IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Iftikhar Muhammad Chaudhry, HCJ
Mr. Justice Mian Shakirullah Jan
Mr. Justice Tassaduq Hussain Jillani
Mr. Justice Jawwad S. Khawaja
Mr. Justice Khilji Arif Hussain

Constitution Petition No.77 of 2012 & CMA No.3057/2012 a/w Const. Petitions No.72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 84, 85, 86, 87, 88, 91, 92, 94, 95, 96, 97, 98, 99, 100, 101, 102, and 103 of 2012

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| Baz Muhammad Kakar & another | (Const.P.77/2012) |
| Muhammad Siddique Khan Baloch | (Const.P.72/2012) |
| Syed Mehmood Akhtar Naqvi | (Const.P.73/2012) |
| Lawyers Writers Forum thr. its President | (Const.P.74/2012) |
| Mahmood-ul-Hassan & another | (Const.P.75/2012) |
| Ch. Muhammad Ashraf Gujjar | (Const.P.76/2012) |
| Ch. Khalid Farooq | (Const.P.78/2012) |
| Abdul Naveed Khan | (Const.P.79/2012) |
| Ghulam Mustafa | (Const.P.80/2012) |
| Shahid Naseem Gondal | (Const.P.81/2012) |
| Muhammad Azhar Siddique | (Const.P.82/2012) |
| Wattan Party thr. Its President | (Const.P.84/2012) |
| Judicial Activism Panel thr. Its Chairman | (Const.P.85/2012) |
| Lahore High Court Bar Association & another | (Const.P.86/2012) |
| Maulvi Iqbal Haider | (Const.P.87/2012) |
| Ch. Amjad Hassan Ali | (Const.P.88/2012) |
| Communist Party of Pakistan | (Const.P.91/2012) |
| G.M. Chaudhry | (Const.P.92/2012) |
| Save Judiciary Movement | (Const.P.94/2012) |
| Sindh Bar Council thr. its Vice Chairman | (Const.P.95/2012) |
| Solicitor Muhammad Dawood | (Const.P.96/2012) |

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| Zafarullah Khan | (Const.P.97/2012) |
| Muhammad Jamil Rana | (Const.P.98/2012) |
| Shahid Orakzai | (Const.P.99/2012) |
| Arshad Mehmood Bagoo & others | (Const.P.100/2012) |
| Pakistan Bar Council thr. Its Chairman | (Const.P.101/2012) |
| Concerned Citizens of Pakistan Society | (Const.P.102/2012) |
| Professor Muhammad Ibrahim | (Const.P.103/2012) |

... PETITIONERS

VERSUS

Federation of Pakistan through Ministry of Law & Justice, Islamabad & others

... RESPONDENTS

For the petitioners: Mr. M. Zafar, Sr. ASC
Mr. Baz Muhammad Kakar, ASC
(in Const.P.77/2012)

Mr. Muhammad Ikram Chaudhry, ASC
Syed Safdar Hussain Shah, AOR
(in Const.P.72/2012)

Syed Mehmood Akhtar Naqvi, in person
(in Const.P.73/2012)

Mr. Liaqat Ali Qureshi, in person
(in Const.P.74/2012)

Mr. Hamid Khan, Sr. ASC
Mr. Muhammad Waqar Rana, ASC
Mr. M.S. Khattak, AOR
(in Const.P.75/2012)

Ch. Muhammad Ashraf Gujjar, ASC in person
(in Const.P.76/2012)

Mr. Abdul Rehman Siddiqui, ASC
Assisted by Ms. Neeli Khan, Advocate
(in Const.P.78/2012)

Mr. Abdul Naveed Khan (absent)
(in Const.P.79/2012)

Mr. Ghulam Mustafa, in person
(in Const.P.80/2012)

Mr. A.K. Dogar, Sr. ASC
(in Const.P.81-82/2012)

Barrister Zafarullah Khan, ASC
(in Const.P.84/2012)

Mr. Muhammad Azhar Siddique, ASC
(in Const.P.85/2012)

Sh. Ahsan-ud-Din, ASC
Ch. Akhtar Ali, AOR
(in Cosnt.P.86/2012)

Mr. Arshad Ali Ch., ASC/AOR
(in Const.P.87/2012)

Ch. Afrasiab Khan, ASC
Ch. Akhtar Ali, AOR
(in Const.P.88/2012)

Engineer Jamil Ahmad Malik, in person
(in Const.P.91/2012)
Mr. G.M. Chaudhry, Adv.
(in Const.P.92/2012)

Mr. Hashmat Ali Habib, ASC
Mr. M.S. Khattak, AOR
(in Const.P.93/2012)

Mr. Rasheed A. Rizvi, Sr. ASC
(in Const.P.95/2012)

Solicitor Muhammad Dawood, in person
(in Const.P.96/2012)

Mr. Zafarullah Khan, Advocate, in person
(in Const.P.97/2012)

Mr. Muhammad Jamil Rana, in person
(in Const.P.98/2012)

Mr. Shahid Orakzai, in person
(in Const.P.99/2012)

Malik Mushtaq Ahmad, ASC
Mr. Mehmood Ahmad Bhatti, Adv.
Mr. Arshad Mehmood Bagoo, Adv.
(in Const.P.100/2012)

Mr. Abdul Latif Afridi, ASC
Mr. Mehmood A. Sheikh, AOR
(in Const.P.101/2012)

Ms. Nasira Iqbal, ASC
(in Const.P.102/2012)

Khan Afzal Khan, ASC
(in Const.P.103/2012)

On Court Notice: Mr. Irfan Qadir, Attorney General for Pakistan
Khan Dil Muhammad Khan Alizai, DAG,
Assisted by Ch. Faisal Hussain and
Barrister Shehryar Riaz, Advocates

For Federation: of Pakistan: Mr. Abdul Shakoor Paracha, ASC
Raja Abdul Ghafoor, AOR Assisted by
M/s Haseeb Shakoor Paracha, Waseem Riaz
Satti and Malik Saqib Mehmood, Advocates

For Leader of Opposition in Senate: Mr. Muhammad Akram Sheikh, Sr. ASC
Mr. Mehmood A. Sheikh, AOR

Other respondents: *Nemo*

Dates of hearing: 23rd to 27th, 30th & 31st of July and
1st to 3rd of August, 2012

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JUDGMENT

**IFTIKHAR MUHAMMAD CHAUDHRY, CJ.** — In all the above 27 petitions under Article 184(3) of the Constitution, constitutionality of Contempt of Court Act, 2012 [hereinafter referred to as 'COCA 2012'] has been challenged. For the sake of brevity and to avoid repetition, the prayer clauses of Constitution Petitions No. 72, 75 and 77 of 2012 are reproduced hereunder: -

CONSTITUTION PETITION NO.72/2012:

(a) That the Contempt of Court Bill/Law 2012 passed by the National Assembly is ultra-vires the Constitution and is against Article 8 of the Constitution, and may be declared against Constitution;

(b) That the impugned Bill/Law is violative of Articles 2A, 4, 5, 25, 175, 203, 204 and 248 of the Constitution of Islamic Republic of Pakistan, 1973;

(c) That the respondent by way of impugned contempt law has unconstitutionally and unlawfully attempted to make

the Constitutional Provisions ineffective which is not warranted by any law;

(d) That the impugned law is result of lack of legislative competence and being without jurisdiction may be declared ultra-vires and without legal effect;

(e) That any other relief that may be permissible under the law and Constitution be also allowed to the petitioner against the respondent to meet the ends of justice.

CONSTITUTION PETITION NO.75/2012:

It is, therefore, respectfully prayed that the Contempt of Court Act 2012 may kindly be declared as *ultra-vires* of the Constitution.

It is further prayed that pending the final disposal of this petition, the operation of the Contempt of Court Act 2012 may kindly be suspended.

CONSTITUTION PETITION NO.77/2012:

It is, therefore, respectfully prayed that this Hon'ble Court may be pleased to declare Contempt of Court Act, 2012 as violative of the Fundamental Rights guaranteed by the Constitution of Islamic Republic of Pakistan and also null and void and the same may please be struck down as a whole in the interest of justice. Any other relief, which may be deemed fit and proper in the circumstances of the case, may also be awarded.

2. The background in which the COCA 2012 was enacted is that the National Reconciliation Ordinance, 2007 (Ordinance No. LX of 2007), hereinafter referred to as the "NRO", was promulgated by the President of Pakistan on 05.10.2007. It was challenged before this Court on 08.10.2007 and the Court *vide* judgment dated 16.12.2009, passed in *Dr. Mobashir Hassan* (Supra) declared the NRO as *void ab initio* and *non est*. In Paragraph No. 178 of the judgment, it was held that all steps taken, actions suffered, and all orders passed by

whatever authority, any orders passed by the Courts of law including the orders of discharge and acquittals recorded in favour of accused persons, are also declared never to have existed in the eyes of law and resultantly of no legal effect. However, despite express directions of the Court, the Federal Government failed to implement the judgment, therefore, *vide* order dated 29.03.2010, this Court initiated the implementation proceedings. During hearing of the case, the Government was again required to take steps to revive all the cases, including those, which were being pursued outside the country before the promulgation of the NRO, but were abandoned in pursuance of the NRO. During the period from 30.03.2010 to 10.06.2010, the then Secretary, Ministry of Law, Justice and Parliamentary Affairs; Chairman, National Accountability Bureau (NAB) and learned Attorney General were repeatedly asked to implement the judgment in *Dr. Mobashir Hassan's case*. The matter continued to linger on and subsequently, the Federation of Pakistan filed a time barred review petition, which was dismissed *vide* judgment dated 25.11.2011 reported as *Federation of Pakistan v. Dr. Mobashir Hassan* (PLD 2012 SC 106). The case regarding implementation of the judgment in *Dr. Mobashir Hassan's case* was again taken up by a 5-Member Bench and *vide* order dated 10.01.2012, the Bench identified six different options available to it to secure implementation of the judgment, including the Option No.2, under which proceedings may be initiated against the Chief Executive of the Federation, i.e. the Prime Minister, the Federal Minister for Law, Justice and Human Rights Division and the Federal Secretary Law, Justice and Human Rights Division for committing contempt of this Court by persistently, obstinately and contumaciously resisting, failing or refusing to implement or execute in full the

directions issued by this Court in its judgment delivered in *Dr. Mobashir Hassan's case*. It may not be lost sight that, apart from the other consequences, by virtue of the provisions of clauses (g) and (h) of Article 63(1) read with Article 113 of the Constitution, a possible conviction on such a charge may entail a disqualification from being elected or chosen as, and from being, a member of *Majlis-e-Shoora* (Parliament) or a Provincial Assembly for at least a period of five years. Then, a 7-Member Bench issued a show cause notice and later framed the charge against Syed Yousaf Raza Gillani, the then Prime Minister of Pakistan, *inter alia*, for having willfully flouted, disregarded and disobeyed the direction given by this Court in Para 178 of the judgment in *Dr. Mobashir Hassan's case* had committed contempt of Court within the meanings of Article 204(2) of the Constitution read with section 3 of the Contempt of Court Ordinance, 2003 (Ordinance V of 2003). The Prime Minister denied the charge, and the matter was proceeded on to full hearing and ultimately, *vide* short order dated 26.04.2012, he was convicted under Article 204(2) of the Constitution read with section 3 of the Contempt of Court Ordinance, 2003 and sentenced under section 5 of the Ordinance to undergo imprisonment till rising of the Court. The detailed reasons of the said order were released on 08.05.2012. Prime Minister Syed Yousaf Raza Gillani did not file an appeal against the said judgment and thus accepted his conviction. A copy of the order dated 26.04.2012 was forwarded by the Court office to the Speaker of the National Assembly. In the meantime, a petition was also filed by one Maulvi Iqbal Haider before the Speaker for making a reference to the Election Commission in terms of Article 63(2) of the Constitution. However, on 24.05.2012, i.e., a day before the expiry of the period of 30 days within which the

Speaker had to decide the question under Article 63(2), she gave a ruling that no question of disqualification of the respondent had arisen pursuant to his conviction by the Supreme Court.

3. Constitution Petitions No. 40 of 2012 etc. were filed before this Court under Article 184(3) of the Constitution challenging the above ruling of the Speaker with the assertions, *inter alia*, that after the judgment of the 7-Member Bench, the respondent Prime Minister stood disqualified as a Member of the *Majlis-e-Shoora* (Parliament) and had also ceased to be the Prime Minister on and from the day and time of his conviction. The Court *vide* short order dated 19.06.2012 allowed the petitions and declared that Syed Yousaf Raza Gillani had become disqualified from being a Member of the *Majlis-e-Shoora* (Parliament) in terms of Article 63(1)(g) of the Constitution on and from the date and time of pronouncement of the judgment of this Court dated 26.04.2012 with all consequences, i.e. he also ceased to be the Prime Minister of Pakistan with effect from the said date and the office of the Prime Minister shall be deemed to be vacant accordingly. The Election Commission of Pakistan was required to issue notification of disqualification of Syed Yousaf Raza Gillani from being a Member of the *Majlis-e-Shoora* (Parliament) with effect from 26.4.2012. On 19.06.2012, the Election Commission of Pakistan issued notification of disqualification of Syed Yousaf Raza Gillani as Member National Assembly of Pakistan with effect from 26.04.2012 and in consequence thereof the notification dated 01.03.2008 to the extent of declaring him as returned candidate from National Assembly Constituency No. NA-151 Multan-IV stood rescinded.

4. The implementation proceedings in *Dr. Mobashir Hassan's case* were fixed on 27.06.2012 when a 5-Member Bench called upon the newly elected Prime Minister to cause a report to be submitted before the Court on 12.07.2012 regarding compliance of the directions contained in Paragraphs No. 177 and 178 of the said judgment, failing which the Court might initiate appropriate action under the Constitution and the law. In the meanwhile, on 09.07.2012, the Contempt of Court Bill, 2012 was tabled in the National Assembly after the relevant rules were suspended and it was passed the same day. The Bill was then placed before the Senate on 11.07.2012 where too it was passed the same day and the President also gave his assent to it the same day converting it into an Act of Parliament, which came into force w.e.f. 12.07.2012. By section 13 of the COCA 2012, the COCA 1976, Ordinance No. V of 2003 and Ordinance No. I of 2004 were repealed.

5. The instant Constitution Petitions were filed to challenge the constitutionality of the impugned legislation on the touchstone of Article 8(1) on the ground of being violative of Fundamental Rights and various other constitutional provisions. The petitions were heard on a number of days and ultimately *vide* short order dated 02.08.2012, following provisions of the COCA 2012 were found *ultra vires* the Constitution, void and *non est*: -

> "2. Interpretation. – In this Act, unless there is anything repugnant in the subject or context.
>
> (a) "judge" includes all officers acting in a judicial capacity in the administration of justice;
>
> 3. Contempt of court.- Whoever disobeys or disregards any order, direction or process of a court, which he is legally bound to obey; or commits a willful breach of

a valid undertaking given to a court; or does anything which is intended to or tends to bring the authority of a court or the administration of law or the due course of any judicial proceedings, or to lower the authority of a court of scandalize a judge in relation to his office, or to disturb the order or decorum of a court, is said to commit "contempt of court".

Provided that the following shall not amount to commission of contempt of court -

(i) exercise of powers and performance of functions by a public office holder of his respective office under clause (1) of Article 248 of the Constitution for any act done or purported to be done in exercise of those powers and performance of those functions;

(ii) fair comments about the general working of courts made in good faith in the public interest and in temperate language;

(iii) fair comments on merits of a decision of a court made, after the pendency of the proceeding in a case, in good faith and in temperate language;

(iv) subject to a prohibition of publication under section 9 or under any other law for the time being in force, the publication of a fair and substantially accurate report of any judicial proceedings.

(v) the publication of any matter, amounting to a contempt of court by reason of its being published during the pendency of some judicial proceedings, by a person who had no reasonable ground for believing that such judicial proceedings were pending at the time of the publication of the matter.

(vi) the distribution of a publication, containing matter amounting to contempt of court, by a person who had no reasonable ground for believing that the publication contained, or was likely to contain, any such matter.

(vii) a true averment made in good faith and in temperate language for initiation of action or in the course of disciplinary proceedings against a judge, before the Chief Justice of a High Court, the Chief Justice of Pakistan, the Supreme

Judicial Council, the Federal Government or a Provincial Government.

(viii) a plea of truth taken up as a defence in terms of clause (vi) in proceedings, for contempt of court arising from an earlier averment unless it is false.

(ix) relevant observations made in judicial capacity, such as, those by a higher court on an appeal or revision or application for transfer of a case, or by a court in judicial proceedings against a judge.

(x) remarks made in an administrative capacity by any authority in the course of official business, including those in connection with a disciplinary inquiry or in an inspection note or a character roll or confidential report.

(xi) a true statements made in good faith respecting the conduct of a judge in a matter not connected with the performance of his judicial functions.

4. Punishment.- (1) … …
(2) … … …
(3) … … …
(4) Notwithstanding anything contained in any judgment, no court shall have the power to pass any order of punishment for or in relation to any act of contempt, save and except in accordance with subsection (1).

6. Bars to taking cognizance.- (1) … … …
(2) No court shall take cognizance, as of a contempt of court, of any averment made before the Supreme Judicial Council in respect of which the Supreme Judicial Council has given a finding that the averment fulfilled the requirements of clause (vi) of the proviso to section 3.
(3) No court shall take cognizance of contempt of court arising from an averment made in due course in appellate, revisional or review proceedings, till such proceedings have been finalized and no further appeal, revision or review lies.

8. Transfer of proceedings for reasons personal to the judge.- (1) Where, in a case in which a judge has made an order under sub-section (1) of section 7, not being a case referred to in sub- section (4) of that section, the alleged contempt of court involves scandalization personal to such judge and is not scandalization of the court as a whole or of all the judges of the court, judge shall forward the record of the case and such comments, if

any; as he deems fit to make, to the Chief Justice of the court.

(2) ... ... ...

(3) If, at any stage of a case in which the Chief Justice has passed an order under clause (a) of sub section (2), the Chief Justice is of opinion that, in the interests of justice, the case shall be transferred to another judge, he may pass an order accordingly; and the case shall then be heard by such other judge.

(4) ... ... ...

(5) When in a case the first cognizance of the offence has been taken by the Chief Justice, the functions of the Chief Justice, under sub-section (1), (2) and (3) shall be performed by a Bench of judges composed of the two next most senior judges available.

10. Expunged material.- No material which has been expunged from the record under the orders of—

(a) ... ... ...

(b) the presiding officer of the Senate, the National Assembly, or a Provincial Assembly, shall be admissible in evidence.

11. Appeal and limitation for appeal.- (1) ... ... ...

(2) ... ... ...

(3) An intra-court appeal shall lie against the issuance of a show cause notice or an original order including an interim order passed by a Bench of the Supreme Court in any case, including a pending case, to a larger bench consisting of all the remaining available judges of the Court within the country:

Provided that in the event the impugned show cause or order has been passed by half or more of the judges of Court, the matter shall, on the application of an aggrieved person, be put up for re- appraisal before the full court:

Provided further that the operation of the impugned show cause notice or order shall remain suspended until the final disposal of the matter in the manner herein before provided.

(4) An appeal under sub-section (1) or sub-section (2) shall be filed-

(a) in the case of an appeal to a Bench of the High Court, within thirty days; and

(b) in the case of an appeal to the Supreme Court, within sixty days, from the date of the order appealed against.

(5) An intra court appeal or application for re-appraisal shall be filed within thirty days from the date of show cause notice or the order, as the case may be.

12. Power to make rules.- The Federal Government may make rules, not inconsistent with the provisions of this Act, providing for any matter relating to its procedure.

> 13. Repeal.- (1) The Contempt of Court Ordinance, 2003 (V of 2003) is hereby repealed.
>
> (2) For removal of doubt it is hereby declared that the Contempt of Court Act, 1976(LXIV of 1976), Contempt of Court Ordinance, 2003 (IV of 2003) and Contempt of Court Ordinance, 2004 (I of 2004) stand repealed."

It was further held that the remaining provisions of the impugned legislation, if allowed to stay on the statute book, would serve no purpose particularly, when it was held that repealing section itself was a nullity, therefore, the principle of severability as applied by this Court. Resultantly, COCA 2012 was declared unconstitutional, void and *non est*, and in consequence whereof, following the dictum laid down in *Attorney-General for Alberta v. Attorney-General for Canada* (AIR 1948 PC 194), it was declared that the Contempt of Court Ordinance, 2003 shall be deemed to have revived with effect from 12.07.2012, the day when COCA 2012 was enforced with all consequences.

6. Mr. M. Zafar, Sr. ASC for the petitioner in Constitution Petition No. 77 of 2012 has argued that the legislature cannot curtail power of the superior courts conferred upon them under Article 204. The purpose of clause (3) of Article 204 under which the impugned legislation has been promulgated is to provide for and to regulate the system to achieve the object of paragraphs (a) to (d) of clause (2) of Article 204 of the Constitution, namely, to punish any person who is found guilty of the commission of any of the acts mentioned therein. He has submitted that the concept of supremacy of Parliament, according to the Constitution, is limited, inasmuch as the Parliament can make only such laws which are not violative of Fundamental Rights. The test of constitutionality is test in the Constitution, and not in the Parliament. To elucidate the point, he stated that if a person is elected, he becomes a representative of the people, but as a single

person he cannot make any law. He has to be part of the relevant majority, i.e., simple majority in the case of an ordinary law, and two-third majority in the case of amendment of the Constitution. Therefore, if a Member of the House is not part of the requisite majority, he cannot make law. These are his limitations. He further argued that power of the Court to punish for its contempt is regulated by Article 204 itself. The immunity of any person is correlated with the power of the Court. If the Court does not inquire from any person, he enjoys the immunity. But if the Court has power to inquire from him, he has no immunity. Article 190 of the Constitution provides that all judicial and executive authorities shall act in aid of the Supreme Court. This acting in aid of the Supreme Court is essentially in terms of the Constitution, therefore, an order passed by the Court cannot be thwarted. The order is to be implemented by the concerned authorities of the Government because all those authorities are required to act in aid of the Supreme Court. He further argued that in presence of the Supreme Court Rules, 1980, there was no need of framing any other rules by the Federal Government as is envisaged by section 12 of COCA 2012.

7. Mr. A.K. Dogar, Sr. ASC has argued that under Entry 55 of the Federal Legislative List, Parliament can make laws about “the jurisdiction and powers of all courts” but only with respect to any of the matters in the said list and that too, to the extent expressly authorized by, or under, the Constitution. Since under Article 204 of the Constitution, the Parliament is not expressly authorized to make a law about the jurisdiction and powers of the subordinate

officers acting in judicial capacity, therefore, the impugned Act in its entirety is *ultra vires* of Article 70 of the Constitution.

8. Mr. Hamid Khan, Sr. ASC has argued that Article 175 of the Constitution provides that no Court shall have any jurisdiction save as is or may be conferred by the Constitution or by or under any law. Since Article 204 confers specific powers and jurisdiction upon the Supreme Court and a High Court, therefore, the Parliament has no authority to curtail those powers and jurisdiction in view of Entry 55 of the Federal Legislative List. He has further argued that the Parliament while enacting COCA 2012 under the purported exercise of powers conferred on it to regulate the exercise of jurisdiction under clause (3) of Article 204 has in fact gone to the point of prohibiting the exercise jurisdiction by the Court. Para (i) to proviso to section 3 completely takes away or prohibits the Supreme Court from initiating contempt of court proceedings against persons referred to in Article 248(1) as public office holders. This, according to the learned counsel, is way beyond the power of regulation of jurisdiction and in fact amounts to usurpation, prohibition or negation of powers and jurisdiction of the Superior Courts. The power to regulate does not mean or include the power to prohibit. In support of the proportion, he has placed reliance on *Arshad Mahmood v. Government of Punjab* PLD 2005 SC 193 (221). Therefore, the provisions of COCA 2012 whereby the power and jurisdiction of the Supreme Court have been curtailed in any manner whatsoever are unconstitutional.

9. Mr. Ikarm Chaudhry, ASC has argued that the impugned enactment is violative of Entry 55 of the Federal Legislative List of the

Fourth Schedule of the Constitution, inasmuch as it encroaches upon domain and jurisdiction of the Superior Courts.

10. Mr. Rashid A. Rizvi, Sr. ASC has submitted that Entry 55 does not empower the Parliament to curtail or limit the jurisdiction of the Supreme Court nor does it empower the Parliament to legislate on matters relating to contempt of Court. Hence, the Parliament in enacting/promulgating COCA 2012 has exceeded its power and authority; therefore, the same is a colourable piece of legislation and void. He has referred to the cases of *S.S. Bola v. B.D. Sardana* (AIR 1997 SC 3127), *Jaora Sugar Mills Pvt. Ltd. v. State of MP* (AIR 1966 SC 416), *Shankara Narayana, BR v. State of Mysore* (AIR 1966 SC 1571), *R. S. Joshi v. Ajit Mills* (AIR 1977 SC 2279), *Ashok Kumar Alias Golu v. Union of India* (AIR 1991 SC 1792) = [(1991) 3 SCC 498], *Robkar Adalat v. Sarfraz Alam* (1996 MLD 1752) and Constitutional Law of India By H.M. Seervai, Volume I, 4th Edition, Chapter III "Court and the Constitution" at pages 269-275.

11. Mr. Abdul Rehman Siddiqui, ASC has argued that the Act is a void piece of legislation in terms of Article 8 and is beyond the legislative powers of the Parliament in terms of Article 204 read with Entry 55 of the Fourth Schedule. He has further argued that the under Act, the judiciary has been rendered powerless and the implementation mechanism of orders of Superior Courts has been frustrated. If any authority of the Government does not implement an order, contempt proceedings are initiated, but henceforth if any authority will not implement the order, and a show cause notice is issued to it, there will be automatic stay. Thus, the executive authority has been given precedence over the judicial authority and the power of

judicial review has been away, which will lead to bad governance and anarchy.

12. Mr. Muhammad Azhar Siddique, ASC has argued that Article 70(4) read with Entry 55 restricts the power of the Legislature in respect of the Supreme Court and confers power upon it to enlarge the jurisdiction of Supreme Court and confer supplemental powers. The impugned contempt law seeks to take away the jurisdiction and powers of the Supreme Court conferred under Article 204 of the Constitution.

13. Ch. Afrasiab Khan, ASC stated that Article 204(3) allows the Parliament to regulate the exercise of power, but the power itself cannot be curtailed nor any exceptions can be created in it by means of an ordinary legislation. What can be regulated is the procedure for exercise of power, but even that would be subject to other Articles of the Constitution.

14. Mrs. Nasira Iqbal, ASC has submitted that the power of the Supreme Court can only be enlarged and not contained. The impugned Act is a nullity in the eye of Constitution.

15. Mr. Latif Afridi, ASC appeared on behalf of Chairman, Executive Committee of the Pakistan Bar Council (PBC) and has stated that PBC is the apex statutory body of the lawyers, which has always stood with the judiciary for the supremacy of the Constitution and rule of law. The present law under challenge is the product of peculiar circumstances and it has to be read and must be considered in its peculiar background. It is not Pakistan alone where there are differences of opinion between the judiciary and the Parliament, or

vice versa. There has been considerably lengthy history behind it. He has argued that COCA 2012 is not at all in conformity with Article 204. It is inconsistent with Fundamental Rights. He stated that as was earlier pointed out perhaps by Mr. Hamid Khan, though it has been enacted under Article 204, which defines the Court, as the Supreme Court and a High Court, under clause (3) the Court has the power to make rules whereas the Parliament has the right to make a law to regulate the exercise of powers of the Supreme Court and a High Court. Since those powers do not provide quantum of punishment, obviously, the law may provide for quantum of punishment as well as the procedure. The COCA 2012 is meant for regulating the procedure of the Supreme Court and the High Courts. Section 3 with all the defences provided therein is contrary to the Fundamental Rights. Section 2, 6 and 9 are violative of Fundamental Rights whereas sections 12 and 13 with respect to right of appeal and limitation are discriminatory, inasmuch as the accused in the contempt case remains present in court, therefore, there is no logic for providing limitation of 60 days for appeal instead of 30 days, which is the normal period for filing an appeal.

