





(On behalf of Advocate General, Sindh  
Mr. Nasir Saeed Sheikh, DAG adopted  
arguments of Attorney General for  
Pakistan)

Mr. Salahuddin Mengal  
Advocate General, Balochistan  
(On 4 to 8 April 2005)

Ms Afshan Ghazanfar  
Assistant Advocate General, Punjab  
(On behalf of Advocate General,  
Balochistan, adopted arguments of  
Attorney General for Pakistan)

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for Advocate General, NWFP

Dates of hearing: 4, 5, 6, 7, 8, 11, 12 & 13 April 2005

## **JUDGMENT**

**NAZIM HUSSAIN SIDDIQUI, C.J.** – This judgment will dispose of above titled Constitution Petitions in which common questions of facts and law are involved.

2. In Petition No. 13/2004, Pakistan Lawyers Forum is the petitioner. The relief claimed by the petitioner is that grafting of the Legal Framework Order, 2002 (hereinafter referred to as the LFO) in the body of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution) and the Constitution (Seventeenth Amendment) Act, 2003 (hereinafter referred to as the 17<sup>th</sup> Amendment, the vote of confidence and the notification of General Pervez Musharraf as Chief of Army Staff and President of Pakistan, are subversive of the Constitution, besides being a direct contravention of the constitutional principles enunciated by this Court in various cases including the Wukala

Mahaz case (PLD 1998 SC 1263) and Syed Zafar Ali Shah's case (PLD 2000 SC 869).

3. In Petition No. 14/2004, Moulvi Syed Iqbal Haider is the petitioner and he prayed to declare that the impugned proviso clause in sub-clause (2) in sub-Article (7) of Article 41 is *ultra vires* to the Constitution and that Article 43 as amended read with Article 47 of the Constitution be construed and interpreted according to the established principles of interpretation of Constitution. Further prayed that Article 63(1)(d) of the Constitution is out of context so far the shedding off the uniform of the President or his removal or impeachment is concerned. For this, he relied upon the case reported as Mahmood Khan Achakzai's case (PLD 1997 SC 426).

4. Petition No. 39/2004 has been filed by Watan Party and therein prayed as under: -

"(a) It is therefore respectfully, prayed that keeping in view of scheme of various Articles in the Constitution of Pakistan, as these presently exist the respondent No.1 (General Pervez Musharraf), may be allowed to hold both offices, i.e. as President of Pakistan and Chief of Army Staff, under the given circumstances.

(b) It is further prayed that all roadside protests and movements, regarding this issue, to disturb the lives of ordinary citizen be stayed and all remedies to be sought by the members of Majlis-e-Shoora in the Parliament.

(c) It is further prayed that the members of MMA and other political parties who have supported and voted 17<sup>th</sup> Amendment and are now ridiculing the constitutional provisions, posts and institutions and by violating them, have earned disqualifications under Article 63(g) &

63(2) and Speaker of the National Assembly or Chairman Senate may be ordered to initiate proceedings against them.”

Mr. Zafarullah Khan argued absolutely contrary to the prayer noted above and challenged the *vires* of the 17<sup>th</sup> Amendment. It is, however, noted that he also filed an application wherein he stated as under: -

“1. That the applicant/petitioner has filed the above mentioned constitutional petition, on 20.9.2000, through Registry Office at Lahore, which is to be read as integral part of this application, with the little correction now “CAN HE BE” instead of words “MAY BE” be read in the third line of PRAYER (a), inadvertently typed.

2. That now the Majlis-e-Shoora, which has already passed a Bill “President to “HOLD ANOTHER OFFICE BILL 2004” which is finally waiting the President of Pakistan assent under Article 75 of the Constitution.

3. That whole nation is divided on this “THE UNIFORM FIASCO”, many sections of the nation are agitating including the members of Majlis-e-Shoora, whether the President of Pakistan can keep these two offices i.e. President of Pakistan as well as office of COAS simultaneously, will these both offices be constitutionally compatible under the 17<sup>th</sup> Amendment.

4. That the democratic complexion of the nation needs to be improved on the international forums and this controversy ought to be solved as soon as possible as per the constitutional interpretations by this Hon’ble Court.

5. That the economic conditions of Pakistan does not allow to waste time on non-issues such as

agitations and strikes rather the nation needs to be geared up to face the joining of World Trade Organization on 1<sup>st</sup> January, 2005, when the quota system will be abolished which subsidized the Pakistan Economy since 1974.

(a) It is, therefore, respectfully prayed that this Hon'ble Court, may fix this petition for early hearing and place the proper interpretation of various constitutional provisions to end this controversy once for all and guide the nation through this uniform fiasco, whether the President can keep two offices at the same time."

5. Petition No. 40/2004 has been filed by Communist Party of Pakistan through its organizer Engineer Jameel Ahmed Malik, who appeared and argued. He sought relief to the effect to declare that the 17<sup>th</sup> Amendment is *ultra vires* to the Constitution, that the President could not hold another office under the Constitution and that Muhammadmian Soomro, Chairman Senate could not give assent to the bill during the period he performed the functions of President of Pakistan.

6. Petition No. 2/2005 has been filed by Pakistan Lawyers Forum with the following prayer: -

"It is, therefore, respectfully prayed that this learned Court be pleased to kindly interfere to exercise its constitutional power at this critical juncture in the history of this country, to defend the Constitution against its constant subversion at the hands of the Respondent 2 who has broken his oath under Article 244 and his faith with the people of Pakistan, has acted in utter disregard of Article 2-A, 4, 48(1), 43, 243 & 244 of the Constitution of Pakistan, has disobeyed the clear directions of the Supreme Court of Pakistan in Zafar Ali Shah's case to hand back power to the Civilians within 3 years, has mutilated

the Constitution to suit his self-serving ends, has forced the learned Judges of the Superior Courts to take oath to act in accordance with his unconstitutional PCO on the pain of removal from office, has subjugated the high office of the Prime Minister for his ulterior motives, has befooled the people of this country by imposing military dictatorship in the garb of true democracy.

It is further prayed that the Respondent No.2 (The President) be declared to be guilty of high treason within the meaning of Article 6 of the Constitution and that it is an eminently fit case for punishment under Section 2(b) of the High Treason (Punishment) Act 1973 and that this learned Court has the "judicial power" to take cognizance directly despite the provision of Section 3 whereof being *ultra vires* the Article 6 of the Constitution of Islamic Republic of Pakistan 1973."

7. Civil Petition No. 927-L/2003 has also been filed by the Pakistan Lawyer Forum under Article 185(3) of the Constitution for leave to appeal against the order dated 10 April 2003 passed by a Division Bench of Lahore High Court in I.C.A. No. 844/2003, whereby said petition was dismissed.

8. The validity and legal effect of the Army takeover, Proclamation of Emergency, Provisional Constitution Order No. 1 of 1999 and the Oath of Office (Judges) Order, 2000 were challenged before this Court in Syed Zafar Ali Shah's case. This Court, through judgment dated 12 May 2000 by a bench comprising 12 Judges, condoned/validated the Army takeover on the touchstone of doctrine of State necessity and State survival and granted three

years' time to General Pervez Musharraf to achieve his declared objectives.

9. The Referendum Order was challenged before this Court in Qazi Hussain Ahmed's case (PLD 2002 SC 853) wherein it was held that the consequences flowing from the holding of referendum should be considered at a proper forum at the appropriate time.

10. On 23 August 2002, the LFO was promulgated whereby amendments in various Articles and Sixth Schedule to the Constitution were made. Article 2 of the LFO provided the manner of convening of first meetings of the National Assembly, Senate and the Provincial Assemblies. Under Article 3 of the LFO, the Constitution was amended to the extent and in the manner specified in column 3 of the Schedule to the LFO. Article 4 provided that the Constitution shall stand revived on such day as the Chief Executive may, by notification in the official Gazette, appoint and different days may be so appointed in respect of different provisions. Article 5 provided that the provisions of LFO shall have effect notwithstanding anything contained in the Constitution or any other Order or law for the time being in force.

11. The LFO was challenged through a Constitution Petition before this Court filed by Watan Party. The petition was dismissed through judgment dated 7 October 2002 on the ground that the petitioner had no *locus standi* to file the same.

12. Elections to the National Assembly and the Provincial Assemblies were held on 10 October 2002.

13. The Constitution was further amended through the 17<sup>th</sup> Amendment, which was passed on 31 December 2003. The 17<sup>th</sup> Amendment reads as under: -

### 17<sup>TH</sup> AMENDMENT

2.	Art. 41	<p><u>Amendment of Article 41 of the Constitution.</u>- In the Constitution of the Islamic Republic of Pakistan, hereinafter referred to as the Constitution, in Article 41, -</p> <p style="padding-left: 40px;">(1) in clause (7), in paragraph (b), for the full stop at the end, a colon shall be substituted and thereafter the following proviso shall be added, namely: -</p> <p>“Provided that paragraph (d) of clause (1) of Article 63 shall become operative on and from the 31st day of December, 2004.” ; and</p> <p>(2) after clause (7) amended as aforesaid, the following new clauses shall be added, namely: -</p> <p>“(8) Without prejudice to the provisions of clause (7), any member or members of a House of Majlis-e-Shoora (Parliament) or of a Provincial Assembly, individually or jointly, may, not later than thirty days from the commencement of the Constitution (Seventeenth Amendment) Act, 2003, move a resolution for vote of confidence for further affirmation of the President in office by majority of the members present and voting, by division or any other method as prescribed in the rules made by the Federal Government under clause (9), of the electoral college consisting of members of both Houses of Majlis-e-Shoora (Parliament) and the Provincial Assemblies, in a special session of each House of Majlis-e-Shoora (Parliament) and of each Provincial Assembly summoned for the purpose, and the vote of confidence having been passed, the President, notwithstanding anything contained in the Constitution or judgment of any court, shall be deemed to be elected to hold office for a term of five years under the Constitution, and the same shall not be called in question in any court or forum on any ground whatsoever.</p> <p>(9) Notwithstanding anything contained in the Constitution or any other law for the time being enforce, the proceedings for the vote of confidence referred to in clause (8) shall be regulated and conducted by the Chief Election Commissioner in accordance with such procedure and the votes shall be counted in such manner as may be prescribed by the rule framed by the Federal Government:</p> <p>Provided that clauses (8) and (9) shall be valid only for the forthcoming vote of confidence for the current term of the President in office.”</p>
3.	Art. 58	<p><u>Amendment of Article 58 of the Constitution.</u>- In the Constitution, in Article 58, after clause (2), the following</p>

