

IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ
MR. JUSTICE MIAN SHAKIRULLAH JAN
MR. JUSTICE TASSADUQ HUSSAIN JILLANI
MR. JUSTICE NASIR-UL-MULK
MR. JUSTICE MUHAMMAD SAIR ALI
MR. JUSTICE JAWWAD S. KHAWAJA
MR. JUSTICE ANWAR ZAHEER JAMALI
MR. JUSTICE KHILJI ARIF HUSSAIN
MR. JUSTICE TARIQ PARVEZ
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE SARMAJ JALAL OSMANY
MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE IJAZ AHMED CHAUDHRY
MR. JUSTICE GULZAR AHMED
MR. JUSTICE MUHAMMAD ATHER SAEED

CMA NO. 5144 OF 2011
& CIVIL REVIEW PETITION NO.129/2010
IN CONST. P. 76/2007 & CMAs No. 1427/2011 etc

[Against the judgment dated 16.12.2009 passed in Constitution
Petitions No. 76 to 80 of 2007]

Federation of Pakistan through Secretary
M/o Law, Justice and Parliamentary Affairs, Islamabad

vs.

Dr. Mubashir Hassan, etc.

For the applicant/petitioner:
[CMA 5144/11 & CRP 129/10]

Mr. Mahmood A. Sheikh, AOR
Mr. Masood Chishti,
Secretary, Ministry of Law &
Justice.

On Court notice:

Maulvi Anwar-ul-Haq
Attorney General for Pakistan

For the respondent No.1:
[CRP 129/2010]

Mr. Salman Akram Raja, ASC
Mr. Mehr Khan Malik, AOR

Date of hearing:

25.11.2011

JUDGMENT

Tassaduq Hussain Jillani, J.- The afore-referred civil review petition seeks review of this Court's judgment dated 16th of December, 2009 whereby Constitution Petitions No. 76 to 80 of 2007 and 59 of 1999 (challenging the vires of the National Reconciliation Ordinance (hereinafter referred to as the "NRO") were allowed/disposed of in terms of the short order dated 16.12.2009, the operative part of which reads as follows: -

- (i) *that the NRO is declared to be an instrument void ab initio being ultra vires and violative of various constitutional provisions including Article Nos. 4, 8, 25, 62(f), 63(i)(p), 89, 175 and 227 of the Constitution;*
- (ii) *that as a consequence of the said declaration, 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 the accused persons, are also declared never to have existed in the eyes of law and resultantly of no legal effect;*
- (iii) *that all cases in which the accused persons were either discharged or acquitted under Section 2 of the NRO or where proceedings pending against the holders of public office had got terminated in view of Section 7 thereof, a list of which cases has been furnished to this Court and any other such cases/proceedings which may not have been brought to the notice of this Court, shall stand revived and relegated to the status of pre-5th of October, 2007 position;*
- (iv) *that all the concerned courts including the trial, the appellate and the revisional courts are ordered to summon the persons accused in such cases and then to proceed in the respective matters in accordance with law from the stage from where such proceedings had been brought to an end in pursuance of the above provisions of the NRO;*
- (v) *that the Federal Government, all the Provincial Governments and all relevant and competent authorities including the Prosecutor General of NAB, the Special Prosecutors in various Accountability Courts, the Prosecutors General in the four Provinces and other officers or officials involved in the prosecution of criminal offenders are directed to offer every possible assistance required by the competent courts in the said connection;*
- (vi) *that similarly all cases which were under investigation or pending enquiries and which had either been withdrawn or where the investigations or enquiries had been terminated on account of the NRO shall also stand revived and the relevant and competent authorities shall proceed in the said matters in accordance with law;*
- (vii) *that it may be clarified that any judgment, conviction or sentence recorded under section 31-A of the NAB Ordinance shall hold the field subject to law and since the NRO stands declared as void ab initio,*

therefore, any benefit derived by any person in pursuance of Section 6 thereof is also declared never to have legally accrued to any such person and consequently of no legal effect;

- (viii) *that since in view of the provisions of Article 100(3) of the Constitution, the Attorney General for Pakistan could not have suffered any act not assigned to him by the Federal Government or not authorized by the said Government and since no order or authority had been shown to us under which the then learned Attorney General namely Malik Muhammad Qayyum had been authorized to address communications to various authorities/courts in foreign countries including Switzerland, therefore, such communications addressed by him withdrawing the requests for Mutual Legal Assistance or abandoning the status of a Civil Party in such proceedings abroad or which had culminated in the termination of proceedings before the competent fora in Switzerland or other countries or in abandonment of the claim of the Government of Pakistan to huge amounts of allegedly laundered moneys, are declared to be unauthorized, unconstitutional and illegal acts of the said Malik Muhammad Qayyum;*
- (ix) *that since the NRO stands declared void ab initio, therefore, any actions taken or suffered under the said law are also non est in law and since the communications addressed by Malik Muhammad Qayyum to various foreign fora/authorities/courts withdrawing the requests earlier made by the Government of Pakistan for Mutual Legal Assistance; surrendering the status of Civil Party; abandoning the claims to the allegedly laundered moneys lying in foreign countries including Switzerland, have also been declared by us to be unauthorized and illegal communications and consequently of no legal effect, therefore, it is declared that the initial requests for Mutual Legal Assistance; securing the status of Civil Party and the claims lodged to the allegedly laundered moneys lying in foreign countries including Switzerland are declared never to have been withdrawn. Therefore the Federal Government and other concerned authorities are ordered to take immediate steps to seek revival of the said requests, claims and status;*
- (x) *that in view of the above noticed conduct of Malik Muhammad Qayyum, the then learned Attorney General for Pakistan in addressing unauthorized communications which had resulted in unlawful abandonment of claims of the Government of Pakistan, inter alia, to huge amounts of the allegedly laundered moneys lying in foreign countries including Switzerland, the Federal Government and all other competent authorities are directed to proceed against the said Malik Muhammad Qayyum in accordance with law in the said connection;*
- (xi) *that we place on record our displeasure about the conduct and lack of proper and honest assistance and cooperation on the part of the Chairman of the NAB, the Prosecutor General of the NAB and of the Additional Prosecutor General of the NAB, namely, Mr. Abdul Baseer Qureshi in this case. Consequently, it is not possible for us to trust them with proper and diligent pursuit of the cases falling within their respective spheres of operation. It is therefore, suggested that the Federal Government may make fresh appointments against the said posts of persons possessing high degree of competence and impeccable integrity in terms of Section 6 of the NAB Ordinance as also in terms of the observations of this Court made in the case of Khan Asfandiyar Wali v. Federation of Pakistan (PLD 2001 SC 607). However, till such fresh appointments are so made, the present incumbents may continue to discharge their obligations strictly in*