16. Mr. Shahid Orakzai, petitioner in Constitution Petition No. 99 of 2012 has argued that the word “law” occurring in Article 204(3) does not mean Act of *Majlis-e-Shoora* (Parliament), but refers to a provincial law as defined in Article 260 of the Constitution. Therefore, it is violative of provincial autonomy. He has prayed that sections 3, 4, 5, 6, 7, and 10 of the impugned Act may be declared *ultra vires* of the Constitution.

17. Mr. Zafarullah Khan Advocate, petitioner in person in Constitution Petition No. 97 of 2012 has, *inter alia*, argued that if any of the executive or judicial authorities does not act in aid of the Supreme Court in obedience to the mandate of Article 190 of the Constitution, they are amenable to the contempt jurisdiction of this Court under Article 204 of the Constitution, therefore, the impugned law is in direct conflict with Articles 190 and 204 of the Constitution.

18. Barrister Zafarullah Khan, Ch. Muhammad Ashraf Gujjar, ASC, Hashmat Ali Habib, Engineer Jamil Ahmed Malik, G.M. Chaudhry, Solicitor Muhammad Dawood, Syed Mahmood Akhtar Naqvi, Liaqat Ali Qureshi, Ghulam Mustafa and Muhammad Jamil Rana have appeared in person and thrown challenge to the constitutionality of the impugned legislation on more or less same or similar grounds and most of them have adopted the arguments of Mr. Hamid Khan, Mr. Rashid A. Rizvi, and other learned counsel for the petitioners.

19. Mr. Abdul Shakoor Paracha, ASC has argued that the Supreme Court under Article 204 of the Constitution has power to punish any person for its contempt, but the exercise of power is to be regulated by law framed by the Parliament in terms of clause (3) *ibid*. He has submitted that the word ‘regulate’ is not defined in the Constitution. He has referred to the meaning of the word ‘regulate’ given in Corpus Juris Secundum and the case of *Robkar Adalat v. Sharaf Alam* (supra).

20. Learned Attorney General has also argued that the exercise of power of the Court to punish for contempt is to be regulated by the Legislature and the scheme of Article 204(3) of the

Constitution does not allow the Supreme Court or a High Court to choose its own law to regulate the exercise of its power. This matter is clearly left to the Legislature, which is the regulator in this case. The moment the law is framed by the Parliament, the rules, if any, will be subject to such and in case of any inconsistency, the law will prevail over the rules framed by the Court. In other words, though the Court is allowed to frame rules to regulate its procedure, but the same will be subject to the law made by the Parliament.

21. We have heard the learned counsel for the petitioners and the respondent Federation of Pakistan as well as the learned Attorney General. Before dealing with the points raised in the petitions, it is necessary to understand the concept of the power of the Court to punish for its contempt from different sources and its evolution overtime. It is a special power, which authorizes the Judge to swiftly and promptly punish a person without recourse to a formal and lengthy trial. The concept of “contempt of Court” has been subject of varying discussion. To some, it is to uphold the majesty of law and the dignity of courts and protect their image in the eyes of the members of the public, whereas others have taken the view that it is merely not to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice. Therefore, the law empowers the courts of law to prevent by summary proceedings any attempt to interfere with the administration of justice. The jurisdiction of committing for contempt is practically arbitrary and unlimited, which is to be exercised always with reference to the interests of the administration of justice and with the greatest reluctance and anxiety on the part of Judges to see whether there is

no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. The contempt jurisdiction is used only from a sense of duty and under the pressure of the public necessity. The object of contempt proceedings is not to afford protection to the Judges personally from imputations to which they may be exposed as individuals, but to keep the course of justice free and to ensure that law and order prevail in the courts. In this behalf, it is relevant to mention that Almighty Allah in *Surah An-Nisā'* has ordained that ***"But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission"*** [4 : 65]. Thus, under Islamic law, a *Qadi* (Judge) has the power to punish contemners. According to a *Hadith* of the Holy Prophet (PBUH), once a dispute arose between an *Ansari* and *Hazrat Zubair* (R.A) on the issue of irrigation of land and the case came before the Holy Prophet (PBUH) for decision. As the land of *Hazrat Zubair* was situated before the land of *Ansari*, therefore, the Holy Prophet (PBUH) gave his verdict: "*O Zubair, first you irrigate your land and then leave the water for the land of the Ansari*". The Ansari objected to the decision that *Hazrat Zubair* was the cousin of the Prophet (Peace be upon him), therefore, the decision was biased. On this, the Holy Prophet (PBUH) got annoyed and said, "*O Zubair! Irrigate your land first and block the water until it reaches top of the wall*". While interpreting this verse, the famous scholar *Allama Al-Qurtubi* wrote that *if someone criticizes the Qadi and not his decision, the Qadi has the power to penalize him*. *Allama Maverdi* explained that the order of the Holy Prophet (PBUH) to

block the water until it reached the wall was a punishment (*Taa'zir*). Similarly, Imam *Shafi* said, "if the parties quarrel before a *Qadi*, the *Qadi* should forbid them, if they continue, the *Qadi* should admonish them and on their refusal to obey, the *Qadi* should detain them according to the intensity of the quarrel. (*Adab-al-Qadi, Vol.I by Allama Mawardi*). *Allama Muhammad Shaheer Arslan* in his book '*Al qaza w Al qaza*' has reported that during the Abbasid Caliphate *Qadi Abu ul Mofid Saif ibn Jaber* convicted and sentenced a person for committing contempt of court for abusing the *Qadi* in court room. Dr. Abdul Aziz Aamir, in his book, '*Al-Taa'zir Fi Shariah-al-Islamiya*' has written that if the parties abuse each other before a *Qadi*, he should send them behind the bars or give any other punishment so that the dignity of the court should be maintained. See: *Fikr-o-Nazar*, for the Month of July, 1983, published by *Idara Tahqeeqat-e-Islami*, *Jamia Islamia*, Islamabad.

22. The practice of punishing those who refuse to carry out its orders or scandalize the Courts or the Judges finds its traces in the ancient times. In western countries, the King was sovereign possessed of all legislative, administrative and judicial powers. The King would make all judicial decrees himself, but soon he assigned this task to Judges. So, a Judge while deciding a dispute between two parties was considered as the representative of the King and the judicial pronouncements were considered as the utterances of the sovereign. As such, disobedience of the order of a Court was considered contempt of the King and not that of the Court. Where a prisoner tried for high treason (1796) was acquitted, and on the verdict being pronounced, some persons in court clapped their hands and huzzaed, one

gentleman on being particularly observed by the court was fined 20 pounds. [Stone's case (Howell's State Trials, vol. xxv, p. 1458)]. Nothing can be more indecent than to make any noise in a court of justice. Any noise close to, or so near the court, as to disturb their proceeding is a contempt of court. A stroke or blow in a court of justice, or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life. This was to instill fear and elicit obedience from all petitioners who came to the Court. A rescue of a prisoner from the courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life; being looked upon as an offence of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excused. [Blackstone, vol. iv. pp. 124 & 125]. The amputation of the right hand was the common form of punishment at the time. One James Williamson was visited with the said punishment for throwing a stone at the Bench in Chester Castle. In 1681, the accused at the Salisbury Summer Assizes threw a brickbat at Chief Justice Richardson. He was hanged in the court, preceded by the offending hand being cut off and fixed to a scaffold. [*2 Dyer 188 b (notes), cf. Oswald, James Francis, Contempt of Court, Committal and Attachment and Arrest upon Civil Process, Bibliolife LLC, (2009) at pp.24-25*]. While the punishment has been modernized, courts in almost every country resort to contempt proceedings regularly.

23. In India, the High Courts which were established under the Letters Patent, had the power to punish a contemner. Some doubts

having arisen as to the power of the High Courts to punish contemners, the Contempt of Courts Act, 1926 (Act No. XII of 1926) was enacted. By means of Contempt of Courts (Amendment) Act, 1937 (Act No.XII of 1937), it was made applicable to all the Provinces of India. Section 2 of the Act empowered the High Courts of Judicature established by Letters Patent to exercise the same jurisdiction, power and authority in accordance with the same procedure and practice in respect of contempt of Courts subordinate to them as they had exercised in respect of their own contempt. It also invested the Chief Court with the powers of a High Court. Section 3 of the said Act provided the limit of punishments by laying down that "[s]ave as otherwise expressly provided by any law for the time being in force, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or with fine, which may extend to two thousand rupees, or with both." Proviso to section 3 provided that an accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court. It is noteworthy that the said Act did not provide procedure but by reference adopted the procedure and the practice, which were obtaining in the High Courts of Judicature established under the Letters Patent.

24. Article 176 of the Constitution of the Islamic Republic of Pakistan 1956 empowered the Supreme Court and the High Courts to deal with the contemners in the following terms: -

> "176. The Supreme Court and each High Court shall be a Court of record and shall have all the powers of such a Court, including the power to make any order

> for the investigation or punishment of any contempt of itself."

Item No.16 of the Federal List (Fifth Schedule of the said Constitution) provided for legislation on the constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of such Court) and the fees taken herein; persons entitled to practice before the Supreme Court, which showed that the contempt of court matters were to be dealt with under the ordinary law, prevailing at that time. The Constitution of the Islamic Republic of Pakistan of 1956 was abrogated in 1958 and a new Constitution, namely, Constitution of the Republic (later amended as Islamic Republic) of Pakistan, was framed in 1962. Article 123 of the said Constitution made a provision for the contempt of Court as follows: -

> "123. (1) In this Article, 'Court' means the Supreme Court or a High Court.
>
> (2) A Court shall have power to punish any person who, --
>
> (a) abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Court;
>
> (b) scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt;
>
> (c) does anything which tends to prejudice the determination of a matter pending before the Court; or
>
> (d) does any other thing which, by law, constitutes contempt of the Court.
>
> (3) The exercise of the power conferred on a Court by this Article may be regulated by law and, subject to law, by rules made by the Court."

After the abrogation of the 1962 Constitution, Interim Constitution of the Islamic Republic of Pakistan was framed in 1972, Article 206

whereof made provision regarding contempt of Court in the terms it existed in the 1962 Constitution. Then came the Constitution of the Islamic Republic of Pakistan of 1973, Article 204 thereof as originally enacted provided as under: -

> "204. Contempt of Court. -- (1) In this Article, 'Court' means the Supreme Court or a High Court.
>
> (2) A Court shall have power to punish any person who--
>
> (a) abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Court; or
>
> (b) scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge in relation to his office into hatred, ridicule or contempt; or
>
> (c) does anything which tends to prejudice the determination of a matter pending before the Court; or
>
> (d) does any other thing, which, by law, constitutes contempt of the Court.
>
> Explanation. – Fair comment made in good faith and in the public interest on the working of the Court or any of its final decisions after the expiry of the period of limitation for appeal, if any, shall not constitute contempt of the Court.
>
> (3) The exercise of the power conferred on a Court by this Article may be regulated by law and, subject to law, by rules made by the Court."

It is pertinent to mention here that Article 176 of the 1956 Constitution neither defined contempt of Court nor did it provide any defences to it. It merely empowered the Supreme Court and the High Courts to make an order for the investigation or punishment for their contempt. On the contrary, Article 123 of the Constitution of 1962 not only empowered the Supreme Court and the High Courts to punish any person for contempt but also elaborated what constituted contempt by defining the same in the above quoted paragraphs (a) to (d). Clause (3) of Article 123 of the 1962 Constitution provided that the exercise

of the power conferred on a Court by the aforesaid Article may be regulated by law and subject to law by the rules made by the Court. Article 204 of the Constitution adopted Article 123 of 1962 Constitution and also provided Explanation after paragraph (d) of clause (2) thereof, which laid down that fair comments made in good faith and in the public interest on the working of the Court or any of its final decisions after the expiry of the period of limitation for appeal, if any, shall not constitute contempt of Court. The Constitution (Fifth Amendment) Act, 1976, which was passed on 16.09.1976 to be effective from 01.12.1976, amended Article 204 and substituted clauses (2) & (3) by new clause (2) as under: -

> (2) A Court shall have the power to punish a person for contempt of court in accordance with law.

25. By the President's Order No. 14 of 1985, the original Article 204 was brought back with effect from 02.03.1985. However, Explanation to clause (2) as originally enacted was omitted. The said PO was affirmed by the Parliament by means of Article 270A under the Constitution (Eighth amendment) Act, 1985.

26. In pursuance of the provisions of Article 204, the Contempt of Court Act, 1976 was promulgated, whereby the Contempt of Courts Act, 1926 (XII of 1926) was repealed.

27. On 10.02.1998, when Mian Muhammad Nawaz Sharif, the then Prime Minister of Pakistan was facing contempt proceedings before the Supreme Court, COCA 1976 was amended by the Contempt of Courts (Amendment) Act, 1997 (Act II of 1998), which made provision for filing of intra-court appeal against the issuance of show cause notice or an original order including an interim order passed by

a Bench of the Supreme Court to a larger bench consisting of all the remaining available Judges of the Court within the country and that the operation of the impugned show cause notice or order shall remain suspended until the final disposal of the matter. The constitutionality of the above newly inserted provision of intra-court appeal was challenged before this Court in Constitution Petition No.43 of 1997 wherein the operation of the impugned legislation was suspended vide order dated 20.11.1997. Later on, since the Bill was converted into Act of Parliament, therefore, the petition was dismissed in view of this technicality *vide* judgment reported as *Navid Malik v. President of Pakistan* (1998 SCMR 1917).

28. On 27.10.1998, the Contempt of Court Ordinance, 1998 (Ordinance X of 1998) was promulgated whereby COCA 1976 was repealed. In the said Ordinance, contempt of Court was categorized as "civil contempt", "criminal contempt" and "judicial contempt" as per definition clause [section 2(b), (c) & (d)], which read as under: -

> "(b) "civil contempt" means the wilful flouting or disregard of –
> (i) an order, whether interim or final, a judgment of decree of a court;
> (ii) a writ or order issued by a Court in the exercise of its constitutional jurisdiction;
> (iii) an undertaking given to, and recorded by, a court; and
> (iv) the process of a court;
>
> (c) "criminal contempt" means the doing of any act with intent to, or having the effect of, obstructing the administration of justice;
>
> (d) "judicial contempt" means the scandalization of a court and includes personalized criticism of a judge while holding office."

The aforesaid Ordinance X of 1998 stood repealed after expiration of 120 days by virtue of Article 89 of the Constitution. Thereafter, on

10.07.2003, the Contempt of Court Ordinance No. IV of 2003 was promulgated, which expired on 09.11.2003. On 15.12.2003, the Contempt of Court Ordinance No. V of 2003 was promulgated, which was made applicable with effect from 09.11.2003, the day the earlier Ordinance had expired. It is pertinent to mention here that by means of Ordinance No. V of 2003, COCA 1976 was again repealed. During the currency of the said Ordinance V of 2003, Article 270AA was inserted into the Constitution on 31.12.2003 by means of the Constitution (Seventeenth Amendment) Act, 2003. Clause (3) of the said Article provided that *all Proclamations, President's Orders, Ordinances, Chief Executive's Orders, laws, regulations, enactments, including amendments in the Constitution, Notifications, Rules, Orders or bye-laws in force immediately before the date on which this Article comes into force shall continue in force until altered, repealed or amended by the competent authority.* As such, by virtue of said Article, all legislative instruments including the Contempt of Court Ordinance No. V of 2003 mentioned therein were continued in force until "altered, repealed or amended by the competent authority".

29. On 15.07.2004, the Contempt of Court Ordinance, 2004 (Ordinance No. I of 2004) was promulgated, which was made applicable with effect from 15.04.2004, the day when the Ordinance No.V of 2003 would have expired in the ordinary course knowing well that Contempt of Court Ordinance No. V of 2003 had been protected under Article 270AA of the Constitution. By means of Ordinance No. I of 2004, COCA 1976 was again repealed, but not the Ordinance V of 2003, presumably on account of its supposed expiry after a period of 120 days as provided in Article 89 of the Constitution. The Ordinance

No. I of 2004 was repealed on 14.11.2004 on expiry of 120 days. It is pertinent to mention that Article 270AA was reinserted by the Constitution (Eighteenth Amendment) Act 2010. However, by Nineteenth and Twentieth Constitutional Amendments, no change was brought about in Articles 270AA.

30. Article 204(3) of the Constitution provides that the exercise of the power conferred on a Court by this Article to punish for its contempt may be regulated by law and, subject to law, by rules made by the Court. It is, therefore, necessary in the first instance to understand the meaning of the word 'regulate' in the first instance from various sources: -

**Black's Law Dictionary, Fifth Edition, p. 1156 -**

"regulate": To fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws. The power of Congress to regulate commerce is the power to enact all appropriate legislation for its protection or advancement; to adopt measures to promote its growth and insure its safety; to foster, protect, control and restrain.

**Corpus Juris Secundum, Vol. LXXVI, p. 610 -**

"regulate": The word 'regulate' is derived from the Latin words 'rego' and 'regula'. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. The word is difficult to define in other terms because it involves a conception for which it stands more accurately than any synonym and there is diversity of opinion as to its meaning and its application to a particular state of acts. Some Courts giving to the term a somewhat restricted and others giving to it a liberal construction.

The word 'regulate' is further defined as meaning to put or keep in good order; to methodize; to arrange; to dispose; to produce uniformity of motion or action. The term is also employed as meaning to foster; to protect; to provide for.

"The word 'regulate' ordinarily indicates not so much the creation or establishment of a new thing as the arranging in proper order and controlling that which already exists

and it has been held to contemplate or imply the continued existence of the subject-matter to be regulated."

**Words and Phrases by West Publishing Co., Vol. 36-A, p. 303-305 –**

"A power to regulate implies a continued existence of the matter to be regulated.

"To 'regulate' in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned as well as the public at large and to promote its growth and insure its safety.

**"While the word 'regulate' has been given a comprehensive meaning and construed to signify both Government and restriction thereby including in an act all subject germane to the object named it does not so much imply creating a new thing as arranging in proper order and controlling that which already exists.**

"To 'regulate' is to fix or control the manner in which a thing is to be done, to prescribe a rule or method for doing it. It is comprehensive enough to cover the exercise of authority over the whole subject to be regulated.

The Superior Courts have interpreted the word 'regulate' in various pronouncements. In *Messrs East and West Steamship Co. v. Pakistan through Secretary to Government of Pakistan* (PLD 1958 SC 41) the observations from *National Labour Relations Board v. Jones and Laugh in Steel Corporation* (301 US 1 at p. 37) that the power to regulate implies a power to foster, to protect, control and restrain, were quoted with approval and it was held that if the Constitution gives to the Legislature the power to regulate a trade by a licensing system, it must follow that the power to prohibit vests in the Legislature insofar as the trade under such system may only be carried on by the licensed persons or corporations. Also see *Malik Asghar v. Government of Punjab* (PLD 2003 Lahore 73). The expression "power to regulate" was also considered in *Arshad Mahmood's case* (supra) and it was held that the power to regulate does not mean or include power to prohibit. In

*Robkar Adalat v. Sarfraz Alam* (supra), the High Court of AJK has held that "the word 'regulate', connotes making of the law prescribing the manner, method and procedure of the exercise of the power by the Court, not controlling its power, but arranging the same in a way that a fair trial is ensured. It was further held that even if the law and rules are not framed for regulating the power, the superior Courts are still at liberty to exercise the power vested in them under this section to punish any person for contempt of Court; and even after framing the law and rule, if any of their provision restricts, curtails or abridges the powers of Courts, that shall be ignored as non-existent and the Courts may proceed in the matter. Also see *VSR & Oil Mills v. State of A.P.* (AIR 1964 SC 1781), *State of U.P. v. M/s Hindustan Aluminium Corpn.* [AIR 1979 SC 1459], *Jiyajeerao Cotton Mills Ltd.. v. Madhya Pradesh Electricity Board* [1989 (Suppl.) 2 SCC 52], *U.P. Co-Operative Cane Unions v. West U.P. Sugar Mills Association* (AIR 2004 SC 3697) = [(2004) 5 SCC 430], *Union Of India v. M/s Asian Food Industries* (AIR 2007 SC 750) = [(2006) 13 SCC 542], *Jibendra Kishore v. Province of East Pakistan* (PLD 1957 SC 41).

31. The question of regulating the exercise of power of the Court under Article 204(3) was considered by Mr. Justice Ajmal Mian, J (as he then was, later CJ) in the case of *State v. Khalid Masood* (PLD 1996 SC 42), wherein he held that clause (3) provides that the exercise of the power conferred on a Court by this Article may be regulated by law and subject to law by rules made by the Court, but it does not mean that a statute can control or curtail the power conferred on the superior Courts by this Article, nor does it mean that in the absence of a statute on the above subject, the above Article will

be inoperative. He further observed that the law referred to in clause (3) of the above Article relates to procedural matters or matters which have not been provided for.

32. As regards the contention of the learned Attorney General that COCA 1976, which model was adopted in COCA 2012 had held the field for almost a quarter of a century, but the same was never challenged by anyone, it is true that constitutionality of the said law on the touchstone of any provision of the Constitution was never tested by this Court, but absence of challenge to any particular law or a provision thereof in the past would hardly make it immune to any challenge in the future. However, it may be pointed out that *Khalid Masood's* (supra), Ajmal Mian, J, (as he then was, later CJ,) in passing commented on the implications of the words 'regulated by law' used in clause (3) of Article 204 of the Constitution and left the question whether any provision of the Act is in conflict with the above Article open to examination in an appropriate case. It may also be pointed out that the said learned Judge once again had the occasion of examining the provisions of COCA 1976 in the case of *Masroor Ahsan v. Ardeshir Cowasjee* (PLD 1998 SC 823) wherein he held as under:-

> "75. Before concluding the above discussion, I may observe that the legal position which has emerged on account of the above discussion of the provisions of the Constitution, the Contempt of Court Act, the Supreme Court Rules and the case-law of Pakistani and foreign jurisdictions in nutshell is as under:-
>
> PROCEDURAL:
>
> (i) That in view of subsection (1) of section 7 of the Contempt of Court Act read with Rule 4 of Order XXVII of the Supreme Court Rules, a show-cause notice for contempt should contain the substance of the charge indicating the offending portion of the

speech/writing which prima facie has been found to be contemptuous.

(ii) That the old view, that a Judge in respect of whom contempt proceedings were initiated could hear the contempt case himself, in view of the fact that it was a special jurisdiction (sui generis) stands modified by section 8 of the Contempt of Court Act which envisages that a Judge including the Chief Justice should not hear the matter if the contempt relates to his person subject to an exception that if contempt is committed in face of the Court or the Judge or the Chief Justice, he may proceed immediately against the contemner and may punish him.

SUBSTANTIVE LAW:

(i) That since the freedom of speech under Article 66 of the Constitution is subject to the Constitution, as a corollary, it must follow that the freedom of speech of a Member of the Parliament is subject to the contempt law under Article 204 of the Constitution and, therefore, the above privilege is not absolute.

(ii) That in view of Article 68 of the Constitution read with clause (c) of sub-rule (2) of Rule 248 of the National Assembly Rules, the Speaker is obliged not to allow a Member to discuss the conduct of any Judge of the Supreme Court or a High Court in the discharge of his duties and if a Member does it in violation of the above provisions, the Speaker is expected to take any of the actions envisaged under Rules 267, 268 and 269 of the aforesaid Rules discussed hereinabove.

(iii) That an expunction order in respect of the offending portion of a speech at the fag-end of the session would not be a defence to an action under Article 204 of the Constitution for the reasons discussed in the body of the above judgment.

(iv) That Article 204 of the Constitution relating to the contempt of Court is to be construed in conjunction with Articles 19 and 66 thereof keeping in view the modern trend about contempt law obtaining in the world to protect and project the freedom of speech and expression and the freedom of press subject to reasonable restrictions.

(v) That the power of contempt should be used sparingly and only in serious cases and that the Court should not be either unduly touchy or over-astute in discovering new varieties of contempt for “its usefulness depends on the wisdom and restraint with which it is exercised”.

(vi) That fair comments about the general working of Courts made in good faith in the public interest and in temperate language and fair comments on the merits of a decision of a Court made after the pendency of the proceedings in a case in good faith and in temperate language without impugning the integrity or impartiality of the Judge are protected under Exceptions (i) and (ii) to section 3 of the Contempt of Court Act.

(vii) That similarly subject to a prohibition of publication under section 9 of the Contempt of Court Act or under any other law for the time being in force, the publication of fair and substantially accurate reporting of any judicial proceedings is also protected under Exception (iii) to section 3 of the said Act."

33. Having considered the dictionary meanings of the word 'regulate' and the interpretation given to it by the Superior Courts in the different judgments noted hereinabove, we reaffirm the law laid down in *Khalid Masood's case* (*supra*) that the law referred to in Article 204(3) relates to procedural matters or matters which have not been provided for and though the exercise of the power conferred on a Court by this Article may be regulated by law and subject to law by rules made by the Court, but it does not mean that a statute can control or curtail the power conferred on the Superior Courts under this Article nor in the absence of a statute on the above subject, the said Article will be inoperative.

34. At this juncture, it may also be noticed that Entry 55 of the Federal Legislative List (Fourth Schedule to the Constitution) authorizes the Parliament to make law on jurisdiction and powers of all courts with respect to any of the matters in the said List to such extent as is expressly authorized by or under the Constitution. Thus, the said Entry on the one hand limits the legislative power of the Parliament to

the making of any law on the jurisdiction and powers of the Supreme Court, and on the other hand empowers the Parliament to make law for enlargement of the jurisdiction of the Supreme Court and the conferring of supplemental powers.

35. The Constitution of Pakistan confers upon the superior Courts power and jurisdiction under Articles 199 and 184(3) to examine the constitutionality of the executive and the legislative actions. In *Mehram Ali v. Federation of Pakistan* (PLD 1998 SC 1445) this Court adjudged the constitutionality of various provisions of the Anti-Terrorism Act, 1997 and declared sections 5(2)(i), 14, 19(10)(b), 24, 25, 26, 27, 28, 30, 35, 37 and 40 of the Act to be invalid being violative of various Articles of the Constitution, namely, Articles 10, 13(b), 25, 175 & 203 of the Constitution and the principle of independence of judiciary enshrined therein. Similarly, in the case of *Liaqat Hussain v. Federation of Pakistan* (PLD 1999 SC 504) it was held that Court cannot strike down a statute on the ground of *mala fides*, but the same can be struck down on the ground that it is violative of a constitutional provision. Consequently, the Court declared section 6 of the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998 in so far as it allowed the establishment of Military Courts for trial of civilians charged with the offences mentioned in the Schedule to the said Ordinance to be unconstitutional and without lawful authority. Also see *Civil Aviation Authority v. Union of Civil Aviation Employees* (PLD 1997 SC 781), *Elahi Cotton Mills Ltd. v. Federation of Pakistan* (PLD 1997 SC 582), *Pir Sabir Shah v. Shad Muhammad Khan* (PLD 1995 SC 66), *Federation of Pakistan v. Shaukat Ali Mian* (PLD 1999 SC 1026), *Wattan Party v. Federation of Pakistan*

(PLD 2006 SC 697), *Muhammad Mubeen-us-Salam v. Federation of Pakistan* (PLD 2006 SC 602), *Muhammad Nasir Mahmood v. Federation of Pakistan* (PLD 2009 SC 107), *Dr. Mobashir Hassan* (supra) and *All Pakistan Newspapers Society v. Federation of Pakistan* (PLD 2012 SC 1).