		<p>new clause shall be added, namely: -</p> <p>“(3) The President in case of dissolution of the National Assembly under paragraph (b) of clause (2) shall, within fifteen days of the dissolution, refer the matter to the Supreme Court and the Supreme Court shall decide the reference within thirty days whose decision shall be final.”</p>
4.	Art. 112	<p><b><u>Amendment of Article 112 of the Constitution.</u></b>- In the Constitution, in Article 112, after clause (2), the following new clause shall be added, namely: -</p> <p>“(3) The Governor in case of dissolution of the Provincial Assembly under paragraph (b) of clause (2) shall, within fifteen days of the dissolution, refer the matter to the Supreme Court with the previous approval of the President and the Supreme Court shall decide the reference within thirty days whose decision shall be final.”</p>
5.		In the Constitution, Article 152A shall be omitted.
6.	Art. 179	<p><b><u>Substitution of Article 179 of the Constitution.</u></b> -- In the Constitution, for Article 179, the following shall be substituted, namely: --</p> <p>“179. Retiring age.—A Judge of the Supreme Court shall hold office until he attains the age of sixty-five years, unless he sooner resigns or is removed from office in accordance with the Constitution”.</p>
7.	Art. 195	<p><b><u>Substitution of Article 195 of the Constitution</u></b> – In the Constitution, for Article 195, the following shall be substituted, namely: --</p> <p>“195. Retiring age.—A Judge of the High Court shall hold office until he attains the age of sixty-two years, unless he sooner resigns or is removed from office in accordance with the Constitution”.</p>
8.	Art. 243	<p><b><u>Amendment of Article 243 of the Constitution.</u></b>- In the Constitution, in Article 243, in clause (3), for the words “in his discretion” the words “in consultation with the Prime Minister” shall be substituted.</p>
9.	Art. 268	<p><b><u>Amendment of Article 268, the Constitution.</u></b>- In the Constitution, in Article 268, in clause (2), for the full stop at the end, a colon shall be substituted and thereafter following proviso shall be added, namely: -</p> <p>“Provided that the laws mentioned at entries 27 to 30 and entry 35 in the Sixth Schedule shall stand omitted after six years.”</p>
10.	Art. 270AA	<p><b><u>Substitution of Article 270-AA of the Constitution.</u></b>- In the Constitution, for Article 270AA, the following shall be substituted, namely: -</p> <p>“270-AA. Validation and affirmation of laws etc.- (1) The Proclamation of Emergency of the fourteenth day of October, 1999, all President's Orders, Ordinances, Chief Executive's Orders, including the Provisional Constitution</p>

	<p>Order No. 1 of 1999, the Oath of Office (Judges) Order, 2000 (No. 1 of 2000), Chief Executive's Order No. 12 of 2002, the amendments made in the Constitution through the Legal Framework Order, 2002 (Chief Executive's Order No. 24 of 2002, the Legal Framework (Amendment) Order, 2002 (Chief Executive's Order No. 29 of 2002, the Legal Framework (second Amendment) Order, 2002 (Chief Executive's Order No. 32 of 2002) and all other laws made between the twelfth day of October, one thousand nine hundred and ninety-nine and the date on which this Article comes into force (both days inclusive), having been validly made by the competent authority, are hereby further affirmed, adopted and declared to have been validly made and notwithstanding anything contained in the Constitution shall not be called in question in any court or forum on any ground whatsoever.</p> <p>(2) All orders made, proceedings taken, appointments made, including secondments and deputations, and acts done by any authority, or by any person, which were made, taken or done, or purported to have been made, taken or done, between the twelfth day of October, one thousand nine hundred and ninety-nine, and the date on which this Article comes into force (both days inclusive), in exercise of the powers derived from any Proclamation, President's Orders, Ordinances, Chief Executive's Orders, enactments, including amendments in the Constitution, notifications, rules, orders, bye-laws, or in execution of or in compliance with any orders made or sentences passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court or forum on any ground whatsoever.</p> <p>(3) All Proclamations, President's Orders, Ordinances, Chief Executive's Orders. Laws, regulations, enactments, including amendments in the Constitution, notifications, rules, orders or bye-laws in force immediately before the date on which this Article comes into force shall continue in force until altered, repealed or amended by the competent authority.</p> <p>Explanation.- in this clause, "competent authority" means, -</p> <p>(a) in respect of President's Orders, Ordinances, Chief Executive's Orders and enactments, including amendments in the Constitution, the appropriate Legislature, and</p> <p>(b) in respect of notifications, rules, orders and bye-laws, the authority in which the power to make, alter, repeal or amend the same vests under the law.</p> <p>(4) No suit, prosecution or other legal proceedings, including writ petitions, shall lie in any court or forum against any authority or any person, for or on account of or in respect of any order made, proceedings taken or act done whether in the exercise or purported exercise of the powers referred to in clause (2) or in execution of or in</p>
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		<p>compliance with orders made or sentences passed in exercise or purported exercise of such powers.</p> <p>(5) For the purposes of clauses (1), (2) and (4) all orders made, proceedings taken, appointments made, including secondments and deputations, acts done or purporting to be made, taken or done by any authority or person shall be deemed to have been made, taken or done in good faith and for the purpose intended to be served thereby."</p>
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14. On 31 December 2004 the President to Hold Another Office Act, 2004 (hereinafter referred to as "Another Office Act") was enacted. Section 2 of the Act provided that the holder of the office of the President of Pakistan may, in addition to his office, hold the office of the Chief of the Army Staff which is hereby declared not to disqualify its holder as provided under paragraph (d) of clause (1) of Article 63 read with proviso to paragraph (b) of Clause (7) of Article 41 of the Constitution of the Islamic Republic of Pakistan or any other law for the time being in force or any judgment of any court or tribunal. Proviso to above section provided that this provision shall be valid only for the present holder of the office of the President.

15. Mr. A.K. Dogar, learned ASC, appearing in above referred petitions raised the following contentions: -

- (a) The scheme of the Constitution is that only the Constitution is supreme and the organs of the State created under it, namely, the legislature, the executive and the judiciary are mandated to perform their functions within their defined spheres independently on the principle of separation of powers. Parliament has the power to make laws or amend the Constitution, but the interpretation of the provisions of the Constitution or the law is the exclusive domain

of the judiciary. None of the organs of the State can claim supremacy over any other organ. They are independent and separate from each other;

- (b) The validity granted by this Court in Syed Zafar Ali Shah's case to the action of 12 October 1999 taken by General Pervez Musharraf was conditional on his achieving the declared objectives within a period of three years acting as the Chief Executive within the framework of the Constitution and the law and the power to amend the Constitution and take other legislative measures was strictly circumscribed by the parameters laid down in the said case. As soon as any of the conditions laid down in the order of this Court was violated or not fulfilled, the validity so granted automatically stood revoked. Thus, all his actions, legislative or executive, have been rendered invalid and without lawful authority;
- (c) Parliament elected through the October 2002 general election was not a validly constituted Parliament, as it did not elect President under the provisions of the Constitution. According to learned counsel, a self imposed President through referendum is not a constitutional President within the contemplation of Article 50 of the Constitution because clear method for election of President under Article 41(3);
- (d) That the Referendum Order was a direct contravention of Article 41(2) of the Constitution as well as the judgment of this Court in Syed Zafar Ali Shah's case;
- (e) The Constitution is based on the Injunctions of Islam as laid down in the Holy Quran and Sunnah of the Prophet (PBUH), which are the

ideological basis and foundation of Pakistan. In Syed Zafar Ali Shah's case, this Court held that "the Constitution of Pakistan is the supreme law of the land and its basic features, i.e., independence of judiciary, federalism and parliamentary form of government blended with Islamic Provisions, cannot be altered even by the Parliament". Above judgment is binding on this Bench;

- (f) Under Article 243 of the Constitution, the control and command of the Armed Forces rests with the Federal Government, which has been illegally taken over by General Pervez Musharraf through illegal and unconstitutional amendments made into the Constitution through the Chief Executive's Orders as well as the 17<sup>th</sup> Amendment;
- (g) General Pervez Musharraf has violated the oath he had taken under Third Schedule (Article 244) not to engage him in political activities. In fact, all the members of the Armed Forces are under similar oath;
- (h) Law of necessity was wrongly applied by this Court in Begum Nusrat Bhutto's case as well as in Syed Zafar Ali Shah's case. Latter case is a copy of the first one and only departure made is with regard to the timeframe;
- (i) The sovereign power to be exercised by the people through their chosen representatives emanates from the Holy Quran and the Sunnah of the Prophet (PBUH), which can never be abrogated, suspended or held in abeyance by any regime, civil or military;
- (j) To say that there is no basic structure theory or principles in Pakistan is not correct. In Wukala

- Mahaz' case, the phrase 'basic features/structure' has frequently been used;
- (k) Abul Aala Moudoodi, in his book, 'Khilafat-e-Malookiyyat, has quoted Imam Abu Hanifa as having said that seizing power by force and getting oath of allegiance under pressure is not a valid means to establish Khilafat;
- (l) In Al-Jehad Trust case, this Court, noticing conflict between two provisions of the Constitution, held that lesser right will yield in favour of the higher right, the provisions, which are nearer the spirit of the Constitution, i.e. the Objectives Resolution/basic features of the Constitution and the provisions framed by the founding fathers of the Constitution will prevail over those framed during martial law;
- (m) In a parliamentary form of government, which is a basic feature of the Constitution, the President is head of the State, i.e. a figurative head and the entire executive authority vests in the Prime Minister and Cabinet, who are responsible to the Parliament. Article 41(7) introduced by the 17<sup>th</sup> Amendment violates the above principle;
- (n) Article 41(7)(b) is in direct conflict with Article 43, Article 243 and Article 244;
- (o) The members of the assemblies are driven by their personal motives to support General Pervez Musharraf. The enemies of Nawaz Sharif have become the friends of General Pervez Musharraf. They have joined him either out of fear of NAB cases or for the perks and privileges they are receiving in different capacities, such as Ministers, Ministers of State, Advisors, etc. All of them have been given some kind of benefits;

- (p) The provisions of Articles 260, 270, 270A and 270AA clearly show that the tradition of violating the Constitution and the law at will has become fully entrenched in Pakistan in view of the validation granted first by the Supreme Court and then by the incoming Parliament;
- (q) The High Treason Act is *ultra vires* the provisions of Article 6 of the Constitution. The condition laid down in the Act that the case under the Act will be registered after the President has approved it, has rendered it ineffective;
- (r) The Supreme Court, in the cases of Begum Nusrat Bhutto and Syed Zafar Ali Shah, went beyond the horizon of its power and jurisdiction to grant validity to the military takeovers;
- (s) Referendum Order is against the provisions of Article 2A of the Constitution because General Pervez Musharraf is not a chosen person within the contemplation of the Constitution;
- (t) In the constitutional scheme, President is part of the Parliament, not of the executive. By controlling and commanding the Armed Forces, General Pervez Musharraf is exercising the real executive power in the country;
- (u) All titular/figurative heads in parliamentary democracies are supreme commanders of the Armed Forces, but the executive power is vested in the head of the government/Prime Minister and the Cabinet. The head of the State acts on the advice of the Prime Minister, which is apparent from the provisions of Article 48(1) of the Constitution. The control and command of the Armed Forces under Article 243 rests with the Federal Government (Prime Minister/Cabinet);

- (v) General Pervez Musharraf is neither a constitutionally elected President nor a legally and validly appointed Chief of Army Staff after reaching the age of superannuation;
- (w) Another Office Act is in direct conflict with the provisions of Article 43. The 17<sup>th</sup> Amendment illegally renders the provisions of Article 41, Article 43 and all other provisions of the Constitution and the law for the time in force ineffective.

