therefore in such circumstances the bar of jurisdiction contained in Article 211 of the Constitution would not stand in the way of the Supreme Court in invoking the jurisdiction under Article 184(3) of the Constitution and passed the appropriate orders.

There can be no departure to the legal position that in normal circumstances the Supreme Court may not be justified to interfere in a reference under Article 209 of the Constitution sent by President against a judge of superior courts to the Supreme Judicial Council or in the proceedings of the Supreme Judicial Council due to the bar of jurisdiction under Article 211 but this ouster clause in respect of the jurisdiction of the Supreme Court is not absolute and may not effect the power of judicial review of Supreme Court to examine the legality of mala fide action of President in performance of his duty under Article 209 of the Constitution. The discharge of constitutional duty by the President in deviation to the spirit of the Constitution can be anvil to the Constitution and is challengeable on diverse grounds including mala fide and colourable exercise of the power in bad faith for ulterior motive. It is difficult to confer validity and immunity to the mala fide act or action of President from judicial scrutiny in exercise of power of judicial review which is inherent in the superior courts. This is settled principle of law that constitutional protection and immunity of judicial review in performance of constitutional duty cannot be extended to the mala fide acts and actions, therefore distinction must be drawn between malice in fact and malice in law for the purpose of interpretation of the relevant provision of the Constitution or a statute

so that an impression must not be created that such provision has been amended, altered or reconstituted which may make the same redundant. The Supreme Court has always been careful and conscious in interpreting the Constitution so as in a manner that it may not create chaos or conflict or make the provision ineffective or nullified.

The Supreme Court being creature of the Constitution is empowered to examine the legislative competence to declare a statute or a legal document ultra vires to the Constitution, or the action of the state authorities void if it is in conflict to the provision of constitution, in exercise of its power of judicial review and has to enforce the Constitution as a paramount law but the scope of Judicial Review of the Superior Courts being confined to the enforcement of Constitution as supreme law for the purpose of determining the question relating to the legality of administrative action, the court will make harmonious interpretation of the provision of the Constitution to avoid any ambiguity.

The Supreme Court is empowered to review an action taken by state authorities under the garb of constitutional immunity to determine the procedural fairness as to whether or not the rights of an individual in respect of his liberty, life or property has been impaired in an unfair manner or due process of law, therefore the review of an action against a specific individual in respect of his rights guaranteed under the Constitution for judicial assessment of its fairness is justified. Thus procedural review is limited as procedural process guarantees only fair decision which impairs the fundamental and substantive rights of a person. The Court has also power to review the substance of such an action. The substantive review means the judicial determination of the compatibility of the substance of an action with the constitution. The court is concerned with the constitutionality of action and thus judicial review other than the question involving procedural fairness is a substantive review but the court's power and ability to determine the

constitutionality of executive action is always subject to the rule of judicial scrutiny. The Supreme Court has continuously been making independent determination of the legitimacy of an action of state authorities which effect the fundamental rights of individual under the Constitution. The Supreme Court in the cases in which the fundamental rights of the individual are impaired by using the strict scrutiny standard jealously guards and determines the question of legality and constitutionality of the action.

The historical and comparative study of the case law and role of superior judiciary in Pakistan in protecting the constitutional rights in exercise of power of judicial review was indeed unique. The concept of judicial review has greater room if there are solid basis for exercise of power of judicial review but this power was never intended to over through the acts of state authorities, whenever judges disagree with the constitutional acts and policy adopted by such acts. Therefore the legitimate judicial review over the acts of executive authorities is always subject to the principle of strict judicial security and restrained.

The conclusion is that the Supreme Court in exercise of the power of judicial review may examine the constitutionality of the acts of state authorities on any ground including mala fide use of power to protect the rights guaranteed by the Constitution.

In the light thereof I would take no exception to the interpretation of the provisions of the Constitution made by the learned author Judge in the main judgment which is based on logic and philosophy of law.

The next question relates to the function and the scope of the jurisdiction of Supreme Judicial Council.

For the purpose and benefit of better appreciation of the question relating to the function and jurisdiction of Supreme Judicial Council, it would be proper to reproduce the provision of Article 209 of the Constitution hereunder: -

"(1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.

