SUPREME APPELLATE COURT GILGIT-BALTISTAN

S.M.C. No. 16/2009

INDEPENDENCE OF JUDICIARY IN GILGIT-BALTISTAN

Present: **Mr. Justice Muhammad Nawaz Abbasi, C.J**
Mr. Justice Syed Jaffar Shah, J
Mr. Justice Muhammad Yaqoob, J

Advocate General Gilgit-Baltistan.

Registrar and Deputy Registrar of Chief Court.

Muhammad Issa and Mr. Manzoor, Advocates.

Date of hearing: 16.11.2009.

JUDGMENT

Muhammad Nawaz Abbasi, CJ.--This petition arises out of the representation filed by the Judicial Officers of the Gilgit-Baltistan sub-ordinate judiciary before the Chief Court Gilgit-Baltistan for an appropriate order for their upgradation in the manner in which the judicial officers of sub-ordinate judiciary in the provinces of Pakistan and in Azad Jammu and Kahsmir have been upgraded. The Chief Court forwarded their representation to the KA&NA Division, (KA&GB Division) Government of Pakistan for appropriate action and on failure to get any decision for a considerable long time, they sought appropriate directions from this Court by sending a copy of their representation which has been treated as an application under Article 61 of the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009. The District & Sessions Judge Gilgit has submitted the representation on behalf of whole Judicial Officers of Gilgit-Baltistan sub-ordinate Judiciary seeking upgradation of the posts of judicial officers in Gilgit-Baltistan judiciary in the manner in which such posts have been upgraded in the four provinces of Pakistan and Azad Jammu & Kashmir, w.e.f 1st January 2008 as under:--

> "It is submitted that the posts of Judicial Officers of Sub-ordinate Judiciary mention below were upgraded in the four provinces including Azad Jammu and Kashmir alongwith incumbents at the end of 2007 and beginning of 2008.

1.	District & Sessions Judge	From BPS 20 to BPS 21
2.	Addl. District & Sessions Judge	From BPS 19 to BPS 20
3.	Senior Civil Judge	From BPS 18 to BPS 19
4.	Civil Judge	From BPS 17 to BPS 18

2. A case for upgradation of the posts of judicial officers of the posts of judicial officers of Gilgit-Baltistan sub-ordinate judiciary was initiated with KA&NA Division to bring them at par with their counterparts in rest of the country vide Chief Court letter dated 10.03.2008.

3. Information sought by KA&NA Division regarding financial implication also furnished by Chief Court vide letter dated 8.9.2008. The case remained with KA&NA Division without any action till end of 2008. On 26th January 2009, KA&NA Division asked Chief Court to re-route the proposal through Chief Secretary N.As for upgradation of the posts of Judicial Officers of N.As Judiciary alongwith creation of the posts of Senior Civil Judges vide their letter dated 26-01-2009.

4. Proposal for upgradation of the posts of Judicial Officers was sent to Chief Secretary N.As for onward submission to KA&NA Division Islamabad vide Chief Court letter dated 18.2.2009. Chief Secretary has submitted the proposal to KA&NA Division but no action has so far been taken by KA&NA Division and the case is pending there despite lapse of considerable time.

5. Your goodself is also aware of the fact that existing judicial allowance of Judicial Officers have been enhanced in the four provinces in the beginning of 2008. Govt. of Punjab has also granted three time special judicial allowance to Judicial Officers of sub-ordinate judiciary w.e.f. 1.7.2008. Moreover, Judicial Officers in the four provinces are availing utility allowance and car allowance. But neither existing judicial allowance of Judicial Officers of Gilgit-Baltistan sub-ordinate judiciary is enhanced nor have they been granted there time special judicial allowance, utility allowance and car allowance while they are facing the same problems of dearness and inflation as facing by their counterparts in other provinces.

6. This disparity has created frustration in Judicial Officers of Gilgit-Baltistan sub-ordinate Judiciary and the issue invites immediate attention of higher authorities.

7. It is therefore, requested that the KA&GB Division Islamabad may be approached for early action in the case of upgradation of the posts of Judicial Officers of Gilgit-Baltistan sub-ordinate Judiciary. A case for grant of three time special Judicial allowance, utility allowance and car allowance may also be initiated with KA&GB Division at the earliest."

2. The Registrar of the Chief Court Gilgit -Baltistan on direction of this Court submitted report in the matter whereas Presidents Supreme Appellate Court Bar Association, the Chief Court Bar Associations and learned Advocate General Gilgit-Baltistan have assisted the Court at preliminary hearing on 10-11-2009 and in the light of the position explained by them, we proceeded to pass the following order:--

"The learned Advocate General states that due to ambiguity in the Rules, the matter relating to the upgradation of Judicial Officers in Gilgit-Baltistan could not be matured which will be considered in due course of time. Mr. Muhammad Issa Senior Advocate, President Supreme Appellate Court Bar Association and Mr. Manzoor Ahmed Advocate President High Court Bar Association Gilgit-Baltistan have stated that under the existing Rules, the Chief Judge of Chief Court is empowered to pass an appropriate order on the subject relating to the grant of
upgradation and allowances to the members of sub-ordinate judiciary in the same manner as it has been done by the High Courts in the Provinces without the intervention of Government of Gilgit-Baltistan and KA&GB Division of Federal Government.

The Registrar Chief Court has pointed out that in the past correspondence was made by Chief Judge of Chief Court with KA&GB Division, but nothing was done. The matters relating to the terms and condition of service of sub-ordinate Judiciary, including grant of promotion, upgradation and allowances etc., have no concern with the executive authorities, except budgetary allocation, therefore the same is to be settled by the judicial authorities under the relevant Rules.

The comments submitted on behalf of Secretary Law and Prosecution Department Gilgit-Baltistan are misconceived and instead of providing any assistance to the Court has further confused the matter. We therefore, direct that Secretary Law and Prosecution alongwith the Deputy Secretary, who has sent the comments, shall appear on the next date and explain the position. In view of the financial implication in the matter the Secretary Finance Gilgit-Baltistan either himself will appear or will depute a representative with instructions of the allocation of expenditures involved therein. The case is adjourned to 16.11.2009"

3. The basic question requiring determination in the present case is whether the provincial Government of Gilgit-Baltistan or the Chief Court Gilgit-Baltistan has the judicial and administrative control in the affairs of sub-ordinate judiciary under the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 and who is competent to deal with the service matters of sub-ordinate judiciary in Gilgit-Baltistan.

4. Mr. Muhammad Saleem, Deputy Secretary Finance Department of Government of Gilgit-Baltistan has explained that judiciary as a whole in Northern Areas (Gilgit-Baltistan) is not entirely independent in financial matters and stated as under:--

5. The financial grant for annual budget is given to the Government of Gilgit-Baltistan by the Federal Government and the function of Finance Department of Gilgit-Baltistan is to allocate the funds in annual budget for the expenditure of the departments, organizations and institutions of provincial Government including the

judiciary and sanction for the expenditure beyond the allocated budget is also given by the Finance Department. The Deputy Secretary however stated that superior judiciary in Gilgit- Baltistan is entirely independent in its administrative and financial matters within the allocated budget and that upgradation of officers of sub- ordinate judiciary is an administrative matter which is in the exclusive domain of Chief Court, Gilgit-Baltistan.

6. We having heard the Presidents Supreme Appellate Court Bar Association and President Chief Court Bar Association Gilgit-Baltistan as Amicus Curie at length and the learned Advocate General on behalf of provincial Government and also taking into consideration the provisions of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 with relevant law on the subject, have disposed of this petition on 16-11-2009 through Short Order as under:--

> "This petition involving the question of up-gradation of judicial officers of the Sub-ordinate Judiciary of Gilgit-Baltistan for the detail reasons to be recorded later is disposed of in the following manner.
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> The Secretary Law, the Deputy Secretary Finance Budget, Registrar Chief Court, have explained the matter in detail. Learned Advocate General and learned Amicus Mr. Muhammad Issa, Sr. Advocate President Supreme Court Bar Association and Mr. Manzoor Ahmed Advocate President Chief Court Bar Association have addressed the Court at length on the subject and submitted that in all the four provinces of Pakistan, the judicial officers in the sub-ordinate judiciary have been up-graded and that in principle the judicial officer in the sub- ordinate judiciary of Gilgit-Baltistan would also entitled to the same benefit of up-gradation. The learned Amicus have argued that notwithstanding the fact that decision taken by the National Judicial (Policy Making) Committee of Pakistan may not have the binding force in Gilgit-Baltistan, but the same having persuasive value may be followed for the purpose of reformation in the judicial service of Gilgit-Baltistan.
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> Mr. Muhammad Saleem, Deputy Secretary, Budget, Finance states that the Finance Department Gilgit-Baltistan may give sanction for the expenditure involved in a matter beyond the allocated budget but the sanction for expenditure of Government of Gilgit-Baltistan beyond the financial grant given by the Federal Government is in the competence of Finance Division of Government of Pakistan. The annual budget of
> Government of Gilgit-Baltistan is prepared by Finance Department of Gilgit-Baltistan for approval by the concerned quarters in Federal Government and in future under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, the budget will be submitted to the Legislative Assembly of

Gilgit-Baltistan for approval. The Deputy Secretary states that the Superior Judiciary in Gilgit-Baltistan is independent in its affairs including financial matters within the allocated budget and up-gradation of Judicial Officers of Sub-ordinate Judiciary in Gilgit-Baltistan is entirely within the competence and domain of Chief Court and that the expenditure involved therein beyond the allocated budget can be sanctioned by the Finance Department with the approval of Chief Secretary Gilgit-Baltistan.

The Secretary Law department Gilgit-Baltistan has stated that:--

(a) Sub-ordinate Judiciary in Gilgit-Baltistan is under the direct control and supervision of the Chief Court as envisaged in Article 76 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 and subject to the provision of expenditure involved therein the Chief Court may up-grade the Judicial Officers in the sub-ordinate judiciary.

(b) The down gradation of Sessions Divisions of district Ghanchay, Istore and Ghizar would amount direct interference in the Judicial affairs and independence of judiciary in conflict to the provision of Article 175 of the Constitution of Pakistan.

Gilgit-Baltistan is part of Pakistan and by following Judicial Policy enforced in Pakistan, the judiciary of Gilgit -Baltistan would certainly be benefited and the disparity in the standard of judicial service of Gilgit- Baltistan would certainly be removed which would advance the cause of independence of judiciary. The Supreme Court of Pakistan in Sharaf Faridi's case PLD 1994 SC 104 held that the Independence of Judiciary means:--

That every Judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without improper influences, inducements or pressures, direct or indirect, from any quarter

or for any reason; and that the judiciary is independent of the Executive and Legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature."

The apex Court of the Country also held that the Government of Pakistan will not require the superior Courts of Pakistan to seek approval for incurring expenditure on any item form the funds allocated for them in the annual budgets provided the expenditure incurred falls within the limit of the sanctioned budget.

In consequence thereto the Finance Division, Government of Pakistan issued Office Memorandum on 24-11-1993 as under:--

"In pursuance of Judgment in Civil Appeals Nos. 105-K to 107-K of 1989 dated 31-03-1993, and in relaxation of

provision contained in Finance Division's OM dated 11-03-1981 the following financial powers will be exercised by the Chief Justice of Supreme Court of Pakistan with immediate effect:--

Full powers to reappropriate funds from one head of account to another head of account, to sanction expenditure on any item, to create new posts and abolish old posts, to change nomenclature and upgrade/down grade any post, provided expenditure is met form within the overall allocated budget of Supreme Court."

The above rule ipso facto will be applicable to the judiciary of Gilgit-Baltistan without any exception. The concept of independence of judiciary is not confined only to the person of judicial officers rather judicial independence mostly depends on administrative and financial independence. The interference of executive in the affaires of judiciary with respect to the prospect of their service and terms and condition of service directly or indirectly may effect the independence of judiciary. The better service status with better terms and condition may ensure the independence of judicial officer to the expectation of a common man.

This has been brought to our notice that the matter relating to the up-gradation of Judicial Officers in the sub-ordinate judiciary of Gilgit-Baltistan remained under consideration with KA&NA Division, Government of Pakistan for a considerable period without any progress and now on the enforcement of Gilgit- Baltistan (Improvement and Self Government) Order, 2009, the Government of Gilgit-Baltistan without interference of Government of Pakistan can remove the financial constraint of the Chief Court in respect of expenditure involved in up-gradation of Judicial Officers of the sub-ordinate judiciary of Gilgit-Baltistan.

Under Northern Areas Governance Order 1994 and now under Gilgit-Baltistan (Improvement and Self Government) Order, 2009 the superior judiciary of Gilgit-Baltistan has been placed at par to the superior judiciary of Pakistan and on the basis of same principal, the sub- ordinate judiciary in Gilgit-Baltistan must be treated at par to that of the sub-ordinate judiciary in the provinces of Pakistan and it would be fair to follow the policy of the High Courts in the provinces of Pakistan regarding up-gradation of Judicial Officers in the sub-ordinate judiciary. The notifications on the subject issued by the High Courts in the country are available on record for perusal and guidance.

Consequently with a view to remove the disparity in the status and standard of judicial service in Gilgit-Baltistan and to bring it at par to the Judicial service in the provinces of Pakistan, we in the light of principal of fair and equal treatment hold that the Judicial officers of sub-ordinate judiciary of Gilgit-Baltistan would be entitled to the benefit of up-gradation.

Resultantly the Chief Court Gilgit-Baltistan in the light of above declaration and in exercise of powers conferred to it under Gilgit-Baltistan (Improvement and Self Government) Order, 2009 will initiate the process of up- gradation of Judicial Officers of the sub- ordinate judiciary in the same manner as has been done by the High Courts in the Provinces. The process of up-gradation may be finalized before 01-01-2010 and expenditure incurred therein beyond the allocated budget will be provided by the Finance Department of Gilgit-Baltistan."

7. Gilgit-Baltistan is virtually part of Federation of Pakistan but this area as such is not defined as territory of Pakistan in Article 1 of the Constitution of Pakistan wherein it is provided as under:--

"**1. The Republic and its territories**

(1) Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan, hereinafter referred to as Pakistan.

2. The territories of Pakistan shall comprise :--

(a) the Provinces of Baluchistan, the North-West Frontier, the Punjab and Sind;

(b) the Islamabad Capital Territory, hereinafter referred to as the Federal Capital;

(c) Federally Administered Tribal Areas; and

(d) such States and territories as are or may be included in Pakistan, whether by accession or otherwise.

(3) [Majlis-e-Shoora (Parliament)] may by law admit into the Federation new States or areas on such terms and conditions as it thinks fit.]"

8. In the light of above definition of territory of Pakistan, Gilgit-Baltistan by virtue of Article 1(2)(d) of the Constitution of Pakistan for all intends and purposes is part of Pakistan and with the system of self governance on the basis of provisional setup has internal independence. The Governor Gilgit-Baltistan is representative of the Chairman of Gilgit-Baltistan who is Prime Minister of Pakistan whereas the Chief Minister is Chief Executive of the Government of Gilgit-Baltistan established under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009.

9. Gilgit-Baltistan geographically is situated in the Northern Areas of Pakistan having the boundaries with china India and Afghanistan. This area having direct link with province of NWFP (Khyber Pakhtoon Khwa) and Capital Territory of Islamabad is traditionally a natural part of Pakistan. The fundamental principles for guidance of the state Government in Pakistan have been laid down in Objective Resolution which was passed by the constituent assembly of Pakistan in 1949 and this resolution by virtue of Article 2-A of the Constitution of Pakistan 1973 has been made substantive part of the

Constitution which provides that the principle of democracy, freedom, equality and social justice as annunciated by Islam shall be observed in Pakistan to enable the Muslims to order their life in accordance with teaching and requirements of Islam. The right of minorities to freely profess and practice their religion was also recognized and in addition to the Fundamental Rights the independence of judiciary was also assured. This Resolution further provides that sovereignty over the entire universe belongs to Allah Almighty and the authority delegated to the people of Pakistan is only a sacred trust.