16. The submissions of the petitioners can be summarized as follows: -

- (i) The President of Pakistan is liable to be proceeded against by this Court pursuant to Article 6 of the Constitution for having violated the judgment of this Court delivered in Syed Zafar Ali Shah's case;
- (ii) The promulgation of the Referendum Order, 2002 was illegal and contrary to the constitutional provisions and so was the LFO without justification;
- (iii) General Pervez Musharraf failed to hand over power to the civilians;
- (iv) The 17<sup>th</sup> Amendment is liable to be struck down on the grounds, namely,
  - (a) That it has been enacted by a Parliament which was not properly constituted; and,
  - (b) That it is violative of the basic structure of the Constitution.
- (v) Clauses (7) and (8) of Article 41 of the Constitution are in irreconcilable conflict with Article 43, which is a higher provision and these must, therefore, yield to it in accordance with the doctrine of harmonious construction;
- (vi) Another Office Act, 2004 is *ultra vires* the Constitution and is liable to be struck down on the ground that it is violative of the Constitution. There

is no item in the Federal Legislative List, which could serve as the jurisdictional basis for its enactment. As such, it is beyond the scope of the Fourth Schedule to the Constitution. Assent to it was given by an "Acting President" who lacked the constitutional authority to do so;

(vii) The Chief of Army Staff (COAS) cannot be the President of Pakistan for the reason that the post of COAS is not excluded from the definition of "Service of Pakistan" under Article 260 of the Constitution. As such, the President is disqualified from being elected as a member of Parliament and also to be the President of Pakistan;

(viii) As a member of the Armed Forces he had made oath under Article 244 of the Constitution in the form set out in the Third Schedule not to engage in political activities whatsoever.

17. Moulvi Syed Iqbal Haider appearing in Petition No. 14/2004 contends that the members of the Parliament contested election under the LFO, yet they pleaded that they did not accept the LFO as a part of the Constitution. It is self-contradictory and illogical. Further, he contends that after 'give and take', they accepted everything and later on passed the 17<sup>th</sup> Amendment by two-thirds majority. He also submitted that even the Constitution was revived under the LFO. He also urges that General Pervez Musharraf amended the Constitution for betterment of the country and the amendments so made are beneficial amendments and were not objected to by the Parliament. On the contrary, all had accepted the same. It is submitted that in Qazi Hussain Ahmed's case, the Supreme Court left the issue of referendum to be decided at the proper forum at the appropriate time. Since the members of the

Parliament had accepted the LFO, they did not question the validity of the referendum held under the LFO at the forum of the Parliament, which was available to them for all these purposes.

18. Explaining further, Moulvi Iqbal Haider stated that the Muttahida Majlis-e-Amal entered into a bargain with the government, availed certain concessions/benefits and supported the government to get the 17<sup>th</sup> Amendment passed by the Parliament by a two-thirds majority and all the actions of General Pervez Musharraf have been validated under Article 270AA. He argued that proviso to Article 41(7)(b) in fact was eyewash for the public, otherwise Article 43 would have debarred the President from holding another office in the service of Pakistan. He stated that provisions of Article 41(7), (8) & (9) are meant for a transitory period and do not have a permanent place in the Constitution. Being time specific, they will go away after the term of the present incumbent comes to an end.

19. Mr. Makhdoom Ali Khan, learned Attorney General for Pakistan appearing for the Federation submitted that while interpreting Constitution, this Court will be guided by the text, i.e. the very words of the Constitution and that the jurisprudence of this Court is anchored in the words of the Constitution otherwise it will be improper. He contended that under Article 260, the President means the President of Pakistan and includes a person for the time being acting as, or performing the functions of, the President of Pakistan. The oath as Chairman Senate or the Speaker of the National Assembly includes the performance of functions of the President whenever called upon to do so. It is distinct from the

office of Acting Chief Justice, for which on every acting appointment, fresh oath is administered to the incumbent. There is no restriction whatsoever on the functions to be performed by the Acting President. In the case of the 1962 Constitution as well as the Indian Constitution, certain functions cannot be performed by the Acting President. Explaining further, learned Attorney General submitted that Article 75 of the Constitution gives the President 30 days to either assent to a bill or send it back to the Parliament for reconsideration. He raised a hypothetical question that if the President is out of the country for 31 days, does it not mean that the constitutional function under Article 75 will not be performed? He also submitted that if the interpretation made by Engineer Jameel Ahmed Malik was adopted, the business of the State would be paralyzed.

20. Learned Attorney General submitted that the legislative lists are to be very widely interpreted, hence entries 41 and 42 do authorize the Parliament to make law including law relating to two offices. These entries are not to be read in isolation, but are to be read with entries 58 and 59 as well. Entry 58 relates to matters, which under the Constitution are within the legislative competence of the Parliament or relate to the Federation. Entries 41, 42, 58 and 59 are as under: -

"41 Elections to the office of President, to the National Assembly, the Senate and the Provincial Assemblies; Chief Election Commissioner and Election Commissions.

42. The salaries, allowances and privileges of the President, Speaker and Deputy Speaker of the National Assembly, Chairman and Deputy Chairman

of the Senate, Prime Minister, Federal Ministers, Ministers of State, the salaries, allowances and privileges of the members of the Senate and the National Assembly; and the punishment of persons who refuse to give evidence or produce documents before committees thereof.

58. Matters which under the Constitution are within the legislative competence of [Majlis-e-Shoora (Parliament)] or relate to the Federation.

59. Matters incidental or ancillary to any matters enumerated in this Part."

21. Learned Attorney General submitted that whether any particular provision of the Constitution is good or bad is outside the compass of this Court. The matters of agreement or disagreement, likes or dislikes lie in the domain of the people of Pakistan, who act through their elected representatives. The people do not act through the members of the Court, but through their elected representatives. It is not disputed nor could be disputed that the power to interpret the provisions of the Constitution is with the superior courts and they can even knock down statutes, which are found *ultra vires* to the Constitution. This is the prime duty of the Supreme Court to interpret the Constitution and in so doing, the Court will preserve, protect and defend it.

22. He further submitted that on 15 November 2002 notification was issued and a number of Articles of the Constitution were revived. After the revival of certain provisions of the Constitution, on 16 November 2002, according to the Constitution, not the PCO, oath was administered to the President by the Chief Justice of Pakistan. On 20 November 2002 notification was issued

giving several dates on which various provisions of the Constitution would come into effect. As a result, the Constitution came fully into effect. MNAs were sworn in on the same day, i.e. 16 November 2002. The Prime Minister of Pakistan was administered the oath of office on 23 November 2002. The Senators took oath on 31 December 2002, the four Chief Ministers were sworn in on 12 March 2003.

23. Learned Attorney General submitted that there is no fixed, pre-defined or a prescribed formula of democracy anywhere in the world. Each country acts according to its own conditions. In the British parliamentary system, the entire House of Lords is unelected, although its powers over the years have been reduced. In the previous US election, Mr. Al Gore had half a million more popular votes than Mr. Bush, but he did not have the requisite votes in the electoral college, which determines who is to be the next President. Even for parliamentary form of government, there is no set formula. There are governments, which are run by unicameral legislature, in others by bicameral legislatures. In England, the monarchy never dismissed a government, but in Canada, the Governor General who derived power from the King/Queen of England, dismissed the government, the Lower House as well as upper house. The President today has less power than General Ziaul Haq had. In case of dissolution of National Assembly, he has to refer it to this Court and he makes appointments under Article 243 in consultation with the Prime Minister, not in his discretion. There is no violation of the parliamentary form of government. President may have some more powers than some of the Presidents, but less than still others. Titular

head is not a recent phenomenon. Prior to that, Crown had the power to dismiss the Prime Minister with minority. In 1976 the Governor General of Australia, who derived his powers from the Queen of England, dissolved both the houses after consultation with the Chief Justice of High Court of Australia. Some Constitutions create balance, some do not. Justice Rustam S. Sidhwa and Justice Ajmal Mian, two known Judges of this Court held that the Constitution now is a mix and that there was no violation of the basic system of government.

24. The petitioners in fact want reappraisal of all the events, which took place on 12 October, 1999 and thereafter. Suffice it to say that the points which have already been agitated and decided conclusively cannot be reopened. In Syed Zafar Ali Shah's case all such points have already been decided and subsequently they were affirmed in Wasim Sajjad's case in which the review petition filed against Syed Zafar Ali Shah's judgment was dismissed. In Syed Zafar Ali Shah's case, this Court, *inter alia*, observed as follows:

“On 12<sup>th</sup> October, 1999 a situation arose for which the Constitution provided no solution and the intervention of the Armed Forces through an extra constitutional measure became inevitable, which is hereby validated on the basis of doctrine of State necessity and the principle of *salus populi suprema lex* as embodied in Begum Nusrat Bhutto's case”.

25. It is significant to observe that during arguments in rebuttal, Mr. A.K. Dogar stated that he did not challenge the decision in Syed Zafar Ali Shah's case but in fact supported it “to the hilt.”