36. Under Article 70 of the Constitution, the Parliament is authorized to make laws with respect to any matter in the Federal Legislative List by adopting procedure laid down in the Constitution. Entry No.55 of the Fourth Schedule, in terms of Article 70(4), prescribes that laws can be promulgated pertaining to *jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorized by or under the Constitution, the enlargement of the jurisdiction* (emphasis provided) *of the Supreme Court, and the conferring thereon of supplemental powers*. Under this Entry, the Constitution maker consciously separated the Supreme Court from all other courts. A plain reading of the words of this Entry, particularly, the portion, where emphasis has been provided, not only creates distinction between the Supreme Court and other courts, but also speaks in respect of enlargement of the jurisdiction of the Supreme Court and conferring of supplemental powers. The literal rule of interpretation of the Constitution and statutes, also known as the golden rule of interpretation, is that the words and phrases used therein should be read keeping in view their plain meaning. Reference in this behalf may be made to the case of *Syed Mukhtar Hussain Shah v. Mst. Saba Imtiaz* (PLD 2011 SC 260), *Mumtaz Hussain v. Dr. Nasir Khan* (2010 SCMR 1254), *Kamaluddin Qureshi v. Ali International Co.* (PLD

2009 SC 367), *Pakistan through Secretary Finance v. M/s Lucky Cement* (2007 SCMR 1367), *Federation of Pakistan through Secretary, Ministry of Finance v. Haji Muhammad Sadiq* (PLD 2007 SC 67), *Mushtaq Ahmed v. Secretary, Ministry of Defence* (PLD 2007 SC 405), *Syed Masroor Shah v. State* (PLD 2005 SC 173), *Federation of Pakistan v. Ammar Textile Mills (Pvt.) Ltd.* (2002 SCMR 510), *World Trade Corporation v. Excise & Sales Tax Appellate Tribunal* (1999 SCMR 632) and *State Cement Corporation of Pakistan Ltd. v. Collector of Customs, Karachi* (1998 SCMR 2207).

37. We believe that there could not be any other view except that the Constitution favours enlargement of the jurisdiction of the Supreme Court and conferment of supplemental powers. The enlargement of jurisdiction is to be understood under the Constitution that the jurisdiction of the Supreme Court may be extended territorially like adhering to Articles 246 and 247 as well as to confer further judicial powers and also conferring supplemental powers to expand the scope of the powers, which it is already exercising. Under the scheme of the Constitution, the Supreme Court is empowered to deal with the matters falling within various types of jurisdiction conferred upon it, i.e., original, appellate, advisory and review. By virtue of Article 189 of the Constitution, a decision of the Supreme Court to the extent it decides a question of law is binding on all other Courts in Pakistan whereas under Article 190 of the Constitution all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. Article 190 has been interpreted by this Court in a large number of cases. See *Akhunzada Behrawar Saeed, ASC v. Justice Sajjad Ali Shah, CJP* (1998 SCMR 173), *Shahid Orakzai v.*

*Nawaz Sharif* (PLD 1999 SC 46), *Human Rights Case No. 13-L of 2006* (2006 SCMR 1769), *Khalid Rashid v. Kamran Lashari, chairman, CDA* (2010 SCMR 594), *Regarding Corruption in Hajj Arrangements in 2010: In Re* (PLD 2011 SC 963), *Iffat Jabeen v. District Education Officer* (2011 SCMR 437), *Syed Yousaf Raza Gillani v. Assistant Registrar, Supreme Court of Pakistan* (PLD 2012 SC 466) and *Suo Motu Case No.4 of 2010* (PLD 2012 SC 553).

38. Article 204(2)(d) and Article 204(3) confer two different types of power on the Parliament. Under the former, the Parliament is empowered to make law providing for more offences of contempt of the Court, which is clear from the wording used therein, i.e. “does any other thing which, by law, constitutes contempt of the Court”. In other words, here the Parliament is empowered to add to the offences already described in Article 204(2)(a), (b) & (c). On the other hand, under Article 204(3) the Parliament is empowered to make law to regulate the exercise of power conferred on a Court under this Article. Thus, these are two distinct areas of legislation envisaged by Article 204. The Preamble to COCA 2012 explicitly provides that it is expedient to repeal and re-enact a law of contempt in exercise of the powers conferred by clause (3) of Article 204 of the Constitution of Islamic Republic of Pakistan. Thus, the legislation under scrutiny has been enacted under Article 204(3), which is restricted to providing for matters enumerated therein, namely, to regulate the exercise of power. It is noteworthy that COCA 2012 has not been enacted by the Parliament in exercise of the power conferred on it by Article 204(2)(d) where a different set of power is envisaged, namely, to add to the offence of contempt of Court already defined in paragraphs (a), (b) &

(c) of clause (2) *ibid*. A perusal of section 3 of COCA 2012 shows that on the one hand, certain kinds of offences enumerated in Article 204 have not been incorporated therein, but at the same time, under the proviso to the said section, various exceptions and defences have been created. This is clearly excess of jurisdiction, inasmuch as the Parliament could not do it while exercising its power under clause (3). So, on this score too, parts of section 3, insofar as they create exceptions and defences to the controlling provision of the Constitution, namely, Article 204(2)(a)(b) & (c) are *ultra vires* of the Constitution.

39. It may be noted that exercise of jurisdiction by the Supreme Court and the High Courts also includes enforcement of Fundamental Rights enshrined in Articles 9 to 28 Chapter 1 of Part II of the Constitution under Articles 184(3) and 199 respectively. However, the jurisdiction of Supreme Court is free from technicalities as the Supreme Court while deciding a case under Article 184(3) for enforcement of Fundamental Rights would be taking into consideration only two conditions enumerated in the above Article, viz., (1) involvement of question of public importance (2) with reference to enforcement of Fundamental Rights. Besides, the Supreme Court, in exercise of jurisdiction under Article 187(1) of the Constitution subject to clause (2) of Article 175, has have the power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document. This Article of the Constitution itself has enlarged the jurisdiction of the Supreme Court. Reference may be

made to *Dr. Mobashir Hassan's case*, wherein following observations have been made: -

> "85. Essentially, the above guidelines/directions for expeditious disposal of cases were issued by this Court, in exercise of its powers under Article 187 of the Constitution, which provides that Supreme Court shall have power to issue such directions, orders or decrees, as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document. This Article of the Constitution has been interpreted in so many cases. However, reference is being made only to Sabir Shah's case (PLD 1995 SC 66). Relevant para. therefrom is reproduced hereinbelow for convenience:-
>
> > "10. The Supreme Court is the apex Court. It is the highest and the ultimate Court under the Constitution. In my view the inherent and plenary power of this Court which is vested in it by virtue of being the ultimate Court, it has the power to do complete justice without in any manner infringing or violating any provision of law. While doing complete justice this Court would not cross the frontiers of the Constitution and law. The term "complete justice" is not capable of definition with exactitude. It is a term covering variety of cases and reliefs which this Court can mould and grant depending upon the facts and circumstances of the case. While doing complete justice formalities and technicalities should not fetter its power. It can grant ancillary relief, mould the relief within its jurisdiction depending on the facts and circumstances of the case, take additional evidence and in appropriate cases even subsequent events may be taken into consideration. Ronald Rotunda in his book "Treatise on Constitutional Case Substance" (Second Edition), Volume 2 at page 90 has stated that "The Supreme Court is an essence of a continual Constitutional convention". The jurisdiction and the power conferred on the Supreme Court does empower it to do complete justice by looking to the facts, circumstances and the law governing a particular case. Article 187 does not confer any jurisdiction. It recognizes inherent power of an apex Court to do complete justice and issue orders and directions to achieve that end. Inherent jurisdiction is vested in the High Court and subordinate Courts while dealing with civil and criminal cases by virtue of provisions of law. The inherent jurisdiction of this Court to do complete justice cannot be curtailed by law as it may adversely affect the independence of judiciary

> and the fundamental right of person to have free access to the Court for achieving complete justice. This enunciation may evoke a controversy that as Article 175(2) restricts Article 187 it will create conflict between the two. There is no conflict and both the Articles can be read together. The conflict in the provisions of the Constitution should not be assumed and if apparently there seems to be any, it has to be interpreted in a harmonious manner by which both the provisions may co-exist. One provision of the Constitution cannot be struck down being in conflict with the other provision of the Constitution. They have to live together, exist together and operate together. Therefore, while interpreting jurisdiction and power of the superior Courts one should look to the fundamental rights conferred and the duty cast upon them under the Constitution. A provision like Article 187 cannot be read in isolation but has to be interpreted and read harmoniously with other provisions of the Constitution. In my humble view, this Court while hearing appeal under a statute has the jurisdiction and power to decide the question of *vires* of the statute under which the appeal has arisen and can even invoke Article 184(3) in appropriate cases."

As it has been pointed out hereinabove, the power and authority of the Parliament to enlarge the jurisdiction of the Supreme Court and to confer supplemental powers, *inter alia,* is aimed at ensuring supremacy of the law through the system of administration of justice. Inasmuch as, to strengthen the enforcement of the constitutional provisions and the decisions pronounced by the Supreme Court under Article 190 of Constitution, all the executive and the judicial authorities throughout Pakistan have been commanded by the Constitution to act in aid of the Supreme Court. On a cursory glance at some of the provisions noted hereinabove and without making reference to the other constitutional provisions, for the sake of brevity, it is concluded that Legislature while enacting any law pertaining to the jurisdiction and the powers of the Supreme Court has an obligation to show obedience to the Constitution and the law as lawgivers, like other functionaries, have taken oath under Article 65 of the Constitution to

preserve, protect and defend the Constitution, therefore, Legislature while legislating or amending the law is duty bound to strictly follow the Constitution because being the chosen representatives of the people, they have to act according to the will of the people of Pakistan and have to establish an order, which enables the State to exercise its powers for the benefit of citizens. Such constitutional obligation clearly postulates that whatever law shall be enacted, it must have nexus with the welfare of the citizens and the Parliamentarians, being the trustees under the Constitution of the will of the people of Pakistan, have to watch the interests of the beneficiaries - the people of Pakistan. Therefore, people of Pakistan earnestly expect that the Parliament is doing nothing without a reason for passing an Act or enactment within it.

40. Barrister Zafarullah Khan, Advocate High Court, petitioner in person in Constitution Petition No. 97 of 2012, has argued that to interpret various provisions of COCA 2012 and to determine their compatibility with the Constitution, the principle expounded in the *Heydon's case* [(1584) 3 Rep. 7b] as discussed and elaborated in Section 3 titled "The Context – External Circumstances of the treatise "Maxwell on Interpretation of Statutes" will be required to be kept in mind. We have considered his argument. The principle is that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it be also within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention. On the aim, scope and object of an Act, the *Heydon's case* lays down that the literal construction then, has, in

general, but *prima facie* reference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act; to consider, according to Lord Coke –

(1) What was the law before the Act was passed;
(2) What was the mischief or defect for which the law had not provided;
(3) What remedy Parliament has appointed; and
(4) The reason of the remedy.

According to another authority: "in order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's Case* to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief". At the same time, the language of the statute must not be strained to make it apply to a case which does not legitimately, on its terms, apply by invoking consideration of the supposed intention of the legislature. The true meaning of any passage, it is said, is to be found not merely in the words of that passage, but in comparing it with other parts of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from those circumstances which the legislature had in view. The same, it would seem, applies to a by-law. Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter. Then the office of all the Judges is always to make such construction as shall –

(a) suppress the mischief, and advance the remedy, and

(b) suppress subtle inventions and evasions for continuance of the mischief, and *pro privat ocommodo* – for private benefit, and

(c) add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico* – for the public good.

In this case, it was debated at large, in what cases the general words of Acts of Parliament shall extend to copyhold or customary estates, and in what not; and therefore this rule was taken and agreed by the whole Court, that when an Act of Parliament does alter the service, tenure, interest of the land, or other thing, in prejudice of the lord, or of the custom of the manor, or in prejudice of the tenant, there the general words of such Act of Parliament shall not extend to copyholds, but when an Act of Parliament is generally made for the good of the weal public, and no prejudice can accrue by reason of alteration of any interest, service, tenure, or custom of the manor, there many times copyhold and customary estates are within the general purview of such Acts."

41. The learned counsel for the petitioners have vehemently contended that many provisions of the impugned Act are designed to achieve a particular object and fall within the purview of targeted or perceived legislation considering the timing of the re-enactment of the contempt law, which was passed at a time when a Prime Minister was constrained to leave office in the wake of his conviction for non-compliance of judgment and orders of this Court and he stood disqualified under Article 63(1)(g) as pointed out in detailed discussion on section 3 as well as Article 63(1)(g).

42. Sheikh Ahsan-un-Din, ASC, President High Court Bar Association has strongly objected to the great haste shown by the Parliament in the promulgation of COCA 2012. He explained that after de-notifying of the former Prime Minister Syed Yousaf Raza Gillani from the seat of National Assembly on 19.06.2012, the impugned law was passed in haste. Mr. Liaqat Ali Qureshi, petitioner in person in Constitution Petition No. 74 of 2012 by making reference to *Quranic* injunction contended that the impugned law has been promulgated without *ghor-o-fikr*, i.e., due deliberation.

43. The statement of objects and reasons appended to the Contempt of Court Bill, 2012 recited that the contempt law is a blend of the power of the court to punish for its contempt and the rights of the citizens in a democracy for fair comments and criticism. It is, therefore, necessary that whereas the law may provide to the alleged accused to have fair trial including transparent procedure for right to appeal. Right to appeal is being streamlined and other necessary provisions relevant to contempt proceedings are being incorporated in the Bill. It was vehemently argued on behalf of the petitioners that under the repealed Contempt of Court Ordinance, 2003 the Federation had a bitter experience because the then Prime Minister Syed Yousaf Raza Gillani was found guilty of, and convicted for, contempt of Court under Article 204(2) of the Constitution read with section 3 of the Contempt of Court Ordinance, 2003 by a 7-Member Bench *vide* judgment dated 26.04.2012 passed in Criminal Original Petition No. 06 of 2012 in *Suo Motu* Case No. 04 of 2010 for willful flouting, disregard and disobedience of this Court's direction contained in Para No. 178 of the judgment in *Dr. Mobashir Hassan's case*. Subsequent thereto, in

pursuance of this Court's order dated 19.06.2012 passed in Constitution Petitions No. 40 of 2012, etc., instituted under Article 184(3) of the Constitution, the Election Commission of Pakistan de-notified him from being a Member of the National Assembly on account of conviction/sentence for contempt of Court in terms of Article 63(1)(g) of the Constitution. Consequently, with the Prime Minister ceasing to hold office, the whole Cabinet was dissolved and under the Constitution a new Member of National Assembly was elected as the Leader of the House who entered upon the office of Prime Minister in terms of the Constitution. The judgment of this Court in *Dr. Mobashir Hassan's case* had not been implemented by sending a letter to seek revival of the requests for mutual legal assistance, the status of civil party claims to the allegedly laundered moneys lying in foreign countries including Switzerland. However, while repealing the Contempt of Court Ordinance, 2003 and adopting the Contempt of Court Act, 1976 model, the Parliament did not highlight what was the mischief and defect which the said law did not provide for, and hurriedly enacted COCA 2012 without taking into consideration the requirements of mischief rule because of the apprehension of the Federation, as pointed out by the learned counsel for the petitioners and also affirmed by the learned counsel for the respondent himself, that the newly elected Prime Minister may not be confronted with the situation which Syed Yousaf Raza Gillani had faced. During hearing, the learned counsel for the Federation was asked to explain the reasons for which both Houses of Parliament took upon themselves to enact the COCA 2012 whereupon he frankly admitted that COCA 2012 was promulgated to provide protection to the public office holders by incorporating Article 248(1) as a proviso to section 3 to ensure

sustenance of democratic order under the Constitution and that what had happened to a former Prime Minister should not happen to another Prime Minister. This statement is quite significant in the facts and circumstances of the present case. We do not want to attribute *mala fides* to the Parliament in promulgating COCA 2012, but any inference can be drawn by anyone from the stand taken by the Federation through its counsel.

44. As regards the question of passing of COCA 2012 in haste, in view of the facts noted hereinbefore, no other view is possible except to infer that the enactment was got passed by suspending the usual business and without referring the matter to any Committee in terms of Rule 122 of the Rules of Procedure of the National Assembly, essentially with an apprehension that on the date already fixed by the Court in the implementation proceedings in *Dr. Mobashir Hassan's case*, an order might be passed against incumbent Prime Minister. While examining the constitutionality of the new enactment, we have to keep this factor in our mind as well.

45. Arguments have been put forward from both the sides in support of their respective points of view to persuade the Court on the constitutionality or otherwise of COCA 2012. Therefore, following the principle that efforts should be made to save the legislation under scrutiny enunciated in *Zahoor Ahmad v. State* (PLD 2007 Lahore 231), *Muhammad Mubeen-us-Salam* (supra), *Wasim Sajjad v. Federation of Pakistan* (PLD 2001 SC 233 ), *Zafar Ali Shah v. Pervez Musharraf* (PLD 2000 SC 869), *Pepper (Inspector of Taxes) v. Hart* (1993 SCMR 1019), *Sapphire Textile Mills Ltd. v. Collector of Central Excise and Land Customs, Hyderabad* (1990 CLC 456) and *Benazir Bhutto v.*

*Federation of Pakistan* (PLD 1988 SC 416), we wanted to guide ourselves in a proper manner. Accordingly, we called for the debates of the Parliament (National Assembly and Senate) made on the eve of promulgation of COCA 2012. A perusal of said debates shows that the Bill was tabled in the National Assembly on 09.07.2012 by suspending rules of procedure of the National Assembly and as per the record of the National Assembly, the proceedings were completed the same day. After having complied with the codal formalities, it was then tabled before the Senate on 11.07.2012 and on completion of the proceedings, the President of Pakistan assented to it the same day and Act of Parliament was published in the Gazette of Pakistan on 12.07.2012 as Contempt of Court Act, 2012.

46. It is to be noted that the Judges of the Superior Courts are obliged under the Constitution to discharge their prime responsibility of keeping the fountain of justice unsullied and pure and to ensure that nobody is allowed to tarnish the image and the majesty of the Court, howsoever high he may be, or whosoever he may be. [*Prem Surana v. Additional Munsif and Judicial* (AIR 2002 SC 2956)]. The growing tendency of not obeying the judgments of the Courts by the State functionaries, including the high-ups of the executive as it happened in Criminal Original Petition No. 06 of 2012 in Suo Motu Case No. 04 of 2010, wherein the then Prime Minister Syed Yousaf Raza Gillani was convicted for contempt of court for having failed to comply with the orders of this Court, will reduce the judgments/decrees of the Courts of law to mere paper decrees and render the whole system of administration of justice ineffective and lead to anarchy. Though the courts, exercising judicial restraint, have always used their power to

punish for contempt sparingly, but at the same time they have a reciprocal expectation from the persons against whom the same were issued for implementation/execution of the judgments, orders and directions.

47. It is vehemently contended by Mr. A.K. Dogar, learned ASC that section 2(a) of COCA 2012 is against the scheme of Article 204(2) read with Entry 55 of the Fourth Schedule to the Constitution. Section 2(a) defines “judge” as including all officers acting in a judicial capacity in the administration of justice. On the other hand, Article 204(1) defines “Court” as the Supreme Court or a High Court. A plain reading of the two provisions in juxtaposition makes it clear that the Judges of the Supreme Court and High Courts having been appointed under Articles 175A and 193 of the Constitution are the holders of constitutional posts; therefore, they cannot be equated with the judicial officers presiding over courts at the level of the district judiciary. Section 2(a) of COCA 2012 gives impression as if it has been promulgated for District Courts as mentioned above. The definition of “judge” as given in section 2(a) of COCA 2012 is patently unconstitutional. The same is, therefore, liable to be struck down on the touchstone of the Constitution.

48. A perusal of Article 204(2)(b) in juxtaposition with section 3 of COCA 2012 shows that Article 204 speaks of “any person” whereas section 3 does not refer to “any person”; Article 204 speaks of “abuses” the process of Court, which is omitted in Section 3; Article 204 speaks of “scandalizes the Court” which is omitted in section 3; and Article 204 uses the phrase “otherwise does anything which tends to bring the Court or a judge of the Court into hatred, ridicule of

Contempt" whereas the said phrase is omitted in section 3. The words "which he is legally bound to obey" used in section 3 envisage a situation where an alleged contemner would be enabled to plead that he is not legally bound to obey any particular order of the court of law. Furthermore, under Article 204, a Court has the power to punish any person –

(i) who abuses the process of the Court in any way,
(ii) interferes with the process of Court in any way, or
(iii) obstructs the process of the Court in any way, or
(iv) disobeys any order of the Court, or
(v) scandalizes the Court, or
(vi) does anything which tends to bring the Court or a Judge of the Court into hatred, or
(vii) does anything which tends to bring the Court or a Judge of the Court into ridicule, or
(viii) does anything which tends to prejudice the determination of a matter pending before the Court, or
(ix) does any other thing which, by law, constitutes contempt of Court.

As against the above, under section 3 of COCA 2012, a Court has the power to punish any person who –

(a) disobeys any order, direction or process of a Court,
(b) disregards any order, direction or process of a Court,
(c) commits a wilful breach of a valid undertaking given to a Court,
(d) tends to bring the authority of a Court or the administration of law into disrespect or disrepute,
(e) interferes with due process of law or due course of any judicial process,
(f) obstructs the process of law or the due process of any judicial process,
(g) interrupts process of law or the due process of any judicial process,
(h) lowers the authority of a Court,

(i) scandalizes a judge in relation to his office,

(j) disturbs the order and decorum of the court.

Above analysis of proviso (i) to section 3 in juxtaposition with Article 204(2) shows that various kinds of contempt of Court enumerated in Article 204, such as noted in aforesaid clauses (i), (vi), (vii) and (viii) have been omitted from the definition given in section 3, thus, the power to punish for contempt of Court has been curtailed in many respects powers, which was not within the legislative competence of the Parliament on the touchstone of Entry No.55 of the Federal Legislative List (Fourth Schedule to the Constitution).

49. It may be noted that in the Contempt of Court Act, 1976 no exceptions were created by the Legislature to protect any public office holder from the contempt of Court proceedings. Under Article 204 of the Constitution the Supreme Court and High Courts have power and jurisdiction to punish any person who commits contempt of Court as defined in paragraphs (a) to (d) of clause (2) of Article 204 without any exception. A provision in the Constitution to punish for the contempt of Court attaches great significance in this behalf. The *pari materia* provision in the Constitution of India, viz., Article 215 in respect of contempt of court is not so comprehensive as compared to the provision of contempt of Court given in Article 204 of our Constitution.

50. Article 204 empowers Supreme Court and High Courts to punish any person for their contempt whereas clause (1) of Article 204 has defined Court as Supreme Court and a High Court. Therefore, by applying the literal rule of construction that in absence of any specific meaning given to any word or phrase used in a legislative instrument,

ordinary meanings are to be assigned to the words and phrases used therein. At this juncture, reference to Article 204(2) is to be made wherein the important words 'any person' are used for the purpose of awarding punishment. According to Chambers Concise Dictionary 41st edition, the word "any" includes "every", whereas according to the *Word and Phrases Volume 32 (page 287)*, the word 'person' *means a specific kind or manifestation of individual character; a being characterized by conscious apprehension, rationality and a moral sense; a being possessing or forming the subject of personality; a particular individual; one as distinguished emphatically from things or animals. Bonbrest v. Kotz, D.C.D.C., 65 F.Supp., 138, 140)*. Thus, considering the meaning of the words 'any person' as noted above, Article 204 empowers the Supreme Court and a High Court to punish all persons across the board without any exception, be he an ordinary citizen, any government servant, or the holder of any public office. However, the definition of 'contempt of Court' given in section 3 of COCA 2012 is subject to proviso, Para (i) whereof creates exception in respect of public office holders mentioned in Article 248(1) by providing that the exercise of powers and performance of functions by them for any act done or purported to be done in exercise of those powers and performance of those functions shall not amount to commission of contempt of Court. As presently we are dealing with the exception (i) under the proviso to section 3, therefore, the criteria of protection to the President, Governor and Ministers, etc., under Article 248 has to be kept in mind. For reference clause (1) of Article 248 is reproduced hereinbelow: -

> "248. Protection to President, Governors, Minister, etc. (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 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 Provincial Government."

Though, *prima facie*, proviso (i) creates an exception or a defence in favour of the public office holders mentioned in Article 248(1), but virtually such a defence will not remain confined to the persons who have been identified in above categories with reference to persons named hereinabove. The language employed in proviso (i) will provide blanket immunity to all public office holders under this provision. In other words, by making reference to Article 248(1) in the ordinary legislation, an amendment has been introduced in Article 204 of the Constitution without adhering to the provisions of Article 238 and 239 of the Constitution, which provide procedure for the amendment of the Constitution, i.e. by majority of 2/3$^{rd}$ votes of the total number of seats of the House. Regarding legislation by reference it is an accepted principle of jurisprudence that a provision of the Constitution, which is a scared document designed to run the affairs of the country and also being similar in its nature, cannot be amended by reference. Inclusion of a provision of the Constitution [Article 248(1)] as exception (i) to section 3 of COCA 2012 has created a mischief purposely, perhaps it was in the sub-conscience of the draftsman that the functionaries mentioned in Article 248(1) are not answerable to any court in the exercise of powers and performance of functions of their respective offices. Clearly, considering the language employed in Article 204, no

protection is available to any of the State functionaries mentioned in Article 248(1) from contempt proceedings, which are *sui generis* for any act done or purported to be done by them in exercise of powers and functions unless an amendment is made in the former Article of the Constitution. This aspect was considered by this Court in *Zahur Ilahi v. Mr. Zulfikar Ali Bhutto* (PLD 1975 SC 383) and it was held that the powers and functions of the Prime Minister are derived from the Constitution, therefore, the same must be referable to the Constitution. Since neither the Constitution nor any law can possibly authorize the Prime Minister to commit a criminal act or do anything which is contrary to law, the immunity cannot extend to illegal or unconstitutional acts. It was further held that even a Prime Minister is, under clause (2) of Article 5 of the Constitution, bound to obey the Constitution and law as that is the basic obligation of every citizen. It was observed that the scope of the powers and functions of a Prime Minister cannot possibly extend to the committing of contempt of Court which is punishable under the Constitution itself and, therefore, by necessary implication prohibited. It was held that if the speech of the Prime Minister did prejudice the pending proceedings against the National Awami party and also contained a veiled threat to the Court, then it amounted to contempt and was not protected by Article 248. It was noted that the Constitution itself declares by Article 190 that all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court. The Prime Minister is, therefore, duty-bound to give effect to the decisions of this Court. Considering the exposition of law made in the precedent case, this much is abundantly clear that such a protection cannot be extended by means of an ordinary legislation as is attempted to be done by means of Para (i) to proviso

to section 3 of COCA 2012. Reference at this stage may be made to the case of *Muhammad Azam Khan v. Government of N.W.F.P.* (1998 SCMR 204) wherein, while dealing with the power of Chief Justice of Peshawar High Court to make recommendation for regularization of the appointees in terms of North-West Frontier Province Public Service Commission Ordinance, 1978, it was held that the concept of independence of judiciary would not make judiciary above the law. Obedience to law and strict adherence thereto by judiciary would rather ensure its independence and enhance its prestige. Therefore, only such recommendation would be meaningful and effective which was made in accordance with law and not which was violative of law or which would have effect of frustrating the law. On the same analogy, adherence to the Constitution by all the State functionaries, low or high, including the Chief Executive of the country would enhance their prestige and honour in the eyes of the general public. It is also in the interest of good governance and welfare of the citizens, which is the raison d'être of existence of any State.

51. It also appears that by creating a group of special people (public office holders) a serious threat has been posed to the independence of judiciary, which is required to be fully secured under Article 2A. In view of the language employed in Para (i) to proviso to section 3, the trust of the citizens has been betrayed, inasmuch as in future the words ‘any person’ used in Article 204(2) would not include the persons referred to in Para (i) to proviso to section 3 and not liable to be punished for the contempt of Court. Similarly, amongst equals i.e. who have committed contempt of court no classification is permissible between public office holders and others falling within the

definition of 'any person'. It would be appropriate to note that all constitutional functionaries are bound to follow the orders of the Court because under Article 248(1) no such exception is available to them. Thus, the defence/exception envisaged by proviso (i) to section 3 has created unreasonable classification, which is prohibited under Article 25 of the Constitution, besides being violative of the due process of law within the contemplation of Article 4 of the Constitution.