10. In the light of the principle laid down in objective resolution, the committee in the Assembly on Constitution submitted a report with

the recommendation of setting up of Supreme Court of Pakistan and High Courts in each province. This report was under process of consideration when the Governor General in 1954 dissolved the constituent Assembly as a result of which there was political unrest in the country. The order of dissolution of assembly was however challenged by the Speaker of the Assembly (Molvi Tamiz uddin) before the Chief Court Sindh and the Chief Court declared the order of dissolution of assembly illegal which was challenged by the Federal Government before the Federal Court and the apex Court of the country setting aside the order of Chief Court held that Governor General in exercise of the power under the Indian Independence Act 1947 could dissolve the assembly. In consequence to the political and constitutional crises, the promulgation of the Constitution of Islamic Republic of Pakistan was delayed which was ultimately given on 23rd March 1956. The uncertainty due to the lack of leadership and political instability created abnormal situation in the country as a result of which General Muhammad Ayub Khan the then Commander in Chief of Pakistan Army in October 1958 by abrogating the Constitution imposed Martial Law in Country and subsequently by giving the Constitution of 1962 with presidential form of Government assumed the office of President of Pakistan. The Supreme Court of Pakistan validating the military takeover by General Ayub Khan in Dosso's Case (PLD 1958 SC 533) performed the judicial functions under the command of Martial Law authorities. The Presidential form of Government introduced in the Constitution of Pakistan 1962 continued in Pakistan till the resignation of General Ayub Khan from the office of President of Pakistan due to the political unrest and crises in the country and General Yahya Khan the then Chief of Army Staff by promulgating Martial Law in the country, took over the office of President as Chief Martial Law Administrator in 1969. The general elections were held in the country in 1970 as a result of which Pakistan People Party headed by late Zulfiqar Ali Bhutto appeared at the scene as majority party in West Pakistan whereas in East Pakistan Awami League of Shaikh Mujeeb-ur-Rehman succeeded with majority. Unfortunately in 1971, due to militancy in East Pakistan the country was disintegrated and territory of Pakistan was reduced to West Pakistan whereas East Pakistan became Bangladesh as an independent country. Late Zulfiqar Ali Bhutto replacing Gen. Yahya Khan assumed the Office of President and Chief Martial Law Administrator and as stopgap arrangement promulgated interim Constitution of Pakistan 1972. The superior Courts in Pakistan in the

intervening period performed functions under the Martial Law Administration and this position continued till promulgation of the Constitution of Islamic Republic of Pakistan 1973. The Political

Government setup under the Constitution of 1973 was quite satisfactorily running the affairs of country but misfortune of the nation that in 1977 a serious political disturbance happened in Pakistan and Civil Administration failed to control the law and order situation as a result of which the then Chief of Army Staff General Zia- ul-Haq on 05th July 1977 through Military coup took over the reign of Government and under the umbrella of Martial Law held the Constitution in abeyance. The Supreme Court of Pakistan in Nusrat Bhutto's Case validated the Military action on the basis of doctrine of necessity and continued to discharge their function under the command of Martial Law regime. Later, in 1981, Chief Martial Administrator proclaiming Provisional Constitutional Order required the judges of Superior Courts in Pakistan to take oath under Provisional Constitutional Order 1981 and except Mr. Justice Anwar-ul-Haq the then Chief Justice of Pakistan and Mr. Justice K. A. Samdhani a senior judge of Lahore High Court, all other judges willingly took oath of their respective offices under Provisional Constitutional Order 1981. This position continued and Superior Courts in Pakistan have regularly been discharging their function under PCO 1981 till the restoration of Constitution of Pakistan 1973 through the Revival of Constitution Order 1985. The Political change in the country created a strong feeling in the public that Military coup was a past and closed chapter in Pakistan and a civilized society with the culture of rule of law would develop and country as per expectation of people would be put on the path of socio economic development in true spirit of the Constitution as a Muslim state but unfortunately in 1999, due to the personal differences of the then Prime Minister of Pakistan (Mian Muhammad Nawaz Sharif) with the then Chief of Army Staff (General Pervez Musharraf) led to create a situation in which the Prime Minister made an attempt to remove the Army Chief from his office and in retaliation the Army Chief taking Military action declared emergency in the country on 12th October 1999 with dismissal of civil Government. The Constitution was once again held in abeyance with dissolution of National and Provincial Assemblies and nation was made to face the political and constitutional crises. General Pervez Musharraf assuming the office of Chief Executive of Pakistan promulgated Oath of Office of judges Order 2000 requiring the Judges of the Supreme Court and High Courts in Pakistan to take oath of their offices under Oath of Office of Judges Order 2000 and except Mr. Justice Saeed-uz-Zaman Siddiqui the then Chief Justice of Pakistan with his colleague Judges in the Supreme Court of Pakistan Mr. Justice Nasir Aslam Zahid, Mr. Justice Wajih Uddin Ahmed, Mr. Justice Mamoon Qazi, Mr. Justice Kamal Mansoor and Mr. Justice Khalil-ur-Rehman Khan all other judges in
the Supreme Court and High Courts anxiously took oath under Oath of Office of Judges Order 2000 so much so some of the judges took oath twice under this Order first as judge of the High Court and then as Judge of the Supreme Court of Pakistan. This unconstitutional takeover of Government by General Pervez Musharraf was

challenged by Zafar Ali Shah, a senior advocate of Islamabad and MNA of Muslim League (N) before the Supreme Court of Pakistan (PLD 2000 SC 869) and Supreme Court not only gave verdict in favour of Military Take Over on the basis of doctrine of necessity but also permitted the Chief of Army Staff and Chief Executive to amend the Constitution. In consequence thereto Legal Framework Order was issued by virtue of which amendments were made in the Constitution. The general elections were held and General Pervez Musharraf removing the then elected President Justice Muhammad Rafiq Tarrar himself assumed the office of President of Pakistan. The Oath of Office of Judges Order 2000 which was part of Legal Framework Order was subsequently protected by the parliament in 17th Amendment of the Constitution by virtue of which amendments made in the Constitution through Legal Framework Order were inserted in the Constitution and General Pervez Musharraf notwithstanding the constitutional bar was allowed to continue to hold the office of President alongwith the office of Chief of Army Staff. The political scenario in the country was again changed when in October 2007 a direct petition under Article 184(3) of the Constitution was bought before the Supreme Court of Pakistan involving the question relating to the qualification of General Pervez Musharraf as candidate in the election for Office of President for the second term. General Pervez Musharraf visualizing that Supreme Court may give verdict adverse to his interest, promulgated the emergency in the country with Provisional Constitutional Order of Oath of Office of Judges on 3rd November 2007 and having not called a large number of judges of the superior Courts for oath under PCO of 2007 unconstitutionally removed them from their offices which led to the judicial crises in Pakistan.

11. The political and constitutional crises in Pakistan since the dissolution of Assembly by the Governor General in 1954 would show that the Supreme Court of Pakistan throughout without taking any exception to the extra constitutional measure adopted by the Governor General and Military Rulers to change the constitutional Governments validated their unconstitutional actions. The situation was changed when Mr. Justice Iftikhar Muhammad Chaudhary the Chief Justice of Pakistan on 09th March 2007 refused to tender resignation from the office of Chief Justice on demand of President General Pervez Musharraf and with aggressive support of lawyers community contested the reference filed against him by the President under Article 209 of the Constitution which was subsequently quashed by the Supreme Court of Pakistan in a Petition under Article 184(3) of the Constitution of Pakistan and also forcefully resisted the unconstitutional action taken by General Pervez Musharraf on 3rd November 2007.

12. The Judiciary in Gilgit-Baltistan in the above circumstances in Pakistan was also not independent and was facing an oppressive atmosphere, therefore, it was difficult for the Superior Courts in Gilgit-Baltistan i.e. Chief Court and Court of Appeal now Supreme Appellate Court established under the Northern Areas Governance Order 1994 since repealed by Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 to assert for the

independence of Judiciary in Gilgit-Baltistan.

13. Prior to 1972 there were no regular Courts in Gilgit-Baltistan and judicial powers were being exercised by the Executive authorities under Frontier Crimes Regulation. The Political Agent was exercising the Power of District & Sessions Judge whereas the Assistant Political Agent and Tehsildars were discharging the functions of Additional District and Sessions Judge and Civil Judges/Magistrates respectively whereas the resident Commissioner was appellate authority of the Political Agent with the power of the High Court. In 1972 on abolishment of FCR the laws of Pakistan were extended to Gilgit-Baltistan and whole area of Gilgit-Baltistan was declared as One Sessions Division with the appointment of a Sessions Judge at Gilgit and Civil Courts were also established.

14. The Court of resident Commissioner was substituted with the Court of Judicial Commissioner and later with the established of Skardu Sessions Division, five other districts were also created.

15. The Court of Judicial Commissioner was converted into Chief Court under Chief Court Establishment Order 1998 and in pursuance of the Judgment of Supreme Court of Pakistan in Al-Jehad Trust Case (1999 SCMR 1379) the Court of Appeal was also established in Gilgit Baltisan in 2005 which was subsequently converted into Supreme Appellate Court in 2007 equal to the status of Supreme Court of AJ&K and now under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 the Supreme Appellate Court has been given the status equal to the Supreme Court of Pakistan. This highest judicial forum with the status of apex Court in Gilgit-Baltistan is quite independent in its judicial and administrative functions as envisaged in Article 175 (3) of the Constitution of Pakistan read with Article 60 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009. The Supreme Appellate Court is also independent in its financial affairs within the allocated budget in terms of circular letter dated 24-11-1993 of Ministry of Finance, Government of Pakistan read with Letter No. F.3 (9)/2005 dated 18-11-2005 issued by the KA&NA Division in pursuance of the judgment of the Supreme Court of Pakistan in the case "Government of Sindh V. Sharaf Faridi" (PLD 1994 SC 105) as under:--

"Government of Pakistan
Finance Division
(Expenditure Wing)

No. F.1 (5) R-12/81 Islamabad, the 24th November, 1993

OFFICE MEMORANDUM

Subject: **REVISED SYSTEM OF FINANCIAL CONTROL, AND BUDGETING FINANCIAL INDEPENDENCE OF JUDICIARY.**

The undersigned is directed to refer to Finance Division's OM of even number dated 11-03- 1981 on the above cited subject and to state that in pursuance of judgment in Civil Appeals No. 105-K to 107-K of 1989 and in relaxation of provision

continued in the above referred OM., the following financial powers will be exercised by the Chief Justice of Supreme Court of Pakistan with immediate effect:--

(i) Full powers to reappropriate funds from one head of account to another head of account within the allocated budget of the Supreme Court.

(ii) Full powers to sanction expenditure on any item from within the allocated budget of Supreme Court.

(iii) Full powers to create new posts and abolish old posts provided that expenditure is me from within the allocated budget of Supreme Court.

(iv) Full powers to change nomenclature and upgrade/down grade any post provided expenditure is met from within the overall allocated budget of Supreme Court.

-Sd-Joint Secretary"

16. The Government of Azad Jammu and Kashmir following the same rule has also delegated financial powers to the Chief Justices of the Superior Courts in the following manner:--

"Azad Government of the State of Jammu and Kashmir
Finance Department

"Muzaffarabad " Dated: March 2, 2006

NOTIFICATION

No. FD/R/(84)/06 In exercise of the powers conferred by Section 58 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, the President is pleased to direct that the following amendments shall be made in the Azad Jammu and Kashmir Delegation of Powers Rules, 1994, namely:--

In the said Rules, in Part II,

(a) Before `Housing and Physical Planning Department', following new departments shall be inserted:-

"SUPREME COURT, HIGH COURT AND SHARIAT COURT"

1. The Chief Justice of AJK Supreme Court/High Court/Shariat Court shall exercise following financial powers:--

(i) Full powers to reappropriate funds from one head of account to another head of account within the allocated budget of the Supreme Court/High Court/Shariat Court AJK.

(ii) Full powers to sanction expenditure on any item

from within the allocated budget of Supreme Court/ High Court/Shariat Court AJK.

(iii) Full powers to create new posts and abolish old posts provided that expenditure is me from within the allocated budget of Supreme Court/ High Court/Shariat Court AJK.

(iv) Full powers to change nomenclature and upgrade/down grade any post, provided expenditure is met from within the overall allocated budget of Supreme Court/ High Court/Shariat Court AJK.

2. Notification No. FDR-1(506)/98/2002 dated 20.02.2002 shall stand cancelled with immediate effect.

-Sd-
Section Officer Finance
(Regulation)"

17. The letter No. F.3 (9)/2005 of KA&NA Division of Government of Pakistan dated 18-11-2005 is read as under:--

"No. F.3 (9)/2005
Government of Pakistan
Kashmir Affairs & Northern Areas Division

Islamabad, the 18th November, 2005.

To

The Chairman,
Court of Appeals,
Northern Areas,
Gilgit.

Subject:-- **DELEGATION OF ADMINISTRATIVE/ FINANCIAL POWERS TO CHAIRMAN, COURT OF APPEALS, NORTHERN AREAS, GILGIT.**

Dear Sir,

I am directed to refer to Chairman, Court of Appeals letter No. 1/2005-CA dated 10th November, 2005 on the subject noted above.

2. The Minister for Kashmir Affairs & Northern Areas/Chief Executive Northern Areas has been pleased to delegate the same Administrative/Financial powers to Chairman, Court of Appeals, Northern Areas as in the Case of Chairman, Chief Court, Northern Areas. A copy of same is enclosed.

Yours faithfully

-Sd-
Section Officer"

18. The Supreme Court of Pakistan visualizing the undue interference of executive authorities of state in the affairs of judiciary with reference to Article 175(3) of the Constitution of Pakistan in Sharaf Faridi's Case (PLD 1994 SC 105) held that real purpose of independence of judiciary cannot be achieved without complete judicial, administrative and financial independence. In the light of principle laid down in the above case the personal conduct of a judge and impartiality of the Courts in the decisions of the cases is equally essential for independence of judiciary as the outside interference or environmental influences may reflect upon the decisions of the Courts and may impaired the impartiality and independence of the Judiciary as an institution.

19. The sound judicial system is always back bone of strong socio economic and political system which is not only an essential and important organ of State, but is also a rich source of conducive atmosphere for progress and prosperity in the society. The judicial system in Gilgit-Baltistan is based on time tested Judicial system of Pakistan and the people generally have the trust and confidence in the system, therefore it is legal and moral obligation of the Government of Gilgit-Baltistan to make judicial reforms and ensure independence of the judiciary for better administration of justice in the light of principles laid down by the Supreme Court of Pakistan governing independence of judiciary in Sharaf Faridi's Case (PLD 1994 SC 105), Malik Asad and other v. Federation of Pakistan (PLD 1998 SC 161) and Al Jehad Trust's case (PLD 1996 SC 396).

20. The territory of Gilgit-Baltistan is considered as a part of Pakistan by virtue of Article 1(2)(d) of the Constitution of Pakistan 1973 and Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 has the status of an order issued under Article 258 of the Constitution of Pakistan and consequently the judgments of the Supreme Court of Pakistan may have more than persuasive value in Gilgit-Baltistan and also are followed with full effect therefore the Provincial Government of Gilgit-Baltistan is under obligation to ensure independence of judiciary in Gilgit-Baltistan in accordance with the policy of law in Pakistan as the complete independence of judiciary in Gilgit-Baltistan as an institution is still not visible in financial matters and this state of affairs may reflect upon the decision of the Courts and disturb the judicial system and norms to maintain the independence of judiciary.

21. This was misfortune of Pakistan that the executives authorities of the Government instead of making efforts to establish rule of law have always followed the policy of suppressing the independence of judiciary for administrative reasons and considerations. The rule of law is based on the concept of administration of justice which is promised on presumption that people are legally literate and are aware to their rights guaranteed under the law and Constitution but without actual legal literacy, the rule of law which is core basis of constitutionalism is not possible in true sense because the lack of legal literacy makes the ignorant masses venerable to deception, deprivation and exploitation. The

protection of the legal rights of the people is not exclusive function of the Court rather the executive authorities are equally under the legal and moral obligation to protect such rights of the people and safeguard the interest of a common man, therefore it is essential to promote the judicial training and legal education for awareness of the people about their legal right and duties in the society. The Constitution of Pakistan 1973 in Article 3 provides for the elimination of exploitation in all forms and recognizes the right of each according to his ability and each according to his work. This article ensures the due share of people in the national life whereas under Article 4 and 25 of the Constitution there is guarantee of equality before law and equal protection of law. The loyalty of the State is inviolable obligation of every citizen under Article 5 of the Constitution of Pakistan 1973 which has direct nexus with Article 6 of the Constitution.

22. The Judiciary has important role in maintaining the rule of law which is not an abstract consideration rather it is living faith which derives its inspiration from Constitutional character, therefore, the Courts are required to jealously guard the legal rights of the citizens independently and while exercising judicial powers, must act strictly in accordance with law following the principle of Judicial restraint. The independence of judiciary in the expectations of people lies in their faith of true service and confidence of impartiality of the judicial Officers as a member of institution. The concept of administration of justice is based on the principle that justice is not only to be done rather it should also be seen to have been done and unfair conduct of judicial officer in discharge of judicial functions may negate this concept in the administration of justice and rule of law.

23. The concept of independence of judiciary is recognized in all civilized countries which is not popular concept only in advanced countries or the countries which have written Constitution rather the universally recognized concept is that the basic function of the judiciary in a political governance system is settlement of Civil and Criminal disputes between the litigants in an impartial and quite independent manner on the basis of facts of the case, brought before the Court strictly in accordance with fair application of law. The superior Courts in a country also discharge important function of interpretation of laws on the basis of settled principles of law, equity and good conscience. The principle of interpretation of law is to remove the ambiguity if any appearing in a provision without any substantive change in such provision and principle of the interpretation of the Constitution is not different to that of the ordinary law with the exception that a provision of the Constitution is not struck down or held redundant to give effect to another provision rather in case of any conflict harmonious interpretation is made to avoid such conflict without change of character of any provision. The superior Courts can declare a substantive law ultra vires if it is found inconsistent with any provision of the Constitution and this power of the superior Court is called power of Judicial Review which also includes the scrutiny and examination of the action of the executive branch of the Government. The Judicial Review of the Courts is an old concept in the administration of justice and superior Courts while interpreting provision of the Constitution may declare a law made by

legislature ultra vires to the Constitution if it is not in accordance with the provisions of the Constitution but this power is not used in the discretion of judges rather in the broader sense it is used proactively with judicial restraint. The power of judicial review is an instrument of the Courts to maintain their independence in respect of discharge of their duty qua the scrutiny of executive actions. This is settled principle of law that in exercise of the power of Judicial Review the Courts cannot question the veracity of the different policies of the Government rather the domain of the Courts is confined to the extend of legal and procedural aspect of the matters and to watch the public authorities not to act or proceed in violation of the law and procedure provided in the law. The violation of law of procedure or mis-application of the substantive provisions of the law by the authorities in departure to the settled principles of law is directly or indirectly abuse of authority of law and Courts in exercise of power of Judicial Review may in such matters give an independent verdict of law.