26. Coming to the *vires* of the Referendum Order, 2002, it is noted that this question was considered by a nine-member bench of

this Court in Qazi Hussain Ahmed's case in which the following was laid down:

It may be pointed out at the outset that insofar as the legal status of the Referendum Order is concerned, it is unquestionable inasmuch as it has been promulgated in pursuance of the Proclamation of Emergency and the P.C.O. 1 of 1999, which have been validated by this Court . . . . It was contended that the President, who is also the Chief Executive and the Chief of Army Staff, has no authority to act under Article 48(6) of the Constitution. . . . As already observed, General Pervez Musharraf had taken over the affairs of the country in extraordinary circumstances and in the light of the judgment of this Court in Zafar Ali Shah's case the Chief Executive/President was fully competent to issue the Referendum Order and thus no objection could be taken because he had the power and authority to do so. We may reiterate here the ratio of Syed Zafar Ali Shah's case, which allowed a period of three years to General Pervez Musharraf to hold the reins of this government in his capacity as the Chief Executive. It is further pertinent to mention here that the country is being steered towards the path of democracy and this is a transitional or transformation period and in the present scenario the Referendum Order has turned out to be a springboard for reiteration of the commitment of the Chief Executive to hold the general election in October, 2002. (pages 921-922, para 61)

The Court, at page 926, para 70 held:

"We have already held that the legal status of the Referendum Order is unquestionable"

On page 938, para 84, it held:

"We have already held that the Referendum Order is a validly promulgated Order of the Chief Executive. The Referendum Order empowers the Chief Election Commissioner and the Election Commission of Pakistan to hold and conduct Referendum and this is not open to challenge on any ground or criteria laid down in Syed Zafar Ali Shah's case."

27. It is significant to note that the petitioners have contended that this Court had held in above case that the Referendum Order did not amend the Constitution and that by using

it as a basis for constitutional amendments, the President violated the spirit of above judgment. Above plea runs directly contrary to the actual finding in said case. What this Court had held in that case was that the Referendum Order could not be challenged on the basis that it was tantamount to an amendment of the Constitution. It was further observed that there was nothing undemocratic in referring an issue directly to the electorate, rather than to the representatives of the electorate, and it was finally observed that referendums were regularly held in various western countries to decide matters of public interest. Under the circumstances, we are of the view that it is no longer open to the petitioners to question the *vires* or validity of the Referendum Order. Besides, the Referendum Order subsequently has been validated by Parliament through a specific reference in Article 270 AA, which has been inserted in the Constitution through the 17<sup>th</sup> Amendment.

28. As regards the legality of the LFO, it is noted that this issue in depth was considered by a five-member bench of this Court in Watan Party's case wherein the following was held: -

"It is worthwhile to mention that all the major political parties have fielded their candidates to contest the General Election, 2002 under the Conduct of General Elections, 2002 (Chief Executive's Order No. 7 of 2002) and none of them has come forward with a petition to question any provision of the Legal Framework Order. It is well known now that after the election the National and Provincial Assemblies will meet. The members will elect Speakers, Deputy Speakers, Prime Minister, Chief Ministers and the Senators. The elected Parliament is in immediate sight and obviously the Parliament and not this Court is the appropriate forum to consider all these amendments. We may further observe that procedure to amend the Constitution as enshrined in Article 239, Part XI remains unaltered. The Parliament retains same power to amend the Constitution as it did before the

promulgation of the Legal Framework Order." (page 81, para 7).

29. The issue as to whether or not amendments to the Constitution made through the LFO were within the competence of the then Chief Executive has now become academic with the passage of the 17<sup>th</sup> Amendment. Further, the amendments made to the Constitution through the LFO have been left unchanged by the 17<sup>th</sup> Amendment. These have been specifically validated and are now to be examined, not with respect to the competence of the Chief Executive, but with respect to the constituent powers of Parliament. Earlier this point was raised before High Court of Sindh in two judgments reported as Nazar Muhammad Khan v. Pakistan (PLD 1986 Karachi 301 at 305) and Nazar Muhammad Khan v. Pakistan (PLD 1986 Karachi 516 at 519) in which it was held that actions of the martial law authorities under General Zia ul Haq were, after the passage of the Eighth Amendment, to be examined not on the touchstone of Begum Nusrat Bhutto's case, but with reference to the powers and competence of Parliament. After the enactment of the Eighth Amendment "the judgment in Begum Nusrat Bhutto's case lost its efficacy". The Full Bench of the High Court of Sindh clearly held:

"In view of the amendment of the Constitution, by insertion of Article 270-A therein...reference to Begum Nusrat Bhutto's case...has become unnecessary."

30. The argument that General Pervez Musharraf acted in violation of Syed Zafar Ali Shah's case is misconceived for the reason that it ignores all the constitutional developments in Pakistan over the past two years. For example, the argument ignores the fact

that elections were held to the National and Provincial Assemblies as per the schedule given by this Court in Syed Zafar Ali Shah's case, that elections were subsequently held to the Senate, that an elected Prime Minister was sworn in along with a full cabinet of elected ministers and above all, that the Constitution was fully restored. Ignoring all these developments, the petitioners stick to their misconception that power has not been handed over to the Parliament. There is no evidence to support this argument but the petitioners want this Court to believe as such.

31. It was strenuously argued that no democracy can exist unless the Prime Minister has complete and undiluted control over the Armed Forces. The simple answer to this proposition is that it can be done only by amending the Constitution and for that Parliament and not this Court is the appropriate forum. It is not the function of this Court to re-write the Constitution. Democracy is not a set of mathematical formula. The principles of democracy differ from country to country. On the strength of subjective consideration, this Court is not legally competent to reverse the process/Constitution.

32. As to the issue of striking down the 17<sup>th</sup> Amendment on procedural grounds, it is observed that an Amendment to the Constitution, unlike any other statute can be challenged only on one ground, viz., it has been enacted in a manner not stipulated by the Constitution itself. It is not disputed that this Court has the jurisdiction, as laid down in Ziaur Rehman's case to strike down a constitutional amendment on the ground that it has been promulgated in a manner other than that provided for by the

Constitution itself. In these cases, the petitioners have challenged the 17<sup>th</sup> Amendment on grounds, both substantive and procedural. As regards procedural *ultra vires*, the argument of the petitioners is that the Amendment is invalid because the Parliament which enacted it was not properly constituted as required by the Constitution. Precisely stated, the argument is that Parliament has not been properly constituted, in that Parliament is defined by Article 50 of the Constitution to be comprised of the National Assembly, the Senate and the President. It is further argued that the Constitution itself has stipulated that only a person elected in accordance with the provisions of the Constitution and specifically in accordance with clauses (3) and (4) of Article 41 can be considered a valid president, and that since General Pervez Musharraf has not been so elected, he is not the President. At the time, the 17<sup>th</sup> Amendment was enacted, General Pervez Musharraf was the duly appointed President of Pakistan by virtue of Article 41(7)(b) of the Constitution of Pakistan. This provision contains a *non obstante* clause and it is to have effect notwithstanding anything contained in the Constitution. No procedural challenge to the 17<sup>th</sup> Amendment can therefore be sustained on the grounds that Parliament was not validly constituted at the time the said measure was enacted. Besides, it is noted that this Court in almost similar circumstances in Ziaur Rehman's case held as follows:

"The argument that, as a result of the decision of this Court in the case of Asma Jilani the Constitution of 1962 was again restored because of the illegal abrogation thereof by the usurper, can also not be accepted after the condonation of the Legal Framework Order and the elections held thereunder. Once the representatives of the people are held to have been validly elected, it must follow that they

had been validly elected for the purpose of framing of the constitution in accordance with the provisions of the Legal Framework Order and then the abrogation of the Constitution of 1962 has also to be impliedly accepted as a *fait accompli* for unless the existing constitution had been abrogated, a new constitution could not be framed."

33. The same issue arose with even greater force in the aftermath of the 1985 election, when the competence of various amendments made to the Constitution by an assembly elected on the basis of non-party elections, was challenged before a seven-member bench of the High Court of Sindh in *Abdul Mujeeb Pirzada's case*. The following was observed by Saeeduzzaman Siddiqui, J. (as he then was): -

"With regard to the contention of learned counsel that the general elections of 1985 were held during the rule of usurper and, therefore, they were not valid, it will suffice to say here that in view of what I have said above, it cannot be said that the general elections of 1985 were held under the rule of usurper. However, if I assume only for the sake of argument in the case, that the elections of 1985 were held by a usurper, the result would not be different, as it cannot be denied that when a civilian government is deposed or overthrown by a military dictator, the only recognized peaceful means to revert to the civilian rule, is through use of ballot, even though such exercise is to be undertaken under the aegis of the military dictator or usurper."

Above judgment was subsequently upheld by a seven-member bench of this Court in *Mahmood Khan Achakzai's case*. It is, thus, settled law that the validity and competence of elected Parliament cannot be challenged on the basis that the person conducting the election was not somehow qualified or authorized to hold that election.

34. In these cases, General Pervez Musharraf was clearly authorized to hold election, indeed he was under obligation to do so

by virtue of the judgment of this Court in Syed Zafar Ali Shah's case. The issue before this Court does not relate to the competence of General Pervez Musharraf as the Chief Executive to make constitutional amendments but to the competence of a duly elected Parliament to make constitutional choices.

35. It will not be out of place to mention here that the 17<sup>th</sup> Amendment is not merely a proforma rubber-stamping by Parliament of the various constitutional amendments made by General Pervez Musharraf through the LFO. Instead, it can be seen from a clause by clause comparison of the LFO and the 17<sup>TH</sup> Amendment that Parliament has independently applied its mind to each and every provision of the LFO and has then reached an independent conclusion as to whether to validate any particular provision, to amend it or even to repeal it. The LFO was a package of 31 constitutional amendments, which were made by the then Chief Executive of Pakistan. Many of them have been validated by the 17<sup>th</sup> Amendment. For instance, the amendment to Article 17 of the Constitution by the LFO has been validated. In other cases through the 17<sup>th</sup> Amendment new provisions have been added or the LFO inserted provisions amended. A proviso to clause (7) of Article 41 has been added whereby the President could continue to be the COAS after 31<sup>st</sup> December, 2004 if a law was enacted to that effect by Parliament. A new clause (8) was added whereby the President was required to take a Vote of Confidence from the Parliament and the four Provincial Assemblies. The LFO has increased the size of the National Assembly from 217 to 342 seats, which included 60 seats for women, and 10 for minorities. The size

of the Senate was increased from 81 to 100. Likewise the size of all Provincial Assemblies was increased and seats were reserved for women and minorities. The voting age was reduced from 21 years to 18 years. Women and non-Muslims on reserved seats have been elected through a system of proportional representation. The 17<sup>th</sup> Amendment validates these changes. By amendment through Article 58(2)(b), the LFO gave the President the power to dissolve the National Assembly if the Government could not be carried on in accordance with the provisions of the Constitution and an appeal to the electorate became necessary. Governors were given similar powers in the provinces. The 17<sup>th</sup> Amendment now makes it incumbent on the President or on the Governors, as the case may be, to refer the matter to the Supreme Court within 15 days after such dissolution and this Court is required to answer the reference within 30 days. The qualifications and disqualifications of the Members of Parliament and Provincial Assemblies were amended.