52. Here, reference may also be made to the case of *Benazir Bhutto v. President of Pakistan* (PLD 1998 SC 388) wherein was held that by providing that independence of judiciary shall be fully secured and all existing laws should be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and *Sunnah* the provisions of Articles 2, 2A & 227 of the Constitution have given Islamic character to the Constitution. It may be mentioned that according to Injunctions of Islam, there is no distinction between the high and the low in the application of law. The Holy Prophet (PBUH) in his last sermon (*Khutba Hajji tul wida*) said, "*all mankind is from Adam and Eve, an Arab has no superiority over a non-Arab nor a non-Arab has any superiority over an Arab; also a white has no superiority over black nor a black has any superiority over white except by piety and good action. Know that every Muslim is a brother to every other Muslim and that the Muslims constitute one brotherhood. Nothing shall be lawful to a Muslim which belongs to a fellow Muslim unless it was given freely and willingly. Do not, therefore, do injustice to yourselves*."

53. Article 63 of the Constitution lays down disqualifications for membership of *Majlis-e-Shoora* (Parliament). Clause (1)(g) of the said

Article provides that a person shall be disqualified from being elected or chosen as, and from being, a member of the *Majlis-e-Shoora* (Parliament), if he has been convicted by a court of competent jurisdiction for propagating any opinion, or acting in any manner, prejudicial to, *inter alia*, the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary, unless a period of five years has elapsed since his release. However, section 3 in defining contempt of Court, *inter alia*, as doing anything to scandalize a judge in relation to his office uses the word 'judge' instead of Court (institution of judiciary). The use of the words 'judge in relation to his office' instead of 'Court' is clearly against the scheme of Article 63(1)(g), which talks of judiciary, and not of any 'judge'. Therefore, the provisions of section 3 are also violative of the said Article.

54. Mr. A.K. Dogar has argued that section 4(4) of the Act is subject to subsection (1) which is also subject to subsection (2) which pertains to apology, therefore, it is a case of vague law, and vague law is no law. And, if the reason of the law ceases, the law ceases. Barrister Zafarullah Khan, Advocate has argued that section 4(4) is also violative of Articles 189 and 190. Mr. Rashid A. Rizvi has argued that an Act of Parliament, which is intended to nullify or frustrate the judgments of the Supreme Court, violates the principle of trichotomy of powers and is, therefore, void. He has argued that the Parliament cannot encroach upon the domain of judiciary to interpret any law or to nullify any rule laid down by the Supreme Court, which has attained finality in view of Articles 189 and 190 of the Constitution. To persuade the Court to take the above view, he has placed reliance on *Indian*

*Aluminum Co. v. State of Kerala & Others* [(1996) 7 SCC 637)] (Paras 35 to 56 at pages 653 to 663) and *Mehram Ali's case* (supra) Para 4 at page 1466. He has also argued that by limiting the offence of contempt under section 4 of the Act, 2012 the power of judicial review of the Superior Courts as provided in Article 184(3) and 199 of the Constitution has been made ineffective. He has pointed out that the rule/ratio of the following cases, amongst others, is likely to be nullified: -

(i) Karachi Bar Association v. Abdul Hafeez Pirzada (PLD 1988 Karachi 309)
(ii) Ch. Zahur Ellahi v. Zulfiqar Ali Bhutto (PLD 1975 SC 383)
(iii) Amanullah Khan v. Federation of Pakistan (PLD 1990 SC 1092)
(iv) Syed Masroor Ahsan v. Ardeshir Cowasjee (PLD 1998 SC 823)
(v) Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265).

On the other hand, Mr. Abdul Shakoor Paracha, ASC for the Federation has argued that there was no ambiguity in the law, therefore, there was no necessity to make reference to the assembly debates or other material, inasmuch as the intention of the legislature was manifestly clear. He has placed reliance on PLD 1997 SC 11. He has also argued that it is a well established rule of interpretation that a legislative instrument is to be read as a whole and that all institutions have to adopt the principle of harmonious interpretation. He has further argued that subsection (4) of section 4 is not violative of any provision of the Constitution. He has argued that the judgment passed in one case cannot be made basis for proceeding for contempt in another case. He has urged that after conviction of former Prime Minister, the proceedings cannot continue. The learned Attorney General has also argued that the provisions of the COCA 2012 cannot be termed unambiguous in any manner, and it is for the Courts of law to give

effect to the same by recourse to the principles of interpretation of statutes, however, in the instant case, nobody has made any attempt to have recourse to such principles of interpretation.

55. A perusal of subsection (4) of section 4 of COCA 2012 shows that it has introduced a *non obstante* clause, inasmuch as it provides that notwithstanding anything contained in any judgment, no Court shall have the power to pass any order of punishment for, or in relation to any act of contempt, save and except in accordance with subsection (1) of section 4. This provision essentially lays down that the judgments passed earlier will be ignored and the order of punishment for contempt of Court will only be passed in accordance with subsection (1) of section 4. The issue whether the legislature by means of an enactment can undo the effect of the judgment has engaged the attention of the superior courts in a large number of cases. It is well settled by the time that no legislation on any subject is permissible, which is against any specific provision of the Constitution. As far as nullifying the effect of a judgment by means of legislation is concerned, there are certain limitations including the one i.e. by amending the law with retrospective effect, on the basis of which the order or judgment has been passed and thereby removing the basis of the decision. Reference may be made to the cases of *Dr. Mobashir Hassan*, *Tofazzal Hossain v. Province of East Pakistan* (PLD 1963 SC 251), *Tirath Ram Rajindra Nath v. State of U.P.* (AIR 1973 SC405), *Mamukanjan Cotton Factory v. Punjab Province* (PLD 1975 SC 50) and *Misrilal Jain v. State of Orissa* (AIR 1977 SC 1686). Further, as held in the case of *I.N. Saksena v. State of Madhya Pradesh* (AIR 1976 SC 2250), it is also to be seen whether the

legislature possesses competence over the subject matter; whether by validation the legislature has removed the defect which the courts had found in the previous law; and whether it is consistent with the provisions of Part III of the Constitution. In *Dr. Mobashir Hassan's case* extract from Thomas M. Cooley's Treaties on the Constitutional Limitation was quoted with approval. To understand the issue in hand, it may be advantageous to reproduce the same. It reads as under: -

> "If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it not according to the judicial, but according to the legislative judgment. But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is the best, most decorous and suitable that could have been adopted or not. If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry."

In *Al-Samrez Enterprise v. Federation of Pakistan* (1986 SCMR 1917), it was held that the principle of law stated in Maxwell's Interpretation of Statutes, 1962 Edition, p. 206 that every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches

a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, to be intended not to have a retrospective operation, is recognized in *Corpus Juris* of this country by its incorporation in section 6 of the General Clauses Act. After making reference to the cases of *March, Mander v. Harris* [(1884) 27 Ch. D. 166] and *Jones v. Ogle* [(1872) L.R. 8 Ch. A. 192], it was further held that if a binding contract was concluded between the appellants and the foreign exporter or steps were taken by the appellants creating a vested right to the then existing notification granting exemption, the same could not be taken away and destroyed in modification of the earlier one, on the ground that under section 21 of the General Clauses Act, the Government could exercise the power of modification. In *Haji Ghulam Rasul v. Government of The Punjab through Secretary, Auqaf* (2003 SCMR 1815), it was found that specific provisions had been made to nullify the judgment of the Supreme Court. It was observed that the Legislature is competent to enact law nullifying the judgment of the Court. In *Mamukanjan Cotton Factory v. The Punjab Province* (PLD 1975 SC 50), however, the argument that the judgments are rendered by the High Court in exercise of its jurisdiction conferred by the Constitution itself, but the validating Ordinance being a is sub-constitutional legislation cannot undo or destroy the 'end product' of the constitutional jurisdiction was not accepted and it was held that the argument is without substance and one which if accepted could indeed lead to startling results. It would strike at the very root of the power of Legislature, otherwise competent to legislate on a particular subject, to undertake any remedial or curative legislation after discovery of defect in an existing law as a result of the judgment of a

Superior Court passed in exercise of its Constitutional jurisdiction. It was further observed that the argument overlooked the fact that the remedial or curative legislation is also 'the end product' of Constitutional jurisdiction in the cognate field. It was held that the argument if accepted, would also seek to throw into serious disarray the pivotal arrangement in the Constitution regarding the division of sovereign power of the State among its principal organs, namely, the Executive, the Legislature and the Judiciary, each being the master of the field assigned to it under the Constitution. In *Fecto Belarus Tractor Ltd. v. Government of Pakistan* (PLD 2005 SC 605), after detailed analysis of the case law on the issue, it was held that power of the legislature to remove the basis on which the judgment is founded is not disputed and that unless the basis for judgment in favour of a party is removed, it would not affect the rights of a party in whose favour the same was passed.

56. It is established that on the one hand, by limiting the power to punish for the offence of contempt of Court in terms of section 4, the powers of judicial review of the superior courts as provided in Articles 184(3) and 199 of the Constitution have been made ineffective, and on the other hand, the Fundamental Right of access to justice of the citizens would be frustrated if the judgment passed by a Court of competent jurisdiction cannot be implemented. The right of access to courts and justice has been dilated upon in a large number of cases. In the case of *Sharaf Faridi v. Islamic Republic of Pakistan* (PLD 1989 Karachi 404) after referring to the cases of *Syed Abul A'la Maudoodi v. Government of West Pakistan* (PLD 1964 SC 673) and *Ms. Benazir Bhutto v. Federation of Pakistan* (PLD 1988 SC

416) it has been held that the right of access to justice to all is a well recognized inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of "due process of law". The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. In the case of *Government of Balochistan v. Azizullah Memon* (PLD 1993 SC 341), it has been held that provisions under scrutiny deny the right of access to Courts and justice. This by itself is an infringement of Fundamental Rights which provide that every citizen shall be entitled to equal protection of law and will not be deprived of life or liberty save in accordance with law. An examination of Articles 9 and 25 read collectively does not permit the Legislature to frame a law, which may bar right of access to the Courts of law and justice. The right of access to justice is internationally well recognized human right and is now being implemented and executed by granting relief under the Constitutional provisions. In the case of *Al-Jehad Trust v. Federation of Pakistan* (PLD 1996 SC 324) it has been held that the right to have access to justice through an independent Judiciary is a Fundamental Right as held in the case of *Sharaf Faridi* (supra). In *Liaqat Hussain's case* (supra) the Court relying upon the cases of *Azizullah Memon* and *Al-Jehad Trust* held that the right to have access to justice through the forums as envisaged by the Constitution is a Fundamental Right. In *Mehram Ali's case* (supra) a Full Bench of this Court while examining the vires of the various provisions of the Anti-Terrorism Act, 1997 has held that the right of "access to justice to all" is a fundamental right, which right cannot be exercised in the absence of an independent Judiciary providing impartial, fair and just adjudicatory framework i.e. judicial

hierarchy. The Courts/Tribunals which are manned and run by Executive Authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution can hardly meet the mandatory requirement of the Constitution. The same principle has been highlighted in the cases of *Al-Jehad Trust v. Federation of Pakistan* (1999 SCMR 1379), *Khan Asfandyar Wali v. Federation of Pakistan* (PLD 2001 SC 607), *Rauf B. Kadri v. State Bank of Pakistan* (PLD 2002 SC 1111), *In the matter of: Reference No.2 of 2005 by the President of Pakistan* (PLD 2005 SC 873), *Muhammad Nadeem Arif v. Inspector-General of Police, Punjab* (2011 SCMR 408), *Shahid Orakazi v. Pakistan through Secretary Law* (PLD 2011 SC 365), *All Pakistan Newspapers Society v. Federation of Pakistan* (supra) and *Watan Party v. Federation of Pakistan* (PLD 2012 SC 292).

57. Under the constitutional scheme, the constitutionality of legislation is examined by the Superior Courts in exercise of power of judicial review. Judicial review is a manifestation of the principle of trichotomy of powers, which envisages that the three organs of the State, namely, the legislature, the executive and the judiciary work within their respective domains in a system of checks and balances. The doctrine of judicial review postulates that the legislative and executive actions are subject to scrutiny by the superior courts to determine their compatibility or otherwise with the terms of a written Constitution. The idea that courts could nullify statutes originated in England with Chief Justice Edward Coke's opinion given in the year 1610 in *Dr. Bonham's Case* [8 Co. Rep. 107a]. Under a statute of Parliament, the London College of Physicians was enabled to levy fines against anyone who violated their rules. The College accused a doctor

of practicing without a license and fined him accordingly. Coke J. found that the statutory powers of the College violated "common right or reason" because "no person should be a judge in his own cause". The idea that Courts could declare statutes void was defeated in England with the Glorious Revolution of 1688, when King James II was removed and the elected Parliament declared itself supreme. However, with the passage of time, the concept of supremacy of Parliament has undergone change even in England as noted by one of us, Mr. Justice Jawwad S. Khawaja in a recent case titled as *Muhammad Azhar Siddique v. Federation of Pakistan* (Constitution Petition No. 40 of 2012) decided on 19.06.2012 wherein he has observed that in *Jackson v. Her Majesty's Attorney General* [(2005) UKHL 560], Lord Steyn writing in the House of Lords, the highest Court of England, has held that the classic account given by Dicey of the doctrine of supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom.

58. The United States Supreme Court for the first time, in the case of *Calder v. Bull* [3 U.S. 386 (1798)], exercised power to review state legislature decisions. In that case, the Connecticut legislature ordered a new trial in a court case about the contents of a will, overruling an earlier court decision challenged before the Court. The US Supreme Court, *vide* unanimous decision, held that the actions of the legislature did not violate the *ex post facto* law in Article 1, section 10 of the Constitution. Justice James Iredell, in his opinion, though stated that courts cannot strike down statutes based only upon principles of natural justice, but affirmed the ability of the Supreme Court to review legislative acts, based on something more than

principles of natural justice. Relevant portion of the judgment is reproduced hereinbelow: -

> If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void ... If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice …
>
> There are then but two lights, in which the subject can be viewed:
>
> > 1st. If the Legislature pursue the authority delegated to them, their acts are valid … they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust ...
> >
> > 2nd. If they transgress the boundaries of that authority, their acts are invalid ... they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act.

59. Five years later, the US Supreme Court for the first time declared a legislative action as “unconstitutional” in the landmark case of *Murbury v. Madison* [5 U.S. (1 Cranch) 137 (1803)], which formed the basis for the exercise of judicial review in the United States under Article III of the American Constitution. In the said case, William Marbury was appointed by President John Adams as Justice of the Peace in the District of Columbia, but commission was not subsequently delivered to him, as such, he filed a petition before the Supreme Court of America. It was prayed that Secretary of State James Madison be forced to deliver the document, but the court, with John Marshall as Chief Justice, declined Marbury’s petition, holding

that the part of the Judiciary Act of 1789 upon which he had based his claim was unconstitutional.

60. The next major ruling whereby an Act of Congress was struck down by the US Supreme Court was the case of *Dred Scott v. Sandford* [60 U.S. 393 (1857)], wherein the already repealed Missouri Compromise of 1820 was invalidated. Later, in the case of *Hepburn v. Griswold* [75 U.S. 603 (1870)] it was held that Congress could not make paper money legal tender for the payment of certain debts. In the year 1895 the federal income tax was invalidated. Over half a century between *Marbury* and the Dred Scott decision, the Court reviewed and upheld several federal statutes. However, each time, it reinforced the power it had claimed in *Marbury* and each time the Government conceded the Court's power of judicial review. In the case of *Hammer v. Dagenhart* [247 U.S. 251 (1918)], the Court said Congress did not design the Child Labor Act of 1916 as a regulation of interstate commerce but to discourage the use of child labor, an impermissible objective. In the case of *Bailey v. Drexel Furniture Co.* [259 U.S. 20 (1922)], an attempt to tax goods manufactured by children was struck down on identical reasoning that the tax was not intended to raise revenue, but to penalize employers of children. In the case of *Carter v. Carter Coal Co.* [298 U.S. 238 (1936)] while invalidating New Deal legislation regulating coal production, it was held that if the rest of a statute can stand on its own when part of it has been invalidated, the Court will strike down only the unconstitutional portion. In the case of *Baker v. Carr* [369 U.S. 186 (1962)], it was held that federal courts could review state apportionment plans for violations of federally guaranteed rights.

61. The Supreme Court of India, in the case of *Kesavananda Bahrain v. The State of Kerala* (AIR 1973 SC 1461) while exercising the power of judicial review to consider the validity of the Twenty-fourth, Twenty-fifth and Twenty-ninth Amendments of the Constitution held that the basic structure of the Constitution was outside the competence of the amendatory power of Parliament. In the case of *Smt. Indira Gandhi v. Shri Raj Narain* (AIR 1975 SC 2299) while considering the constitutionality of Thirty-ninth Amendment of the Constitution it was held that by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic Government to which were pledged. In the case of *Minerva Mills Ltd v. Union of India* (AIR 1980 SC 1789) while considering the constitutionality of Forty-second Amendment of the Constitution it was held that the judiciary was the interpreter of the Constitution and was assigned the delicate task of determining the extent of the power conferred on each branch of the government, its limits and whether any action of that branch transgressed such limits. In the case of *A.K. Kaul v. Union of India* (AIR 1995 SC 1403), the court discussed the justiciability of an action of an authority functioning under the Indian Constitution. In the case of *Raja Ram Pal v. Speaker, Lok Sabha* [(2007) 3 SCC 184] it was held that it was the solemn duty of the Court to protect the fundamental rights guaranteed by the Constitution zealously and vigilantly. In the case of *I.R. Coelho v. State of Tamil Nadu* (AIR 2007 SC 861), while considering the validity of amendments to the Constitution made on or after 24th April, 1973, after referring to the cases of *L. Chandra Kumar v. Union of India* [(1997) 3 SCC 261] and *S.R. Bommai v. Union of India* [(1994) 3 SCC

1], it was held that the judicial review was a basic feature of the Constitution and such constituent power could not be abrogated by judicial process of interpretation. It was further held that it was a cardinal principle of the Constitution that no one could claim to be the sole judge of the power given under the Constitution and that its actions were within the confines of the powers given by the Constitution.

62. A perusal of subsection (4) of section 4 reveals that it is enacted to undo the effect of the judgments passed by the courts of law, which are binding on all other courts in Pakistan to the extent they decide a question of law, or are based upon or enunciate a principle of law as provided in Article 189 of the Constitution. Thus, apart from being contrary to Article 189 of the Constitution, it is held to be violative of the Fundamental Right of access to justice enshrined in Article 9 of the Constitution and void as per Article 8 of the Constitution.

63. It was vehemently contended on behalf of the petitioners that the impugned law is violative of the principle of independence of judiciary and access to justice as enshrined in Articles 2A, 4, 5, 9, 14, 19, 37(d), 175, 189, 190, 191, 204 and 227 of the Constitution. Reliance has been placed on the cases of *Mehram Ali v. Federation of Pakistan* (supra), *Liaquat Hussain v. Federation of Pakistan* (PLD 1999 SC 504), *In the matter of: Reference No.2 of 2005 by the President* (PLD 2005 SC 873), *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879), *Mehram Ali v. Federation of Pakistan* (1998 SCMR 1156) and *Mir Muhammad Idris v. Federation of Pakistan through Secretary Ministry of Finance* (PLD 2011 SC 213).

64. In the case of *Chairman, N.W.F.P. Forest Development Corporation v. Khurshid Anwar Khan* (1992 SCMR 1202), it was held that Court acting under rules framed by virtue of the Constitutional power was not bound to follow any other statutory dispensation, which came in conflict with the independence of judiciary. Supreme Court was not even bound by the provisions of Civil Procedure Code, 1908 or Criminal Procedure Code, 1898 in so far as regulation and control of practice and procedure of the Court itself was concerned. It was further held that Article 2A of the Constitution (Objectives Resolution) commands that independence of judiciary has to be fully secured. Words 'fully' and 'secured' are explicit enough not to leave any doubt that Constitutional set up of Pakistan preserves the independence of Supreme Court by a definite mandate. Considering the importance assigned to the independence of judiciary under the Constitution, this Court, in the case of *Al-Jehad Trust v. Federation of Pakistan* (PLD 1996 SC 324) held that in case of conflict between the two Articles 209 and 203C, Article 209 of the Constitution shall prevail over Article 203C which detracts from dominant intent and spirit of the Constitution, namely, independence of judiciary. In the case of *Mahmood Khan Achakzai v. Federation of Pakistan* (PLD 1997 SC 426) it was held that limitation placed on the power of judicial review of superior Courts or any Court through Constitution (Eighth Amendment) Act, 1985 was without any legal basis. Power and jurisdiction of judicial review could not be controlled and fettered on such basis. Judges of the Superior Courts had taken oath to defend, preserve and protect the Constitution. It was further held that Courts while striking down any illegal and unconstitutional provision or

interpreting the Constitution are bound to defend, protect and preserve the Constitution. Salary paid to the Judges was not a bounty or favour, rather it was a constitutional duty to pay salary and give other benefits to the Judges by which independence of judiciary was guaranteed. In the case of *Mehram Ali v. Federation of Pakistan* (1998 SCMR 1156) certain provisions of the Anti-Terrorism Act, 1997 were declared to be not valid as the same militated against the concept of independence of judiciary and Articles 175 & 203 of the Constitution. In the case of *Asad Ali v. Federation of Pakistan* (PLD 1998 SC 161) it was held that right of access to impartial and independent Courts/Tribunals is a fundamental right of every citizen. The existence of this right is dependent on the independence of judiciary. It was further held that any deviation from the method of appointment prescribed under the Constitution to the high Office of Chief Justice of Pakistan is likely to shake the public confidence in the institution of judiciary and to tarnish its image as the neutral arbiter in dispute between citizen and citizen and citizen and State, thus, infringing the Fundamental Rights of citizens guaranteed under Articles 9 and 25 of the Constitution to have free, fair and equal access to independent Courts/Tribunals. In the case of *Masroor Ahsan's case* (supra) it was held that the Constitution has enshrined and emphasized independence of judiciary and relevant provisions of the Constitution have to be interpreted in a manner which would ensure independence of judiciary and that neither the Judiciary nor the Legislature transgress their limits and an equilibrium is maintained inter se among the three organs of the State. In the case of *Sajjad Ali Shah v. Asad Ali* (1999 SCMR 640) it was held that the appointment of senior most Judge of Supreme Court as the Chief Justice of Pakistan was not only

supported by a well-established Constitutional convention acted upon and accepted by the functionaries exercising power to appoint the Chief Justice of Pakistan, but also on a fair interpretation of provisions of Articles of the Constitution relating to the appointment of Chief Justice of Pakistan and the principle of independence of judiciary enshrined in the Constitution. In the case of *Jamat-i-Islami Pakistan v. Federation of Pakistan* (PLD 2000 SC 111) it was held that the provision of section 35 of the Anti-Terrorism Act, 1997 was not valid as the same militated against the concept of the independence of judiciary and was also violative of Articles 175 & 203 of the Constitution, and therefore, needed to be suitably amended inasmuch as the power to frame rules was to be vested in the High Court to be notified by the Government. In the case of *Ziaullah v. Najeebullah* (PLD 2003 SC 656) it was held that the question relating to the age of a claimant in terms of section 7 of Juvenile Justice System Ordinance, 2000 can only be determined by a judicial forum for it is a question of fact which can be settled judiciously for the purpose of treating the accused to be a juvenile offender. The Executive Authorities or any Committee enjoys no powers to discharge the judicial functions and if they are allowed to do so, that would negate the independence of judiciary as any Court or Tribunal which is not found on any of the Articles of the Constitution cannot lawfully share judicial powers with the Courts referred to in Articles 175 & 203 of the Constitution. In the case of *Accountant-General, Sindh v. Ahmed Ali U. Qureshi* (PLD 2008 SC 522) it was held that in a broader sense, the concept of independence of judiciary is not confined to the extent of disposal of cases by the Judges and discharging of judicial functions rather in the extended meanings, the concept of independence of judiciary is

complete separation from executive authorities of the State in all matters including pay and pension which is an essential component of independence of judiciary. It was further held that all financial matters concerning the judiciary including pay and pension as well as other privileges of Judges are under the direct control of Executive Authorities and Executive Authorities, treating the judiciary as a subordinate department, without recognizing its independent status as an important organ of the State. It was held that the executive is not supposed to interfere in the affairs of judiciary in any manner. In the case of *Shamshad v. Federal Board of Intermediate and Secondary Education* (PLD 2009 SC 75) it was held that the Supreme Court did not claim supremacy but at the same time it was its constitutional duty to uphold the independence of judiciary and rule of law. Legislature, executive and judiciary were enjoined by the Constitution to perform their functions and discharge their duties within the limits set by the Constitution and the law. Existence and extent of a privilege of a House or its Committee that it had certain privilege was not conclusive and the same had to be established before the court of law. Once the same was established, the courts were required to stay their hands off ungrudgingly. Proceedings by a court or the Parliament or its Committee were not to be taken in a manner which may lead to unnecessary confrontation and chaos. Provisions of Rule 201(5) of the Rules of Procedure and Conduct of Business in the National Assembly had been wisely introduced with a view to avoid any conflict with, or encroachment upon, the exercise of judicial power which could not be taken away or abridged in any manner. In the case of *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879) it was held that access to justice and independence of judiciary is a

salient feature of Constitution of Pakistan. The Chief Justice of Pakistan is head of the Judiciary, therefore, his views deserve due deference and his recommendation is non-justiciable which is inextricably linked with the independence of judiciary. In the case of *Chief Justice of Pakistan v. President of Pakistan* (PLD 2010 SC 61) while considering the validity of the order of the President of Pakistan restraining a Judge from exercising his judicial power and from discharging the obligations cast on him by the Constitution, it was held that the order in question of the President 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. In *Dr. Mobashir Hassan's case*, it was held that no other forum including the Legislature is empowered to declare an order or judgment, whereby conviction has been recorded under section 31-A of the National Accountability Ordinance, 1999 to be *void ab initio* except in the civil cases pertaining to certain tax matters and any intervention by the executive, contrary to the principle of Independence of Judiciary, is unconstitutional.

65. Article 2A of the Constitution provides that independence of the judiciary shall be fully secured primarily to ensure that the Superior Courts play their due role in the enforcement of the Fundamental Rights of the citizens guaranteed under the Constitution. A host of other provisions incorporated in the Constitution point to the scheme and significance of the role to be played by this important organ of the State. Article 8 of the Constitution provides that if any law is found to be inconsistent with the Fundamental Rights provided in

Chapter 1, Part II of the Constitution, such a law, to the extent of inconsistency shall be void. The Superior Courts, in the past, in exercise of the powers of judicial review as has been discussed hereinabove, have been examining and declaring the laws void, meaning thereby that such laws are rendered inoperative constitutionally. Thus, it is concluded that the Superior Courts, while exercising the power of judicial review are possessed with the jurisdiction to declare a law void to the extent of inconsistency with the Fundamental Rights, the principle of Independence of Judiciary or any other provision of the Constitution.

66. Subsection (2) of section 6 of COCA 2012 provides that no court shall take cognizance as of a contempt of Court of any averment made before the Supreme Judicial Council in respect of which the Supreme Judicial Council has given a finding that the averment fulfilled the requirements of clause (vi) of the proviso to section. Since this provision is dependent upon, and relatable to, section 3, which has been declared to be *ultra vires*, therefore, the foundation upon which it rested having been removed, it cannot stand. Accordingly, it ceases to exist.

67. Subsection (3) of section 6 provides that no court shall take cognizance of contempt of Court arising from an averment made in due course in appellate, revisional or review proceedings, till such proceedings have been finalized and no further appeal, revision or review lies. This provision gives a licence to commit contempt of Court unhindered by the penal action by the Court, inasmuch as it postpones the cognizance of a contempt case for an indefinite period of time and altogether ignores the fact that in a large number of cases, the alleged contemner may be required to be punished promptly to maintain the

dignity and respect of the court, particularly where the contempt is committed in the face of the Judge. In *Khalid Masood's case* (*supra*), the importance of the power to punish for contempt of Court as emphasized in *Sir Edward Snelson's case* (PLD 19961 SC 237) was taken note of wherein it was held that the power of committal for contempt is given to the Superior Courts in order that they may swiftly and summarily protect themselves against willful disregard or disobedience of their authority by visiting with prompt punishment any conduct, which tends to bring their authority and the administration of justice into scorn or disregard. It was further held that the dignity and authority of the courts has a link with the supremacy and majesty of the law, therefore, any conduct which is calculated to diminish that dignity or authority is a criminal contempt, which a Court is under duty to punish. In *State v. Mujibur Rahman Shami* (PLD 1973 SC 1), it was observed that contempt of Court is a grave offence against the State.