- accordance with law. They shall, however, transmit periodical reports of the actions taken by them to the Monitoring Cell of this Court which is being established through the succeeding parts of this judgment;*
- (xii) *that a Monitoring Cell shall be established in the Supreme Court of Pakistan comprising of the Chief Justice of Pakistan or a Judge of the Supreme Court to be nominated by him to monitor the progress and the proceedings in the above noticed and other cases under the NAB Ordinance. Likewise similar Monitoring Cells shall be set up in the High Courts of all the Provinces comprising of the Chief Justice of the respective Province or Judges of the concerned High Courts to be nominated by them to monitor the progress and the proceedings in cases in which the accused persons had been acquitted or discharged under Section 2 of the NRO;*
- (xiii) *that the Secretary of the Law Division, Government of Pakistan, is directed to take immediate steps to increase the number of Accountability Courts to ensure expeditious disposal of cases;*
We place on record our deep sense of appreciation for the learned counsel for the parties as also for the learned amici curiae who have rendered invaluable assistance to us in these matters.

The petitions stand allowed and disposed of by this short order in terms noted above.

2. The detailed reasons were subsequently given which judgment is reported in PLD 2010 Supreme Court 265.

3. Learned counsel for the Federation of Pakistan, Dr. Zaheer-ud-Din Babar, on Court query, specifically referred to paragraphs No. 12, 44, 45 & 46 of the detailed judgment which are sought to be reviewed by the petitioner. However during the course of arguments, he contended that certain observations made in paras 56, 63 to 86, 137, 139, 151, 171, 172 & 178 also warrant review. The paras to which he made specific reference are as under: -

"12. During the course of hearing, Federation of Pakistan has submitted Civil Misc. Application Nos. 4875 & 4898 of 2009, of identical nature, wherein attention of the Court was drawn towards its earlier judgment passed in Sindh High Court Bar Association's case (PLD 2009 SC 879) and at pages 11 & 12 of the said applications, apprehension of destabilization of the system was expressed in the following terms:--

"If however, this Hon'ble Court wishes to rule upon wider issues other than those raised in the petition and prayer the Federation requests that fresh petitions be filed precisely stipulating these issues whereupon the Federation will seek instructions on such new petition.

Pak Today is poised at the cross roads. One road leads to truly federal democratic welfare state with the balance of power between an- Independent judiciary, a duly elected Govt. representing the will of the people a determined executive which is fighting the war against terrorism and poverty. The second road leads to destabilization of the rule of law. The people .of Pakistan await your verdict."

As in above 'statement apprehension of destabilization of the system has been expressed, therefore, Mr. Kamal Azfar, learned Senior ASC, who had filed the Applications, referred to hereinabove, was called upon to submit an affidavit, clarifying the stand taken by him. Surprisingly, he, verbally, contended that "apprehension of destabilization of the democratic system is from GHQ and CIA", The words so uttered by him are as follows: -

"There are extra constitutional forces in Pakistan and outside Pakistan which are trying to destabilize this country. I say more openly, the dangers to Pakistan come from the CIA & GHQ."

The above statement on behalf of Federation was prominently noted by the leading newspapers. On the same day, learned Acting Attorney General once again made a categorical statement of accepting the decision, whatsoever, will be recorded by this Court. His such statement has also been recorded vide order dated 15th December, 2009, which is reproduced hereinbelow for convenience: -

"Learned Attorney General for Pakistan has concluded his submissions, while reiterating his stand, taken on the first day of hearing that the Federal Government is not defending the NRO....."

"STATEMENT

In Compliance of the orders of the Hon'ble Supreme Court of Pakistan to apprise the Hon'ble Court as to how the Federation would interpret the wording "the second road leads to the destabilization of the rule of law", it is submitted as follows: -

(1) There is no mention of the wording 'threat to democracy' in the Statement.

(2) The Federation supports the Prosecution, in accordance with law, of persons alleged to have done wrong doing. The Federation does not oppose the Petitions seeking a declaration that the National Reconciliation Ordinance 2007 (NRO) is illegal and unconstitutional.

(3) With regard to the "wider issues" mentioned in paragraph No.9 these refer to those matters which were raised by the Petitioner's counsel during oral arguments and which find no mention whatsoever in the Petitions. For example, submissions made in respect of Articles 89 (in particular the alleged concept of "implied Resolution") and A.264 on the effect of Repeal.

(4) The Federation's view is that those who have benefited under the NRO should be proceeded against under the appropriate laws before the courts having the competent jurisdiction. As factual matters need to be determined by the Trial Courts.

(5) So far as my comments made yesterday before this Hon'ble Court concerning the threat from GHQ, the CIA and the contents of

paragraph 9 of the CMA are concerned these were my personal views and were not made on the instructions of the Federation of Pakistan. As such I withdraw the same, which should not be considered by this Hon'ble Court in any manner whatsoever and the same should be deleted and expunged from the record.