36. A new provision was inserted for the old Article 63-A, which provided for disqualification on grounds of defection. Under Articles 70 and 71, a Mediation Committee has been set up and under Article 73 the Senate is enabled to make recommendations in respect of Money Bills. On the return of a bill by the President under Article 75 the requirement that it be considered by a Joint Sitting of the Parliament has been omitted and bills are now to be reconsidered by the Parliament sitting in separate Houses. By an amendment in Article 101, the Governor of a province is now to be appointed by the President in consultation with the Prime Minister and under Article 140-A local government has been entrenched in

the Constitution. Article 152-A relating to the National Security Council inserted in the Constitution by the LFO was omitted by the Seventeenth Amendment. The clog on the power of the High Court not to pass an interim order for a period of more than six months was removed. The service of the judges of the Federal Shariat Court was made pensionable. The Supreme Judicial Council was given suo motu powers. The composition of the Election Commission of Pakistan was changed. In Article 224 specific powers were conferred on the President to appoint a Care-taker Cabinet on the dissolution of the National Assembly and on the Governor to appoint such a Cabinet at the provincial level with the approval of the President. Under Article 243 the appointments of the Chairman, Joint Chiefs of Staff Committee and the three service Chiefs are now to be made by the President in consultation with the Prime Minister. By an amendment in Article 268 of the Constitution, entries 27 to 30 and 35 in the Sixth Schedule are to stand omitted after six years.

37. The 17<sup>th</sup> Amendment adds a new Article 270-AA providing validation to all orders, ordinances, proclamations and actions of the transitional period of extra- constitutional deviation including the Referendum Order and the LFO. Entries 25 to 35 were added in the Sixth Schedule of the Constitution. This list of changes is not exhaustive. It is merely illustrative. It is specifically noted that the Constitution had earlier been amended through the LFO to provide for a National Security Council by insertion of Article 152A. That Article has been omitted by the 17<sup>th</sup> Amendment. Likewise, the power of the President to dissolve the National Assembly as contained in Article 58(2)(b) has been qualified by making such

decision compulsorily referable to this Court. Even Article 270AA as originally provided in the LFO has been deleted in its entirety and replaced with an entirely different Article.

38. The present constitutional structure rests on the foundation of the 17<sup>th</sup> Amendment. Without it, the civilian rule may not have been possible. In similar circumstances, while examining the validity of the 8<sup>th</sup> Amendment in Abdul Mujeeb Pirzada's case, Ajmal Mian J. (as he then was), observed as follows:

"I may observe that the elections of 1988 on party basis were held on the basis of the amended Constitution, everyone has taken oath including the Judges to protect the Constitution as was in force on the day of taking of oath. The said oath was taken by everyone after the Martial Law was lifted and the Fundamental Rights were restored. Incidentally I may mention that I and all other sitting Judges of this Court were appointed during the Martial Law and, therefore, the first oath, which we had taken on 01.01.1986 under the Constitution, was of the amended Constitution. If I were to declare certain amended provisions of the Constitution as violative of the Objectives Resolution or of the basic structure of the Constitution, it would disturb the basis on which the present structure of the democracy is grounded. It will be difficult to demarcate a line, where to stop. The present legal edifice is based on the amended Constitution. If we take out some amended provisions, the superstructure of democracy built on it may collapse. For example, under Article 41(3) read with Second Schedule to the Constitution electoral college for election of the President has been made more representative by P.O. No. 14 of 1985 by providing that the Provincial Assemblies will also form part of the electoral college. If I were to hold the above amendment as illegal, it will affect the incumbent of the office of the President, which in turn will affect the incumbent of the office of the Prime Minister as the President had nominated the Prime Minister under amended Article 91(2). It is true that the Prime Minister had obtained a vote of confidence but the challenge to the National Assembly can be thrown on the grounds that its seats by direct and indirect election have been increased and the qualifying age for a voter has been raised from 18 years to 21 years, by P.O. No. 14 of 1985, which deprived right of franchise to a

sizeable number voters between the age of 18 to 21 years. A number of other incumbents of other offices and a number of other institutions, who are not before us, will also be affected. This will be an unending process. In my view, there is no manageable standard or the objective standard available with this Court to decide, which of the amendments should be struck down and which of them should be retained. This is a highly sensitive and politicized controversy, which has unfortunately assumed great significance in view of polarized and charged political climate obtaining in the country."

Above decision was upheld by this Court in Mahmood Khan Achakzai's case. Present situation is almost identical. By striking down anyone or more of the provisions of the 17<sup>th</sup> Amendment, this Court will only destroy the entire system prevailing now.

39. General Elections have now been held here and 18 year olds have voted. This enlarged electorate has cast its votes for an expanded Parliament and four Provincial Assemblies. The elected members have taken oath of their respective offices. The Speakers and Deputy Speakers of the National Assembly and Provincial Assemblies have been elected. The Chairman and Deputy Chairman Senate have been elected. The Prime Minister and the four Chief Ministers have been elected. Governors have been appointed in the four provinces. The President has taken a Vote of Confidence as required by clause (8) of Article 41 of the Constitution. All these constitutional functionaries have made oath under the Constitution and are occupying their respective offices. Appointments to civil services and armed forces have been made. Service Chiefs have been appointed. Judges and the Chief Justices of the superior courts have been appointed and have taken oath under the Constitution.

40. The Government is functioning in accordance with the Constitution. If the petition is accepted and the 17<sup>th</sup> Amendment

struck down, this entire constitutional edifice will collapse. The President, the Prime Minister, the Governors, the Chief Ministers, the Parliamentarians, the Members of the Provincial Assemblies, 3 Services chiefs and Judges of superior judiciary appointed by the President, all will cease to hold office at once. The government of the country will cease to function and total anarchy will prevail. The government under the Constitution will be undone and a vacuum will be created. This is not the function of the judiciary. In short, accepting the petitions and striking down the 17<sup>th</sup> Amendment would invite chaos and create a constitutional crisis. This Court must allow the government to function and the institutions to gain strength and mature with time. The alternative route leads straight to the political thicket and since the decision in Ziaur Rehman's case this Court has always avoided such a course. If the petitioners have a grievance, their remedy lies with the Parliament and failing that in the court of the people and not with the Court.

41. It has been urged by the petitioners that the 17<sup>th</sup> Amendment in its entirety or at least specifically, Article 41 (7)(b) and Article 41(8) should be struck down as violative of the basic structure of the Constitution. It may first be noted that it has repeatedly been held in numerous cases that this Court does not have the jurisdiction to strike down provisions of the Constitution on substantive grounds.

42. First this issue was examined in Ziaur Rahman's case, in which various persons who had been convicted by military courts had challenged the purported ratification of the acts of that regime vide Article 281 of the Interim Constitution of Pakistan, 1972. In

addition, the said persons had also challenged the *vires* of the Interim Constitution itself, *inter alia*, on the basis that the said Constitution had been framed by an assembly which had been elected on the basis of a legal framework prescribed by a regime later declared to be illegal by this Court in Asma Jilani's case PLD 1972 SC 139. A five-member bench of this Court held as follows:

"So far, therefore, as this Court is concerned it has never claimed to be above the Constitution nor to have the right to strike down any provision of the Constitution. It has accepted the position that it is a creature of the Constitution; that it derives its powers and jurisdictions from the Constitution; and that it will confine itself within the limits set by the Constitution . . . .(page 69)

[I]t is now necessary to examine as to whether any document other than the Constitution itself can be given a similar or higher status or whether judiciary can, in the exercise of judicial power, strike down any provision of the Constitution itself either, because, it is in conflict with laws of God or of nature or of morality or some other solemn declaration which the people themselves may have adopted for indicating the form of government they wish to establish. I, for my part, cannot conceive a situation, in which, after a formal written constitution has been lawfully adopted by a competent body and has been generally accepted by the people, including the judiciary, as a Constitution of the country, the judiciary can claim to declare any of its provisions *ultra vires* or void. This will be no part of its function of interpretation. (pages 70-71)

43. This judgment was subsequently re-examined by a four-member bench of this Court in Saeed Ahmed Khan's case (PLD 1974 SC 151) in which the submission was that Article 269 of the Constitution of 1973 was liable to be struck down to the extent it sought to oust the jurisdiction of the judiciary. In this context, the Court held as follows:

"The learned counsel for the respondents has, relying on the statements of law contained in Vol. 16 of the Corpus Juris Secundum, impressed upon us to

constantly keep in mind the main purpose sought to be accomplished by the adoption of the Constitution and to so construe the same as to effectuate rather than destroy that purpose, which, according to him, is enshrined in Article 3 of the Interim Constitution and Article 4 of the permanent Constitution. (pages 165-166)

We are not unmindful of these provisions but after our decision in Zia ur Rahman's case, we are no longer in a position to say that the Martial Law Regulations, under which the executive actions impugned in the present cases were taken, have not acquired the status of a "law" within the meaning of these Articles. In any event, it is not possible for us to declare that a provision of the Constitution is not law because it seeks to oust the jurisdiction of the Courts with regard to certain subjects without affecting the judicial power itself. We cannot strike it down. We can only interpret it, according to the accepted rules of interpretation and define its nature and scope. (emphasis supplied)(pages 166)

44. Subsequently, this Court reiterated this view in Brig (Retd.) F.B. Ali's case (PLD 1975 SC 507) in which at page 528 it held that "the Courts cannot strike down a law on any such higher ethical notions nor can Courts act on the basis of philosophical concepts of law."