(2) The Council Shall consist of,--

(a) The Chief Justice of Pakistan;

(b) The two next most senior Judges of the Supreme Court; and

(c) The two most senior Chief Justice of High Courts.

(3) If at any time, the Council is inquiring into the capacity or conduct of a judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or any other cause, then--

(a) If such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b)of clause (2), and

(b) If such member is the Chief Justice of a High Court, the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts,

shall act as a member of the Council in his place.

(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.

(5) If, on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court, --

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct,

The President shall direct the Council to inquire into the matter.

(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion,--

(a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and

(b) that he should be removed from office,

The president may remove the judge form office.

(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.

(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts."

The Supreme Judicial Council is an exclusive body constituted under Article 209 of the Constitution, which consists of the Chief Justice of Pakistan, two next most senior judges of the Supreme Court and two most senior Chief Justices of High Courts. The Supreme Judicial Council if at any time is enquiring into capacity or conduct of a judge who is member of the Council or a member of Council is unable to act due to any reason, in case such member is a judge of the Supreme Court, the next judge in seniority, and if he is a Chief Justice of the High Court, the Chief Justice of another High Court next in seniority, shall act as a member of the Council in his place. Article 260 of the Constitution provides that "the Chief Justice in relation to the Supreme Court or a High Court includes the judge for the time being acting as Chief Justice of the Court and the Judge includes Chief Justice of the Court." In the light of Sub Article (3) of Article 209 read with Article 260 of the Constitution the debate with reference to Sub Article (2) of the Article 209 that in the absence of Chief Justice of Pakistan, the constitution and composition of Supreme Judicial Council may not be proper is of no significance.

Sub Article (5) of Article 209 provides that the President on an information received from Council or any other source, if is of the view that judge of the Supreme Court or a High Court is incapable of properly discharging function of his office by reason of physical or mental incapability or is guilty of misconduct, shall direct Council to inquire into the matter and Supreme Judicial Council in consequence to the inquiry conducted in the matter, if submits report to the President with the opinion that judge is unable of performing duties of his office or has been guilty of misconduct and he may be removed from his office, the president may remove the Judge from office. It is thus mandatory for the President

that on receipt of information of the nature mentioned above against a judge of the superior Courts, to issue direction to Supreme Judicial Council for holding an inquiry into the matter and if the Supreme Judicial Council forms opinion as stated in clause (a) and (b) of Sub Article (6) of Article 209 of the Constitution, the President may in his discretion remove the Judge. The expression 'shall' used in sub Article (5) places duty on the president to issue direction to the Supreme Judicial Council for inquiry into the matter whereas the word 'may' used in sub Article (6) indicates that the President may or may not remove the Judge. The Code of Conduct issued by the Supreme Judicial Council is to be observed by the Judges of superior Courts and under Sub Article (7) of the Article 209 of the Constitution provides protection of tenor to the Judges of superior courts as no judge can be removed from his office except in the manner provided in Article 209.

The plain reading of Article 209 of the Constitution would show that it is complete code by itself providing the manner in which a judge can be removed from his office on the ground of misconduct or if he is incapable of performing his duties due to mental or physical incapacity.

The power and jurisdiction of the Supreme Judicial Council a constitutional body is not unlimited to pass any order in the manner as is the power of judicial review and jurisdiction of the Supreme Court rather its power is confined to the extent of matters falling within the purview of Article 209 and Article 210 of the Constitution and not beyond the scope of these articles which do not as such authorize the President or Supreme Judicial Council to restrain a judge from discharging his functions during the pendency of a reference against him sent by the President to Supreme Judicial Council for inquiry in due process of law. The power of the Supreme Judicial Council under Article 209 is not unbridled rather the careful examination of Article 209 and Article 210 of the Constitution would lead to the conclusion that function of Supreme Judicial Council is only to hold an inquiry and submit report to the President and the President on the basis of report

may remove the judge. In view thereof, I without taking any exception to the observation made by my learned brother Mr. Justice Khalil-ur-Rehman Ramday J. in this behalf in the main judgment, endorse the same as such.