24. The judicial independence of Courts without power to judicial review of the action of executive branch of the Government may not advance the cause of justice and rule of law to the entire satisfaction of administration of justice and for the purpose of exercise of power of judicial review the essential question for determination would be as to whether an action of a Governmental entity give rise to state action for the purpose of constitutional limitation and violation or not. The violation of civil rights or constitutional provisions by a private person may not be at par to the state action for judicial determination by the constitutional Courts in exercise of power of judicial review but an action in official authority is a Governmental action which is considered state action for the purpose of judicial review and superior Courts in Pakistan without modifying the strict rule of judicial review concerning state action, have developed a series of theories that an extra constitutional activity by a state authority in a particular situation might be justified in the larger interest of the state and in such cases of state action, a state authority may on the basis of national interest and state necessity claim immunity from individual liability. Consequently the determination of legality of state action in such cases except as public function is based on the relationship between the state authority and individual responsibility for an unconstitutional activity. There may not be any justification for a wrong action by a state authority on the ground of public interest but the situation must be distinguished from the cases involving defacto authorization to a state authority for an action taken in official capacity which by inception may have the color of law. The Courts in exercise of power of judicial review may declare an extra constitutional action taken by the state authority as illegal and unconstitutional but may not be justified to undo the steps taken in consequence to such action in public interest or proceed against the individuals who acted under the command of wrong action of state authority. The exercise of judicial authority beyond the scope of concept of judicial review may be wrong and violation of guarantee of equal protection which is available to all individuals under the Constitution. The exercise of jurisdiction in excess of judicial authority may be in derogation to the fair treatment, rule of law, and equal protection of law which may cause serious damage to the concept of independence of judiciary.

25. The Courts generally hesitate to exercise any authority in the area which exceeds the scope of express constitutional and legal grants, and notwithstanding the power of judicial review of superior Courts in respect of legislature and executive acts to insure the conformance of such acts with constitutional provisions and determination of an issue involving a political question is an important exception to the power of judicial review and Courts usually show reluctance to enter into such question. This is settled principle of judicial review that in order to maintain judicial independence and integrity the Courts always refrain from reviewing executive and legislature action relating to public policy and involving political question. Therefore in the light of principle of separation of powers this is not proper for the Courts to entertain the matters involving political question or policy decision, which for the purpose of internal business of Government fall exclusively within the ambit of executive authorities. There can be no exception to the rule that if a matter is within exclusive domain of executive or legislative authority of the state the Courts cannot in exercise of power of judicial review interfere in the decision taken by such authorities within the area of their prerogative and this is established practice that even in the area in which the power of executive and legislature is not clear, the Courts may not override the executive authority rather burden is put on legislature to settle the issue by act of parliament.

26. The Courts traditionally have been reluctant to enter into political controversies and policy decisions because such matters are settled by political and non political people through negotiation and mutual understanding which cannot be decided through judicial process rather the Courts in the light of principle of judicial review and maxim of judicial restrain can define the relative scope of executive and legislative power in the light of explicit constitutional and legal provisions.

27. The Legislature, Executive and Judiciary are three basic organs of state and these branches of the state have to discharge their functions on the basis of principle of trichotomy of Powers in a political system of governance. The discharge of functions by these organs of the state on the basis of theory of separation of powers is always considered essential for good governance, notwithstanding the fact that complete separation of power may also be equally dangerous for the existence of the state and consequently the independent and strong judiciary is indispensable for security and protection of the rights and liberties of citizens and for accountability of public functionaries to note the use of the power.

28. The Judicial department of the state may have effective check on executive and legislative authorities of the state as an impartial body and guardian of the Constitution but this duty cannot be effectively performed by the judiciary without complete independence in its affairs and free from all outside influences. However it is necessary for judicial independence that judicial officers and judges of the sub-ordinate and superior Courts must be the person of high caliber and sound integrity with good reputation, who are also the men of knowledge and jurisprudential approach. The

required standard of independence of judiciary cannot be maintained without independent and transparent method of appointment of Judges. The unquestionable discretion of the executive or Judicial authorities in the appointment of Judges is not proper which may invite controversies and also involve personal choice or liking and disliking of the concerned authorities, therefore may not be transparent to satisfy the required standard. The proposal regarding the method of appointment of Judges in the Superior Courts on the recommendation of an independent Judicial Commission may be more transparent to ensure the independence of the institution but the proposal regarding system of appointment of judges exclusively on the recommendation of a judicial commission with the involvement of a committee of the parliament may not be practicable due to the political atmosphere of the country. Therefore the most beneficial method appears to be the combination of Judicial and Executive authorities which must be an independent body constituted of persons of independent reputation free from any political and Governmental interest or judicial influence.

29. The security of tenure of the judges is most essential for the independence of judiciary as without the protection of tenure a judge may not be able to discharge his duty with free mind. The removal of the judges of the superior Courts from the office except in the manner provided in the Constitution of Pakistan and Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, is direct attack on the independence of Judiciary and is serious threat to the rule of law. The protection of the tenure of judges with better terms and condition of service is essential for their impartiality in the judicial conduct and independence in their functions.

30. The Supreme Court of Pakistan in Sharaf Faridi's Case (PLD 1994 SC 105) and in Aljahad Trust Case (PLD 1996 SC 342 and 1999 SCMR 1379) while discussing the questions relating to the independence of judiciary and the separation of powers has strongly observed that the method of appointment of judges of superior Courts and protection of their tenure has close nexus with their independence and in Asad Ali's Case (PLD 1998 SC 161) on the basis of convention held that most senior judge of the Supreme Court in absence of any valid reason must be appointed as Chief Justice of the Court.

31. The concept of independence of the Judiciary is based on the notion that a judge is free to decide matter before him in accordance to his assessment of facts and understanding of the law without outside influence or amusement and direct or indirect pressure from any quarter. It is thus expected that the judicial authorities must exercise jurisdiction in judicial matters to the entire satisfaction of law and discharge their function quite independently and free of the influence of executive and legislature. The Supreme Court of Pakistan interpreting the provision of Article 175 (3) of the Constitution of Pakistan in Sharaf Faridi's Case supra laid down the guideline for the independence and separation of judiciary from the executive and in the light thereof Ministry of Finance, Government of

Pakistan has issued a circular letter No. F.1(5)R-12/81 dated 26-11-1993 regarding the financial power of the Chief Justice in respect of reappropriation of the funds, creation of new posts, abolishment of old post or change of a nomenclature of post and also to upgrade or down grade any post without interference of the executive within allocated budget.

32. The judicial conduct of the Superior Courts in the imbalanced political and constitutional atmosphere in Pakistan has been under serious criticism as a burning question although the Courts generally have been discharging their functions to the satisfaction of law and concept of justice with fair play and good conscious which is reflected in various judgments rendered by the superior Courts in Pakistan but it is evident from the judicial history of Pakistan, that institution of judiciary due to constant influence of executive could not ensure complete independence in the expectations of the people. The common person in the society of limited resources may not have proper access to justice for exercise of legal rights before the Courts and further the technical procedure and long delay in final settlement of the disputes also discourage a common person to bring his grievance to the Courts as with the passage of time the real purpose and importance of decision may lose its value in ground reality which certainly seriously reflect upon the faith of a common person on the independence of judiciary as an institution and consequently instead of seeking legal remedy before the Court he would prefer to settle the dispute through alternate methods. The public confidence in the institution of judiciary cannot be built merely on the basis of publicity or projection of the judgments and the public issues in the judicial seminars and conferences rather the people expect real and substantial justice from the Courts of law.

33. This is a matter of common knowledge that without following the principle of fair application of law and judicial restraint a judgment of the Court may not have the characteristics of an independent and impartial judgment and may not safeguard the mandate of law and interest of justice. The popular judicial decision may be good for public consumption but may not serve the real purpose rather may offend the judicial norms and lower the image of the Court in the eye of a common man. The popular judgments are not always balanced judgments and may not essentially satisfy the requirement of impartiality and neutrality which are basis of concept of independence of judiciary and administration of justice.

34. This is general perception that defective judicial system in Pakistan and impartiality of judicial authorities is main cause of thepoor dispensation of administration of justice and past judicial history of Pakistan would show that this perception was not unfounded. The Supreme Court of Pakistan in Molvi Tamizuddin's case (PLD 1955 FC 240) in suppression of the recognized principle of the Constitution and rule of law preferred to give legal cover to the unconstitutional action of dissolution of assembly by Governor General. In Doso's Case (PLD 1958 SC 533) the Supreme Court of Pakistan introducing the revolutionary theory justified the military coup

and recognized the principle of `might is right' for the change of political Government. In Shorish Kashmiri's Case (PLD 1969 SC 14) and Baqi Baloch's Case (PLD 68 SC 313) the Supreme Court of Pakistan applying the test of reasonableness held that in the matter of preventive detention the Court cannot substitute its opinion for the satisfaction of the detaining authority. The above unfluctuative judgments of the Supreme Court of Pakistan would apparently show the executive influence on the judiciary. The Supreme Court of Pakistan in Asma Jilani's case (PLD 1972 SC 139) declared Gen. Yahya Khan usurper at the time, when he was no more in power and applying the principle of continence and condonation validated the acts done by him in larger interest of the country but surprisingly to the contrary in Nusrat Bhutto's case (PLD 1977 SC 657) held that Military take over by General Zia-ul-Haq in the circumstances prevailing in the country was State necessity. The Supreme Court of Pakistan applying the same test in Zafar Ali Shah's Case (PLD 2000 SC 869) and in Iqbal Tikka Khan's case (PLD 2008 SC 178) justified the extra constitutional action taken by General Pervez Musharraf firstly on 12th October 1999 and secondly on 03rd November 2007. The Supreme Court of Pakistan also laid down the principle of Judicial Independence and rule of law in some of the cases of constitutional importance mentioned herein below:--

> Federation of Pakistan v. Haji Muhammad Saifullah Khan (PLD 1989 SC 166), Ahmad Tariq Rahim v. Federation of Pakistan (PLD 1992 SC 646), Muhammad Nawaz Sharif v. President of Pakistan (PLD 1993 SC 473), Benazir Bhutto v. Farooq Ahmad Khan Leghari (PLD 1998 SC 388), Sabir Shah v. Federation of Pakistan (PLD 1994 SC 738), Al-Jehad Trust v. Federation of Pakistan (1999 SCMR 1379), Asad Ali v. Federation of Pakistan (PLD 1998 SC 161), Mahmood Khan Achakzai v. Federation of Pakistan (PLD 1997 SC 416), Farooq Ahmad Khan Leghari v. Federation of Pakistan (PLD 1999 SC 57), Sh. Liaqat Hussain v. Federation of Pakistan (PLD 1999 SC 504).

35. Notwithstanding the above judgments of Supreme Court of Pakistan on rule of law and constitutional governance the superior judiciary in Pakistan has not been able to develop the culture of complete independence of the Judicial institution. The Courts in past generally have ignored the requirement of independence and impartiality in the matter of public and constitutional importance for political consideration or under the influence of vested interests. The Supreme Court of Pakistan not only on the basis of doctrine of necessity validated the unconstitutional action of Military take over in Nusrat Bhutto's case (PLD 1977 SC 657) Zafar Ali Shah's case (PLD 2000 SC 869) and in Tika Iqbal Muhammad Khan case (PLD 2008 SC 178) but also permitted the Military rulers to amend the Constitution for their convenience and day to day working. The Supreme Court of Pakistan however dealing with the question relating to the imposition of the emergency in the country with reference to Article 232 to 235 observed in an election matter Salahuddin Tirmizi v. Chief Election Commissioner and others (PLD 2008 SC 735) which was decided during the regime of General Pervez Musharraf, in which the judgment was authored by the author Judge of this judgment, held that emergency beyond the scope of Articles 232 to 235 of the

Constitution has no legal and moral justification and is unconstitutional. The relevant portion of the judgment is reproduced hereunder:--

> "19. The constitutional bar of jurisdiction certainly does not permit the Courts to dilate upon matter of the nature in which the Courts are precluded to exercise jurisdiction, including the proclamation of emergency in the country by virtue of Articles 232 to 235 of the Constitution but notwithstanding the ouster clause, the Superior Courts in exercise of their power of judicial review, may examine the circumstances calling for justification of such action of the executives affecting the fundamental rights of people. The superior Courts, in case of proclamation of emergency in the country in consequence to which Constitution is held in abeyance and is made inoperative, can also exercise power of judicial review which is inherent in the Superior Courts to examine the question regarding the existence of circumstances for justification of such extra constitutional action and State necessity.
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> 20. The question as to whether an action taken in deviation to the Constitution, except for the sake of integrity and solidarity of the country and protection of the Constitution itself is justified, cannot be answered in affirmative in the normalcircumstances and such an action is certainly subject to the judicial review of the superior Courts. There may be a situation leading to the imposition of emergency in the country through extra-constitutional measures in which the constitutional machinery of State becomes inoperative but there is no concept of proclamation of emergency while Constitution is operative except in the manner as provided under Articles 232 to 235 of the Constitution and an extra constitutional action by an executive authority while the Constitution is operative, may have no legal and moral justification. The Courts in such situation, being custodian of the constitution,, must protect the Constitution and must not condone extra constitutional action and permit impairing of the constitutional mandate except for the integrity of country or in case of external aggression against the State. There is a difference between the emergency under the Constitution and beyond the scope of constitutional provisions and also has different purposes and consequences therefore, contention of learned Attorney General that the Executive authorities have absolute power and authority to Judge the need of emergency and Court due to the bar contained in the Constitution, have no jurisdiction to interfere in the matter, is not correct interpretation of law".

36. The above observation having far reaching effect in principal would be applicable to emergency of 3rd November 2007 and all military coups in Pakistan with the principle of continence and condonence in the manner in Asma Jillani's Case (PLD 1972 SC 139). This observation was reaffirmed by the Supreme Court of Pakistan in

the subsequent judgment in the case of Sind High Court Bar Association v. Federation of Pakistan (PLD 2009 SC 897) authored by the Chief Justice (Mr. Justice Iftikhar Muhammad Chaudhary) in which the judgment in Iqbal Tikka Khan's case (PLD 2008 SC 178) was overruled and the action taken by General Pervez Musharraf on 3rd November 2007 was declared as illegal and ultra vires to the Constitution without declaring the similar action taken by General Pervez Musharraf on 12th October 1999 which was validated by the Supreme Court of Pakistan in Zafar Ali Shah's case and in consequence to which subsequently the Constitution was amended through Legal Frame Work Order which was made part of the Constitution through 17th amendment. The unique feature of 17th amendment was that General Pervez Musharraf was allowed to hold the office of President together with the office of the Chief of Army Staff. The direct petition under Article 184(3) of the Constitution brought before the Supreme Court of Pakistan challenging the constitutionality of certain provisions in 17th amendment including the provision relating to dual office of president was dismissed and the Judges of the superior Courts who have been functioning under the oath taken under PCO No. 1 of 2000 without taking fresh oath under the Constitution continued to discharge their function till proclamation of emergency in the county on 3rd November 2007 as a result of which a large number of judges of superior Courts ceased to hold the office for not given oath under Provisional Constitutional Order of Oath of Office of Judges 2007. There were two sets of judges in the superior Courts, prior to 3rd November 2007, one set was of the judges who had taken oath under PCO No 1 of 2000 and other set was of the judges who were appointed subsequent to the 17th amendment in the Constitution and before promulgation of emergency on 3rd November 2007 all the judges were part of the same judiciary. The extra constitutional measure adopted by General Pervez Musharraf for removal of judges from their office on 3rd November 2007 was badly condemned by the Lawyers community with the help of political parties and public in general as a result of which General Pervez Musharraf was compelled to tender resignation from the office of President. The successor elected Government following the mandate of Constitution proceeded to undo the wrong done by General Pervez Musharraf and Prime Minister of Pakistan by an Executive Order inducted the removed judges to their respective offices. This may be pointed out that prior to the action of 3rd November 2007, General Pervez Musharraf the then President sent a reference against the Chief Justice of Pakistan Mr. Justice Iftikhar Muhammad Chaudhary to the Supreme Judicial Counsel under Article 209 of the Constitution in March 2007 on his refusal to tender resignation from the office of Chief Justice of Pakistan and since this reference was not filed in good faith and Chief Justice was also restrained from discharging his functions, therefore the same was challenged by the Chief Justice via direct Petition under Article 184 (3) of the Constitution before the Supreme Court of Pakistan and the Court was unanimous in quashing the reference on the ground of malafide.

37. The above instances of constitutional violations brought a revolutionary change and lawyers community taking a very strong

exception to the above constitutional deviation by the executive fought for the cause of Independence of Judiciary. The judicial crises in 2007 in Pakistan was the result of the controversy on the candidature of General Pervez Musharraf to contest the election for the office of President for the second term. The opposing candidate Mr. Justice (R) Wajihuddin Ahmed, a former judge of Supreme Court of Pakistanfiled a direct petition under Article 184(3) of the Constitution before the Supreme Court seeking declaration that General Pervez Musharraf was not qualified to contest the election. Prior to this petition a similar petition was filed by Jamat-e-Islami through Amir and others (PLD 2009 SC 549) which was dismissed by the Supreme Court on the ground that direct petition under Article 184(3) of the Constitution in the matter was not maintainable as no fundamental right of any person other than the person whose candidature was being challenged in the petition was involved for adjudication and the interference of Court in the matter would amount to deny the right of a candidate to contest the election. However during the hearing of the second petition filed by Mr. Justice (R) Wajiuddin Ahmed the executive authorities of the state on the basis of certain observations made by the Supreme Court during the hearing of the case gathered an impression that Court would probably give verdict against General Pervez Musharraf therefore he in his capacity as Chief of Army Staff promulgated emergency in the country and held the Constitution in abeyance. The Oath of Office of Judges Order 2007 was issued and majority of Judges of Superior Courts having been not given oath ceased to be the judges.