45. It is worth noting that this Court in the cases of Zia ur Rahman, Saeed Ahmed Khan and F.B. Ali did not take into account Indian caselaw on the question of the jurisdiction of the superior judiciary to strike down a constitutional amendment. However, the Indian case law was subsequently taken into consideration by a six member full bench of this Court in the well known case of Islamic Republic of Pakistan v. Abdul Wali Khan, PLD 1976 SC 57, 100 in which the *vires* of the amendment to Article 17 made by the Constitution (First Amendment) Act, 1974 came into question. More specifically, the Court noted the majority judgment in the case of

Kesvavanda Bharati v. State of Kerala, AIR 1973 SC 1461 and then held:

“It is unnecessary for us to enter into this controversy, as this Court is committed to the view that the “the judiciary cannot declare any provision of the Constitution to be invalid or repugnant” to the national aspirations of the people and the validity of a Constitutional amendment can only be challenged if it is adopted in a manner different to that prescribed by the Constitution. (page 100)

46. A challenge to the Fourth Amendment to the Constitution on the ground of the doctrine of basic structure was rejected by the High Court of Sindh in Dewan Textile Mills v. Federation (PLD 1976 Karachi 1368).

47. The challenge to the Seventh Amendment to the Constitution before the High Court of Sindh failed in the case reported as Niaz A. Khan v. Federation (PLD 1977 Karachi 604 at 648).

48. Soon thereafter, this Court was once again faced with the issue of the validity of a constitutional amendment in the case of Federation of Pakistan v. United Sugar Mills Ltd., PLD 1977 SC 397 which related to the Constitution (4<sup>th</sup> Amendment) Act, 1976. In the said case, a five member full bench of this Court again referred to Indian cases on the subject and held:

“In Pakistan, this Court in the case of Zia ur Rahman has, however, firmly laid down the principle that a constitutional provision cannot be challenged on the ground of being repugnant to what are sometimes stated as “national inspirations” or an “abstract concept” so long as the provision is passed by the competent Legislature in accordance with the procedure laid down by the Constitution. (page 410)

49. In Jehangir Iqbal Khan v. Federation PLD 1979 Peshawar 67 the Peshawar High Court rejected a challenge to the Fifth Amendment to the Constitution.

50. In the well known case of Fauji Foundation v. Shamim ur Rehman (PLD 1983 SC 457) a four member bench of this Court examined the concept of limitations on legislative power and reaffirmed the conclusions in the cases of Zia ur Rahman and United Sugar Mills. The Fauji Foundation's case is particularly noteworthy in that, this Court specifically examined the various Indian cases on the point, as well the judgment of Mr. Justice Shameem Hussain Kadri in the case of Darwesh M. Arbey v. Federation of Pakistan, PLD 1980 Lah. 684. In that case, the learned judge had held with respect to the Constitution (7<sup>th</sup> Amendment) Act that "The Parliament is not sovereign to amend the Constitution according to its likes and dislikes much less than changing the basic structure of the constitution." This Court noted at p. 627 of the Fauji Foundation case that the Indian cases did not advance the position taken by Kadri, J. and that "the learned Judge failed to notice that the amending power, unless it is restricted, can amend, vary, modify or repeal any provision of the Constitution." The Darwesh M. Arbey case was overruled.

51. The issue of amendments to the Constitution was considered also by the High Court of Sindh in Sharaf Faridi's case. In the said judgment, a seven member full bench of the said Court headed by Ajmal Mian, J., (as he then was) examined the question as to whether the changes in the Constitution brought about by the Fifth Amendment to the Constitution could be declared *ultra vires* to

the Constitution and concluded that the said amendment could not be struck down, either on the basis of its alleged repugnancy to Art. 2A of the Constitution or for being violative of the basic structure of the Constitution.

52. Subsequently, another seven member bench of that Court examined the precise question as to whether the superior judiciary was competent to strike down amendments to the Constitution in the context of the Eighth Amendment and the various amendments to the constitution made by the 1985 Assembly in Abdul Mujeeb Pirzada's case. Ajmal Mian, J., (as he then was) concluded on behalf of a unanimous Full Bench, after a thorough and detailed review of both Pakistani and Indian case law, as follows:

"I am, therefore, of the view that in presence of the above unambiguous dictums of the Pakistan Supreme Court, it is not open to this Court to hold that a provision of the Constitution can be struck down on the ground of its being violative of the Objectives Resolution or of national aspirations or of higher ethical notions or of philosophical concepts of law or of the basic structure. (page 70)

53. The judgment in Abdul Mujeeb Pirzada's case may also be noted with respect to the point that it specifically considered the contention of the petitioners therein that the doctrine of basic structure already stood implicitly accepted by this Court in Fazlul Quader Chowdhary's case (PLD 1963 SC 486). This contention was rejected in the following words:

"It is therefore evident that the consistent view of the Pakistan Supreme Court has been that a Constitutional provision cannot be struck down on a ground other than that it was passed in a manner other than provided under the Constitution. The case of Fazlul Quader Chowdhary relied upon by Mr.

Yahya Bakhtiar does not lay down any contrary proposition than what has been held by the Supreme Court in the aforesaid subsequent cases. (page 70)

54. The judgment in the case of Abdul Mujeed Pirzada was subsequently upheld by this Court in Mahmood Khan Achakzai's case. The said case was disposed of by virtue of a short order, reported as Abdul Mujeeb Pirzada's case (1997 SCMR 232), which stated in relevant part as follows:

"What is the basic structure of the Constitution is a question of academic nature which cannot be answered authoritatively with a touch of finality but it can be said that the prominent characteristics of the Constitution are amply reflected in the Objectives Resolution which is now substantive part of the Constitution as Article 2A inserted by the Eight Amendment."

55. The detailed judgment in the said case was subsequently reported as Mahmood Khan Achakzai's case. It may be noted further that the said case was decided not by one judgment, but that there were in fact three separate judgments. One of the two leading judgments was written by the Chief Justice, Mr. Justice Sajjad Ali Shah and was signed (in effect) by only four other judges. Saleem Akhtar, J., did not sign the judgment of Sajjad Ali Shah, C.J. while Zia Mehmood Mirza, J., noted that he concurred only with the conclusion of the learned Chief Justice that the appeals deserved to be dismissed. Saleem Akhtar, J., instead authored a separate leading judgment, which was also signed by four other members of the bench, this time with the exception of Zia Mehmood Mirza, J., and Sajjad Ali Shah, C.J. Finally, Raja Afrasiab, J., who had also concurred with the judgments of both the Chief Justice and Saleem Akhtar, J., authored his own independent judgment as well.

56. There is a significant difference between taking the position that Parliament may not amend salient features of the Constitution and between the position that if Parliament does amend these salient features, it will then be the duty of the superior judiciary to strike down such amendments. The superior courts of this country have consistently acknowledged that while there may be a basic structure to the Constitution, and while there may also be limitations on the power of Parliament to make amendments to such basic structure, such limitations are to be exercised and enforced not by the judiciary (as in the case of conflict between a statute and Article 8), but by the body politic, i.e., the people of Pakistan. In this context, it may be noted that while Sajjad Ali Shah, C.J., observed that "there is a basic structure of the Constitution which may not be amended by Parliament", he nowhere observes that the power to strike down offending amendments to the Constitution can be exercised by the superior judiciary. The theory of basic structure or salient features, insofar as Pakistan is concerned, has been used only as a doctrine to identify such features.

57. The conclusion which emerges from the above survey is that prior to Syed Zafar Ali Shah's case, there was almost three decades of settled law to the effect that even though there were certain salient features of the Constitution, no constitutional amendment could be struck down by the superior judiciary as being violative of those features. The remedy lay in the political and not the judicial process. The appeal in such cases was to be made to the people not the courts. A constitutional amendment posed a political

question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.

58. It may finally be noted that the basic structure theory, particularly as applied by the Supreme Court of India, is not a new concept so far as Pakistani jurisprudence is concerned but has been already considered and rejected after considerable reflection as discussed in the cases noted hereinabove. It may also be noted that the basic structure theory has not found significant acceptance outside India, as also discussed and noted in the Achakzai's case. More specifically, the Supreme Court of Sri Lanka refused to apply the said theory in a case, reported as In re the Thirteenth Amendment to the Constitution and the Provincial Councils Bill (1990) LRC (Const.) 1. Similarly, the said theory was rejected by the Supreme Court of Malaysia in a case titled Phang Chin Hock v. Public Prosecutor (1980) 1 MLJ 70.

59. The position adopted by the Indian Supreme Court in Kesvavananda Bharati case is not necessarily a doctrine, which can be applied unthinkingly to Pakistan. Pakistan has its own unique political history and its own unique judicial history. It has been the consistent position of this Court ever since it first enunciated the point in Zia ur Rahman's case that the debate with respect to the substantive *vires* of an amendment to the Constitution is a political question to be determined by the appropriate political forum, not by the judiciary. That in the instant petitions of this Court cannot abandon its well settled jurisprudence.

60. The argument made by the petitioners is that the addition of the proviso to Article 41(7) was destructive of the

parliamentary form of government, in that, it allowed the President to retain control of the Armed Forces, which was the true test of power.

61. Clearly, Article 41(7) makes no change whatsoever to the balance of powers between the President and the Prime Minister, particularly in relation to the Armed Forces. Furthermore, whether General Pervez Musharraf can constitutionally hold the office of the COAS while also being President of Pakistan is a very different question from whether the 17<sup>th</sup> Amendment has impermissibly altered the balance of powers between the President and the Prime Minister. It is not open to dispute that vide Item 50 of the Schedule to P.O. 14 of 1985, Article 243 of the Constitution was amended in 1985 through the addition of sub-article (1A) which reads explicitly as follows:

“Without prejudice to the generality of the foregoing provision, the supreme command of the Armed Forces shall vest in the President.”

No change has been made in Article 243(1A) by the 17<sup>th</sup> Amendment and the addition of sub-article (1A) to Article 243 was approved by this Court in Achakzai's case. No challenge to Article 41(7) is therefore sustainable on this ground.

62. The alternative argument (which was only faintly argued by the petitioners) is that the mere fact that clauses (7) and (8) of Article 41 permit a serving general, and COAS, to function as the President of Pakistan is unacceptably violative of the parliamentary form of governance. The argument is not tenable, in that:

- (i) Pakistan has very recently emerged from a period of constitutional deviation and there is

no practical option but to allow the transition to proceed smoothly.