68. As rightly argued by Mr. Zafarullah Khan, a Magistrate Class-III is empowered under section 228 PPC to punish a person in such like cases. Similarly, many other authorities are empowered under the Constitution and the law to punish persons who undermine their authority. In such circumstances, there is no reason as to why a Judge be not empowered to punish a person who may be eroding or undermining his authority. Reference has been made to Lord Denning's book "The Due Process of Law". The learned author, in the introduction to the book, quoted Lord Hardwicke who said in [The St. James' Evening Post case (1742) 2 Atkins 469 at p. 472] that there cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters. There is not one stream of justice.

There are many streams. Whatever obstructs their courses or muddies the waters of any of those streams is punishable under the single cognomen “Contempt of Court”. It has its peculiar features. It is a criminal offence but it is not tried on indictment with a jury. It is tried summarily by a judge alone, who may be the very judge who has been injured by the contempt. He further referred to Francis Mann, who wrote in July 1979 issue of *The Law Quarterly Review* (p. 348) that contempt of Court is undoubtedly one of the great contributions the common law has made to the civilized behaviour of a large part of the world beyond the continent of Europe where the institution is unknown. In his treatise, Lord Denning also referred to the case titled R v. Almon [(1765) Wilm 243 – 271] that if the authority of the Judges is to be trampled upon by pamphleteers and news writers, and the people are to be told that the power given to the Judges for their protection is prostituted to their destruction, the Court may retain its power some little time, but it will instantly lose all its authority; and the power of the Court will not long survive the authority of it: is it possible to stab that authority more fatally than by charging the Court?

69. In the light of the above discussion, it can safely be concluded that the contempt of Court is a criminal offence, which is tried summarily by a judge alone, who may be the very judge who has been injured by the contempt as against a regular trial. The Judge who is being scandalized in special jurisdiction, is not debarred form hearing the case. By providing that no court shall take cognizance of contempt of Court arising from an averment made in due course in appellate, revisional or review proceedings, till such proceedings have been finalized and no further appeal, revision or review lies, section

6(3) curtails the power of a Judge, thereby defying the principle of independence of judiciary, which is not permissible. The provision is contrary to the principle of independence of judiciary and right of access to justice as enshrined in Articles 2A and 9 of the Constitution. It is, therefore, void.

70. Subsection (1) of section 8 provides that where, in a case in which a Judge has made an order under subsection (1) of section 7, not being a case referred to in subsection (4) of that section, the alleged contempt of Court involves scandalization personal to such Judge and is not scandalization of the court as a whole or of all the Judges of the court, the judge shall forward the record of the case and such comments, if any, as he deems fit to make, to the Chief Justice of the Court. While giving finding on section 3 of COCA 2012, it has already been held that the use of the words 'judge in relation to his office' instead of the word 'Court' is violative of Article 63(1)(g). Besides, the provision by requiring the concerned Judge to forward the record of the case along with his comments to the Chief Justice of his Court takes away the power from the concerned Judge to punish the alleged contemner even in the cases where he may have committed contempt of Court on the face of the Judge. This is violative of the principle of independence of judiciary.

71. Subsection (3) of section 8 provides that if, at any stage of a case in which the Chief Justice has passed an order under clause (a) of subsection (2), the Chief Justice is of opinion that, in the interest of justice, the case shall be transferred to another Judge, he may pass an order accordingly; and the case shall then be heard by such other Judge. It may be mentioned that Order XI of the Supreme Court Rules, 1980 provides that save as otherwise provided by law or by these

Rules, every cause, appeal or matter shall be heard and disposed of by a Bench consisting of not less than three Judges to be nominated by the Chief Justice. The proviso to the above Order provides that if the Judges hearing a petition or an appeal are equally divided in opinion, the petition or appeal shall, in the discretion of the Chief Justice, be placed for hearing and disposal either before another Judge or before a larger Bench to be nominated by the Chief Justice. It may also be mentioned that under rule 7 of Order XXVII *ibid,* the contempt matter shall, in the first instance, be placed before the Chief Justice and such Judges as the Chief Justice may nominate to consider the expediency or propriety of taking action in the matter.

72. Sh. Ahsanuddin ASC has argued that constitution of benches is a prerogative of the Chief Justice under Order XI of Supreme Court Rules, 1980, but under the impugned Act, this function is being taken over by the other organs of the State under a scheme, and even though it be not termed as *mala fide*, yet it is not fair. The provision of section 8(3) is directly relatable to the power of the Chief Justice in the matter of constitution of benches, which aspect has already formed the subject matter of discussion by this Court in a large number of cases. *In re: M.A. No.657 of 1996 in References Nos. 1 and 2 of 1996* (PLD 1997 SC 80), relying upon the cases of *Zulfikar Ali Bhutto v. The State* (PLD 1978 SC 125) and *Malik Hamid Sarfaraz v. Federation of Pakistan* (PLD 1979 SC 991), it was held that application of the party with a request for constitution of Full Bench will be covered by Order XI, Supreme Court Rules, 1980, which provides specifically for constitution of Benches by the Chief Justice. It is very clearly provided therein that the Chief Justice may, in a fit case, refer any cause or appeal as aforesaid to a larger Bench. Order

XXXIII, Rule 6 of the Supreme Court Rules is not attracted in such a case as it provides that the Court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It was further held that under the Constitution and the law regulating the practice of the Supreme Court, it is not only the privilege but the duty and obligation of the Chief Justice to personally preside over all important cases and to nominate Judges for hearing cases which come up before the Court. No person has the right to ask the Chief Justice to abdicate this responsibility, nor does anyone have the right to demand a Bench of his own choice. This would be contrary to the well established norms regulating the functioning of the superior Courts. It is the undisputed privilege and duty of the Chief Justice to constitute Benches for the hearing and disposal of cases coming before Supreme Court and no litigant or lawyer can be permitted to ask that his case be heard by a Bench of his choice. The above principle was reiterated in *Supreme Court Bar Association v. Federation of Pakistan* (PLD 2002 SC 939).

73. It is to be noted that the Supreme Court Rules, 1980 having been framed under Article 191 of the Constitution have a constitutional backing. Therefore, the Legislature cannot take over the duty/function of the Chief Justice and other Judges to hear cases because in such eventuality, the Executive would be issuing orders for constitution of Benches of their choice for hearing of particular cases, which would be interference in the jurisdiction of the Court as well as violation of the principles of independence of judiciary and denial of access to justice enshrined in Articles 2A, 9 and 175 of the Constitution. Undoubtedly, these powers are to be exercised by the judicial authorities. There is no scope for encroachment upon the

powers of judicial review of the superior courts vested in them under the Constitution. In *Mahmood Khan Achakzai's case* (supra) this Court has held that power and jurisdiction of judicial review could not be controlled and fettered. In *Khurshid Anwar Khan's case* (supra) it was held that as mandated by Article 2A, independence of judiciary of judiciary is to be fully secured. In *Mehram Ali's case* (supra), the provisions of ATA, which militated against the independence of judiciary and Articles 175 and 203 of the Constitution were held to be invalid whereas in *Asad Ali's case* it was held that right of access to impartial and independent courts/tribunals. The provision of subsection (3) of section 8 being a clog on the power of the Chief Justice to constitute benches is violative of the principle of independence of judiciary and right of access to justice.

74. Subsection (2) of the said section provides that on receipt of the papers, mentioned in sub-section (1), the Chief Justice, after inviting, if he deems fit, further comments, if any, from the judge first taking cognizance of the offence and making such inquiry in such manner as he deems fit, shall pass orders specifying another judge, which if the Chief Justice so orders, may be the Chief Justice; a Bench of judges set up by the Chief Justice, of which the judge first taking cognizance of the offence is not a member; and the case shall then be heard accordingly. Subsection (4) of the said section provides that when, in pursuance of an order under sub-section (2), the Judge first taking cognizance of the case is not hearing the case, the other judge or, as the case may be, the Bench of judges hearing the case may invite or receive any further comments from the judge first taking cognizance of the offence and shall call and hear any witnesses whom such judge desires to be examined, and all comments furnished by the

judge first taking cognizance of the offence shall be treated as evidence in the case and such judge shall not be required to appear to give evidence. Subsection (5) of section 8 provides that when in a case the first cognizance of the offence has been taken by the Chief Justice, the functions of the Chief Justice, under subsection (1), (2) and (3) shall be performed by a Bench of judges composed of the two next most senior judges available. For the reasons ascribed to the provision of subsection (3) *ibid*, the provision of subsection (5) is also not sustainable.

75. Section 10(b) provides that no material which has been expunged from the record under the orders of the presiding officer of the Senate, the National Assembly, or a Provincial Assembly, shall be admissible in evidence. Mr. Abdur Rehman Siddiqui and Sh. Ahsanuddin ASCs argued that Article 19 of the Constitution has been violated by the impugned Act, inasmuch as the Fundamental Right of freedom of speech and expression provided therein is restricted, *inter alia*, in relation to contempt of court. In response, learned Attorney General has argued that all these petitions, in essence, and *per se* amount to violation of Fundamental Rights of freedom of speech as enshrined in Article 19 of the Constitution, and also its new recognition in the proviso to section 3 of the COCA 2012. He has argued that under Article 19 of the Constitution as well as under Article 19 of the United Nations Declaration of Human Rights, reasonable restriction can be imposed on freedom of speech, *inter alia*, in relation to contempt of Court, therefore, the defences of fair comments etc., as provided in the proviso to section 3 make the new contempt law look like a reasonable restriction in terms of Article 19 of the Constitution. He argued that there is no conflict between Article 19 and Article 204 of

the Constitution because any law to regulate the exercise of power to punish for contempt of Court must conform to the scheme of the Constitution and should not ignore any provision of the Constitution.

76. It is to be noted that the right to freedom of speech and expression guaranteed under Article 19 is subject to reasonable restrictions imposed by law, *inter alia*, in relation to contempt of Court. The right to freedom of speech and expression envisaged by Article 19 of the Indian Constitution is also subject to similar restriction in relation to contempt of Court. Article 19 has been interpreted by this Court in its various judgments. In *Masroor Ahsan's case* (supra), it was held as under: -

> "Keeping in view the above principle of interpretation of a Constitutional provision, it may again be observed that Article 19 of the Constitution (which relates to one of the fundamental rights) inter alia provides that every citizen shall have the right to freedom of speech and expression subject to any reasonable restrictions imposed by law which includes law relating to contempt of Court. In other words, the above Article of the Constitution guarantees freedom of speech but it is subject to reasonable restrictions imposed by law in respect of the matters mentioned therein including the contempt of Court. A Member of the Parliament in addition to his right under Article 66 of the Constitution may, as a citizen of Pakistan, invoke Article 19 if he makes a speech outside the Parliament. However, since aforesaid respondents Nos.3, 4, 5 and 7 made speeches on the floor of the House, we will have to refer to Article 66; clause (1) of which lays down that "Subject to the Constitution and to the rules of procedure of Majlis-e-Shoora (Parliament), there shall be freedom of speech in Majlis-e-Shoora (Parliament) and no member shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in Majlis-e-Shoora (Parliament), and no person shall be so liable in respect of the publication by or under the authority of Majlis-e-Shoora (Parliament) of any report, paper, votes or proceedings". The moot question is, as to whether the words "Subject to the Constitution" which prefixed the operative portion of Article 66 makes the above right of freedom of speech on the floor subject to other provisions of the Constitution, namely, Article 68 which enjoins that no discussion shall take place in Majlis-e-Shoora (Parliament) with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of

his duties. Furthermore, Article 204 of the Constitution, as pointed out hereinabove, has empowered the Supreme Court and a High Court to punish "any person" who has committed contempt as defined in sub-clauses (a) to (d) thereof. In England, it is a well-settled proposition of law after the Bill of Rights that a Member of the Parliament enjoys absolute right of freedom of speech. In this regard, reference may be made to the following three English cases:--

(i) Church of Scientology of California v. Johnson-Smith (1972) 1 All England Law Reports, page 378);
(ii) Wason v. Walter and others (1861 to 1873 All England Law Reports page 105); and
(iii) Bradlaugh v. Sossett (1884 QBD Volume XII, page 271).

Reference may also be made to the following passage from Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament, Twentieth Edition:--

> "Speeches in Parliament not actionable.
> The absolute privilege of statements made in debate is no longer contested, but it may be observed that the privilege which formerly protected Members against action by the Crown now serves largely as protection against prosecution by individuals or corporate bodies. Subject to the rules of order in debate (see Chapter 19), a Member may state whatever he thinks fit in debate, however offensive it may be to the feelings, or injurious to the character, of individuals; and he is protected by his privilege from any action for libel, as well as from any other question or molestation."

25. Since we have a written Constitution of 1973 containing Articles dealing with the rights of the Members of the Parliament and their obligations, we cannot derive any help from the legal position obtaining in England as to the absolute right of freedom of speech enjoyed by the Members of the British Parliament. In this view of the matter, the judgment of this Court in the case of Pakistan v. Ahmad Saeed Kirmani and others PLD 1958 SC (Pak.) 397 with reference to Article 89 of late Constitution of 1956 (which related to the privilege of the Members of the Legislative Assembly) cannot be pressed into service, firstly, that the language used in Article 176 of the late Constitution of 1956 relating to the power of the Supreme Court and of the High Courts for contempt was couched in different language than Article 204 of the Constitution of 1973. It was in line with Article 129 of the Indian Constitution. Secondly, that the above two Articles, namely, Articles 56 and 89 were not prefixed with the words "subject to the Constitution".

"92. … … Bare perusal of Article 19 of the Constitution postulates reasonable restraints whereby citizen while exercising his right of freedom of speech or expression and freedom of Press is prohibited to conduct himself in any manner which may violate security or defence of Pakistan or a part thereof, or could affect friendly relations with Foreign States. In the same way citizen under freedom clause is bound to ensure that his freedom does not strike against public order, decency or morality or provisions regarding contempt of Court. The right of freedom further prohibits incitement of citizen for committing any offence. Therefore, owing the responsibility of honouring the dictates of Constitution the Supreme Law of the country firmly embodied in Article 19 of the Constitution, every citizen while making speech, expressing himself or causing publication in the press is obligated to refrain from all such acts which may be calculated to constitute contempt of Court. For emphasis we may impress upon normal circumstance, which under the Constitution disdains immoral, indecent, anti-State, or un-Islamic publications, expressions or speeches. It equally creates an obligation for the citizen, while exercising his right to ensure that his comment with regard to conduct of a Judge or the Court should not be violative of law. From scrutiny of the precedent case-law and all relevant factors coupled with fundamental rights, the authors of editorials/articles, publishers, editors of newspapers or journals or Advocates have bounden duty to avoid from using strikingly pungent language which smacks of loud bitterness or aimed at emitting intemperate expression or abnormal understanding suggesting scandalization of the Court or cause obstruction to the impartial administration of justice. It appears necessary that citizens, editors or authors while making a speech or writing articles/editorials or arranging its publication must not use awkward or disrespectful language which may cause ridiculing or undermining the prestige of Court. The citizen, therefore, desiring to exercise fundamental rights specified under the Constitution and law must owe responsibility of obeying its corresponding constraints by satisfying that they are acting with bona fides without *mens rea* to damage or affect the justice system in the country. While exercising rights boundaries must be fixed whereby the disparaging or disrespectful remarks or attempts violating law or transgressing the limits of fair comments are avoided. Truth also can be expressed with noble and constructive objectives for institutional improvement by using decent and recognised phraseology. Ironical or sarcastic expression, intemperate speech, immodest or disgraceful publication merely with mala fide intentions aimed at blackmailing, must be avoided and abhorred. Yellow journalism as rightly observed by Mr. Aziz A. Munshi, learned counsel for respondent in Criminal Original Petitions Nos.18 to 21 of 1995 should be condemned

> because it affects the requirements of law or Constitution, and increase social malady."

In the light of the above exposition of the law, it is well settled that a citizen while exercising his Fundamental Right of speech and expression is obliged to ensure that his comment with regard to conduct of a Judge or the Court does not violate the law. Article 19 contemplates imposition of restrictions, *inter alia*, in relation to contempt of Court, but here defences have been provided with the result that nobody will be punished for contempt of Court. The provisions of the impugned law, which are aimed at devising ways to wriggle out of the pale of the contempt law, traverse the limits contemplated by Article 19 of the Constitution.

77. The issue of expunction of remarks made by a member of any House in violation of Article 68 of the Constitution was discussed by this Court in *Masroor Ahsan's case* (*supra*) and it was held that in view of Article 68 of the Constitution read with clause (c) of sub-rule (2) of Rule 248 of the National Assembly Rules, the Speaker is obliged not to allow a Member to discuss the conduct of any Judge of the Supreme Court or a High Court in the discharge of his duties and if a Member does it in violation of the above provisions, the Speaker is expected to take any of the actions envisaged under Rules 267, 268 and 269 of the aforesaid Rules, i.e., if the remarks are against a Judge of the Supreme Court or a High Court, it is to be referred to the concerned Chief Justice and where the remarks are against a Judge of the subordinate court, to the Registrar of the concerned High Court. It was further held that an expunction order in respect of the offending portion of a speech at the fag-end of the session would not be a defence to an action under Article 204 of the Constitution. It is,

therefore, clear that only such remarks will be expunged, which are not derogatory. In case of derogatory remarks, the Speaker of the National Assembly and the Chairman Senate are under a constitutional obligation to take action in terms of the aforesaid Rules, inasmuch as the expunction of derogatory remarks would be contrary to Constitution and law. Accordingly, section 10(b) is not sustainable and is declared to be void.

78. Section 11 (3) provides that an intra-court appeal shall lie against the issuance of a show cause notice or an original order including an interim order passed by a Bench of the Supreme Court in any case, including a pending case, to a larger bench consisting of the remaining available judges of the Court within the country and in the event the impugned show cause or order has been passed by half or more of the judges of Court, the matter shall, on the application of an aggrieved person, be put up for re-appraisal before the full court and the operation of the impugned show cause notice or order shall remain suspended until the final disposal of the matter. The first proviso to section 11(3) renders the whole proceedings of contempt of Court ineffective as at the initial stage after issuing a show cause notice, Full Court will have to be assembled to examine the grievance of the contemner if the show cause notice has been issued by half of the Judges whereas under the Supreme Court Rules, 1980, even very high profile cases may be decided by a two-Member Bench. The second proviso to section 11(3), which provides for automatic suspension of a judicial order, is violative of the principle of trichotomy of power and the independence of judiciary. Hence, the provision in question is contrary to settled principles governing the grant or refusal of interim

orders, besides being violative of the principle of independence of Judiciary.

79. Mr. A.K. Dogar, Sr. ASC has argued that section 11(3) is violative of all jurisprudence inasmuch as it is against the principle of prompt, summary and quick punishment. Other learned counsel/petitioners have also made similar argument. In response, it is argued on behalf of the Federation that the provision is not unprecedented, inasmuch as a similar provision existed in the Contempt of Court Act, 1976, which was never challenged by anyone during its currency and enforcement.

80. The statement of objects and purposes annexed to the Contempt of Court Bill, 2012, *inter alia*, envisaged to provide to the alleged accused to have fair trial including transparent procedure for right to appeal and the right to appeal was being streamlined. However, what has been done is that a bench of the available judges in the country is contemplated to be constituted for hearing of appeal against a show cause notice or an original order including an interim order passed by a Bench of the Supreme Court in any case, including a pending case to a larger Bench consisting of all the remaining available Judges of the Court within the country, and in the event the impugned show cause or order has been passed by half or more of the judges, the matter shall, on the application of an aggrieved person, be put up for reappraisal by the full court. As noted in the history of the contempt law in the beginning of the judgment, a similar provision was enacted in the COCA 1976 by way of an amendment when the then Prime Minister was facing the contempt proceedings. However, subsequently, when the aforesaid law was repealed, the aforesaid provision of appeal was not re-enacted in the new law of contempt.

Such a provision, it appears, was drafted to meet a particular situation then prevailing. Incidentally, a similar situation had arisen in the recent past where the sitting Prime Minister faced contempt of Court charge who was ultimately convicted for it and disqualified from being a member of the Parliament as also the Prime Minister. The Prime Minister elected thereafter is sailing in the same boat and is before the Court to answer the charge of contempt of Court for non-compliance with the order passed in *Dr. Mobashir Hassan's case*. In this backdrop, the impugned COCA 2012 was promulgated, section 11(3) whereof, *inter alia*, provided for the right of appeal as discussed hereinabove.

81. Mr. Latif Afridi, ASC has referred to the case titled as *In the matter of: Special Reference by the President Under Article 143* (AIR 1965 SC 745) wherein the President of India sent a Special Reference under Article 143(1) of the Constitution to the Indian Supreme Court for its opinion on five questions. The background of the Reference was that on 14.03.1964, the Speaker of the Legislative Assembly of Uttar Pradesh administered, in the name of and under the orders of the Legislative Assembly, a reprimand to one Keshav Singh for having committed contempt of the House and also for having committed a breach of the privileges of Narsingh Narain Pandey, a member of the House by getting printed and published a pamphlet which bore the signature of Keshav Singh along with the signature of other persons. In pursuance of the decision taken by the House later on the same day, the Speaker directed that Keshav Singh be committed to prison for committing another contempt of the House by his conduct in the House when he was summoned to receive the aforesaid reprimand and for writing a disrespectful letter to the Speaker of the House earlier. According to this order, a warrant was

issued under the signature of the Speaker of the House directing that Keshav Singh be detained in Jail for a period of seven days, and in execution of the warrant, Keshav Singh was detained in Jail. On 19.03.1964, Mr. B. Solomon Advocate presented a petition to the High Court on behalf on Keshav Singh under section 491 of the Code of Criminal Procedure, 1898, as well as under Article 226 of the Constitution. The matter was fixed before N.U. Beg and G.D. Sahgal JJ., when the petition was admitted and notice was ordered to be issued to the respondents. It was further ordered that the applicant should be released on bail. The Deputy Registrar of the Court was asked to take necessary action in connection with the Order. On 21.03.1964, the House proceeded to take action against the two Judges who passed the order on Keshav Singh's application, as well as Keshav Singh and his Advocate. The House by its resolution dated 21.03.1964 took the view that M/S G.D. Sahgal, N.U. Beg, Keshav Singh and B. Solomon had committed contempt of the House and, therefore, it was ordered that Keshav Singh should immediately be taken into custody and kept confined in Jail for the remaining term of his imprisonment and M/S N.U. Beg, G.D. Sahgal and B. Solomon should be brought in custody before the House. The two Judges, immediately after coming to know about the said resolution approached the Allahabad High Court with separate petitions under Article 226 of the Constitution. On the same day, a Full Bench of the Allahabad High Court consisting of 28 Judges after taking up the case directed that the said petitions should be admitted and ordered for issuance of notices against the respondents restraining the Speaker from issuing the warrant in pursuance of the direction of the House given to him on 21.03.1964, and from securing execution of the

warrant if already issued, and restraining the Government of U.P. and the Marshal of the House from executing the warrant. Mr. Solomon, Advocate, on 25.03.1964, presented a similar petition which was also heard by the Full Bench of 28 Judges and after admitting the petition, an interim order was passed prohibiting the implementation of the resolution the validity of which was challenged by the petitioner. On the same day, the House passed a clarificatory resolution wherein it was resolved that the question of contempt may be decided after giving an opportunity of explanation to the persons named in the original resolution of 20.03.1964 according to rules. As a result of the said resolution, the warrants issued for the arrest of the two Judges and Mr. Solomon were withdrawn, with the result that the two learned Judges and Mr. Solomon were placed under an obligation to appear before the House and offer their explanations as to why the House should not proceed against them for their alleged contempt of the House. In the said circumstances, on 26.03.1964, the President made a reference under Article 143(1) of the Constitution mentioning therein that the incidents in question had given rise to a serious conflict between a High Court and a State Legislature which involved important and complicated questions of law regarding the powers and jurisdiction of the High Court and its Judges in relation to the State Legislature and its officers and regarding the powers, privileges and immunities of the State Legislature and its members in relation to the High Court and its Judges in the discharge of their duties. The Court held as under: -

> “59. Whilst we are considering this aspect of the matter, it is relevant to emphasise that the conflict which has arisen between the High Court and the House is, strictly speaking, not a conflict between the High Court as and the

> House as such, but between the House and a citizen of this country. Keshav Singh claims certain fundamental rights which are guaranteed by the Constitution and he seeks to move the High Court under Art. 226 on the ground that his fundamental rights have been contravened illegally. The High Court purporting to exercise its power under Art. 226(1), seeks to examine the merits of the claims made by Keshav Singh and issues an interim order. It is this interim order which has led to the present unfortunate controversy. No doubt, by virtue of the resolution passed by the House requiring the Judges to appear before the Bar of the House to explain their conduct, the controversy has developed into one between the High Court and the House; but it is because the High Court in the discharge of its duties as such Court intervened to enquire into the allegations made by a citizen that the Judges have been compelled to enter the arena. Basically and fundamentally, the controversy is between a citizen of Uttar Pradesh and the Uttar Pradesh Legislative Assembly. That is why in dealing with the question about the extent of the powers of the House in dealing with cases of contempt committed outside its four-walls, the provisions of Art. 226 and Art. 32 assume significance. We have already pointed out that in Pandit Sharma ([1959] Supp. 1 S.C.R. 806 this Court has held that Art. 21 applies where powers are exercised by the legislature under the latter part of Art. 194(3). If a citizen moves the High Court on the ground that his fundamental right under Art. 21 has been contravened, the High Court would be entitled to examine his claim, and that itself would introduce some limitation on the extent of the powers claimed by the House in the present proceedings."

The underlying issue for which this judgment has been referred to by the learned counsel is that there is always a shade of difference of opinion between the Judiciary and the Parliament.

