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Judgment Sheet
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

Writ Petition No.71713/2019
(General (R) Pervez Musharraf vs. Federation of Pakistan, etc.)

JUDGMENT

Dates of hearing:	*09.01.2020, 10.01.2020 and 13.01.2020*
Petitioner by:	*M/s Khawaja Ahmad Tariq Raheem, Muhammad Azhar Siddique, Mian Shabbir Ismaeel and Mian Ali Asghar, Advocates* *Mr. Ahmed Abdullah Dogar, Advocate in Diary No.3242/2020 and Mr. Azhar Iqbal, Advocate in Diary No.3267 and Mr. Sarfraz Hussain, Advocate in CM No.1/2020*
Amicus curiae:	*Syed Ali Zafar, Senior Advocate*
State/Federation by:	*Mr. Ishtiaq Ahmed Khan, Additional Attorney General assisted by M/s. Asad Ali Bajwa and Aftab Raheem, Deputy Attorneys General, Ms. Zarish Fatima, Mehmood Ahmad Joya and Ch. Zubair Ahmed Assistant Attorneys General with Farrukh Ali Mughal, Solicitor General, Ministry of Law, Iftikhar-ul-Hassan, Deputy Solicitor General Ministry of Law and Muhammad Awais Javed, Section Officer, Ministry of Interior* *Mr. Shoaib Zafar, Additional Advocate General*

SAYYED MAZAHAR ALI AKBAR NAQVI, J:-

"The concept of State, in ordinary sense relates to noblest work of man; but man himself free and honest is, I speak of this word as noblest work of God" said by Justice Wilson. Practically, the concept of State cannot be considered subordinate to the people but let everything else be subordinate to the State; hence, State in all eventualities is complete body of

free persons united together for their common benefits, to enjoy peacefully what is their own and to do justice/fair-play to others. Hypothetically, it can be termed as an artificial person, having its own affairs, interests and rights while framing its rules inviting fulfilment of its obligations. From the time immemorial, it is consensus of all, that the concept of State describes people or entity of individuals united more or less closely in socio-political relations, inhabiting, temporarily or permanently the same soil which often it denotes territorial region, inhabited by such people, community or individual emerging into a State. The consensus of the people residing in the territorial region emerges into a document which has legal attributes and has been termed as the "Constitution". The Constitution, written or un-written, is sacrosanct, the State and the Citizenry and even the pebbles on the streets are bound by it.

Article 265(1) describes the Constitution of Islamic Republic of Pakistan. The Legislature, the Executive and the Judiciary are the main organs of the State with their limitations defined in the Constitution. This living document is based upon a trichotomy of power vested with these institutions. The Legislature is assigned to frame the law while the Executive is under obligation to implement it; whereas, the third organ of the State has a unique authority to act as a 'watch dog' over the actions of these two institutions. Judiciary being the custodian of legal rights of the public has precedence over the two other institutions of the State in many respects. It is this attribute which makes this institution more vibrant to serve and look after the affairs of the public and also to act as a guardian of the codified statutory/constitutional enactments; and it owes it to the people to honour their contract with the State, to preserve the law, to rectify the grievances brought before it by any aggrieved person or body, regardless of class, status, rank, ethnicity or other divisions. An act or omission may be void, illegal or un-constitutional, however, to term that action within the ambit of an offence, a thorough scrutiny/evaluation of the peculiar facts and circumstances that surrounds the matter, is essential. The State and its machinery have a pivotal role to play in this regard. In essence, the

functions of the State are discharged by the Federal and Provincial Governments in the spirit as it is mandated in the Constitution. The functions, obligations and duties of the State as prescribed in the Constitution, if any, not duly discharged particularly in view of the social contract, caters legal implications. These legal impediments stated above are challenged and remedied by one organ of the State viz. the Judiciary. Undeniably, any aggrieved person can knock the door of this institution for the redressal of his grievances, which indeed classifies the fairness of the State towards its subjects. The Judiciary has been placed upon a higher pedestal subject to transparency in the determination of such impediments while fulfilling all the factors of dispensation of justice and fair-play. Constitution, the supreme living document, has itself ordained the authority to this institution through judicial review in the form of plenary jurisdiction, statutory jurisdiction and constitutional jurisdiction, the latter being extra-ordinary in nature. It would not be out of context to mention that 'Objective Resolution' was made part of the Constitution while inserting Article 2-A as its substantive part whereof: which further strengthens the Preamble of the Constitution. It was part of Constitution of 1956, Constitution of 1962, Interim Constitution of 1972 and now the Constitution of 1973. The Preamble of the Constitution classifies its scope, intent and purpose, which is reproduced as under:-

> *"Whereas 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;*
>
> *And whereas it is the will of the people of the Pakistan to establish an order:*
>
> *Wherein the State shall exercise its powers and authority through the chosen representatives of the people;*
>
> *Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed:*
>
> *Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah…"*

Preamble of the Constitution reflects the aim, aspirations, genus, genesis and thinking of the people of that territory. The Constitution is a living document because it cannot be restrained to the past rather it has life to unfold the future for its implementation. A close scrutiny of the Constitution, its Preamble, insertion of Article 2-A, ensue its intent to provide social justice to its subjects within the prescribed limits of Qur'an and Sunnah; wherein the fundamental rights are fully guaranteed, hence the implementation of any provision of the Constitution can be ensued through the intervention of the Judiciary, which undoubtedly enjoys a unique and supreme position in the Constitution, to dilate upon the question of governance of the subjects of the State which affects life, liberty thus being an instrument for the interpretation of social, moral, economic, political and legal issues. However, at the same time duty is cast upon this organ of the State (Judiciary) to observe the principles of equity, fairness, due process while keeping itself within the norms of justice eliminating an element of exploitation in the spirit of Article 3 of the Constitution.

2. The jurisdiction of this Court was invoked through the instant constitutional petition calling into question the vires of the proceedings before a 'special court' constituted under the Criminal Law Amendment Act, 1976 (hereinafter to be referred as ***the Act 1976****). After affording preliminary hearing Single Bench of this Court, in view of legal importance of the issue, recommended for constitution of Full Bench. Pursuant to which the Hon'ble Chief Justice vide order dated 23.12.2019 constituted Full Bench. The salient features of the instant petition, as well as, the matter before this Court is with regard to pendency of proceedings before a 'special court' with reference to accusations of 'High Treason' arising out of issuance of proclamation of emergency by the petitioner through Provisional Constitution Order No.1/2007 and Provisional Constitution Order No.2/2007, dated 03.11.2007.*

To set the facts in order it is worth mentioning that proclamation of emergency by the petitioner by means of Provisional Constitution Order No.1/2007 and Provisional Constitution Order No.2/2007 was validated in

pursuance of Presidential Order No.5/2007 as a consequence whereof Article 270AAA was inserted. Hence, it was also duly notified in the official gazette.

The question of validation of Article 270AAA was called in question before the august Supreme Court of Pakistan through filing of Constitutional Petition Nos.87/88 of 2007 and after adjudication thereupon, the Apex Court validated the afore-said legislation by virtue of judgment reported as TIKA IQBAL MUHAMMAD KHAN and others vs. General PERVEZ MUSHARAF and others ***(PLD 2008 Supreme Court 178)***.

The validation with regard to Article 270AAA by august Supreme Court in the above judgment was again agitated before the Apex Court and a Larger Bench was constituted to adjudicate upon its vires. The Larger Bench comprising of 14 Hon'ble Judges of august Supreme Court of Pakistan declared it unconstitutional, ultra vires, illegal and of no legal effect through judgment reported as SINDH HIGH COURT BAR ASSOCIATION through Secretary and another vs. FEDERATION OF PAKISTAN through Secretary, Ministry of Law and Justice, Islamabad and others ***(PLD 2009 Supreme Court 789)***.

Thereafter during the pendency of another Constitutional Petition before the august Supreme Court, the issue of validation of Article 270AAA was considered; and though it was already declared unconstitutional, illegal and void ab initio but it was further ordered to be deleted from the Constitution, which is spelled out from judgment reported as Dr. MOBASHIR HASSAN and others vs. FEDERATION OF PAKISTAN and others ***(PLD 2010 Supreme Court 1)***.

A Civil Petition No.2255/2010 was filed before august Supreme Court for initiation of proceedings qua the charge of 'High Treason' against the petitioner. During the pendency of the afore-said Civil Petition, on 26.06.2013, learned Attorney General made twofold statement:

i) Showing inclination of the then Prime Minister to initiate proceedings of 'High Treason' against the petitioner.

ii) *The then Prime Minister had directed the Secretary Interior to refer the matter to the Federal Investigation Agency for inquiry.*

In view of statement made by the learned Attorney General, the proceedings were disposed off by august Supreme Court of Pakistan. The scope of petition relates to constitution of special court, vires of Section 2 of The High Treason (Punishment) Act, 1973, vires of Sections 4(4) and 9 of the Act, 1976, vires of Article 6 of the Constitution, and its culpability in the given circumstances.