The last question requiring examination is regarding the mala fide. There are different kinds of mala fide, i.e. personal malice and bias, mala fide in fact and mala fide in law. The action on the basis of personal malice or bias may contain the element of mala fide. The action taken in colourable exercise of power and misuse of law for an ulterior motive or extraneous consideration may be termed as malice in law and fact which is a mixed question of law and fact and is subject to proof either by way of direct or circumstantial evidence or on the basis of admitted facts. The personal malice can sufficiently be proved by the evidence brought on record whereas a presumption of mala fide of fact can be raised on the basis of circumstantial evidence. In the present case we find that the personal malice and bias of the President against Chief Justice of Pakistan was floating on the surface of record as the circumstances leading to the action of President and the manner in which the reference was sent to Supreme Judicial Council would be sufficient to prove the malice of President without any further evidence and proof.

There is no cavil to the proposition that ordinarily the mala fide being a question of fact is to be proved through the evidence but the court may take into consideration the circumstances leading to the action and the motive behind it for determination of inferential question of mala fide.

The Seriousness and uniqueness of mala fide action by the head of state in performance of his constitutional duty is not to be readily or easily accomplished, therefore standard of proof of mala fide of constitutional authorities of state should be high such as clear and covenanting evidence which is defined as measure or degree of proof which may produce in the mind of trier of facts a firm belief or conviction as to the allegations sought to be established, it is intermediate i.e. more than a mere preponderance but not to the extend of certainty as is required beyond

a reasonable doubt in criminal cases which does not mean clear and unequivocal. The standard of proof in ordinary civil cases may be insufficient to proof mala fide because of its seriousness but at the same time the standard of proof required in criminal cases beyond reasonable doubt is too high to prove mala fide, which test is used in criminal cases as the accused may be imprisoned and suffer loss of liberty. In view thereof the mala fide of fact in the normal circumstances is required to be established through the positive evidence and not merely on the basis of allegations but the personal malice of a person in official position can be examined in the context as to whether the action in official capacity was extraneous and for collateral purpose which was taken in bad faith or such an action was in good faith. The colourable exercise of power in transgression to the Constitution for personal reason and interest may be an act of mala fide which may exclude the element of bona fide. There can be no exception to the rule that mala fide may not be attributed to a provision of law, but colourable exercise of power under such provision with an ulterior motive and personal interest may bring the action within ambit of mala fide for the purpose of Judicial Review.

In the light of foregoing discussion I am of the firm view that in the facts and the circumstances of the present case, the action of the President was the result of personal malice which was not taken in good faith, rather it was motivated for collateral purposes which is sufficiently proved on record and in consequence thereto the Supreme Court of Pakistan in exercise of its power of Judicial Review could justifiably examine the matter in its original jurisdiction and quash the reference on the ground of mala fide.

In the end I must say that the daring step taken by Mr. Justice Iftikhar Muhammad Chaudhary, Chief Justice of Pakistan, not to surrender before the executive authorities and accept their demand of resignation from the office of Chief Justice of Pakistan was a unique example in the history of

Pakistan. The refusal of Mr. Justice Iftikhar Muhammad Chaudhary, Chief Justice of Pakistan to tender his resignation from the office of Chief Justice of Pakistan was a great message to the nation that an executive action beyond the mandate of Constitution being against the rule of law must not be accepted. The reaction of Mr. Justice Iftikhar Muhammad Chaudhary, Chief Justice of Pakistan in the extra ordinary circumstances was to make the executive authorities of state realize that the Constitution is supreme and must be followed in letter and spirit. The nation having deep sense of appreciation of the situation in which Mr. Justice Iftikhar Muhammad Chaudhary, Chief Justice of Pakistan has taken courageous step condemned the action of President and will remember him as a Judicial Hero in the Judicial history for not sacrificing the flag of Judicial Independence and rule of law. I have added my note in support of the reasons given by my learned brother Mr. Justice Khalil-ur-Rehman Ramday J. in the main judgment to express my views which may be treated as a part of the Judgment.

Justice Muhammad Nawaz Abbasi