(6) It is emphasized that the Federation of Pakistan holds this Hon'ble Court in the highest esteem and has the greatest respect for the same."

The above statement, filed on behalf of Federation of 'Pakistan, has disclosed the intention of Federation of Pakistan, particularly to the effect that those who have acquired benefit under the NRO, 2007 should be proceeded against under the relevant laws, before the Courts of competent jurisdiction, as factually matters need to be determined by the Trial Court. Learned Acting Attorney General for Pakistan and learned counsel appearing for Federation of Pakistan have reiterated this stand, time and again, during the course of hearing.

44. *Relevant extract from the book "Reconciliation: Islam, Democracy and the West" by late Mohtarma Benazir Bhutto; as relied upon by M/s Abdul Hafeez Pirzada and A.K. Dogar, Sr. ASC are also reproduced hereinbelow for ready reference: --*

"In August I called PPP leaders to New York. There we discussed giving General Musharraf a "nonpaper" of what we expected. Makhdoom Amin Fahim gave the "nonpaper" to General Musharraf on August 18. The "nonpaper" said that unless there was movement, by the end of August both sides would be free to go their own ways. General Musharraf and I had a long conversation over the phone that night. He said he would send a team to see me at the end of August.

The August team met me in London at my flat in Queens Gate. They discussed a whole new constitutional package. We increased the political price for the new package. They said they would come back in two days. They didn't. As the deadline approached for calling off talks, I got a call that the deadline would be extended. It was, but there was silence from the Musharraf camp.

The PPP and I met in London in September, and I announced that the date of my return to Pakistan would be given on September 14, 2007 from all the capitals and regions of Pakistan. I wanted the date announced from my homeland. The talks with Musharraf remained erratic. He didn't want us resigning from the assemblies when he sought re-election. There wouldn't be much difference in his winning whether we boycotted or contested, but we used this to press him to retire as army chief. He cited judicial difficulties. It was a harrowing period. After many, many late-night calls, he passed a National Reconciliation Order, rather than lift the ban on a twice-elected prime minister seeking office a third time, which he said he would do later. In exchange for the NRO, we reciprocated by not resigning from the assemblies, although we did not vote for him. We knew the matter still had to be decided by the Supreme Court. We thought Musharraf took the wrong decision to seek re-election from the existing Parliament, that it would only compound the crisis. But he had made his choice."

45. It appears from the above extract of the book, itself, of late Mohtarma Benazir Bhutto that the NRO, 2007 was designed to benefit a certain class of individuals against whom cases were registered between 1st January, 1986 to 12th October, 1999 subject to the scheme laid down therein. Thus we, prima facie, hold that the NRO, 2007 was not promulgated for achieving the object of national reconciliation as according to its substantive provision i.e. Section 2, it was meant to extend benefit to 'the accused persons, 'against whom cases were registered between 1st January, 1986 to 12th October, 1999, subject to the scheme laid down therein. Likewise, under Section 7 of the NRO, 2007, the cases against 'holders of public office', involved in the offences, inside and outside the country, deemed to have been withdrawn, including the proceedings, initiated under Section 33 of the NAO, 1999 outside the country, through request for mutual assistance and civil party to proceedings, by the Federal Government, before the 12th October, 1999. These two provisions, abundantly, make it clear that the NRO, 2007 has extended benefit only to the criminals, involved in the minor or heinous crimes and 'holders of public office' involved in corruption and corrupt practices, as such it cannot be considered to be a legislation for achieving the object of national reconciliation.

46. We have yet to see a law pari materia with the NRO, 2007 according to which an accused, who being 'holder of public office', indulged into corruption and corrupt practices, plundering and looting of national wealth, etc., has been extended the benefit of withdrawal of his cases from the Court of competent jurisdiction. In order to understand the word 'reconciliation' reference may be made to 'Black's Law Dictionary' wherein it has been defined as 'restoration of harmony between persons or things that had been in conflict'. Likewise in 'Corpus Juris Secundum' the word 'reconciliation' has been defined as 'the renewal of amicable relations between two persons who had been at enmity or variance usually implying forgiveness of injuries on one or both sides; it is treated, with respect to divorce'. The word 'reconciliation' has been defined in 'Advanced Law Lexicon' 2005 Ed. as 'the restoration to friendship and harmony; renewal of amicable relations between two persons having been in conflict; literally the restoration of friendly relations after an estrangement'. As it has been argued by Mr. Abdul Hafeez Pirzada, Sr. ASC that when the word 'national' is prefixed with the word 'reconciliation', its meaning changes absolutely from its ordinary dictionary meanings, and 'national reconciliation' means 'the reconciliation of the entire nation':. Therefore, keeping in view the fact, noted hereinabove, that the NRO, 2007 was the result of deal between two individuals for their personal objectives, coupled with its dictionary meaning, it cannot be called 'national reconciliation'."

4. Petitioner had initially challenged the short order dated 16.12.2009 but when the detailed reasons were released, he filed C.M.A. No. 1844 of 2010 and added additional grounds in support of the petition for review. In support of the petitions, learned counsel made following submissions:-

- (i) that although the Federation of Pakistan had not defended the National Reconciliation Ordinance before this Court the observations made in Paras 44 and 45 of the detailed judgment (under review) with

- reference to Mohtarma Benazir Bhutto's book "Reconciliation: Islam, Democracy and the West" that any benefit was drawn by the author and that NRO 2007 was not promulgated for the object of national reconciliation but for the benefit of certain individuals is incorrect; that the only benefit which she derived was restoration of democracy and that this finding is an error apparent in the face of record;
- (ii) that initially a statement was filed to the effect that the Federation did not contest the Petition No. 76 of 2007 and rather filed a conceding statement. It was however submitted by the Federation's counsel then, that if this Court intended to travel outside the parameters of the prayers made in the petitions which were allowed (vide the judgment under review), it would have been proper and just to grant reasonable time to the Federation to reply and contest. In written reply the said counsel had specifically made a prayer as follows:

"if however this Hon'ble Court wishes to rule upon wider issues other than those raised in the petition in that case, the Federation requests that petitions be filed precisely stipulating these issues whereupon the Federation will seek instructions on such new petitions."