*3. At the very outset, learned counsel for the petitioner while addressing his arguments with regard to maintainability of the instant petition contended that as vires of the federal enactment have been challenged, therefore, in view of pronouncement of the Apex Court in the case reported as "The FEDERAL GOVERNMENT through Secretary Interior, Government of Pakistan vs. Ms. AYYAN ALI and others" **(2017 SCMR 1179)**, the instant petition is maintainable before us. As far as merits of the case are concerned, learned counsel contended that the very basis of initiation of proceedings against the petitioner by the then regime is a consequence of mala fides and ulterior motives. The main crux of arguments advanced by learned counsel for the petitioner emanated from the act of proclamation of emergency by the petitioner dated 03.11.2007 which was made very premises for initiation of proceedings against him, and it was asserted that the same did not fall within the ambit of Article 6 of the Constitution as it was not enforceable at the relevant time. He contended that in such backdrop the initiation of proceedings against the petitioner under the Act 1976, punishable under the High Treason (Punishment) Act 1973 [hereinafter to be referred as **the Act 1973**] is void ab-initio and nullity in the eyes of law. Further argued that the alleged act was committed in the year 2007 and subsequently the matter was brought before august Supreme Court of Pakistan where it was examined at length, however, without any declaration to the effect that the petitioner had ever perpetrated an act of 'High Treason' nor it was so observed even when its review proceedings were pressed into service ensuing the change of regime. He*

further submitted that after the lapse of approximately six years i.e. 24.06.2013, the proceedings so initiated are not only hit by the principle of laches rather also are coram-non-judice. Next urged that the procedure adopted for filing of the complaint against the petitioner, constitution of 'special court', constitution of prosecution team, as well as, appointment of Judges for the 'special court', was altogether in contravention with the explicit provisions of the law on the subject and the Constitution. While elaborating his argument, learned counsel maintained that neither any meeting of the Federal Cabinet was invited on the subject nor agenda items were circulated nor minutes of such meeting were forwarded to the President for sanction as required under Article 90(1) of the Constitution, therefore, it does not carry any legal sanctity. Moreover, the proceedings being criminal in nature, the mandatory procedure as provided under Section 200/202 of the Criminal Procedure Code was not adhered to. Learned counsel vigorously argued that no person other than the complainant and the personnel of the FIA/Investigating Officers appeared during the course of trial as witnesses. Learned counsel further submitted that the petitioner was also exercising the authority of the President of the State at the relevant time, hence his act dated 03.11.2007 is covered under Article 232 of the Constitution. Further argued that it is fundamental principle of jurisprudence that the trial in absentia is unconstitutional being in violation of the explicit provisions of Articles 9, 10 and 10-A of the Constitution of Islamic Republic of Pakistan, 1973, hence provisions of Section 9 of the Act 1976, being ultra vires, are liable to be declared void ab-initio being inconsistent with the provisions of Article 8 of the Constitution. It was lastly argued that the provisions of Article 6 introduced through 18th amendment are repugnant to Article 232 of the Constitution and therefore, have no legal effect. Learned counsel, while summing up his arguments, submitted that in view of the facts and circumstances, the initiation of proceedings against the petitioner and superstructure built thereupon is fallacious, void ab-initio, unconstitutional and liable to be struck down.

4. Syed Ali Zafar, Senior Advocate, who was appointed as amicus curiae to assist the Court, while rendering his assistance submitted that the act of proclamation of emergency dated 03.11.2007 was not encompassed by the provisions of Article 6 of the Constitution as it was in force at the relevant time. Further contended that although the 18th amendment was incorporated subsequently, however, no corresponding amendment was made in the High Treason (Punishment) Act 1973, as such, the acts covered within the meaning 'suspension' or 'holding in abeyance' could not be said to be punishable under the Act ibid. Learned amicus curiae pointed out the grave irregularities vis-à-vis the provisions of Section 3 of the Act 1976; wherein the Code of Criminal Procedure has been made applicable mutatis mutandis for instituting proceedings in the matter. While referring the provisions of Section 200/202 of the Code of Criminal Procedure he contended that after filing of complaint, it was enjoined upon the 'special court' to examine the complainant at preliminary stage in order to evaluate whether the matter was liable to be inquired into, however, ironically on 24.06.2013, the Secretary to the Prime Minister, through a letter, directed the Secretary Interior Division to get the matter inquired into through Federal Investigation Agency prior to constitution of 'special court', which was subsequently established on 20.11.2013. As far as the legality of the constitution of the 'special court' is concerned, it was argued before us that in view of provisions of Section 4 of the Act 1976, the same was to be given effect by the Federal Government, as contemplated by Article 90(1) of the Constitution of Islamic Republic of Pakistan, 1973; while the procedure adopted in this case is in derogation to Section 4 of the Act, 1976. He further submitted that the complaint before the 'special court' has not been filed by the authorized officer in terms of Section 3 of the Act 1976, inasmuch as the corresponding amendment was not made in the notification dated 29.12.1994 after 18th amendment; hence the very filing of complaint itself is without lawful authority. As regards the provisions of Section 9 of the Act 1976, it was argued that the same are patently repugnant to Article 8 of the Constitution, as well as, to injunctions of Islam. Maintained that any enactment if repugnant to the injunctions of Islam has been deprecated by

the Superior Courts of the country from time-to-time. It was further emphasized that the act of 'High Treason' cannot be supposed to have been committed by a single person rather it is a collective act, as is evident from the rationale underlying the unambiguous provisions of the Act 1976; wherein word 'accused persons' has been used. However, in the case in hand only the petitioner has been saddled with the accusation, which fact itself smacks of mala fide on the part of the then regime. Learned counsel emphatically argued that the act purportedly committed by the petitioner was on 03.11.2007 and at that time the provisions introduced through the 18th amendment were not part of the Constitution which were introduced on 18.04.2010, therefore, it is manifestly clear that the words 'suspension' and 'holding in abeyance' added in Article 6 of the Constitution, 1973 were alien to our Constitution at that time hence, these words could not be given retrospective effect, as envisaged in Article 12(1)(a) of the Constitution. Further submitted that even in the provisions of Article 12(2) of the Constitution, only words 'abrogation' and 'subversion' have been incorporated. Learned amicus curiae vehemently argued that 'proclamation of emergency' is brainchild of the Constitution, hence, its application under Article 6 does not commensurate. He maintained that in this backdrop the entire exercise with regard to complaint since its inception to the culmination was in utter disregard to the provisions of the Constitution. It was finally argued that earlier the matter concerning the act of invoking emergency provisions by the petitioner came up before august Supreme Court of Pakistan in the case of SINDH HIGH COURT BAR ASSOCIATION through Secretary and another vs. FEDERATION OF PAKISTAN through Secretary, Ministry of Law and Justice, Islamabad and others ***(PLD 2009 Supreme Court 789)*** *whereby though certain acts were declared unconstitutional, however, no penal consequences were ensued. Further argued that the provisions of Section 2 of the Act 1973 were also necessarily liable to be amended correspondingly after the 18th amendment, but such amendments were surprisingly excluded from consideration by the legislature. It was lastly argued that re-constitution of a Bench entails re-hearing with an intent to apprise the court each and every bit of material*

placed before it for consideration but despite of change in the 'special court' on number of occasions, it kept on with the proceedings with the same material before it which is against the dictates of justice and fair-play. Learned amicus curiae while summing up his arguments, submitted that in the attending facts and circumstances of this case the modus operandi adopted ranging from commencement of the proceedings in the instant matter, i.e. filing of the complaint and constitution of 'special court' to the law made applicable therein i.e. provisions of Section 9 of the Act 1976 and amendment in Article 6 of the Constitution incorporated through 18th amendment are bereft of the constitutional mandate, ultra vires, unlawful and coram-non-judice.