- (ii) Furthermore, clauses (7) and (8) of Article 41 have the concurrence of two-thirds of the elected representatives of a sovereign nation. Even to the extent that these are open to examination by this Court, it would be appropriate for this Court to defer to Parliament's assessment as to their acceptability.
- (iii) The impugned provisions are not unprecedented. After the restoration of parliamentary democracy following the rule of General Zia ul Haq, sub-article (7) was amended to provide that he would continue to be President by virtue of the mandate earlier obtained by him through a referendum. The *vires* of the said amendment were examined and upheld by this Court in Achakzai's case as well as in the case reported as Al Jihad Trust's case (PLD 1997 SC 34, 133) and hence no objection is maintainable with respect to Article 41(7), as currently drafted. In fact, in the instant case, General Pervez Musharraf is the President not only by virtue of an earlier referendum but by virtue of a vote of confidence obtained from a freely elected Parliament and all the Provincial Assemblies of the four Provinces. The procedure followed was identical to that stated in the Second Schedule to the Constitution. The continuation in office of General Pervez Musharraf as President of Pakistan subject to a vote of confidence obtained from Parliament therefore represents the affirmation of parliamentary supremacy, not its negation. It also cannot be ignored that

clause (8) of Article 41 which provided for such a vote was not a part of the LFO but has been inserted by the Seventeenth Amendment.

63. According to the petitioners, the mere fact that General Pervez Musharraf is today President by virtue of a vote of confidence under Art 41(8), and not by virtue of an election held under Article 41(4) is enough to destroy Pakistan's "parliamentary form of governance." However, this argument is unsustainable on several grounds.

- (i) In the first instance, it may be noted that the appointment of a President on the basis of a vote of confidence is not historically unprecedented. In fact, Article 282 of the Interim Constitution of 1972 specifically provided that Mr. Zulfikar Ali Bhutto would be deemed to be the President if he succeeded in obtaining a vote of confidence from Parliament. This was in spite of the fact that the Interim Constitution specifically provided that the President will be elected by the National Assembly. No exception can therefore be taken to sub-article (8) of Article 41 on the ground that it is violative of parliamentary form of governance.
- (ii) It may further be noted that the vote of confidence obtained by the President pursuant to sub-article (8) of Article 41 was obtained and tabulated in exactly the same manner, and subject to exactly the same rules, as those normally applicable to presidential elections under Article 41(4). The only difference between the mandate received by the President pursuant to the vote of confidence

and the mandate that the President would have received, had there been an election under Article 41(4), is that no votes were cast for opposing candidates. According to the petitioners, the mere fact that there were no opposing candidates is enough, by itself, to invalidate the no confidence vote. However, it can scarcely be argued that the validity of an electoral mandate depends on the presence of competing candidates: after all, a person who runs unopposed for a particular office is still deemed to have been validly elected notwithstanding the absence of opponents.

64. The Constitution has now for a considerable period of time provided for a balance of powers between the President and the Prime Minister. Rustam S. Sidhwa, J., in *Ahmed Tariq Rahim's case* (PLD 1992 SC 646) noted:

A few words may be stated about the position of the President. The President, as Head of the State, represents the unity of the Republic. He is thus placed above the party. He is entitled to certain communications and information, which is the duty of the Prime Minister to furnish, with power to submit for the consideration of the Cabinet any matter on which a decision may have been taken but which has not been considered by the cabinet. He can call upon the Cabinet to reconsider any advice tendered or consider such advice. He has power to act in his discretion in respect of any matter in respect of which he is empowered by the constitution to do so, with entitlement to decide whether he is so empowered. He has power to refer any matter of national importance to a referendum. He has power to send messages to either House for their consideration. He has the right to address both Houses assembled together at the commencement of each Session of Parliament. He has the power to dissolve the National assembly if, in his opinion, a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution. He has the power inter alia to appoint the Chairman of the Joint Chiefs

of Staff Committee and the three Chiefs of the Army Staff, Naval Staff and Air Force Staff. He is at the apex, as the executive authority of the Federation, which is vested in him, is exercised by him directly or through officers subordinate to him. He is to be aided and advised in the exercise of his functions by the Cabinet or the Prime Minister; except in cases where he is obliged to act in his discretion. The President is therefore no less powerful than the Prime Minister.

The basic character of the Constitution is now a mix. It is not Presidential; it was never meant to be. It is not totally Parliamentary; as it was intended.

65. Similarly, a full bench of this Court also observed in A/ Jehad Trust case (PLD 1997 SC 84, 133) as follows:

Now, if all the amendments made in the Eighth Amendment are studied minutely it would appear, candidly speaking that more powers have been given to the President to provide him an effective role but Parliamentary Form of Government is retained. Article 41 in the Constitution before the Eighth Amendment provided in sub-Article (1) that there shall be a President of Pakistan who shall be the Head of State and shall represent the unity of the Republic and this provision remains in the same position after the Eighth Amendment. Article 41 originally contained six sub-Articles and RCO/P.O.14 of 1985 has made two amendments. Sub-Article (1) envisaged that in performance of his functions, the President shall act on and in accordance with the advice of the Prime Minister and such advice shall be binding on him. This sub-Article is amended with deletion of words "and such advice shall be binding on him" and proviso has been added that the President shall act in accordance with advice tendered after such re-consideration. Sub-Article (3) requiring orders of President to be countersigned by the Prime Minister for validity is deleted. These amendments inserted by Eighth Amendment Act, 1985, do not show that form of the Government in the Constitution of 1973 has been changed from Parliamentary to Presidential.

66. Therefore, it is no longer correct to think of the Constitution of Pakistan as providing for a purely parliamentary system according to the Westminster model. Instead, what can be seen is that over time, Pakistan has evolved its own political system

so as to suit the political conditions found here. No objection can now be taken to the said system on the basis that it provides for a balance of powers (as opposed to concentrating all powers in the hands of the Prime Minister). As such, the vehement protests of the petitioners that the impugned provisions have destroyed the basic structure of the Constitution appear to be considerably overwrought and no weight can be placed on those arguments.

67. In the instant case, while it has been argued that there is a conflict between the provisions of Article 43 and clauses (7) and (8) of Article 41, the conflict in question is not irreconcilable. The reason why the conflict is not irreconcilable is because both clauses (7) and (8) of Article 41 contain non obstante clauses which provide that the said clauses are to have effect notwithstanding anything contained in the Constitution. Clause (7) of Article 41 specifically overrides Article 43. In short, Parliament has made it very clear in enacting and validating clauses (7) and (8) of Article 41 that the said clauses take precedence of the other provisions of the Constitution including Article 43. There is, therefore, no conflict between the impugned amendments and Article 43. In fact, the theory of harmonious construction requires that in the instant case, full effect be given to clauses (7) and (8) of Article 41 because that is the clear intent of Parliament and in the event of a conflict between these clauses and any other provision of the Constitution including Article 43 these clauses will prevail. In this context, it may be noted that in each of the above-noted cases in which the theory of harmonious construction was applied by this Court, none of the clauses contained a non obstante clause. The petitioners' argument

is therefore unsustainable to the extent it seeks to rely on the theory of harmonious construction.

68. Another Office Act is not liable to be struck down as *ultra vires* of Article 43 of the Constitution. The simple reason for this is that, as discussed above, General Pervez Musharraf is the President of Pakistan under clauses (7) and (8) of Article 41, both of which provide that he shall hold that office notwithstanding anything in the Constitution to the contrary. Clause (8) obviously takes into account Article 43 as well while clause (7) specifically overrides Article 43. Article 43 is therefore simply not applicable to the President in office and hence there is no conflict between the provisions of the 17<sup>th</sup> Amendment and Article 43.

69. The provisions of Article 63(1)(d) have been made applicable to the continuation in office of the President after 31 December 2004 by virtue of the proviso to clause (7) of Article 41, which was inserted by the 17<sup>th</sup> Amendment.

70. Any other clause or paragraph of Article 63 of course does not apply to the President since it is settled law that the President is only required to be qualified to be a member of Parliament (as provided by Article 62) and is consequently not hit by the disqualifications contained in Article 63 of the Constitution. The argument of the petitioners that the President is subject to all the disqualifications contained in Article 63 of the Constitution ignores the settled law on this point as discussed and upheld most recently in Qazi Hussain Ahmed's case.

71. The argument that the COAS could not have assumed the office of the President because of the definition of the "service of

Pakistan" in Article 260 and the disqualifications in respect of such persons contained in Article 63 is untenable as these have no application to the President.

72. The argument that on account of the oath made by him as a member of the Armed Forces under Article 244 read with the Third Schedule to the Constitution disqualified the COAS from being the President is misconceived. It overlooks the fact that clauses (7) and (8) of Article 41 carry *non obstante* clauses and these are to have effect notwithstanding anything contained in the Constitution. Clauses (7) and (8) of Article 41, therefore, override Article 244 and the oath in the Third Schedule like they override Articles 43 and 260 of the Constitution.

73. Since Article 63(1)(d) has now been made specifically applicable to the continuance in office by the President after 31 December 2004 through the proviso, it is, therefore, clear that the President would be disqualified from continuing in office qua President if he was to hold an office of profit in the service of Pakistan, except "an office declared by law not to disqualify its holder." All that has happened in the instant case is that by virtue of Another Office Act, Parliament has declared that the office of the COAS is an office, which does not disqualify its holder. The President is, therefore, not barred by the proviso to clause (7) of Article 41 from continuing in office as both the Chief of Army Staff (COAS) and the President because the position of COAS has been declared by law not to disqualify its holder as expressly contemplated by Article 63 (1)(d).

74. The petitioners further argued, in this context, that the continuation of the President as the COAS was violative of Article 41(7) since it was intended by Parliament that there would be a bar on the President continuing to hold both the offices of the President and the Chief of Army Staff after 31 December 2004 and that there was an understanding amongst the various political parties and the President to that effect.

75. This Court in the exercise of its constitutional jurisdiction does not examine disputed questions of fact. Even if the said "understanding" or "agreement" was before the Court it would not be guided in its interpretation of the Constitution by such a document. It will perform its constitutional duty. It will interpret the Constitution according to its plain meaning. If the words are clear and unambiguous it needs no external aids for interpretation. To quote Justice Jackson of the United States Supreme Court in United States v. Public Utilities Commissioner of California 345 U.S. 295, 319 (1953) the Court should reach the result "by analysis of the statute instead of by psychoanalysis of Congress". Justice Antonin Scalia, a serving judge of the US Supreme Court, in his book A Matter of Interpretation, observes at page 17:

I think, that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical. It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend

what they will; but it is only the laws that they enact which bind us.