38. The past experience of judicial and constitutional history of Pakistan would show that the concept of independence of judiciary was confined to the extend of the decisions of cases in private litigation without discharge of function as an independent institution in the matters of constitutional importance. The judges of the superior Courts in Pakistan have always been in favour of giving legitimation to the unconstitutional Governments of Army Generals and by taking oath of office under PCOs not only validated the Military takeovers but also allowed the Military rulers to amend the Constitution for their convenience which was beyond the power and authority of the Supreme Court of Pakistan. In the past the Judiciary in Pakistan was under the constant influence of executive and now the independence of judiciary due to the environmental and political influence, is under serious threat. The declaring of an action of executive on the policy decision as illegal may be treated a popular decision but practically such decision if is not based on the consideration of rule of law may not advance the cause of independence of judiciary. The general concept of independence of judiciary is that the judicial authorities must discharge their function free from any executive or political influence or institutional environment or personal liking or disliking or any consideration other than the will of law and in an Islamic society the concept of independence of judicial decisions is entirely based on the principle of fairness, equality, complete impartiality and neutrality in the command of Holy Quran and Sunnah of the Holy Prophet (PBUH)

39. In Islamic judicial system a Qazi or Judge has no immunity

for official or personal conduct in private or public life beyond the scope of law and the limits of Almighty Allah because a judicial officer in Islam is not free to act and proceed in the manner he likes and exercise unfettered discretion in giving decision in the matters brought before him rather under the dictate of Holy Quran and Sunnah, he has to act in all matters strictly in accordance with the law and injunctions of Islam in a quite impartial manner with complete independence and neutrality on the basis of factual position on record. The parties are at liberty to object to the improper manner of disposal of cases by the Judicial officer and point out the defect in dispensation of justice due to his personal interest or bias. Which may directly or indirectly effect his impartiality and neutrality. In Islam there is no restriction on healthy criticism on judicial or personal conduct of a judicial authority if such criticism is not frivolous and unfounded and on the basis of such expression of views in respect of conduct of judicial officers no person can be proceeded for the insult of Court whereas in commonly known administration of justice system such a person is liable to punishment. The concept of administration of justice in Islam can be understood from the letters addressed by Hazrat Omar رضی اللہ عنہ to Qazi Abu Musa Ashari and by Hazrat Ali رضی اللہ عنہ to Malik Ashdar, Governor of Egypt. The guidelines for a judicial officer with reference to the judicial system of Islam are also found in Khutbaat-e-Bahawalpur.

40. The judicial office is a trust and a person holding such office is a trustee who is severely accountable for his judicial duties because as a judicial officer in Islamic judicial system has to dispense justice strictly in accordance with the commandments of Allah and not for any other consideration. The judicial task is very sacred and judicial officer must be an honest and devoted person of high caliber and must discharge the duty of dispensation of justice quite fairly and honestly. The Holy Prophet PBUH by laying foundation of Islamic state himself by performing the sacred, noble and dignified duty of administration of justice, established the rule of law strictly in accordance with injunctions of Islam. Thus the position of a judicial officer in Islamic justice system is so crucial and delicate that he is accountable for his each and every action and deed and cannot fulfill the test unless he is a pious person who refrains from committing major sins and also is not in a habit of committing minor sins and thus a person who is profligate and fasiq or who commits major sins and also without any reluctance repeats minor sins is not qualified for appointment as a judicial Officer. The standard of character of a judicial officer is not to injure the feeling of a person for any consideration other than the will of Allah and the command of Holy Quran and Sunnah of Holy Prophit PBUH is that a judicial officer who does not follow the above rule of ethics he is not adil, Allah doth command you to render back your trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice: verily how excellent is the teaching which he giveth you for Allah is He Who heareth and seeth all thi"

41. The behavior of the judicial authorities must not be similar to that of the executive authorities and thus lack of tolerance, patience and courage to face healthy criticism in the defects in the judgments

may reflect his personal character and also seriously damage the concept of independence of Judiciary. This is normal practice that the judicial authorities loosing patience even to healthy criticism use the tool of contempt of Court to satisfy their personal ill-feelings about others in judicial proceedings and misuse the law of contempt of Court. The use of law of contempt was a rare phenomena and common practice was that law of contempt was not set at motion even in grave situations except in the extreme cases involving the dignity and honour of the Court and superior Courts only in exceptional circumstances, would initiate contempt proceedings against a common person and in case if an action would require against a judicial officer for his objectionable judicial conduct falling within the ambit of law of contempt, he would not be called in open Court rather would be called in Chamber to explain his position in the interest of honour, dignity and decorum of the institution of judiciary and also to save the judicial officer from disgrace. The above practice and principle of judicial restrained now is not followed with the spirit of tolerance rather this rule is applied to different persons and authorities in different manner in the same circumstances and situation. The use of law of contempt of Court against the judicial officer and judges of the same or superior Courts is in conflict to the concept of comity of Judges and may disgrace the institution. Mr. Justice Sardar Muhammad Raza Khan, a senior Judge of the Supreme Court of Pakistan sadly expressed in his dissenting note in the judgment in Review Petitions which arised out of the judgment dated 31st July 2009 of Supreme Court of Pakistan in consequence to which contempt notices were issued by the Court to the Judges of High Courts and Supreme Court of Pakistan for noncompliance of order passed by a seven member Bench of Supreme Court of Pakistan after proclamation of emergency in the country on 3rd November 2007 as under:--

> The background, the circumstances and detailed introduction has already been furnished by my Honourable brother Mr. Justice Javed Iqbal. Suffice it to say that the learned Judges of High Courts, affected by our judgment dated 31.7.2009 in Constitutional Petitions No.8 and 9 of 2009, through applications in hand, seek permission to get the judgment reviewed, on the ground, inter alia, that they had been condemned unheard. Majority held, through short order dated 13.10.2009, that the Reviews are not maintainable. With my humble comprehension of law and justice, I happened to dissent with the majority view.
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> Mr. Wasim Sajjad, learned Senior ASC was the first to initiate. His elaborate arguments were followed by rest of learned counsel, among whom, Shaikh Zameer Hussain, Malik Muhammad Qayyum, Mr. Khalid Ranjha, Syed Ali Zafar, Syed Naeem Bokhari and Dr. A. Basit, added their finishing notes. The caveat contentions were supported by Mr. Rashid A. Razvi, Mr. Hamid Khan, Mr. Muhammad Akram Sheikh; Mr. Shah Khawar, being the Acting Attorney General.
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> The learned counsel on either side seem to have agreed on

one thing that the review jurisdiction is exercised by the Supreme Court under (i) Article-188 of the Constitution, (ii) Order XXVI of the Supreme Court Rules, 1980, and (iii) Order XLVII of the CPC, all taken together. I would like to dilate upon Article-188 of the Constitution and Order XXVI of the Supreme Court Rules, 1980 and would not rely upon Order XLVII because as per Rule-9(ii) substituted by the Federal Adoption of Laws Order, 1975 (P.O 4 of 1975), Order XLVII, CPC is not applicable to the Supreme Court.

A close perusal of Article-188 of the Constitution and Order XXVI of the Supreme Court Rules, 1980 would indicate that both these provisions commence with the words `the Supreme Court shall have power'. Similar are the words in Order XXVI that `the Court may review its judgment or Order'. This makes it abundantly clear that the Supreme Court has wide, rather, suo moto powers to review its judgments or orders provided the grounds for such review are available. Order XLVII, CPC, according to the Supreme Court Rules, are referable only to the extent of the grounds, not the ones mentioned in the Order but similar to those mentioned therein. The Rules, therefore, provide a much wider ambit for review than that mentioned in Order XLVII. Once again I may mention that except for the similarity of grounds, nothing can be borrowed from Order XLVII, CPC so as to restrict the jurisdiction of the Supreme Court for the simple reason that nothing mentioned in Order XLVII CPC is applicable to the Supreme Court.

The above conclusion leads to further analogy that even filing of application by a person is not necessary. If, at all, an application is filed by any person feeling aggrieved, it may be considered as an information furnished for the Supreme Court to exercise its powers under Article-188 of the Constitution. I have purposely mentioned Article 188 of the Constitution and avoided the Supreme Court Rules because any jurisdiction, original or appellate, exercised by the Supreme Court under the provisions of the Constitution (Article-184(3) - 188) cannot be limited, abridged, curtailed or restricted even by the Supreme Court itself, under its rule making power. I fully agree on this point with Sheikh Zamir Hussain, learned counsel for one of the applicants that in order to do complete justice under Article-4, 25, 187 and 188, the Supreme Court should rather assume jurisdiction instead of refusing to do justice. Malik Asad Ali's case (PLD 1998 SC 161).

It was contended that the applicants have no locus standi to get the judgment in question reviewed. This argument makes room for discussion as to whether the applicants (the judges of superior judiciary) are the aggrieved persons, in view further of a phenomenon, as to whether the judgment in question was in rem or in personam. In order to determine as to who is the person aggrieved, I would be referring to the case law produced by the learned counsel on either side. Before that, I may emphatically express my belief that no previous authority

is required on any of the points involved. If this Bench of 14 Honourable Judges of the Supreme Court consider a view to be based on natural justice, fair play and good conscience, it can render a favourable verdict which by itself would be the strongest of rulings to be followed by all concerned as a source of relief for teeming millions. I would, thus, refer to the authorities only to satisfy those, who believe in letters.

Far back in the year 1917, in Jhabba Lal's case (AIR 1917 Allahabad 160), Mr. Walsh, J. of Allahabad described the person aggrieved as `not the one who is disappointed of a benefit, which he might have received if some other order had been made. He must be a man, who has suffered a legal grievance, a man against whom the decision has been pronounced, which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to some something'. In the instant case, the applicants claimed, and rightly so, that through the judgment in question, they have wrongfully been deprived of the status and their right and title to such status has wrongfully been affected.

It was also argued that the applicants are not the persons aggrieved, because they were not a party to the case in which the judgment is pronounced. In Kawdu's case (AIR 1929 Nagpur 185(d), a Director of the company was considered an aggrieved person, though he was not a party to the original case. I have already observed that under Article-188 of the Constitution, the Supreme Court has wide powers to review its judgment, in order to prevent miscarriage of justice, without having regard to any intriguing technicalities. Similar view seems to have been taken by a five member larger Bench of the Indian Supreme Court in Shiv Deo Singh's case (AIR 1963 SC 1909), where nothing in Article- 226 of the Indian Constitution was considered precluding a High Court from exercising the powers of review, which inheres in every Court of plennary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. In this case review of a person, not a party to the proceedings, was allowed with remarks that `Khosla, J. (of the High Court) did what the principles of natural justice required him to do". Khosla, J. had reviewed his own order on the application of a person, who was not a party to the earlier one.

Coming to the case law of our own country, the learned counsel placed reliance on H.M Saya & Company's case (PLD 1969 SC 65), where it is observed that even a stranger to suit can file an appeal. To my mind, this verdict is extremely important because, if a stranger can file an appeal, he can file a review as well on the same analogy. In the instant case, the entertainment of review is all the more important, because the judgment in question is that of the Supreme Court against which not appeal is provided. Obviously, an aggrieved person can file nothing, but a review on a very strong ground that he was not a party and was not heard. The restriction prevailing in

the mind of the learned opposite counsel might not have been damaging, had the order under review been passed either by the Civil Court or by the District Court or the High Court because any aggrieved person could have filed an appeal. If such principle is applied to the judgment of the Supreme Court, it would tantamount to absolutely barring the remedy to persons who have certainly been condemned unheard. Fahmida Khatoon's case (PLD 1975 Lahore 942) is though a single Bench judgment of Lahore High Court yet numerous rulings have been mentioned and discussed therein; holding that even a stranger, without being a party, can file a review, even under Order XLVII, Rule-1, CPC.

To be treated in accordance with the law, and to be heard by any forum, likely to decide some matter against him, is the fundamental and inalienable right of a citizen. Any violation thereof would be a violation of Article-4 & 25 of the Constitution. In this behalf, I would like to refer, with credit, to a judgment rendered by a seven member Bench of this Court in case of Pakistan Muslim League (PLD 2007 SC 642) which, with pleasant coincidence, happened to be authored by my honourable brother, Javed Iqbal, J., who also is the author of majority judgment in the instant case. In this case, with reference to Article 184 (3) of the Constitution, it was under consideration as to whether it was necessary that the person invoking relevant jurisdiction should be an aggrieved party. This Court held that it is not necessary for the purpose involved in the said case. Presently, the case of the applicants is on a better footing because they are most certainly the aggrieved party.

After having discussed the law produced in the case of Pakistan Muslim League, supra, the Honourable author Judge observes in view of judicial consensus that;

"(i) that while interpreting Article 184(3) of the Constitution the interpretative approach should not be ceremonious observance of the rules or usages of the interpretation but regard should be had to the object and purpose for which this Article is enacted i.e. the interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution namely the Objectives Resolution (Article 2-A), the fundamental rights and the directive principles of State policy so as to achieve democracy, tolerance, equity and social justice according to Islam.

(ii) That the exercise of powers of Supreme Court under Article 184(3) is not dependent only at the instance of the `aggrieved party' in the context of adversary proceedings. Traditional rule of locus standi can be dispensed with and procedure available in public interest litigation can be made use of, if it is brought to the Court by a person acting bona fide.

(iii) .....

(iv) That under Article 184(3) there is no requirement that only an aggrieved party can press into service this provision. Supreme Court can entertain a petition under Article 184(3) at the behest of any person.

(v-vii) .....

(viii) That the language of Article 184(3) does not admit of the interpretation that provisions of Article 199 stood incorporated in Article 184(3) of the Constitution. Therefore, this Court while dealing with a case under Article 184(3) of the Constitution is neither bound by the procedural trappings of Article 199 ibid, nor by the limitations mentioned in that Article for exercise of power by High Court in a case." (Emphasis provided).

Though the discussion aforementioned refers to Article 184(3) yet the principles of prudence, interpretation and assumption of jurisdiction, in order to do complete justice, are fully in consonance with what I feel in the instant case with reference to Article 187-188 of the Constitution.

Faqirullah's case (1999 SCMR 2203) is another example of doing justice by invoking review jurisdiction. In this case, despite State being the protector of the rights of complainant in criminal cases, was present yet on the review application of complainant, who was not a party in the original case, he was heard and, no less a judgment of acquittal was set aside and the accused sentenced to death. This Court maintains the practice of imparting ultimate justice throughout. It should not be departed from in the instant cases.

I am of the firm view that, for the Supreme Court to exercise its powers under Article 188 of the Constitution and Order XXVI of the Supreme Court Rules, it is not at all necessary for the applicant/petitioner to be a party in the judgment under review. Such inferences are drawn, if at all, from Order XLVII of the CPC, which is not applicable to the Supreme Court. Rather, in cases where complete justice was needed to be done, even strangers were entertained in review matters under Order XLVII, CPC.

The instant applications are further contested on the ground that our judgment sought to be reviewed was judgment in rem and conclusive against world and thus could not be challenged by the individuals. Mr. Rashid A. Razvi placed reliance on Pir Bukhsh's case (PLD 1987 SC 145). After having gone through the above ruling and also having reconsidered our own judgment in question, I believe that the judgment in totality is not in rem. So far as our declaration with regard to the Proclamation of Emergency, the Enforcement of Provisional Constitution Order and Oath of Office (Judges) Order, 2007 is concerned, it can be dubbed as judgment in rem, but so far as the fall out thereof with regard to the applicants is concerned, it

is in personam, especially because such judges were not a party and could have been impleaded in view of the prospective results of our principal findings. The amends can be made only by hearing them now at this stage.

Quite forcefully, it was alleged that this Court in Al-Jehad Trust's case (1999 SCMR 1379) had not impleaded many judges despite the fact that they were eventually affected. No doubt Al-Jehad Trust's case, Supra, has been extensively relied upon in our judgment in question, but this aspect of Al-Jehad Trust's case, where also the Judges were condemned unheard, is not at all enviable. It was admitted at the Bar that judges of some High Courts were even issued notice in Al-Jehad Trust's case, but it is equally undeniable that many affected were not made party. Should we, in the circumstances, feel bound by an action, where the judgment operated in rem for those who were not impleaded and in personam for those who stood impleaded. This course of action adopted in that case was also not judicial and should not be followed as a precedent, especially by a Bench of as many as 14 Judges. To my mind, even in Al-Jehad Trust's case, the Court was not sure, whether it is going to pronounce a judgment in rem or in personam. To some, it impleaded, to others, it did not, thereby, condemning them unheard. If such a precedent is followed once again, as was followed in our judgment in question, and is placed reliance upon even to deny hearing in the review petitions, it would not be a judgment in rem, but a "condemnation-in-rem".

It was further argued in the light of the case of Hameed Akhtar Niazi (1996 SCMR 1185) considering the judgment to be one in rem, that the benefit thereof was extended to those people as well, who were not a party. I think this judgment, rather, serves my view point. In the judgment aforesaid, benefit of one verdict was given to all universally and not that the people were condemned universally. The ruling aforesaid was beneficiary and not jeopardizing and hence, cannot be pressed into service. Assuming for the sake of arguments that our judgment in question was a judgment in rem, which I do not believe it was, how on earth it was inferred that such judgment cannot be challenged by a person or persons who were not a party to it, but seriously and adversely affected thereby. There is every likelihood that if heard in review, the applicants might be able to influence the Court to change its decision concerning the applicants. It all depends upon the hearing of the case and, for the sake of doing ultimate justice, I hold the view that the review petitions be heard on merit.

A judgment cannot be called one in rem when questions of fact being a deciding factor and being variously relevant and applicable to the affectees involved, has differently and specifically been pleaded in defence.