5. Learned Additional Attorney General for Pakistan on the strength of available record apprised that it is a pity that the whole proceedings in the instant matter since undertaking given by the then Attorney General for Pakistan during the proceedings in Civil Petition No.2255/2010 had been initiated beyond the scope of law on the subject. He further apprised that on the desire of the then Prime Minister, a letter dated 26.06.2013 was written to the Secretary Interior for issuance of instructions to the Director General, FIA for holding an inquiry and investigation into the matter under Article 6 of the Constitution of Islamic Republic of Pakistan, 1973. Learned Additional Attorney General assisted us that in pursuance thereof an inquiry was conducted by the FIA authorities, followed by a complaint lodged before the 'special court' constituted under the Act 1976. When confronted, learned Additional Attorney General candidly apprised that though minutes of the meeting of the Cabinet dated 24.06.2013 are available on record, however, no agenda item for holding such meeting is available. As far as authority vested with the Secretary Interior qua filing of complaint before the 'special court' as mentioned in letter dated 12.12.2013 is concerned, the learned Additional Attorney General apprised that the authority in this regard was drawn from S.R.O. 1234(1)/94; although after the 18th amendment it became insignificant. Moreover, subsequently the 'special court' was established in pursuance of notification

dated 20.11.2013 issued by the Ministry of Law, Justice and Human Rights. According to the learned Additional Attorney General, in the notification, it has been unequivocally mentioned that the 'special court' was to be constituted by the Federal Government comprising of three Hon'ble Judges of the High Court, however, he conceded that instead of adopting requisite procedure as laid down in Article 90(1) of the Constitution, the consultation/recommendations were sought from the Hon'ble Chief Justice of Pakistan beyond the mandate of law. Moreover, the constitution of legal team was also not approved by the Federal Government. He further apprised that appointments of Judges and President of the 'special court' were made on the recommendations of the Hon'ble Chief Justice of Pakistan. When so confronted; he frankly conceded that every act concerning the establishment of 'special court', assigning the issue of appointment of Judges and President and other issues were within the competence of Federal Government but it was squarely breached in all eventualities.

6. We have considered the arguments advanced by learned counsel for the petitioner, Syed Ali Zafar, Senior Advocate, learned Additional Attorney General for Pakistan and gone through the record available on file.

7. It is not far-fetched to mention that the concept of judicial review stemmed from the judgment in the case of "WILLIAM MARBURY vs. JAMES MADISON, Secretary of State of the United States" ***(5 US 137 – Supreme Court 1803)****, passed by the Chief Justice Marshall and the principles of judicial review enunciated by such a great jurist still hold good in the annals of the constitutional dispensation of a federal character. He declared that "the legislature has no authority to make laws repugnant to the Constitution and in the case of constitutional violation the court has absolute and inherent rights to invent the system of judicial review which was already in the process of evolution", but by this decision he strengthened the system to the optimal. Again Justice Marshall, in the case of "M'CULLOCH vs. THE STATE OF MARYLAND"* ***(17 US 316 –***

Supreme Court 1819) *declared the stature of Maryland as unconstitutional. In this case, Justice Marshall expanded the powers of the Federal Government by invoking the doctrine of implied powers. The doctrine of judicial review established by Chief Justice Marshall in William Marbury's case, is still vibrant and its force stands unabated. Through his various constitutional decisions, the Chief Justice Marshall established the following principles:*

(a) The people as a whole are sovereign.

(b) The Government is the Government of the people, it emanates from the people, its powers are granted by the people and it is to be exercised for the benefit of the people.

(c) The Constitution is supreme.

(d) A law repugnant to the Constitution is void.

(e) The court has power to determine the constitutionality of a legislative Act and declare it void when it is repugnant to the Constitution.

(f) Legislation can be declared unconstitutional only in clear case of unconstitutionality and not in any doubtful case.

(g) The constitution is a living instrument adaptable to all new conditions of life.

(emphasis supplied)

The courts wield power of judicial review of a legislative action in order to determine constitutionality of the law so enacted. Any law beyond scope of its authority cannot be held plausible, in that, it critically casts aspersions on rights of those to be governed. The concept of judicial review of such legislation not only vindicates rights of those governed rather it is also all the more essential for upholding democracy and ensuring supremacy of the Constitution.

The judiciary assumes, in essence, a vitally crucial role as custodian of the constitutional principles to provide its people what Constitution, in essence, guaranteed to them and this can only be possible if the power of judicial review is independently exercised as protector of the liberties of its citizens, otherwise any autocratic move to impinge upon their fundamental

rights will badly reflect on democratic institutions. Hence, it goes without saying that the key role of an independent judiciary to do away with ultra vires legislation becomes indispensable.

It is also pertinent to observe that it is only the power of judicial review that has served the purpose of acting as a clog on the legislative authority with a view to circumvent it as ultra vires of the Constitution. In countries adhering to the principle of legislative supremacy, the scope of judicial review is somewhat limited in the sense that the power of review of the courts is confined to the review of administrative actions. But the countries like Pakistan, India or the U.S.A; having written constitution or federal legislature, find a wider scope of judicial review to examine the legislative and administrative actions of the state. The concept of judicial review, since its inception, is based on the concept of a supreme law i.e. the Constitution.

8. Having due regard to the fundamental principles of judicial review as set forth by the eminent jurists, it is enjoined upon this Court to examine the question of maintainability. While resolving this moot point, it has essentially to be borne in mind that the paramount object of the constitutional petition casts obligation on us to ascertain the term 'person' within the contemplation of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. Needless to emphasis that it will determine as pre-requisite, the competence of the writ petition qua person amenable to the territorial jurisdiction of this Court. Besides, in the present controversy, the vires of a legislative instrument, (a federal instrument), issued by the Federal Government are impugned on the ground that it is offensive of the provisions of the Constitution of Islamic Republic of Pakistan, 1973. More-so, that the federal instrument, the notification under challenge, is deficient in its procedural, as well as, substantive requirements as ordained by the Constitution and other laws ancillary thereto. We are also conscious of the fact, that an application, prior to the decision rendered by the special court, was moved before the learned 'special court' objecting the validity, constitution of the 'special court', which (with respect), was left unattended

for an indefinite period of time, against which a writ of certiorari was being filed before this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. The question of maintainability of the court before the same court is out of run as the establishment of 'special court' was brainchild of the same statute; hence it could not entertain and decide the question of its legality which aspect has been settled by the superior courts from time-to-time. The basic premise of this petition, undisputedly, is a judicial inquiry in terms of the federal notification on which the validity and formation as stated earlier, is wholly dependent. Since a federal instrument/notification is under question before this Court, undoubtedly, it has territorial jurisdiction as envisaged under Article 199 of the constitution of Islamic Republic of Pakistan, 1973. Furthermore, the place of residence as contemplated under Section 20 of Civil Procedure Code, 1908, has no relevance, particularly, when dealing with the issue of territorial jurisdiction under article 199 of the Constitution of Islamic Republic of Pakistan, 1973. We may safely rely upon the case titled "LPG ASSOCIATIONS OF PAKISTAN through Chairman vs. FEDERATION OF PAKISTAN through Secretary, Ministry of Petroleum and Natural Resources, Islamabad and 8 others" reported as ***(2009 CLD 1498)****, In this regard, wherein whilst relying upon various judicial pronouncements of the Apex Court as well as of the High Courts, it was held as under:*

(a) The Federal Government or any body politic or a corporation or a statutory authority having exclusive residence or location at Islamabad with no office at any other place in any of the Province, shall still be deemed to function all over the country.

(b) If such Government, body or authority passes any order or initiates an action at Islamabad, but it affects the "aggrieved party" at the place other than the Federal Capital, such party shall have a cause of action to agitate about his grievance within the territorial jurisdiction of the High Court in which said order/action has affected him.

(c) This shall be more so in the cases where a party is aggrieved or a legislative instrument (including any rules, etc.) on the ground of it being ultra vires, because the cause to sue against that law shall accrue to a person at the place where his rights have been affected. For example, if a law is challenged on the ground that it is confiscatory in nature, violative of the fundamental rights to property; profession, association etc. and any curb has been placed upon such a right by a law enforced at Islamabad, besides there, it

> *can also be challenged within the jurisdiction of the High Court, where the right is likely to be affected.*

Similarly, the above-mentioned view of the High Court has further been reiterated/approved by the august Supreme Court of Pakistan in the case of "The FEDERAL GOVERNMENT through Secretary Interior, Government of Pakistan vs. Ms. AYYAN ALI and others" reported as ***(2017 SCMR 1179)*** *wherein it was held as under:*

> *"... Federal Government, though may have exclusive residence or location at Islamabad, would still be deemed to function all over the country..."*

The august Supreme Court of Pakistan further in the case of "Messers AL-IBLAGH LIMITED, LAHORE vs. THE COPYRIGHT BOARD, KARACHI and others" reported as ***(1985 SCMR 758)*** *held as under:-*