As there is no ambiguity in the language of the proviso to clause (7) of Article 41, this Court must give effect to it irrespective of what may be the political understanding or agreement or what one of the participants may have written in his reminiscences or what a public or constitutional functionary, including the President may have said in a public address.

76. The most important consideration for this Court in interpreting the Constitution is not the alleged factual background and circumstances in which a particular provision of the Constitution was adopted but the actual text of the provision. In this context, it can very easily be seen that had it been the intent of Parliament to place an absolute bar on the holding of two offices by the President, it could very easily have provided so by referring to Article 43, rather than Article 63(1)(d), in the proviso to sub-article (7) of Article 41 subsequently inserted by the 17<sup>th</sup> Amendment. The very fact that Parliament chose to insert a reference to Article 63(1)(d), rather than Article 43, in the proviso added to Article 41(7) shows that Parliament did not intend the ban on holding of two offices to be absolute after December 31, 2004 but instead to be dependent upon the will of Parliament itself. Since Parliament has now authoritatively provided for holding of two offices by the President through Another Office Act, there is no conflict (constitutional, statutory or otherwise) left for this Court to resolve.

77. It was further argued with respect to Another Office Act that Parliament lacked the legislative competence to make any law with respect to the qualifications (or disqualifications) of the

President. This argument is readily controverted because entry 41 of the Federal Legislative List refers explicitly to "Elections to the office of the President" which entry must, upon any reasonable interpretation, be deemed to provide sufficient legislative authority for the impugned Act.

78. In addition to entry 41, it may also be noted that entry 58 of the Federal Legislative List refers to "Matters, which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or relate to the Federation." In the instant case, Article 63(1)(d) itself provides that Parliament may, by law provide that certain public office shall be deemed not to disqualify its holder from holding an elected office. In light of the clear constitutional mandate, as well as the settled principle of law that entries in legislative lists are to be interpreted broadly, no exception can be taken to Another Office Act on the ground that Parliament lacked the legislative competence to enact such a law.

79. An alternate challenge to Another Office Act was presented by the petitioners on the ground that the said Act had not been competently enacted, in that assent to the said Act had been given not by the President himself but by the Chairman of the Senate, Mohammadmian Soomro who was then the acting President. In support of this contention, the petitioners placed reliance upon the provisions of clauses (1) and (2) of Article 49 of the Constitution and the different language used therein.

80. In this context, it is noted that Article 260 of the Constitution defines the term "President" to include not only the President of Pakistan but also any "person for the time being acting

as, or performing the functions of, the President of Pakistan.” Thus, no distinction is drawn in the said definition between the President and the person who is either acting as President or performing the functions of the President. Thus, while there is certainly a distinction between the language of sub-articles (1) and (2) of Article 49, it is a distinction without a difference.

81. Any imposition of restrictions on the powers of an Acting President would run contrary to the intent of the framers of the Constitution. In this context, it is noted that Article 15 of the Constitution of Pakistan, 1962 explicitly provided for certain limitations on the powers of an acting president. Similarly, Article 64 of the Constitution of India, 1949 provides for certain limitations on the powers of the Vice President who otherwise under Article 65 is entitled to act as President during the absence of the President. Given these two historical precedents, it can therefore be concluded that by not putting in any explicit restrictions on the powers of an acting President, the framers of the 1973 Constitution were making a deliberate choice.

82. This precise issue has already been examined by the Lahore High Court in the case titled Zafar Ali Shah v. Federal Government of Pakistan (1994 CLC 5). In that case, the court examined the question as to whether the Chairman of the Senate could act as President without taking a fresh oath to that effect. The learned Judge held that there was no constitutional requirement upon the Chairman of the Senate to take a fresh oath, since the oath of Chairman of the Senate already provided for that eventuality

and hence concluded that “the Acting President has all the powers of the elected President whose vacancy he was filling in.”

83. Even otherwise, it makes no sense for this Court to impose restrictions upon the role of the Acting President. If such restrictions were imposed upon the Acting President, it would follow that in times of emergency, the country would be unable to respond effectively if the President was out of the country for any reason. No such intention can be attributed to the founders of the Constitution and the argument of the petitioners is rejected on this ground.

84. It may also be noted that in the instant case, the argument of the petitioners is somewhat disingenuous because had Another Office Act been, in fact, signed into effect by the President himself, the petitioners would have challenged it on the ground that no man can be a judge in his own cause. In the given circumstances, it was not only legally but also otherwise appropriate for Another Office Act to be assented to by the Acting President and hence the petitioners’ arguments in this regard are rejected.

85. The petitioners also argued that the statute be struck down because it was not a “good thing”. This Court, however, held in Zia-ur-Rahman’s case that “it is not the function of the judiciary to legislate or to question the wisdom of the Legislature in making a particular law”. This Court has consistently held that the wisdom or policy of the legislature is not open to question in the exercise of the power of judicial review. Reference in this regard can be made to:

- The Punjab Province v. Malik Khizar Hayat Khan Tiwana (PLD 1956 FC 200 at 208);
- Federation of Pakistan v. Saeed Ahmad (PLD 1974 SC 151 at 165);

- Shirin Munir v. Government of Punjab (PLD 1990 SC 295 at 306);
- Zulfiqar Ali Babu v. Government of Punjab (PLD 1997 SC 11 at 26); and
- Zaman Cement Company (Pvt.) Ltd. v. Central Board of Revenue (2002 SCMR 312 at 324).

86. In this context, reference may be made to a decision of the High Court of Australia in Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd. 28 CLR 129 at 148 wherein the following was observed: -

What, then, are the settled rules of construction? The first, and "golden rule" or "universal rule" as it has been variously termed, has been settled in Grey v. Pearson 6 HLC 61 at p. 106 and the Sussex Peerage Case 11 Cl. & Fin. 85, at p. 143, in well known passages which are quoted by Lord Macnaghten in Vacher's Case (1913) A.C. at pp.117-118. Lord Haldane L.C. in the same case, made some observations very pertinent to the present occasion. His Lordship, after stating the speculation on the motives of the Legislature was a topic which Judges cannot profitably or properly enter upon, said: -- "Their province is the very different one of construing the language in which the Legislature has finally expressed its conclusions and if they undertake the other province which belongs to those who, in making the laws, have to endeavour to interpret the desire of the country, they are in danger of going astray in a labyrinth to the character of which they have no sufficient guide.

87. Lastly, the petitioners argued that the statute be struck down because that would be the more appropriate thing to do and would be in consonance with popular demand. This Court has, however, always held that statutes are not to be struck down lightly. The Court must make every attempt to reconcile the statute to the Constitution and only when it is impossible to do so, must it strike down the law. Reference can be made to:

- The Province of East Pakistan v. Sirajul Haq Patwari
- (PLD 1966 SC 854 at 954);

- Mehreen Zaibun Nisa v. Land Commissioner  
(PLD 1975 SC 397 at 433);
- Multiline Associates v. Ardeshir Cowasjee  
(1995 SCMR 362 at 381);
- Messrs Elahi Cotton Mills Ltd. v. Federation of Pakistan  
(PLD 1997 SC 582 at 676);
- Dr. Tariq Nawaz v. Govt. of Pakistan  
(2000 SCMR 1956 at 1959-1960);
- Mian Asif Aslam v. Mian Mohammad Asif  
(PLD 2001 SC 499 at 511); and
- Pakistan Muslim League (Q) v. Chief Executive of Pakistan (PLD 2002 SC 994 at 1010, 1031 & 1032).

88. Statutes are presumed constitutional and the burden of proving otherwise is on the petitioners. This Court has never struck down a statute on subjective notions of likes and dislikes or what is popular and unpopular. That is not its function. It is as much its duty to uphold a statute, which is constitutional as is its duty to strike down an unconstitutional statute. It will be of advantage in this regard to refer to a passage from a book "The Supreme Court" authored by the Chief Justice of the United States Supreme Court, William H. Rehnquist wherein he says:

The role of the Supreme Court is to uphold those claims that it finds are well founded in the Constitution, and to reject other claims of individual liberty against the government that it concludes are not well founded. Its role is no more to exclusively uphold the claims of the individual than it is to exclusively uphold the claims of the government: It must hold the constitutional balance true between these claims. And if it finds the scales evenly balanced, the long-standing "presumption of constitutionality" to which every law enacted by congress or a state or local government is entitled means that the person who seeks to have the law held unconstitutional has failed to carry his burden of proof on the question.

It has always seemed to me that this presumption of constitutionality makes eminent good sense. If the Supreme Court wrongly decides that a law enacted by Congress is constitutional, it has made a mistake, but the result of its mistake is only to leave the nation with a law duly enacted by the popularly chosen members of the House of Representatives and the Senate and signed into law by the popularly chosen president. But if the Court wrongly decides that a law enacted by Congress is not constitutional, it has made a mistake of considerably greater consequence; it has struck down a law duly enacted by the popularly elected branches of government, not because of any principle in the Constitution but because of the individual views of desirable policy held by a majority of the nine justices at that time.

89. A very eminent jurist, Judge Learned Hand observes that a judge who interprets a statute must always remember:

That he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern.

90. This Court must have due regard for the democratic mandate given to Parliament by the people. That requires a degree of restraint when examining the *vires* of or interpreting statutes. It is not for this Court to substitute its views for those expressed by legislators or strike down statutes on considerations of what it deems good for the people. This Court is and always has been the judge of what is constitutional but not of what is wise or good. The latter is the business of Parliament, which is accountable to the people.

91. The petitioners also submitted that it is imperative to take action against the President under Article 6 of the Constitution

because under section 3 of the High Treason Act, 1973, no court can examine a charge on grounds of treason unless a reference is forwarded to the court by the President, which in this case is not possible. It is noted that section 3 *ibid* does not require a reference from the President but this duty has been assigned to the Federal Government. This provision remains in its original form since enacted. The petitioners' argument is misplaced. The petitioners do not seek a striking down but virtually insist on re-writing the same and pray that after doing so, this Court may take cognizance of the matter and initiate a prosecution against the President. Suffice it to say that it is not the function of the courts of law. Even otherwise, on facts, which are incontrovertible, there is no basis for initiating such a prosecution.

92. In consequence, the petitions are dismissed. Above are reasons for the short order announced on 13 April 2005.

CHIEF JUSTICE

JUDGE

JUDGE

JUDGE

JUDGE

ISLAMABAD  
13 April 2005

APPROVED FOR REPORTING