82. It may be observed that the Contempt of Court Ordinance, 2003, which was holding the field prior to the promulgation of COCA 2012, fully catered to this aspect. Section 19 of the Contempt of Court Ordinance, 2003 dealt with the filing of appeal against orders passed

by the Superior Courts under which, in the case of an order passed by a single judge of a High Court an intra-court appeal shall lie to a bench of two or more judges; in a case in which the original order has been passed by a division or larger bench of a High Court an appeal shall lie to the Supreme Court; and in the case of an original order passed by a single judge or a bench of two judges of the Supreme Court an intra-court appeal shall lie to a bench of three judges and in case the original order was passed by a bench of three or more judges an intra-court appeal shall lie to a bench of five or more judges. Subsection (2) provided that the appellate court may suspend the impugned order pending disposal of the appeal. The provision remained operational for quite some time. In the case of *Abdul Hameed Dogar, Former Judge v. Federation of Pakistan* (PLD 2011 SC 315) the original order of framing of charge against the former Judges of the superior Courts was passed by a 4-Member Bench of this Court. The said order was challenged by means of intra-court appeal which was heard by a larger Bench comprising 7 Hon'ble Judges. In the case of *Justice Hasnat Ahmed Khan v. Federation of Pakistan/State* (PLD 2011 SC 680), the original order was passed by a 4-Member Bench of this Court and the intra-court appeal was heard by a Bench comprising 6 Hon'ble Judges. In the case of *Syed Yousaf Raza Gillani, Prime Minister of Pakistan v. Assistant Registrar, Supreme Court of Pakistan* (2012 SCMR 422), the original order was passed by a 7-Member Bench of this Court and the intra-court appeal filed under section 19 *ibid* was heard by a larger Bench comprising 8 Hon'ble Judges. In *Contempt proceedings against Syed Yousaf Raza Gillani* (PLD 2012 SC 553) the respondent objected to his trial by a seven Member Bench on the ground that after the charge was framed the Bench had became not competent

to try the respondent, as such the trial by the same Bench militates against the principle of ‘due process’ in terms of Article 10A of the Constitution. The Court held that the principle of right to 'fair trial' has been acknowledged and recognized by our Courts since long and is by now well entrenched in our jurisprudence. The right to a ‘fair trial’ undoubtedly means a right to a proper hearing by an unbiased competent forum. The latter component of a ‘fair trial’ is based on the age-old maxim “*Nemo debet esse judex in propria sua causa*” that “no man can be a judge in his own cause”. It was further held that this principle has been further expounded to mean that a Judge must not hear a case in which he has personal interest, whether or not his decision is influenced by his interest, for ”justice should not only be done but be seen to have been done”. The Court relied upon the case of *the President v. Shaukat Ali* (PLD 1971 SC 585) and Federation of *Pakistan v. Muhammad Akram Sheikh* (PLD 1989 SC 689). In the first case one of the objections raised by the respondent Judge was that the Supreme Judicial Council was disqualified from hearing the Reference, as it had earlier scrutinized the declaration of the assets of the respondent and was, therefore, bound to be biased. The objection was rejected on two grounds; firstly, that there was no question or allegation of any bias on any individual member of the Supreme Judicial Council and the mere fact that the Council had scrutinized the declaration of assets was not sufficient to establish the likelihood of bias: “for, if it were so then no Judge who issues a rule in a motion or issues notice to show cause in any other proceedings or frames a charge in a trial can ever hear that matter or conduct that trial. The reason is that a preliminary inquiry intended to determine whether a prima facie

case has been made out or not is a safeguard against the commencement of wholly unwarranted final proceedings against a person. To say that a charge should be framed against a person amounts to saying nothing more than that the person should be tried in respect of it. Anybody who knows the difference between the prima facie case and its final trial, would reject the objection as misconceived." The second ground for rejecting the objection was that of necessity, in that if sustained, there would be no forum or tribunal to hear the Reference, as the Supreme Judicial Council had the exclusive jurisdiction to hear the Reference and all its members had at the preliminary stage scrutinized the statement of declaration of assets of the Judge. In the second case this Court, while reaffirming that the principle that "no one should be a judge in his own cause and justice should not only be done but should manifestly appear to have been done, were very salutary and fully entrenched judicial principles of high standard", acknowledged that a Judge, when otherwise disqualified on account of the said principles, may still sit in the proceedings if in his absence the tribunal or the Court having exclusive jurisdiction would not be complete. It was further held as under:-

> "28. In the case of THE PRESIDENT v. SHAUKAT ALI ibid) the Supreme Judicial Council had on its own motion, after scrutinizing the statement of the respondent Judge, made a report to the President. The pronouncement by the then Chief Justice Hamoodur Rahman provides a complete answer to the objection of the learned counsel for the defence. The learned counsel had tried to draw a distinction between the exercise of contempt jurisdiction by the Court on its own motion and on the complaint of a party and it was contended that it is only in the former case that a Judge would stand disqualified to try a contemnor. This distinction we do not consider to be material. In both situations a Judge applies his mind before issuing notice to the respondent and later is to form a prima facie opinion after

> preliminary hearing whether or not to frame a charge and proceed with the trial. If it is held that a Judge holding a trial after having formed a prima facie or tentative opinion on merits of a case violates a litigant's fundamental right guaranteed under Article 10A, it would lead to striking down a number of procedural laws and well established practices, and may land our judicial system into confusion and chaos; a Judge, who frames a charge in every criminal case, will stand debarred from holding trial of the accused; a Judge hearing a bail matter and forming a tentative opinion of the prosecution case would then be disqualified to try the accused; a Judge expressing a prima facie opinion while deciding a prayer for grant of injunction would become incompetent to try the suit. There may be scores of other such situations. Be that as it may, in all such situations the cause is not personal to the Judge and he has no personal interest in the matter to disqualify him.
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> 29. The exception recognized by the two judgments of this Court cited above on the ground of necessity to the rule that "no person shall be a judge in his own cause" is also attracted here. After the show cause notice was issued to the respondent, a preliminary hearing was afforded to the respondent in terms of Subsection (3) of Section 17 of the Contempt of Court Ordinance 2003. Upon conclusion of the hearing we decided to proceed further and frame a charge against the respondent. This order was challenged through an Intra-Court Appeal filed under section 19 of the Ordinance. It was heard by an eight-member Bench of this Court, headed by the Hon'ble Chief Justice. The Appeal was dismissed and the order by this Bench, forming a prima facie opinion to frame the charge against the respondent, was upheld. Like the present, the Bench hearing the Intra-Court Appeal had also applied its mind to the existence or otherwise of a prima facie case. If the argument of the learned counsel is accepted, all the members of the Bench hearing the Intra-Court Appeal would be equally disqualified, thus, leaving only one Hon'ble Judge of this Court unaffected. No Bench could then be constituted to hear the contempt matter.
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> 34. From the foregoing discussion, it follows that a Judge, making a prima facie assessment of a contempt matter whether initiated suo motu or on the application of a party, does not stand disqualified on the touchstone of the requirements of a 'fair trial', from hearing and deciding the matter. Thus our trial of the respondent does not infringe upon the respondent's fundamental right to a fair trial enshrined in Article 10A of the Constitution. The objection on this account is, therefore, not sustained."

83. No doubt, right of appeal is a creation of the statute and unless specifically conferred, it would not be available. If a statute

does not confer right of appeal, it does not exist. See *Multan Electric Power Company Ltd. through Chief Executive v. Muhammad Ashiq* (PLD 2006 SC 328), *Muhammad Siddique v. Lahore High Court, Lahore* (PLD 2003 SC 885) and *Pakistan v. Abdul Hayee Khan* (PLD 1995 SC 418). In this behalf, it may be noted that rule 5(1) of Order XLI of Civil Procedure Code, 1908 provides that an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may, for sufficient cause, order stay of execution of such decree. Under sub-rule (2) of the said rule, where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may, on sufficient cause being shown, order the execution to be stayed. However, sub-rule (3) of the said rule provides that no order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied (a) that substantial loss may result to the party applying for stay of execution unless the order is made; (b) that the application has been made without unreasonable delay; and (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. In *Shah Wali v. Ghulam Din alias Gaman and another* (PLD 1966 SC 983), *H.M. Fazil Zaheer v. Kh. Abdul Hameed* (1983 SCMR 906) and *Government of Punjab through Secretary, Labour and Manpower v. Shahid Mehmood Butt* [2006 PLC (C.S.) 325] it has been held that the operation of a decree passed by a court of first instance is not automatically suspended on mere filing of appeal therefrom. In *Naeem Ullah Khalid v. Dr. Hafiz Mushtaq Ahmad*

(2007 YLR 1418) and *Mian Ghulam Yasin v. Election Commission of Pakistan* (2007 CLC 304) the Lahore High Court has held that mere filing of appeal against a decree or order does not operate as stay of proceedings, unless Appellate Court specifically stays the proceedings or grants injunction. This position is recognized by the Supreme Court in its rules of procedure "Supreme Court Rules, 1980" under Order XX, rule 1, which provides that the filing of a petition for leave to appeal or an appeal shall not prevent execution of the decree or order appealed against, but the Court may, subject to such terms and conditions as it may deem fit to impose, order a stay of execution of the decree or order, or order a stay of proceedings, in any case under appeal to the Court. The rationale for the proposition is that stay is granted when the Court finds that the appellant has arguable case, that the balance of convenience lies in his favour and not staying the impugned action would involve the parties into unnecessary expense and waste of time if the appeal eventually succeeded against the impugned order.

84. Coming to the issue in hand, it may be noted that not only the issuance of a show cause notice, or the passing of an original order including an interim order by a Bench of the Supreme Court are judicial functions, but also the matter of continuance or otherwise of any such order is to be decided by the Judge/Bench concerned discharging his judicial functions by applying judicial mind. How can he be denuded of this important part of the power to punish for contempt of Court? The provision of appeal and the composition of a larger bench, convening of full court for the hearing of such appeal and automatic suspension of the operation of the impugned order as introduced by section 11(3) appears to be aimed at causing hindrance in proceeding with contempt of Court cases smoothly and quickly,

particularly those concerning the public office holders. It was frankly admitted by the learned counsel for the Federation himself that the impugned law was brought to save the incumbent Prime Minister.

85. Section 11(4) prescribes limitation of 30 days for filing of appeal to a Bench of the High Court and 60 days in the case of an appeal to the Supreme Court from the date of the order appealed against whereas under clause (5) *ibid*, an intra-court appeal or application for re-appraisal may be filed within 30 days from the date of show cause notice or the order, as the case may be. Mr. M. Zafar, Sr. ASC has argued that although there is no cavil with the proposition that appeal is creation of statute and further there is no dispute that limitation under the law can be prescribed for filing petitions, appeals, reviews, however, in the instant case, this being a contempt law, it cannot be allowed that after the contempt is committed, the accused will be held accountable for his act of commission or omission some time in the distant future. Mr. Latif Afridi, ASC has submitted that under the provisions of the impugned Act, the action against commission of contempt of Court has been subordinated to a procedure which is very time consuming, although the accused in such a case remains present in the court, therefore, there is no logic for 60 days' period of limitation for filing of appeal before the Supreme Court instead of 30 days, which is the normal period for filing an appeal. He also contended that this again is a discriminatory treatment. Article 37(d) of the Constitution mandates the State to ensure inexpensive and expeditious justice. The provision in question is clearly violative of the said mandate inasmuch as it delays the decision of contempt cases and compromises the expeditious disposal of such cases to restore the dignity of the Courts, who are responsible for administration of justice.

As mentioned earlier, the law empowers the courts of law to punish for its contempt swiftly and promptly punish a person without recourse to a formal and lengthy trial to uphold the majesty of law and the dignity of courts and protect their image in the eyes of the members of the public and to prevent undue interference with the administration of justice and independence of judiciary.

86. Section 12 of COCA 2012 provides that the Federal Government may make rules, not inconsistent with the provisions of the Act, providing for any matter relating to the procedure. The COCA 2012 has been passed in exercise of powers conferred by Article 204(3) under which two institutions of the State have been given power – one, the Parliament to make the law to regulate the exercise of power conferred on a Court under this Article because the Constitution has not mentioned the procedure how Article 204 is to be enforced; and two, the Court to make rules subject to law made by the Parliament. However, as mentioned earlier, the Parliament, in making a law in terms of clause (3) of this Article, cannot reduce powers of the Court conferred by Article 204(a), (b) & (c), though it may enlarge the powers of the Court to punish for contempt while exercising its power under Article 204(2)(d). The purpose of the law to be made by the Parliament in terms of clause (3) *ibid* is to provide for and to regulate the system to achieve the object of clauses (1) and (2) of Article 204 of the Constitution. However, in so doing, the Legislature cannot curtail power of a Court to punish for its contempt conferred by Article 204. The learned counsel for the petitioners have challenged the constitutionality of this provision on the ground that it is violative of the clause (3) of Article 204 of the Constitution, which provides that the exercise of the power conferred on a Court by this Article may be

regulated by law and, subject to law, by rules made by the Court. In presence of the Supreme Court Rules, 1980, there is hardly any occasion for framing any other rules by the Federal Government as is purported to be provided under section 12 of COCA 2012. Confronted with the above position, the learned counsel for the Federation frankly conceded that section 12 is not in line with the provision of aforesaid clause (3), which confers the rule making power on the Court. Accordingly, section 12 is declared to be *ultra vires* of the said constitutional provision.

87. By subsection (1) section 13 of COCA 2012 the Contempt of Court Ordinance, 2003 (V of 2003) has been repealed whereas subsection (2) *ibid* provides that for removal of doubt it is declared that the Contempt of Court Act, 1976 (LXIV of 1976), Contempt of Court Ordinance, 2003 (IV of 2003) and Contempt of Court Ordinance, 2004 (I of 2004) stand repealed. Sh. Ahsanuddin ASC for the petitioner in Constitution Petition No. 86 of 2012 has argued that the Contempt of Court Ordinance 2003 stood protected by means of Article 270AA as inserted by the Seventeenth and Eighteenth Constitutional Amendments, therefore, the same could not be repealed by COCA 2012.

88. As noted hereinabove, the Contempt of Court Ordinance No. V of 2003 was promulgated on 15.12.2003 whereby the COCA 1976 was repealed. During the currency of the said Ordinance No. V of 2003, Article 270AA was inserted into the Constitution by means of the Constitution (Seventeenth Amendment) Act, 2003 on 31.12.2003, which continued in force certain legislative measures including the Ordinance No. V of 2003 until “altered, repealed or amended by the competent authority”. However, on 15.07.2004, the Contempt of Court

Ordinance, 2004 (Ordinance No. I of 2004) was promulgated, which was made applicable with effect from 15.04.2004, the day when the Ordinance No. V of 2003 would have expired in the ordinary course. By means of Ordinance No. I of 2004, COCA 1976 was once again repealed, but not the Ordinance V of 2003, presumably on account of its supposed expiry after a period of 120 days as provided in Article 89 of the Constitution. Thereafter, the Ordinance No. I of 2004 was repealed on 14.11.2004 on expiry of 120 days. Later on, by the Constitution (Eighteenth Amendment) Act 2010, Article 270AA was reinserted, as such the Ordinance No. V of 2003 continued to be in force.

89. In view of the successive repeals of the contempt laws promulgated from time to time, the question before us in the instant case is which contempt law was prevailing in the country prior to the promulgation of COCA 2012. This issue was first dealt with by this Court in *Suo Motu Case No.1 OF 2007* (PLD 2007 SC 688), wherein initially the charge was framed against the contemners under COCA 1976. However, during hearing of the case, it was pointed out that the Ordinance No. V of 2003 was holding the field in view of the provision of Article 270AA as inserted under the Seventeenth Constitutional Amendment, whereupon the charge was amended and proceedings were finalized under the Ordinance No. V of 2003. The issue was again considered in the case of *Hasnat Ahmad Khan v. Institution Officer* (2010 SCMR 354) wherein it was held that Ordinance No. V of 2003, was holding the field in pursuance of the blanket cover provided by clause (3) of Article 270AA as inserted by the Seventeenth Constitutional Amendment. In this case, the judgment in *Suo Motu Case No.1 OF 2007* was quoted with approval. In *Justice Hasnat*

*Ahmed Khan v. Registrar, Supreme Court of Pakistan* (PLD 2010 SC 806), it has been held as under: -

> "12. We may add that the Supreme Court and the High Courts derive power to punish contemnors from Article 204 of the Constitution, and are not dependant upon sub-constitutional legislation. Clause 3 of the Article only provides that the exercise of power conferred upon the Court under the Article may be regulated by law and, subject to law, by rules made by the Court. All the foregoing statutes from the Contempt of Court Act, 1976, onwards have been enacted with reference to Clause 3 of Article 204.
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> 13. We now take up the argument that since notices to the petitioners and the respondents in the connected matters were issued under Contempt of Court Act, 1976 in accordance with the order of a 14 Members Bench dated 13.10.2009 a 5 Member Bench could not alter the provision of law. Indeed, the notices were issued "under Article 204 of the Constitution read with sections 3 and 4 of the Contempt of Court Act, 1976 or any other enabling provisions of the relevant law". Reference to "any other enabling provision of the relevant law", in the notices was in the alternative to the provisions of the Contempt of Court Act, 1976. Perhaps this phrase was added as a precaution as there was still some controversy prevailing at the time as to whether or not the Contempt of Court Act, 1976 stood effectively repealed and replaced by Ordinance V of 2003. The argument that the said phrase be read as ejusdem generis with the Contempt of Court Act, 1976, is untenable in that the 'enabling provisions' mentioned in the phrase is followed by the words 'of the relevant law'. If it was intended to refer to the enabling provisions of the Contempt of Court Act, 1976, it would not have been qualified by the words 'the relevant law', the relevant law means law other than the 1976 Act, if so found relevant. We have already held that the Ordinance V of 2003 is the relevant law. It is, therefore, not necessary to refer the case back to a larger Bench for rectifying the order of issuing notices.
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> 14. In view of our finding that the 1976 Act stands repealed, the argument that these constitution petitions be heard as Intra Court Appeals under section 10(2-A) of the Act need not be dilated upon. Above are the reasons for the short order dated 4.5.2010, the operative paragraphs 6 and 7 are reproduced:--
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> > "6. We find neither of the two contentions tenable, and hold that the Contempt of Court Ordinance (No.V of 2003) has been given permanence and protection by Article 270AA as substituted by the Constitution (17th Amendment) Act, 2003 as well as by the Constitution (18th Amendment) Act, 2010 and section 20 of the Ordinance has repealed the Contempt of Court Act, 1976. Thus, no intra court

> appeal under section 10(2-A) of the Contempt of Court Act, 1976 is maintainable. Since we have held that the Ordinance V of 2003 is the law in force regulating proceedings of contempt of Court, the said Ordinance is the "relevant law" mentioned in the notices issued to the petitioners. Accordingly, the notices to the petitioners as well as to the others in the connected criminal original petitions, shall be read as having been issued under Article 204 of the Constitution of the Islamic Republic of Pakistan read with sections 3 and 5 of the Contempt of Court Ordinance, 2003 (Ordinance V of 2003)."

Again, in the case of *Justice Hasnat Ahmed Khan v. Federation of Pakistan/State* (PLD 2011 SC 680) it was held as under: -

> "59. Dr. Abdul Basit, learned counsel raised question that under the Eighteenth and Nineteenth Constitutional Amendments the Contempt of Court Ordinance, 2003 has not been protected. This argument is not available to him for the reasons that this Court has already held in *In re: Suo Motu Case No.1 of 2007* (PLD 2007 SC 688) that the Contempt of Court Ordinance, 2003 (No. V of 2003) was accorded permanence by means of Article 270AA incorporated in the Constitution by the Seventeenth Constitutional Amendment. It is to be further added that in Eighteenth Constitutional Amendment all laws including President's Orders, Acts, Ordinances, etc. made between 12.10.1999 and 31.12.2003 to be in force until altered, repealed or amended by the competent authority including the Contempt of Court Ordinance, 2003 have been protected."

Finally, in the case of contempt of Court against former Prime Minister Syed Yousaf Raza Gillani titled as *Criminal Original Petition No. 6 of 2012 in Suo Motu Case No. 4 of 2010* (PLD 2012 SC 553), the issue was again agitated by learned Attorney General before a 7-Member Bench by submitting that there was no law of contempt in force in the country as the Contempt of Court Ordinance No. V of 2003 having lapsed by efflux of time under Article 89 stood repealed under Article 264 of the Constitution and that Article 270AA did not protect the said Ordinance. The Court after considering the above referred cases held as under: -

> "47. ... ... ... This question squarely came before this Court in Suo Motu Case No.1 of 2007 (PLD 2007 SC 688) where it was held that the Contempt of Court Ordinance (V of 2003) holds the field. This judgment had been affirmed by this Court in Justice Hasnat Ahmed Khan v. Federation of Pakistan (PLD 2011 SC 680). It was pointed out to the learned Attorney General that even if there was no sub-constitutional legislation regulating proceedings of Contempt of Court, this Court was possessed of constitutional power under Article 204 to punish contemnors, with no restrictions on the exercise of power including that regarding quantum of punishment that can be imposed on the contemner."

90. The learned Attorney General has argued that the question as to which law of contempt was in force prior to COCA 2012 is pending determination in the case of in Suo Motu Case No.1 of 2007 wherein a 16 – Member Bench had suspended the operation of the impugned judgment convicting and sentencing the alleged contemners therein, therefore, the question as to which contempt law was holding the field is still *sub judice* and is to be decided by a 16 – Member Bench. He further argued that after the repeal of Contempt of Court Ordinance No. I of 2004, which was promulgated after the repeal of Contempt of Court Ordinance No. V of 2003, practically there was no contempt law in the country and reference to the latter Ordinance as the law of the land on the subject was not correct position of law. The learned counsel for the Federation, however, has taken the plea that there was confusion as to which law was holding the field, which factor has been noticed in the statement of objects and reasons annexed to the Contempt of Court Bill, 2012, therefore, section 13(2) has been enacted for the removal of doubts.

91. The argument of the learned Attorney General has no force. The issue as to which contempt law was holding the field has already been settled in the above referred cases wherein it was made clear that the Contempt of Court Ordinance No. V of 2003 was

continuing on the statute book prior to the promulgation of COCA 2012. The case referred to by the learned Attorney General is directed against the conviction and sentence passed against the alleged contemners in the said case, which being a distinct matter is to be decided separately.

92. Now, the question is whether there was any necessity to repeal the Contempt of Court Ordinance, 2003. The preamble to the COCA 2012 states that it is expedient to repeal and re-enact the law of contempt in exercise of the powers conferred by clause (3) of Article 204 of the Constitution. Applying the doctrine of mischief, which has been discussed in detail hereinabove, it can safely be held that there was no necessity of repealing Ordinance V of 2003. As discussed hereinabove in the light of *Khalid Masood's case* (supra), a law can only be promulgated under Article 204(3) of the Constitution to regulate the exercise of power to punish for contempt. However, when a law, namely, Ordinance V of 2003 was already holding the field, whose constitutionality had not been questioned, and the cases including case of Syed Yousaf Raza Gillani noted hereinabove, relevant para therefrom has already been reproduced hereinbefore, had been decided under the said law, therefore, no other conclusion could be drawn that the COCA 2012 was promulgated against the statement of objects and purposes included in the Bill, as also the preamble of COCA 2012 itself. It was also violative of the mandate of Article 204(3).

93. In addition to it, as mentioned earlier, section 13(1) of COCA 2012 has repealed the Contempt of Court Ordinance, 2003 whereas under section 13(2) *ibid* for removal of doubts, it is declared that the Contempt of Court Act, 1976, the Contempt of Court

Ordinance, 2003 and the Contempt of Court Ordinance, 2004 are repealed. It is pertinent to mention that the Contempt of Court Act, 1976 had been repealed for the fist time on 27.10.1998 by means of Contempt of Court Ordinance X of 1998. It was repealed for the second time on 10.03.2003 when the contempt of Court Ordinance IV of 2003 was promulgated. It was then repealed on 15.12.2003 when the contempt of Court Ordinance V of 2003 was promulgated and lastly, it was repealed on 15.07.2004 on promulgation of the contempt of Court Ordinance I of 2004. Similarly, the contempt of Court Ordinance I of 2004 was repealed on 14.11.2004 in terms of Article 89 of the Constitution. This Court has, time and again, held that the contempt of Court Ordinance V of 2003 is holding the field as discussed above. In such a situation, the argument raised by Mr. Shahid Orakzai seems to be valid that after the Eighteenth Constitutional Amendment, the Parliament is not empowered to promulgate any such law, as all criminal laws are to be promulgated by the Provincial Legislatures. The Contempt of Court Ordinance V of 2003 has been given permanence by the Seventeenth & Eighteenth Constitutional Amendments, which aspect has not been touched upon under the Nineteenth and Twentieth Constitutional Amendments. Therefore, its repeal is a nullity in the eyes of law. In this view of the matter, section 13 of the Act, being contrary to Article 204(3) of the Constitution is *void ab initio*.

94. Mr. Rashid A. Rizvi, ASC has argued that in enacting the COCA 2012 the Parliament has travelled beyond the mandate of the Constitution and the circumstances, in which the impugned legislation was enacted, make it a colourable legislation, therefore, the same is liable to be declared void. He has placed reliance on *Mehr Zulfqar Ali*

*Babu* (PLD 1997 SC 11). He has further argued that *mala fides* are not required to be proved in the case of colourable legislation in the light of the law laid down in *Shankara Narayana's case* (supra) and *R. S. Joshi's case* (supra). The learned counsel for the Federation has also relied upon *Shankara Narayana's case* relied upon by Mr. Rashid A. Rizvi to contend that where the legislature is competent to enact a certain law, the enactment cannot be declared to be void on the ground of colourable legislation. He has also placed reliance on *Dr. Mobashir Hassan's case* to canvass the proposition that only such provisions of an enactment can be declared void as are found to be inconsistent with the Fundamental Rights as per mandate of Article 8 of the Constitution and that the whole enactment cannot be declared void.

95. We have examined the case law cited at the bar. In *K.C. Gajapati Narayan Deo v. The State of Orissa* (AIR 1953 SC 375) it has been held as under: -

> "It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it,

> transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff, J. in Attorney-General for Ontario v. Reciprocal Insurers, (1924 AC 328 at p. 337).
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> "Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing.
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> "In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method."

In *G. Nageswara Rao v. Andhra Pradesh State Road Transport Corporation* (AIR 1959 SC 308) it has been held that: -

> "We have quoted the observations in extenso as they neatly summarise the law on the subject. The legal position may be briefly stated thus: The legislature can only make laws within it legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by the Constitution. The legislature cannot over-step the field of its competency, directly or indirectly. The Court will scrutinize the law to ascertain whether the legislature by device put-ports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it. If, in fact, it has power to make the law, its motives in making the law are irrelevant."

In *Jaora Sugar Mills's case* (supra) it has been held that: -

> "The challenge to the validity of a Statute on the ground that it is a colourable piece of legislation is often made under a disconnection as to what colourable legislation

really means. As observed by Mukherjea J., in K. C. Gajapati Narayan Deo and Others v. The State of Orissa [1954] S.C.R. 1 at p. II, "the idea conveyed by the expression 'colourable legislation' is that although apparently a Legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere presence or disguise." This observation succinctly and effectively brings out the true character of the contention that any legislation is colourable legislation. Where a challenge is made on this round, what has to be proved to the satisfaction of the Court is that though the Act ostensibly is within the legislative competence of the Legislature in question, in substance and in reality it covers a field which is outside its legislative competence. It would be noticed that as soon as this aspect of the matter is borne in mind, the argument that the Act is a colourable piece of legislation takes us back again to the true scope and effect of the provisions of S. 3. If the true scope and effect of s. 3 is as Mr. Pathak assumes it to be, then, of course, the Act would be void on the round that it is a colourable piece of legislation. But if the true scope and effect of s. 3 is as we have already held it to be, then in passing the Act, Parliament has exercised its undoubted legislative competence to provide for the recovery of the specified cesses and commissions in the respective State areas from the dates and in the manner indicated by it. When demands were made for the recovery of the said cesses, they will be deemed to have been made not in pursuance of the State Acts but in pursuance of the provisions of the Act itself. Therefore, we do not think there is any substance in the argument that the Act is invalid on the ground that it is a colourable piece of legislation."

In *B.R. Shankaranarayana's case* (supra) it has been held that: -

"As pointed out by this Court in Gajapati Narayan Deo's case, the whole doctrine of colourable legislation resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. It is open to the Court to scrutinize the law to ascertain whether the legislature by device, purports to make a law which,

> though in form appears to be within its sphere, in effect and substance, reaches beyond it."

In *Ashok Kumar Alias Golu v. Union of India* [(1991) 3 SCC 498] it has been held that: -

> "It is only when a legislature which has no power to legislate frames a legislation so camouflaging it as to appear to be within its competence when it knows it is not, it can be said that the legislation so enacted is colourable legislation. … … the whole doctrine resolves itself into a question of competency of the concerned legislature to enact the impugned legislation. If the legislature has transgressed the limits of its powers and if such transgression is indirect, covert or disguised, such a legislation is described as colourable in legal parlance. The idea conveyed by the use of the said expression is that although apparently a legislature in passing the statute purported to act within the limits of its powers, it had in substance and reality transgressed its powers, the transgression being veiled by what appears on close scrutiny to be a mere pretence or disguise. In other words if in pith and substance the legislation does not belong to the subject falling within the limits of its power but is outside it, the mere form of the legislation will not be determinate of the legislative competence."

96. From the above discussion in the case law, following principles are deduced: -

(a) The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant.

(b) In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation.

(c) The legislature can only make laws within it legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by the Constitution.

(d) The idea conveyed by the expression 'colourable legislation' is that although apparently a Legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere presence or disguise.

(e) Where a challenge is made on this round, what has to be proved to the satisfaction of the Court is that though the Act ostensibly is within the legislative competence of the Legislature in question, in substance and in reality it covers a field which is outside its legislative competence.