> *"...The Central Government has set up a Copyright Board for the whole of Pakistan and it performs functions in relation to the affairs of the Federation in all the Provinces. Hence, any order passed by it or proceedings taken by it in relation to any person in any of the four Provinces of Pakistan would give the High Court of the Province, in whose territory the order would affect such a person, jurisdiction to hear the case.*
>
> *...We agree and are of the opinion that both the Lahore High Court as well as the Sindh High Court had concurrent jurisdiction in the matter and both the Courts could have entertained a Writ Petition against the impugned orders in the circumstances of this case. We, therefore, hold that the Lahore High Court has illegally refused to exercise jurisdiction in this case. The case will, therefore, go back to the Lahore High Court for the decision of the Writ Petition filed by the appellant before it for decision on merits, in accordance with law."*

*Similarly, in the case of "TRADING CORPORATION OF PAKISTAN (PRIVATE) LIMITED vs. PAKISTAN AGRO FORESTRY (PRIVATE) LIMITED and another" reported as (****2000 SCMR 1703)*** *this principle was elaborated in the following terms:-*

> *"The learned Single Judge of the High Court in Chambers has elaborately dealt with this aspect of the matter in this judgement in writ petition and has held that the Respondent No.1 having cause of action against Federal Government could bring the Constitution petition either at Karachi or at Rawalpindi Bench of Lahore High Court. The learned Single Judge rejected the objection of maintainability of the writ petition on the ground that affairs of*

> *Trading Corporation of Pakistan are being controlled by the Ministry of Commerce at Islamabad. Before the High Court the relief was not only claimed against the petitioner but was also claimed against the respondent No. 2, the Ministry of Commerce, Government of Pakistan at Islamabad as such the petition was competently filed."*

Keeping in view the constitutional jurisdiction of this Court, the law under challenge, and the principles qua maintainability, enunciated by the Superior Courts of the country from time-to-time, coupled with the fact that the Provisional Constitution Order No.1/2007 was issued by the petitioner in the capacity of Chief of Army Staff, General Headquarters Rawalpindi, the same falls within the territorial jurisdiction of this Court. Hence, in view of Section 5 of Part-G of Chapter-1 of High Court Rules and Orders, this Court can entertain the instant petition even at principal seat, therefore, the same is maintainable in the given circumstances.

*9. The question qua scope/jurisdiction of Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, is also of much significance, in order to deliberate upon the points raised before us. We are cognizant of the fact that if the Court deems it in the fitness of things that as a result of an act of the State beyond the scope of law, which encroaches upon the fundamental rights of a person guaranteed under the Constitution, a Constitutional Court while exercising its extra-ordinary jurisdiction can entertain and come forward for the rescue of the aggrieved person being under the bounden duty as per dictates of justice and equity. Hence, while taking into consideration all the facts and circumstances and the autocratic nature of proceedings of the 'special court' as argued before us and in order to resolve it we sought guidance from pronouncements of the superior courts of the country. In a land mark judgment handed down in the case titled "SHARAF FARIDI and 3 others vs THE FEDERATION OF ISLAMIC REPUBLIC OF PAKISTAN through Prime Minister of Pakistan and another" reported as (**PLD 1989 Karachi 404**) following principle was laid down:-*

> *"---Art. 199(1)(c) & Part II-Fundamental Rights…High Court is authorized to enforce the Fundamental Rights of an aggrieved person and to declare that so much of the law which is inconsistent with the Fundamental Rights shall be void--High Court has power to declare*

> *the law to be void and power to enforce the Fundamental Rights which are violated by the law itself."*

It was further held in the same judgment as under:-

> *"...Art. 199...Powers with which High Court has been vested under Art.199. According to clause (1)(a)(i) of this Article, subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law, on the application of any aggrieved party, make an order: "directing a person performing, within the territorial jurisdiction of the court function in connection with the affairs of the Federation, a Province or local authority, to refrain from doing anything, he is not permitted by law to do, or to do anything he is required by law to do". Paragraph (ii) further empowers the High Court to make an order "declaring that any act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a Province or a local authority has been done or taken without lawful authority and is of no legal effect". The above power of the High Court is akin to the power of the English Courts to issue writs of certiorari and mandamus. Article 199 further empowers the High Court to issue writs in the nature of the habeas corpus and quo warranto but in view of the nature of the relief sought in these petitions, reference to the same unnecessary."*

It was further held in the same judgment that the fundamental rights guaranteed by the Constitution cannot be infringed through autocratic legislative enactments or tainted executive action. Relevant extract out of the same is reproduced as under:-

> *"Constitution of Pakistan (1973) ...Part II...Fundamental Rights guaranteed by the Constitution are immune from the pale of legislative enactments and executive action."*

Similarly in the case of <u>Miss BENAZIR BHUTTO vs. FEDERATION OF PAKISTAN and another</u> ***(PLD 1988 Supreme Court 416)****; the august Supreme Court of Pakistan while describing the scope of Article 199 of the Constitution held as under:-*

> *"Article 199(1)(c) authorises the High Court to enforce the Fundamental Rights of an aggrieved person and to declare that so much of the law which is inconsistent with the Fundamental Rights shall be void."*

10. As far as merits regarding initiation of proceedings before the 'special court' are concerned, perusal of record reflects that the proclamation of emergency was issued by the petitioner through Provisional Constitution Order No.1/2007 and Provisional Constitution Order

No.2/2007, dated 03.11.200 and in this regard Presidential Order No.5/2007 was made part of the Constitution through insertion of Article 270AAA. Notification in this regard was also issued in the official gazette. Subsequent to that Constitutional Petition Nos.87/88 of 2007 were filed before august Supreme Court of Pakistan and the legislation was validated vide judgment reported as TIKA IQBAL MUHAMMAD KHAN and others vs. General PERVEZ MUSHARAF and others ***(PLD 2008 Supreme Court 178)***.

The validation of Article 270AAA was called in question before the august Supreme Court and while adjudicating the same a Larger Bench comprising of 14 Hon'ble Judges decided the same by declaring it unconstitutional, ultra vires of the Constitution, illegal and of no legal effect, which was reported as SINDH HIGH COURT BAR ASSOCIATION through Secretary and another vs. FEDERATION OF PAKISTAN through Secretary, Ministry of Law and Justice, Islamabad and others ***(PLD 2009 Supreme Court 789)***.

This matter was taken up third time by the august Supreme Court in the case of Dr. MOBASHIR HASSAN and others vs. FEDERATION OF PAKISTAN and others ***(PLD 2010 Supreme Court 1)*** *and though it was already declared unconstitutional, illegal and void ab initio but in the above judgment it was also ordered to be deleted from the Constitution. Hence, as the superstructure of insertion of Article 270AAA was made part of the Constitution pursuant to Presidential Order No.5/2007, which was declared unconstitutional, hence the same was deleted as part of the Constitution.*

A Civil Petition No.2255/2010 was filed before august Supreme Court of Pakistan with the prayer to initiate proceedings under Article 6 of the Constitution against the petitioner on account of proclamation of emergency, which was declared unconstitutional by the Apex Court in two subsequent judgments, after its validation. During the pendency of proceedings, the then learned Attorney General made a statement for initiation of proceedings against the petitioner under Article 6 of the

Constitution as such the same was disposed off vide judgment reported as Moulvi IQBAL HAIDER and others vs. FEDERATION OF PAKISTAN through Secretary M/o Law and Justice and others ***(2013 SCMR 1683)***. *Perusal of record available on file reflects that the above statement of the learned Attorney General was based upon a summary moved by the Secretary, Law, Justice and Human Rights Division dated June 21, 2013, relevant extract out of which is reproduced as under:-*

> *"The extracts from the statutes show that as a first step the Federal Government has to take a decision with regard to the initiation of proceedings under Article 6 of the Constitution. It may be added that Article 90(1) of the Constitution defines the Federal Government as the Prime Minister and the Federal Ministers acting through the Prime Minister who shall be the chief executive of the Federation. This decision, if taken, will be followed by a complaint initiated by the Secretary, Interior Division as "authorized officer". The investigation shall be conducted by the Federal Investigation Agency. On the conclusion of the investigation, the said "authorized officer" shall forward to the Special Court (to be constituted by the Law and Justice Division) a statement of the case together with a list of the accused persons, formal charges of offences alleged to have been committed by each one of them and a list of witnesses intended to be produced before the court by the prosecution."*

Plain reading of the summary moved in this respect clearly reflects that proceeding under Article 6 of the Constitution was to be made operative in consonance with Article 90(1) of the Constitution of Islamic Republic of Pakistan. However, it was initiated on the direction of the then Prime Minister issued to the Secretary Interior to further instruct the Director General, Federal Investigation Agency, to inquire into the allegation of 'High Treason' under Article 6 of the Constitution. The relevant portion of letter dated 26.06.2013, issued in this behalf, reads as under:-