Now I come to the most important aspect of the case concerning the principle of audi alteram partem. The applicants claimed that they have been condemned un-heard. That they have not been a party to the constitutional petitions No.8 & 9/2009; that they were not even issued notice to

appear and answer the charges before taking the drastic action against them and that the review petitions filed by them are the first and last chance that they are likely to avail. If not given a chance to be heard, the principle of audi alteram partem would stand violated, not once but thrice.

The centuries old concept of audi alteram partem is nothing but a principle of due process embodied clearly and expressly in Article 4 of our Constitution. The principle which now has become of universal acceptance is a wide ranging guarantee of procedural fairness in the judicial process. Giving the defendant his day in the Court is of the essence of principle of justice as also of natural justice. Guarantee of due process refers to procedure that protects the people against arbitrary treatment. Essential elements of due process in "Methew Vs. Albridge" were laid down as follows:--

(i) Adequate notice of charges or basis for action;
(ii) A neutral decision maker;

(iii) An opportunity to make an oral presentation to the decision maker

(iv) An opportunity to present evidence;

(v) An opportunity to controvert and cross-examine the evidence;

(vi) The right to have a counsel;

In his book `Judicial Review of Public Action' Mr. Justice Fazal Karim has elaborately discussed the principle of due process associating the same with human rights. He further goes on to refer to Section 24-A of the General Clauses Act and concludes that the concept of "fairness" has received legislative recognition and confirmation through its insertion in the General Clauses Act. According to the learned author, Section 24-A of the Act embodies, by necessary implication, the principles of natural justice, which include the right of hearing before an impartial Tribunal. In the case of Fisher Vs. Keen (1878) 11 Ch.D.353, it was observed that persons who decided upon the conduct of others, they are not "to blast a man's reputation forever, to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct". The jurists have gone to such an extent of holding that the defect created by an absence of hearing cannot be cured by a second and subsequent hearing because the original decision is a nullity.

76. The concept of audi alteram partem based on the principle of natural justice is Centuries old. Audi alteram partem applies to "Everyone who decides Anything". The history quite laboriously is traced by a five member larger bench of Supreme Court of India in Tulsi Ram's case (AIR 1985 SC 1416). The expression `natural law', was largely used in the philosophical speculation of the Roman Jurists and was

intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by rational intelligence of man and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral and physical Constitution. This principle was opposed by those who believed natural justice, with reference to its terminology, as the law of jungle that prevailed widely on earth. From the clash of those theories, if there was any help to be found or any hope to be discovered, it was only in a law based on justice and reason which transcended the laws and customs of men, a law made by someone greater or mightier than those men who made these laws and established these customs. Such a person could only be a divine being and such a law could only be `natural law' or `the law of nature', so just that it could be binding on all mankind. It was not the law of nature in the sense of the law of jungle. With the passage of time, the natural justice happened to be considered as part of the law of God.

Natural justice fulfills the requirements of substantial justice and the natural sense of what is right and wrong. Many writers have dubbed it as `fundamental justice', `fair play in action' and a `duty to act fairly'. Ormond, LJ in Lewis Vs. Heffer (1978) I WLR 1061.1076 have found the phrase of natural justice to be `a highly attractive and potent phrase'.

Maugham, J., in Maclean Vs. Workers Union (1929) 1 Ch. 602, 624) held a different view and considered natural justice to be a law of jungle and of might is right. He summed up with the observation that, "the truth is that justice is a very elaborate conception, the growth of many centuries of civilization; and even now the conception differs widely in countries usually described as civilized". Some jurists following Maugham L. J., were of the opinion that `the principle of natural justice are vague and difficult to ascertain'. This fallacious view was well rebutted by Lord Reid in Ridge Vs. Baldwin (1964) AC 40, in the following words:--

> "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist. The idea of negligence is equally insusceptible of exact definition, but what a reasonable man would regard as fair procedure in particular circumstances and what he would regard as negligence in particular circumstances are equally capable of serving as tests in law, and natural justice as it has been interpreted in the Courts is much more definite than that. It appears to me that one reason why the authorities on natural justice have been

found difficult to reconcile is that insufficient attention has been paid to the great difference between various kinds of cases in which it has been sought to apply the principle". (Emphasis supplied)

The whole discussion boils down to the conclusion that justice should not only be done but should manifestly be seen to be done. In Bosweel's case (1605) 6 Co.Rep.48b, 52a), it was beautifully held that;

> "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right."

The principle of natural justice has now received international recognition by being enshrined in article 10 of the Universal Declaration of Human rights adopted and proclaimed by the General Assembly of the United Nations by resolution 217A (III) of December 10, 1948. It was further recognized by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14 of the International Covenant on Civil and Political Rights adopted by the General Assembly Resolution 2200A (XXI) of December 16, 1966, having come into force on March 23rd , 1976.

The outcome of the short history of audi alteram partem narrated hereinbefore, as applicable to the present judicial systems of the whole world, is put in a nutshell by the Supreme Court of India in the case of Tulsi Ram Supra, as follows:--

".....audi alteram partem rule, in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation thereto, have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence, both oral and documentary, in his defence....."

Coming to the learned discourse of my honourable brother in the majority view, the reliance was placed on the assertions of Mr. Rashid A. Razvi and Mr. Hamid Khan, learned counsel for the caveators that the applicants were not a party to Constitution Petitions No.8 & 9 of 2009 and hence have no locus standi to file a review, not maintainable in turn. This argument, I have already mentioned, is derived from Order XLVII of the CPC which, as observed earlier, is not applicable. It was further alleged that the applicants, not being a party, no relief was claimed against them. Such argument makes the review petitions all the more necessary to be heard. If the actions challenged in the Constitution Petitions were those of

General Pervez Musharraf, taken in between 3.11.2007 and 16.12.2007, and if this Court deemed it necessary to issue notice to General Pervez Musharraf, it was rather obligatory to issue notices to the applicants, if any possible action was intended to be taken against them as a fallout of any declaration.

Mr. Hamid Khan's assertion that the applicants were aware of the hearing of Constitution Petitions and that they could have applied for becoming a party, was also approved in the majority judgment. I do not subscribe to the view so taken because it assumes that the applicants had a knowledge of what is happening in this Court and that they ought to have had the knowledge as to what was going to happen, concerning them. It is a settled principle of law that any knowledge outside the Court does not fall within the purview of knowledge. If the argument is considered valid, it would mean that in proceedings in rem (as it is called by the opposite side), the public at large, even if in thousands, should themselves come to the Court and apply for impleadment. This is neither advisable nor practicable. The simple rule of justice is that, whosoever is likely to be affected, notice should be issued to him or them by the Court itself. This was precisely done by this Court qua General Pervez Musharraf, but the applicants were ignored.

Mr. Hamid Khan further contended that in our judgment dated 31.7.2009, reliance is placed upon the case of Al-Jehad Trust and Malik Asad Ali, supra and if the review petitions are heard, the applicants might allege to set the aforesaid rulings aside. I have already referred to Al-Jehad Trust's case and firmly believe that this Bench is not bound to follow every act taken in that case as gospel. The fact that the Judges from the province of Sindh and NWFP were not made party to the above referred case, is not at all enviable aspect of Al-Jehad Trust case. This Bench consisting of 14 Honourbale Judges could have avoided to follow Al-Jehad Trust case, so far as the question of condemnation of certain citizens was concerned, especially when such citizens happened to be the judges of superior judiciary.

It was further accepted in majority judgment that in our judgment in question, the void actions of General Pervez Musharraf and void declarations in Tikka Iqbal case were set aside; that it was a national act, which cannot be set aside in review. This argument is totally misplaced because it might be advanced when the review petitions are heard. At the moment, we are stuck up in the problem as to whether the review petitions should at all be heard or not. Wittingly or unwittingly, the remarks have come for the third time, concerning the merit of the review petitions and such remarks have condemned the applicants for the third time.

The argument that the hearing of the review petitions would be an exercise in futility, is also not valid because such exercises

are mostly undertaken by this Court regardless of what the outcome of review petition would be. How the results of review petitions could be assessed or visualized at the present moment. The majority view has decided this aspect as well without the applicants being heard in review petitions. At this juncture, Mr. Muhammad Akram Sheikh, learned counsel for the caveator was last to be heard. He stated that power of Court is not a charity, but bound to be used for the benefit of the citizens. I agree with the learned counsel that power of Court should always be used for the benefit of citizens, and those citizens who were Judges of the superior judiciary, if condemned unheard, must be heard in review. Mr. Sheikh, while speaking from the deep recesses of his mind and heart, at the end submitted that `he was not in favour of closing the door of justice to any one'. So do I.

The matters alluded to above and the points yet to be heard in the review petitions have already been decided in para No.21 of majority judgment, pre-determining that if heard, a contrary view cannot be taken. Whether a contrary view can be taken or not, is possible to be judged only after when the review petitions are heard. Does it require to be reaffirmed that this aspect of Al-Jehad Trust's case, if found violative of the principles of natural justice, could not be set aside or differed from, by a Bench of 14 Honourable Judges of this Court?

In majority judgment (para-22), it is remarked that the applicants, in their review petitions have not challenged the declaration of this Court in main judgment that the actions of General Pervez Musharraf were void ab initio and hence it be presumed that the applicants accepted the fallout thereof. I humbly disagree with this view as well because if that part of our judgment is not challenged, it does not mean that the fallouts are accepted. Had those been accepted by the applicants, there was no sense in filing the review petitions. Such remarks in para-22 are also made with reference to the review petitions, which are never heard as yet. In para-22, page-25, the merits of review are rejected on the very basis of our own judgment which is under review and which reviews we have not yet heard.

A review, under the law, can be allowed if sufficient grounds are established. Such grounds are dispelled in para 28 and 29 of the judgment without hearing the petitioners on merits. I may recall that no technicalities of Order XLVII, CPC can be brought under consideration, the order being not applicable to the Supreme Court, except for the grounds mentioned therein. Moreover, the grounds also could be adhered to only when review petitions are heard. In para 32, with reference to the judgment of Honourable Mr. Justice Ghulam Mujaddid Mirza, it was observed that the Supreme Court had laid down a law (PLD 1969 SC 65), regarding appeals and that there is a lot difference between appellate and review jurisdiction. I remember having discussed this matter in the earlier part of

the judgment and have tried to equate appellate jurisdiction with the review jurisdiction, especially when the order under review is that of the Supreme Court, against which no appeal lies, except to the God Almighty. I have a firm faith and belief that the matter in hand should not be left to Almighty Allah because His retribution and requital is, no doubt delayed but certainly not outrageous.

The applicants through the majority judgment are denied hearing of review on the analogy that by doing so, the finality attached to the judgment of the apex Court would be eliminated. I do not agree with this view as well because had it been so, there would have been no justification for the legislature to provide Article 188 in the Constitution and no occasion for the Supreme Court to make a provision of Order XXVI in the Rules. Judgments of the Supreme Court are occasionally reviewed. If the factum of finality is of prime consideration, the judgment in review can, rather, be the one which becomes final. In para 35 of the majority judgment, it was after all mentioned that `any other view possible' could not be taken even if the review petitions are heard. At the cost of repetition, I may say that it is tantamount to rejecting the review petitions without hearing them, whereas, the fact of the matter is that if a judgment is reviewed, it is always the other view which is taken. In para 38, it was observed that a rule making authority cannot clothe itself with the power, which is not given to it under the statute. I also believe in the same concept of law that rule making power cannot step beyond the legislation and on the same analogy, this Court under its rule making power, cannot curtail its own power, widely given by Article 187 and 188 of the Constitution.

Repeatedly it was argued that the applicants have not been issued notice in main Constitution Petitions No.8 & 9 of 2009, decided on 31.7.2009, because they happened to possess the status of Judges. In this behalf, the majority seems to be of the view, approved and taken from Al-Jehad Trust's case as follows:-

> "It must be borne in mind that Judges of superior Courts by their tradition, maintain high degree of comity amongst themselves. They are not expected to go public on their differences over any issue. They are also not expected to litigate in Courts like ordinary litigant in case of denial of a right connected with their offices. Article VI of the Code of Conduct signed by every Judge of the Superior Courts also enjoins upon them to avoid as far as possible any litigation on their behalf or on behalf of others. Therefore, in keeping with the high tradition of their office and their exalted image in the public eye, the Judges of superior Courts can only express their disapproval, resentment or reservations' on an issue either in their judgment or order if the opportunity so arises....." (Emphasis provided)

The above view seems also to be prevailing all over when, with reference to the review applications and present applications of the Judges, it was seriously objected to as to why, being Judges, they had mentioned that through our judgment, they happened to loose their service. The use of word `service' regarding their assignments and status was considered to be below their dignity. With utmost respect and with utmost effort at my command, I could not reconcile with this paradoxical logic that, on the one hand the Judges are considered so honourbale and so exalted that even issuance of notice to them in a very crucial matter is considered below their dignity and, on the other hand, they are issued contempt notices in utter disregard of their status as well as the principle of comity among Judges. For a long time, they have been hearing the cases of millions of litigant public; they have been awarding decrees, recording convictions, imposing sentences and redressing the grievances of the people (which actions we have safeguarded in our judgment dated (31.7.2009) and for a long time they have been addressed by the learned counsel and the litigant public as "my lord", but at the present, they are issued contempt notices, insulted and humiliated in Court to such an extent that one of the advocates among audience, uninvitedly and uninterruptedly stands up, pointing out his finger at Mr. Justice Syed Zulfiqar Ali Bukhari and proclaiming in the open Court, "isko saza do - isko zaroor saza do - isko exemplary punishment do". This act has shocked me so much as if that counsel was pointing his finger at us. In view of the dignity attached to their high offices and the exalted image that the public have about the Judges of superior judiciary, I am of the firm opinion and hold that the contempt proceedings against the Judges be not initiated and if so, the notices be withdrawn.

If heard in review petitions, it is not necessary that they be able to persuade this Court to recall its judgment, concerning the actions of General Pervez Musharraf, but there is likelihood that they might persuade this Court to take lenient view against them and to follow the principle of condonation by keeping in view the centuries old principle of comity among judges. But that too is subject to the hearing of the cases. The majority judgment is of the view that even if we hear the cases, we would not resort to any second opinion. This is tantamount to condemning the applicants for the third time and I am afraid, the theory of judgment in rem might not turn out to be of condemnation in rem.

Getting support from Monika Gandhi's case (AIR 1978 SC 597), my honourable brother maintained the view that where the right to prior notice and an opportunity to be heard before an order is passed, would obstruct the taking of prompt action, such a right can be excluded. The relevant observation of the Supreme Court of India in the aforesaid case is reproduced as follows:--

> "Since the audi alteram partem rule is intended to inject justice into the law, it cannot be applied to defeat the ends of justice, or to make the law lifeless, absurd, stultifying, self- defeating or plainly contrary to the common sense of the situation. `Audi alteram partem' rule as such is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications."

Accordingly, it was observed that the principle of audi alteram partem can be applied to achieve the ends of justice and not to defeat them. I am spellbound to answer to such reasonings. Being a member of the Bench in the original case, I personally could not see any urgency involved for which a drastic action of ignoring audi alteram partem be resorted to. Do we mean to say that, had the applicants/Judges been issued notice and had they been heard during the main case and even if they are heard in review petitions, it would lead to defeat the ends of justice, making the law lifeless, absurd, stultifying, self-defeating or plainly contrary to the commonsense of the situation. At least, I am not aware of any commonsense of the situation that would have lead to injustice, had the applicants been heard. If not heard earlier, they must be heard now in the review petitions.

An undeniable hard fact cannot be forgotten that every word reduced into black and white by the Supreme Court is a command of law. Constitutionally, such verdict is bound to be followed by all the Courts and by generations of the people. We should avoid holding a view of such nature that tomorrow, even a Civil Judge might stand up and quote the Apex Court in order to shun the concept of audi alteram partem and resultantly commit injustice. I wish, we had followed the quotations of Lord Denning, "Justice isn't something temporal-it is eternal-and the nearest approach to a definition that I can give is, Justice is what the right thinking members of the community believe to be fair". If a just end is to be achieved, it must be through just means.

Numerous paragraphs of our judgment dated 31.7.2009 are referred to by my honourable brother in support of the view that review petitions have no merit. This also, to my mind, is not a fair approach because those very portions of our judgment are sought to be reviewed and unless we hear the applicants in review, we cannot justify our own views under review. Again it was observed that the principle of natural justice cannot be applied where `the grant of relief would amount to retention of ill- gotten gains or lead to injustice or aiding the injustice". At the cost of repetitions, I am constrained to say that this again is a verdict given about review petitions, which are never heard. Numerous substantial points have already been answered in the judgment, which could have only been answered after hearing the applicants in review. The applicants are demanding no better opportunity than the one

given by notice to General Pervez Musharraf. Any denial, therefore, to the applicants would be a discrimination, violating the provisions of Article 25 of the Constitution.

In paragraph 55, it was remarked that the one sought to be reviewed, was a landmark judgment in impeding the future path of any dictator. In relation to the aforesaid object it was, no doubt, an important judgment in judicial history of the country, but another equally important aspect thereof is that it practically damaged none except the weakest of the strata. The fallouts ought to have been equal. Such discrimination can only be made amends for through the hearing of review petitions filed by the applicants."

Consequent upon what has been discussed, I hold that the Supreme Court has unfettered powers under Article 187-188 of the Constitution read with Order XXVI of the Supreme Court Rules to do ultimate justice for which review petitions are absolutely maintainable. The applications in hand are hereby accepted and the review petitions entertained for full hearing by the Court."

42. In the light of above observation and the dignity attached with the High Office of a Judge of Superior Court the public in general has exalted image, therefore, the initiation of contempt proceedings against a judge of superior Courts is not desireable which may lowered the dignity and honour not only of the office of judge but also the institution of judiciary.