- (iii) that this Hon'ble Court has failed to take note of the preamble to the NRO which makes it abundantly clear that the purpose of the NRO was to promote

national reconciliation and that desired object was achieved. Similarly this Hon'ble Court also did not take into consideration the peculiar circumstances, under which the NRO was promulgated i.e. the restoration of democracy after many years of the rule of a military dictator who had perpetuated his rule by forcing the leader of the main political parties of Pakistan i.e. PPP and PML(N) in exile and his crude attacks on the judiciary;

- (iv) that he would press ground (t) in CMA 1844 of 2010 only to the extent that the NRO has wrongly been held as a deal between two individuals, rather it was an initiative taken by the then President of Pakistan and duly approved by the then Cabinet and all the political parties benefited from it. He further requested that Paras (a), (u), (v), (x), (cc), (dd), (hh), (gg), (ii), (k) in CMA 1844 of 2010 be deleted.
- (v) that according to the law laid down by this Court, parties are not permitted to argue the grounds which are neither taken in the pleadings nor relief is granted behind the prayer of the parties;
- (vi) that admittedly NRO was past and closed transaction and it was dead peace of legislation when it was taken up for discussion during the proceedings of the instant case;
- (vii) that the esteemed judgment of this Court delivered in Constitution Petitions No. 76-80 of 2007 and 59 of

2007 has touched upon Islamic jurisprudence and some complicated concepts of constitutional law which have developed over centuries. As the judgment was to have repercussions, not only in Pakistan but globally as well, this Court should have been adequately assisted by experts in Swiss Law and eminent Islamic scholars for probing into Islamic jurisprudence;

- (viii) that once the Federation had conceded to the prayers in the petition there were no legal grounds or justifiable reasons to pronounce a detailed judgment going beyond the parameters of the pleading and prayers in Petition No. 76 of 2007 and connected petition;
- (ix) that if such a precedent is followed in uncontested matters, it would severely hamper the working of the judiciary and the effective administration of justice. For instance, if a Court were to hold full hearing in uncontested criminal/compoundable, civil cases and constitution petitions where the parties in dispute had reached an amicable settlement within or outside the court, this would cause chaos in the system;
- (x) that it is not denied that political victimization had been going on between the various political parties when the opportunity arose throughout the period of

the NRO. This is borne out of even from the book of PML (N) Chief Mian Muhammad Nawaz Sharif;

- (xi) that the Hon'ble Court has erred in para 169 in holding that the President had no power to promulgate the NRO under Article 89 as the NRO's is subject matter fell beyond the scope of the Federal and the concurrent list. The Hon'ble Court in the same para held that Parliament had the power to enact the NRO as an Act of Parliament and through its 31st July 2009 judgment gave Parliament the opportunity to do so within four months. That if the Parliament had the power to make the NRO an Act, the President also had the power to promulgate an Ordinance in respect of the NRO being part of the Parliament;
- (xii) that in para 178 of the detailed judgment, this Court has erred in ordering the Federal Government and other concerned authorities to seek revival of the said requests, claims and status contrary to the principles of International Law in foreign countries;
- (xiii) that paragraphs 63 to 67 and 367 to 385 are not tenable as some of the convictions recorded which were annulled by invoking NRO were convictions in absentia and the prosecution was launched with malice. Such convictions were in derogation to the law down in PLD 1998 SC 1445;

(xiv) that decision to write or not to write letter to Swiss authorities to open/revive the prosecution/cases falls within the domain of Executive authority and the direction by this Court to issue a letter to Swiss authorities in this regard is violative of the principles of trichotomy of powers which is one of the foundational values of the Constitution of Islamic Republic of Pakistan. Para 4 of the short note in the case reported at PLD 2009 SC 879 reiterated this salutary rule;

that under Article 89 of the Constitution, powers of the President to promulgate an Ordinance and an Ordinance so issued has the same effect as an Act of the Parliament. The declaration given by this Court in Para 169 of the judgment under review to the effect that the President "*though has an authority under Article 89 of the Constitution to promulgate an Ordinance but cannot issue temporary legislation which the Parliament is empowered to do*" is not correct interpretation of the said constitutional provision;

(xv) that the Court erred in law when in Paras 171 and 172, it directed revival of the criminal matters/cases which stood terminated as a result of NRO;

(xvi) that the Court fell in error in not appreciating the functions of the Attorney General under Article 100 of the Constitution i.e. it is the office of the said

incumbent which is empowered to act or not to act in terms of its mandate and the letter written by the then Attorney General for Pakistan to Swiss authorities to withdraw the prosecution was well within its mandate. The adverse finding recorded in this regard offended the principle of audi alteram partem. The observations made in Paras 178 and 456 are in derogation to Article 4 of the Constitution as well;

- (xvii) that in rendering the judgment under review, this Court has not kept in view the well established rule of law that any right accrued to a citizen cannot be disturbed or compromised in collateral proceedings;
- (xviii) that while exercising the power of judicial review, this Court ought to have observed the salutary principle of judicial restraint and the observations made in Paras 85, 86 and 151 are not in consonance with the said principle;
- (xix) that the Court while traversing beyond the spirit and import of the statement made by the learned Acting Attorney General Mr. Shah Khawar or counsel for the Federation Mr. Kamal Azfar has not kept in view the following principles of appreciation of pleadings: -
 - (i) that a judgment cannot go beyond the admissions/pleadings;

- (ii) that non-denial of an assertion is also a pleading and the pleadings have to be considered in their entirety;
 - (iii) that a fact has to be pleaded and then argued;
 - (iv) that the concession given by the counsel cannot be stretched far beyond the non-validity of the Ordinance under the Constitution.
- (xx) that scope of review under Rule 188 of the Supreme Court Rules 1980 read with Order XXVI of the Code of Civil Procedure is very wide and this Court can review the judgment under consideration if there are errors in the face of record or it is against the law declared by this Court.