> *"The Prime Minister has been pleased to direct that the Secretary Interior, in his capacity as the authorized officer [notified vide S.R.O. 1234(I)/94 under Section 3 of the High Treason (Punishment) Act, 1973], forthwith issue instructions to the Director-General FIA to commence an inquiry and investigation into the acts amounting to High Treason under Article 6 of the Constitution relating to the acts of General (R) Parvez Musharraf taken on 03.11.2007."*

Above letter unfolds that the instruction was issued to the Secretary Interior by the Prime Minister on 26.06.2013 after the 18th amendment while S.RO.1234(I)/94 dated 29.12.1994 demands that the Federal Government

would authorize the Secretary Interior to file complaint against the accused of 'High Treason', which is reproduced as under:-

> *"S.R.O.1234(I)/94 – In exercise of the powers conferred by section 3 of the High Treason (Punishment) Act, 1973 (LXVIII of 1973), and in supersession of its Notification No.S.R.O.1166(I)/94, dated the 1st December, 1994, the Federal Government is pleased to authorize Secretary, Interior Division, Government of Pakistan, to file complaints against a person accused of 'High Treason' as defined in Article 6 of the Constitution."*

It is established that Secretary Interior was competent to file a complaint against the accused of 'High Treason' only on the recommendations of the Federal Government whereas the Federal Government was to operate in the spirit of Article 90(1) of the Constitution which includes the Prime Minister and the Cabinet. However, the requisite requirement of the Constitution was totally ignored. During the course of proceedings learned Additional Attorney General was directed to place on record any document from where it could be gathered that the complaint was filed by the Secretary Interior on the recommendations of the Federal Government in the spirit of Article 90(1) of the Constitution, however, he frankly conceded and made statement before the Court that despite of significant efforts he could not trace out any document qua the meeting of the Federal Cabinet which conferred authorization to the Secretary Interior as per provisions of the Constitution. He further stated that the Federal Government turned out to be reckless in complying with the measures designed to meet the legislative object which was rationally connected to it as such the means used to impair the rights it militated, were accomplished to procure the objective. In view of the foregoing scenario, the filing of the complaint before the 'special court' is without any legal justification and intrudes upon the relevant law and the Constitution.

11. Now we dilate upon the aspect of constitution of 'special court'. The modus operandi for such purpose has been provided in Section 4(i) of the Act 1976, which is reproduced as under for ready reference:-

> ***"4. Special Court**.—(1) [For the trial of any of the offences specified in sub-section (1) of section 3, the Federal Government may, by notification in the official Gazette, set up one or more Special Courts]*

composed of three persons each of whom is a Judge of a High Court, and shall nominate one of the said persons to be the President of the Special Court."

From the bare reading of Section 4(i) of the Act 1976, it is abundantly clear that the constitution of the 'special court' has to be accomplished by the Federal Government as envisaged in Article 90(1) of the Constitution. However, in the case in hand the same was constituted by means of notification dated 20th November, 2013, issued by the Ministry of Law, Justice and Human Rights Division, which is reproduced as under:-

"TO BE PUBLISHED IN THE NEXT ISSUE
OF THE GAZETTE OF PAKISTAN PART-I

Government of Pakistan
Ministry of Law, Justice and Human Rights
*****

Islamabad the 20th November, 2013

NOTIFICATION

No.F.3(32)2013-SoI-II:- In exercise of the powers vested by Section 4 of the Criminal Law Amendment (Special Court) Act, 1976 (Act No. XVII of 1976) the Federal Government in consultation with the Honorable Chief Justice of Pakistan, as well as the Honorable Chief Justices of five High Courts, is pleased to constitute a Special Court for trial of offence of High Treason under the High Treason (Punishment) Act, 1973 (Act No.LXVII of 1973) comprising of the following learned Judges of the High Courts;-

1. *Justice Faisal Arab, High Court of Sindh*
2. *Justice Syeda Tahira Safdar, High Court of Baluchistan*
3. *Justice Muhammad Yawar Ali, Lahore High Court*

2. Justice Faisal Arab, High Court of Sindh being the Senior most Judge amongst them, shall be the President of the Special Court, The place of sitting of the Special Court shall be at Islamabad.

(SHOAIB MIR)
Joint Secretary

The Manager,
Printing Corporation of Pakistan Press,
KARACHI.

Copy forwarded to:-

1. *The Secretary to the President, President's Secretariat, Islamabad.*
2. *The Secretary to the Prime Minister, Prime Minister's Office, Islamabad.*
3. *The Speaker, National Assembly, National Assembly Secretariat, Islamabad.*
4. *The Registrar, Supreme Court of Pakistan, Islamabad.*
5. *The Registrar, Lahore High Court, Lahore.*
6. *The Registrar, High Court of Sindh, Karachi.*

7. The Registrar, Peshawar High Court, Peshawar.
8. The Registrar, High Court of Balochistan, Quetta.
9. The Registrar, Islamabad High Court, Islamabad.
10. Concerned Honorable Judges.
11. Record.

Sd/-
(MIR BALACH)
Section Officer"

The above notification straightway reflects that the 'Federal Government; in consultation with the Hon'ble Chief Justice of Pakistan, as well as, the Hon'ble Chief Justices of five High Courts, had constituted the 'special court' for the trial. When confronted, the learned Additional Attorney General had been candid to concede that for the accomplishment of above process, no document with regard to such an act by the 'Federal Government' in consonance of Article 90(1) of the Constitution is or could be made available on record. We had also asked the learned Additional Attorney General to apprise that where the connotation of 'consultation with the Chief Justice of Pakistan' was drawn from, for constitution of the 'special court' and again he responded that the same is alien to the provisions of the Act 1976, as well as, the Constitution of Islamic Republic of Pakistan, 1973. Hence, from above, it is established without any doubt that the very constitution of the 'special court' was squarely illegal/improper and without jurisdiction. Moreover, re-constitution of the 'special court' was made on number of occasions. The procedure for such contingency calls upon the Federal Government to notify the vacant seat and appoint another Judge. During the course of proceedings, we were apprised that in such an eventuality the requisite procedure was not adopted despite of the fact that at that time the ratio decidendi of august Supreme Court of Pakistan in the case of Messers MUSTAFA IMPEX, KARACHI and others vs. The GOVERNMENT OF PAKISTAN through Secretary Finance, Islamabad and others ***(PLD 2016 Supreme Court 808)*** *was available for guidance. As such the exercise carried out in this behalf was unwarranted and without lawful authority. The Federal Government failed to adhere to the mechanism enunciated by the Apex Court qua the constitutional requirements, hence, the whole exercise is illegal, unconstitutional and void*

ab-initio, which is squarely against the dictum of due process/fair trial. It is consistent view of the superior courts of the country that whenever court is not properly constituted, proceedings carried out by it are nothing but coram-non-judice. This principle was elaborated by the Apex Court in the case of CHITTARANJAN COTTON MILLS Ltd. vs. STAFF UNION ***(PLD 1971 Supreme Court 197)****; wherein following principle was laid down:-*

> *"(c) Jurisdiction – Court not properly constituted – Proceedings must be held to be coram non judice – Question relating purely to jurisdiction of Court – Could be raised at any stage."*

12. At this juncture, we have noticed that regarding the proceedings pertaining to a 'High Treason' case, the Criminal Procedure Code is applicable mutatis mutandis. Sections 200/202 provide a mechanism in regard to the proceedings in a complaint case, which are reproduced as under:-

> ***"200 Examination of complainant.*** *A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Magistrate…."*
>
> ***"202 Postponement of issue of process.*** *(1) Any Court, on receipt of a complaint of an offence of which it is authorized to take cognizance, or which has been sent to it under Section 190, sub-section (3), or transferred to it under Section 191 or Section 192, may, if it thinks fit, for reasons to be recorded postpone the issue of process for compelling the attendance of the persons complained against, and either enquire into the case itself or direct an inquiry or investigation to be made by [any Justice of the Peace or by] a police-officer or by such other person as it thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint…"*

The foregoing provisions transpire that after filing of the 'complaint', it is the court itself to examine the complainant along with other witnesses, if any, at preliminary stage and thereafter it would be upto the court to either order for initiation of inquiry regarding the allegations or it may drop the inquiry proceedings. However, in the instant case the procedure was trampled/transgressed by the executive in a very skeptical manner. It has been consistent view of the superior courts of the country that when a statute requires that an act should be done in a particular way or manner, it must be done as prescribed by law, and any deviation therefrom would be against

the intent of legislature, hence makes it invalidate. Respectful reliance, in this regard, is placed on the ratio decidendi of august Supreme Court of Pakistan in the case reported as ATTA MUHAMMAD QURESHI vs. The SETTLEMENT COMMISSIONER, LAHORE DIVISION, LAHORE and 2 others ***(PLD 1971 Supreme Court 61))****, wherein the following principle was laid down:-*