(f) The whole doctrine of colourable legislation resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant.

(g) It is only when a legislature which has no power to legislate frames a legislation so camouflaging it as to appear to be within its competence when it knows it is not, it can be said that the legislation so enacted is colourable legislation.

(h) If in pith and substance the legislation does not belong to the subject falling within the limits of its power but is outside it, the mere form of the legislation will not be determinate of the legislative competence.

Examined on the touchstone of the above principles, the COCA 2012 is a colourable legislation as it was beyond the legislative competence of the Parliament, and accordingly unconstitutional and void.

97. The next important aspect of the case relates to the doctrine of severability, which has been expounded in the case *Attorney-General for Alberta* (supra) in the following terms: -

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, weather on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is ultra vires at all."

Based on the above principle, Mr. A.K. Brohi (late), a prominent jurist, in his book captioned "Fundamental Law of Pakistan" at page … has concluded as under: -

> "In each case, therefore, it is a question for argument whether or not upon the Court coming to the conclusion that certain portions of the Act are beyond the law-making powers of the Legislature, the whole of the Act will be declared void. The test laid down by their lordships of the Privy Council, in any case is not easy to apply, but that it is the only test that can be applied, appears to be a matter beyond dispute."

At page 266 of the aforesaid book, the following rules of construction laid down by the American Courts in cases where the question of severability has been the subject of their consideration, as summarized by the Indian Supreme Court in *R.M.D.C. v. Union of India* (AIR 1957 SC 628) are given: -

(1) In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid.

(2) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable.

(3) Even when the provisions which are valid, are distinct and separate from those which are invalid if they form part of a

single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.

(4) Likewise when the valid and invalid parts of a Statute are independent and do not form part of a Scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of legislature, then also it will be rejected in its entirety.

(5) The severability of the valid and invalid provisions of a Statute does not depend on whether provisions are enacted in same section or different section, it is not the form but the substance of the matter that is material and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.

(6) If after the invalid portion is expunged from the Statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void as otherwise it will amount to judicial legislation.

(7) In determining the legislative intent on the question of severability, it will be legitimate to take into account the history of legislation, its object, the title and preamble of it.

Above principles are also described in the Shorter Constitution of India, 14th Edition, 2010, Vol. 2, p. 1706. Furthermore, in the case of *Motor General Traders v. State of Andhra Pradesh* (AIR 1984 SC 121), following propositions on the doctrine of severability are laid down: -

(1) The history, object, title and preamble of the Act shall have to be taken into consideration.

(2) The remaining statute, after removing the invalid and inconsistent portions from it, must give full meaning without any alterations. If any alterations are required to that remaining statute, then it must be struck down as a whole. The remaining portion shall also not to be taken into account.

(3) The form is not material. The substance is material.

(4) The question of severability has to be judged on the intention of legislature. To ascertain the intention of the legislature the statement of the mover of the bill is no more admissible than a speech made on the floor of the house.

(5) The part of an Act can be held valid and another part invalid, if they are severable. If the offending provisions are so interwoven into the scheme that they are not severable, the whole is ultra vires and void.

(6) It is well settled principle that the proceedings of the legislature cannot be called in and for construing a section.

98. From a perusal of the above case law, it is clear that the doctrine of severability permits a Court to sever the unconstitutional portion of a partially unconstitutional statute in order to preserve the operation of any uncontested or valid remainder, but if the valid portion is so closely mixed up with the invalid portion that it cannot be separated without leaving an incomplete or more or less mixed remainder, the Court will declare the entire Act void. In the instant case, the provisions of sections 2(a), 3, 4(4), 6(2) & (3), 8(1), (3) & (5), 10(b), 11(3) [first and second provisos], (4) & (5), 12 and 13 of COCA 2012 have been found unconstitutional and void on the touchstone of different provisions of the Constitution discussed hereinabove, particularly Articles 2A, 4, 8, 9, 10A, 25, 175, 204, etc. Besides, the impugned Act has been held to be a colourable legislation, which was promulgated without legislative competence. Therefore, applying the doctrine of severability in view of the law laid down in *Muhammad Mubeen-us-Salam* (supra) and *Zaman Cement Co. (Pvt.) Ltd. v. Central Board of Revenue* (2002 SCMR 312) it is not possible to keep intact the impugned enactment and is to be struck down as a whole.

99. Mr. Abdul Shakoor Paracha, ASC for the Federation of Pakistan has challenged the maintainability of the instant petitions on the ground that the petitions do not meet the twin requirement of Article 184(3) of the Constitution of Pakistan, viz., the involvement of a question of public importance with reference to enforcement of any of the Fundamental Rights conferred by Chapter 1, Part II of the Constitution. According to the learned counsel, these petitions have been filed merely on the basis of speculations and apprehensions whereas the petitioners are required to specifically show the

infringement of any of their Fundamental Rights and mere apprehension about the violation of any of their rights does not entitle them to invoke the jurisdiction of this Court under Article 184(3). The petitioners are also required to establish that the matter is of public importance failing which their remedy may lie in invoking the jurisdiction of the High Court under Article 199 of the Constitution. He has relied upon the cases of *Mian Muhammad Shahbaz Sharif v. Federation of Pakistan* (PLD 2004 SC 583) and *Pakistan Muslim League (N) v. Federation of Pakistan* (PLD 2007 SC 642).

100. The learned Attorney General for Pakistan also urged that these petitions are not maintainable under Article 184(3) of the Constitution as no question of enforcement of Fundamental Rights of the petitioners is involved, none of the petitioners is directly aggrieved, therefore, they ought to approach the respective High Courts so that the aggrieved person may have the right of appeal before this Court under Article 185(3) of the Constitution against the judgments of the High Courts, and this Court is also benefited by the opinion of the High Courts on the issues determined therein. He has argued that jurisdiction under Article 184(3) cannot be exercised with the sole object of avoiding conflicting judgments that may be handed down by the High Courts because in such eventuality, the Supreme Court will be required to transfer to its file all cases pending in the High Courts on one point. He has argued that the entire case of the petitioners is that the new contempt law is going to adversely affect the independence of the judiciary, which is too sweeping a statement because the same law had remained in force for almost a quarter of a century, but nobody had ever come forward with the plea that the law of contempt was a clog on the independence of judiciary.

101. This Court has already dealt with the question of jurisdiction in a good number of cases. It is crystal clear from the language of Article 184(3) of the Constitution that it is not necessary that Fundamental Right of any particular individual is breached, rather the only requirement is that a question of public importance with reference to the enforcement of a Fundamental Right is involved. The issue was considered by this Court in *Benazir Bhutto v. Federation of Pakistan* (PLD 1988 SC 416), wherein the then Chief Justice made a classic statement that law is not a closed shop. Reference in this behalf may also be made to the judgments of this Court *In the matter of: Corruption in Hajj Arrangements in* 2010 (PLD 2011 SC 963), *Watan Party v. Federation of Pakistan* (PLD 2011 SC 997) and *Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd.* (PLD 2010 SC 1109). Relevant Para from the last mentioned judgment reads as under: -

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

In the instant case, petitioners have approached this Court under Article 184(3) of the Constitution. The learned Attorney General has ignored the language of this provision, which is open ended and

nowhere mandates that resort to Article 199 in the first instance is a pre-requisite. The exercise of jurisdiction by the Supreme Court under Article 184(3) is to be regulated by the Court itself in accordance with the Constitution and the law as per its practice and procedure, and no hard and fast rule has ever been, or can be, laid down providing for the cases to be first entertained by the High Court under Article 199 and the cases to be directly filed in the Supreme Court under Article 184(3). The question as to which case is to be directly entertained by the Supreme Court is to be decided by the Court considering the peculiar facts and circumstances of a particular case. Therefore, the plea that the aggrieved party will have the right of appeal against the judgment of the High Court if the matter is first decided by the High Court under Article 199 of the Constitution has no merit. Reference in this behalf may usefully be made to the cases of *Manzoor Elahi v. Federation of Pakistan* (PLD 1975 SC 66), *Darshan Masih v. State* (PLD 1990 SC 513) and *Pakistan Lawyers' Forum v. Pervez Musharraf* (2000 SCMR 897).

102. The learned counsel for the Federation has argued that Fundamental Rights are classified into four categories, namely, freedom of speech (Article 19), property (Articles 23 & 24), equality (Article 25) and access to justice. But, there is no complaint of violation of Fundamental Rights covered in the three categories and the petitioner's case is that the COCA 2012 is violative of the Fundamental Right of equality enshrined in Article 25. According to the learned Attorney General, all these petitions, which have been filed on the ground of independence of judiciary and violation of Fundamental Rights guaranteed by the Constitution, in essence, *per se* relate to violation of Fundamental Rights of freedom of speech as enshrined in

Article 19 of the Constitution, and also its new recognition in the provisos to section 3 of the COCA 2012. He has vehemently contended that nobody has a Fundamental Right to have a particular contempt of Court law of his or her choice, even the Hon'ble Judges do not have that right. On the other hand, it is the right of all and sundry to possess freedom of speech, expression and thought, which is also recognized in the Universal Declaration of Human Rights, whereas the law of contempt is not so recognized under the said UN Declaration.

103. The learned Attorney General has also raised objection to the petition filed by the Bar Councils, particularly Pakistan Bar Council on the ground that it is not the function of the Bar Councils to file petitions and thereby cause the Judges to become Judges in their own cause because this way unfortunately the entire nation gets the message as if the Judges are becoming sensitive about the law, which concerns them. To substantiate his argument, he has read out the functions of the Bar Councils as laid down in section 13 of the Legal Practitioners and Bar Councils Act, 1976 and stated that filing of petitions does not fall within the role assigned to them under the Act. He then referred to clause (e) of subsection (1) of section 9 of the said Act, which the functions of a Provincial Bar Council shall be to promote and suggest law reform, but this provision too, according to the learned Attorney General would not enable a Provincial Bar Council to file petitions challenging the *vires* of any law.

104. We have considered the stance taken by the learned counsel for the Federation and the learned Attorney General. It may be observed that this is not the first time that petitions have been filed before this Court on behalf of Bar Associations, Bar Councils, representatives or members of the Bar on important constitutional

matters. Reference here may be made to the case of *Supreme Court Bar Association v. Federation of Pakistan* (PLD 2002 SC 939) wherein the appointments of Judges of Supreme Court were challenged by the Supreme Court Bar Association through its President Mr. Hamid Khan, Pakistan Lawyers Forum through its President Mr. A.K. Dogar, Wattan Party through its President Mr. Zafarullah Khan, Barrister-at-Law, Rai Muhammad Nawaz Kharal, Advocate Supreme Court of Pakistan and Pakistan Bar Council through its Vice-President Mr. H. Shakeel Ahmed by filing Constitution Petitions under Article 184(3) of the Constitution. After the pronouncement of judgment in the aforesaid case, a review petition was filed by Supreme Court Bar Association reported as PLD 2003 SC 82 wherein it was observed that the elected offices of the bar are sacred offices who have a role in promoting and advancing the system and the cause of the administration of justice in the country. In the recent past, Sindh High Court Bar Association filed petition challenging the appointment of Judges of High Court of Sindh in the case reported as *Sindh High Court Bar Association v. Federation of Pakistan* (PLD 2009 SC 879), wherein the Provisional Constitution Order, 2007 and other extra-constitutional measures of General Pervez Musharraf were declared as unconstitutional and *void ab initio*. Similarly, the validity of Eighteenth Constitutional Amendment was challenged, *inter alia*, by Supreme Court Bar Association, Lahore High Court Bar Association, Lahore High Court Bar Association, Rawalpindi Bench, Pakistan Lawyers Forum as well as District Bar Association, Rawalpindi in the case reported as *Nadeem Ahmad v. Federation of Pakistan* (PLD 2010 SC 1165). In *President Balochistan High Court Bar Association v. Federation of Pakistan* (2012 SCMR 897), Constitution Petitions were filed on behalf of Balochistan High Court Bar

Association regarding abduction of persons by security agencies. In the instant case, as is mentioned in the title of the judgment, constitutionality of COCA 2012 has been challenged, *inter alia*, on behalf of petitioners including Pakistan Bar Council through Chairman, Executive Committee and others. Admittedly, the Pakistan Bar Council and Provincial Bar Councils, under the Legal Practitioners and Bar Councils Act (XXXV) of 1973, enjoy statutory status as the highest bodies representing the legal fraternity in the Federation and the Provinces respectively. Their active interest in these petitions together with others mentioned above is a sign of vibrancy and vitality in society and rule of law and the Constitution. Article 5 of the Constitution provides that obedience to the Constitution and law is the inviolable obligation of every citizen. This Article casts an obligation on all persons to work for the supremacy of the Constitution and the rule of law in the country. So, like all other natural persons, the legal entities also have a bounden duty to see that the Constitution is implemented and enforced. The bar bodies have never lagged behind in the cause of enforcement of the Constitution and the rule of law. We were expecting Attorney General for Pakistan who is *ex-officio* Chairman of the Pakistan Bar Council to have appreciated the role and efforts of the Pakistan Bar Council for the rule of law, as the apex Bar Council had earlier done in the appointment of Judges' case in 2002 and 2003. If a member of the civil society or an ordinary citizen is entitled to file a petition, then appearance of the bar associations and bar councils is most welcome. The argument of the learned Attorney General is without substance and is rejected.

105. It is to be noted that if Constitution is violated, every citizen has a right to challenge the same. Reference may be made to

the case of *Al-Jehad Trust v. Federation of Pakistan* (PLD 1996 SC 324). Relevant paras therefrom read as under: -

> "12. Yet another objection raised was that the petitioner could not invoke Article. 184(3) of the Constitution as he has not been able to show whether any one, of his fundamental rights was infringed. To this objection reply of the petitioner was that his fundamental right as enunciated under Article 18 of the Constitution, which relates to freedom of trade, business or profession and provides that subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business, is infringed. It is submitted by the petitioner that he is a practising lawyer and has a very vital interest in the Judicial set-up which can function independently only when there is proper and total compliance of the Articles relating to the Judiciary and appointments are also made in accordance with the Constitutional scheme made thereunder. According to him, a lawyer cannot survive if the Judiciary is not independent. He has further submitted that he is governed by the Legal Practitioners and Bar Councils Act, 1973 and the rules framed thereunder. He made reference to Rule 165 which provides that it is duty of advocates to endeavour to prevent political considerations from outweighing judicial fitness in the appointment and selection of Judges. They should protest earnestly and actively against the appointment or selection of person s who are unsuitable for the Bench. Petitioner also made reference to Rule 175-A which provides that non-observance or violation of the cannons of professional conduct and etiquette mentioned in this chapter by an advocate shall be deemed to be professional misconduct making him liable for disciplinary action. We find sufficient force in this contention. It appears that the remedies under Articles 199 and 184 (3) available in a High Court and the Supreme Court respectively are concurrent in nature and question of locus standi is relevant in a High Court, but not in the Supreme Court when the jurisdiction is invoked under Article 184(3) of the Constitution. According to the petitioner, he went to the High Court and his writ petition was dismissed without deciding the questions of controversy. He filed the petition for leave to appeal against the impugned judgment and also filed the direct petition under Article 184(3) of the, Constitution praying for examination of the Articles relating to the Judiciary and in that connection has called in question some appointments in the Superior Judiciary. The learned Attorney General has submitted that since the controversy of the appointments challenged by the petitioner before this Court has already been answered by the High Court in its judgment, this Court should refrain from going into the question of interpreting the Articles relating to the

Judiciary, which will be an exercise of academic nature and that if such an exercise is undertaken then there is every apprehension of breach of the Doctrine of 'Trichotomy of Powers' in which it is very likely that this Court may go beyond the ambit of interpretation of the Constitution and may re-write the Constitution. He further submitted that the decision of the Supreme Court of India reported as AIR 1991 SC 268 (Supreme Court Advocates-on-Record Association v. Union of India) should not be followed on the ground of judicial restraint.

13. We are of the view that the petitioner has rightly invoked the jurisdiction of this Court under Article 184(3) of the Constitution and leave has rightly been granted in the other petition for the reason that in both the cases common question of interpretation of the Articles relating to the Judiciary are involved, which are of public importance. We are not impressed by the contention that interpretation of the Articles in these cases would be merely an exercise of academic nature. On the contrary, it can be said that this exercise has become very essential and necessary and would help a great deal in making the matters very clear by interpreting the relevant provisions of the Constitution relating to the Judiciary. It is held by this Court in the case of Fazlul Quader Chowdhry and others v. Muhammad Abdul Haque PLD 1963 SC 486 that the interpretation of the Constitution is the prerogative as well as the duty of the superior Courts as envisaged in the Constitution and this interpretative function cannot be a mere academic exercise without relation to concrete dispute, either between a subject and subject or between a subject and the State. It is further held that cases of conflict between the supreme law of the Constitution and an enactment might come for adjudication before the Courts and in such cases, it would be plain duty of the superior Courts, as its preservers, protectors and defenders, to declare the enactment in question as invalid to the extent of its repugnancy with the Constitutional provisions. The power of judicial review therefore must exit in Courts of the country in order that they may be enabled to interpret the Constitution in all its multifarious bearings on the life of the citizens in this country. It is also held that the Constitution ought to be interpreted as an organic whole giving due effect to its various parts . and trying to harmonise them, so as to make it an effective and efficacious instrument for the governance of the country. The above mentioned judgment is noticed in the case of the State v. Zia-ur-Rahman and others PLD 1973 SC 49 and it is held that the Supreme Court is the creature of the Constitution and does not claim any right to strike down any provision of the Constitution, but does claim right to interpret the Constitution, even if a provision in the Constitution is a provision seeking to oust the jurisdiction of the Court. This right to interpret the Constitution is not acquired 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 abolishing the Court itself.
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> 14. In the case of Fauji Foundation v. Shamimur Rehman PLD. 1983 SC 456 distinction between "Judicial Power" and "Jurisdiction" is made and it is held by this Court that in our Constitution the word used is "Jurisdiction" which denotes authority for the Courts to exercise the judicial power as such power is inherent in the superior Courts to-interpret, construe and apply law as a result of X system of division of powers. The "Judicial Power" is not constitutionalised in the Courts as in American Constitution, although the Courts in Pakistan traditionally exercise the jurisdiction over the matters though not exclusive, which includes exercise of judicial power."

Right of access to justice and independent judiciary is also one of the important rights of the citizens and if there is any threat to the independence of judiciary, it would be tantamount to denial of access to justice, which undoubtedly is a fundamental right under Article 9 of the Constitution. Whenever there is a violation of Articles 9 and 25 of the Constitution, it will involve a question of public importance with reference to enforcement of the Fundamental Rights of the citizens, who may approach the Court for the enforcement of these rights under Article 184(3) of the Constitution without having to discharge the burden of *locus standi*.

106. As regards the contention of the learned counsel for the Federation that the petitions do not raise a question of public importance with reference to enforcement of Fundamental Rights within the contemplation of Article 184(3) of the Constitution, it may be observed that Article 184(3) has received interpretation in a number of cases. In *Benazir Bhutto v. Federation of Pakistan* (PLD 1988 SC 416), Mr. Justice Muhammad Haleem CJ, as he then was, observed that Article 184(3) does not say as to who shall have the

right to move the Supreme Court nor does it say by what proceedings the Supreme Court may be so moved or whether it is confined to the enforcement of the Fundamental Rights of an individual which are infracted or extends to the enforcement of the rights of a group or a class of persons whose rights are violated. In this context, the question arises whether apart from the non-incorporation of sub Articles 1(a) and 1(c) of Article 199 the rigid notion of an “aggrieved person” is implicit in Article 184(3) as because of the traditional litigation which, of course, is of an adversary character where there is a *lis* between the two contending parties, one claiming relief against the other and the other resisting the claim. This rule of standing is an essential outgrowth of Anglo-Saxon jurisprudence in which the only person wronged can initiate proceedings of a judicial nature for redress against the wrongdoer. However, in contrast to it, this procedure is not followed in the civil law system in vogue in some countries. The rationale of this procedure is to limit it to the parties concerned and to make the rule of law selective to give protection to the affluent or to serve in aid for maintaining the status quo of the vested interests. This is destructive of the rule of law, which is so worded in Article 4 of the Constitution as to give protection to all citizens. The inquiry into law and life cannot 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 usages of interpretation, but regard should be had to the object and the purpose for which this Article is enacted, that is, this interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution,

namely, the Objectives Resolution (Article 2A), the Fundamental Rights and the Directive Principles of State policy so as to achieve democracy, tolerance, equality and social justice according to Islam. The adversary procedure, where a person wronged is the main actor if it is rigidly followed for enforcing the Fundamental Rights, would become self-defeating as it will not then be available to provide "access to justice to all" as this right is not only an internationally recognized human right, but has also assumed constitutional importance as it provides a broad based remedy against the violation of human rights and also serves to promote socio-economic justice which is pivotal in advancing the national hopes and aspirations of the people permeating the Constitution and the basic values incorporated therein, one of which is social solidarity, i.e., national integration and social cohesion by creating an egalitarian society through a new legal order. It was further observed that this ideal can only be achieved under the rule of law by adopting the democratic way of life as ensured by Fundamental Rights and Principles of Policy. Article 184(3) was further interpreted by this Court in *Mian Muhammad Nawaz Sharif v. President of Pakistan* (PLD 1993 SC 473), wherein the exposition of law made in *Benazir Bhutto's case* was affirmed and it was held that while construing Article 17 which guarantees fundamental right, Court's approach should not be narrow and pedantic but elastic enough to march with the changing times and guided by the object for which it was embodied in the Constitution as a fundamental right, and that its full import and meaning must be gathered from other provisions such as Preamble of the Constitution, Directive Principles of State Policy and the Objectives Resolution, which shed luster on the whole Constitution. This Court, in a recent judgment *In the matter of:*

*Corruption in Hajj Arrangements in* 2010 (PLD 2011 SC 963) has held that the Supreme Court and High Courts, in exercise of the jurisdiction conferred upon them under Articles 184(3) and 199 of the Constitution respectively, are bound to protect and preserve the Constitution as well as to enforce Fundamental Rights conferred by the Constitution either individually or collectively. They are fully cognizant of their jurisdiction, which they exercise with judicial restraint. But such restraint cannot be exercised at the cost of rights of the citizens if justice is denied to them. The scheme of the Constitution makes it obligatory on the superior Courts to interpret Constitution and law and enforce Fundamental Rights. The above parameters laid down from time to time have continued to regulate exercise of jurisdiction under Article 184(3) of the Constitution.

107. The Courts are obliged to exercise their powers and jurisdiction to secure the rights of the citizens against arbitrary violations. While protecting and enforcing the Fundamental Rights of the people, the courts may also determine the legality of an executive action or a legislative act. It is too late in the day for the learned counsel for the Federation of Pakistan, or for that matter, the learned Attorney General to object to the maintainability of the petitions pressing into service the *rigid notion of an "aggrieved person" where* the *person wronged is the main actor* as being *implicit in Article 184(3)* to call upon him to demonstrate the actual violation of any of their Fundamental Rights. They must realize that *inquiry into law and life makes a greater demand on judicial functions* and it would not be possible to close the doors of the Courts upon those who come forward to seek enforcement of the Constitution [*Benazir Bhutto's case* (*supra*)]. The Preamble (Objectives Resolution – Article 2A)

acknowledges that the sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust. Therefore, all persons acting in pursuance thereof are trustees. The people of Pakistan, acting through their representatives have framed the Constitution in the discharge of that trust. As rightly argued by Ch. Afrasiab Khan, ASC, it is not only a social contract, but a trust deed, therefore, the trustees cannot go outside the trust nor can anyone of them claim absolute authority or sovereignty, be it in the legislative, executive or judicial sphere. The Constitution has defined the limits of exercise of power, domain of operation and activities of various organs of the State and laid the foundations of a strong established democratic State of Pakistan. So, everybody is bound to act in accordance with the framework of the Constitution. The arguments of the learned counsel for the Federation of Pakistan and the learned Attorney General, it appears, have just ignored the dictum laid down in the aforesaid cases.

108. The petitioners' case is that they have approached this Court for the vindication of their Fundamental Rights as enshrined in Articles 2A, 4, 9, 14, 19 & 25, as also the mandate of the Constitution contained in Articles 204 and 227 with the that the impugned legislation runs contrary to the principle of independence of judiciary and also infringes the Fundamental Right of access to justice. The objections raised by Mr. Abdul Shakoor Paracha, ASC for the Federation and the learned Attorney General to the maintainability of the petitions are without any merit, which are repelled and the petitions are held to be maintainable.

109. Mr. Hamid Khan, Sr. ASC has argued that in the event, the COCA 2012 is struck down, the Contempt of Court Ordinance, will be revived. We have examined this issue. After having found various provisions of COCA 2012 as *ultra vires* the Constitution, we are of the opinion that the remaining provisions of the impugned legislation, if allowed to stay on the statute book, would serve no purpose particularly, when it has been held that the repealing section (section 13) itself is a nullity, therefore, the principle of severability as applied by this Court in *Mehram Ali v. Federation Pakistan* (PLD 1998 SC 1445) and *Dr. Mobashir Hassan' case* is not attracted in the present case. Thus, having been left with no constitutional option, COCA 2012 is declared unconstitutional, void and *non est*, as a consequence whereof, following the dictum laid down in *Attorney-General for Alberta* (supra), it is declared that the Contempt of Court Ordinance, 2003 shall be deemed to have revived with effect from 12.07.2012, the day when COCA 2012 was enforced with all consequences.

110. Above are the reasons for our short order dated 03.08.2012 whereby the titled petitions were disposed of as under: -

(i) The petitions are maintainable under Article 184(3) of the Constitution as questions of public importance with reference to enforcement of Fundamental Rights are involved therein;

(ii) Under Article 204 read with Entry 55 of the Fourth Schedule to the Constitution, the High Courts and the Supreme Court have powers to punish any person who is found guilty for the Contempt of Court falling within the definition of contempt of Court given in clause (2) of Article 204 of the Constitution;

(iii) Section 2(a) of COCA 2012, which defines the word "Judge" as including all officers acting in judicial capacity in administration of justice, is contrary to Article 204(1) of the Constitution as under the latter provision, the Court means the Supreme Court or a High Court;

(iv) Section 3 of the COCA 2012 as a whole is void and contrary to Articles 4, 9, 25 & 204(2) of the Constitution for the reasons that–

(a) The acts of contempt liable to be punished mentioned in Article 204(2)(b) and some actions of contempt of Court falling under Article 204(2)(c) have been omitted from the definition of contempt of Court given in section 3 of COCA 2012;
(b) COCA 2012 has been promulgated under clause 3 of Article 204 of the Constitution, which confers power on the legislature to make law to regulate the exercise of power by the Courts, and not to incorporate any substantive provision or defences as it has been done in the proviso;
(c) Powers of the courts have been reduced by incorporating expression "by scandalizing a Judge in relation to his office" whereas in Article 204(2) the word 'Court' has been used. Similarly, the definition provided by section 3 runs contrary to the provisions of Article 63(1)(g) of the Constitution according to which, if a person has been convicted/sentenced for ridiculing the judiciary, he will be disqualified to hold a pubic office, and in section 3 this expression has been omitted and instead of institution of judiciary, scandalization of a Judge has been confined in relation to his office;
(d) By enacting provisos (i) to (xi) to section 3, immunities/defences have been provided, whereas no such provision exists in the Constitution; and
(e) The proviso (i) to section 3, which grants exemption to the public office holders mentioned in Article 248(1) from contempt of Court is violative of Article 25 as under Article 204(2), the Court is empowered to punish 'any person' for its contempt without any exception.