5. Learned Attorney General for Pakistan, Mr. Moulvi Anwar-ul-Haq appeared on Court's call and the Court sought his assistance because in terms of Article 100 of the Constitution, it is mandated as follows: -

"100. (1) The President shall appoint a person, being a person qualified to be appointed a Judge of the Supreme Court, to be the Attorney-General for Pakistan.
(2) The Attorney-General shall hold office during the pleasure of the President and shall not engage in private practice so long as he holds the office of the Attorney-General.
(3) It shall be the duty of the Attorney-General to give advice to the Federal Government upon such legal matters, and to perform such other duties of a legal character, as may be referred or assigned to him by the Federal Government, and in the performance of his duties he shall have the right of audience in all courts and tribunals in Pakistan.
(4) The Attorney-General may, by writing under his hand addressed to the President, resign his office."

6. He however, did not argue the review petition under the impression that since the Federation had engaged a counsel, the Attorney General was not required to argue the same. Nevertheless the Court queried from him about the distinction between the repeal of a law in terms of Article 164 of the Constitution and a law having been declared void by a Court, to which in all fairness, he replied that the effect of repeal of a law is provided in the afore-referred Article but the effect of declaration by a Court that the law is void would be that no such law ever existed. We may also mention here that Mr. Babar Awan had also filed an application seeking permission to place on record certain record of the Law Department / letters / communications authored by or on behalf of the former Attorney General for Pakistan but initially on 24.11.2011 we did not permit him to read those documents as those were neither filed in the main case nor they were referred to in the instant review petition. However, we examined those documents ourselves during the break and called Mr. Babar Awan after the break to read those documents but he did not appear. The case was adjourned to 25.11.2011 to enable him to appear and even on the said date he did not appear. We asked Mr. Masood Chishti, Federal Law Secretary, present in Court to read those documents but he expressed his inability to read as he had no instructions to do that. Thereafter, we asked Mr. Attorney General to read those documents and came to the conclusion that those had no bearing on the instant review petition. The application was accordingly disposed of.

7. Having heard learned counsel for the review petitioner, learned Attorney General for Pakistan and having gone through the

material laid before this Court, the issues which crop up for consideration are as follows: -

- (i) Whether the judgment under consideration reflects “errors in the face of record” or there is “sufficient cause” warranting its review;
- (ii) Whether the Court in passing the judgment under review went beyond the conceding statement made by learned Acting Attorney General for Pakistan or the counsel for Federation Mr. Kamal Azfar;
- (iii) Whether this Court has made any declaration qua the NRO being Islamic or un-Islamic and thereby entered the exclusive jurisdictional domain of the Federal Shariat Court in terms of Article 203G of the Constitution;
- (iv) Whether the effect of repeal of an ordinance or law in terms of Article 164 of the Constitution and section 6 of the General Clauses Act is the same as that of an ordinance or law being declared *non est* and null and void.

The following two issues having nexus are being discussed together.

Issue No. (i) Whether the judgment under consideration reflects errors in the face of record or there is sufficient cause warranting its review;

Issue No. (iii) Whether this Court has made any declaration qua the NRO being Islamic or un-Islamic and thereby entered the exclusive jurisdictional domain of the Federal Shariat Court in terms of Article 203G of the Constitution;

8. The power of review has been conferred upon this Court in terms of Article 188 of the Constitution of Islamic Republic of Pakistan and the Court is to exercise the said jurisdiction strictly within its parameters because the Constitution mandates that, *no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.*" [Article 175(2)] A reference to the said Article would be in order which reads as follows: -

"188. Review of Judgments or Orders by the Supreme Court.
The Supreme Court shall have power, subject to the provisions of any Act of [169] [Majlis-e-Shoora (Parliament)] and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it."

9. In terms of the afore-referred provision, this power is subject to an Act of the Parliament or Rules framed by this Court. The Parliament has not enacted any law in this regard but this Court has framed Rules and Order XXVI Rule 1 relates to this Court's power to review which is as follows: -

"1. Subject to the law and the practice of the Court, the Court may review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, rule I of the Code and in a criminal proceeding on the ground of an error apparent on the face of the record."

10. The afore-referred Rule provides that this Court may review its judgment in a civil proceeding on grounds similar to those mentioned in Order XLVII Rule I of CPC and in a criminal proceeding if there is an "error apparent on the face of record". To comprehend the nature of grounds in a civil proceeding which may warrant review, Rule 1 of Order XLVII CPC has to be kept in view which is reproduced below: -

"1. Application for review of judgment.---(1)
Any person considering himself aggrieved,--

- (a) *by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;*
- (b) *by a decree or order from which no appeals allowed; or*
- (c) *by a decision on a reference from a Court of Small Causes,*
and who, from the discovery of new and important matter or evidence which, after exercised of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the receipt or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

11. An analysis of the contentions raised in the petition and submissions made by petitioner's learned counsel would indicate that they neither disclose discovery of a new important matter nor evidence of which the petitioner/Federation was not aware at the time of hearing of the main petition to bring it to the notice of this Court. We specifically queried learned counsel about the paragraph which according to him reflected some mistake or error apparent on the face of record and he initially referred to paragraphs No. 12, 44, 45 and 46 but during the course of his submissions, he also referred to paragraphs, 56, 63 to 86, 137, 139, 151, 171, 172 and 178.

12. We have carefully examined the afore-referred paragraphs and find that these paras do not reflect any error or mistake within the meaning of the Constitutional and Statutory provisions or the Rules framed by this Court to which reference has been made in para 7 above to warrant exercise of review jurisdiction.