> *"(c) Interpretation of statutes – Neglect of plain requirement of an absolute statutory enactment prescribing how something is to be done – Held, would invalidate thing being done in some other manner – Enactment whether absolute or merely directory —Test"*

This principle was also elaborated in the case titled as "The COLLECTOR OF SALES TAX, GUJRANWALA and others vs. Messers SUPER ASIA MOHAMMAD DIN AND SONS and others" ***(2017 SCMR 1427)*** *in the following terms:-*

> *"----'Directory' and 'mandatory' provisions---Scope---When a statute required that a thing should be done in a particular manner or forms it had to be done in such manner, but if such provision was directory, the act done in breach thereof would not be void, even though non-compliance may entail penal consequences; however, non-compliance of a mandatory provision would invalidate such act."*

In the case of "ZIA UR REHMAN vs. Syed AHMED HUSSAIN and others" ***(2014 SCMR 1015)*** *their Lordships in the august Supreme Court of Pakistan had observed as under:-*

> *"...If law required a particular thing to be done in a particular manner, it had to be done accordingly, otherwise it would be non-compliance with the legislative intent...."*

Similar view was held in the cases of KHYBER TRACTORS (PVT.) LTD. through Manager vs. PAKISTAN through Ministry of Finance, Revenue and Economic Affairs, Islamabad ***(PLD 2005 Supreme Court 842)****, HAKIM ALI vs. MUHAMMAD SALIM and another* ***(1992 SCMR 46)*** *and ATTA MUHAMMAD QURESHI vs. The SETTLEMENT COMMISSIONER, LAHORE DIVISION, LAHORE and 2 others* ***(PLD 1971 Supreme Court 61).***

We may aptly hold that there are degrees of unreasonableness but indubitably a very extreme degree of like nature, as discussed above, can bring such fallacious administrative decision within the legitimate scope of judicial invalidation.

13. Another crucial point agitated before us with great force is that provisions of Section 9 of the Act, 1976 'trial in absentia' are unconstitutional, which not only impinge upon the principles of natural justice but also transgress the injunctions of Islam. For evaluation of the contention raised by learned counsel for the petitioner and its constitutionality it would be advantageous to go through the provisions of Section 9 of the ibid Act, which are reproduced as under:-

> *"9. No trial before the Special Court shall be adjourned for any purpose unless the Special Court is of opinion that the adjournment is necessary in the interests of justice and, in particular, no trial shall be adjourned by reason of the absence of any accused person due to illness, or if the absence of the accused or his counsel has been brought about by the accused person himself, or if the behavior of the accused person prior to such absence has been, in the opinion of the Special Court, such as to impede the course of justice but, in any such case, the Special Court shall proceed with the trial after taking necessary steps to appoint an advocate to defend any such accused person."*

This aspect of the legal proceedings 'trial in absentia' was considered and decided by a learned Division Bench of this Court in a salutary judgment reported as "ZIA ULLAH KHAN and others vs. GOVERNMENT OF PUNJAB and others" ***(PLD 1989 Lahore 554)****. Relevant extract out of the same is reproduced as under:-*

> *"---Art.10 — Special Courts for Speedy Trials Act (XV of 1987), S.8 —Special Courts for Speedy Trials Ordinance (II of 1987), S.8 – Provisions of S.8 of the Act/Ordinance insofar as they permit the trial of an accused person in absentia are violative of Art.10 of the Constitution."*

The above verdict was assailed before august Supreme Court, which was upheld by virtue of judgment of the Apex Court reported as GOVERNMENT OF PUNJAB through Secretary, Home Department vs. ZIA ULLAH KHAN

and others ***(1992 SCMR 602)****. In another pronouncement of august Supreme Court of Pakistan in the case of MUHAMMAD ARIF vs. THE STATE* ***(2008 SCMR 829)****, following principle was laid down:-*

> *"----Arts. 9 & 10(1)---Anti-Terrorism Act (XXVII of 1997), S.10(11-A)---Trial in absentia---Trial of accused in absentia is violative of Arts.9 and 10(1) of the Constitution and S.10(11-A) of the Anti-Terrorism Act, 1997, which is not sustainable under the law and necessitates retrial of the accused."*

Similar view was held in the cases of M.B. ABBASI and another vs. THE STATE ***(2009 SCMR 808)****, ARBAB KHAN vs. THE STATE* ***(2010 SCMR 755)*** *and NAZAR MUHAMMAD vs. THE STATE* ***(2011 SCMR 1487)****.*

Moreover, with the amendment in the Constitution by way of insertion of Article 10-A, this aspect has further fortified/strengthened the view taken by the superior courts. Provision of Article 10-A is reproduced as under:-

> *"[10-A. Right to fair trial. — For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.]"*

The concept of trial in absentia is even inconsistent with the "doctrine of Islamic Justice" enunciated in the Holy Qur'an and Sunnah rather it is against the golden principles of natural justice. This aspect was taken into consideration and elaborated by august Supreme Court of Pakistan in a landmark judgment in the case titled "PAKISTAN and others vs. PUBLIC AT LARGE and others ***(PLD 1987 Supreme Court 304)*** *while holding as under:-*

> *"---The narration of the Injunctions of the Qur'an and the Sunnah do establish beyond any show of doubt the right to honour and reputation is one of the inviolable rights of man in addition to other valuable rights. Can this be taken away without due process as enjoined by the Qur'an and Sunnah?*
>
> *It is clear from various Injunctions of the Qur'an that Adl, Qist and Ihsan are the components of total and complete justice in Islam. It requires not only equal treatment between man and man but also protects the rights of one against unfair treatment.*
>
> *Condemning someone without making proper inquiry has been prohibited. The word "Tabeyyanu" in Verse 94 has been repeated twice. It is not without significance. Some commentators have laid great stress on it and gave it the meaning of "investigation" as also "interrogation". This purpose cannot be achieved without a notice and proper opportunity of showing cause---.*

> *When a public authority is to be exercised for resolving a controversy regarding rights and liabilities, the decision would not be rendered without proceedings in which the person affected is also afforded an opportunity of hearing.*
>
> *It is common principle which governs the administration of justice in Islam that in case of liability with penal or quasi-penal consequences and/or deprivation of basic rights a notice as well as an opportunity of hearing, are of absolute necessity. This by itself has to be recognised as a basic right---*
>
> *---- In so far as man in general is concerned, there are numerous verses in the Holy Qur'an (refer to the Schedule) which clearly show that on the Day of Judgment everyone will be confronted with the evidence of his deeds during the present life and he would have an opportunity of denial. But the evidence and the atmosphere would be such that he would not be able to deny the strength of the evidence. Here it may be explained that in the exercise of judgment making there are always three main elements: the maker of the judgment, the party/s about whom the judgment is made and the matter/substance of the judgment. As the maker of the judgment in the case under discussion would be Almighty Himself, therefore, it is futile to imagine that he would be making wrong judgment. In any case, man would be made aware of the accusation. And notwithstanding the reality it being question of principle, Allah Almighty has bestowed the right on man to be aware of what he is being punished for. Something can be said about the fact that when made aware, man would have an opportunity of offering an explanation or making a plea of guilty or denial. In other words, there would be an opportunity of making a plea regarding accusation. But mostly the opportunity when availed of would result in the plea of admission as the evidence would be strong and overwhelming."*

Hence, when examined from this perspective, it is crystal clear that the provision contained in Section 9 of the Act 1976 is repugnant to the injunctions of Islam and in contravention of Article 8 of the Constitution, which provides that any law inconsistent with or in disregard of fundamental rights is void. The same is reproduced as under:-

> *"8. Laws inconsistent with or in derogation of Fundamental Rights to be void.*
>
> > *(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.*
> >
> > *(2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contraventions, be void."*

14. Next question hunting us is whether the act purportedly committed by the petitioner can be characterized as an act attracting the provisions of Article 6 of the Constitution. While evaluating this aspect, it is noteworthy that emergency was proclaimed on 03.11.2007. Article 6 part of the Constitution at that time is reproduced as under:-

> *"6. High treason. (1) Any person who abrogates or attempts or conspires to abrogate, subverts or attempts or conspires to subvert the Constitution by use of force or show of force or by other un-constitutional means shall be guilty of high treason.*
>
> *(2) Any person aiding or abetting the acts mentioned in clause (1) shall likewise be guilty of high treason.*
>
> *(3) [Majlis-e-Shoora (Parliament)] shall by law provide for the punishment of persons found guilty of high treason."*