43. This is established beyond any doubt that under the mandate of Quran and Sunnah the right to honour and self respect is one of the inviolable rights of a person in the society in addition to other valuable rights which cannot be taken away without due process as enjoined by the Holy Quran and Sunnah of Holy Prophet (PBUH) and thus in an Islamic state an executive or judicial authority is not permitted to disgrace a person for non compliance of an order which is not in accordance with the injunctions of Islam and penal action in such a matter amounts to dishonour and disgrace a person which is unfair and against the concept of justice in Islam. The command of Holy Quran and Sunnah of Holy Prophet (PBUH) is that no person in private capacity or as public authority can violate the individual rights or scarify the principle of fair and equal treatment for any consideration other than the will of Allah Almighty. In Islamic concept of law, there are no rational basis for carrying over a residual plenary power by an inferior or superior Court or a public authority for exercise of the power for personal satisfaction rather, the accountability in the exercise of power requires that power must be exercised objectively in strict observance of fair, impartial and equal treatment in the application of laws on the basis of facts in accordance with the spirit of injunctions of Islam. The principle deduced from the teaching of Holy Quran and Sunnah is that a public authority or a judge/qazi is not empowered to proceed against any person on the charge of violation of his order unless it is first established that the order which is stated to have been violated was an order in accordance with the injunctions of Islam. It is pertinent to point out that an order passed by a public or a judicial

authority if is not in consonance with the command of Holy Quran and Sunnah can not be treated a valid order to have any effect and being derogatory to the injunction of Islam can be ignored, therefore the initiation of process of law and Court against a person in such cases for non compliance of the order of Court may be oppressive and an act of disgracing a person in the society.

44. The fundamental principle of law of contempt is that Courts must be hesitant in frequent use of this law because in certain cases the use of contempt law, instead of advancing the cause of justice and dignity of Court may lowered the honour of Court in the estimation of public and cause damage to its independence. The analysis of the law of contempt in the light of the concept of administration of justice and fair application of law in Islam would bring to the conclusion that the judicial and personal character of a judicial authority must be in all respect above board and of high standard. The remote element of personal interest or bias or a consideration other then the equity, justice and good conscious may have effect on the impartiality and neutrality of the Court which may not be as such visible but may cause serious damage to the independence of judiciary in public perception. The parties before the Court either rich or poor, the public authority or an individual, a private person or Government organization have equal right of protection of law, and Courts must be conscious to give decision on the basis of the facts in accordance with law without fear and favour with the spirit of fair treatment and Justice to all. The verdict of the Court in accordance with the policy of law in the matters of public importance or against the policy of Government in violation of law certainly advance the cause of justice giving impression of independent judiciary but the real independence is found only in strict observance of the principle of complete impartiality and neutrality in discharge of the judicial functions with independent mind and judicial restraint.

45. Pakistan is an Islamic state and Gilgit-Baltistan being part of Pakistan ipso facto follow the judicial system in Pakistan which is based on Islamic concept of judicial system and administration of justice. In the light of principles of Islamic Justice System without the high standard of the personal character and fair conduct of judicial authorities, the mere popular decisions or decision adverse to the policy of Government may not be the real criterion of the independence of judiciary. The principal of Judicial restrained and element of self-determination are sin qua non to the independence of a judicial authority which must be strictly followed in all circumstances. This is unfortunate that concept of independence of judiciary has been misconstrued with the judicial activism and popular decisions even if such decision are against the spirit of law and Constitution.

46. The foundation of judicial system in Pakistan no doubt has the basis of English judicial system but the Constitution under Article 227 provides that no law in Pakistan can be made in conflict to the injunction of Islam and the Courts in Pakistan also strictly follow the law in the spirit of Justice system in Islam. The Constitution of Pakistan 1973 in its preamble and in Chapter `Principle of Policy' (Article 29 to 40) fully assures the governance in accordance with the

principles of Islam and this mandate of Constitution of Pakistan 1973 has been made part of Article 49 of the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 as under:--

> "No law shall be repugnant to the teachings ad requirements of Islam as set out in the Holy Quran and the Sunnah and all existing laws shall be brought in conformity with the Holy Quran and the Sunnah."

47. The Constitution of a state is the fundamental law to govern the system of state. In Pakistan the Constitution of Pakistan 1973 with all sub-ordinate laws is based on the principle of law in Islam and the command of Holy Quran and Sunnah and Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 having been issued by Government of Pakistan in exercise of power under Article 258 of the Constitution of Pakistan has the sanction of law under the command of Holy Quran and Sunnah. In Islam the Judges/Qazis cannot claim absolute immunity for their judicial conduct and also there is no concept of blind obedience of all kind of orders rather only those orders or directions of judicial authorities are binding which are in conformity to the injunctions of Islam. The order of Qazi which is not in consonance to the command of Holly Quran and Sunnah of Holy Prophet (PBUH) if is not followed has no penal consequence. The Holy Quran commands in Sura Al Nisa, as under:--

> "O you who believe! Obey Allah and obey the Messenger (Muhammad ﷺ), and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allah and His Messenger (ﷺ), if you believe in Allah and in the Last Day. That is better and more suitable for final determination."

48. Consequently the obedience of a lawful order passed by a Court is essential and disobedience of such an order must have penal consequences to maintain the authority of Court and law. The provision in law to punish a person for not obeying lawful order of the Court is not in conflict to the law of Islam. In Pakistan the law providing punishment for non compliance of the Order of Court is based on English Judicial System and is not stricto senso in accordance with the justice system in Islam because, in Islam if an order passed by a Court is not in accordance with the injunctions of Islam, it has no binding and non compliance of such an order is not disobedience to constitute contempt of Court. In the common judicial system followed in the world, the violation of an Order of the Court which is not a lawful order or which is passed by a Judicial Authority without lawful authority may not constitute contempt of Court, therefore the Courts in a muslim society without realizing the true concept of law of contempt are not supposed to exercise the power of contempt in conflict to the concept of justice system in Islam. The lack of moral courage to face the criticism in respect of personal and judicial conduct sometime is the sole reason for initiating the contempt proceedings and judicial authorities instead of realizing their own mistake and fault use the law of contempt as a tool to avoid public criticism on their conduct and judgments or judicial decisions of public importance. The judicial officer have no immunity from criminal prosecution in cases of

corruption but only in exceptional cases criminal proceedings are initiated against Judicial Officer, rather criminal misconduct is often treated only misconduct and similarly, the judicial officers and even Judges of the Superior Courts by use of personal remarks in an indecent language commit the contempt of their own Court which is misuse of the power and judicial authority and may fall within the ambit of judicial misconduct. The reason behind power of contempt of Court is to safe the honour and dignity of the Court and the institution of judiciary and not to dishonor any person for the personal reason and prestige. The position of a judge in Islamic justice system is very vulnerable and even an ordinary man can raise objection against the improper conduct of a judge and the principle in the Islamic justice system governing the conduct of a judge or Qazi is that he should abstain from exercising power in a manner which may disgrace a person in the society and thus oppressive action against a person for the reason beyond the norms of law in a Muslim society is not in accordance with rule of law and justice.

49. In English Judicial system a conduct which tends to bring authority of law into disrespect may constitute contempt of Court and the principle developed through long practice is that power of contempt of Court is always exercised with extra care and Court except in extra ordinary cases is always reluctant in use of the weapon of contempt of Court.

50. Contempt in general is an act which may abstract justice or process of law and Court but it is always subject to the certain limitation and qualification because the judges and Courts are also open to criticism for their judicial act which is contrary to the judicial norms and conduct. The Court or a judicial officer at the time of passing an order if for any reason was not holding judicial authority to act as such and pass an order, the violation of such an order may not constitute contempt rather, the exercises of the power of contempt in such situation may be the misuse of process of law and may constitute judicial misconduct. The concept of contempt of Court and jurisdiction of Courts in contempt matters is derived from common law of England and is not as such a concept of Justice System in Islam, therefore the Courts in a Muslim state may not be justified to exercise power of contempt of Court unless the contempt is that of violation of an order which is based on the injunctions of Islam. The non observance of the Islamic concept of law in exercise of power of contempt of Court may involve the element of maligning and disgracing a person which may be abuse of the authority of law. The legal conception of the term contempt basically signifies to an order of Court which is entitled to legal regard and thus it is difficult to lay down an exact definition of contempt of Court in respect of an order without determination of legal sanction of such an order and lawful authority of the Court which passed the Order. In the matter of civil or criminal contempt unless it is established that a lawful order of the Court was willfully disobeyed, the machinery of law of contempt cannot be used and law of contempt is not set at motion for violation of an order which was not considered a valid order at the time of passing of such an order. The subsequent declaration of the legal status of an order may have no penal consequences for its violation if any prior to such

declaration. Be that as it may if the alleged contempt is in large scale in consequence to an act of Government, the Court following the principle of continence and condonation may on the basis of rule of tolerance show magnanimity.

51. The sub-ordinate judiciary in Gilgit-Baltistan and Pakistan derives the power of contempt of Court under the ordinary law whereas the superior Courts in Pakistan exercise such power under Article 204 of the Constitution and in Gilgit-Baltistan under Article 75 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009. The constitutional provisions or ordinary law as the case may be are not above the injunctions of Islam and unless it is proved that an order was passed strictly in accordance with the Islamic injunction, the violation of such an order may not authorize the Court to invoke the penal provision of law of contempt and exercise the jurisdiction for punishment in contempt. This is unfortunate that in a Muslim state the Courts without determining the validity of an order on the touchstone of Islamic injunctions exercise the jurisdiction in contempt matters on the assumption that all orders passed by the Court notwithstanding the validity of such order on the test of injunction of Islam, is treated a lawful order for the purpose of contempt of Court. The purpose of law of contempt is to maintain the dignity and honour of the Court and use of this law with the purpose to disgrace and dishonour a person in the society or injure his self-respect is a gross miscarriage of justice which may render the judge/Qazi liable to action in Islamic Justice system. This is common that the Courts do not hesitate from using the power of contempt in oppressive manner without first determining the real question regarding the sanctity and legality of the order for the violation of which the process for contempt of Court is initiated. The unfettered exercise of power of contempt by the Court may reflect upon the concept of independence of Judiciary.

52. The Constitution of Pakistan and law is based on Islamic concept of law and no law in Pakistan can be made contrary to the injunctions of islam. Therefore the people in Pakistan enjoy the guarantees of civil rights and liberties in spirit of Islamic law and similarly the protection and privileges are available to the public authorities for their official acts. The Head of State under the Constitution of Pakistan has complete immunity from criminal prosecution during his tenure of office. The purpose of this immunity is to attach sanctity with high office and for dignity of head of state. This is not personal immunity to continue when a person is no more in the office as head of state. The judicial authorities in the same manner have the judicial immunities in respect of their judicial function but these immunities of the head of state or judicial authorities are not absolute rather are subject to certain limitation. The principle of Islamic law is that an order passed by an executive or judicial authority or any other state authority if is not in consonance with the injunctions of Islam has no consequences for non compliance and thus an order of an executive or judicial authority contrary to the spirit of injunction of Islam may have no legal sanctity as no supremacy can be claimed by any authority on the strength of provisions of Constitution and law on the law of Holy Quran. Therefore the exercise of power by the executive or judicial authorities without determining

the matter before them on the basis of fundamental principle of law of Islam is improper which may mislead the correct application of law and use of authority.

53. The justice system in Islam is a sacred obligation which is to be maintained in conformity with the command of Allah Almighty in the most honest and objective manner This is the responsibility of rulers in an Islamic state to set up a comprehensive system of administration of justice and to ensure justice to all. The ultimate aim of justice in Islam is to ensure the peace and welfare of the people under the command of law and most guiding principle of administration of justice is to place once own self in the position of seeker of justice. The Holy Prophet (PBUH) explained the principle of equality and justice that "you should wish for your brother what you wish for yourself". This golden principle is a true guideline for a judge in the administration of justice to give one what is exactly due to him and equal to what that he deserves. Islam being a religion of humanity attaches great importance to the administration of justice and according to the Holy Quran, justice is to be dispensed without fear and favour in most fair and equitable manner for which the integrity, impartiality and independence of judges is most essential. In Islamic justice system all are equal before law and have equal protection of law and no person how so ever high he is, has special privilege or status in the eye of law. The concept of rule of law in Islam is so strict that the Holy Prophet (PBUH) صلی اللہ علیہ وآلہ وسلم considering himself equal before the law, at one occasion while deciding a theft case said:--

"If Muhammad's (PBUH صلی اللہ علیہ وآلہ وسلم) daughter Fatima (رضی اللہ عنہا) have been found guilty in stealing, I would have her hand cut"

54. The great Khaliph Hazrat Umar رضی اللہ عنہ and Hazrat Ali (رضی اللہ عنہ) without seeking any concession or asking for special treatment appeared before the Qazi like an ordinary person.

55. The qualities of fairness, independence, humbleness and honesty attached with the judicial office may have no sanctity if judicial power is exercised by the judicial authorities in departure to the principle of fair and impartial treatment as a result of which, the life, liberty and property of the people would not be protected because the decision in the matters before the Court would be deemed to have been regulated by the personal opinion of the judges and not by the fundamental principle of law. Therefore, the Judicial authorities in all circumstances must proceed on the basis of fundamental principle of justice and rule of law. In Islamic Justice System the exercise of judicial power for a consideration except to advance the cause of justice such as popularity and publicity of decisions of the Court may impair the justice and destroy the judicial system. The Judiciary in Islam is entirely independent and the concept of justice is also not that of remedial and formal justice of different civilizations rather it is

substantial and absolute with all fairness.

56. In Surah Al-e-Imran, Allah Almighty commands as under:--

> "O ye who believe: stand out firmly for justice, as witness to Allah, even as against yourselves, or your parents, or your kin and whether it be against rich or poor, for Allah can best protect both. Follow not the lusts of your heart, lest ye swerve, and if ye distort justice or decline to do justice, verily Allah is well acquainted with all that ye do. (4:135)"

57. In Surah Maida, the holy Qur'an ordinates as under:--

> "O ye who believe: stand out firmly by Allah as witness to fair dealing and let not the hatred of others to you make you swerve to wrong and depart from Justice. Be just that is next to piety: and fear Allah, for Allah is well acquainted with all that ye do. (5:8)"

58. The basic requirement of judicial independence in all judicial systems is making of decision without the consideration of social status, importance and position of a litigant in the society, rather regard must be given to fair treatment to all litigants to protect the purpose of law and to maintain the decorum of Court in an impartial manner with the responsibility of accountability before law and Almighty Allah.

59. Justice system in Islam emphasizes on personal character and judicial conduct of a judge so that the public may have full confidence and faith in his independence in disposition of justice quite in accordance with law. The unwritten code of Conduct in Judicial System is applicable to all judicial authorities and the same code of conduct without any exception is applicable to judiciary in Gilgit-Baltistan. The job of judicial office in all systems requires special skill and demands highest quality of intellect and character with unimpeachable qualities of being God fearing, law abiding, truthful, obstimonious, wise in opinion, Courteous, forbearing, calm, blameless, untouched by greed, faithfulness to the words and job. A judge or Qazi must be balanced and should discharge his functions without fear and favour and should also avoid mixing up with people or freely move at public places. The Judicial Officer should abstain from deciding the cases while in rage and must be consistent in Judgments, strong in his views and must maintain the decorum of Court, and also should decide the cases expeditiously without unnecessary delay. The Judicial Officer must have effective control over the staff without being rude, rough and humiliating and must be punctual, regular and in time and should also be dressed in prescribed uniform. A Judge or Qazi must be humble and behave in dignified manner without being proud and should avoid to see visitors in the chamber and also should not decide a matter in which he has even a remote interest. He should not hear the case in absence of other party except in the cases of ex-parte proceedings and must conduct himself in the Court in an impartial manner so that no prejudice is caused to any party in any manner or create an impression of favour or disfavour. He should not maintain personal

relationship of either nature with the parties who have cases before him and if the relationship cannot be discontinued he must

discontinue hearing of such cases. The above code of conduct is moral standard for judicial officer and is equally necessary for institutional morality.

60. The concept of independence of judiciary has direct nexus with the conduct of individual judges and following the Judicial conduct as stated above a person holding judicial office must not behave like an executive authority or a politician. The Judges are supposed to strictly observe the Code of Conduct with the qualities of God fearing, abstemious, forbearing, blameless and untouched by greed which is most essential for independence of a judicial officer and while dispensing justice should observe calmness and concentrate to the issue before him and should be strong without being rough and polite without being weak. The holder of judicial office must be careful about the decorum and dignity of the Court by giving equal respect to all parties and the lawyers. The Judicial officer must be above reproached and has to maintain high moral in official or private life and should avoid indecent behaviour to anyone and also should not hear the cases in which he has a remote interest. In relation to discharge of judicial functions a judicial officer may in good faith get the minimum publicity which is considered beneficial to the administration of justice and the institution but the publicity for the purpose of personal popularity is against the good conduct. The involvement of a judicial authority in public controversies in political matters even on a question of law is improper conduct.

61. The principle is that all civil servants and the public authorities are bound to be honest with unblemished integrity. The judicial officer in the matter of integrity and character are supposed to be above board as they discharge very sacred nature of their duty with pivotal position to administer justice. The concept in Islam is that those who perform the function of judges must not only possess profound knowledge and deep insight but also should be men of integrity and capable of learning skills of justice under all circumstances and judicial officers are expected to guard their reputation accordingly.

62. The Job of the judicial officer is very sensitive and in Islam it is said that a person who discharges the role of Qazi in the society will have to face very difficult time on the Day of Judgment.