(v) Incorporation of Article 248(1) in proviso (i) to section 3 is tantamount to amending the Constitution, which cannot be done without following the procedure laid down in Articles 238 and 239 of the Constitution;
(vi) Article 248(1) has not granted immunity to any of the public office holders mentioned therein from any criminal proceedings, therefore, by means of proviso (i) to section 3, no immunity can be granted to the public office holders in violation of Article 25 of the Constitution;
(vii) The terms and phrases used in provisos (i) to (xi) to section 3 are ambiguous and absurd and are meant to give benefit to contemners who have no respect for the judgments of the Courts, therefore, the said provisos being contrary to the principle of equality before law are void;
(viii) Under subsection (4) of section 4, the effect of earlier judgments has been nullified by pronouncing a legislative judgment without removing the basis on which the judgments were pronounced, which is violative of the Fundamental Right of access to justice as enshrined in Article 9 and this provision also runs contrary to Article 189 of the Constitution; therefore, this provision is void;

(ix) Section 6(2) is not sustainable because of declaration of section 3 void as a whole;

(x) Section 6(3) encourages/promotes the commission of contempt of Court by postponing cognizance of a contempt of Court arising from an averment made in due course in appellate, revisional or review proceedings, till such proceedings have been finalized and no further appeal, revision or review lies, although to maintain the dignity and respect of the Court, prompt action to punish the contemner is called for. As any delay in this behalf would not only erode the dignity, but would also promote the tendency of disrespecting the courts and their orders, therefore, this provision being contrary to the principle of independence of judiciary and access to justice as enshrined in Articles 2A and 9 of the Constitution is void;

(xi) Section 8 relating to transfer of proceedings is tantamount to curtailing the judicial powers. Subsection (1) of section 8 is not sustainable because instead of the phrase 'scandalizing the Court', expression 'scandalizing a Judge in relation to his office' has been used. This subsection also runs contrary to recognized principle of punishing any person who is guilty of contempt on the face of the Court where a prompt action to maintain the dignity of the court is called for;

(xii) Transfer of proceedings form one Judge/Bench to another Judge/Bench is the prerogative of the Chief Justice being administrative head of his Court, which cannot be controlled by the legislature, therefore, subsection (3) of section 8 is violative of the principle of independence of judiciary;

(xiii) Under subsection (5) of section 8, legislature cannot exercise power of transferring a case from the file of Chief Justice to next Senior Judge as it would be against the independent functioning of the Court and legislative interference in this behalf is tantamount to undermining the authority of the Chief Justice and other Judges as well. As such, this provision too is not sustainable;

(xiv) Section 10(b) is violative of Fundamental Right of freedom of speech and expression enshrined in Article 19, which is subject to a reasonable restriction, *inter alia*, in relation to contempt of Court and Article 68 of the Constitution, which provides that no discussion shall take place in Parliament with respect to conduct of a Judge of the Supreme Court or a High Court;

(xv) Section 11(3) relating to filing of intra-court appeal against issuance of show case notice or an original order including an interim order passed by a Bench of the Supreme Court in any case, including a pending case to a larger Bench consisting of all the remaining available Judges of the Supreme Court within the country is violative of the principle of expeditious disposal of the cases enshrined in Article 37(d) of the Constitution and the possibility of hearing of appeals by a larger Bench consisting of remaining Judges of the court within the country may render the proceedings ineffective as against each

interlocutory order, appeals will be filed and there would be no end to the proceedings and in such a manner the dignity and independence of the Courts would be compromised;

(xvi) The first proviso to section 11(3) will render the whole proceedings of contempt of Court ineffective as at the initial stage after issuing a show cause notice, Full Court will have to be assembled to examine the grievance of the contemner if the show cause notice has been issued by half of the Judges whereas under the Supreme Court Rules, 1980, even very high profile cases may be decided by a two-member Bench;

(xvii) The second proviso to section 11(3), which provides for automatic suspension of a judicial order, is violative of the principle of trichotomy of power and the independence of judiciary. The passing of such an order is essentially a judicial function, which has to be performed by the Judges of the Supreme Court or the High Courts. The provision in question is contrary to settled principles governing the grant or refusal of an injunction/stay order. Thus, it being against the principle of independence of judiciary is not sustainable;

(xviii) The provisions of subsections (4) and (5) of section 11, which prescribe limitation of 30 days for filing an appeal to a Bench of the High Court, 60 days for filing appeal to the Supreme Court, and filing of intra-court appeal or application for re-appraisal within 30 days from the date of show cause notice or the order, as the case may be, are aimed at delaying decision of contempt cases and compromise the expeditious disposal of such cases to restore the dignity of the Courts, who are responsible for administration of justice;

(xix) Section 12 of the Act is contrary to Article 204(3) of the Constitution, thus *void ab initio*;

(xx) By means of Article 270(AA), the Contempt of Court Ordinance, 2003, which was promulgated on 15.12.2003, continued in force till 12.07.2012, the day on which COCA 2012 was promulgated. In enacting section 13, which repeals COCA 1976, and the Ordinances of 2003 and 2004, no reason has been assigned for the repeal of the same;

(xxi) Subsection (2) of section 13 whereby COCA 1976, which already stood repealed on 15.12.2003, has also been repealed along with Ordinances of 2003 and 2004 without spelling out logical reasons to promulgate COCA 2012, therefore, it is a nullity in the eyes of law;

(xxii) As per preamble of the legislation under scrutiny, it has been framed in exercise of the powers conferred by clause (3) of Article 204 of the Constitution, which provides that the exercise of the power conferred on a Court by this Article may be regulated by law and subject to law by rules made by the Court, but it does not mean that a statute can control or curtail the powers conferred on the superior Courts by the said Article, nor does it mean that in the absence of a statute on the above subject, the above Article would be inoperative; and

(xxiii) While enacting COCA 2012 in pursuance of clause (3) of Article 204 read with Entry 55 of the Fourth Schedule to the Constitution, attempt has been made to reduce the powers of the Court as has been indicated in different provisions, thus, all such provisions are contrary to Entry 55 of the Constitution.

17. After having found various provisions of COCA 2012 as *ultra vires* the Constitution, we are of the opinion that the remaining provisions of the impugned legislation, if allowed to stay on the statute book, would serve no purpose particularly, when it has been held that repealing section itself is a nullity, therefore, the principle of severability as applied by this Court in *Mehram Ali v. Federation Pakistan* (PLD 1998 SC 1445) and *Dr. Mobashir Hassan' case* is not attracted. Thus, having been left with no constitutional option, COCA 2012 is declared unconstitutional, void and *non est*, as a consequence whereof, following the dictum laid down in *Attorney General for Alberta v. Attorney-General for Canada* (AIR 1948 PC 194), it is declared that the Contempt of Court Ordinance, 2003 shall be deemed to have revived with effect from 12.07.2012, the day when COCA 2012 was enforced with all consequences.

18. No order as to costs."

Iftikhar Muhammad Chaudhry, HCJ

Mian Shakirullah Jan, J

Tassaduq Hussain Jillani, J

Jawwad S. Khawaja, J

Khilji Arif Hussain, J

Islamabad, 3rd August, 2012
APPROVED FOR REPORTING

**Jawwad S. Khawaja, J.** I have gone through the judgment of Hon'ble the Chief Justice and am in respectful agreement with the same. There is, however, one aspect of these petitions which is of the utmost importance to the law of contempt which I wish to highlight through this brief note.

2. The aspect I advert to, is the distinction between contempt of court through disobedience of a Court order (disobedience contempt) and contempt through scandalization of a Judge or Court. This distinction is well recognized in almost every common law jurisdiction, and has been accorded recognition in Article 204 of our own Constitution. Thus sub-Article 2(a) empowers the Court *"to punish any person who … obstructs the process of the Court in any way or disobeys any order of the Court"*. Sub-Article 2(b) on the other hand speaks of contempt where a person *"scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt"*. The distinction between disobedience contempt and contempt through scandalization is founded on sound doctrinal principles. The learned Attorney General, who repeatedly urged the Court to exercise judicial restraint, seems to have erred precisely because of ignoring this distinction. It is only when we take stock of the distintinction between the two types of contempt that we realize how misleading the argument for judicial restraint is.

3. It is worth noting that most of the highly publicized legal contests which have of late come up before the Court fall in the category of disobedience contempt, not scandalization. According to figures obtained from the office of this Court, in the year 2009, there were 131 contempt cases filed in Court. These all were cases where an order had been disobeyed and had nothing to do with scandalization of the Court or a Judge. In 2010, 129 of the total 130 contempt cases instituted pertained to disobedience and only one alleged scandalization. In 2011, of the 110 contempt cases instituted, only one case pertained to scandalization. In the current year there have been 77 contempt cases so far. Of these 20 are by petitioners who have sought contempt proceedings against individuals who allegedly have scandalized a Court or judge. Of these 77 cases only 3 have been initiated by the Court itself and are yet to be decided. The most seminal contempt case recently decided by this court viz. *Syed Yousaf Raza Gillani versus Assistant*

*Registrar, Supreme Court of Pakistan (2012 SCMR 424),* also pertained to disobedience of a Court order, a fact which the Court noted thus: "*The contempt proceedings arose out of non implementation of the judgment of this Court. The cause is not of any member of the Bench but of the Court and in a wider sense of enforcement of the law.*" Below, we will examine in some detail how this branch of contempt law emerged and why the constitution demands of us that it be dealt with sternly.

**DISOBEDIENCE CONTEMPT: HISTORICAL ORIGIN AND CONSTITUTIONAL SIGNIFICANCE.**

4. Historically, disobedience contempt emerged, essentially, as an enforecement mechanism, which the court found necessary for upholding the rule of law and for executing its orders. While today the law of contempt in this country finds its moorings firmly in the Constitution of Pakistan, it is nonetheless instructive to inquire into the historical origins of this power, particularly in the English common law tradition which has had an influence upon our own but which has been significantly modified and clearly explicated in Pakistan through our Constitution and laws.

5. It may be mentioned that in medieval England, the courts of the common law had a limited range of common law remedies which could be granted to litigants. Parallel to the courts of the common law in England, there emerged another system for administering justice, headed by the Lord Chancellor of England. These courts are generally referred to as the courts of equity. It is these courts which initially evolved a range of effective remedies other than the few offered by common law courts. Among these remedies were directives and declarations which had to be complied with *in personam,* i.e. by the person against whom these court orders were directed. It was to deal with those who were disobedient to the orders of the courts that the recourse by way of contempt of court was to be taken. In its most common form, this power is manifested today in Pakistan, in Order 39 of the Civil Procedure Code, 1908 which empowers a Court to order a person to be detained in prison if he is guilty of disobedience of a Court order. It should be clear, therefore, that the law of contempt in our present context originated primarily, as a mechanism for enforcing court orders, and not as a tool for silencing dissenters or critics. The facts and figures cited above indicate

that this original conception continues to hold the field. Disobedience contempt (as opposed to scandalization contempt) remains the most important aspect of the law of contempt in our jurisdiction today. And this is so because of the constitutional imperative that every person and authority in Pakistan are duty bound to obey the Constitution and the law. We have only recently reiterated this point in the judgment titled *Syed Yousaf Raza Gillani versus Assistant Registrar, Supreme Court of Pakistan* (2012 SCMR 424). Referring to "*[the] timeless and prophetic principle of governance, encapsulated in the well-known saying:* سيد القوم خادهم *(The leader of a people is their servant)", it* was held that "*[o]ur constitution manifests the embodiment of this very principle when it obliges the highest executive functionary to carry out the commandments expressed by the people in the form of the constitution and the law. Deviations by fiduciaries from these commandments must remain of the gravest concern to citizens and courts alike."* In that judgment, the Court also referred to a *hadith* of the Holy Prophet (peace be upon him), which expresses the spirit of equality enunciated by Islam which the Constitution refers to. The Holy Prophet (peace be upon him) urged

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

Translation: *O people, those before you were ruined because when someone of high rank among them (sharif) committed theft, they would spare him, but when a weak person from amongst them (zaeef) committed theft, they would inflict the prescribed punishment upon him.*" (Sahih Bukhari).

6. In law-abiding nations of the world, the power to punish contemnors has not only existed, but it has also been used whenever required to enforce Court Orders. World history is full of examples of persons, public figures of the highest standing amongst them, who were punished by courts for contempt. Professor Ronald Goldfard, in "The History of the Contempt Power" has masterfully narrated two famous instances. His narration of a case from medieval England can be gainfully reproduced here:

> *"One can read of the escapades of ruddy Prince Hal, later to become Henry V of England, and his notorious brush with the law of contempt. When Hal was the Prince of Wales, one of his servants was arrested for committing a felony … the Prince appeared in a rage, and demanded that his man be let free. Chief Justice*

*Gascoigne, delicately but firmly ruled that the laws of the realm must be met … The Prince tried physically to take the servant away, whereupon Gascoigne ordered him again to behave. When the Prince raged … the judge reminded his prince that he kept the peace of the King … and suggested that Hal set a good example. When Hal did not heed this advice, he was sentenced for contempt, and committed to the King's Bench prison … People speculated whether this would be the end of Gascoigne's career. It developed that the King was pleased, and rejoiced that he had both a judge who dared to minister justice to his son, and a son who obeyed him (if reluctantly)*".

7. This episode has been eloquently dealt with by Shakespeare in the following words:-

*Into the hands of justice.' You did commit me:*
*For which, I do commit into your hand*
*The unstained sword that you have used to bear;*
*With this remembrance, that you use the same*
*With the like bold, just and impartial spirit*
*As you have done 'gainst me. There is my hand*"
(Shakespeare's Henry V, Part 2, Act 5, Scene 2).

8. Professor Goldfard also gives another example from the early years of the United Stated of America:

"*Major General Andrew Jackson, in command of the city of New Orleans in 1814, heard rumors that the state legislature was thinking of capitulating to the British … Jackson was suspicious of the French volunteer troops who had been leaving the ranks. He ordered them out of the city. Lewis Louallier wrote an article in the local press critical of General Jackson's conduct. Jackson ordered his arrest and imprisonment. Louallier then brought habeas corpus proceedings before Judge Hall of the district court. The judge granted his release. Jackson went into another rage, and arrested Hall. Then, United States Attorney Dick brought habeas corpus proceedings for release of Judge Hall, and it was granted. He joined Hall and Louallier in prison. After many judicial and political machinations all parties were released, and Jackson learned that the war was over. United States Attorney Dick then appeared before Judge Hall and moved for General Jackson's punishment for contempt.*
*Jackson, shifting tactics, and under the good advisement of his attorney, argued the inequities of contempt. He asserted that the summary power of contempt violated his rights under the fifth and sixth amendments. He ingeniously argued that the necessity which allowed circumvention of constitutional privileges in contempt cases was a lesser one than the necessity which prompted his conduct. He had ordered*

> *martial law because it was necessary for the preservation of the whole country. Nonetheless he was found guilty of contempt and fined $1,000. It has been reported that the memory of this incident plagued Jackson until long after his later ascendency to the presidency.*"
>
> (Goldfard, Ronald. The History of the Contempt Power, Washington University Law Review, Vol: 1961, Issue: 1)

We are reminded here, of our own recent history and the struggle of the people of Pakistan to uphold the Constitution and to enforce the rule of law. It is, therefore, unfortunate that instead of adhering to the Constitutiton, the Contempt Act was enacted in violation of the same.

9. The above noted historical episodes highlight the significance of the power of the court to punish contemnors. Soceities which have attained the rule of law have done so at a price. And that price, we too must be prepared to pay. This historical context also makes it easier to understand why a people's movement for the restoration of constitutional rule in Pakistan, which began with a defense of the constitutional protections for judicial independence, now seems to be culminating in a series of highly contested legal cases revolving around the law of contempt. Some lament that this is an unfortunate trajectory. But, in the light of history, this trajectory seems only natural. In a government of laws, the courts of law are supposed to decide matters before them in accordance with the law. Once they have passed a judgment, the government of the day is required to implement it. But what happens if its functionaries do not do so? As stated earlier in the judgment, that, ultimately, is the question with which we are repeatedly being confronted whether through the executive's non-compliance or through unconstitutional legislative action such as the impugned Contempt Act, 2012.

10. In a previous judgment, we thoroughly examined our Constitution's response to this question, which emerges through an interpretation of Articles 184(3), 187, 190 and 204 and, in a limited category of cases, also through Article 63(1)(g) too. The scheme which emerges from the Constitution runs, in short, like this: the Court, in and of itself, has to pass orders and to require the implementation of its orders; responsibility for implementation has been made obligatory on other organs of the state, primarily the

Executive. However, in the unfortunate situation that a functionary of the Executive refuses to discharge his constitutional duty, the Court is empowered to punish him for contempt. Of course, this power of punishing contemnors for disobedience is meant more to be a deterrent than a weapon of aggression. Generally, in a country where the rule of law prevails, a situation of this sort should never arise. And even when it does arise, a contemnor, once fully apprised of the imminent consequences of his disobedience, would purge himself of contempt through compliance. Yet, in periods where the supremacy of the constitution is contested as the dominant ethos of government, it is not surprising that cases do arise where a deterrent effect can be achieved only by an actual exercise of this power. In such cases, the Courts are in fact constitutionally obliged not to shy away from the inevitable. Simply put, a government of laws cannot be created or continued with toothless courts and defiant or blithely non-compliant public functionaries.

**SCANDALIZATION CONTEMPT**

11. The Attorney General in his submissions repeatedly urged the Court to adopt judicial restraint. He also cited a number of precedents and texts to emphasize the notion of judicial restraint in contempt cases. We repeatedly requested him, and the other learned counsel to cite precedent from anywhere in the world where the courts exercised judicial restraint in the face of disobedience contempt. As stated earlier in the opinion, despite our repeated requests, no such precedent could be cited – perhaps, because there is none. All the precedents which wax lyrical about the benefits of judicial restraint are, in reality, cases where the issue was that of scandalization. In cases of disobedience contempt, the approach is altogether different. In such cases, courts do not show restraint because at stake is the people's right to the rule of law, not the ego of judges.

12. When Lord Denning, the well known British judge, made his oft-quoted speech in *R v. Meteropolitan Police Commissioner (1968)*, he too was sitting in judgment on a case of scandalization contempt, not of disobedience contempt. The learned Attorney General emphatically relied on this speech without appreciating this distination. Lord Denning

said: "*Let me say at once that we will never use this jurisdiction (contempt) as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself* ". (*R v. Meteropolitan Police Commissioner, ex parte Blackburn* (No.2) [1968] 2 QB 150 at 154)

13. We cannot agree with him more. Our constitutional jurisprudence has followed the concept of contempt law relating to scandalization as expounded by Lord Denning. In this context, the judgment of this Court in the case titled *Syed Masroor Ahsan and others versus Ardeshir Cowasjee and others* (PLD 1998 SC 823, 1124) can be gainfully cited wherein, amongst other precedents, *R v. Meteropolitan* was quoted, and it was observed that "*the Pakistani nation should learn tolerance and inculcate the haibit of appreciating the opposite point of view. Furthermore, our approach should … be oriented with the object to promote Isalmic, social and political justice … which cannot be attained unless we strive to strengthen the institutions including the Judiciary.*" Barring instances of deliberate, egregious or malicious utterances, this Court has never been intolerant of critics. All we demand of those who criticize us is what Lord Denning also sought: "*… remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy.*" (R v. Meteropolitan, *supra*)

14. As elaborated in the judgment of Hon'ble the Chief Justice, the Contempt Act 2012 creates impermissible and unconstitutional exceptions to protect a certain category of persons from contempt for violating Court orders which they are obliged by the Constitution to obey and enforce. In the context of the foregoing discussion, it becomes clear why this could be such a dangerous and unconstitutional proposition. This is why the Court has no option but to strike it down the impugned Contempt Act, 2012.

(Jawwad S. Khawaja)
Judge

**Khilji Arif Hussain, J.** I have had the privilege to go through the opinion recorded by Hon'ble Chief Justice of Pakistan and by my learned brother Hon'ble Mr. Justice Jawwad S. Khawaja. Apparently nothing is left to add on my part as all aspects of the matter have been dealt with by my learned brothers in their opinions. However, with great humility at my command, I would like to add few lines to deal briefly with the question of Legislative Power of the Parliament in democratic system governed by written Constitution and Powers of Judicial Review of the Courts.

## LEGISLATIVE POWER OF THE PARLIAMENT

2. The Constitution is an organic law which defines the structure, powers and functions of the three organs of the State i.e. Executive, Legislature and Judiciary, there relationship inter se, for limit for such powers and functions and also the relationship between the citizens and the Government.

3. Every modern democratic Constitution are entrusted public welfare functions to the Government established by it, wherein the Government becomes the trustee of the people who are beneficiaries. Thus, in every modern democratic state, the Government is the trustee that cannot act or exercise powers against the interest of its beneficiaries (people).

4. Article 2(A) of the Constitution specifically provided that the sovereignty belongs to Almighty Allah and the delegated authority to be exercised by the people of Pakistan within the limits described by Him, is a secret trust whereas it is the will of the people of Pakistan to establish an order, wherein the State shall exercise its powers and authority through the chosen representatives of the people.

5. In the administration of Justice in a true democratic state, it is in the courts and not in the legislature that the citizens of such a state primarily feel the keen, cutting edge of the law. It means that the actual law, be it enacted or customary, is what the courts interpret and finally enforce. This is the power/function through which the judiciary can enforce the rule of law. Therefore, there is absolute need to respect the decisions of the courts. Mr. Justice Arthur T. Vanderbilt has aptly and ably remarked; *"It is in the courts and not in the legislature that our citizens primarily feel the keen, cutting edge of the law. If they have respect for the work of the courts, their respect for law will survive the shortcomings of every other branch of government; but if they lose their respect for the work of the courts, their respect for law and order will vanish with it to the great detriment of society"*

6. Further, it is almost universally acknowledged that one of the most fundamental aspects of the protection of human rights is the creation of a strong indigenous legal system and the maintenance of an independent judiciary. The establishment of a strong legal system and an independent judiciary may sound somewhat pedestrian. It is, however, only through the creation of a strong legal system that human rights can be enforced. The system of enforcement of human rights will only operate effectively if Judges can determine disputes between individuals and the State in the absence of the State's influence. For example, judicial independence has been defined variously as: "*the degree to which judges actually decide cases in accordance with their own determinations of the evidence the law and justice free from coercion, blandishments, interference, or threats from governmental authorities or private citizens"* In modern democracy, be it presidential or parliamentary, the importance of the independence of the judiciary cannot be *minimized* and *neglected* because there can be no democracy without basic human

rights and fundamental freedoms as its foundation and there can be no protection and enforcement of human rights and fundamental freedoms without the existence of an independent judiciary.

7. Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached.

In the case of **Director of Public Prosecutions of Jamaica versus Mollison,** (2003) 2 AC 411, it was held that the independence of the judiciary is a 'constitutional fundamental' and cannot be trespassed upon by other branches of government.

In the case of **R. Anufrijeva versus Secretary of State for the Home Department,** (2003) UKHL 36, the House of Lords held that the executive cannot make unilateral determinations of people's rights which bypassed the scrutiny of the courts. This right of 'access to justice' could also be considered a 'fundamental' constitutional principle.

8. The Parliament being duly elected representative of the people of Pakistan, which is to carry on the business of the Country make all policies, and political decision, is the only body to legislate with respect to any matter in the Federal Legislative List by originating bill in either of the House except Money Bill which has to originate in the National Assembly. The Parliament has exclusive power to make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan, but only in respect of any matter enumerated in Federal

Legislative List and not in contravention with the rights conferred by part-II of the Constitution or in conflict with any Articles of the Constitution.

9. According to the theory of separation of powers, the function of the Legislature is to make law-Jus dare, that of the executive is to execute law and to dispense administrative functions Jus-dicere, and that of the judiciary is to interpret and apply the law-Jus-dicere. However, the countries governed by Federal written Constitution, the function of the Courts more particularly a Constitutional Court is not merely of jus-dicere being the guardian of the Constitution itself.

10. The Legislature even by law can overcome the effect of any judgment of the Superior Courts and Courts uphold such legislation. If any reference is required one can see Article 31A of the Customs Act by which Legislature nullify the effect of the judgment of this Court in the case of **Al-Samrez Enterprise versus The Federation of Pakistan,** (1986 SCMR 1917) and such Legislation was upheld by the Superior Court.

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11. The constitutionality of a law is to be presumed because the Legislature which was first required to pass upon the question, acting as they, must be deemed to have acted with integrity and with a just desire to keep within the restrictions laid down by the Constitution upon their action, have adjudged that it is so.

12. This Court in exceptional circumstances can intervene and review the validity of Legislation which is perceived to be beyond the constitutional pale. The Constitution of Pakistan is written Constitution with a concept of separation of powers and no Organ of the State whether Executive, Legislature or Judiciary is supreme to one or other,

supreme is only the Constitution which reflects the will of the people. It is not only the duty and obligation of the Courts to protect the Constitution but also of every citizen whether in Pakistan or not to protect it. If any of the provision of the Constitution is breached by any one including by Legislation, then it is the duty of the Judiciary to review the Legislation, if it cannot be construed in a manner consistent with Articles of the Constitution.

13. If we accept the proposition that the Judiciary may not question the validity of an Act of the Parliament even if it is against the Fundamental Rights, violative of any Article of the Constitution, then this obedience to statue will result in disobedience to the Constitution for the protection of which not only the Judges but also the Parliamentarians have taken Oath.

14. By Oath of office, as Judge, we have to protect the Constitution, which is the voice of the people of Pakistan. Like Constitution, Court is also colour blind and makes no difference between a person holding any office and an ordinary man, except where the Constitution itself made any such difference.

15. The Law of Contempt is not to punish a person by a Court under Article 204 of the Constitution for Contempt of Court nor is for some personal ego of the Judges of the Superior Courts, but is to ensure the independence of Judiciary in terms of Article 194 read with Preamble and Article 2A of the Constitution and Entry 55 of the Federal Legislative list which further limits the Legislative Power of the Parliament, in respect of the jurisdiction of the Supreme Court.

16. The Constitution makers considers contempt of Court so serious that he has not left it to change by Legislature by simple majority

by defining what act constitute contempt. Article 204 of the Constitution is not to protect the ego of the Judges but in fact it protects the right of public generally and specially of the litigant so that the rights given to them by Courts can be enforced.

17. The Constitution confers powers upon the Parliament to frame the law within the limits fixed by it and if any law framed by the Parliament is in conflict with the Constitution, the same is liable to be struck down. Article 24 of the Constitution puts restrictions on the Parliament to frame the law for acquiring the properties without compensation. Likewise prior to Eighteenth Amendment, the Parliament could frame law in respect of 59 entries mentioned in the Federal Legislative List and 47 entries in the Concurrent List, but after Eighteenth Amendment, the Parliament has no authority to frame the law in respect of any items which were earlier mentioned in the Concurrent List and any law if framed by the Parliament in respect of the matters not in the Federal Legislative List fall within the domain of the Provincial Legislation, the same can be struck down.

18. To conduct judicial review of a Statute, the Court must review the Statute in the light of exactly what the Constitution says, and state why each part of Statute is unconstitutional. This Court and the Courts in neighbouring Countries strike down the Legislation, as and when they come to the conclusion that same is in conflict with any provision of the Constitution.

19. The Constitution framer provided only in two Articles of the Constitution for taking action/cognizance.

20. Article 6 of the Constitution provides that for the guilty of high treason the Parliament shall by law provide for the punishment of persons found guilty, whereas, Article 204 of the Constitution provided

that the Court shall have power to punish any person who did any act mentioned in the Clause (a) to (c) of the Article 204 (2) and by law and any other things not mentioned in Article 204(2) (a) to (c) can be added as an act of contempt of Court and the power to punish confer by Article 204(2) can be regulated by law, by rules made by the Court.

21. On scanning the Constitution, it appears that being cognizance of severances of the matter and to ensure the independence of judiciary, the Constitutional framer provided for the punishment any person in term of Article 204 by the Court even if no regulation in this regards has been made by Legislation.

22. The question why the power was not conferred upon the Court to punish a person guilty of high treason as conferred in the case of contempt of Court, the wisdom of the Constitution framers appears to be that for creating an independent organ within the frame of the Constitution and to secure independence of judiciary which is dominant intent and spirit of the Constitution, in case of any act of contempt mentioned in Article 204(a) to (c) the Court can punish any person being guilty of contempt, instead leaving the matter at the mercy of the legislature to frame the law. Whereas high treason being a serious crime against the society, the Constitution framers in their wisdom decided that it is for the Legislature to frame to law to take cognizance against such persons.

With these few words, I concur with the opinion recorded by my learned brothers.

(Khilji Arif Hussain)
Judge