Similar wording of offence was used in Section 2 of The High Treason (Punishment) Act 1973, which is reproduced as under:-

> *"**2. Punishment for high treason, etc.** A person who is found guilty--*
>
> *(a) of having committed an act of **abrogation** or **subversion** of a Constitution in force in Pakistan at any time since the twenty-third day of March, 1956; or*
>
> *(b) of high treason as defined in Article 6 of the Constitution, shall be punishable with death or imprisonment for life."*

Article 6 of the Constitution was amended by means of 18th amendment on 20.04.2010 i.e. subsequent to the act alleged against the petitioner, whereas there is no deeming clause embodied therein regarding its applicability retrospectively. Provisions of the same are reproduced as under for ready reference:-

> *"6. High treason.[(1) Any person who abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means shall be guilty of high treason.]*
>
> *(2) Any person aiding or abetting [or collaborating] the acts mentioned in clause (1) shall likewise be guilty of high treason.*
>
> *[(2A) An act of high treason mentioned in clause (1) or clause (2) shall not be validated by any court including the Supreme Court and a High Court.]*
>
> *(3) [Majlis-e-Shoora (Parliament)] shall by law provide for the punishment of persons found guilty of high treason."*

Even otherwise, in Section 2(b) of the Act 1973, which was promulgated on 26th September 1973, the provisions of Article 6, as it was applicable at that time, were mentioned. Hence, after any relevant amendment in the Constitution, corresponding amendment in the Act 1973 was essential for holding it in field, which was not done. Hence, this aspect alone is sufficient to discard the acts introduced through the 18th amendment in Article 6 of the Constitution.

Moreover, through 18th amendment in Article 6, in addition to words 'abrogation' and 'subversion', 'suspension' and 'holds in abeyance' were also made part thereof. These words have been defined in different dictionaries as under:-

Abrogation

"The abolition or repeal of a law, custom, institution, or the like." (Black's Law Dictionary 11th Edition)

"Abrogation is the act of abrogating; the annulment or repeal of a law by authority of the legislative power." (The Major Law Lexicon Volume 1)

"A total deprivation of fundamental rights, even in one limited area, may amount to an abrogation of the basic structure of the Constitution." (K J AIYAR Judicial Dictionary Volume-1)

Subversion

"The process of overthrowing, destroying, or corrupting <subversion of legal principles> <subversion of the government>" (Black's Law Dictionary 11th Edition)

Suspension

"The act of temporarily delaying, interrupting, or terminating some <business operation> < suspension of a statute>" (Black's Law Dictionary 11th Edition)

"Suspension literally means 'the act of debarring for a time from a function or a privilege'. It means a temporary deprivation of one's office or position." (The Major Law Lexicon Volume 6)

Abeyance

"Expectation or contemplation of law, the position of being without a owner, a state of suspension, dormant condition" (Shorter Oxford English Dictionary)

"The phrase, 'held in abeyance', in the statute trolling statutes of limitations and grievance timelines while the teacher's claims

> *are held in abeyance under moratorium against claims while a teacher is on a program of assistance means to hold in temporary inactivity or suppression; it refers to cession or suspension" (Words and Phrases Permanent Edition 19A)*

Hence, when meaning of words 'abrogation', 'subversion' and 'suspension' & 'holding in abeyance' contained in different dictionaries are evaluated while putting in juxtaposition, it becomes crystal clear that act of 'suspension' in no way would tantamount to 'abrogation' or 'subversion' as contained in Article 6 of the Constitution.

15. Even otherwise from the perusal of complaint filed before the 'special court' and subsequent proceedings clearly demonstrate that the acts mentioned therein were not part of Article 6 of the Constitution at the time of commission of alleged accusation rather those were incorporated in Article 6 by virtue of 18th Amendment, hence it cannot be made basis for initiation of proceedings under Article 6 of the Constitution.

16. Another aspect which this Court cannot lose sight of is that the proceedings against the petitioner before the 'special court' are violative of Article 12(1)(a)(b) of the Constitution of Islamic Republic of Pakistan, 1973, which is reproduced as under:-

> *"12. Protection against retrospective punishment.-(1) No law shall authorize the punishment of a person-*
>
> *(a) for an act or omission that was not punishable by law at the time of the act or omission; or*
>
> *(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.*

It is abundantly clear from plain reading of the provisions of Article 12(1)(a)(b) that any criminal act shall not be given retrospective effect unless committed subsequent to such legislation. Respectful reliance, in this regard, is placed on the ratio decidendi of august Supreme Court of Pakistan in the cases of MUHAMMAD FAZAL and others vs. SAEEDULLAH KHAN and others ***(2011 SCMR 1137)****, Dr. MUHAMMAD SAFDAR vs. EDWARD HENRY LOUIS* ***(PLD 2009 Supreme Court 404)*** *and MAQBOOL AHMAD and another vs. THE STATE* ***(2007 SCMR 116)****.*

In the case of MAQBOOL AHMAD and another vs. THE STATE ***(2007 SCMR 116)*** *following principle was laid down:-*

> *"---S. 10(4)(3)---Anti-Terrorism Act (XXVII of 1997), S.38—Constitution of Pakistan (1973), Art.12---Procedural and substantive law---Retrospective effect---Scope---Trial Court convicted accused/appellant under S.10(4) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and sentenced him to life imprisonment---High Court upheld the finding of Trial Court---Accused contended that, he was not to be charged and convicted under S.10(4) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, for the reason that the said section was introduced through amendment in December, 1997 whereas offence had taken place on 5-6-1997; that S. 10(3) of the Ordinance was applicable in the case of accused and that accused was not to be tried by Anti-Terrorism Court as offence was committed by accused before promulgation of Anti-Terrorism Act, 1997---Validity---Accused had committed offence on 5-6-1997 when according to S.10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 punishment for offence committed by accused was to extend to 25 years and whipping numbering 30 stripes but S.10(4) of the Ordinance was introduced after date of commission of offence, hence, no punishment was to be awarded under said section, being in glaring violation of Art.12 of the Constitution".*

It is worth mentioning that though amendment was made in Article 6 of the Constitution and words "suspends", "holds in abeyance", or "attempts or conspires to suspend" or "hold in abeyance" were incorporated, however, Article 12(2) is confined to words 'abrogation' and 'subversion' of the Constitution. The same reads as under:-

> *"(2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence."*

17. It is not out of context to take into consideration the arguments advanced before us qua provisions of Article 232 of the Constitution. There is no denial to this fact that the said Article is brainchild of the Constitution which confers powers to the President for issuance of proclamation of emergency subject to conditions laid down therein. We have observed that amendment in Article 6 with regard to insertion of additional words "suspends", "holds in abeyance", or "attempts or conspires to suspend" or "hold in abeyance", if evaluated on the threshold of Article 232 and Article 12(2) of the Constitution, it has become a question of fact which requires

judicial interpretation as it raises question of caution in the mind of a person of ordinary prudence qua exercise of this authority duly conferred by the Constitution.

18. In view of foregoing facts and circumstances and its deliberation further lends support that if an act of the executive is committed without any legal justification and the same is not sustainable in the eyes of law, any superstructure raised over the same would fall to ground. This principle of law has been deliberated and enunciated by the Superior Courts from time-to-time. Respectful reliance in this regard is placed on the ratio decidendi of august Supreme Court of Pakistan in the case of REHMATULLAH and others vs. SALEH KHAN and another ***(2007 SCMR 729)****, wherein it was held as under:-*

> *"----When basic order is without lawful authority, then all superstructure built on it would fall on the ground automatically."*

Similar view was held in the cases of EXECUTIVE DISTRICT OFFICER (EDUCATION), RAWALPINDI vs. MUHAMMAD YOUNAS ***(2007 SCMR 1835)****, MUHAMMAD SHAFI and others vs. ALLAH DAD KHAN* ***(PLD 1986 Supreme Court 519)*** *and YOUSAF ALI's case* ***(PLD 1958 Supreme Court [Pak.] 104)***.