63. Hazrat Ayesha رضی اللہ عنہا narrated that Holy Prophet صلی اللہ علیہ وآلہ وسلم said:-

عادل وانصاف پسند قاضی کو بھی قیامت کے روز ایک ایسی گھڑی سے سابقہ پڑنا ہی ہے جس میں وہ یہ تمنا کرے گا کہ کاش اس نے کبھی ایک کھجور کے معاملہ میں بھی دو آدمیوں کے درمیان کوئی فیصلہ نہ کیا ہوتا۔

64. The Muslim Jurists Laid down guide lines for a Qazi as under:--

65. The Qazi should not raise his voice on the voice of any party and should maintain balance in his conduct in the Court and also must maintain equality between the parties so that justice must not only be done but also should be seen to have been done.

66. The Qazi should not decide the matter while he is in rage

as he will not be able to maintain the balance in his conduct and thinking.

67. The Qazi just hear the parties to their satisfaction without any interference and must decide the matter on the basis of facts quite independently without any fear or favour, with impartiality and complete neutrality.

68. Qazi is supposed at higher pedestrian and Allah Almighty guides him but if Qazi decides the issues before him on the basis of his will and personal motive he has to face swear consequences.

69. The Qazi must be honest and a person who is dishonest in his words and conduct or is morally or intellectually corrupt is not qualified to hold the office of Qazi and it is in his interest not to retain the office of Qazi so that he may be saved from punishment in eternal life.

70. During the life of Holy Prophet صلی اللہ علیہ وآلہ وسلم the office of Qazi was not separate from state authority and this high judicial office was separated during the period of Khulifa-e-Rashadeen. The regular Judicial Department for the first time was established by the Abbasid Khaliph Haroon-ur-Rashid when Iman Abu Yousuf was appointed as Chief Judge (Qazi-ul-Quaza) with delegation of Judicial powers and Khaliph on his recommendation used to appoint other Qazis in the judicial department. The institution of judiciary was quite independent in performing the judicial functions free from all outside influences. The careful study of Islamic judicial history would show that it is full of instances of standard of administration of justice with entirely different consideration and values to that of the Justice system presently in practice. In Islam the judiciary is a sacred institution and judicial authorities may have no other consideration in the decision of a matter except the command of their conscious in accordance with the injunctions of Islam and will of Allah almighty. In an Islamic State all judicial and executive authorities are equally responsible for dispensation of justice and are supposed to be vigilant about the rights and duties of the people and also the legal and moral obligation to perform their function with complete impartiality, neutrality and honesty in all respect free of all sort of influences.

71. The direct and indirect interference of the executive authorities in the affairs of Courts may effect on their functioning and independence which is essential for administration of justice. The independence of Judiciary is necessary for good governance in a civilized society, therefore, this is legal and moral duty of executive to ensure independence of institution of judiciary to advance the cause of justice. The public right of access to justice does not mean the mere approach to the Courts, rather it ensures expeditious and inexpensive justice to all without any discrimination on the basis of principal of equality, rule of law, natural justice and fair treatment. There can be no exception to the universal truth that justice ensures balance in the society and without justice the peace in the society cannot be maintained and without peace a society may not survive. Consequently, mere preaching of rule of law and justice is not enough for an equitable and just society unless the basic principles of law are

practically and effectively activated for administration of justice. The concept of access to justice generally means that a system in which a common person may be able to avail effective and actionable mechanism for the protection of his rights and includes the ability of people to seek and obtain remedy through formal and informal justice system and influence of law. The comparative study of administration of justice in Islam and the justice system in practice in the world would reveal that the access to justice is recognized as fundamental right in all systems.

72. In the light thereof the emphasize would be that the members of the superior and inferior judiciary must adhere to the principles and guidelines to be followed to maintain good behavior and conduct in their official as well as in private life to exclude a remote chance of imbalanced decision and the element of personal interest, motive, bias or malice directly or indirectly must not reflect upon dispensation of justice which may create doubt about the person of Judge and independence of judiciary in the minds of litigants. The behavior and conduct of a judicial officer contrary to the judicial ethics and norms may lose the confidence of public in the Judiciary as an institution.

73. The independence of Judiciary in the light of extended meaning of the concept of separation of powers is that Legislature and Executive must not interfere in the function of Judiciary and must discharge their function within their respective domain under the Constitution. The concept is that no organ of the state should encroach upon or cross the limit of its jurisdiction and enter into the area of jurisdiction of other organ of the state. The interference of the executive or the legislature in the affairs of the judiciary through administrative action or enactment of laws as the case be may effect the independence of judiciary and lead to conflict between these three branches of the Government and also damage the system which is dangerous for the foundation of state. The concept of separation of power does not mean that only executive authorities undertake the responsibility of not interfering in the affairs of judiciary rather this is equally an obligation of judiciary not to enter into the area of executive authorities and disturb the public policy which is not against the law and Constitution.

74. The concept of separation of power means the judicial, legislative and executive branches of the state have to discharge functions in their respective fields by creating the line of demarcation of their areas and jurisdiction which is based on the system of check and balance to ensure independence of each branch and to prevent accumulation of power in one branch. The deviation from the concept of strict division of functions between the three branches of the state may consolidate all powers in one institution in an imbalanced manner which may create political unrest and tenancy. The concept of separation of power is not as such capable of precise legal definition and also a source for solution to intra Governmental disputes because separation of power may be more political doctrine then to technical rule of law. The idea to limit the activities of one branch of the Government or to extent activities of any one branch of

the Government may lead to overlap or bend the function of other and thus the departure of the principle form fair treatment to the areas of jurisdiction of each branch may create confusion and disturb the theory of separation of power and independence of judiciary, consequently the principle of separation of power and independence of judiciary must not be detached from each other in the interest of good governance and rule of law. The legislation is the function of Parliament whereas interpretation of the law is function of the judiciary but in exercise of such power judiciary must not exercise the judicial power and interpret the law in a manner of rewriting of a provision of law or Constitution which is certainly considered encroachment upon the area of the legislature. Similarly the executive authorities of the state are not supposed to interpret the laws in contradiction to the interpretation made by the Courts to avoid any conflict with judicial branch of the state. Under Article 68 and 69 of the Constitution of Pakistan the Courts are not supposed to interfere in the business and the proceedings of the parliament and similarly the conduct of a judge or proceedings of the Court cannot be discussed or made subject matter of debate in the Parliament. The function of the executive branch of the Government is also described in the Constitution and this branch of the state cannot enter in the areas of jurisdiction of Parliament or the Courts rather it has to implement the law and judgments of the Courts in letter and spirit strictly in accordance with the principle of separation of power and independence of judiciary. In the light of same principle the interference of the judiciary in an area exclusively falling within the domain of Parliament or executive in respect of legislation or policy decision being beyond the scope of power and jurisdiction of the judiciary under the law and Constitution may create conflict and clash between two organs of the State. The concept of independence of judiciary is two fold as on one hand the executive and legislative authorities of state cannot interfere in the affairs of judiciary and on the other hand judiciary is also required to remain within its domain and exercise the judicial power following the principle of judicial restraint and must be careful not to cross the limits of its jurisdiction. The care must be taken in the exercise of power and jurisdiction to avoid public criticism in respect of conduct of an individual judge or of the judiciary as an institution otherwise the purpose of separation of power and independence of judiciary may not be accomplished.

75. The concept of independence of judiciary is thus based on the principle that the executive and legislature must exercise the power in a manner in which there is no direct or indirect interference in the affairs of judiciary and similarly judiciary following the principle of judicial restrain must exercise jurisdiction within the constitutional and legal frame work and must avoid to enter into the areas of other organs of the state. Therefore we in all fairness have no hesitation to hold that misconception regarding independence of judiciary is required to be removed from the mind of a common person in the society in the interest of administration of justice and rule of law.

76. The Superior Courts in Gilgit-Baltistan in the past having the influence of executive authorities have not been able to

independently establish the Judicial precedents for guidance of the sub-ordinate judiciary and also have made no effect for complete separation of judiciary from executive to ensure its independence in the light of interpretation of Article 175(3) of the Constitution of Pakistan by the Supreme Court of Pakistan and the concept of independence of Judiciary with the principles laid down and the guidelines given in Sharaf Faridi's Case (PLD 1994 SC 105). This is well established and recognized principle of constitutional law that a provision of Constitution should not be interpreted in a narrow manner rather it should be given liberal and broad interpretation and to give proper effect to a provision of the Constitution and to avoid conflict of a specific provision of the Constitution with another provision, the principle of harmonious interpretation of the statutes must be followed. This is fundamental principle of constitutional law that a specific provision of the Constitution is not supreme to any other provision of Constitution but the provision which contained the mandate of independence of judiciary has special characteristic because independence of judiciary guarantees the protection of rights of people through the process of judicial determination by the Courts. In the light of above principle Supreme Court of Pakistan and superior Courts in Indian Jurisdiction have expressed the necessity of independence of judiciary in the case mentioned below:--

77. In the case of Government of Baluchistan through Additional Chief Secretary v Aziz Ullah Memon (PLD 1993 SC 341) it was held as under:--

> "In fact the administration of justice cannot be made subject to or controlled by the executive authorities. the Constitution provides for separation of judiciary from the executive. It aims at an independent judiciary which is an important organ of the State within the Constitutional sphere. The Constitution provides for progressive separation of the judiciary and had fixed a time limit for such preparation. It expired in the year 1987 and from then onwards, irrespective of the fact whether steps have been taken or not, judiciary stands separated and does not and should not seek aid of executive authorities for its separation of judiciary is the corner-stone of independence of judiciary and unless judiciary is independent, the fundamental right of access to justice cannot be guaranteed. One of the modes for blocking the road of free access to justice is to appoint or hand over the adjudication of rights and trial of offences in the hands of the executive officers. This is merely a semblance of establishing Courts which are authorized to decide cases and adjudicate the rights, but in fact such Courts which are manned and run by the executive authorities without being under the control and supervision of the judiciary can hardly meet the demands of Constitution. Considering from this point of view we find that the impugned Ordinance II of 1968 from the cognizance of the case till the revision is disposed of, the entire machinery is in the hands of the executive from Naib-Tehsildar to the official of the Government in the Ministry. Such a procedure can hardly be

conducive to the administration of justice and development of the rear nor will it achieve the desired result of bringing law and order, peace and tranquility or economic prosperity and will being. The Constitution envisages independent judiciary separate from the executive. Thus, any Tribunal created under the control and superintendence of the executive for adjudication of Civil or criminal cases will be in complete conflict with Article 175, 9 and 25."

78. In Zafar Ali Shah v. Chief of Army Staff etc. (PLD 2000 SC 869) the Supreme Court of Pakistan observed as under:--

"210. The independence of Judiciary is a basic principle of the constitutional system of governance in Pakistan. The Constitution of Pakistan contains specific and categorical provisions for the independence of Judiciary. The Preamble and Article 2A state that "the independence of Judiciary shall be fully secured"; and with a view to achieve this objective. Article 175 provides that "the Judiciary shall be separated progressively from the executive". The rulings of the Supreme Court in the cases of Government of Sindh v. Sharaf Faridi (PLD 1994 SC 105, Al Jehad Trust (supra) and Malik Asad Ali v. Federation of Pakistan (PLD 1998 SC 161), indeed, clarified the constitutional provisions and thereby further strengthened the principle of the independence of Judiciary, by providing for the separation of Judiciary from the executive, clarifying the qualifications for appointment of Judges of the High Courts, prescribing the procedure and the time frame for appointment of Judges, appointment of Chief Justices and the transfer of a Judge from a High Court to the Federal Shariat Court. Furthermore, the Supreme Court judgments in the cases of Mehram Ali and Liaquat Hussain (supra) are also in line with the above rulings, in as much as, they elaborated and reiterated the principle of judicial independence and the separation of Judiciary from the executive.

211. In a system of constitutional governance, guaranteeing Fundamental Rights, and based on principle of trichotomy of powers, such as ours, the Judiciary plays a crucial role of interpreting and applying the law and adjudicating upon disputes arising among Governments or between State and citizens or citizens' inter se. The Judiciary is entrusted with the responsibility for enforcement of Fundamental Rights. This calls for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society.

212. The Constitution makes it the exclusive power/responsibility of the Judiciary to ensure the sustenance of system of "separation of powers" based on checks and balances. This is a legal obligation assigned to the Judiciary. It is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals, To do so, the

Judiciary has to be properly organized and effective and efficient enough to quickly address and resolve public claims and grievances; and also has to be strong and independent enough to dispense justice fairly and impartially. It is such an efficient and independent Judiciary which can foster an appropriate legal and judicial environment where there is peace and security in the society, safety of life, protection of property and guarantee of essential human rights and fundamental freedoms for all individuals and groups, irrespective of any distinction or discrimination on the basis of cast; creed, colour, culture, gender or place of origin, etc. It is indeed such a legal and judicial environment, which is conducive to economic growth and social development.

79. In Aljahad Trust Case (1999 SCMR 1379) the Supreme Court of Pakistan held as follows:--

"The independence of Judiciary is inextricably linked and connected with the constitutional process of appointment of Judges of the superior Judiciary. The relevant constitutional provisions are to be construed in a manner which were ensure the independence of Judiciary. A written Constitution is an organic document designed and intended to cater the need for all times to come. It is like a living tree, it grows and blossoms with the passage of time in order to keep pace with the growth of the country and its people. Thus, the approach, while interpreting a constitutional provision should be dynamic, progressive and oriented with the desire to meet the situation, which has arisen, effectively. The interpretation cannot be a narrow and pedantic. But the Court's efforts should be to construe the same broadly, so that it may be able to meet the requirement of ever changing society. The general words cannot be construed in isolation but the same are to be construed in the context in which, they are employed. In other words, their colour and contents are derived from their context.

The system of appointment of Judges obtaining in U.S.A. and U.K. has no direct bearing on the issue. The systems of appointment of Judges in the above two countries are different as compared to Pakistan. The relevant Articles in Constitution of Pakistan relating to appointments in Judiciary with minor variations have been lifted from the Indian Constitution, 1950, and, therefore, the factum as to how they have been interpreted and acted upon in India is relevant.

As stated in the short order, if we look at the Constitution of 1973, we find that the title is "The Constitution of Islamic Republic of Pakistan" and Article 2 thereof commands that Islam is to be its State religion. Preamble to the Constitution says that the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed and independence of judiciary fully secured Objectives Resolution as reproduced in the Preamble has been made as substantive part of the Constitution by Article 2A inserted by P.O. No. 14 of 1985, Part IX of the Constitution

contains Islamic provisions in which Article 227 envisages that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. The institution of Judiciary in Islam enjoys the highest respect and in this judgment in the preceding paragraphs from 34 to 46 instances from the Islamic history have been given showing how and on what criteria Judges/Qazis were appointed and how they were respected and even the rulers. of the time used to appear in the Court and obey judgments without any demur, which were binding on them. The Islamic history also shows that rulers were God fearing, humble, polite, benign, unsarcastic and righteous, and did not claim any air of mundane superiority and submitted to the Jurisdiction of the Courts as a matter of duty. In one case when Amirul Momineen appeared in the Court of Qazi who got. up from his seat as a gesture of deference, Amirul Mornineen disapproved it on the ground that it was inconsistent with the dignity and independence of the Court. In Islam Chief Justice was given power to appoint other Judges in the sub-ordinate Courts."

80. In the matter of appointment of the judges in the superior and inferior judiciary with reference to the Articles 233 to 236 of the Constitution of India, the Supreme Court of India in the case of Chandra Mohan v. State of U.P AIR 1966 SC 1987 held as under:--

> "The exercise of the power of appointment by the Governor is conditional by his consultation with the High Court, that is to say he can only appoint a person to the Court of District Judge in consultation with the High Court. The object of consultation is apparent that the High Court knows better that the Governor in regard to the suitability or otherwise of a person belonging either to the "judicial service or to the bar" to be appointed as a District Judge.
>
> Indeed it is common knowledge that in pre-independence India there was a strong agitation that the judiciary should be separated from the executive. And the makers of the Indian Constitution also realized that "it is the sub-ordinate judiciary in India who are brought most closely into contact with the people, and it is no less important, perhaps indeed ever more important, that there independence should be placed beyond question in the case of superior judges."

81. In the case of State of Asam v. Kusseswar (AIR 1970 SC 1617) the Supreme Court of India observed as under:--

> "The High Court was of opinion that this was deliberately done to grab at the power of promoting sub-ordinate judges by taking advantage of the definition of District Judge which includes an Assistant District Judge. By this device, which the High Court described as `a fraud upon the Constitution' the power of promotion vested in the High Court in respect to persons belonging to the Judicial Service of a State and holding posts inferior to the post of the District Judge the

jurisdiction of the High Court under Article 235 was taken away. Formely, the sub-ordinate service was composed of two grades and promotion between the two grades was made by the High Court. Under the new rules there is only one grade (i.e. grade III) in which Art. 235 can operate if at all. Since all the posts there are equal and carry equal pay there is no scope for promotion at all. The High Court is thus right that there is no scope for the exercise of the power of the High Court to make promotions in the case of persons below the rank of District Judges (which terms includes an Assistant District Judge). The High Court was thus far right but the High Court is not right in thinking that it can ignore the hierarchy of Courts in Assam as established by law and treat the change as of no consequence. The remedy is not to go against the Civil Courts Act as amended, but to have the amendment rescinded. We are of the view that the change is likely to lead to an impairment of the independence of judiciary at the lowest levels whose promotion which was vested by the Constitution in the High Court advisedly, will no longer be entire in the hands of the High Court. The remedy for it is by amendment of the law to restore the former position. We may say that we do not approve of the change of mere name without any additional benefits."