13. Para 44 of the judgment under review merely makes a reference to late Mohtarma Benazir Bhutto's book "Reconciliation:

Islam, Democracy and the West". The observations made in Para 45 of the National Reconciliation Ordinance, 2007 are qualified by the expression "*prima facie*" but the finding that the said Ordinance "*extended benefit to those involved in minor or heinous crimes and holders of public office involved in corruption or corrupt practices, as such it cannot be considered to be a legislation for achieving the object of national reconciliation*" was with reference to those who promulgated the NRO and did not attribute any motive to the late Mohtarma Benazir Bhutto. The point in issue before this Court was not what was in the mind of the author of the afore-mentioned book as she was a political leader of international stature and she may have been responding to the initiative and offers made by General Pervaiz Musharraf which in her estimation *inter alia* led to restoration of democracy. The Court while passing the judgment under review was mainly concerned with the subject matter of the NRO and its consequences and even while declaring it to be "*non est*", it did not give any adverse finding on the merit of the cases which were either terminated or ended in acquittal on account of the said Ordinance. The Court, on the contrary, while reviving those cases left it to the concerned courts to decide it as mandated in law strictly on merit. No wonder none of the beneficiaries whose cases were reviewed has sought review of the judgment. The Court during hearing of this petition made a particular reference to some of the important holders of public office who instead of getting any benefit from the NRO faced trial and earned acquittal from a court of law i.e. Mr. Yousaf Raza Gillani, Prime Minister of Pakistan and those whose cases having been revived as a consequence of the judgment under review faced trial but

acquitted i.e. Mr. Rehman Malik, the Interior Minister, Government of Pakistan.

14. The Court in Para 178 of the judgment merely held that the communications addressed by the then Attorney General were unauthorized and the Federal Government was directed to take steps to seek revival of the request in that context. Neither during the hearing of the main case, learned counsel for the Federal Government placed on record any instructions of the Federation in this context nor during the hearing of this review petition, any such material was laid before this Court which could persuade us to hold that the said communication by the then Attorney General was duly authorized to warrant its review.

15. In Paragraphs 63 to 67, the Court was merely commenting on certain amendments in Criminal Procedure Code (section 494 of the Cr.P.C.) with regard to withdrawal of cases and as to how such amendments were not tenable in law; how the stated object of the preamble of the NRO 2007 of seeking "national reconciliation" could be realized by acquitting certain people accused of corruption; how the Indian Supreme Court in (AIR 1980 SC 1510) commented upon the role of a court seized of the request for withdrawal of a criminal case should proceed i.e. uninfluenced by any political consideration with a view to ensure that the Court does not become "anyone's stooge".

16. In Paragraphs 68 to 85 of the judgment under review, the Court commented upon the effect of Section 6 of the NRO 2007 whereby section 3A of the National Accountability Ordinance, 1999 was amended with regard to trials in absentia and how the said amendment is violative of the principle of trichotomy of powers

enshrined in the Constitution. The observations made in the afore-referred paragraphs are based on precedent case law and are in accord with the mandate of the Constitution. This is evident from the observation made in Para 81 of the judgment under consideration which reads as follows: -

"81. The legislature is competent to legislate but without encroaching upon the jurisdiction of the judiciary. If, it is presumed that the insertion of clause (aa) in Section 31A of the NAO, 1999, by means of Section 6 of the NRO, 2007, is constitutionally valid even then it would be tantamount to allow the legislature to pronounce a judicial verdict against an order or judgment of a competent Court of law, declaring the same to be void ab initio. Therefore, following the doctrine of trichotomy of powers, the action of the legislative authority, whereby clause (aa) has been inserted in Section 31A of the NAO, 1999, by means of the NRO, 2007, would be considered to be a step to substitute the judicial forum with an executive authority. Thus, it would not be sustainable being contrary to the principle of independence of judiciary, as mentioned in Article 2A of the Constitution, which provides that independence of judiciary shall be fully secured read with Article 175 of the Constitution, which lays down a scheme for the establishment of the Courts, including the superior Courts and such other Courts as may be established by law. In the case in hand, except an appeal under Section 32 of the NAO, 1999 to the High Court of the Province, no other remedy is available to a convict against his conviction/sentence, to get it set aside."

Dilating upon the rationale of the guidelines issued by this Court from time to time in the precedent cases to which reference has been made in these paragraphs as also in the judgment under review, the Court observed in Para 85 as follows: -

"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."

17. Paragraph 137 to 139 merely elucidate the mandate of Article 227 which stipulates that the existing laws shall be brought in conformity with the injunctions of Islam and that this shall not affect the personal laws of non-Muslim citizens or their status as citizens; of Article 228 regarding the composition of Islamic Council of Ideology and the reference to be made by the President or the Governor of a Province if two-fifths of the total membership of the Parliament or a Provincial Assembly requires so for seeking advice from the said Council as to whether a proposed law is repugnant to injunctions of Islam or not and on Article 230 relating to the functions of the Council. In Paras 138 and 139, the Court merely observed that Article 25 of the Constitution providing for equal protection of law to all citizens is in countenance with Quranic injunctions and that the National Reconciliation Ordinance had not been promulgated in terms of Article 227(1) of the Constitution. The Court did not annul the NRO on the ground of its being un-Islamic as that would be violative of Article 203(g) of the Constitution, which stipulates that: -

"203G. Bar of Jurisdiction

Save as provided in Article 203F, no court or tribunal, including the Supreme Court and a High Court, shall entertain any proceeding or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court."

18. In Para 139 of the judgment under review, the Court candidly observed: -

"The observations relating to the application of Article 227 and to the morality and conscience of the Constitution are only further supportive observations that can be construed as a reconfirmation of the essential and inherent invalidity in the light of the other express provisions contained in the Constitution. The Primary' touchstones remain the other provisions of the Constitution specified in the judgment."