19. Another question which requires judicial scrutiny is that whether the Court can go beyond the prayer in the constitutional petition. This matter was again deliberated by the Superior Courts and now it has become a matter of unanimous interpretation of law that the Superior Courts of the country are well within jurisdiction rather are under obligation to take notice of the changed circumstances/subsequent events to mould the relief sought for in the interest of safe dispensation of justice. Respectful reliance in this regard is placed on a celebrated judgment of august Supreme Court of Pakistan in Saiyyid ABUL A'LA MAUDOODI's case ***(PLD 1964 Supreme Court 673)*** *wherein following principle was laid down:-*

> *"(tt) Constitution of Pakistan (1962), Art.98 – Court may award relief required by justice of cause though such relief has not been prayed for."*

This view was further held by the Apex Court in the cases of Syed ALI ASGHAR and others vs. CREATORS (BUILDERS) and 3 others ***(2001 SCMR 279)*** *and SAMAR GUL vs. CENTRAL GOVERNMENT and others* ***(PLD 1986 Supreme Court 35).*** *In a landmark judgment handed down in the case titled "SHARAF FARIDI and 3 others vs THE FEDERATION OF ISLAMIC REPUBLIC OF PAKISTAN through Prime Minister of Pakistan and another" reported as (**PLD 1989 Karachi 404**) it was held as follows:-*

> *"Court having jurisdiction to adjudicate upon a matter, has the power to mould a relief according to the circumstances of the case, if dictates of justice so demand even if such a relief has not been expressly claimed provided the relief to be given is within the compass of the jurisdiction of the Court."*

*20. The accumulative effect of the preceding paragraphs, judicial analysis of law and Constitution on the subject we are of the considered view that the principle of judicial review is based upon the elimination of exploitation, protection and treatment of law on equal basis, absence of any element of discrimination and adherence to the principles of safe administration of justice. Herculean task of Chief Justice John Marshal in the case of "WILLIAM MARBURY vs. JAMES MADISON, Secretary of State of the United States" **(5 US 137- Supreme Court 1803)** has enlightened the mind of this Court, therefore, while seeking guidance from the above sources, we deem it appropriate to declare without hesitation that the concept of judicial review in our system is placed on higher pedestal as compared to others. It lends support from the fact that our system is based upon 'doctrine of Islamic jurisprudence' after insertion of Article 2-A of the Constitution. All these aspects when considered conjointly it clearly widen its scope. It is not without context to point out that the tools for the exercise of administration of justice are under strict responsibility of equity, law and fairness without an iota of exploitation, malice screening out any chance of personal victimization. The concept of fairness of judicial system, its width, potential and being vibrant in its entirety, is because of divine authorization. Allah (Almighty) has ordained in the Holy Book to deliver justice while introducing a mechanism which is based upon fair-ness and mercy. In this regard we have sought guidance from the following verses of Holy Qur'an:-*

اِنَّ اللّٰہَ یَاۡمُرُ بِالۡعَدۡلِ وَالۡاِحۡسَانِ ﴿۹۰﴾ سورۃالنحل

ترجمہ: بیشک اللہ عدل اور احسان اور صلہ رحمی کا حکم دیتا ہے

The recital of the afore-said verse imprints an impression of comprehensiveness of the word عدل which itself deliberate in entirety the concept of justice and fair-play. However, despite of this the word احسان has been ordained in the Holy Verse which relates to 'forgiveness' and 'mercy'. This concept has not been made available in any other judicial system placing the concept of judicial review conspicuous as compared to others. In the ensuing verses of the Holy Quran similar emphasis has been made upon:-

فَاحۡکُمۡ بَیۡنَ النَّاسِ بِالۡحَقِّ وَلَا تَتَّبِعِ الۡہَوٰی فَیُضِلَّکَ عَنۡ سَبِیۡلِ اللّٰہِ ؕ اِنَّ الَّذِیۡنَ یَضِلُّوۡنَ عَنۡ سَبِیۡلِ اللّٰہِ لَہُمۡ عَذَابٌ شَدِیۡدٌۢ بِمَا نَسُوۡا یَوۡمَ الۡحِسَابِ ﴿۲۶﴾ سورۃ ص

ترجمہ: تو لوگوں میں انصاف کے فیصلے کیا کرو اور خواہش کی پیروی نہ کرنا کہ وہ تمہیں خدا کے رستے سے بھٹکا دے گی۔ جو لوگ خدا کے رستے سے بھٹکتے ہیں ان کے لئے سخت عذاب (تیار) ہے کہ انہوں نے حساب کے دن کو بھلا دیا۔﴿۲۶﴾ **سورۃ ص**

فَاحۡکُمۡ بَیۡنَہُمۡ بِالۡقِسۡطِ ؕ اِنَّ اللّٰہَ یُحِبُّ الۡمُقۡسِطِیۡنَ ﴿۴۲﴾ سورۃ المائدہ

ترجمہ: پس تم انکے درمیان فیصلہ میں انصاف کرو بیشک اللہ دوست رکھتا ہے انصاف کرنیوالوں کو۔

اِنَّاۤ اَنۡزَلۡنَاۤ اِلَیۡکَ الۡکِتٰبَ بِالۡحَقِّ لِتَحۡکُمَ بَیۡنَ النَّاسِ بِمَاۤ اَرٰىکَ اللّٰہُ ؕ وَلَا تَکُنۡ لِّلۡخَآئِنِیۡنَ خَصِیۡمًا ۙ﴿۱۰۵﴾ سورۃ النساء

ترجمہ: (اے پیغمبر) ہم نے تم پر سچی کتاب نازل کی ہے تاکہ خدا کی ہدایت کے مطابق) لوگوں کے مقدمات میں فیصلہ کرو اور (دیکھو) دغابازوں کی حمایت میں کبھی بحث نہ کرنا۔
﴿۱۰۵﴾ سورۃ النساء

یٰۤاَیُّہَا الَّذِیۡنَ اٰمَنُوۡا کُوۡنُوۡا قَوّٰمِیۡنَ لِلّٰہِ شُہَدَآءَ بِالۡقِسۡطِ ۫ وَلَا یَجۡرِمَنَّکُمۡ شَنَاٰنُ قَوۡمٍ عَلٰۤی اَلَّا تَعۡدِلُوۡا ؕ اِعۡدِلُوۡا ہُوَ اَقۡرَبُ لِلتَّقۡوٰی ۫ وَاتَّقُوا اللّٰہَ ؕ اِنَّ اللّٰہَ خَبِیۡرٌۢ بِمَا تَعۡمَلُوۡنَ ﴿۸﴾ سورۃ المائدہ

ترجمہ: اے ایمان والوں! خدا کے لیے انصاف کی گواہی دینے کے لیے کھڑے ہو جایا کرو۔ اور لوگوں کی دشمنی تم کو اس بات پر آمادہ نہ کرے کہ انصاف چھوڑ دو۔ انصاف کیا کرو کہ یہی پرہیزگاری کی بات ہے اور خدا سے ڈرتے رہو۔ کچھ شک نہیں کہ خدا تمہارے سب اعمال سے خبردار ہے

21. In view of facts and circumstances put forth before us by learned counsel for the petitioner, learned amicus curiae and learned Additional Attorney General for Pakistan and its close scrutiny/examination by us in the preceding paragraphs, we are of the considered view that it is

established without an iota of doubt that very basis of initiation of proceedings against the petitioner/General (R) Pervez Musharraf, since its inception to the culmination are beyond the constitutional mandate, ultra vires, coram-non-judice, unlawful, hence, any superstructure raised over it shall fall to ground.

22. The instant constitutional petition stands ***allowed*** *in the above terms.*

23. These are the detailed reasons for our short order dated 13.01.2020, which is reproduced as under:-

> *"After hearing arguments advanced by learned counsel for the petitioner, Syed Ali Zafar, Senior Advocate/amicus curiae and learned Additional Attorney General for Pakistan we unanimously decide the lis in the following terms for the reasons to be recorded in detail later on:-*
>
> *i) That non-obtaining of approval for filing the complaint and constitution of special court in terms of Section 4 of the Criminal Law Amendment (Special Court) Act, 1976 is violative of law, as well as, devoid of legal sanctity.*
>
> *ii) That the notification dated 29.12.1994 though was issued by the competent authority but it remained un-amended for its application regarding the substantive law contained in Section 3 of the High Treason (Punishment) Act, 1973 and Article 6 of the Constitution amended through the 18th amendment.*
>
> *iii) That the amendment in Article 6 of the Constitution of Islamic Republic of Pakistan, 1973 introduced at a belated stage through 18th amendment cannot be given retrospective affect to constitute an offence purportedly committed much earlier, which is against the spirit of Article 12 of the Constitution.*
>
> *iv) That Section 9 of the Criminal Law Amendment (Special Court) Act, 1976 qua trial in absentia is declared as illegal, unconstitutional being repugnant to injunctions of Islam, as well as, Article 2-A, 8 and 10-A of the Constitution of Islamic Republic of Pakistan, 1973."*

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24. As the main constitutional petition has already been decided by us, therefore, there is no need to further proceed in the above said petitions. Thus, these are disposed off accordingly.

(Sayyed Mazahar Ali Akbar Naqvi)
Judge

(Ch. Muhammad Masood Jahangir)
Judge

(Muhammad Ameer Bhatti)
Judge

Approved for Reporting

Riaz