82. In the light of the ratio of the judgments referred above we may not dispute the authority of Provincial Government of Gilgit-Baltistan for framing the rules in respect of the terms and condition of the judicial service rather the emphasize is that sub-ordinate judicial service rules must not be in conflict with the spirit of independence of judiciary and the mandate of law and Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009. It has been pointed out to us that service rules of Sub-ordinate Judiciary and the rules of business of Government of Gilgit-Baltistan have not been framed in consonance with the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 and law laid down by the Supreme Court of Pakistan in Sharaf Faridi's Case (PLD 1994 SC 105) supra, as a result of which an impression has been created that judiciary in Gilgit-Baltistan is functioning under the control of Ministry of Kashmir Affairs & Northern Areas (KA&NA Division now KA&GB Division) as a department of provincial Government of Gilgit-Baltistan. This general impression must be dispelled from the mind of a common man to build the public confidence in the judiciary as we have observed that in past even the superior Courts in Gilgit-Baltistan (Court of Appeal and Chief Court) were not considered independent in their administrative and financial affairs. The position under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 is different and we find that Supreme Appellate Court Gilgit-Baltistan having the status of apex Court in Gilgit- Baltistan is equal to the Supreme Court of AJ&K and Supreme Court of Pakistan and is entirely independent in its administrative affairs as well as financial matters within the allocated budget. The appointment of judges of Supreme Appellate Court, Gilgit-Baltistan is made by the Prime Minister of Pakistan in his capacity as Chairman of the Gilgit-Baltistan Council on the advise of Governor and with the consultation of the Chief Judge of the Court. The Chief Court Gilgit-

Baltistan has the status equal to the provincial High Courts in Pakistan and in addition to the superintendent and control of sub-ordinate judiciary in Gilgit-Baltistan by virtue of Article 76 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 is also empowered to deal with the service matters of judicial authorities of sub-ordinate judiciary including their posting, transfer and promotion and disciplinary matters as well as financial affairs. The Judges of Supreme Appellate Court and Chief Court Gilgit-Baltistan are entitled to the same terms and condition of service and privileges to which the judges of superior Courts in Pakistan are entitled. They have also the protection of tenure of office as no judge of the Supreme Appellate Court or Chief Court can be removed from his office except in the manner provided in Article 66 of the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 which provides as under:--

(1) There Shall be a Supreme Judicial Council of Gilgit-Baltistan.

(a) the Chief Judge of Gilgit-Baltistan who shall be its Chairman.

(b) the Senior Judge of the Supreme Appellate Court; and

(c) the Chief Judge of the Chief Court.

(2) A Judge of the Supreme Appellate Court or of the Chief Court shall not be removed from office except as provided by this Article.

Explanation: The expression "Judge" includes the Chief Judge of Gilgit- Baltistan and the Chief Judge of Chief Court of Gilgit-Baltistan.

(4) If on information received from the Supreme Judicial Council or from any other source, the Chairman of the Gilgit-Baltistan Council or the Governor is of the opinion that a Judge of the Supreme Appellate Court or of the Chief Court,

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

(b) may have been guilty of misconduct, the Chairman or the Governor, as the case may be, shall direct the Supreme Judicial Council to inquire into the matter.

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

(6) If, after inquiring into the matter, the Supreme Judicial Council reports to the Chairman of the Gilgit-Baltistan Council that it is of the opinion.

(a) that the Judge is incapable of performing the

duties of his office or has been guilty of misconduct; and

(b) that he should be removed from office, the Chairman shall advise the Governor to remove the Judge from his office and the Governor shall pass orders accordingly.

(7) The Supreme Judicial Council shall issue a Code of conduct to be observed by Judges of the Gilgit-Baltistan Supreme Appellate Court, and of the Gilgit-Baltistan Chief Court.

(8) If at any time the Supreme Judicial Council is inquiring the conduct of a Judge who is a member of the Supreme Judicial Council, or a member of the Supreme Judicial Council is absent or is unable to act due to illness or any other cause, than;

(a) If such member is the Chief Judge or the Judge of the Supreme Appellate Court the Judge of the Supreme Appellate Court who is next in seniority;

(b) If such member is the Chief Judge of Gilgit-Baltistan Court, the most senior most of the other Judges of the Chief Court, shall, act as a member of the Supreme Judicial Council in his place.

(9) If, upon any matter inquired into by the Supreme Judicial Council, there is a difference of opinion amongst its member, the opinion of the Supreme Judicial Council shall be expressed in terms of the view of the majority."

83. The special forum of Supreme Judicial Council provided under Article 66 of the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 is an exclusive body to deal with the cases of removal of judges of superior Courts in Gilgit-Baltistan on any ground mentioned therein. The judges of the Supreme Appellate Court and Chief Court Gilgit-Baltistan thus having the guarantee of tenure cannot be removed from their respective offices except in the manner provided in Article 66 of the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009. The Superior Courts in Gilgit-Baltistan are quite independent in their judicial, administrative and financial matters within the allocated budget and executive authorities have no concern with their affairs, therefore, the role assigned to the Law Department, Government of Gilgit-Baltistan in the rules of business in respect of work of Supreme Appellate Court and Chief Court Gilgit-Baltistan is in conflict with the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009.

84. In the preamble of Constitution of Pakistan 1973 it is stated that principles of democracy, freedom, equality and social justice as enunciated by Islam shall be fully observed. There shall be guarantee of fundamental rights including equality of status, principle of equality before law, economic and political justice and freedom of thought, expression, believe, and association subject to law and

public morality. The concept of complete independence of judiciary and to secure the transparent system of administration of justice as is enunciated in the preamble of the Constitution of Pakistan 1973 is also embodied in the Judicature Chapter in Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 and in the light there of it is essential that the appointment of the judges of the Superior Courts in Gilgit-Baltistan should be made in the manner as is provided in the Constitution of Pakistan 1973 to ensure the compete independence of judiciary. This may be pointed out that Supreme Court of Pakistan in Al Jahad Trust case (1999 SCMR 1379) held that appointment of judges of the Superior Courts of Pakistan by the President without the consultation of the Chief Justice of the concerned High Court and the Chief Justice of Pakistan is invalid. In consequence thereto, Article 260 of the Constitution was amended wherein it was provided that consultation except in respect of the appointment of Judges of superior Courts is not binding on the President.

85. Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 has constitutional status for Gilgit-Baltistan under Article 258 of Constitution of Pakistan but under the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 the consultation of the Chief Judge of the Chief Court or Chief Judge Gilgit-Baltistan in the appointment of judges of the Chief Court is not required and appointment is made by executive authorities without the consent and consultation of Chief Judges, which is in conflict to the independence of judiciary envisaged in Article 175 of the Constitution of Pakistan 1973 and is also against the norms of an independent judicial system. The Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 having no over riding effect on the Constitution of Pakistan and law laid down by the Supreme Court of Pakistan on the concept of independence of Judiciary, the appointment of a judge without the consultation of the Chief Judge of the Chief Court or Supreme Appellate Court will be against the spirit of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009. Therefore the Law Department, Government of Gilgit-Baltistan is required to take up the matter with the concerned quarters for suitable amendments in the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 to bring the provision relating to the appointment of Judges of Chief Court in consonance to the concept of the independence of judiciary as envisaged in the Constitution of Pakistan. The independence of judiciary is one of the basic consideration for good governance and unless there is separation of judiciary from the executive in term of Article 175 of the Constitution of Pakistan 1973, the good governance is not possible.

86. The function of the Courts in Gilgit-Baltistan is similar to that of the Courts in Pakistan and the Sub-ordinate Courts in Gilgit-Baltistan like such Courts in the provinces of Pakistan also perform the quasi judicial functions such as tribunals, arbitrators, receivers, administrators of the state and guardians of the minors and thus in view of the nature of functions being discharged by the Courts the independence of judiciary is always felt necessary for fair, independent and impartial decisions of the matters brought before the Courts. Notwithstanding the superintendence and control of the Sub-

ordinate Courts by the Chief Court, the executive authorities except in judicial matters treat the sub-ordinate judiciary as an administrative department of the Provincial Government with the result that Courts are dependent of executive authorities in respect of their affairs which may effect their independence and the right of access to justice of a common person. The Chief Court being the controlling authority of sub-ordinate Judiciary must take care of its affairs and discharge the responsibility in respect of regulating the affairs of sub-ordinate judiciary including the framing of the rules regarding the terms and condition of service of Judicial officers and financial matters in exercise of the power under Article 76 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 which provides as under:--

> "76. (1) The Chief Court to superintend and control all Courts sub-ordinate to it.
>
> (2) A Court so established shall have such jurisdiction as conferred on it by law.
>
> (3) No Court shall have any jurisdiction which is not conferred on it by this Order or under any other law."

87. Under Article 78 of the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 the administrative Courts and tribunals have to be established to advance the cause of justice and independence of Judiciary. The Special Courts established under Antiterrorism Act 1997 has the status of Sessions Court and in pursuance of the Judgment of Supreme Court of Pakistan in Case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445). Section 14 of the Anti Terrorism Act 1997 has been amended as under:--

> "**14. Composition and appointment of presiding officers of (Anti-Terrorism Court) --**(1) (Anti-Terrorism Court) shall consist of a Judge, being a person who:--
>
> (i) is a Judge of High Court or is or has been Sessions Judge or an additional Sessions Judge; or
>
> (ii) has exercised the power of a District Magistrate or an Additional District Magistrate or and has successfully completed an advance course in Shariah, (Islamic Law) conducted by the International Islamic University Islamabad; or
>
> (iii) Has for a period of not less than ten years been an advocate of High Court
>
> (2) Subject to the provisions of subs. (4) the Federal Government or the Provincial Government if directed by the Federal Government to establish a Court under this Act, shall after consultation with the Chief Justice of the High Court appoint a judge of each Court.
>
> (3) A Judge shall hold office for a period of two and a half

years but may be appointed for such further term or part of term or part of tem as the Government appointing the Judge may determine

(4) Judge may be removed from his officer prior to the completion of the period for which he has been appointed after consultation with the Chief Justice of High Court.

Explanation. The qualification of being an advocate for a period of not les than ten years may be relaxed in the case of a suitable person who is a graduate from a Islamic University and has studied Islamic Shariah and Fiqah as a major subject.

(5) In a case a judge is on leave or for any other temporarily unable to perform his duties the Government making appointment of such judge may, after consultation with the Chief justice of High Court authorize the Sessions Judge, having jurisdiction at the principal seat of the Anti-Terrorism Court to conduct proceedings of urgent nature so long as such judge is unable to perform his duties

(6) The Anti-Terrorism Court existing immediately before the commencement of the Anti-Terrorism (Second Amendment) Ordinance, 2002, and the judges appointed to such Courts, shall subject to the provisions of this Act, as amended, continue to function and try offences."

88. The Provisions of Code of Criminal Procedure and Qanoon-e-Shahadat (Act 10 of 1984) are applicable in the trials before the special Court and by virtue of Section 32 of the Act, it is a Sessions Court for all intends and purposes, therefore the presiding officer of Special Court should also be brought at par to the Sessions Judges in respect of the terms and conditions of Service.

89. The Provincial Government of Gilgit-Baltistan is thus required to frame rules in this behalf and the Law Department, Government of Gilgit-Baltistan in consultation with the Chief Judge of the Chief Court will proceed to frame the rules to regulate the Judicial Service in Gilgit-Baltistan including the service of Special Judge as part of judicial Service.

90. In the Rules of Business 2009 Government of Gilgit-Baltistan framed under Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, in Column 3 of Schedule I, the Supreme Appellate Court and Chief Court Gilgit-Baltistan have been shown as Special Institution under the Head `Administrative Departments' and Law Department has been assigned the function of coordination with the work of the Courts. The institution of Supreme Appellate Court and Chief Court in Judicature Chapter of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 are entirely independent with separate entity and have no direct or indirect concern in relation to their functions with any administrative department and consequently the Law department except playing the role of a liaison office cannot in any manner interfere in the affairs of the judiciary. The ambiguity and conflict appearing in Column 3 of

Schedule I in the Rules of business of Government of Gilgit-Baltistan with the provisions of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 relating to the Supreme Appellate Court and Chief Court is against the concept of independence of judiciary therefore the entry `Supreme Appellate Court and Chief Court Gilgit-Baltistan' in the Column 3 of Schedule I of the Rules of Business, Government of Gilgit-Baltistan is required to be omitted to bring these rules at par to the Rules of Business of Federal Government of Pakistan 1973.

91. The Supreme Appellate Court in addition to the original, appellate and review Jurisdiction, has also advisory jurisdiction and decision of the Court on the question of law is binding on all executive and judicial authorities in Gilgit-Baltistan and these authorities are also bound to act in aid of the Supreme Appellate Court. The Chief Court in addition to the judicial functions also has the power of superintendent and administration of the sub-ordinate Courts including the appointment, promotion and transfer of Judicial Officers and their disciplinary matters. Therefore the complete independence of the judiciary at all level in Gilgit-Baltistan in all respect is necessary for the sound judicial system and provincial Government must adhere to the rule of law to ensure the independence of judiciary.

92. In consequence to the above discussion and in pursuance of the judgment of the Supreme Court of Pakistan in Sharaf Faridi's Case read with Letter dated 24-11-1993 of Ministry of Finance, Government of Pakistan we direct that in the interest of independence of Judiciary in Gilgit-Baltistan the Accountant General Gilgit-Baltistan may depute an officer not below the rank of Assistant Accounts Officer to discharge his functions of pre-audit in respect of Supreme Appellate Court i.e. the bills etc and issue of cheques within the allocated budget to eliminate any direct or indirect interference of executive in financial matters of the Court. The Accountant General may also make similar arrangement to maintain the independence of Chief Court and sub-ordinate judiciary in respect of their financial matters within their allocated budget. In the light of above discussion we with a view to ensure complete independence of judiciary in Gilgit-Baltistan may issue the following directions and guidelines:--

1. The Chief Court Gilgit-Baltistan should frame the service rules of Sub-ordinate Judiciary on the pattern of the rules framed by the High Courts in the provinces with necessary modifications and may frame the judicial policy at par to the policy in the provinces of Pakistan.

2. The Chief Court with a view to improve the functioning of sub-ordinate judiciary may create the post of Senior Civil Judge in the judicial service like the judicial service in the provinces of Pakistan and Azad Jammu and Kashmir to remove disparity.

3. The chief Court may also ensure for the establishment of the separate office of Nazir of each district and sub-division and regulate independent process server agency in all Civil Courts of Gilgit-Baltistan so that delay

may not be caused in the service of notices and summons.

4. The administrative affairs of the sub-ordinate judiciary including the posting, transfer and promotion of the judicial officers may be regulated through Administrative Committee for improvement of their performance and also depute inspection judges to monitor the sub-ordinate judiciary.

5. The Chief Secretary Government of Gilgit-Baltistan may take necessary steps for the establishment of service tribunal with appellant forum as provided in Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 and may also with the consultation of Chief Judge of the Chief Court Gilgit-Baltistan and approval of Ministry of Law, Government of Pakistan establish a separate Banking Court and a Custom Court at Gilgit.

6. The percentage of 40% and 60% for appointment of judges in the Chief Court provided in Article 69 of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 is not in consonance with the Constitution of Pakistan and the Constitution of Azad Jammu and Kashmir. There is also no provision for temporary increase of judges in the Supreme Appellate Court in the manner as is provided in Article 182 of the Constitution of Pakistan,1973 and Article 42 (8-A) of the Constitution of AJ&K 1974 in the situation mentioned therein. The Chief Secretary may take necessary steps for the amendment of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 in this behalf.

7. The Provincial Government of Gilgit-Baltistan may take necessary steps for separation of executive Magistrates from Judicial Office and establish an independent prosecution branch separate to the Police Department by making appointments of prosecutors from Bars under the control of Advocate General or Prosecutor General.

8. In the matter of appointment of Judicial Officers in the Sub-ordinate Judiciary through process of selection by Gilgit-Baltistan Public Service Commission a Judge of the Chief Court shall be nominated as representative member of commission to ensure participation of judiciary in the selection of judicial posts.

93. The Chief Secretary with consultation of Chief Judge of the Chief Court may setup separate Labour Courts in pursuance of the Judgment of this Court in CPLA 12/2009, All Gilgit-Baltistan Workers Federation v. Federation of Pakistan and others.

94. The provincial Government of Gilgit-Baltistan in the light of law laid down by the Supreme Court of Pakistan in Mehram Ali's Case (1998 SCMR 1445) and in pursuance of this judgment may

bring the special judge ATA Court at par to the Sessions Judge in the matter of his terms and conditions of service and also fill on priority the vacant position of special judge to expedite the disposal of cases under ATA Act 1997.

95. The Law Department, Government of Gilgit-Baltistan may set up a separate Human Rights Wing to attend the complaint of people on Human Rights violation and also allocate special fund for assistance to distress and destitute person in the manner as in the Law, Justice and Parliamentary Affairs Division, Government of Pakistan.

96. The sub-ordinate judiciary was functioning in Gilgit-Baltistan on commencement of Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 under the control and superintendent of the Chief Court by virtue of Article 20 of Northern Areas Governance Order 1994 and now in pursuance of Article 76 of the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 read with Article 175 of the Constitution of Pakistan 1973, the provincial Government of Gilgit-Baltistan is required to issue notification for the separation of the sub-ordinate judiciary from the executive with judicial administrative and financial control of the Chief Court. The annual budget of sub-ordinate judiciary must be allocated through Chief Court in the light of annual requirement of each Court.

97. The provincial Government will also in pursuance of letter of Ministry of Finance, Government of Pakistan dated 24-11-1993 supra, issue instruction to the Finance and law departments for guidance.

98. The above are the detail reasons for the short order, passed on 16-11-2009, which has been produced in paragraph No. 6 supra as part of this Judgment and in addition to the directions contained therein this petition under Article 61 of the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 with above directions and guidelines is disposed of with no orders as to the costs.

Chief Judge

Judge

Jugde