19. So far as paragraphs 171 and 172 are concerned, they merely relate to the consequences of the declarations made in the judgment whereby the National Reconciliation Ordinance was held to be "void ab initio", "ultra vires" and was *"deemed non est from the date of its promulgation i.e. 5th October 2007 as a consequence whereof 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"* and thereafter in terms of Para 172 of the acquittals and discharge orders were annulled and the criminal cases were revived. No exception could be taken to such a declaration and directions issued first because this was the legal consequence of the declarations made with regard to the NRO and second the counsel for Federation himself candidly submitted that the Federation had no objection if the cases against those who benefited from the NRO are revived and they are proceeded as mandate in law.

20. The submission of petitioner's learned counsel with regard to Para 169 of the judgment under review reflect lack of proper appreciation. The Court acknowledged the power of the President in terms of Article 89 of the Constitution to promulgate an ordinance but

qualified the same holding that he cannot issue a temporary legislation, which the Parliament is not empowered to do. The observation was made with reference to lists of subjects on which the Parliament is empowered under the Constitution to legislate. The Court found that, "a thorough perusal of the Federal and the Concurrent Lists persuades us to hold that the President was not empowered to issue the NRO, 2007 as the subjects covered by its Section 2, 6 and 7 fall beyond the scope of these lists." The learned counsel did not explain as to how the afore-referred provisions of the NRO fell within the list on which the Parliament was empowered to legislate and therefore the President Could.

Issue No. (ii) Whether the Court in passing the judgment under review went beyond the conceding statement made by learned Acting Attorney General for Pakistan or the counsel for Federation Mr. Kamal Azfar;

Issue No. (iv) Whether the effect of repeal of an ordinance or law in terms of Article 164 of the Constitution and section 6 of the General Clauses Act is the same as that of an ordinance or law being declared *non est* and null and void.

21. To appreciate the afore-referred issues, it would be in order to keep in view the statements made by the then learned Acting Attorney General Mr. Shah Khawar as also the then learned counsel for Federation Mr. Kamal Azfar which have been reproduced in Para-3 of this judgment. Mr. Babar Awan, ASC particularly referred to that part/para of the written statement filed by Mr. Kamal Azfar wherein he had stated as follows: -

"(3) With regard to the "wider issues" mentioned in paragraph No.9 these refer to those matters which were raised by the Petitioner's counsel during oral

arguments and which find no mention whatsoever in the Petitions. For example, submissions made in respect of Articles 89 (in particular the alleged concept of "implied Resolution") and A.264 on the effect of Repeal."

22. The Court repeatedly asked learned counsel as to what is meant by "wider issues" to which he did not respond. However, the issue alluded to in the said part of the statement of learned counsel for the Federation pertains to the effect of repeal of an Ordinance in terms of Article 264 of the Constitution which reads as follows: -

"264. Effect or repeal of laws.

Where a law is repealed or is deemed to have been repealed, by, under, or by virtue of the Constitution, the repeal shall not except as otherwise provided in the constitution,

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of the law or anything duly done or suffered under the law;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the law; or

(e) affect any investigation legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed."

23. Section 6 of the General Clauses Act is couched in similar terms as it provides that: -

"6. Effect of repeal. *Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not:*

- (a) *revive anything not in force of existing at the time at which the repeal takes effect; or*
- (b) *affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or*
- (c) *affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
- (d) *affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or*
- (e) *affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;*

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

24. In terms of Article 89 of the Constitution, the President may promulgate an Ordinance and it shall have the same effect as an Act of the Parliament. However, the Article *inter alia* provides that it shall stand repealed if not extended by the National Assembly within the period stipulated in the said Article. In the case in hand, the Court was not seized of a matter/issue with regard to the effect of repeal in terms of Article 89, rather the Court in passing the judgment under review itself made a declaration on reasons mentioned therein that it was "ultra vires of the Constitution", "void ab initio" and "non est". The effect of repeal as spelt out in clauses (a) (b) (c) (d) and (e) of Article 264 of the Constitution referred to above, therefore cannot be canvassed particularly in view of the candid statement made by learned Acting Attorney General and in Para 4 of the statement of the

then learned counsel for the Federation Mr. Kamal Azfar. The judgment of this Court reported at Muhammad Arif v. The State (1993 SCMR 1589) and Government of Punjab v. Zia Ullah Khan (1992 SCMR 602) relate to the effect of repeal made in terms of Article 89 of the Constitution. In Jannat-ul-Haq Vs. Abbas Khan (2001 SCMR 1073) this Court distinguished between the effect of repeal of law in terms of Article 264 of the Constitution and the fact of law having been declared to be repugnant to the Fundamental Rights by a Court. In holding that the effects of "repeal" of a law and its being declared as "void" are distinct, the Court held at page 1081 as follows: -

"Another significant aspect in this context is that right of repeal being inherent in Legislature alone, any change of law including its annulment otherwise than by legislation would not constitute "repeal" as to protect any right, obligation acquired, accrued or incurred under an annulled law. Similarly operation of a law declared to be repugnant to the Injunctions of Qur'an and Sunnah or anything done or suffered thereunder before a specified date or continuation of suits pending on the specified date also does not amount to the repeal of law. There is a fine distinction between both the aforesaid eventualities insofar as their respective implications are concerned. The implication of the expression "ceases to have effect" occurring in Article 203-D regarding Islamization of laws would be that special methodology in its post declaration juncture to be repugnant to Injunctions of the Qur'an and Sunnah is provided therein. It is, therefore, concluded that Article 264 of the Constitution which governs the implications of repeal of law would not be attracted to the laws which are declared to be void on ground of their being violative of the fundamental rights enshrined in the Constitution as is the case in hand. The Court seized of such matters is to provide the solutions to the implications."

25. Similarly in Muhammad Iqbal Vs. Ghaunsullah Khan (2002 CLC 1533), one of us, who was then a Judge of the Peshawar High

Court, speaking for the Court at page 1537 came to the conclusion as follows: -

"A perusal of the abovequoted provisions of the Constitution and the General Clauses Act would reveal that the expression "ceased to have effect" cannot be held synonymous with repeal as is envisioned by Article 264 of the Constitution and section 6 of the General Clauses Act. In the former eventuality even pending cases cannot be dealt with in accordance with the law which has been so held repugnant to the Injunctions of Islam and ceases to have effect after the date mentioned in the decision while in the latter eventuality a proceeding pending in a Court or any such right, privilege, obligation or liability, acquired, accrued or incurred under any enactment so repealed are fully protected unless a different intention appears from repealing enactment."

26. Before parting with this judgment, we may like to observe that the Court was conscious of the fact that although neither the Parliament approved the NRO as an Act nor defended the law rather did not oppose revival of criminal cases, yet this petition for review was filed on behalf of the Federation; that despite repeated queries of the Court, learned did not elaborate as to how the Federation was an "aggrieved person" or disclose any other "sufficient cause" to fall within the parameters of the law regulating the review jurisdiction. However, in the interest of justice, we held a detailed hearing. We even allowed learned counsel for review petitioner to argue the matter notwithstanding the fact that earlier on Mr. Masood Chishti filed application to seek permission to argue the case who was superseded by Mr. Kamal Azfar and even he withdrew as he was appointed Advisor to the Prime Minister and thereafter Mr. Babar Awan, ASC filed CMA No. 5144 of 2011 seeking permission to argue the case. The indulgence extended, however, cannot be in derogation to law. We permitted him to argue so that if we find that a case for review is

made, we will allow the application seeking permission to argue, which could only have been argued under the Supreme Court Rules by the counsel who appeared for the Federation in the main case. Having considered all the grounds urged before this Court, we are of the view that no case for review is made out. The application seeking permission to argue by the counsel who admittedly did not appear for Federation in the main case is violative of Rule Order XXVI Rule 6 of the Supreme Court Rules and therefore not tenable and the application was disposed of accordingly. While dismissing the review petition, we reiterate the earlier view of this Court in Justice Khurshid Anwar Bhinder v. Federation of Pakistan (PLD 2010 SC 483) wherein at Page 526 it was held as follows: -

“A review is by its very nature not an appeal or a re-hearing merely on the ground that one party or another conceives himself to be dissatisfied with the decision of the court, but that it should not only be granted for some sufficient cause akin to those mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure, the provisions thereof incorporate the principles upon which a review was usually granted by Courts of Law in England. The indulgence by way of review may no doubt be granted to prevent remediable injustice being done by a court of last resort as where by some inadvertence an important statutory provision has escaped notice which, if it had been noticed, might materially have affected the judgment of the court but in no case should a rehearing be allowed upon merits.”

Afore-mentioned are the detailed reasons for dismissing this petition for review in terms of the short order passed by this Court on 25.11.2011 which is as follows: -

On 24.11.2011, Dr. Babar Awan, learned Sr. ASC concluded his arguments. In the meanwhile, he had filed CMA no. 5234/2011 and insisted for permission to rely upon the same. As it is settled principle of law that ordinarily at the review stage, a document is not allowed to be produced unless it is very much relevant to do complete justice. Initially request was not entertained, but subsequent thereto, after giving a second thought, we formed the opinion to allow the learned counsel to refer to and read the said documents. However, when we assembled in the second half, he was not present. Message was sent to him through the Court staff, but he

did not turn up. In the meanwhile, learned Attorney General for Pakistan was asked to convey him to appear in Court today because otherwise except the case of Syed Nasir Ali Shah, all the listed matters including the instant CMA/Review Petition have been concluded.

It seems that in the late hours a request was sent by him to the Registrar for adjournment, which was not entertained and the same was returned. When the hearing of the case opened today, Mr. Masood Chishti, Secretary, Ministry of Law & Justice, Government of Pakistan, who himself had drafted the Review Petition at the time when he was practicing law, was asked to read the documents instead of arguing the same because we are of the opinion that the learned counsel to whom directions have been made out of sheer respect, he should have made himself available before the Court, but the Secretary, despite our clear direction as well as expressing displeasure, except reading only one letter dated 02.09.1997 declined to read other documents. However, the learned Attorney General for Pakistan, in such a situation, was asked to read documents through and through. In compliance with the order, all the documents, which pertained to the years 1997 to 1999 in respect of investigation of the cases against Mr. Asif Ali Zardari and Mohtarama Benazir Bhutto pending before the Swiss Courts were considered in his presence.

It may be observed that this Court is seized with the matter relating to review of the judgment dated 16.12.2009 in pursuance whereof, the National Reconciliation Ordinance, 2007 was declared void ab initio, being ultra vires and violative of certain Articles of the Constitution, therefore, to be deemed non est from the day of its promulgation. However, after hearing the learned counsel for the petitioner from 21 to 24th November, 2011 at length and having gone through the documents as well as considering all the aspects of the case relating to the Review Petition filed under Article 188 of the Constitution to review the judgment dated 16.12.2009, we are of the considered opinion that no case is made out for the review of the said judgment. Resultantly, the Review Petition and CMA No. 5144/2011 are dismissed with no order as to costs. The concerned authorities are hereby directed to comply with the judgment dated 16.12.2009 in letter and spirit without any further delay.

Chief Justice.

Judge (1)

Judge (2)

Judge (3)

Judge (4)	Judge (5)	Judge (6)
Judge (7)	Judge (8)	Judge (9)
Judge (10)	Judge (11)	Judge (12)
Judge (13)	Judge (14)	Judge (15)
	Judge (16)	

Islamabad
25.11.2011
Khurram Anees
Approved for Reporting